

# Withdrawn/Redacted Material

## The George W. Bush Library

| DOCUMENT NO. | FORM   | SUBJECT/TITLE                                                                                                     | PAGES | DATE       | RESTRICTION(S) |
|--------------|--------|-------------------------------------------------------------------------------------------------------------------|-------|------------|----------------|
| 001          | Report | Proposed Legislative Initiatives [8 PAGES RELEASED IN WHOLE ON PRA RE-REVIEW 05/20/2025 JLS]                      | 8     | 09/15/2001 |                |
| 002          | Draft  | [Draft legislation] [20 PAGES RELEASED IN WHOLE ON PRA RE-REVIEW 05/20/2025 JLS]                                  | 20    | N.D.       |                |
| 003          | Chart  | Status of Leahy Negotiations on Administration's Bill [2 PAGES RELEASED IN WHOLE ON PRA RE-REVIEW 05/20/2025 JLS] | 2     | 09/26/2001 |                |
| 004          | Bill   | [Draft bill] [19 PAGES RELEASED IN WHOLE ON PRA RE-REVIEW 05/20/2025 JLS]                                         | 19    | 09/2001    |                |
| 005          | Draft  | Section 101 [4 PAGES RELEASED IN PART FOR b(6) ON PRA RE-REVIEW 05/20/2025 JLS]                                   | 4     | 09/21/2001 | b6;            |

### COLLECTION TITLE:

Counsel's Office, White House

### SERIES:

Kavanaugh, Brett - Subject Files

### FOLDER TITLE:

Anti-Terrorism Legislation [1]

### FRC ID:

9121

### RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
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|--------------|-------|-----------------------------------------------------------------------------------|-------|------------|----------------|
| 006          | Draft | Section 102 [2 PAGES RELEASED IN PART FOR (b)(6) ON PRA RE-REVIEW 05/20/2025 JLS] | 2     | 09/21/2001 | b6;            |
| 007          | Draft | Section 103 [2 PAGES RELEASED IN PART FOR (b)(6) ON PRA RE-REVIEW 05/20/2025 JLS] | 2     | 09/21/2001 | b6;            |
| 008          | Draft | Section 104 [1 PAGE RELEASED IN PART FOR (b)(6) ON PRA RE-REVIEW 05/20/2025 JLS]  | 1     | 09/21/2001 | b6;            |
| 009          | Draft | Section 105 [2 PAGES RELEASED IN PART FOR (b)(6) ON PRA RE-REVIEW 05/20/2025 JLS] | 2     | 09/21/2001 | b6;            |
| 010          | Draft | Section 106 [4 PAGES RELEASED IN PART FOR (b)(6) ON PRA RE-REVIEW 05/20/2025 JLS] | 4     | 09/21/2001 | b6;            |

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| 011          | Draft | Section 107 [2 PAGES RELEASED IN PART FOR (b)(6) ON PRA RE-REVIEW 05/20/2025 JLS] | 2     | 09/21/2001 | b6;            |
| 012          | Draft | Section 108 [2 PAGES RELEASED IN PART FOR (b)(6) ON PRA RE-REVIEW 05/20/2025 JLS] | 2     | 09/21/2001 | b6;            |
| 013          | Draft | Section 109 [3 PAGES RELEASED IN PART FOR (b)(6) ON PRA RE-REVIEW 05/20/2025 JLS] | 3     | 09/21/2001 | b6;            |
| 014          | Draft | Section 110 [2 PAGES RELEASED IN PART FOR (b)(6) ON PRA RE-REVIEW 05/20/2025 JLS] | 2     | 09/21/2001 | b6;            |
| 015          | Draft | Section 153 [2 PAGES RELEASED IN WHOLE ON PRA RE-REVIEW 05/20/2025 JLS]           | 2     | N.D.       |                |

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| 016          | Draft | Section 201 [2 PAGES RELEASED IN WHOLE ON PRA RE-REVIEW 05/20/2025 JLS] | 2     | 09/21/2001 |                |
| 017          | Draft | Section 202 [2 PAGES RELEASED IN WHOLE ON PRA RE-REVIEW 05/20/2025 JLS] | 2     | 09/21/2001 |                |
| 018          | Draft | Section 301 [2 PAGES RELEASED IN WHOLE ON PRA RE-REVIEW 05/20/2025 JLS] | 2     | 09/21/2001 |                |
| 019          | Draft | Section 302 [1 PAGE RELEASED IN WHOLE ON PRA RE-REVIEW 05/20/2025 JLS]  | 1     | 09/21/2001 |                |
| 020          | Draft | Section 303 [2 PAGES RELEASED IN WHOLE ON PRA RE-REVIEW 05/20/2025 JLS] | 2     | 09/21/2001 |                |

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| 021          | Draft | Section 304 [2 PAGES RELEASED IN PART FOR (b)(6) ON PRA RE-REVIEW 05/20/2025 JLS] | 2     | 09/21/2001 | b6;            |
| 022          | Draft | Section 305 [2 PAGES RELEASED IN WHOLE ON PRA RE-REVIEW 05/20/2025 JLS]           | 2     | 09/21/2001 |                |
| 023          | Draft | Section 306 [2 PAGES RELEASED IN PART ON b(6) PRA RE-REVIEW 05/20/2025 JLS]       | 2     | 09/21/2001 | b6;            |
| 024          | Draft | Section 307 [1 PAGE RELEASED IN WHOLE ON PRA RE-REVIEW 05/20/2025 JLS]            | 1     | 09/21/2001 |                |
| 025          | Draft | Section 308 [2 PAGES RELEASED IN PART FOR (b)(6) ON PRA RE-REVIEW 05/20/2025 JLS] | 2     | 09/21/2001 | b6;            |

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|--------------|-------|-----------------------------------------------------------------------------------|-------|------------|----------------|
| 026          | Draft | Section 309 [2 PAGES RELEASED IN WHOLE ON PRA RE-REVIEW 05/20/2025 JLS]           | 2     | 09/21/2001 |                |
| 027          | Draft | Section 351 [2 PAGES RELEASED IN PART FOR (b)(6) ON PRA RE-REVIEW 05/20/2025 JLS] | 2     | 09/21/2001 | b6;            |
| 028          | Draft | Section 352 [2 PAGES RELEASED IN PART FOR (b)(6) ON PRA RE-REVIEW 05/20/2025 JLS] | 2     | 09/21/2001 | b6;            |
| 029          | Draft | Section 353 [2 PAGES RELEASED IN WHOLE ON PRA RE-REVIEW 05/20/2025 JLS]           | 2     | 09/21/2001 |                |
| 030          | Draft | Section 354 [2 PAGES RELEASED IN PART FOR (b)(6) ON PRA RE-REVIEW 05/20/2025 JLS] | 2     | 09/21/2001 | b6;            |

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| 031          | Draft | Section 355 [2 PAGES RELEASED IN WHOLE ON PRA RE-REVIEW 05/20/2025 JLS]           | 2     | N.D.       |                |
| 032          | Draft | Section 356 [2 PAGES RELEASED IN WHOLE ON PRA RE-REVIEW 05/20/2025 JLS]           | 2     | N.D.       |                |
| 033          | Draft | Section 401 [1 PAGE RELEASED IN WHOLE ON PRA RE-REVIEW 05/20/2025 JLS]            | 1     | 09/21/2001 |                |
| 034          | Draft | Section 402 [2 PAGES RELEASED IN WHOLE ON PRA RE-REVIEW 05/20/2025 JLS]           | 2     | 09/21/2001 |                |
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| 037          | Draft | Section 405 [2 PAGES RELEASED IN WHOLE ON PRA RE-REVIEW 05/20/2025 JLS]           | 2     | 09/21/2001 |                |
| 038          | Draft | Section 406 [2 PAGES RELEASED IN PART FOR (b)(6) ON PRA RE-REVIEW 05/20/2025 JLS] | 2     | 09/21/2001 | b6;            |
| 039          | Draft | Section 407 [2 PAGES RELEASED IN PART FOR (b)(6) ON PRA RE-REVIEW 05/20/2025 JLS] | 2     | 09/21/2001 | b6;            |
| 040          | Draft | Section 408 [2 PAGES RELEASED IN PART FOR (b)(6) ON PRA RE-REVIEW 05/20/2025 JLS] | 2     | 09/21/2001 | b6;            |

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| 006          | Draft  | Section 102                                           | 2     | 09/21/2001 | P5; P6/b6;     |
| 007          | Draft  | Section 103                                           | 2     | 09/21/2001 | P5; P6/b6;     |
| 008          | Draft  | Section 104                                           | 1     | 09/21/2001 | P5; P6/b6;     |

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| 011          | Draft | Section 107   | 2     | 09/21/2001 | P5; P6/b6;     |
| 012          | Draft | Section 108   | 2     | 09/21/2001 | P5; P6/b6;     |
| 013          | Draft | Section 109   | 3     | 09/21/2001 | P5; P6/b6;     |
| 014          | Draft | Section 110   | 2     | 09/21/2001 | P5; P6/b6;     |
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| 019          | Draft | Section 302   | 1     | 09/21/2001 | P5;            |
| 020          | Draft | Section 303   | 2     | 09/21/2001 | P5;            |
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| 028          | Draft | Section 352   | 2     | 09/21/2001 | P5; P6/b6;     |
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| 035          | Draft | Section 403   | 3     | 09/21/2001 | P5; P6/b6;     |
| 036          | Draft | Section 404   | 1     | N.D.       | P5;            |
| 037          | Draft | Section 405   | 2     | 09/21/2001 | P5;            |
| 038          | Draft | Section 406   | 2     | 09/21/2001 | P5; P6/b6;     |
| 039          | Draft | Section 407   | 2     | 09/21/2001 | P5; P6/b6;     |
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White House

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PROPOSED LEGISLATIVE INITIATIVESIntelligence GatheringFILE  
ANTI -  
TERRORISMTitle III

- **Interception of communications.** Certain terrorism-related offenses are not presently Title III predicates for which authority to intercept communications is granted. Proposal: Amend the federal wiretap statute, 18 U.S.C. § 2516, to authorize federal prosecutors to seek a court order to intercept communications in connection with such terrorism-related offenses: 18 U.S.C. §§ 37, 229, 842, 930(c), 960, 2332, 2332a, 2332b, 2339A, 2339B, as well as any other federal felony offense that the Attorney General certifies is related to an act of terrorism as that term is defined by 18 U.S.C. § 3077(l).
- **Emergency wiretap and pen register authority.** Certain domestic terrorism and international terrorism offenses are not currently included in the categories of existing offenses for which emergency electronic surveillance orders can be obtained under 18 U.S.C. § 2518(7) and pen register orders under § 3125(a)(1). Proposal: Add these domestic and international terrorism offenses to the categories of offenses for which emergency authorization exists. The proposed legislation would define "international terrorism" by reference to the existing definition in 18 U.S.C. § 2331 and "domestic terrorism" by reference to a newly-created definition in § 2331.
- **National jurisdiction for pen/trap orders.** Currently the government must apply for new pen register/trap and trace orders in every jurisdiction where an investigation is being pursued. Proposal: Delete from 18 U.S.C. § 3123(a) the words: "within the jurisdiction of the court" and replace them with the words "anywhere within the United States." This change would enable the government to obtain one pen register/trap and trace order that can be executed anywhere within the United States and would eliminate the current need to apply for new orders each time the investigation leads to another jurisdiction (e.g. computer hacking).
- **Exception to the statutory exclusionary rule in the wiretap statute.** Currently, 18 U.S.C. § 2515 requires exclusion in judicial and administrative proceedings of any communication intercepted in violation of Title III. Proposal: Amend § 2515 by adding an objective "good faith" exception to the exclusionary rule similar to that set forth by the Supreme Court in *United States v. Leon*, 468 U.S. 897 (1984). Further, under this provision, evidence derived from a court-ordered interception later found to be deficient would not be subject to exclusion absent a judicial finding of objective bad faith by law.
- **Seizure of voice mail messages under search warrants.** Currently the government must apply for a Title III wiretap order to acquire voice mail messages that have been consensually recorded and are stored by a service provider for retrieval by the customer. Proposal: Delete from 18 U.S.C. 2510(1) the words: "and such term includes any electronic storage of such communication." This action would permit law enforcement to



use a search warrant under Rule 41 to seize voice mail messages being held by service providers for retrieval by the customer.

- **Multi-point wiretaps for terrorist surveillance.** Title III currently requires surveillance orders to specify the nature and location of the "communications facility" (e.g., a telephone or computer) to be intercepted. It does not allow orders to be issued against a specific individual. 18 U.S.C. § 2518(4)(b). **Proposal:** Create authority for Title III orders to be issued against known or suspected terrorists which would apply to each "facility" they use. This change is necessary in light of the prevalence of cell phones and other modern communications technology which can be quickly acquired and disposed of.

- **Exhaustion of normal procedures.** At present, Title III allows wiretapping only if, among other requirements, "normal investigative procedures" have been tried and have failed. 18 U.S.C. § 2518(3)(c). **Proposal:** Add an exception to Title III for investigations involving suspected terrorism. Wiretaps should be permitted in terrorism investigations if law-enforcement officers have probable cause to believe that the target is a terrorist, and probable cause to believe that the wiretap will uncover useful evidence.

#### FISA

- **Surveillance of foreign agents.** The Foreign Intelligence Surveillance Act (FISA) currently authorizes electronic surveillance of a "foreign power" for up to one year after an order is issued. 50 U.S.C. § 1805(e)(1). It also permits physical searches of a "foreign power" for up to a year. *Id.* § 1824(d)(1). **Proposal:** Amend FISA to permit surveillance and searches of "an agent of a foreign power." This amendment would permit use of these intelligence-gathering techniques against foreign diplomats and known intelligence officers in the United States. If amended, the FBI should be required to verify the target's continued use of each facility every 180 days in a manner that can be reviewed by FBI's inspections division and by OIPR.

- **Expand third party assistance under FISA.** Under current FISA provisions, the government can seek information and assistance from common carriers, landlords, custodians and other persons in court-ordered surveillance. **Proposal:** Amend FISA to expand existing authority to allow, "in circumstances where the Court finds that the actions of the target of the application may have the effect of thwarting the identification of a specified person," a common carrier, landlord, custodian or other person be required to furnish the applicant information and technical assistance necessary to accomplish electronic surveillance in a manner that will protect its secrecy and produce a minimum of interference with the services that such person is providing the target of electronic surveillance.



### Immigration

- **Administrative Removal of Terrorists.** Under Section 238 of INA, the INS may issue a final order of removal, without an immigration court hearing, to aliens convicted of certain crimes. Proposals: Amend this statute to provide for administrative removal of people found by the Attorney General to be terrorists. Also, amend the statute to provide for the continued detention of such individuals, at the discretion of the Attorney General, until their removal is accomplished. This authority is already being asserted by the Department in the soon-to-be-published long-term detainee regulation, but statutory clarification would be helpful. The statute also should clarify that the detention authority should continue even if the alien is given relief from deportation under the Convention Against Torture (which is a distinct possibility for terrorists from certain countries).
- **Expanded Terrorist Definition for Alien Terrorist Removal Court.** The Alien Terrorist Removal Court is the only mechanism available to the government to use classified evidence as part of an affirmative case to remove an alien involved in terrorism. In existence since 1996, it has never been used, in part because of the narrow definition of terrorist in the statute. The current definition is limited to individuals who provide material support for a "terrorist activity." When combined with the intent element, this probably requires the government to prove support for an illegal terrorist act. Proposal: Amend the definition of terrorist to provide that an alien is a terrorist if he provides material support for a terrorist organization, even if the support is ostensibly provided to the organization's supposedly non-terrorist, "philanthropic" wing.
- **Mandatory Detention of Suspected Terrorists.** Currently, there exists mandatory detention for persons who are deportable or inadmissible for terrorist-related reasons. Proposal: Amend Section 236 of the INA to provide that aliens determined by the Attorney General to pose a threat to the national security are subject to mandatory detention. This expansion would allow individuals to be detained on a lesser standard than clear and convincing evidence on this issue. This amendment would also eliminate hearing before Immigration Judges for those individuals determined to fall within the modified provision.



## Criminal Justice

### Substantive Criminal Law

- **No Statute of Limitations for Terrorism Prosecution.** Existing federal law, 18 U.S.C. § 3282, bars prosecuting most offenses after five years. 18 U.S.C. § 3286 extends the limitation period for prosecution for a selective list of offenses that may be committed by terrorists – but only to eight years. Proposal: Eliminate the limitation period for prosecution for all terrorism crimes. This would make it possible to prosecute the perpetrators of terrorist acts whenever they are identified and apprehended.
- **Increase maximum penalties.** Under existing law, the maximum prison terms for federal offenses are normally determined by specifications in the provisions which define them. These provisions may not provide adequate maxima in cases where the offense is aggravated by its terrorist character or motivation. Proposal: Provide alternative maximum prison terms, including imprisonment for any term of years or for life, for crimes that are likely to be committed by terrorists. This would be analogous to the maximum fine provisions of 18 U.S.C. § 3571(b)-(c), which supersede lower fine amounts specified in the statutes defining particular offenses, and would more consistently ensure the availability of sufficiently high maximum penalties in terrorism cases.
- **Increased penalties for terrorist conspiracies.** The maximum penalty under the general conspiracy provision of federal criminal law (18 U.S.C. § 371) is five years, even if the object of the conspiracy is a serious crime carrying a far higher maximum penalty. For some individual offenses and types of offenses, special provisions authorize conspiracy penalties equal to the penalties for the object offense – see, e.g., 21 U.S.C. § 846 (drug crimes) – but there is no consistently applicable provision of this type for the crimes that are likely to be committed by terrorists. Proposal: Provide maximum penalties for conspiracies to commit terrorism crimes which are equal to the maximum penalties authorized for the objects of such conspiracies. This would more consistently provide adequate penalties for terrorist conspiracies.
- **RICO for terrorist crimes.** The list of predicate federal offenses for RICO, appearing in 18 U.S.C. § 1961(1), includes none of the explicitly defined terrorism offenses and none of the other offenses which are most likely to be committed by terrorists. Proposal: Add all terrorism crimes to the list of RICO predicates. This will allow RICO to be used more frequently in the prosecution of terrorist organizations.



- **Possession of biological agents and toxins.** Current law prohibits the possession, development, acquisition, etc. of biological agents or toxins "for use as a weapon." 18 U.S.C. § 175. Proposal: Amend the existing definition of "for use as a weapon" such that the government would be required to prove only that the possessor of such agents and toxins had no legitimate purpose for possession, rather than proving that the possessor intended to use the agents and toxins as a weapon. This modification preserves the right to possess and use such agents for peaceful purposes, while enhancing the government's ability to prosecute suspected terrorists in possession of such materials. As amended, the prohibition also would apply only to the possession, development, acquisition, etc. of biological agents or toxins "for use as a weapon against persons."

- **Lawyers aiding terrorism.** 18 U.S.C. § 2339A prohibits providing material support or resources to terrorists. The definition of material support or resources is generally not broad enough to encompass expert services and assistance, such as the activities of a lawyer who facilitates the commission of terrorist crimes by his clients. Proposal:

Amend 18 U.S.C. § 2339A to include expert services and assistance. This would make the offense applicable to lawyers who provided such services or assistance, knowing or intending that it is to be used in preparing for or carrying out terrorism crimes.

- **Concealment of terrorism crimes.** 18 U.S.C. § 4 ("misprision of felony") makes it a crime to conceal and fail to report to the authorities the commission of a felony. The maximum penalty is three years of imprisonment, regardless of the seriousness of the concealed crime. Proposal: Provide a higher maximum penalty under 18 U.S.C. § 4 where the crime concealed is a terrorism crime. This will allow more effective prosecution, and provide a greater deterrent, to persons involved in supporting acts of terrorism, even if not directly prosecutable as accomplices.
- **Harboring terrorists.** 18 U.S.C. § 792 makes it an offense to harbor or conceal persons engaged in espionage. There is no comparable provision for terrorism. Proposal: Amend 18 U.S.C. § 792 to make the same prohibition apply to harboring or concealing persons engaged in terrorism crimes.
- **Post-release supervision of terrorists.** Existing federal law (18 U.S.C. § 3583(b)) generally caps the maximum period of post-imprisonment supervision for released felons at 3 or 5 years. The drug laws (21 U.S.C. § 841) mandate longer supervision periods for persons convicted of certain drug trafficking crimes, and specify no upper limit on the duration of supervision, but there is nothing comparable for terrorism offenses. Proposal: Provide for longer supervision periods, including potentially lifetime supervision, for persons convicted of terrorism crimes. This would permit appropriate tracking and oversight following release of offenders whose involvement with terrorism may reflect



lifelong commitments to fanatical political or religious ideologies.

### Criminal Procedure

- **Pretrial detention of terrorists.** Defendants in federal cases are subject to pretrial detention if no release conditions can reasonably assure the defendant's appearance and public safety. 18 U.S.C. § 3142(e) creates a rebuttable presumption that defendants charged with serious drug crimes or certain other specified offenses cannot safely be released – but only one terrorism crime (18 U.S.C. § 2332b) is included in the list of covered offenses. Proposal: Extend the offenses that give rise to a presumption in favor of pretrial detention to include all terrorism crimes. This would require defendants in terrorism cases to produce evidence that they will not flee or endanger the public if released before trial.
- **Administrative subpoenas for terrorism investigations.** Current law does not permit the use of administrative subpoena authority in investigating terrorism. Proposal: Provide the Attorney General with administrative subpoena authority, patterned on that authorized for drug trafficking investigations, to be used in terrorism investigations.
- **Single-jurisdiction search warrants.** Rule 41 of the Federal Rules of Criminal Procedure currently requires a search warrant to be obtained within a district for searches within that district. Proposal: Amend Rule 41 to permit search warrants to be applied for and obtained in a single jurisdiction, regardless of where they will be executed.
- **Notice for execution of search warrants.** The law currently governing notice to subjects of warrants, where there is a showing to the court that immediate notice would jeopardize an ongoing investigation or otherwise interfere with lawful law-enforcement activities, is a mix of inconsistent rules, practices, and court decisions varying widely from jurisdiction to jurisdiction across the country, which greatly hinders the investigation of many terrorism and other cases. Proposal: To establish a statutory, uniform standard for all such circumstances. This proposal would incorporate by reference the familiar, court-enforced standards currently applicable to stored communications under 18 U.S.C. § 2705 and apply them to all instances where the court is satisfied that immediate notice of execution of a search warrant would jeopardize an ongoing investigation or otherwise interfere with lawful law-enforcement activities.
- **McDade exception.** 28 U.S.C. § 530B makes federal government attorneys subject to state bar rules. This has interfered with involvement by federal prosecutors in undercover operations or questioning of arrested suspects where state attorney conduct standards prohibit or severely limit such activities by lawyers. Proposal: Create an exception to 28



U.S.C. § 530B which allows federal government lawyers to be involved in undercover operations and questioning of suspects, consistent with federal constitutional standards. This will more consistently permit federal prosecutors to advise and participate in investigative activities relating to terrorism.

- **DNA identification of terrorists.** The statutory provisions governing the collection of DNA samples from convicted federal offenders (42 U.S.C. § 14135a(d)) are restrictive, and do not include persons convicted for the crimes that are most likely to be committed by terrorists. DNA samples cannot now be collected even from persons federally convicted of terrorist murders in most circumstances. Proposal: Expand the DNA sample collection categories for federal offenders at least to include all persons convicted of terrorism crimes, and optimally to include all persons convicted of federal felonies. (Many states now authorize the collection of DNA samples from all felons, and the Senate passed legislation in 1999, S. 254 § 1503, which would have permitted the collection of DNA samples from all federal felons.) This reform would facilitate the solution of crimes committed by terrorists through DNA matching.

#### Financial Infrastructure

- **Make support for terrorists a money laundering predicate.** Existing law does not make provision of material support or resources to a designated foreign terrorist organization a predicate offense under the money laundering statute. Proposal: Make 18 U.S.C. § 2339B, which prohibits providing material support or resources to a designated foreign terrorist organization, a predicate offense to the money laundering statute, thus expanding our legislative arsenal in support of our terrorism financing initiative.
- **Broaden prohibition on providing support or resources to terrorists.** The statutes that criminalize providing "material support or resources" to terrorists or designated foreign terrorist organizations, 18 U.S.C. §§ 2339A and 2339B define that term using a phrase, "other financial securities," that does not appear elsewhere in the criminal code. Proposal: A clarifying amendment that would substitute a term that is clearly (and broadly) defined in the criminal code to ensure that the full range of monetary instruments is included within the scope of the definition of "material support or resources."
- **Forfeiture of the instrumentalities of terrorism.** Current law does not expressly permit the civil and criminal forfeiture of the instrumentalities of terrorism. Proposal: Add new civil and criminal forfeiture provisions to 18 U.S.C. §§ 981 & 982 to cover instrumentalities used to commit terrorist crimes. These changes would also cover any property involved in a violation of 18 U.S.C. Chapter 113B, including funds raised in furtherance of material support violations of 18 U.S.C. §§ 2339A & 2339B.

- **Enhancement of OJP authorities.** Current law limits OJP's authority to work directly with service providers (as opposed to governments) under the circumstances created by the September 11 attacks (42 U.S.C. § 10603b(b)), and to co-ordinate and manage emergency-response and other activities of its various components, and is unclear as to



proper execution of certain aspects of the Public Safety Officers benefits program.

Proposal: To amend OJP's authorities in these areas, specifically by authorizing OJP to work directly with service providers, in addition to governmental entities, to expedite terrorism victim relief efforts, by enhancing its authority to co-ordinate and manage emergency-response- and other activities of its various components, and by clarifying provisions governing the provision of public safety officer benefits.

• **Authority to pay rewards.** Section 106 of the FY2001 DOJ appropriations act places a per-reward cap of \$2M (and a \$10M annual aggregate cap) on rewards that may be offered by the Attorney General; a similar cap is found in both House and Senate FY2002 bills. Given the increasing sophistication of terrorist acts, these limitations may well prove to hamper the Department's ability to bring the guilty to justice. Proposal: To remove those caps. This proposal would authorize the Attorney General to offer/pay rewards of any amount he or the President determines to be necessary for information/assistance.



(2) in the heading of subsection (a), by inserting "Institutional" before "Removal";

(3) in paragraph (a)(1), by replacing "241" each place it appears with "237";

(4) by amending the heading of subsection (b) to read "Proceedings for the Administrative Removal of Aliens";

(5) in subsection (b)(1)--

(A) by replacing "deportable" with "removable"; and

(B) by inserting "or, in the case of an alien certified under paragraph (2)(C), under any provision of section 212 or section 237," after "felony";

(6) in subparagraph (b)(2)(A), by striking "or" at the end;

(7) at the end of subparagraph (b)(2)(B), by replacing the period with "; or", and by inserting thereafter a new subparagraph as follows:

"(C) has been certified by the Attorney General, pursuant to paragraph (6).";

(8) at the end of paragraph (b)(5), by inserting a new paragraph as follows:

"(6) Certification.--The Attorney General may certify an alien to be an alien who he has reason to believe may commit, further, or facilitate acts described in section 237(a)(4)(A)(i), (A)(iii), (A)(iv), or (B), or engage in any other activity that endangers the national security of the United States, which certification is not reviewable by any court."; and

(9) by redesignating the subsection (c) redesignated as such by section 671(b)(13) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 as subsection (d).

## **SEC. 202. DEFINITIONS RELATING TO TERRORISM.**

The Immigration and Nationality Act of 1952 is amended--

(1) in Section 212(a)(3)(B) (8 U.S.C. 1182)--

(A) in clause (ii)--

(i) by inserting "it had been" before "committed in the United States"; and

(ii) by replacing "or firearm" with ", firearm, or other weapon or dangerous device";

(B) by amending clause (iii) to read as follows:



"(iii) Engage in terrorist activity defined

"As used in this chapter, the term "engage in terrorist activity" means, in an individual capacity or as a member of an organization--

"(I) to commit or to incite to commit, under circumstances indicating an intention to cause death or serious bodily injury, an act of terrorist activity;

"(II) to prepare or plan a terrorist activity;

"(III) to gather information on potential targets for terrorist activity;

"(III) to solicit funds or other things of value for terrorist activity or for any terrorist organization;

"(IV) to solicit any individual for membership in a terrorist organization, a government that supports terrorism, or to engage in a terrorist activity; or

"(V) otherwise to commit an act that the actor knows, or reasonably should know, affords material support (including, without limitation, a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons (including, without limitation, chemical, biological, and radiological weapons), explosives, or training), to any organization that the actor knows, or reasonably should know, is a terrorist organization, or to any individual whom the actor knows, or reasonably should know, has committed or plans to commit any terrorist activity.

"This clause shall not be construed to encompass any material support the alien affords to an individual who had previously committed terrorist activity if the alien



establishes by clear and convincing evidence that such support was afforded only after that individual had permanently and publicly renounced and rejected the use of, and had ceased to commit or support, any terrorist activity.”; and

(C) by adding a new clause after clause (iv) to read as follows:

“(v) Terrorist organization defined

“As used in clause (iii), the term “terrorist organization” means any organization—

“(I) designated or redesignated under section 219;

“(II) that commits or materially supports, or that has a significant subgroup that commits or materially supports, terrorist activity, regardless of any other activities conducted by the organization or its subgroups;

“(III) that intends to commit or materially support, or that has a significant subgroup that intends to commit or materially support, terrorist activity, regardless of any other activities conducted by the organization or its subgroups; or

“(IV) that has committed or materially supported, or that has a significant subgroup that has committed or materially supported, terrorist activity, regardless of any other activities conducted by the organization or its subgroups, unless the Secretary of State has determined in his sole discretion, after consultation with the Attorney General, that as of a date specified by the Secretary the organization shall not be considered a terrorist organization.”; and

(2) in Section 219(a) (8 U.S.C. 1189(a))--

(A) in subparagraph (1)(B), by inserting “or terrorism (as



defined in section 140(d)(2) of the State Department Authorization Act, Public Law 100-204 (22 U.S.C. 2656f(d)(2)) or retains the capability and intent to engage in terrorist activity or terrorism)" after "212(a)(3)(B))";

(B) in subparagraph (1)(C), by inserting "or terrorism" after "terrorist activity";

(C) by amending subparagraph (2)(A) to read as follows:

"(A) NOTICE.—

"(i) Seven days before making a designation under this subsection, the Secretary shall, by classified communication, notify the Speaker and Minority Leader of the House of Representatives, the President pro tempore, Majority Leader, and Minority Leader of the Senate, and the members of the relevant committees, in writing, of the intent to designate an organization under this subsection, together with the findings made under paragraph (1) with respect to that organization, and the factual basis therefor.

"(ii) The Secretary shall publish the designation in the Federal Register seven days after providing the notification under clause (i).";

(D) in clause (2)(B)(i), by replacing "subparagraph (A)" with "subparagraph (A)(ii)";

(E) in subparagraph (2)(C), by replacing "paragraph (2)" with "paragraph (2)(A)(i)";

(F) in subparagraph (3)(B), by replacing "subsection (c)" with "subsection (b)";

(G) in subparagraph (4)(B), by inserting after the first sentence the following:

"The Secretary also may redesignate such organization at the end of any 2-year redesignation period (but not sooner than 60 days prior to the termination of such period) for an additional 2-year period upon a finding that the relevant circumstances described in



paragraph (1) still exist. Any redesignation shall be effective immediately following the end of the prior 2-year designation or redesignation period unless a different effective date is provided in such redesignation.”;

(H) in subparagraph (6)(A),

(i) by inserting “or a redesignation made under paragraph (4)(B)” after “paragraph (1)”;

(ii) in clause (i), by

(I) inserting “or redesignation” after “designation” the first time it appears; and

(II) striking “of the designation”; and

(iii) in clause (ii), by striking “of the designation”;

(I) in subparagraph (6)(B), by

(i) replacing “through (4)” with “and (3)”;

(ii) inserting the following new sentence at the end:

“Any revocation shall take effect on the date specified in the revocation or upon publication in the Federal Register if no effective date is specified.”;

(J) in paragraph (7), by inserting “, or the revocation of a redesignation under paragraph (6),” after “paragraph (5) or (6)”;

and

(K) in paragraph (8), by

(i) replacing “paragraph (1)(B)” with “paragraph (2)(B), or if a redesignation under this subsection has become effective under paragraph (4)(B)”;

(ii) inserting “or an alien in a removal proceeding” after “criminal action”; and

(iii) inserting “or redesignation” before “as a defense”.

#### **SEC. 203. MANDATORY DETENTION OF SUSPECTED TERRORISTS.**

Section 236 of the Immigration and Nationality Act is amended—

(1) by redesignating subsection (e) as (f) and by inserting before the same the following new subsection:

“(e) Detention of Terrorist Aliens.--

“(1) Custody.--The Attorney General shall take into custody any alien who is certified under paragraph (3).



“(2) Release.--The Attorney General shall maintain custody of any such alien until such alien is removed from the United States. Such custody shall be maintained irrespective of any relief from removal the alien may be eligible for or granted until the Attorney General deems such alien is no longer an alien who may be certified pursuant to paragraph (3).

“(3) Certification.--The Attorney General may certify an alien to be an alien he has reason to believe may commit, further, or facilitate acts described in section 237(a)(4)(A)(i), (A)(iii), or (B), or engage in any other activity that endangers the national security of the United States.”

#### **SEC. 204. HABEAS CORPUS AND JUDICIAL REVIEW.**

Except as provided herein and notwithstanding any other provision of law, including section 2241 of title 28, United States Code, no court shall have jurisdiction to review, by habeas corpus petition or otherwise, any action taken, administrative proceeding brought, or determination made—

(1) to detain an alien under section 203 of this Act; without regard to the place of detention, judicial review of the detention of such an alien is available only by habeas-corpus petition filed in the United States District Court for the District of Columbia; and

(2) to remove an alien under section 201 of this Act; without regard to the place in which the immigration court or other administrative proceedings were conducted, judicial review of an order of removal of such an alien entered under section 238 or 240 of the Immigration and Nationality Act of 1952, and of any cause or claim raised with respect to the proceedings which resulted in such order, is available only by petition for review filed in the United States Court of Appeals for the District of Columbia Circuit, in accordance with the procedures and limitations specified in section 242 of such Immigration and Nationality Act.

#### **SEC. 205. FELONY PUNISHMENT FOR VIOLENCE COMMITTED ALONG THE UNITED STATES BORDER.**

(a) IN GENERAL- Chapter 27 of title 18, United States Code, is amended by adding at the end the following:

“Sec. 554. Violence while eluding inspection or during violation of arrival,



reporting, entry, or clearance requirements

"(a) IN GENERAL- Whoever attempts to commit or commits a crime of violence or recklessly operates any conveyance during and in relation to—

"(1)(A) attempting to elude or eluding immigration, customs, or agriculture inspection; or

"(B) failing to stop at the command of an officer or employee of the United States charged with enforcing the immigration, customs, or other laws of the United States along any border of the United States; or

"(2) an intentional violation of arrival, reporting, entry, or clearance requirements, as set forth in section 107 of the Federal Plant Pest Act (7 U.S.C. 150ff), section 10 of the Act of August 20, 1912 (commonly known as the 'Plant Quarantine Act' (7 U.S.C. 164a)), section 7 of the Federal Noxious Weed Act of 1974 (7 U.S.C. 2807), section 431, 433, 434, or 459 of the Tariff Act of 1930 (19 U.S.C. 1431, 1433, 1434, and 1459), section 10 of the Act of August 30, 1890 (26 Stat. 417; chapter 839 (21 U.S.C. 105)), section 2 of the Act of February 2, 1903 (32 Stat. 792; chapter 349; 21 U.S.C. 111), section 4197 of the Revised Statutes (46 U.S.C. App. 91), or any provision of the Immigration and Nationality Act (8 U.S.C. 1101 et seq.) shall be—

"(A) fined under this title, imprisoned not more than 5 years, or both;

"(B) if bodily injury (as defined in section 1365(g)) results, fined under this title, imprisoned not more than 10 years, or both; or

"(C) if death results, fined under this title, imprisoned for any term of years or for life, or both, and may be sentenced to death.

"(b) CONSPIRACY- If 2 or more persons conspire to commit an offense under subsection (a), and 1 or more of those persons do any act to effect the object of the conspiracy, each shall be punishable as a principal, except that a sentence of death may not be imposed pursuant to this subsection."

(b) CLERICAL AMENDMENT- The analysis for chapter 27 of title



18, United States Code, is amended by adding at the end the following:  
"554. Violence while eluding inspection or during violation of arrival, reporting, entry, or clearance requirements."

(c) RECKLESS ENDANGERMENT- Section 111 of title 18, United States Code, is amended—

(1) by redesignating subsection (b) as (c); and

(2) by inserting after subsection (a) the following:

"(b) RECKLESS ENDANGERMENT- Whoever—

"(1) knowingly disregards or disobeys the lawful authority or command of any officer or employee of the United States charged with enforcing the immigration, customs, or other laws of the United States along any border of the United States (including, in addition to any external boundary of the United States, the functional equivalent of the border, any port-of-entry to the United States, any authorized immigration or customs checkpoint, and the territorial sea or airspace of the United States); and

"(2) as a result of disregarding or disobeying an authority or command referred to in paragraph (1), endangers the safety of any person or property,

shall be fined under this title, imprisoned not more than 6 months, or both."

#### **SEC. 206. APPLICABILITY.**

Notwithstanding any other provision of law, the amendments made by this title (other than the amendments made by sections 205 and 207, which shall apply to offenses committed on or after the date of enactment) shall apply to all aliens, regardless of whether any such aliens entered the United States before or after the date of the enactment of this Act, or whether any relevant activity by any such aliens occurred before or after such date, and shall apply to all past, pending, or future deportation, exclusion, removal, or other immigration proceedings.

#### **SEC. 207. FALSE REPRESENTATION.**

Section 911 of title 18, United States Code, is amended by replacing "three" with "five".

#### **SEC. 208. AMENDMENT OF LIMITATION RELATING TO "S" NON-IMMIGRANT STATUS.**

Section 214(k)(1) of the Immigration and Nationality Act of 1952



(8 U.S.C. 1184(k)(1)) is amended—

- (1) by replacing "200" with "350"; and
- (2) by replacing "50" with "150".

**SEC. 209. MULTILATERAL CO-OPERATION AGAINST TERRORISTS.**

[LANGUAGE TO FOLLOW FROM STATE]

**SEC. 210. INTER-AGENCY DATA SHARING.**

[LANGUAGE TO FOLLOW FROM STATE]

**Title III--CRIMINAL JUSTICE**

**Subtitle A--Substantive Criminal Law**

**SEC. 301. NO STATUTE OF LIMITATION FOR PROSECUTING  
TERRORISM OFFENSES.**

(a) IN GENERAL.—Section 3286 of title 18, United States Code, is amended to read as follows:

**"§ 3286. Terrorism offenses**

"Notwithstanding any other provision of law, an indictment may be found or an information instituted for any Federal terrorism offense at any time without limitation."

(b) CONFORMING AMENDMENT.—The analysis for chapter 213 of title 18, United States Code, is amended by amending the item relating to section 3286 to read as follows:

"3286. Terrorism offenses."

(c) APPLICATION.—The amendments made by this section shall apply to the prosecution of any offense committed before, on, or after the date of enactment of this section.

**SEC. 302. ALTERNATIVE MAXIMUM PENALTIES FOR TERRORISM  
CRIMES.**

Section 3559 of title 18, United States Code, is amended by adding after subsection (d) the following new subsection:

"(e) Authorized terms of imprisonment for terrorism crimes. — A person convicted of any Federal terrorism offense may be sentenced to imprisonment for any term of years or for life, notwithstanding any maximum term of imprisonment specified in the law describing the



offense. The authorization of imprisonment under this subsection is supplementary to, and does not limit, the availability of any other penalty authorized by the law describing the offense, including the death penalty, and does not limit the applicability of any mandatory minimum term of imprisonment, including any mandatory life term, provided by the law describing the offense.”.

### **SEC. 303. PENALTIES FOR TERRORIST CONSPIRACIES.**

Chapter 113B of title 18, United States Code, is amended—

(1) by inserting after section 2332b the following:

#### **“§ 2332c. Attempts and conspiracies**

“Any person who attempts or conspires to commit any Federal terrorism offense shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.”; and

(2) in the analysis for the chapter, by inserting after the item relating to section 2332b the following:

“2332c. Attempts and conspiracies.”.

### **SEC. 304. TERRORISM CRIMES AS RICO PREDICATES.**

Section 1961(1) of title 18, United States Code, is amended—

(1) by striking “or (F)” and inserting “(F)”; and

(2) by replacing “financial gain;” with “financial gain, or (G) any act that is indictable as a Federal terrorism offense;”.

### **SEC. 305. BIOLOGICAL WEAPONS.**

(a) Chapter 10 of title 18, United States Code is amended—

(1) in section 175—

(A) in subsection (b)—

(i) by striking, “section, the” and inserting “section – (1) the”;

(ii) by striking “does not include” and inserting “includes”;

(iii) by inserting “other than” after “system for”; and

(iv) by striking “purposes.” and inserting the following: “purposes, and (2) the terms ‘biological agent’ and ‘toxin’ do not encompass any biological agent or toxin that is in its naturally-occurring environment, if the biological agent or toxin has not been cultivated, collected, or otherwise



extracted from its natural source.”;

(B) by redesignating subsection (b) as (c); and

(C) after subsection (a), by adding a new subsection as follows:

“(b) Additional offense.—Whoever knowingly possesses any biological agent, toxin, or delivery system of a type or in a quantity that, under the circumstances, is not reasonably justified by a prophylactic, protective or other peaceful purpose, shall be fined under this title, imprisoned not more than 10 years, or both. Knowledge of whether the type or quantity of any biological agent, toxin, or delivery system is reasonably justified by a peaceful purpose is not an element of the offense.”;

(2) after section 175a, by adding a new section as follows:

**“§ 175b. Possession by restricted persons**

“(a) No person described in section 922(g) shall ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any biological agent or toxin, or receive any biological agent or toxin that has been shipped or transported in interstate or foreign commerce, if the biological agent or toxin is listed as a ‘select agent’ in subsection (j) of section 72.6 of title 42, Code of Federal Regulations, pursuant to section 511(d)(1) of the Antiterrorism and Effective Death Penalty Act of 1996 (Public Law 104-132), and is not exempted under subsection (h) of such section 72.6, or appendix A of part 72 of such title; except that the term “select agent” does not include any such biological agent or toxin that is in its naturally-occurring environment, if the biological agent or toxin has not been cultivated, collected, or otherwise extracted from its natural source. The prohibition of this section shall also apply to an alien (other than an alien lawfully admitted for permanent residence) who is a national of a country as to which the Secretary of State, pursuant to section 6(j) of the Export Administration Act (50 U.S.C. App. 2405(j)), section 620A of chapter 1 of part M of the Foreign Assistance Act of 1961 (22 U.S.C. 2371), or section 40(d) of chapter 3 of the Arms Export Control Act (22 U.S.C. 2780(d)), has made a determination (that remains in effect) that such country has repeatedly provided support for acts of international terrorism.

“(b) Whoever knowingly violates this section shall be fined as



provided in this title, imprisoned not more than ten years, or both, but the prohibition contained in this section shall not apply with respect to any duly authorized governmental activity under title V of the National Security Act of 1947.”; and

(3) in the chapter analysis, by inserting after the item relating to section 175a the following:

“175b. Possession by restricted persons.”.

(b) The Anti-Terrorism and Effective Death Penalty Act of 1996 is amended by adding a new subsection after subsection 511 (42 U.S.C. 262 note) as follows:

**“§ 511A. Regulation of biological agents posing national-security threat**

“(a) IN GENERAL.--

“(1) LIST OF AGENTS POSING SECURITY THREAT.--The Secretary shall, through regulations promulgated under subsection (d), establish and maintain a list of those biological agents listed pursuant to section 511(d)(1) that he determines to be a national-security threat.

“(2.) CRITERIA.--In determining whether to include an agent on the list under paragraph (1), the Secretary shall--

“(A) consider the criteria specified in section 511(d)(1)(B)(i), and any other criteria that he determines to be appropriate; and

“(B) consult with scientific, intelligence, and military experts representing appropriate professional groups.

“(b) REGULATION OF BIOLOGICAL AGENTS POSING SECURITY THREAT.--The Secretary shall, through regulations promulgated under subsection (d), provide for the establishment and enforcement of standards and procedures governing the possession, use, and transfer of agents listed under subsection (a)(1) designed to protect public safety and national security, including safeguards to prevent access to such agents for use in domestic terrorism or international terrorism or for any other criminal purpose.

“(c) CIVIL MONEY PENALTIES.--A violation of a requirement imposed by regulation promulgated under this section shall be subject to a civil money penalty of up to \$250,000.



“(d) REGULATIONS.--The Secretary shall promulgate regulations to carry out this section. The initial regulations implementing this section shall be issued as interim final regulations.

“(e) INAPPLICABILITY OF PAPERWORK REDUCTION ACT.--The provisions of the Paperwork Reduction Act (44 U.S.C. ch. 35) shall not apply to this section.

**SEC. 306. SUPPORT OF TERRORISM THROUGH EXPERT ADVICE OR ASSISTANCE.**

Section 2339A of title 18, United States Code, is amended--

(1) in subsection (a)--

(A) by striking “a violaton” and all that follows through “49” and inserting “any Federal terrorism offense”; and

(B) by replacing “violation,” with “offense,”; and

(2) in subsection (b), by inserting “expert advice or assistance,” after “training,”.

**SEC. 307. PROHIBITION AGAINST HARBORING TERRORISTS.**

Section 792 of title 18, United States Code, is amended--

(1) by inserting “or a Federal terrorism offense,” before “shall be fined”; and

(2) by inserting at the end: “There is extraterritorial Federal jurisdiction over any violation (including, without limitation, conspiracy or attempt) of this section. A violation of this section may be prosecuted in any Federal judicial district in which the underlying offense was committed, or in any other Federal judicial district as provided by law.”.

**SEC. 308. POST-RELEASE SUPERVISION OF TERRORISTS.**

Section 3583 of title 18, United States Code, is amended by adding at the end the following:

“(j) Supervised release terms for terrorism offenses. --

Notwithstanding subsection (b), the authorized terms of supervised release for any Federal terrorism offense are any term of years or life.”.

**SEC. 309. DEFINITION.**

(a) Chapter 1 of title 18, United States Code, is amended--

(1) by adding after section 24 a new section as follows:

**“§ 25. Federal terrorism offense defined**

“As used in this title, the term ‘Federal terrorism offense’ means a violation of, or an attempt or conspiracy to violate--



“(a) section 32 (relating to destruction of aircraft or aircraft facilities), 37 (relating to violence at international airports), 81 (relating to arson within special maritime and territorial jurisdiction), 175, 175b (relating to biological weapons), 229 (relating to chemical weapons), 351 (relating to congressional, cabinet, and Supreme Court assassination, kidnapping, and assault), 792 (relating to harboring terrorists), 831 (relating to nuclear materials), 842(m) or (n) (relating to plastic explosives), 844(e) (relating to certain bombings), 844(f) or (i) (relating to arson and bombing of certain property), 930(c), 956 (relating to conspiracy to injure property of a foreign government), 1030(a)(1), (a)(4), (a)(5)(A), or (a)(7) (relating to protection of computers), 1114 (relating to protection of officers and employees of the United States), 1116 (relating to murder or manslaughter of foreign officials, official guests, or internationally protected persons), 1203 (relating to hostage taking), 1361 (relating to injury of Government property or contracts), 1362 (relating to destruction of communication lines, stations, or systems), 1363 (relating to injury to buildings or property within special maritime and territorial jurisdiction of the United States), 1366 (relating to destruction of an energy facility), 1751 (relating to Presidential and Presidential staff assassination, kidnapping, and assault), 1992, 2152 (relating to injury of fortifications, harbor defenses, or defensive sea areas), 2155 (relating to destruction of national defense materials, premises, or utilities), 2156 (relating to production of defective national defense materials, premises, or utilities), 2280 (relating to violence against maritime navigation), 2281 (relating to violence against maritime fixed platforms), 2332 (relating to certain homicides and other violence against United States nationals occurring outside of the United States), 2332a (relating to use of weapons of mass destruction), 2332b (relating to acts of terrorism transcending national boundaries), 2332c, 2339A (relating to providing material support to terrorists), 2339B (relating to providing material support to terrorist organizations), or 2340A (relating to torture);

“(b) section 236 (relating to sabotage of nuclear facilities or fuel) of the Atomic Energy Act of 1954 (42 U.S.C. 2284);

“(c) section 601 (relating to disclosure of identities of covert agents) of the National Security Act of 1947 (50 U.S.C. 421); or

“(d) section 46502 (relating to aircraft piracy), section 46504



(relating to interference with a flight crew), section 46505 (relating to carrying a weapon or explosive on aircraft), section 46506 (relating to application of certain criminal laws to acts on aircraft), or section 60123(b) (relating to destruction of interstate gas or hazardous liquid pipeline facility) of title 49.”; and

(2) in the chapter analysis, by inserting after the item relating to section 24 the following:

“25. Federal terrorism offense defined.”.

(b) Section 2332b(g)(5)(B) of title 18, United States Code, is amended by striking “is a violation” and all that follows through “title 49” and inserting “is a Federal terrorism offense”.

### **Subtitle B—Criminal Procedure**

#### **SEC. 351. PRESUMPTION AGAINST PRETRIAL RELEASE IN TERRORISM CASES.**

Section 3142(e) of title 18, United States Code, is amended in the final sentence by striking “or an offense under section 924(c), 956(a), or 2332b of title 18 of the United States Code” and inserting: “, an offense under section 924(c) or 956(a) of this title, or a Federal terrorism offense.”.

#### **SEC. 352. SINGLE-JURISDICTION SEARCH WARRANTS FOR TERRORISM.**

Rule 41(a) of the Federal Rules of Criminal Procedure is amended by inserting after “executed” the following: “and (3) in an investigation of domestic terrorism or international terrorism (as defined in section 2331 of title 18, United States Code), by a federal magistrate judge in any district in which activities related to the terrorism may have occurred, for a search of property or for a person within or outside the district”.

#### **SEC. 353. NOTICE.**

Section 3103a of title 18, United States Code, is amended by adding at the end the following: “With respect to any issuance of a warrant or court order under this section, or any other law or rule, to search for and seize any property or material that constitutes evidence of a criminal offense in violation of the laws of the United States, any notice required, or that may be required, to be given may be delayed pursuant to the standards, terms, and conditions set forth in section 2705, unless otherwise expressly provided by statute.”.



#### **SEC. 354. DNA IDENTIFICATION OF TERRORISTS.**

Section 3(d)(1) of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. 14135a(d)(1)) is amended—

- (1) by redesignating subparagraph (G) as subparagraph (H); and
- (2) by inserting after subparagraph (F) the a new subparagraph as follows:

“(G) Any Federalism terrorism offense (as defined in section 25 of title 18, United States Code).”.

#### **SEC. 355. GRAND JURY MATTERS.**

Rule 6(e)(3)(A) of the Federal Rules of Criminal Procedure is amended—

- (1) by striking “and” at the end of subdivision (i);
- (2) by replacing the period at the end of subdivision (ii) with “; and”; and
- (3) by inserting after subdivision (ii) the following:

“(iii) federal law-enforcement-, intelligence-, protective-, or national-defense personnel, or any federal personnel responsible for administering the immigration laws of the United States, where the matters pertain to international terrorism or domestic terrorism (as defined in section 2331 of title 18, United States Code), or a matter of national security.”.

#### **SEC. 356. EXTRATERRITORIALITY.**

Chapter 113B of title 18, United States Code, is amended—

- (1) in the heading, by striking “Exclusive”;
- (2) by inserting “There is extraterritorial Federal jurisdiction over any Federal terrorism offense and any offense under this chapter.” at the beginning; and
- (3) in the chapter analysis, by striking “Exclusive” in the item relating to section 2338.

#### **SEC. 356. DEFINITION.**

[LANGUAGE TO FOLLOW FROM STATE]

### **Title IV--FINANCIAL INFRASTRUCTURE**

#### **SEC. 401. LAUNDERING THE PROCEEDS OF TERRORISM.**



Section 1956(c)(7)(D) of title 18, United States Code, is amended by inserting "or 2339B" after "2339A".

**SEC. 402. MATERIAL SUPPORT FOR TERRORISM.**

Section 2339A of title 18, United States Code, is amended—

(1) in subsection (a), by inserting "A violation of this section may be prosecuted in any Federal judicial district in which the underlying offense was committed, or in any other Federal judicial district as provided by law." at the end; and

(2) in subsection (b), by replacing "or other financial securities" with "or monetary instruments or financial securities".

**SEC. 403. ASSETS OF TERRORIST ORGANIZATIONS.**

Section 981(a)(1) of title 18, United States Code, is amended after paragraph (F) by adding the following new paragraph:

"(G) All assets, foreign or domestic--

"(i) of any person, entity or organization engaged in planning or perpetrating any act of domestic terrorism or international terrorism (as defined in section 2331) against the United States, citizens or residents of the United States, or their property, and all assets, foreign or domestic, affording any person a source of influence over any such entity or organization;

"(ii) acquired or maintained by any person for the purpose of supporting, planning, conducting, or concealing an act of domestic terrorism or international terrorism (as defined in section 2331) against the United States, citizens or residents of the United States, or their property; or

"(iii) derived from, involved in, or used or intended to be used to commit any act of domestic terrorism or international terrorism (as defined in section 2331) against the United States, citizens or residents of the United States, or their property."

**SEC. 404. TECHNICAL CLARIFICATION RELATING TO PROVISION OF MATERIAL SUPPORT TO TERRORISM.**

No provision of title IX of Public Law 106-387 shall be understood



to limit or otherwise affect section 2339A or 2339B of title 18, United States Code.

**SEC. 405. DISCLOSURE OF TAX INFORMATION IN TERRORISM AND NATIONAL-SECURITY INVESTIGATIONS.**

Section 6103 of title 26, United States Code, is amended –

(1) in paragraph (i)(3), by adding a new subparagraph after subparagraph (B) as follows:

“(C) Response to Terrorist Incidents and Threats.—

The Secretary may disclose returns or return information to the extent necessary to assist officers or employees of any Federal agency involved in the response to or the investigation of terrorist incidents, threats, or activities; the Federal agency may redisclose information received pursuant to this paragraph to State or local law-enforcement officials who are part of a joint investigative team with the Federal agency.”; and

(2) in subsection (i), by adding a new paragraph after paragraph (6), as follows:

“(7) Information Concerning Terrorist Activities.--The Secretary may disclose returns and return information, upon a particularized request signed personally by an individual in the Department of Justice or the Department of the Treasury appointed by the President with the advice and consent of the Senate, or a member of the Senior Executive Service who is responsible for the collection of analysis of intelligence and counter-intelligence information concerning terrorist organizations and activities. Information disclosed under this paragraph may be disclosed to employees of the Department of Justice and the Department of the Treasury personally and directly engaged in (and solely for their use in) the collection or analysis of intelligence and counterintelligence information concerning terrorist organizations or activities. Information disclosed under this paragraph may be disclosed to other United States intelligence agencies when relevant to their analysis of intelligence and counter-intelligence information concerning terrorist organizations and activities, and thereafter the information so disclosed may be used by such



agencies only in accordance with Executive Order 12333 (or successor order)."

**SECTION 406. RESTRAINT OF PROPERTY SUBJECT TO CRIMINAL FORFEITURE.**

Section 413(e)(1) of the Controlled Substances Act (21 U.S.C. § 853(e)(1)) is amended by inserting "or (p)" after "(a)".

**SECTION 407. PRESIDENTIAL AUTHORITIES.**

[LANGUAGE TO FOLLOW FROM TREASURY]

**SECTION 408. TRADE SANCTIONS.**

[LANGUAGE TO FOLLOW FROM TREASURY]

**SECTION 409. EXTRATERRITORIALITY.**

[LANGUAGE TO FOLLOW FROM TREASURY]

**Title V--EMERGENCY AUTHORIZATIONS**

**SEC. 501. OFFICE OF JUSTICE PROGRAMS.**

(a) In connection with the airplane hijackings and terrorist acts (including, without limitation, any related search, rescue, relief, assistance, or other similar activities) that occurred on September 11, 2001, in the United States, amounts transferred to the Crime Victims Fund from the Executive Office of the President or funds appropriated to the President shall not be subject to any limitation on obligations from amounts deposited or available in the Fund.

(b) Section 112 of title I of section 101(b) of division A of Public Law 105-277 and section 108(a) of appendix A of Public Law 106-113 (113 Stat. 1501A-20) are amended— (1) after "that Office", each place it occurs, by inserting "(including, notwithstanding any contrary provision of law (unless the same should expressly refer to this section), any organization that administers any program established in title 1 of Public Law 90-351)"; and (2) by inserting "functions, including any" after "all".

(c) Section 1404B(b) of the Victim Compensation and Assistance Act is amended after "programs" by inserting ", to victim service organizations, to public agencies (including Federal, State, or local governments), and to non-governmental organizations that provide

assistance to victims of crime.”.

(d) Section 1 of H.R. 2882 of the 107th Congress as enacted is amended in section 1(a) by striking “, (d),”, by inserting “(containing sufficient information to permit a proper distribution pursuant to such section 1201(a), where relevant)” before “by a”, and by replacing all the matter after “certification,” with “benefits under such section 1201(a) and the first year’s benefits under such section 1201(b).”.

**SEC. 502. ATTORNEY GENERAL’S AUTHORITY TO PAY REWARDS.**

No reward offered by the Attorney General in connection with hijackings or terrorist acts shall be subject to any per- or aggregate reward spending limitation established by law, unless the same should expressly refer to this section, and no reward paid pursuant to any such offer shall count toward any such aggregate reward spending limitation.

**SEC. 503. LIMITED AUTHORITY TO PAY OVERTIME.**

The matter under the headings “Immigration And Naturalization Service: Salaries and Expenses, Enforcement And Border Affairs” and “Immigration And Naturalization Service: Salaries and Expenses, Citizenship And Benefits, Immigration And Program Direction” in the Department of Justice Appropriations Act, 2001 (as enacted into law by Appendix B (H.R. 5548) of Public Law 106-553 (114 Stat. 2762A-58 to 2762A-59)) is amended by striking the following each place it occurs: “*Provided*, That none of the funds available to the Immigration and Naturalization Service shall be available to pay any employee overtime pay in an amount in excess of \$30,000 during the calendar year beginning January 1, 2001:”.

**SEC. 504. SECRETARY OF STATE’S AUTHORITY TO PAY REWARDS.**

[LANGUAGE TO FOLLOW FROM STATE]

**SEC. 505. ASSISTANCE TO COUNTRIES CO-OPERATING AGAINST INTERNATIONAL TERRORISM.**

[LANGUAGE TO FOLLOW FROM STATE]



**STATUS OF LEAHY NEGOTIATIONS ON ADMINISTRATION'S BILL  
(9/26/01, 5 p.m.)**

| <b>SETTLED PROVISIONS</b>                 | <b>PROVISIONS STILL OUTSTANDING/STATUS</b>                                                                                                                               |
|-------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
|                                           | 101 – Administration firm, with “no content” amendment                                                                                                                   |
| 102 (as amended)                          |                                                                                                                                                                          |
|                                           | 103 – Leahy to propose language                                                                                                                                          |
| 104                                       |                                                                                                                                                                          |
|                                           | 105 – case law provided to Leahy                                                                                                                                         |
|                                           | 106 – Leahy/DOJ coordinating on definition of “computer tresp.”                                                                                                          |
| 107                                       |                                                                                                                                                                          |
| 108                                       |                                                                                                                                                                          |
|                                           | 109 (as amended) – Leahy to propose language                                                                                                                             |
| 110                                       |                                                                                                                                                                          |
| 111                                       |                                                                                                                                                                          |
| 112                                       |                                                                                                                                                                          |
|                                           | 151 – Administration reviewing Leahy proposal                                                                                                                            |
|                                           | 152 – Administration reviewing Leahy § 207                                                                                                                               |
|                                           | 153 – Administration firm                                                                                                                                                |
|                                           | 154 – Administration firm                                                                                                                                                |
|                                           | 155 – Administration reviewing Leahy proposal                                                                                                                            |
|                                           | 156 – Leahy reviewing Administration proposed amendment                                                                                                                  |
|                                           | 157 – Administration reviewing Leahy proposal                                                                                                                            |
|                                           | 158 – Leahy/Kennedy to propose language                                                                                                                                  |
|                                           | 159 – Need Leahy feedback                                                                                                                                                |
|                                           | 201 – Administration owes Leahy definition of terrorism organiz.                                                                                                         |
|                                           | 202 – under Administration review                                                                                                                                        |
|                                           | 203 – Administration owes Leahy view on whether AG’s certification will be reviewable                                                                                    |
|                                           | 204 – Leahy views contingent on definition of terrorist org.                                                                                                             |
| 205 (as amended)                          |                                                                                                                                                                          |
|                                           | 206 – Administration concerned about penalty provisions                                                                                                                  |
|                                           | 207 – Administration accepts part ( <i>i.e.</i> reporting req’ts)                                                                                                        |
|                                           | 301 – contingent on definition of terrorism offense                                                                                                                      |
|                                           | 302 – contingent on definition of terrorism offense                                                                                                                      |
|                                           | 303 – contingent on definition of terrorism offense                                                                                                                      |
| 304                                       |                                                                                                                                                                          |
| 305 – w/ possible addt’ns from Biden bill |                                                                                                                                                                          |
|                                           | 306 – contingent on definition of terrorism offense                                                                                                                      |
|                                           | 307 – Administration reviewing Leahy proposal (new harboring provision modeled on § 792, but omitting “suspects”), and checking with State on extraterritoriality clause |
|                                           | 308 – contingent on definition of terrorism offense                                                                                                                      |
|                                           | 309 – Administration and Leahy each to propose new language                                                                                                              |
|                                           | 351 – Need feedback from Leahy                                                                                                                                           |
|                                           | 352 – Administration reviewing Leahy proposal                                                                                                                            |
|                                           | 353 – Hatch and Leahy working on language; and subject to                                                                                                                |

**STATUS OF LEAHY NEGOTIATIONS ON ADMINISTRATION'S BILL  
(9/26/01, 5 p.m.)**

|               |                                               |
|---------------|-----------------------------------------------|
|               | definition of terrorism offense               |
|               | 354 – Leahy to propose alternative language   |
|               | 355 – under Administration review             |
| 356           |                                               |
| 357           |                                               |
| 401           |                                               |
| 402           |                                               |
| 403           |                                               |
| 404           |                                               |
|               | 405 – Leahy to propose language               |
|               | 406 – under Administration review             |
|               | 407 – Need feedback from Leahy                |
|               | 408 – under Administration review             |
| 409           |                                               |
| 501           |                                               |
|               | 502 – Administration reviewing Leahy language |
| 503           |                                               |
|               | 504 – Administration reviewing Leahy language |
| 505 (dropped) |                                               |
| 506           |                                               |



107TH CONGRESS

1st SESSION

H.R. \_\_\_\_\_

To combat terrorism and defend the Nation against terrorist acts, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

September \_\_, 2001

## A BILL

To combat terrorism and defend the Nation against terrorist acts, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

### SEC. 1. SHORT TITLE.

This act may be cited as the "Anti-Terrorism Act of 2001."

### SEC. 2. TABLE OF CONTENTS.

The following is the table of contents for this Act:

- Sec. 1. Short title.
- Sec. 2. Table of contents.
- Sec. 3. Construction; severability.

### Title I--INTELLIGENCE GATHERING

#### Subtitle A--Electronic Surveillance

- ✓ Sec. 101. ~~Terrorism as a predicate act for authorization of wiretaps.~~
- ✓ Sec. 102. ~~Emergency wiretap and pen register authorities.~~
- Sec. 103. Modification of authorities relating to use of pen registers and trap and trace devices.
- Sec. 104. ~~Limitation on statutory exclusion.~~
- Sec. 105. Seizure of voice-mail messages pursuant to warrants.
- Sec. 106. ~~Procedures for interception.~~
- Sec. 107. Authorized disclosure.
- Sec. 108. Savings provision.
- ✓ Sec. 109. Use of wiretap information from foreign governments.
- Sec. 110. Interception of computer trespasser communications.

110-114

Paul C.

Richard Green

Consolidate  
§'s  
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- Sec. 111. Scope of subpoenas for records of electronic communications.
- Sec. 112. Nationwide service of search warrants for electronic evidence.
- Sec. 113. Clarification of scope.
- Sec. 114. Emergency disclosure of electronic communications to protect life and limb.

#### Subtitle B--Foreign Intelligence Surveillance and Other Information

- Sec. 151. Period of orders of electronic surveillance of non-United States persons under foreign intelligence surveillance.
- Sec. 152. Multi-point authority.
- Sec. 153. Foreign intelligence information.
- Sec. 154. Foreign intelligence information sharing.
- ~~Sec. 155. Federal Bureau of Investigation.~~
- Sec. 156. Definition.
- Sec. 157. Pen register and trap and trace authority.
- Sec. 158. Business records.
- Sec. 159. Miscellaneous national-security authorities.
- Sec. 160. Disclosure of educational records.
- Sec. 161. Clarification of application of laws.
- Sec. 162. Central Intelligence Agency security authorities.
- Sec. 163. Protective intelligence functions of Secret Service.
- Sec. 164. Presidential authority.

#### Title II--IMMIGRATION

- ~~Sec. 201. Administrative removal of terrorists.~~
- Sec. 202. Definitions relating to terrorism.
- Sec. 203. Mandatory detention of suspected terrorists.
- Sec. 204. Habeas corpus and judicial review.
- ~~Sec. 205. Felony punishment for violence committed along the United States border.~~
- Sec. 206. Applicability.
- ~~Sec. 207. False representation.~~
- ~~Sec. 208. Amendment of limitation relating to "S" non-immigrant status.~~
- Sec. 209. Multilateral co-operation against terrorists.
- Sec. 210. Inter-agency data sharing.

#### Title III--CRIMINAL JUSTICE

##### Subtitle A--Substantive Criminal Law

- ✓ Sec. 301. No statute of limitation for prosecuting terrorism offenses.
- ✓ Sec. 302. Alternative maximum penalties for terrorism crimes.
- ✓ Sec. 303. Penalties for terrorist conspiracies.
- ✓ Sec. 304. Terrorism crimes as RICO predicates.
- ✓ Sec. 305. Biological weapons.
- Sec. 306. Support of terrorism through expert advice or assistance.
- Sec. 307. Prohibition against harboring terrorists.
- Sec. 308. Post-release supervision of terrorists.
- Sec. 309. Definition.

##### Subtitle B--Criminal Procedure



- ~~Sec. 351. Presumption against pretrial release in terrorism cases.~~  
~~Sec. 352. Single-jurisdiction search warrants for terrorism.~~  
~~Sec. 353. Notice.~~ *keep*  
✓ Sec. 354. DNA identification of terrorists.  
✓ Sec. 355. Grand jury matters.  
✓ Sec. 356. Extraterritoriality.  
Sec. 357. Definition.

#### Title IV--FINANCIAL INFRASTRUCTURE

- Sec. 401. Laundering the proceeds of terrorism.  
Sec. 402. Material support for terrorism.  
Sec. 403. Assets of terrorist organizations.  
Sec. 404. Technical clarification relating to provision of material support to terrorism.  
Sec. 405. Disclosure of tax information in terrorism and national-security investigations.  
Sec. 406. Restraint of property subject to criminal forfeiture.  
Sec. 407. Presidential authorities.  
~~Sec. 408. Trade sanctions.~~ → ?  
Sec. 409. Extraterritorial jurisdiction.

#### TITLE V--EMERGENCY AUTHORIZATIONS

- Sec. 501. Office of Justice Programs.  
Sec. 502. Attorney General's authority to pay rewards.  
Sec. 503. Limited authority to pay overtime.  
Sec. 504. Secretary of State's authority to pay rewards.  
Sec. 505. Assistance to countries co-operating against international terrorism.

### SEC. 3. CONSTRUCTION; SEVERABILITY.

Any provision of this Act held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, shall be construed so as to give it the maximum effect permitted by law, unless such holding shall be one of utter invalidity or unenforceability, in which event such provision shall be deemed severable from this Act and shall not affect the remainder thereof or the application of such provision to other persons not similarly situated or to other, dissimilar circumstances.

## TITLE I--INTELLIGENCE GATHERING

### Subtitle A--Electronic Surveillance

#### SEC. 101. TERRORISM AS A PREDICATE ACT FOR AUTHORIZATION OF WIRETAPS.

Section 2516(1) of title 18, United States Code, is amended--

(1) by redesignating paragraph (p), as so redesignated by

section 434(2) of Public Law 104-132 (110 Stat. 1274), as paragraph (r); and

(2) by inserting after paragraph (p), as so redesignated by section 201(3) of division C of Public Law 104-208 (110 Stat. 3009-565), the following new paragraph:

“(q) any violation of section 2332d or any Federal terrorism offense; or”.

## **SEC. 102. EMERGENCY WIRETAP AND PEN REGISTER AUTHORITIES.**

Title 18, United States Code, is amended—

(1) in section 2518(7)(a)(iii), by inserting “, or domestic terrorism or international terrorism (as defined in section 2331),” after “organized crime”;

(2) in section 2331--

(A) in paragraph (1)(B)--

(i) by inserting “(or to have the effect)” after “intended”; and

(ii) in clause (iii), by replacing “by assassination or kidnapping” with “(or any function thereof) by mass destruction, assassination, or kidnapping (or threat thereof)”;

(B) in paragraph (3), by striking “and”;

(C) in paragraph (4), by replacing the period with “; and”;

and

(D) by inserting the following after paragraph (4):

“(5) the term ‘domestic terrorism’ means activities that—

“(A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; and

“(B) appear to be intended (or to have the effect)—

“(i) to intimidate or coerce a civilian population;

“(ii) to influence the policy of a government by intimidation or coercion; or

“(iii) to affect the conduct of a government (or any function thereof) by mass destruction, assassination, or kidnapping (or threat thereof).”; and

(3) in section 3125(a)(1)—

(A) in subparagraph (A), by striking “or” at the end;



(B) in subparagraph (B), by striking the comma at the end and inserting a semicolon; and

(C) by inserting after subparagraph (B) the following new subparagraphs:

“(C) domestic terrorism or international terrorism (as defined in section 2331);

“(D) immediate threat to public health or safety, or to the national security of the United States; or

“(E) an ongoing attack on the integrity or availability of a protected computer, which attack would be an offense punishable under section 1030,”; and

(D) by replacing “or any Deputy Assistant Attorney General,” with “any Deputy Assistant Attorney General, or (when designated for this purpose by the Attorney General) any United States Attorney,”.

#### **SEC. 103. MODIFICATION OF AUTHORITIES RELATING TO USE OF PEN REGISTERS AND TRAP AND TRACE DEVICES.**

(a) GENERAL LIMITATION ON USE BY GOVERNMENTAL AGENCIES- Section 3121(c) of title 18, United States Code, is amended—

(1) by inserting “or trap and trace device” after “pen register”;

(2) by inserting “, routing, addressing,” after “dialing”; and

(3) by striking “call processing” and inserting “the processing and transmitting of wire and electronic communications”.

(b) ISSUANCE OF ORDERS—

(1) IN GENERAL- Subsection (a) of section 3123 of title 18, United States Code, is amended to read as follows:

“(a) IN GENERAL- (1) Upon an application made under section 3122(a)(1), the court shall enter an ex-parte order authorizing the installation and use of a pen register or trap and trace device anywhere within the United States, if the court finds that the attorney for the Government has certified to the court that the information likely to be obtained by such installation and use is relevant to an ongoing criminal investigation. The order shall, upon service thereof, apply to any person or entity providing wire or electronic communication service in the United States whose assistance may facilitate the execution of the order.

“(2) Upon an application made under section 3122(a)(2), the

court shall enter an ex-parte order authorizing the installation and use of a pen register or trap and trace device within the jurisdiction of the court, if the court finds that the State law-enforcement or investigative officer has certified to the court that the information likely to be obtained by such installation and use is relevant to an ongoing criminal investigation.”.

(2) CONTENTS OF ORDER- Subsection (b)(1) of section 3123 of title 18, United States Code, is amended—

(A) in subparagraph (A)--

(i) by inserting “or other facility” after “telephone line”; and

(ii) by inserting before the semicolon at the end “or applied”; and

(B) by striking subparagraph (C) and inserting the following new subparagraph (C):

“(C) the attributes of the communications to which the order applies, including the number or other identifier and, if known, the location of the telephone line or other facility to which the pen register or trap and trace device is to be attached or applied, and, in the case of an order authorizing installation and use of a trap and trace device under subsection (a)(2), the geographic limits of the order; and”.

(3) NON-DISCLOSURE REQUIREMENTS- Subsection (d)(2) of section 3123 of title 18, United States Code, is amended—

(A) by inserting “or other facility” after “the line”; and

(B) by striking “, or who has been ordered by the court” and inserting “or applied, or who is obligated by the order”.

(c) DEFINITIONS—

(1) COURT OF COMPETENT JURISDICTION- Paragraph (2) of section 3127 of title 18, United States Code, is amended by striking subparagraph (A) and inserting the following new subparagraph (A):

“(A) any district court of the United States (including a magistrate judge of such a court) or any United States Court of Appeals having jurisdiction over the offense being



investigated; or”.

(2) PEN REGISTER - Paragraph (3) of section 3127 of title 18, United States Code, is amended—

(A) by striking “electronic or other impulses” and all that follows through “is attached” and inserting “dialing, routing, addressing, or signaling information transmitted by an instrument or facility from which a wire or electronic communication is transmitted”; and

(B) by inserting “or process” after “device” each place it appears.

(3) TRAP AND TRACE DEVICE- Paragraph (4) of section 3127 of title 18, United States Code, is amended—

(A) by inserting “or process” after “a device”; and

(B) by striking “of an instrument” and all that follows through the end and inserting “or other dialing, routing, addressing, and signaling information reasonably likely to identify the source of a wire or electronic communication;”.

#### **SEC. 104. LIMITATION ON STATUTORY EXCLUSION.**

Chapter 119 of title 18, United States Code, is amended—

(1) in section 2515, by inserting after “chapter” the following: “, *provided*, That the foregoing prohibition shall not apply where the interception was pursuant to a good-faith reliance on an order of a court of a State or of the United States, or was by a person not acting under color of law (if the party seeking such reception did not participate directly or indirectly in the violation)”;

(2) in section 2517(1) and (2), by inserting “or under the circumstances described by the proviso in section 2515” after “chapter” each place it occurs; and

(3) in section 2518(10)(a), by replacing the period at the end of subparagraph (iii) with a semi-colon and by replacing “Such” in the flush portion immediately thereafter with “except that no such motion may be granted under the circumstances described in the proviso in section 2515. Such”.

#### **SEC. 105. SEIZURE OF VOICE-MAIL MESSAGES PURSUANT TO WARRANTS.**

Title 18, United States Code, is amended—

(1) in section 2510 –

(A) in subsection (1), by striking all the words after “commerce”; and

(B) in subsection (14), by inserting “wire or” after “transmission of”; and

(2) in section 2703(a) and (b)--

(A) by replacing “Contents of electronic” with “Contents of wire or electronic” every place it occurs;

(B) by replacing “contents of an electronic” with “contents of a wire or electronic” every place it occurs; and

(C) by replacing “any electronic” with “any wire or electronic” every place it occurs; and

(D) by replacing “communication,” with “communication (including any electronic storage of such wire communication),”.

#### **SEC. 106. PROCEDURES FOR INTERCEPTION.**

Section 2518(3)(c) of title 18, United States Code, is amended by –

(1) inserting “(i)” before “normal”;

(2) inserting “or” after the semicolon; and

(3) adding at the end the following:

“(ii) there is probable cause for belief that the wire, oral, or electronic communications are being used, or are about to be used, in connection with domestic terrorism or international terrorism (as defined in section 2331), with a matter representing an imminent threat to national security, or with conduct constituting an imminent risk to continuity of a function of government or to human life; and”.

#### **SEC. 107. AUTHORIZED DISCLOSURE.**

Section 2510(7) of title 18, United States Code, is amended by adding “, and (for purposes only of section 2517) any officer or employee of the executive branch of the federal government” after “such offenses”.

#### **SEC. 108. SAVINGS PROVISION.**

Section 2511(2)(f) of title 18, United States Code, is amended–

(1) by replacing “or chapter 121” with “, chapter 121, or chapter 206”; and

(2) by replacing “wire and oral” with “wire, oral, and electronic”.

#### **SEC. 109. USE OF WIRETAP INFORMATION FROM FOREIGN**



## **GOVERNMENTS.**

Chapter 119 of title 18, United States Code, is amended—

(1) by adding a new section 2514, as follows:

"2514. Use of extraterritorial interceptions by foreign governments.

"(1) Information lawfully received under United States law from the interception of wire, oral or electronic communications outside the United States by a foreign government or a person acting at the direction thereof—

"(a) without the knowing participation of any officer or employee of the United States or person acting at the direction thereof; or

"(b) with such participation, but under circumstances in which such interception would have been lawful if executed within the United States by such officer, employee, or person, shall be admissible, and the United States may disclose the information (or derivative information therefrom) in any proceeding held under the authority of the United States or any state or political subdivision thereof.

"(2) Information described in subsection (1) the government alleges could affect the national security shall have no less protection than that afforded by law to confidential informants."; and

(2) in the chapter analysis, by inserting before the item relating to section 2515 the following:

"2514. Use of extraterritorial interceptions by foreign governments.".

## **SEC. 110. INTERCEPTION OF COMPUTER TRESPASSER COMMUNICATIONS.**

Chapter 119 of title 18, United States Code, is amended—

(1) in section 2510—

(A) in subsection (17), by striking "and" at the end;

(B) in subsection (18), by replacing the period with a semi-colon; and

(C) by adding after subsection (18), two new subsections as follows:

"(19) 'protected computer' has the meaning set forth in section 1030; and

"(20) 'computer trespasser' means a person who accesses a protected computer without authorization and thus has no reasonable

expectation of privacy in any communication transmitted to, through, or from the protected computer.”; and

(2) in section 2511(2), by adding after paragraph (h) a new paragraph as follows:

“(i) It shall not be unlawful under this chapter for a person acting under color of law to intercept the wire or electronic communications of a computer trespasser, if—

“(A) the owner or operator of the protected computer authorizes the interception of the computer trespasser’s communications on the protected computer;

“(B) the person acting under color of law is lawfully engaged in an investigation;

“(C) the person acting under color of law has reasonable grounds to believe that the contents of the computer trespasser’s communications will be relevant to the investigation; and

“(D) such interception does not acquire communications other than those transmitted to or from the computer trespasser.”.

#### **SEC. 111. SCOPE OF SUBPOENAS FOR RECORDS OF ELECTRONIC COMMUNICATIONS.**

Section 2703(c)(1)(C) of title 18, United States Code, is amended--

(1) by replacing “name, address, local and long distance telephone toll billing records, telephone number or other subscriber number or identity, and length of service” with the following:

“(i) name;

“(ii) address;

“(iii) local and long distance telephone connection records, or records of session times and durations;

“(iv) length of service (including start date) and types of service utilized;

“(v) telephone or instrument number or other subscriber number or identity, including any temporarily assigned network address; and

“(vi) means and source of payment (including any credit card or bank account number)”; and



(2) by striking "and the types of services the subscriber or customer utilized," after "of a subscriber to or customer of such service,".

**SEC. 112. NATIONWIDE SERVICE OF SEARCH WARRANTS FOR ELECTRONIC EVIDENCE.**

Chapter 121 of title 18, United States Code, is amended—

(1) in section 2703, by striking "under the Federal Rules of Criminal Procedure" every place it appears and inserting "using the procedures described in the Federal Rules of Criminal Procedure by a court with jurisdiction over the offense under investigation"; and

(2) in section 2711--

(A) in paragraph (1), by striking "and";

(B) in paragraph (2), by replacing the period with "; and";

and

(C) by adding the following new paragraph at the end:

"(3) the term 'court of competent jurisdiction' has the meaning assigned by section 3127, and includes any federal court within that definition, without geographic limitation."

**SEC. 113. CLARIFICATION OF SCOPE.**

Section 2511(2) of title 18, United States Code, as amended by section 110(2) of this Act, is further amended by adding at the end a new paragraph as follows:

"(j) Nothing contained in section 631 of the Act of June 19, 1934 (47 U.S.C. 551) shall be deemed to restrict voluntary or obligatory disclosures of information pursuant to the provisions of this chapter, chapter 121, or chapter 206, except that such disclosures shall not include records revealing customer cable television viewing activity."

**SEC. 114. EMERGENCY DISCLOSURE OF ELECTRONIC COMMUNICATIONS TO PROTECT LIFE AND LIMB.**

(a) Section 2702 of Title 18, United States Code, is amended—

(1) by amending the heading to read, "Voluntary disclosure of customer communications or records";

(2) in subsection (a)(2)(B) by replacing the period with "; and";

(3) by adding after paragraph (a)(2) a new paragraph as follows:

"(3) a provider of remote computing service or electronic communication service to the public shall not knowingly divulge a record or other information pertaining to a subscriber to or customer of such service (not including the contents of communications covered by subsection (a)(1) or (a)(2)) to any governmental entity.";

(4) in subsection (b) by striking "Exceptions.—A person or entity" and inserting "Exceptions for disclosure of communications.—A provider described in subsection (a)";

(5) in paragraph (b)(6)--

(A) in clause (A)(ii), by striking "or";

(B) in subparagraph (B), by replacing the period with "  
; or";

(C) by inserting after subparagraph (B) a new subparagraph as follows:

"(C) if the provider reasonably believes that an emergency involving immediate danger of death or serious physical injury to any person requires disclosure of the information without delay."; and

(6) by adding after subsection (b) a new subsection as follows:

"(c) Exceptions for disclosure of customer records.—A provider described in subsection (a) may divulge a record or other information pertaining to a subscriber to or customer of such service (not including the contents of communications covered by subsection (a)(1) or (a)(2))--

(1) as otherwise authorized in section 2703;

(2) with the lawful consent of the customer or subscriber;

(3) as may be necessarily incident to the rendition of the service or to the protection of the rights or property of the provider of that service;

(4) to a governmental entity, if the provider reasonably believes that an emergency involving immediate danger of death or serious physical injury to any person justifies disclosure of the information; or

(5) to any person other than a governmental entity.".

(b) Section 2703 of title 18, United States Code, is amended--



(1) by amending the section heading to read, "Required disclosure of customer communications or records".

(2) by redesignating subsection (c)(2) as (c)(3);

(3) in subsection (c)(1)--

(A) by striking "(A) Except as provided in subparagraph (B) a provider of electronic communication service may" and inserting "A governmental entity may require a provider of electronic communication service or remote computing service to";

(B) by striking "covered by subsection (a) or (b) of this section) to any person other than a governmental entity." and inserting a close parenthesis;

(C) by striking "(B) A provider of electronic communication service or remote computing service shall disclose a record or other information pertaining to a subscriber to or customer of such service (not including the contents of communications covered by subsection (a) or (b) of this section) to a governmental entity";

(D) by redesignating subsection (C) as subsection (c)(2);

(E) by redesignating subsection (B)(i) as (A), (B)(ii) as (B), (B)(iii) as (C), (B)(iv) as (D), and (B)(v) as (E);

(F) in subsection (D) (formerly (B)(iv)) by striking the final period and inserting "; or";

(G) by inserting after subsection (D) (formerly (B)(iv)) the following subsection:

"(F) seeks information pursuant to subparagraph (2).".

## **Subtitle B--Foreign Intelligence Surveillance and Other Information**

### **SEC. 151. PERIOD OF ORDERS OF ELECTRONIC SURVEILLANCE OF NON-UNITED STATES PERSONS UNDER FOREIGN INTELLIGENCE SURVEILLANCE.**

The Foreign Intelligence Surveillance Act of 1978 is amended by adding "or an agent of a foreign power, as defined in section 101(b)(1)(A),"--

- (1) in section 105(e)(1) (50 U.S.C. 1805(e)(1)), after "or (3),"; and
- (2) in section 304(d)(1) (50 U.S.C. 1824(d)(1)), after "101(a),".

**SEC. 152. MULTI-POINT AUTHORITY.**

Section 105(c)(2)(B) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1805(c)(2)(B)) is amended by inserting ", or, in circumstances where the Court finds that the actions of the target of the application may have the effect of thwarting the identification of a specified person, such other persons," after "specified person".

**SEC. 153. FOREIGN INTELLIGENCE INFORMATION.**

The Foreign Intelligence Surveillance Act of 1978 is amended by replacing "that the" with "that a"--

- (1) in section 104(a)(7)(B) (50 U.S.C. 1804(a)(7)(B)); and
- (2) in section 303(a)(7)(B) (50 U.S.C. 1823(a)(7)(B)).

**SEC. 154. FOREIGN INTELLIGENCE INFORMATION SHARING.**

Notwithstanding any other provision of law, it shall be lawful for foreign intelligence information obtained as part of a criminal investigation (including, without limitation, information subject to Rule 6(e) of the Federal Rules of Criminal Procedure and information obtained pursuant to chapter 119 of title 18, United States Code) to be provided to any federal law-enforcement-, intelligence-, protective-, or national-defense personnel, or to any federal personnel responsible for administering the immigration laws of the United States.

**SEC. 155. FEDERAL BUREAU OF INVESTIGATION.**

The Foreign Intelligence Surveillance Act of 1978 is amended by inserting "the Director of the Federal Bureau of Investigation (or, in his absence, the Deputy Director thereof)," after "Affairs,"--

- (1) in section 105(a)(7) (50 U.S.C. 1805(a)(7)); and
- (2) in section 303(a)(7) (50 U.S.C. 1823(a)(7)).

**SEC. 156. DEFINITION.**

Section 101(a) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801(a)) is amended--

- (1) by striking "or" at the end of paragraph (5); and
- (2) by adding after paragraph (6) a new paragraph as follows:

"(7) any individual, group, or entity who or which is under the direction of a power described in paragraphs (1) through (6) and is engaged in transnational activity or designated by the President as a foreign intelligence priority."



#### **SEC. 157. PEN REGISTER AND TRAP AND TRACE AUTHORITY.**

Section 402(c) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1842(c)) is amended--

(1) at the end of paragraph (1), by adding "and";

(2) in paragraph (2)--

(A) by inserting "from the telephone line to which the pen register or trap and trace device is to be attached, or the communication instrument or device to be covered by the pen register or trap and trace device" after "obtained"; and

(B) by replacing all the matter after "General" with a period; and

(3) by striking paragraph (3).

#### **SEC. 158. BUSINESS RECORDS.**

The Foreign Intelligence Surveillance Act of 1978 is amended--

(1) in section 501 (50 U.S.C. 1861), by amending the same to read as follows:

"§ 501. Administrative subpoenas.

"(a) In any investigation to gather foreign intelligence information or an investigation concerning international terrorism, which investigation is being conducted by the Federal Bureau of Investigation under such guidelines as the Attorney General may approve pursuant to Executive Order 12333 (or a successor order), the Attorney General may, by administrative subpoena, require the production of any tangible things (including books, records, papers, documents, and other items) that are relevant to the investigation.

"(b) A person who, in good faith, produces tangible things under a subpoena issued pursuant to this section shall not be liable to any other person for such production. Such production shall not be deemed to constitute a waiver of any privilege in any other proceeding or context."; and

(2) by striking section 502 (50 U.S.C. 1862).

#### **SEC. 159. MISCELLANEOUS NATIONAL-SECURITY AUTHORITIES.**

(a) Section 2709(b) of title 18, United States Code, is amended--

(1) by inserting "at Bureau headquarters or Special Agent in Charge in Bureau field offices" before ", may" the first place it occurs;

(2) in paragraph (1)--

(A) by replacing "the Director" and all that follows through "Director)" with "he";

(B) by inserting ", or electronic communication

transactional records" after "toll billing records"; and

(C) by replacing "made that" and all that follows through the end with "made that the name, address, length of service, and toll billing records sought are relevant to an authorized foreign counterintelligence investigation; and"; and

(3) in paragraph (2)--

(A) by replacing "the Director" and all that follows through "Director)" with "he"; and

(B) by replacing "made that" and all that follows through the end with "made that the information sought is relevant to an authorized foreign counterintelligence investigation."

(b) Section 1114(a)(5)(A) of Public Law 95-630 (12 U.S.C.

3414(a)(5)(A)) is amended--

(1) by inserting "in a position not lower than Deputy Assistant Director at Bureau headquarters or Special Agent in Charge in Bureau field offices" after "designee"; and

(2) by striking all the matter following "purposes" up to the period; and

(c) Section 624 of Public Law 90-321 (15 U.S.C. 1681u) is amended--

(1) in subsection (a)--

(A) by inserting "in a position not lower than Deputy Assistant Director at Bureau headquarters or Special Agent in Charge in Bureau field offices" after "designee" the first place it appears; and

(B) by replacing "writing that" and all that follows through the end with "writing that such information is necessary for the conduct of an authorized foreign counterintelligence investigation.";

(2) in subsection (b)--

(A) by inserting "(in a position not lower than Deputy Assistant Director at Bureau headquarters or Special Agent in Charge in Bureau field offices)" after "designee" the first place it appears; and

(B) by replacing "writing that" and all that follows through the end with "writing that such information is necessary for the conduct of an authorized foreign counterintelligence



investigation.”; and

(3) in subsection (c)--

(A) by inserting “(in a position not lower than Deputy Assistant Director at Bureau headquarters or Special Agent in Charge in Bureau field offices)” after “designee”; and

(B) by replacing “camera that” and all that follows through “States.” with “camera that the consumer report is necessary for the conduct of an authorized foreign counterintelligence investigation.”.

#### **SEC. 160. DISCLOSURE OF EDUCATIONAL RECORDS.**

(a) Section 408 of the National Education Statistics Act of 1994 (20 U.S.C. 9007) is amended by adding after subsection (b) a new subsection as follows:

“(c) Without regard to subsections (a) and (b), the Attorney General or the Secretary of Education (or any Federal officer or employee designated by either of them) may, upon determining that so doing can reasonably be expected to assist in investigating or preventing a Federal terrorism offense as defined in section 25 of title 18, United States Code, or domestic terrorism or international terrorism as defined in section 2331 of that title--

“(1) collect, through legal process or as otherwise authorized by law, reports, records, and information (including individually-identifiable information), in the Center's possession; and

(2) for official purposes, retain, disseminate, and use (including as evidence at trial or in other administrative or judicial proceedings) such reports, records, or information as otherwise authorized by law, consistent with such guidelines as the Attorney General may issue to protect confidentiality.

No person furnishing reports, records, or information pursuant to this subsection shall be liable to any other person for furnishing such information.”.

(b) Section 444 of the General Education Provisions Act (20 U.S.C. 1232g), is amended by adding after subsection (i) a new subsection as follows:

“(j) Without regard to subsections (a) through (i) or any provision of State law, the Attorney General (or any Federal officer or employee designated by him) may, upon determining that so doing can reasonably be expected to assist in investigating or preventing a Federal terrorism offense as defined in section 25 of title 18, United States Code, or domestic terrorism or international terrorism as

defined in section 2331 of that title—

“(1) collect education records and other information in the possession of an educational agency or institution; and

(2) for official purposes, retain, disseminate, and use (including as evidence at trial or in other administrative or judicial proceedings) such records or other information as otherwise authorized by law, consistent with such guidelines as the Attorney General may issue to protect confidentiality.

No person furnishing records or information pursuant to this subsection shall be liable to any other person for furnishing such information.”.

#### **SEC. 161. CLARIFICATION OF APPLICATION OF LAWS.**

Unless expressly provided to the contrary, restrictions or penalties contained in any other act with respect to assistance, sales, or transfers to or transactions with countries, entities, or persons shall not be construed to apply to otherwise duly authorized intelligence activities subject to the reporting requirements of title V of the National Security Act.

#### **Sec. 162. CENTRAL INTELLIGENCE AGENCY SECURITY AUTHORITIES.**

[LANGUAGE TO FOLLOW FROM CIA]

#### **SEC. 163. PROTECTIVE INTELLIGENCE FUNCTIONS OF SECRET SERVICE.**

[LANGUAGE TO FOLLOW FROM STATE]

#### **SEC. 164. PRESIDENTIAL AUTHORITY.**

Section 203 of Public Law 95-223 (50 U.S.C. 1702) is amended—

(1) at the end of subparagraph (a)(1)(A), by replacing “; and” with a comma and adding thereafter the following (flush to that subparagraph):

“by any person, or with respect to any property, subject to the jurisdiction of the United States;”

(2) in subparagraph (a)(1)(B)--

(A) by striking “by any person, or with respect to any property, subject to the jurisdiction of the United States.”;

(B) by replacing “interest;” with “interest by any person, or



with respect to any property, subject to the jurisdiction of the United States; and"; and

(C) by inserting ", block during the pendency of an investigation" after "investigate";

(3) at the end of paragraph (a)(1), by adding a new subparagraph as follows:

"(C) when the United States is engaged in armed hostilities or has been attacked by a foreign country or foreign nationals, confiscate any property, subject to the jurisdiction of the United States, of any foreign person, foreign organization, or foreign country that he determines has planned, authorized, aided, or engaged in such hostilities or attacks against the United States; and all right, title, and interest in any property so confiscated shall vest, when, as, and upon the terms directed by the President, in such agency or person as the President may designate from time, and upon such terms and conditions as the President may prescribe, such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes."; and

(4) by adding at the end a new subsection (c) as follows:

"(c) Classified information.--In any judicial review of a determination made under this section, if the determination was based on classified information (as defined in section 1(a) of the Classified Information Procedures Act, such information may be submitted to the reviewing court ex parte and in camera."

## **Title II--IMMIGRATION**

### **SEC. 201. ADMINISTRATIVE REMOVAL OF TERRORISTS.**

Section 238 of the Immigration and Nationality Act of 1952 (8 U.S.C. 1228) is amended--

(1) in the heading, by replacing "Aliens Convicted Of Committing Aggravated Felonies" with "Certain Aliens";

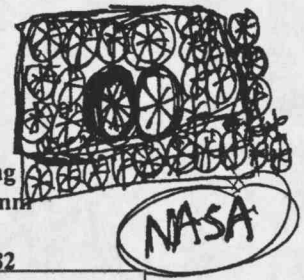


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## - TECHNOLOGICAL NEUTRALITY

## - NATIONAL EFFECT OF ORDER

### Section 101: Modification of authorities relating to use of pen registers and trap and trace devices

#### Summary/Simplified Explanation of Provision:

The pen register and trap and trace statute governs the prospective collection of non-content traffic information associated with communication, such as the phone numbers dialed by a particular telephone. Pen/trap orders are a critical tool used to identify the members of a terrorist conspiracy or the source of a terroristic threat. *(\*) as to electronic confirm existing practice to eliminate uncertainty in appellate courts + uncertainty*

The statute, however, needs to be updated in two ways: (1) it does not clearly allow for the use of pen/trap devices to trace Internet communications, and (2) a pen/trap order only applies to communications providers within the jurisdiction of the court. The proposed amendments would solve these problems by making the statute's language technology neutral and by allowing a federal court to issue a single order that would apply to all providers in a communication's chain, including those outside of the court's jurisdiction. *(\*) as to single order, this is to eliminate an administrative burden that serves no clear purpose*

#### Full Explanation of Provision:

The amendments to the pen/trap statute fall into two categories: those that clarify the scope of the statute so that it would include not only telephone communications but also electronic communications on computer networks, and those that allow courts to issue a single order for tracing a communication anywhere within the U.S. The following explanations address these issues separately.

#### [scope of the statute]

- Congress enacted the pen/trap statute in 1986. In the succeeding fifteen years, new communications media – such as e-mail – have expanded dramatically. Terrorists and criminals increasingly employ the new methods of communication, and law enforcement investigators have had to adapt their investigative strategies accordingly.
- These changes in terrorism and criminal activity have forced courts to consider how to apply the language of the pen/trap statute to the new technologies. For the

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most part, the courts have drawn the appropriate analogies and have issued pen/trap orders to collect such information as the source and destination of e-mails sent to a particular criminal's account.

- Although numerous courts across the country have issued pen/trap orders for communications on computer networks, no federal district or appellate court has explicitly ruled on the propriety of this practice. Moreover, certain litigants have begun to challenge the application of the pen/trap statute to such electronic communications.

- If the pen/trap statute is interpreted not to apply to electronic communications, investigators would lose a critical tool for investigating terrorist organizations and other organized criminal groups. Moreover, computer users would lose the important privacy protections offered by the pen/trap statute. Thus, Congress should amend the pen/trap statute to assure that investigators can use it to trace electronic communications just as they can to trace telephone communications.

#### [single order]

- In the past, a single telephone company would handle a call from end to end. Today, however, a single call or electronic communication is often carried by multiple providers, such as a local telephone company, a long distance carrier, and then a cellular carrier.

- Moreover, the change in technology has been accompanied by changes in the way that terrorists and criminals conceal their identities. Criminals have become adept at changing their means of communication rapidly. Terrorists and drug dealers switch from one cloned cellular phone to another, for example, and hackers route their communications through different Internet computers to hide their tracks. Thus, it has become increasingly important to be able *quickly* to obtain court authorization to use pen/trap devices. Indeed, delays caused by the need to obtain multiple court orders have hindered important investigations.

- The basic procedure for obtaining a pen/trap order, however, has not changed with the technology. Under existing law, an investigator generally must obtain separate court orders addressed to each communication provider along the chain. Law enforcement officers need a mechanism to serve a *single order* that applies to all such providers.

#### Explanation of Current Law:

As discussed above, the existing pen/trap statute does not clearly apply to tracing communications over computer networks, and pen/trap orders have effect only within the jurisdiction of the issuing court.



### Examples of Why the Provision is needed:

- In the investigation of the terrorist attacks on September 11, an AUSA in the northeastern U.S. needed to obtain a trap and trace order on a web hosting service in another district. The current statute's cramped jurisdictional provision would require him to seek the order in that other district, involving a second AUSA and thus slowing the process. Moreover, the ability to obtain such crucial process in any district is uncertain, given the lack of clarity over the statute's applicability to non-telephonic communications networks.
- Likewise, an embassy received a series of e-mail messages threatening to bomb it. Tracing of the threats was complicated by the use of both a web-based email service and an e-mail forwarding service that intentionally does not keep records of the source of messages. Section 101 would make clear that the trap and trace statute applies to such Internet threat communications, as well as permit the issuance of a single order to trace the threat communications to their source.
- In one recent case, a terrorist placed poison in containers of baby food. He marked the containers and sent an e-mail to the authorities explaining which stores had them and how to identify them. He then repeatedly sent e-mails threatening to poison more baby food if his demands were not met. When investigators tried to trace the e-mail communications, they discovered that the perpetrator had established many accounts in false names and that the e-mail messages were being automatically forwarded from one account to another. Investigators were forced to obtain several pen/trap orders in different jurisdictions, reducing their ability to quickly and effectively trace the e-mail messages.
- Law enforcement authorities obtained a pen/trap order on an e-mail account that was crucial to finding and arresting James Kopp, who had been indicted for killing a doctor in front of his wife and child in their home near Buffalo, New York in 1998. Kopp had managed to evade authorities for three years until he was arrested in France this spring.
- In 1996, a "phone phreaker" made repeated harassing telephone calls to 911 telephone systems, tying up a line and thereby disrupting service, on occasion for more than an hour at a time. Because these calls were carried by more than one carrier, prosecutors obtained a series of trap and trace orders in different jurisdictions directed to each of the phone companies that in turn handled the call, a process which delays investigations as each order is prepared and then presented to a federal magistrate judge.

### Political Sensitivities



Although there appears to be broad recognition of the need to update the pen/trap statute, privacy advocates have proposed that the standard for obtaining a pen/trap order be raised at the same time. For example, Senator Leahy circulated a bill on September 20 that contains a provision that would modernize the pen/trap statute, but his version would require prosecutors to submit a written affidavit of fact in support of their applications. Although this procedure is intended to enhance privacy, even though there has been absolutely no showing that the current process has been in any way misused. Moreover, it makes little sense to raise the administrative burden on law enforcement given our current investigative needs.

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TECHNOLOGICAL  
NEUTRALITY

**Section 102: Seizure of Voice Mail Messages Pursuant to Warrants**

**Summary/Simplified Explanation of Provision:**

Under current law the government could obtain voicemail stored on an answering machine in someone's home using a search warrant, but would need a Title III wiretap order to get from a service provider messages that had not been heard. This section would treat stored voicemail like stored email and require that a search warrant be used. It also enhances privacy by requiring notice when opened voicemail is obtained using a subpoena or court order.

**Full Explanation of Provision:**

By amending the definition of "wire communication" (which means human "voice" communications) and extending to voicemail the procedures used to compel access to electronic mail, this section enables law enforcement personnel to seize unopened voice mail messages from a service provider pursuant to a search warrant. At present, unopened electronic mail can be obtained with a search warrant, but unopened voicemail requires a wiretap order issued under Title III, 18 U.S.C. § 2510 et seq. In addition, this section enhances privacy by requiring notice (which can be delayed in certain circumstances) to the subscriber of a service provider when opened voicemail – voicemail that has already been received – is obtained with a subpoena or court order, rather than a warrant. These changes put stored voice communications on a par with stored non-voice communications (e.g., stored email).

These changes are necessary because requiring a wiretap order to obtain access to voicemail creates unnecessary delay to meet Title III's extensive procedural requirements. In addition, because data and voice communications are increasingly carried together over the Internet, law enforcement faces the risk that it will inadvertently violate Title III by using a search warrant to obtain electronic mail that has a "voice" attachment. The current distinction between voice and data is not workable.

**Explanation of Current Law:**

At present, 18 U.S.C. § 2510(1) anomalously defines "wire communication" to include "any electronic storage of such communication," meaning that the government must apply for a Title III wiretap order before it can obtain unopened voice mail messages held by a service provider. Opened voicemail may be obtained with a subpoena, unless a warrant is required as a



constitutional matter. Electronic mail is obtained using the processes of 18 U.S.C. § 2703, which requires a warrant for unopened electronic mail, and a subpoena or court order with notice (which can be delayed in certain circumstances) or a warrant without notice for opened electronic mail.

#### **Examples of Why the Provision is needed:**

Law enforcement officers investigating a terrorism case tracked one co-conspirator to a hotel room. In the hotel room, which the co-conspirator had abandoned, agents found a cellular phone and subpoenaed phone records for the phone. The service provider confirmed that there were voice mail messages on the phone. As required by Title III, agents obtained a wiretap order for the voice mail messages in hopes of identifying other co-conspirators involved in the terrorist attack.

[Sensitive: The above sanitized example has occurred in this case. A Deputy Chief in a U.S. Attorney's Office advises that investigators have identified a number of phones — including a cell phone with associated voicemail service — used by one of the hijacker pilots in the September 11, 2001 attacks.]

#### **Potential for Controversy:**

Medium. The provision removes a procedural barrier to obtaining unopened voicemail but includes additional privacy protections for opened voicemail. Privacy advocates will complain about the former, even though the case for harmonization with electronic mail is incontrovertible, as voice and data communications converge.

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INFORMATION  
SHARING

Section 103: Authorized Disclosure

Summary/Simplified Explanation of Provision:

Authorizes disclosure of information obtained through Title III interceptions to "any officer or employee of the executive branch of the federal government." The intent of this provision is to ensure that information relevant to the national security intercepted in criminal investigations can be shared with appropriate investigators.

Full Explanation of Provision:

Under Title III, as presently written, intercepted information may be given to other "investigative or law enforcement officers." As defined, that description does not appear to include a wide variety of members of the intelligence community, for example: essentially all of the Central Intelligence Agency (CIA) and the National Security Agency (NSA). This is a clear impediment to sharing useful information that may be overheard on a Title III interception. The new provision would resolve that problem.

Explanation of Current Law:

18 U.S.C. 2510(7) defines an "investigative or law enforcement officer" in terms of the authority to conduct investigations of or to make arrests for the criminal violations that are predicates for Title III interceptions. Title III information can be disclosed to these officers when appropriate to the carrying out of their duties. Much of the intelligence community is simply excluded from this definition. A draft opinion by the Office of Legal Counsel (OLC), which given its draft nature should probably not be referenced externally, supports this fairly narrow interpretation.

Examples of Why This Provision is Needed:

The practical concern about this provision comes more from the intelligence side than the criminal side. The Office of Intelligence and Policy Review (OIPR) (the office charged with implementing the FISA statute) highlighted two areas where such information-sharing could be significant.

A target of a Title III interception might reveal information directly relevant to an investigation of an international terrorist organization. For example, he may discuss the



addresses in France used by terrorists. Such information could, of course, be of use to both United States and French intelligence.

Title III interceptions frequently reveal details of the lifestyle and habits of targets with ties to both criminal and terrorist activities. Examples of such information include a target's meeting locations and associates. Such facts may be of great operational importance to intelligence agencies.

#### **Possible Controversy:**

The general concept is likely not controversial. The Leahy bill tries to accomplish something similar at Section 203, but to a narrower class of persons, possibly too narrow. There is, however, probably something to be said for the argument that our draft language could be interpreted to allow very wide disclosure. While defending the general concept, it would be reasonable to agree to negotiate about the exact scope and language.

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TECHNOLOGICAL  
NEUTRALITY -  
FILLING GAP

Section 104: Savings Provision

Summary/Simplified Explanation of Provision:

Makes clear that when a FISA pen register/trap and trace is used, it will not violate the provisions of 18 U.S.C. 3121, *et seq.*

Full Explanation of Provision:

18 U.S.C. 2511(2)(F) is designed to assure that FISA surveillances are not deemed to violate Title III. It lists specific interception provisions that do not govern when a FISA interception is being utilized, drawing boundaries between the interception provisions. For whatever reason, Chapter 206 (18 U.S.C. 3121, *et seq.* pen register/trap and trace) was omitted from 2511(2)(f). Section 104 of the proposed legislation simply corrected this oversight. This may be of greater significance now since Section 155 expands the FISA pen register provisions.

Explanation of Current Law:

The present version of 2511(2)(f) does not include the pen register statute so an argument could be made that 3121 applies in the FISA context.

Examples of Why the Provision is Needed:

Simply to clarify the law.

Potential for Controversy:

None. The Leahy bill contains an identical provision, Section 205.



# ADMISSION OF PROBATIVE EVIDENCE

↳ interception by  
foreign government

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substitute →  
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## Section 105: Use of Wiretap Information From Foreign Governments

### Summary/Simplified Explanation of Provision:

The intent of the provision is to ensure that information from interceptions conducted by foreign governments abroad can be used in proceedings in this country. The provision also attempts to place reasonable protections on the security of sources and methods which may have been involved in these interceptions.

### Full Explanation of Provision:

The provision would codify two basic principles regarding interceptions conducted abroad by foreign governments. First, foreign interceptions in which officers or employees of the United States had no involvement would be admissible in proceedings in the United States. Second, evidence obtained from foreign interceptions in which officers or employees of the United States were involved are admissible as long as the interception complied with the law of that country. The provision also would, to the extent possible in criminal cases, assure the continued confidentiality of the sources and methods involved in the foreign interception.

### Explanation of Current Law:

There is no statutory provision on this point. However, the proposed legislation is a codification of the majority case law.

### Explanation of Why the Provision is Needed:

The provision will clarify the law in this area. This is significant given the growing cooperation between law enforcement agencies across national boundaries. For example, in recent years, OEO has noted an increase in the number of federal interception requests that have, as their basis for probable cause, wiretaps carried out under the legal regime established by foreign governments. OEO has also noticed an increase in the number of nations from which such information originates.

### **Potential for Controversy:**

The general concept may not be controversial, but there are a couple of aspects that could lead to questions. First, our language may need to be modified since additional internal comments have raised some issues about precise wording, which could also come up in committee questioning. Second, a parade of horrors is possible: what if a foreign government intercepts all of its citizens routinely? The response, is twofold, but perhaps a little dry. First, there is still a constitutional "shocks the conscience test" that probably applies to all evidence. Second, our law cannot govern a foreign regime or control its methods of evidence gathering. In that case, excluding probative evidence makes no sense.



# PROVIDING ASSISTANCE TO SERVICE PROVIDERS WHO ARE VICTIMS OF ATTACKS

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Pager number: 800-759-8888 x135-9106  
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## Section 106: Interception of Computer Trespasser Communications

### Summary/Simplified Explanation of Provision:

Current law may not allow victims of computer trespassing to request law enforcement assistance in monitoring unauthorized attacks. Because providers often lack the expertise, equipment, or financial resources required to monitor attacks themselves, they often have no way to exercise their existing statutory rights to protect themselves from intruders. The wiretap statute has prevented government assistance in such cases, even though computer trespassers have absolutely no expectation of privacy in their network attack transmissions. To correct this problem, the proposed amendments to the wiretap statute would allow victims of computer attacks to authorize persons "acting under color of law" to monitor trespassers on their computer systems in a narrow class of cases.

### Full Explanation of Provision:

- When a cyber-terrorist or criminal computer hacker breaks into a computer belonging to someone else, he threatens the privacy and security of the users and owner of that computer. Such computer trespassers have no reasonable expectation that the communications they send to that computer will remain private. Yet current law has prevented law enforcement from assisting the victims of a computer trespasser in catching the trespasser.
- Although computer trespassers have no expectation that their activities on someone else's computer will remain private, the wiretap statute only partially recognizes this common-sense fact. Under the current statute, service providers that become victims of computer hacking may freely intercept electronic communications by trespassers on their computer systems to protect their own rights and property. As it stands, however, the statute does not clearly allow law enforcement to conduct the same monitoring of trespassers. This uncertainty has prevented law enforcement from assisting even after expressly requested to do so by the victim.



This outcome is plainly unacceptable. The current statute has prevented victims from taking the natural and reasonable steps in their own defense that would be entirely legal in the physical world. For example, burglary victims may invite the police into their homes to help them catch burglars in the act of committing their crimes. The wiretap statute should place cyber-intruders on the same footing as physical world intruders: the statute should not block investigators from responding to victims' requests in the computer context simply because the means of committing the burglary happen to fall within the statutory definitions of "wire" or "electronic" communications.

Businesses, universities, and the military suffer numerous penetrations into their computer systems every year. These hackers run the gamut from teenagers "cyber-joyriding" to agents of foreign powers attempting to steal valuable information and industrial secrets to terrorists. Such hackers routinely do not attack directly from their own computer systems. Instead, they first hack into systems with limited security measures – such as small businesses and universities – and use these intermediate computers to hide their true identities. The owners of these machines generally want to assist investigators to identify and stop the hackers who are disrupting the Department of Defense networks, but they often lack the resources and expertise to monitor the individuals who are illicitly using their computers. Current law has prevented the government from responding to their requests for help.

Remedying this difficulty in the wiretap statute requires that the statute be updated so that it would allow law enforcement investigators – with the prior authorization of the victim – to intercept the communications sent by a computer trespasser to or through a victim computer system. A carefully drafted, narrow amendment would solve this problem without infringing on the privacy interests of authorized users.

#### **Explanation of Current Law:**

As discussed above, current law protects both authorized and unauthorized users as "parties to a communication," and it does not give the service provider the power to consent. Often, the only procedure law enforcement can use is the slow and difficult process of obtaining a wiretap order, even though intruders have absolutely no expectation of privacy in their communications with the victim computer.

#### **Examples of Why the Provision is needed:**

In the widespread "distributed denial of service" attacks against eBay, Yahoo!, CNN, and other prominent Internet sites that occurred in February 2000, the perpetrator first gained control of a number of intermediate computers at universities and businesses to use as "zombies." These "zombies" then attacked, and took offline, the ultimate victim computers.



At the time of the attack it was unknown whether the attack was an act of terrorism, whether it was state sponsored, or economically motivated. Several of the intermediate zombie computer owners contacted law enforcement to ask for assistance in monitoring their systems in the event that the intruder returned to their systems or used them in committing other attacks. Despite the fact that the intruder had no expectation of privacy in their systems, law enforcement's ability to render this aid was extremely limited, unless prepared to obtain scores of wiretap orders.

This limitation could assume even greater importance if terrorists coupled a physical attack with a cyber denial of service attack in order to cripple command, control and response mechanisms. A terrorist organization could magnify the death toll and psychological impact of the physical attack if it were to shut down the e-mail and Internet servers of the Federal Emergency Management Agency, the Red Cross, the Federal Bureau of Investigation, and the local police and fire departments. The proposed computer trespasser exception would allow law enforcement – at the request of the victim – to quickly monitor the intruder's activity and prevent further harm.

In one recent case, a foreign hacker broke into a sensitive computer system at a military base in the U.S. Investigators trying to trace the origin of the attack discovered that the hacker had also broken into many non-military computers in different parts of the country and was using these computers to hide his location and as staging grounds for attacks on other military computers. Even though the hacker had no expectation of privacy in his communications with these intermediate computers (such as the computer network at a high school), the investigators could not effectively monitor the hacker's communications to and from these computers without going through the time-consuming steps of obtaining a wiretap order in each of the applicable jurisdictions. Yet the hacker switched to new intermediate computers often, making the cumbersome process of obtaining wiretap orders in different judicial jurisdictions largely ineffective.

Although there have been no known terrorist incidents to date that involve a physical terrorist attack, the following hypothetical example illustrates the problem:

Suppose the operators of the computer network that controls air traffic of a major U.S. airport discover signs that an intruder has penetrated the network. For safety reasons, they cannot simply turn the machines off, and they do not possess the tools or expertise necessary to monitor the hacker's activity on their network. They cannot immediately determine whether the intruder is a curious teenager or a terrorist who could act imminently. Under current law, if they reach out to law enforcement authorities for assistance in monitoring the hacker, they would learn that, without going through the cumbersome and time-consuming process of obtaining court authorization, law enforcement cannot help intercept the content of the illegal intruder's communications with the system – even though the intruder has absolutely no expectation of privacy in these communications. With the exception, investigators could immediately assist the computer owner in monitoring the intruder.



### Political Sensitivities

In prior legislative discussions, many lawyers misunderstood the scope of the provision, believing that it would allow widespread interception by law enforcement. Critics complain that it will allow law enforcement authorities to intercept the communications of legitimate computer users, ignoring the provision's explicit prohibition on doing so.



TECHNOLOGICAL  
NEUTRALITY

ELIMINATING ADMIN  
BURDEN

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**Section 107: Scope of Subpoenas for Records of Electronic Communications**

**Summary/Simplified Explanation of Provision:**

Section 107 would update and slightly broaden the class of records, to include for example credit card records, that law enforcement may obtain from a service provider with a subpoena in order to determine the identity of an account holder in fast moving Internet investigations, including of terrorist incidents.

**Full Explanation of Provision:**

Now that criminals are increasingly using Internet Service Providers and email services that do not verify the accuracy of the names and addresses of their subscribers, it is critical to terrorist and other investigations to ascertain billing and other information identifying account holders as soon as possible. In addition, the Internet equivalent of a user's telephone number – his or her assigned “address” – may change often. This address can be critical in determining the identity of a person who sends a threat or claims responsibility for a bombing attack, just as “Caller ID” information can be for crimes using the telephone.

Under current law, this information can be obtained by subpoena when a telephone is involved, but only by the slower and more cumbersome process of a court order for Internet investigations. In fast-moving investigations such as terrorist bombings – in which Internet communications are a critical method of identifying conspirators and determining the source of the attacks – the delay necessitated by the use of court orders can often be fatal. Therefore, the proposed amendments to § 2703(c)(1)(C) would permit investigators to obtain billing information and assigned address information with a subpoena. This would not allow obtaining records of a user's browsing activity with a mere subpoena, however.

**Explanation of Current Law:**

Current law allows the government to use a subpoena to compel communications providers to disclose a small class of records that pertain to electronic communications, limited to such records as the customer's name, address, and length of service. 18 U.S.C. § 2703(c)(1)(C). For telephones, “telephone toll billing records” can also be obtained with a subpoena.

### Examples of Why the Provision is needed:

In the PENTBOM case, prosecutors have been forced to seek multiple 2703(d) orders for user-identification records believed to relate to the hijackings; subpoenas would have been much faster in each case.

The San Francisco Chronicle, in discussing the possible use of the Internet by one of the alleged hijackers, noted that "Using publicly accessible computers at libraries or cybercafes, in conjunction with free e-mail accounts, is the perfect way to communicate in secret, computer security experts say." Because users often provide false names when establishing accounts, other identifying information (such as the credit card used to set up an account) is a crucial tool to identifying and prosecuting wrongdoers.

### Potential for Controversy:

Low to Medium. This provision involves a minor expansion of government authority to obtain information with a subpoena, to which privacy advocates are opposed. It must be made clear that this change will not allow obtaining records of a user's browsing habits – just information that identifies who has committed a crime.



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**Section 108: Nationwide Service of Search Warrants for Electronic Evidence**

**Summary/Simplified Explanation of Provision:**

Section 108 would allow a search warrant to compel stored communications to be issued in the district where an investigation is taking place, even if the service provider is located in another district.

**Full Explanation of Provision:**

A warrant must be used in certain cases to obtain information, such as unopened email, from service providers. This type of warrant is different from a traditional warrant; instead of law enforcement searching through the service provider's data, the warrant is given to the service provider who gives the responsive information to law enforcement. The warrant is like a court order that could just as well be served by facsimile. Despite this difference, however, under the Federal Rules of Criminal Procedure warrants must generally be for property within the district where the warrant is issued. Because internet service providers are located in one district but offer services in other districts, an investigator in Boston seeking electronic e-mail in the Yahoo! account of a suspected terrorist may need to coordinate with agents, prosecutors, and judges in the Northern District of California, none of whom have any other involvement in the investigation. Having the warrant issued in the Northern District of California also provides no privacy or other benefit – the same probable cause standard must be met. This causes unnecessary procedural delay in obtaining access to critical information. Accordingly, this section authorizes courts with jurisdiction over investigations (under amendments contained in Section 101) to compel evidence directly, without requiring the intervention of their counterparts in the districts where major Internet service providers are located. This also puts the jurisdictional rules for compelling electronic mail on a par with jurisdictional rules for compelling documents via grand jury subpoena.

**Explanation of Current Law:**

Current law requires the government to use a search warrant to compel a provider to disclose unopened e-mail. 18 U.S.C. § 2703(a). Because Federal Rule of Criminal Procedure 41 requires that the "property" to be obtained be "within the district" of the issuing court, the rule may not allow the issuance of § 2703(a) warrants for e-mail located in other districts.

**Examples of Why the Provision is needed:**

- NATIONAL EFFECT  
- ELIMINATING ADMIN BURDEN - TECHNICAL

NEUTRALITY

Many requests to U.S. Attorneys' offices in key Internet service provider districts have come from other districts investigating the September 11 attacks. Section 108 would streamline this process by eliminating a needless extra administrative step, while leaving untouched the probable cause requirement.

**Potential for Controversy:**

Low. This provision is likely to cause only "jurisdiction shopping" complaints, but because the warrant must be issued by a court with jurisdiction over the investigation (under amendments contained in Section 101), such complaints are insubstantial.



# TECHNOLOGICAL NEUTRALITY

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## Section 109: Clarification of Scope ("Cable Act Fix")

### Summary/Simplified Explanation of Provision:

The Cable Communications Policy Act ("Cable Act"), passed in 1984 to regulate various aspects of the cable television industry, could not take into account the changes in technology that have occurred over the last seventeen years. Cable television companies now often provide Internet access and telephone service in addition to television programming. Because of perceived conflicts between the Cable Act and the laws that govern law enforcement's access to communications and records of communications, cable providers have refused to comply with lawful court orders, thereby slowing or ending critical investigations.

Law enforcement must have the capability to trace, intercept, and obtain records of the communications of terrorists and criminals with great speed, even if these offenders choose to use a cable provider for their telephone and Internet service. This legislative proposal would clarify that when a cable company acts as a telephone company or an Internet service provider, it must comply with the same laws governing the interception and disclosure of wire and electronic communications that apply to any other telephone company or Internet service provider.

### Full Explanation of Provision:

Congress passed the Cable Communications Policy Act ("Cable Act") in 1984 to limit the ways in which providers of cable television programming can disclose the television viewing records of cable subscribers. It established an extraordinarily high level of protection for records pertaining to customers' television service (e.g., notification of the subscriber, an adversary hearing, and proof far higher than even probable cause). At that time, cable technology did not allow cable operators to provide Internet access or telephone service over cable lines.

- In 1986, Congress passed the Electronic Communications Privacy Act ("ECPA") to govern the ways in which providers of electronic communications service may disclose information and cooperate with law enforcement. This Act applies to all such providers –



including those that use a coaxial "cable" – without regard to the type of technology used to provide such services.

- In the subsequent decades, technology improvements have allowed cable television providers to offer their customers Internet access and telephone service over the same cable lines. Indeed, the number of cable customers receiving broadband Internet access has risen dramatically and is expected to continue to do so for years to come.
- This change in technology has arguably created a conflict in the two laws. Although Congress never intended that the Cable Act would apply to telephones and the Internet, the broad language of the act has placed cable providers in an awkward position: if they comply with court orders issued pursuant to ECPA, they may risk liability for violating the Cable Act. Consequently, many providers have refused to comply with lawful court orders, hindering important criminal investigations.
- For example, if an investigator attempted to trace the Internet communications of the members of a terrorist conspiracy, he would need to act quickly before the electronic "trail" grows cold. Thus, even delays in obtaining logging records from computers may prevent officers from successfully locating the source of extortion demands sent by a terrorist bomber.
- So far, the courts considering the issue have eventually required cable providers to disclose such records, but even the need to litigate the issue has wasted resources and delayed time-sensitive investigations.
- *Simply stated, the rules governing the disclosure of the records possessed by a communication service provider should not depend on whether the company offers its service over telephone lines, cable lines, or some other medium. Cable companies – just like any telephone company or Internet service provider – should comply with court orders and other legal process pursuant to ECPA, the wiretap statute, and the pen register and trap and trace statute (with respect to their telephone and Internet customers).*

### Explanation of Current Law:

As discussed above, there is arguably a conflict between the Cable Act and the statutes that govern law enforcement's access to communications and records of communications. This alleged conflict in the two sets of statutes has hindered important investigations.

The Cable Act creates extremely strong restrictions on law enforcement access to communications and records held by a cable company. In order for law enforcement authorities to gain access to records pursuant to the Cable Act, they must notify the subscriber (usually the target of the investigation) and prove in an adversary hearing the need for the records by clear and convincing evidence (a standard higher than probable cause or even "more probable than not"). This procedure – that would require notification of the target before beginning a wiretap,



for example – is totally incompatible with almost any criminal investigation.

**Examples of Why the Provision is needed:**

- If the Cable Act applies to cable companies providing Internet access, then Internet users receive radically different privacy protection based solely on their choice of Internet access (i.e., telephone dial-up or cable). Those who subscribed to cable services would receive notification before law enforcement sought to install a wiretap or a pen/trap device, or to have access to any records held by the company. Any terrorist or criminal could easily make use of this "safe haven" in order to avoid law enforcement surveillance.
- In one recent case, law enforcement agents investigated a suspected pedophile who not only distributed images of child pornography but bragged that he was sexually molesting a minor girl. The agents discovered that the offender was using a particular cable ISP, and obtained a court order under ECPA commanding the cable company to identify the name and address of the offender. The cable company, however, refused to comply with the court order, citing the Cable Act. Prosecutors pleaded with the cable company for approximately two weeks, trying to get them to obey the order. They told the company that the case involved a suspect who was sexually abusing a girl. Yet for two weeks the company refused to provide the information without first notifying the subscriber (as allegedly required by the Cable Act). Pursuing other investigative leads, agents identified and arrested the subject. Only after the arrest did the cable company finally turn over the records.

**Political Sensitivities**

Although there are no reasoned arguments for treating cable companies differently from other Internet service providers, various privacy advocates have objected to amending the Cable Act because they would like to see its extremely restrictive standard replicated in other statutes, such as ECPA.



① EMERGENCY  
② TECHNOLOGICAL  
NEUTRALITY

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### Section 110: Emergency Disclosure of Electronic Communications

#### Summary/Simplified Explanation of Provision:

Section 110 would authorize disclosures of communications (or records relating to such communications) by a service provider if the provider reasonably believes that an emergency involving immediate danger of death or serious physical injury to any person requires disclosure without delay. The section would also permit a provider to disclose transactional and subscriber data to protect its rights and property.

#### Full Explanation of Provision:

Providers of electronic communications service currently cannot voluntarily disclose the communications (or records relating to such communications) of their customers or subscribers in emergencies that threaten death or serious bodily injury. This section amends 18 U.S.C. § 2702 to authorize such disclosures if the provider reasonably believes that an emergency involving immediate danger of death or serious physical injury to any person requires disclosure of the information without delay. This is critical, because in terrorist incidents there may be no time to obtain process. This puts a provider's voluntary disclosure of stored customer communications to protect life and limb on a par with current rules allowing disclosure to protect its rights or property.

In addition, providers cannot currently disclose non-content records to protect their rights and property, even though, perversely, they can disclose content (which is more sensitive) in similar circumstances. This problem substantially hinders the ability of providers to protect themselves from cyberterrorists and criminals. In order to promote the protection of our nation's critical infrastructures, this section amends 18 U.S.C. § 2702 to allow communications providers to voluntarily disclose both content and non-content records to protect their computer systems.

#### Explanation of Current Law:

Existing law, 18 U.S.C. § 2702, contains no provision that allows providers of electronic communications service to disclose the communications (or records relating to such communications) of their customers or subscribers in emergencies. Current law also contains an odd disconnect: a provider may disclose the contents of the customer's communications in order to protect its rights or property but the current statute does not expressly permit a provider to



voluntarily disclose non-content records (such as a subscriber's login records). 18 U.S.C. § 2702(b)(5). Note that current law also requires providers to disclose evidence of federal child exploitation offenses that comes to their attention. See 42 U.S.C. § 13032.

### **Examples of Why the Provision is needed:**

In the immediate aftermath of the September 11 hijacking attacks, several computer records custodians came forward offering customer records believed to relate to the terrorists' activities. Technically, the current statute makes such disclosures — even when made to prevent imminent death or serious injury — a violation, subjecting the disclosing provider to civil damages (including punitive damages) and attorneys' fees. The amendment would authorize disclosures in these limited cases.

The Department of Justice has in the past received requests for assistance from investigators attempting to prevent a suicide by tracing suicide notes sent by electronic mail. Currently, the Electronic Communications Privacy Act does not explicitly authorize disclosure to the government by an electronic mail provider of the content of communications, transactional records, or subscriber information in order to find the person who sent the suicide note and save his or her life. Therefore, whether a life can be saved might depend on the willingness of the provider to risk legal liability.

### **Potential for Controversy:**

Low (non-content disclosure) to medium (content disclosure). This section expands the scope of disclosures that a service provider can make without process; however, it does so in order to protect life and limb. Allowing disclosure of non-content records to protect rights and property may also displease privacy advocates; however, such records can currently be disclosed to non-governmental entities without any restrictions whatsoever, limiting any costs to privacy. It is noteworthy that this provision merely allows a provider to disclose, but does not require disclosure; in other words, it gives the government no additional power to compel records.

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### **Section 153: Foreign Intelligence Information**

### **Summary/Simplified Explanation of Provision:**



# INFORMATION SHARING

## SECTION 153: FOREIGN INTELLIGENCE

Under current law, an application for electronic surveillance or physical search pursuant to the Foreign Intelligence Surveillance Act (FISA) must contain a certification that "the" purpose of the search or surveillance is to obtain foreign intelligence information. Proposed Section 153 would change "the" to "a".

### Full Explanation of Provision:

FISA electronic surveillance and physical searches are used in most major espionage and international terrorism investigations. Many of these investigations result in prosecutions. Concern has arisen in recent years in the FISA Court and in the Department that the sharing of information developed during the course of these investigations-either where FISA techniques are in use or may be contemplated-with prosecutors may call into question the foreign intelligence purpose of the investigation and thus the accuracy of the certification. This concern has been most acute with respect to what kinds of advice, if any, prosecutors may provide investigators in order to preserve or enhance a potential prosecution. As a result, prosecutors frequently do not receive information in a timely fashion, or worse, do not receive information relevant to their decision-making. Similarly, investigators in these important matters frequently make decisions without legal guidance that can impact significantly a subsequent prosecution.

The proposed change would eliminate the current need to evaluate the relative weight of criminal and intelligence purposes in these investigations and facilitate information sharing and advice giving.

### Explanation of Current Law:

FISA requires that the purpose of the search or electronic surveillance be the acquisition of foreign intelligence information. Courts have interpreted this to mean that the primary purpose must be foreign intelligence; no court has held that it must be the only purpose.

### Examples of Why the Provision is needed:

This issue was examined at length in the Bellows Report. The Report found that critical legal advice in the Wen Ho Lee investigation was not sought from prosecutors out of concern that the seeking of such advice might run afoul of primary purpose. Similarly, the GAO, in a report issued in July 2001, found that there were significant coordination issues between the Criminal Division and the FBI in these investigations. GAO noted that differing interpretations within the Department on primary purpose issues have inhibited the proper coordination of criminal and counterintelligence functions.

### Potential for Controversy:

Potential controversy exists as some will view this change as tipping a delicate Fourth

foreign court  
no PC



Amendment balance and enabling investigators to improperly circumvent the traditional, and more stringent, probable requirements for obtaining a criminal search warrants or electronic surveillance.

# HOMELAND SECURITY

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## Section 201: Definitions Relating to Terrorism

### Summary/Simplified Explanation of Provision:

This provision makes changes to the definitions of "terrorist activity" and "engage in terrorist activity" under Section 212(a)(3)(B) of the Immigration and Nationality Act (INA). It also clarifies the procedures for designating and redesignating foreign terrorist organizations by the Secretary of State under Section 219 of the INA.

### Full Explanation of Provision:

The Alien Terrorist Removal Court (Title V of the INA) is the only mechanism available to the government in which classified evidence can be used as part of an affirmative case to remove an alien involved in terrorism. In existence since 1996, it has never been used, in part because of the narrow definition of "terrorist" which limits the applicability of the Court. The statute was sought, in large part, to facilitate the removal of aliens who use the United States as a base from which to support terrorist groups overseas. However, the current definition is limited to individuals who provide material support for a "terrorist activity." This section broadens that definition to include anyone who affords material support to an organization that the individual knows or should know is a terrorist organization, regardless of whether or not the purported purpose for the support is related to terrorism. These revised definitions will apply in all types of removal proceedings (before the Alien Terrorist Removal Court, immigration courts, and the INS). This legislation seeks to stop the provision of support to terrorist organizations through sham non-terrorist activities. The legislation further defines "terrorist organization" and improves the mechanism for the designation and redesignation of groups as terrorist organizations. Both the INA definition and that used by the State Department for terrorism are utilized. The remaining changes to Section 219 are technical corrections.

### Explanation of Current Law:

Section 212(a)(3)(B) of the INA makes certain aliens excludable if they have engaged in terrorist activity. Section 219 of the INA allows the Secretary of State to designate certain foreign terrorist organizations which threaten the security of US nationals or the national security of the United States.

### Examples of Why the Provision is needed:



Present law can be read to require that an alien must have knowledge that the material support he is providing is to be used for a terrorist purpose to be subject to removal for having engaged in terrorist activities.

**Controversial:**

This provision is controversial as it will be opposed by those who claim they are only providing support for humanitarian purposes. Such support, however, is fungible, and it is often diverted to carry out violent activities.

HOMELAND  
SECURITY

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## Section 202: Mandatory Detention of Suspected Terrorists

### Summary/Simplified Explanation of Provision:

This provision allows the Attorney General to detain additional aliens the Attorney General determines to be dangerous to the national security of the United States.

### Full Explanation of Provision:

Currently, persons deportable or inadmissible for terrorism-related reasons must be detained. This section expands this mandatory detention to those individuals the Attorney General determines pose a threat to national security, whether or not the alien is eligible for or is granted relief from removal. The Attorney General is vested with the discretion to make these time-sensitive decisions and to detain individuals who are found to pose a threat to national security until they are actually removed or until the Attorney General determines the person no longer poses a threat.

### Explanation of Current Law:

Current law provides for detention of those deportable or inadmissible for terrorism-related reasons, unless they are granted discretionary relief.

### Examples of Why the Provision is needed:

Aliens who are inadmissible or deportable for terrorism-related reasons should be ineligible for discretionary relief and should remain in custody until they are actually removed or until they no longer pose a threat.

### Controversial:

The provision may be controversial as it permits Attorney General to detain someone until removed from the United States or no longer deemed dangerous. If a country is not found that



will except the alien and they remain a danger, they could be incarcerated indefinitely.

# ENSURING ABILITY TO PROSECUTE TERRORIST CRIMES

NO MATTER WHEN FOUND + INDICTED

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## Section 301: No Statute of Limitation for Prosecuting Terrorism Offenses

### Summary/Simplified Explanation of Provision:

This provisions deletes the current 5 or 8 year statute of limitations for federal terrorism offenses.

### Full Explanation of Provision:

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

The section expressly provides that it is applicable to offenses committed before the date of enactment of the statute, as well as those committed thereafter. This retroactivity provision ensures that no limitation period will bar the prosecution of crimes committed in connection with the September 11, 2001 terrorist attacks. The constitutionality of retroactive applications of changes in statutes of limitations is well-settled where the change is applied to crimes which remain within the statute of limitations at the time of enactment of the new legislation. See, e.g., United States v. Grimes, 142 F.3d 1342, 1350-51 (11th Cir. 1998); People v. Frazer, 982 P.2d 180 (Cal. 1999).

### Explanation of Current Law:

Under current 18 USC §§ 2382 and 2386, non-capital terrorism offenses have a statute of limitations of 5 or 8 years. 18 U.S.C. § 3282 bars prosecuting most offenses after five years. 18 U.S.C. § 3286, as currently formulated, extends the limitation period for prosecution for certain offenses that may be committed by terrorists – but only to eight years. While this is a limited improvement over the five-year limitation period for most federal offenses, it is patently inadequate in relation to the catastrophic human and social costs that frequently follow from such crimes as destruction of aircraft (18 U.S.C. § 32), aircraft hijackings (42 U.S.C. §§ 46502, 46504-06), attempted political assassinations (18 U.S.C. §§ 351, 1116, 1751), or hostage taking (18 U.S.C. § 1203). These are not minor acts of misconduct which can properly be forgiven or forgotten merely because the perpetrator has avoided apprehension for some period of time. Anomalously, existing law provides longer limitation periods for such offenses as bank frauds and certain artwork thefts (18 U.S.C. §§ 3293-94) than it does for the crimes characteristically committed by terrorists.

In many American jurisdictions, the limitation periods for prosecution for serious offenses are



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

**Examples of Why the Provision is needed:**

Terrorism offenses are often difficult to solve, especially when they occur overseas. Often it requires painstaking investigations with or without the cooperation of foreign authorities to establish the identity of the perpetrators and obtain sufficient evidence to successfully prosecute a terrorism offense.

**Controversial:**

This provision should not be controversial.

INCREASED  
PENALTIES

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## Section 302: Alternative Maximum Penalties For Terrorism Crimes

### Summary/Simplified Explanation of Provision:

This provision creates a new alternative maximum penalty of any term of years or for life for federal terrorism offenses (as defined in the proposed new Section 25 of Title 18, United States Code, created by Section 309(a)).

### Full Explanation of Provision:

Under existing law, the maximum prison terms for federal offenses are normally specified in the provisions which define the offenses. These provisions can provide inadequate maxima in cases where the offense is aggravated by its terrorist character or motivation. This section accordingly adds a new subsection (e) to 18 U.S.C. § 3559 which provides alternative maximum prison terms, including imprisonment for any term of years or for life, for crimes that are likely to be committed by terrorists. This will more consistently ensure the availability of sufficiently high maximum penalties in terrorism cases. As in several other provisions of this bill, the list of the serious crimes most frequently committed by terrorists set forth in section 309 of the bill ("Federal terrorism offenses") is used in defining the scope of the provision.

This section affects only the maximum penalty allowed by statute. It does not limit the authority of the Sentencing Commission and the courts to tailor the sentences imposed in particular cases to offense and offender characteristics.

### Explanation of Current Law:

Under current law each offense included in the definition of Federal terrorism offense has its own statutory cap which in many cases may be limited to 20 years or less of imprisonment.

### Examples of Why the Provision is needed:

This provision is needed to give federal judges more flexibility to sentence terrorists convicted under crimes that have been on the books in many cases for numerous years whose statutory cap may not reflect the seriousness of the terrorist conduct.

### Controversial:

This provision should not be controversial.



INCREASED  
PENALTIES

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### Section 303: Penalties for Terrorist Conspiracies

#### Summary/Simplified Explanation of Provision:

This provision raises the penalty for conspiracy or attempt to commit any federal terrorism offense to the same penalty as proscribed for the substantive offense.

#### Full Explanation of Provision:

The maximum penalty under the general conspiracy provision of federal criminal law (18 U.S.C. § 371) is five years, even if the object of the conspiracy is a serious crime carrying a far higher maximum penalty. For some individual offenses and types of offenses, special provisions authorize conspiracy penalties equal to the penalties for the object offense – see, e.g., 21 U.S.C. § 846 (drug crimes) – but there is no consistently applicable provision of this type for the crimes that are likely to be committed by terrorists. This section accordingly adds a new § 2332c to the terrorism chapter of the criminal code – parallel to the drug crime conspiracy provision in 21 U.S.C. § 846 – which provides maximum penalties for conspiracies to commit terrorism crimes that are equal to the maximum penalties authorized for the objects of such conspiracies. This will more consistently provide adequate penalties for terrorist conspiracies. As in various other provisions in this bill, the relevant class of offenses is specified by use of the notion of “Federal terrorism offense,” which is defined in section 309 of the bill.

#### Explanation of Current Law:

Under current law, unless the federal terrorism offense specifies a higher penalty for conspiracy, the penalty for a conspiracy for that offense is governed by 18 USC § 371, which has only a 5 year period of imprisonment. Also, unless the federal terrorism offense has a penalty for attempt, there is no penalty for an attempt as there is no general federal attempt statute.

#### Examples of Why the Provision is needed:

A conspiracy or attempt to commit a federal terrorism offense should be treated as harshly as the substantive offense itself. Many terrorism offenses already contain conspiracy provisions that permit sentences at the same level as for the substantive offense. This provision ensures such for all of the federal terrorism offenses.

#### Controversial:

This provision should not be controversial.



INCREASED  
CHARGES / PENALTIES  
→ RICO [used for  
organized crime]

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Date and Time: September 21, 2001 4 p.m.

### Section 304. Terrorism Crimes as RICO Predicates

#### Explanation of Provision:

The provision would add all Federal terrorism offenses (as defined by the new 18 U.S.C. §25 created by Section 309 of this bill) to the list of predicate crimes under the RICO statute. It would enable prosecutors to bring RICO charges against individuals associated with an enterprise (including an association in fact such as a terrorist organization) who commit terrorism crimes as part of a pattern of racketeering. This provision will allow prosecutors to charge a large number of acts by a terrorist organization in a single count of a single indictment.

#### Explanation of Current Law:

Current law does not permit the charging of many terrorism offenses as predicate acts for a RICO charge. So, for example, if individuals associated with a terrorist organization were providing material support to that organization through a pattern of widely disparate acts that are not already RICO predicates, those individuals could not be charged with violating RICO, even though each act might qualify as a violation of 18 U.S.C. § 2339B.

#### Examples of Why the Provision is Needed

RICO provides a flexible instrument to charge a wide variety of related criminal activities by members of a criminal enterprise in a single count in a single case. Absent RICO, acts committed by different members of a single terrorist organization in several jurisdictions often cannot be charged in a single indictment due to lack of venue in any one jurisdiction. Furthermore, frequently the various components of a terrorist organization serve different goals (raising money for training, falsifying IDs, killing people, taking hostages), so that it would be difficult to charge in a single indictment, and defendants would be able to attack the charges on the grounds that multiple conspiracies, rather than a single conspiracy, was present. Finally, because predicate acts in a RICO charge may, under some circumstances, be charged more than five years after they occurred, RICO allows prosecutors to bring before the judge and jury evidence relating to the entire history of a criminal organization.

RICO created a crime to reflect the reality of how a complex criminal organization operates, and without it, the jury would not be able to understand the full scope of the organization. If various members of a terrorist organization committed acts over a period of several years to raise money for the organization or train for terrorist acts, under current law each of these activities might have to be charged as separate cases, and acts occurring more than five years ago might not be able to be charged at all. If Federal terrorism offenses are included as RICO predicates, prosecutors would be able, in a single RICO count, to list all of the activities



committed by members of the organization in a number of different judicial districts over the entire life of that organization. The RICO count would therefore allow prosecutors to put all of the evidence relating to these various activities before a single judge and jury.

RICO has proved indispensable in attacking La Cosa Nostra. Many of the most important mob prosecutions (for example, the "Commission" case) would have been impossible if we had not been able to use RICO to combine all the various sub-conspiracies into a single prosecution. For similar reasons, RICO would be a powerful tool for prosecutors to wield against terrorist groups.

In addition, making the crimes a RICO predicate would increase the penalties for some offenses and, like proposed § 403, would permit forfeiture of the organization's assets; under current non-RICO law, the only available theory for forfeiting al Qaeda's money would be that it was the "proceeds" of terrorism, and very few terrorism offenses actually produce "proceeds."

This provision is not expected to be very controversial. However, Congressman Sensenbrenner's chief staffer is concerned about expanding the scope of this offense and will need to be persuaded of the necessity of doing so.



BIOLOGICAL  
WEAPONS - CONFORM  
PROHIBITION IN  
CRIMINAL PROVISION  
TO FORFEITURE  
PROVISION

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Section 305: Biological Weapons

Summary/Simplified Explanation of Provision:

This provision expands the federal restrictions on the possession of biological agents and toxins.

Full Explanation of Provision:

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

The section further requires that the Department of Health and Human Services establish a regulatory system for biological agents that are a national security threat.

Explanation of Current Law:

Under current law, 18 USC § 175 only prohibits the use of biological agents, toxins, or delivery systems when they are intended to be used as a weapon. There are some controls over the transfer of Select Agents.

Examples of Why the Provision is needed:

Biological agents and toxins are feared to be the next weapon of terrorists. Under current law, it must be proven that the biological agent or toxin is possessed for use as a weapon (or that it was so use). Unlike firearms, there are no restrictions on which persons are authorized to possess such biological agents or toxins. The controls and standards for transferring, using or possessing biological agents and toxins dangerous to national security are not comprehensive.

**Controversial:**

There may be controversy over the establishment of a regulatory system for certain biological agents, including concerns about the possible impact on legitimate scientific research. HHS has raised concerns about broader past proposals regarding possible impact on legitimate scientific research.



STOPPING ~~FROM~~  
TERRORISTS FROM  
BEING ABLE TO  
OBTAIN ASSISTANCE  
cf. executive  
order on  
freezing assets

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### Section 306: Support of Terrorism Through Expert Advice or Assistance

#### Summary/Simplified Explanation of Provision:

This provision expands the federal crime of providing "material support or resources" to terrorists to include expert advice or assistance. The section also amends 18 U.S.C. § 2339A to conform its coverage of terrorism crimes to the more complete list specified in section 309 of the bill. ("Federal terrorism offenses").

#### Fuller Explanation of Provision:

18 U.S.C. § 2339A prohibits giving material support or resources, or concealing or disguising the nature, location, source or ownership of material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out, a violation of various anti-terrorism statutes. It is a 10-year felony. The definition of "material support or resources" currently includes providing money or financial services, lodging, training, safehouses, documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets.

Currently the provision focuses almost exclusively on the provision of physical resources; the only exception is "training" and "financial services." This provision would expand the definition of "material support or resources" to include "expert advice or assistance."

The current provision fails to recognize that in our high-tech society, services (as opposed to physical assets) are increasingly important to allow terrorist organizations to accomplish their aims. Increasingly, terrorists rely on expert advice and assistance.

The section also amends 18 U.S.C. § 2339A to conform its coverage of terrorism crimes to the more complete list specified in section 309 of the bill.

#### Examples of Why the Provision is Needed:

Under current law, it is unclear that this provision could be used to prosecute many people who materially contribute to the operation of terrorist networks:

- Civil engineers who inform terrorists what force must be applied to make a

building collapse.

- Accountants who help terrorists conceal their financial sources (unless this qualifies as "financial services").

- Safety consultants who inform terrorists about how to bypass security

**Potential Controversy:**

This section is not particularly controversial, although some are afraid it will be applied against lawyers. It will be helpful to emphasize the protection afforded by the high mens rea: to be convicted, persons must be proved to have acted "knowing or intending that [their assistance] is to be used in preparation for, or in carrying out," a terrorist offense.



# MAKING TERRORISM CRIMES EQUIVALENT TO ESPIONAGE FOR HARBORING CRIMES

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## Section 307: Prohibition Against Harboring Terrorists

### Summary Explanation of Provision:

This section would create an offense of harboring terrorists.

### Full Explanation of Provision/Explanation of Current Law:

18 USC 792 defines an offense of harboring or concealing a person where there are "reasonable grounds to believe or suspect" that the person "has committed, or is about to commit" an offense under the espionage laws. There is no offense of similar breadth that would apply to harboring or concealing people who have committed, or are about to commit, terrorism offenses. Section 307 would insert a reference to terrorism offenses (as defined in section 309 of the bill) into 18 USC 792, thereby making it an offense to harbor terrorists under the same standards that currently apply to criminal liability for harboring spies. The section, as amended, will have extraterritorial effect, thereby making it applicable to offenses committed abroad, as well as those committed in the United States.

### Explanation of Why the Provision is Needed:

Harboring terrorists poses a danger to the national security which is readily comparable to that posed by harboring spies. Therefore, it is appropriate to treat such conduct as a crime under standards similar to those that apply in relation to espionage offenses. The extraterritorial application of this provision means that it will reach persons who engage in harboring activities in other countries, including potentially governmental personnel in countries (such as Afghanistan) that harbor terrorists.

### Controversy:

The provision does not appear to be intrinsically controversial. There may be controversy over the breadth of the definition of "Federal terrorism offense" in section 309 of the bill, which is drawn on in defining the scope of the harboring offense. However, this point is not specific to the harboring provision, but applies generally to the various sections that use this concept.

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Date and Time: 9/21/01, 9:45 p.m.

### **Section 308: Post-Release Supervision of Terrorists**

#### **Summary/Simplified Explanation of Provision:**

This provision increases the maximum period of supervised release after service of sentence to life for terrorism crimes. Most offenses have a maximum supervised release period of 3 or 5 years. This brings terrorism into parity with the worst drug-trafficking offenses.

#### **Fuller Explanation of Provision:**

Existing federal law (18 U.S.C. § 3583(b)) generally caps the maximum period of post-imprisonment supervision for released felons at 3 or 5 years. Thus, in relation to a released but still unreformed terrorist, there is no means of tracking the person or imposing conditions to prevent renewed involvement in terrorist activities beyond a period of a few years.

This provision brings terrorism into parity with serious drug offenses. The drug laws (21 U.S.C. § 841) mandate 10-year supervision periods for persons convicted of trafficking large quantities of drugs, and specify no upper limit on the duration of supervision, but there is nothing comparable for terrorism offenses. Another provision (21 U.S.C. § 860(b)) permits courts to triple the supervised release terms of recidivists.

The provision would apply to any of the complete list of terrorism crimes in section 309 of the bill.

#### **Examples of why the provision is needed:**

There may be cases when a life sentence is not appropriate, but the judge nonetheless wishes to keep close tabs on a person for a long period of time. Many terrorists have a deep ideological commitment to the ideas that drove them to terrorism, which may require lifelong monitoring.

#### **Potential Controversies:**

Unlikely to be controversial. Some people may be concerned that this provision is too tough. But:

•Maximum sentences should be designed for the worst offenders, not for the average offender. Maximum sentences have no applicability in the average



case. That is set by the sentencing guidelines, over which Congress has complete control. Current guidelines would prescribe a 3-5 year term under USSG § 5D1.2; the judge would have to make an upward departure to impose a life sentence of supervised release. (Upward departures happen in about 1% of cases.)

- Judges have the ability to terminate supervision at any time after 1 year under 18 U.S.C. § 3583(e)(1) if it is no longer appropriate.

- Application of life terms of supervised release have been upheld in the drug context. See United States v. Pollard, 249 F.3d 738 (11<sup>th</sup> Cir. 2001); United States v. Garcia, 112 F.3d 395, 398 (9<sup>th</sup> Cir. 1997).

Some people may be concerned that this would be irrelevant because the worst offenders would have life sentences and never be eligible for supervised release.

- There may be cases when a life sentence is not appropriate, but the judge nonetheless rightly wishes to keep close tabs on a person who may have a lifelong ideological commitment or propensity to violence.

Some may complain the provision is pointless because many terrorists are aliens, and once they've served their sentences, they'll likely be deported.

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### Section 309: Definitions

#### Summary Explanation of Provision:

This section defines the terms "Federal terrorism offense" and "domestic terrorism."

#### Full explanation:

The first subsection in this section defines the term "Federal terrorism offense," which is used in defining the scope of several other provisions in the bill – for example, the provision eliminating the statute of limitations for terrorism offenses, and the provisions authorizing up to lifetime imprisonment and post-release supervision in cases involving terrorism offenses. The offenses included in the list are generally not offenses which are only committed by terrorists – but they are the offenses for which terrorists and their supporters are most likely to be prosecuted. Use of a single list provides uniformity in the various enhancements and special provisions the bill provides for cases involving terrorism crimes.

Use of a listing approach of this type – as opposed to making special provision for cases in which "terrorist motivation" in some defined sense can be specifically proven – was generally deemed most suitable in the bill for provisions creating new offenses, penalty enhancements, or enlargement of the temporal or geographic boundaries for prosecution. Specifying the scope of these provisions on the basis of the offense involved – with no further requirement of proving "terrorist motivation" – avoids the difficulties of establishing subjective motivation in criminal litigation and potentially compromising intelligence sources as might be required to establish the terrorist connections of a particular crime. This approach is exemplified in a number of existing provisions, including 18 USC 2339A, which defines the offense of providing material support to terrorists, and 18 USC 3286, which extends the limitation period for prosecution of certain terrorism crimes. Notwithstanding the underlying rationale and explicit references to terrorism or terrorists in the headings of these statutes, they require no proof of terrorist motivation, but simply predicate their applicability on whether certain types of offenses in a specified list are involved.

While the offenses listed in the definition of "Federal terrorism offenses" will not actually be crimes committed by terrorists in all cases – and even in some particular cases may be relatively minor crimes – other features of the criminal justice system ensure that this will not result in undue severity in the treatment of lesser offenders who commit offenses included in the

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list. For example, while section 302 of the bill authorizes up to life imprisonment for all offenses in this list, that is only a statutory maximum penalty – reflecting the most allowed for the most aggravated crime, rather than the appropriate sentence for a typical crime. Sentences will continue to be tailored appropriately to offense and offender characteristics based on the sentencing guidelines and the sentencing decisions of judges in particular cases, but the higher maximum ensures that an appropriate penalty will not be foreclosed in cases where the terroristic character of the crime makes an existing statutory maximum penalty too lenient.

The final subsection in section 309 defines the term “domestic terrorism,” supplementing and largely paralleling an existing definition of “international terrorism” in 18 USC 2331. These terms are used in a number of other provisions in the bill, such as section 351's authorization of single-jurisdictions search warrants for terrorism cases.

### **Explanation of Current Law:**

As noted above, a number of the existing provisions (including 18 USC 2339A and 3286) include listings of offenses which implicitly provide partial definitions of the notion of a “terrorism crime.” The most comprehensive existing list is in 18 USC 2332b(g)(5)(B), which appears as part of provisions that give the Attorney General primary investigative responsibility in terrorism cases (see §2332b(f)). The listing that defines “Federal terrorism offense” in section 309 of the bill starts from this existing list and adds some additional offenses – e.g., the new offense of harboring terrorists created by section 307 of the bill, and a number of aircraft violence offenses (49 USC 46504-06) which appear in the existing list in 18 USC 3286 but not in the current 18 USC 2332b(g)(5)(B) list.

### **Controversy:**

Objections have been raised to the definition of “Federal terrorism offense” on the ground that it does not require proof of terrorist motivation, and that the offenses in the definitional list are not necessarily committed by terrorists and may in some actual cases amount to relatively minor crimes. Responses to such objections are suggested in the above discussion.



- NATIONAL SCOPE  
- ELIMINATING  
ADMINISTRATIVE  
BURDEN

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### Section 351: Single-Jurisdiction Warrants for Terrorism

#### Summary/Simplified Explanation of Provision:

This provision would provide that in an investigation of terrorism, a magistrate judge in a district where "activities related to the terrorism may have occurred" [that language may be considered a bit indeterminate] to issue warrants under Rule 41 for "a search of property or for a person" outside the district. Although the bill captions this "Single-Jurisdiction Search Warrants," on its face it would apply to warrants to seize persons as well.

#### Fuller Explanation of Provision:

Rule 41(a) of the Federal Rules of Criminal Procedure currently requires a warrant to be obtained within a district for searches and seizures within that district. The only exception is for cases in which the property or person is presently within the district but might leave the district before the warrant is executed.

The restrictiveness of the existing rule creates unnecessary delays and burdens for the government in the investigation of terrorist activities and networks that span a number of districts, since warrants must be separately obtained in each district regardless of the location of the originating office that uncovered the lead. It also means that the judge passing on the warrant will likely be less familiar with the case than a judge in the district where the case occurred who will likely have seen other warrants for that case.

This section resolves that problem by providing that warrants can be obtained in any district in which activities related to the terrorism may have occurred, regardless of where the warrants will be executed.

Many of the provisions of the Administration's bill (such as the statute of limitations extension and the maximum sentence increase) apply to crimes likely to be committed by terrorists regardless of whether they are committed to intimidate the population or affect government policies. This one, however, applies a different definition of terrorism, and so is restricted to crimes that "appear to be intended . . . to intimidate or coerce a civilian population" or to influence a government by intimidation or coercion. 18 U.S.C. § 2331



### Examples of why this provision is needed:

In the current investigation, many of the most important leads originate in the eastern seaboard between D.C. and Boston, and the prosecutors and judges most knowledgeable about the case are there. When leads spring up in other locations—say, Boise Idaho—officers wish to follow them up as quickly as possible. Having to locate an AUSA to bring the warrant to an unfamiliar judge wastes valuable time and resources.

### Potential Controversies:

Likely to be somewhat controversial.

Some people feel like this affords those searched lesser protection.

- The judges most likely to fully understand the case are in the district where it occurred and who have had other warrants brought before them, and thus they (and not a remote judge unfamiliar with the case) are most likely to appreciate whether probable cause is present. The additional step of getting a government attorney and judge unfamiliar with the case to look at a warrant drafted by persons outside the district offers no additional protection while diverting government resources and wasting time. This is critical because terrorism investigations are necessarily fast-moving to apprehend sophisticated criminals before evidence is destroyed.

Some people are concerned that distant prosecutors will interfere with local investigations, or vice versa.

- The terrorism offenses of the sort implicated here (§2331) are the sort of important national cases that are likely to be centrally coordinated to minimize the risk of interference. That is true of the current case, which is closely coordinated here in D.C.

Does this permits judge shopping?

- No—you must be in court in a district where crime took place.

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Date and Time: 9/21/01, 10:36 p.m.

**Section 352: Notice for Search Warrants**

**Summary/Simplified Explanation of Provision:**

This provision would reconcile conflicting authority to clearly permit delayed notice of search warrants.

**Fuller Explanation of Provision:**

Rule 41 provides that an "officer taking property under [a search] warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property or shall leave the copy and receipt at the place from which the property was taken." The inventory must be conducted in the presence of the resident or one credible person other than the applicant. However, the rule does not explicitly state when the copy of the warrant or receipt should be left, and it is silent about whether or when notice should be given when nothing is seized and taken from the property. In the absence of explicit guidance, the courts are divided about whether Rule 41 permits delayed notice of search warrants. This greatly hinders terrorism investigations.

This provision would amend 18 U.S.C. 3103a, which allows for a warrant to be issued to search for and seize any property that constitutes evidence of a crime. It would be amended to provide that "With respect to any issuance of a warrant or court order under this section, or any other law or rule, to search for and seize any property or material that constitutes evidence of a criminal offense in violation of the laws of the United States, any notice required, or that may be required, to be given may be delayed pursuant to the standards, terms, and conditions set forth in section 2705, unless otherwise expressly provided by statute." Section 2705 provides for delayed notice when the government subpoenas stored communications from the provider of a computing service and requires that the court shall grant the order for delayed notification for not more than 90 days "if the court determines there is reason to believe" that immediate notification may endanger the life or safety of an individual, cause flight from prosecution, result in the destruction of evidence, the intimidation of witnesses, or otherwise seriously jeopardize an investigation. Title III also permits for delayed notification of wiretaps (and delayed notification of entry to install listening devices).

This section resolves this problem by establishing a statutory, uniform standard for all such circumstances. It incorporates by reference the familiar, court-enforced



standards currently applicable to stored communications under 18 U.S.C. § 2705, and applies them to all instances where the court is satisfied that immediate notice of execution of a search warrant would jeopardize an ongoing investigation or otherwise interfere with lawful law-enforcement activities.

**Examples of why this provision is needed:**

-(A Jim Reynolds story.) One case that actually happened involved a bomb laboratory. The FBI came under a delayed-notice search warrant and confirmed there was a bomb lab on the premises. With a delayed-notice warrant, they were able to watch the building for days afterward to determine all the members of the ring. They were able to replace the explosive in the bombs with inert material, both seizing evidence (the explosive) and ensuring they could not be used to harm people.

**Potential Controversies:**

This is likely to be very controversial: a similar (but broader) provision<sup>1</sup> in a drug bill introduced 2 or 3 years back stirred up considerable controversy in both houses of Congress from both the right (Rep. Barr) and left (Sen. Leahy) and ultimately failed. Part of that proposal, however, would have amended Rule 41(d) to limit the requirement of leaving an inventory to cases involving only tangible property, which would have permitted an entry into a home to download the contents of a hard drive without ever giving the person searched notice. Congressman Barr's staff was especially vehement. However, that provision is omitted from this bill. This provision does not change whether or not notice must be given. It leaves current law intact about whether or not notice must be given, and merely states that in cases where notice must be given, delays of up to 90 days will be permitted if the investigation would otherwise be compromised.

They are likely to say the §2705 provides a standard that is too low—the judge must issue the warrant on a showing that “there is reason to believe that notification . . . may” have one of the adverse results listed. However:

A similar delayed-notice provision exists for wiretaps, which also involve a substantial privacy interest, and the wiretap provisions also allow delayed notice when investigators to enter a structure to install microphones.

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<sup>1</sup>The provision combined a read

(a) Section 3103a of title 18, United States Code, is amended by adding at the end the following: “With respect to any issuance under this section or any other law (including, without limitation, section 3117, and any rule), any notice required, or that may be required, to be given may be delayed pursuant to the standards, terms, and conditions set forth in section 2705, unless otherwise expressly provided by statute.”

(b) Section 2(e) of Public Law 95-78 (91 Stat. 320) is amended by adding after the final period the following: “In addition, subdivision (d), as in effect on January 1, 1999, is amended by inserting ‘tangible’ before ‘property’ each place it occurs.”



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### Section 353: DNA Identification of Terrorists

#### Summary Explanation of Provision:

This section adds federal terrorism offenses, as defined in section 309 of the bill, to the list of qualifying offenses for purposes of collecting DNA samples from federal offenders.

#### Full Explanation of Provision:

Collecting DNA samples from convicted offenders makes it possible to solve crimes by matching their DNA profiles to biological residues in crime scene evidence. The efficacy of the DNA identification system depends largely on how many offenders are in the system – broader DNA sample collection means more crimes solved. Thirteen states now authorize the collection of DNA samples from all convicted felons, and the general trend in the states is strongly towards broader sample collection.

However, the sample collection law for federal offenders (42 USC 14135a(d)) takes a restrictive and peculiarly selective approach, and in particular, does not include persons convicted for most of the crimes that are likely to be committed by terrorists. DNA samples cannot now be collected even from persons federally convicted of many terrorist murders. For example, 49 USC 46502, which applies to aircraft hijackings (including hijackings with fatal consequences) is not included in the current DNA sample collection list.

The Department favors the collection of DNA samples from all federal felons, and has so stated publicly. Section 353 recommends a narrower reform – extending sample collection to terrorism offenses – because of concerns about going beyond specifically terrorism-related matters in this bill.

#### Explanation of Current Law:

The qualifying offenses for DNA sample collection from federal offenders under existing law (42 USC 14135a(d)) are certain homicidal offenses, sex offenses, peonage and slavery offenses (chapter 77), kidnapping, certain robbery and burglary offenses, certain major crimes in Indian country cases, and related attempts or conspiracies. The provisions used most frequently in prosecuting terrorists are, in most instances, not included in the current list.



**Controversy:**

In the formulation of the existing DNA sample collection law for federal offenders, some members of the House Judiciary Committee resisted broad sample collection, resulting in the narrow and unsatisfactory scope of the existing law. Some of the same members may resist extensions in the present context. The atmosphere in the Senate has been far more favorable to broad DNA sample collection. The Senate passed legislation that would have permitted us to collect DNA samples from all federal felons in 1999, and Senator Leahy's current terrorism bill would expand DNA sample collection to all persons convicted of federal crimes of violence.

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Date and Time: 9/21/01, 11:28 p.m.

### **Section 354: Grand Jury Matters**

#### **Summary/Simplified Explanation of Provision:**

This provision amends Rule 6(e) to permit the disclosure of matters occurring before a grand jury to members of the intelligence community, protective and national-defense personnel, immigration personnel, and the President and Vice President without requiring that it be done "to enforce federal criminal law." It also permits such matters to be disclosed to law-enforcement personnel without requiring that the judge supervising the grand jury receive a list containing the name of every agent who will receive that information.

#### **Fuller Explanation of Provision:**

Rule 6(e)(3)(A) permits disclosure without court order of matters occurring before a grand jury (other than its deliberation and the vote of any grand juror) to be made to (i) "an attorney for the government for use in the performance of such attorney's duty" or (ii) "government personnel" including state personnel, who are deemed necessary by that attorney to assist that attorney in the performance of his or her duty "to enforce federal criminal law." The attorney must promptly provide the district court with the names of the persons to whom such disclosure has been made under that portion of the rule.

An early-1990s OLC opinion states that the President and NSC staff probably qualify to be "government personnel," but states that grand jury information still cannot be turned over to them, whether with a court order or not, unless it is for the purpose of assisting a government attorney in "enforc[ing] federal criminal law." Acts taken to further national security concerns, no matter how immediate and weighty, do not fall into the category of federal criminal law enforcement. Thus, even information that is potentially highly relevant to the national security cannot be disclosed.

#### **Examples of Why the Provision is Needed:**

There are approximately 4,000 agents and 3,000 paralegals working on the current investigation. It is conceivable that grand jury material might have to be distributed to dozens if not hundreds of them to adequately follow a lead. It is impractical in the extreme to list every single agent or paralegal by name under such circumstances. Yet, releasing it to someone whose name does not appear on the list is punishable as



criminal contempt.

•Because terrorism cases may result in both criminal prosecutions and military action, information learned in the course of an investigation may be relevant both to law enforcement and national security. Yet under current law, it can only be released to nonlawyers "to enforce criminal law." Thus, if agents learned in the grand jury the location of anti-aircraft missiles that would jeopardize U.S. forces in an upcoming strike, they would very likely be unable to inform the President or National Security Council of that fact.

**Potential controversies:**

Likely to be controversial. Potential controversies will be lessened by the fact that Sen. Leahy's staff has proposed a similar change, albeit requiring a court order and identifying a different group to whom it can be disclosed.

Some may complain that there is no requirement of a court order (as is required in the draft bill prepared by Sen. Leahy's staff). However (depending on how adamant we are), getting a court order can be time-consuming, and would involve courts in the essentially executive function of determining what intelligence information is appropriately released to intelligence officers, defense personnel, and the president. Courts still maintain supervisory authority to bring a contempt action against anyone who discloses information beyond the scope of the rule, so the court continues to have its traditional role in supervising the grand jury.

Some may complain that this impairs necessary grand jury secrecy, or the fact that there is no requirement (as for current disclosures to government personnel) that they be advised to keep the information secret. However, those eligible for disclosure have a long tradition of holding secret information in confidence. (At least most of them; "any federal personnel responsible for administering the immigration laws of the United States" is potentially very expansive.)

Some staffers have argued it would be abused, saying that, for example, Pres. Bush could use it to look at grand jury material on Senator Toricelli. However, our bill clearly states that the information can be released only when it "pertain[s] to international terrorism or domestic terrorism (as defined in [18 U.S.C. §2331], or a matter of national security." It thus also links it to an act of terrorism designed to intimidate the populace or the government.

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## Section 355: Extraterritoriality

### Summary/Simplified Explanation of Provision:

This provision provides for extraterritorial federal jurisdiction for a host of terrorism offenses.

### Fuller Explanation of Provision:

Statutes are normally interpreted under the presumption that they apply only within the territorial boundaries of the United States. EEOC v. Arabian Am. Oil. Co., 499 U.S. 244, 248 (1991). Thus, they will normally only be given extraterritorial application if the statute explicitly states it should be. However, courts have also held that the territorial presumption does not govern the interpretation of criminal statutes, by their nature, implicate the legitimate interests of the United States abroad. United States v. Bowman, 260 U.S. 94, 98 (1922). International law ordinarily holds that states have extraterritorial jurisdiction over crimes that involve one of their nationals either as a victim or a perpetrator to ensure the state has some valid interest over the offense, or if the perpetrator is found in the United States. There are some crimes, such as air piracy, for which there is "universal jurisdiction," and prosecutions for them can be brought anywhere.

Some federal terrorism crimes explicitly have extraterritorial application, and thus can be prosecuted by the United States regardless of where they are committed. For example, 18 U.S.C. §§ 175 (biological weapons offenses), 1203 (hostage taking), 2332a (weapons of mass destruction) contain language which expressly contemplates their application to conduct occurring outside of the United States. However, there coverage is not complete; for example, the "weapons of mass destruction" offense only has extraterritorial jurisdiction if the perpetrator is an American, not if the victim is American. There are no explicit extraterritoriality provision in many other statutes defining offenses likely to be committed by terrorists.

This section helps to ensure that terrorist acts committed anywhere in the world can be effectively prosecuted by specifying that there is extraterritorial jurisdiction for the prosecution of all federal terrorism offenses, defined as those set forth in Section 309 (listing federal terrorism offenses) and those set forth in Chapter 113B (relating to terrorism). It amends 18 U.S.C. § 2338, which currently provides for exclusive federal jurisdiction over terrorism crimes listed in Chapter 113B to provide for "extraterritorial jurisdiction" for all such crimes.

**NOTE:** The provision, as drafted, appears to me to exceed America's ability to prosecute offenses under international law. It is not limited to those offenses where the U.S. has a valid interest, i.e., those crimes overseas where the victim or perpetrator was American. That said, it is identical to the extraterritoriality provision in 18 U.S.C. §§ 351 (crimes against congresspersons and cabinet members) and 1751 (crimes against the President).

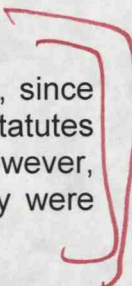


### **Examples of Why the Provision is Needed:**

Some crimes that are likely to be committed by terrorists do not have explicit extraterritorial jurisdiction—for example, unlawful transactions involving nuclear materials that result in death or injury (18 U.S.C. § 831—note that if the materials were detonated, extraterritorial jurisdiction would then be available under § 2332a), willful destruction of government property (18 U.S.C. §1361), and providing material support to terrorists under § 2339A (if it involves a designated foreign terrorist organization, extraterritorial jurisdiction is available under § 2339B). Because of the general presumption against extraterritorial application, they are unlikely to be applied extraterritorially even if the victim is an American.

### **Potential controversies:**

Unlikely to be controversial. However, some may argue there is no need for it, since many terrorism offenses are explicitly extraterritorial. (My review of the various statutes reveals only a handful of provisions that are not explicitly extraterritorial.) However, there is no reason any of these offenses should go unpunished because they were committed abroad against an American.



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## **Section 356: Jurisdiction Over Crimes Committed at U.S. Facilities Abroad**

### **Summary Explanation of Provision:**

This section would explicitly extend the special maritime and territorial jurisdiction of the United States to U.S. diplomatic and consular premises and related private residences overseas.

### **Full Explanation of Provision:**

When offenses are committed by or against a U.S. national abroad on U.S. government property, the country in which the offense occurs may have little interest in prosecuting the case. Unless the United States is able to prosecute the offenders, these crimes may go unpunished. This section clarifies inconsistent caselaw to establish that the United States may prosecute offenses committed in its missions abroad, by or against its nationals.

### **Explanation of Current Law:**

Section 7(3) of title 18 currently provides for federal jurisdiction over "lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof . . . ." Several circuit courts have held that this provision embraces U.S. diplomatic missions abroad, while other courts disagree. A statute similar to Section 356 was enacted in 2000 to provide for federal jurisdiction over civilians employed by or accompanying military forces overseas.

### **Examples of Why the Provision is Needed:**

This provision is needed to make clear, in light of inconsistent caselaw on the subject, that the United States has jurisdiction to prosecute crimes at U.S. diplomatic and consular premises and related private residences overseas. This provision is not controversial.



At least one district court, in connection with East Africa bombings linked to Usama Bin Ladin, has concluded that U.S. embassy property is not within the special territorial jurisdiction of the United States. The court therefore dismissed murder charges against certain defendants in that case. United States v. Usama Bin Ladin, 92 F. Supp. 2d 189, 214-15 (S.D.N.Y. 2000).

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## **Section 401: Laundering the Proceeds of Terrorism**

### **Summary Explanation of Provision:**

This section would provide more complete coverage of money-laundering related to terrorism by adding as a further predicate offense 18 U.S.C. § 2339B, which prohibits providing material support or resources to designated foreign terrorist organizations.

### **Full Explanation of Provision:**

Money laundering under 18 U.S.C. § 1956 involves conducting or attempting to conduct a financial transaction knowing that the property involved represents the proceeds of an unlawful activity as specified in section (c)(7) of the statute. Violations of 18 U.S.C. § 2339A, which prohibits providing material support to terrorists (as opposed to designated foreign terrorist organizations) are already included as specified unlawful activities in the money laundering statute. This provision would expand the coverage to financial transactions involving designated foreign terrorist organizations as well.

### **Explanation of Current Law:**

As noted above, current law provides money laundering coverage to financial transactions relating to material support to terrorists. The money laundering statute does not currently cover transactions relating to designated foreign terrorist organizations, which support the terrorists and their unlawful activities.

### **Examples of Why the Provision is Needed:**

This provision expands the scope of the money laundering statute to assure that financial transactions involving designated foreign terrorist organizations are covered, even if the purpose of the transaction does not deal with a specific act of terrorism. There are currently 31 designated foreign terrorist organizations, including al Qa'ida, Hizballah, and Hamas. This provision is not controversial.



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## **Section 402: Material Support for Terrorism**

### **Summary/Simplified Explanation of Provision:**

This provision allows the prosecution of a violation of 18 USC § 2339A where either the material support or where the substantive offense for which the support was provided was or would be committed.

### **Full Explanation of Provision:**

18 U.S.C. § 2339A prohibits providing material support or resources to commit certain terrorism offenses. Under the statute's definitional subsection, the prohibited forms of support include (among many other things) "currency or other financial securities." This provision expands the venue to not only where the material support or resources were provided but also to include the federal district where the substantive offense was committed or was to be committed. This section also adds an explicit reference to "monetary instruments" to the definition. The purpose of the amendment is to make it clear that the definition is to be taken expansively to encompass any and all forms of money, monetary instruments, or securities.

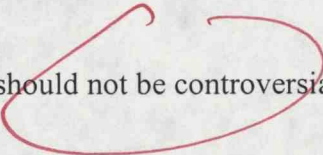
### **Explanation of Current Law:**

Under current 18 USC § 2339, it is unlawful to provide material support or resources, within the United States, knowing or intending that such support will be used in, or for preparation of, or to carry out certain violent terrorist crimes. At present, venue for the offense is only where the material support or resources were provided. At present the definition of "material support and resources" contains only the phrase "financial securities, which is an undefined term under federal law..

### **Examples of Why the Provision is Needed:**

This provision will permit venue also in the federal district where the substantive offense was or was suppose to be committed. Venue for substantive offenses committed overseas where remain only in the district where the material support or resources where provided. The addition of "monetary instruments" ensures that all financial securities are encompassed by the statute.

Controversial: This provision should not be controversial.





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### Section 403: Assets of Terrorist Organizations

#### Summary/Simplified Explanation of Provision:

Provides for civil and criminal forfeiture of all the assets of a person, entity or organization engaged in domestic or foreign terrorism.

#### Full Explanation of Provision:

This provision is needed to create a legal basis for the restraint and confiscation of the assets used to commit or facilitate a terrorist offense. More broadly, it also adopts from the RICO context the concept of forfeiture of all assets of a terrorist organization, and all assets affording a person a source of influence over a terrorist organization.

#### Explanation of Current Law:

~~Current law~~ does not contain any authority tailored specifically to the confiscation of terrorist assets. What forfeiture authority there is may be applied to terrorism cases only in certain narrow circumstances. Under 18 U.S.C. § 981(a)(1)(C), the Government has the authority to forfeit the *proceeds* of any offense listed in the money laundering statute as a "specified unlawful activity" ("SUA"). This list includes many state and federal crimes of violence, such as murder, arson and the use of explosives, as well as the terrorism offenses in Chapter 113A of title 18 (*i.e.* 18 U.S.C. §§ 2332, 2332a, 2332b and 2339A), but excluding Section 2339B.

Under the money laundering statute, the government has the somewhat broader authority to forfeit any property involved in a money laundering offense, including the laundering of the proceeds of any of the above-referenced SUA offenses. See 18 U.S.C. § 981(a)(1)(A). Thus, if a person conducts a financial transaction involving the proceeds of one of the SUA offenses, and does so with the intent to promote another SUA offense, or to conceal or disguise the proceeds, all property involved in that transaction is subject to forfeiture.



The problem with both of these theories is that they are either limited to property that is the proceeds of a terrorism offense, or require proof that the property involved in a financial transaction was the *proceeds* of such an offense. Most of the terrorism offenses listed in the statute do not yield "proceeds." (An exception may be Section 2332A, under which the money provided by a person to a terrorist organization may be construed as the "proceeds" of the offense.) Moreover, establishing the source of property under the control of a terrorist organization is enormously more difficult than establishing that the property has been, or is intended to be used to support terrorism.

Only one provision of current law does not require proof regarding the source of the funds to be forfeited. Under Section 981(a)(1)(A), the Government can forfeit any property brought into the United States from a place outside of the United States if the purpose of the transfer was to promote an SUA offense. Thus, property in the hands of a terrorist organization can now be forfeited if it can be established that the property came from overseas, and was then used, or set aside to be used, to support terrorist activities.

What is really needed, however, is a provision that deprives a terrorist organization of its economic base of power by permitting the forfeiture of all property of a terrorist organization regardless of the source of the property, and regardless of whether the property has actually been used to commit a terrorism offense. Section 403 makes all property of a terrorist organization subject to forfeiture. This is similar in concept to the forfeiture now available under RICO that permits the confiscation of any assets of a racketeering enterprise, or the assets that afford any person a "source of influence" over such an enterprise. See 18 U.S.C. § 1963(a)(2).

Moreover, Section 403 authorizes the forfeiture of property used or intended to be used to facilitate a terrorist act, regardless of the source of the property. The language in the proposal is similar to that in the drug forfeiture statutes that provides for the forfeiture of property used to facilitate drug offenses. See e.g. 21 U.S.C. § 881(a)(4), (6) and (7).

There is no need for a separate criminal forfeiture provision. As long as the civil forfeiture statute is enacted, criminal forfeiture will automatically be authorized. See 28 U.S.C. § 2461(c).

### **Examples of Why the Provision is needed:**

Without this provision, forfeitures in terrorism cases would be limited to proceeds derived from the offense.

### **Potential for Controversy**

In briefings this week with Congressional staff, this has not proven to be



controversial. Some have questioned, however, whether the extension of the RICO concept – i.e., forfeiture of all assets of an individual, entity or organization based on the activities of that person, but not requiring a nexus between the assets and the crime – might not allow the Government to forfeit the house or business of a person who engaged in terrorism but did not use those assets to commit the crime. The answer is, yes, such forfeiture is possible in that case, but like all forfeitures would be limited by the Excessive Fines Clause of the 8<sup>th</sup> Amendment if the forfeiture proved to be grossly disproportionate to the gravity of the offense.

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**Section 404: Technical Clarification Relating to Provision of  
Material Support to Terrorism**

**Summary Explanation of Provision:**

This section makes it clear that the Trade Sanctions Reform and Export Enhancement Act of 2000 does not apply to 18 U.S.C. §§ 2339A or 2339B, relating to material support to terrorists and designated foreign terrorist organizations.

**Full Explanation of Provision:**

The Trade Sanctions Reform and Export Enhancement Act of 2000, Title IX of Public Law 106-387, creates exceptions to the nation's Trade Sanctions Programs for food and agricultural products. Section 404 makes it clear that the exceptions to trade sanctions for these items does not prevent criminal liability for the provision of these otherwise excepted items to support terrorist activity or foreign terrorist organizations, as detailed in sections 2339A and 2339B. Thus the provision of food and agricultural products to terrorists or to designated foreign terrorist organizations continues to be prohibited.

**Explanation of Current Law:**

This is not a change from current law. The provision simply clarifies the coverage of criminal provisions relating to material support to terrorist activity and foreign terrorist organizations.

**Examples of Why the Provision is Needed:**

This provision serves to foreclose any possible misunderstanding or argument that the Trade Sanctions Reform and Export Enhancement Act of 2000 in some manner trumps or limits the prohibition on providing material support or resources to terrorism. This provision is not controversial.



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**Section 405: Disclosure of Tax Information in Terrorism  
and National Security Investigations**

**Summary Explanation of Provision:**

This section amends the Internal Revenue Code, 26 U.S.C. § 6103, to permit disclosure of Internal Revenue Service (IRS)-maintained information to law enforcement agencies responding to or investigating terrorist activity and to the intelligence community.

**Full Explanation of Provision:**

Taxpayer records maintained by the IRS are subject to strict rules regarding disclosure to other Government agencies, detailed in 26 U.S.C. § 6103. Although the law currently allows for the disclosure of such information to non-Treasury personnel in emergency circumstances, there is no terrorism-specific exception. This provision amends section 6103 to permit disclosure of IRS-maintained information to any Federal agency investigation responding to terrorist acts, and to State and local law enforcement agencies that are part of a joint investigative team with the Federal agency. This section further amends section 6103 to allow in certain circumstances for the release of tax information to Department of Justice and Department of the Treasury personnel involved in counter-terrorism investigations and analysis, and to permit this information to be disseminated to the intelligence community.

**Explanation of Current Law:**

Current law does not permit disclosure of IRS-maintained taxpayer records to law enforcement authorities conducting criminal investigations of acts of terrorism; nor does it permit release of tax information to the intelligence community.

**Examples of Why the Provision is Needed:**

This provision serves to facilitate the investigation of terrorist acts by permitting law enforcement officials to review tax information that may be relevant to the

investigation. The section also permits members of the intelligence community to review the tax information in connection with their analysis of terrorist organizations and activities. While any provision relating to the release of tax information may be controversial, the need for law enforcement and intelligence officials to review tax information in cases relating to the national security clearly outweighs any privacy concerns that traditionally attends the confidentiality of tax information.



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### **Section 406: Restraint of Property Subject to Criminal Forfeiture**

#### **Summary/Simplified Explanation of Provision:**

Authorizes the court to restrain assets of a indicted defendant to ensure that sufficient assets are available, upon conviction, to satisfy a forfeiture judgment.

#### **Full Explanation of Provision:**

This provision is necessary to allow the Government to freeze the assets of a terrorist who may be indicted for a terrorist offense, whether or not the assets in question can be shown to be directly connected to the terrorist offense.

#### **Explanation of Current Law:**

Following the conviction in a criminal case, a court may order the forfeiture of property traceable to the offense, or it may enter a judgment in favor of the government for the value of that property if the traceable property is unavailable. *United States v. Candelaria-Silva*, 166 F.3d 19 (1st Cir. 1999) (criminal forfeiture order may take several forms: money judgment, directly forfeitable property, and substitute assets). To make such post-conviction remedies effective, it is necessary for the court to be able to restrain assets pre-trial so that they are available, in the event of conviction, to satisfy the forfeiture judgment.

This section slightly expands the scope of the property that may be restrained pre-trial to ensure that there are sufficient assets to satisfy a judgment. Although some courts interpret current law to allow pre-trial restraint of non-traceable assets, see *In Re Billman*, 915 F.2d 916 (4th Cir. 1990), others only permit the government to restrain assets themselves traceable to the offense, see *United States v. Gotti*, 155 F.3d 144 (2d Cir. 1998). The proposed amendment would recognize that many assets are "fungible," and assist the government's ability to deprive terrorists of their assets without proving the assets they are able to locate are themselves traceable to the offense. Without

this amendment, in courts that take the narrower view of the law, the government is unable to preserve the assets of major crime figures during the trial to ensure that they are available to satisfy a judgment in the event of a conviction. See *Gotti, supra* (vacating pre-trial order restraining assets of organized crime leader).

This section would permit pretrial restraint of substitute assets only in criminal forfeiture cases, and only after a grand jury has found probable cause to believe an offense giving rise to a forfeiture has been committed. The property can actually be forfeited to the government only after a petit jury has found the offense proved beyond a reasonable doubt and returned a judgment of conviction. The amendment is made to the Controlled Substances Act because the provisions governing criminal forfeitures in drug cases are incorporated, by statute, into all other criminal forfeiture statutes. 28 U.S.C. §2461(c).

#### **Examples of Why the Provision is needed:**

Outside of the Fourth Circuit, we would be unable to freeze the assets of a terrorist pending trial unless it could be shown that the assets were directly linked to the offense.

#### **Potential for Controversy**

This provision has proved to be controversial in the past. Most Members of Congress see it as necessary, but Sen. Leahy has always opposed it on the ground that it could be used by the Government to deprive a defendant of the assets he needs to hire a defense attorney. Arguments that such problems have been avoided in the Fourth Circuit, where this rule has been in effect for a decade, have been unavailing. Nor has the fact that all other countries with criminal forfeiture statutes have a provision permitting pre-trial restraint of assets (tainted or untainted) needed to satisfy a judgment been persuasive.



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### **Section 407: Trade Sanctions**

#### **Summary/Simplified Explanation of Provision:**

Section 407 would amend section 902 of the "Trade Sanctions Reform and Export Enhancement Act of 2000" (TSRA) to permit the President to impose sanctions on agricultural and medical exports to all designated terrorist, drug trafficking, and weapons proliferation entities wherever they are located. This is a Treasury Department proposal.

#### **Full Explanation of Provision:**

This amendment authorizes the President to retain sanctions with respect to exports of agricultural commodities, medicine, and medical devices to designated terrorist, drug trafficking, and weapons proliferation entities. With respect to terrorist entities, this amendment conforms TSRA with 18 U.S.C. § 2339B, which makes it a criminal offense knowingly to provide material support or resources to a designated Foreign Terrorist Organization. Although the Administration does not believe that the criminal prohibition in section 2339B is affected by TSRA, this amendment will remove any doubt, and it will be useful with respect to other counter-terrorism programs. Since the current law does not authorize the continuation of sanctions relating to agricultural and medical exports to the Taliban and Taliban-controlled territory of Afghanistan, the proposed amendments of section 906 of the TSRA would address this concern. The draft bill would also amend section 904 of TSRA to clarify that the President may control the export of items for use in the design, development, or production of missiles as well as items for use in nuclear, biological or chemical weapons proliferation.

#### **Explanation of Current Law:**

Under current law sanctions on the export of agricultural and medical products to terrorist entities located outside the terrorist list countries (as designated by the State Department) would be terminated.

**Examples of Why the Provision is needed:**

With respect to the Taliban, current law would lift sanctions and thereby permit the uncontrolled exportation of agricultural and medical products to terrorist entities in Afghanistan.



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### Section 408: Extraterritorial Jurisdiction

#### Summary/Simplified Explanation of Provision:

Section 408 would create extraterritorial jurisdiction for financial crimes involving credit cards, account numbers, and personal identification numbers and certain other crimes. This amendment would permit U.S. law enforcement to investigate and prosecute these crimes when they occur outside the United States, if they involve a U.S. financial institution and the tools or proceeds pass through or are in the United States. This is a Treasury Department proposal.

#### Full Explanation of Provision:

With the dramatic increase in electronic and computerized access to U.S. financial payment systems from abroad, these systems are increasingly vulnerable to criminal activities conducted by persons who never set foot in the United States. Section 408 would amend 18 U.S.C. § 1029 to strengthen the protection of U.S. financial payment systems and would allow U.S. authorities to disrupt foreign criminal enterprises – including terrorist organizations – by authorizing federal law enforcement to investigate and prosecute financial crimes that occur outside the United States if two conditions are met linking the crime to the United States: first, the crime must be directed against a payment system owned or controlled by a U.S. based financial institution; and two, the tools or proceeds of such crime must be transported to or held in the United States.

#### Explanation of Current Law:

Although current law covers conduct affecting interstate or foreign commerce, it does not explicitly provide for extraterritorial jurisdiction.

#### Examples of Why the Provision is needed:

Terrorists operating abroad can make use of misappropriated or counterfeit account numbers to further their criminal activities using U.S. based financial institutions.

This amendment would permit U.S. law enforcement to disrupt such activities.