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USA PATRIOT Improvement and Reauthorization Act of 2005: A Legal Analysis

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Summary

Several sections of the USA PATRIOT Act and one section of the Intelligence Reform and Terrorism Prevention Act of 2004 were originally scheduled to expire on December 31, 2005. In July 2005, both Houses approved USA PATRIOT reauthorization acts, H.R. 3199 and S. 1389, and the conference committee filed a report, H.Rept. 109-333. A separate bill, the USA PATRIOT Act Additional Reauthorizing Amendments Act of 2006 (S. 2271), provided civil liberties safeguards not included in the conference report. Both H.R. 3199 and S. 2271 were signed into law (P.L. 109-177 and P.L. 109-178) by the President on March 9, 2006.

This report describes the USA PATRIOT Improvement and Reauthorization Act of 2005 (the Act) and, where appropriate, discusses the modifications to law made by the USA PATRIOT Act Additional Reauthorizing Amendments Act of 2006. Consisting of seven titles, the Act, among other things:

- Makes permanent 14 of the 16 expiring USA PATRIOT Act sections as well as the material support of terrorism amendments scheduled to expire on December 31, 2006.
- Creates a new sunset of December 31, 2009, for USA PATRIOT Act sections 206 and 215 (“roving” FISA wiretaps and FISA orders for business records), and for the “lone wolf” amendment to FISA.
- Provides for greater congressional and judicial oversight of section 215 orders, section 206 roving wiretaps, and national security letters.
- Requires high-level approval for section 215 FISA orders for library, bookstore, firearm sale, medical, tax return, and educational records.
- Enhances procedural protections and oversight concerning delayed notice, or “sneak and peek” search warrants.
- Expands the list of predicate offenses in which law enforcement may obtain wiretap orders to include more than 20 federal crimes.
- Revises criminal penalties and procedures concerning criminal and terrorist activities committed at seaports or aboard vessels.
- Reenforces federal money laundering and forfeiture authority, particularly in connection with terrorist offenses.
- Allows the Attorney General to determine whether a state qualifies for expedited habeas corpus procedures for state death row inmates.
- Establishes a new National Security Division within the Department of Justice (DOJ), supervised by a new Assistant Attorney General.
- Creates a new federal crime relating to misconduct at an event designated as a “special event of national significance,” whether or not a Secret Service protectee is in attendance.
- Intensifies federal regulation of foreign and domestic commerce in methamphetamine precursors.

Much of the information contained in this report may also be found under a different arrangement in CRS Report RL33239, *USA PATRIOT Improvement and Reauthorization Act of 2005: Section-by-Section Analysis of the Conference Bill*.

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USA PATRIOT Improvement and Reauthorization Act of 2005: A Legal Analysis

Introduction

By operation of section 224 of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) of 2001,¹ several of the USA PATRIOT Act's amendments to the Foreign Intelligence Surveillance Act (FISA)² and the Electronic Communications Privacy Act (ECPA)³ concerning law enforcement and intelligence investigative tools, were originally scheduled to expire on December 31, 2005.⁴ Section 6001(a) of the Intelligence Reform and Terrorism Prevention Act (IRTPA) of 2004 (concerning "lone wolf" terrorists) was also scheduled to sunset on that date. Without any legislative action, these provisions as well as amendments to them would have ceased to exist after the sunset date, and most of the pre-existing provisions of law would have been revived automatically.

During the 109th Congress, the House and Senate each passed USA PATRIOT Reauthorization Acts, H.R. 3199 and S. 1389 respectively,⁵ which made permanent 14 of the 16 expiring USA PATRIOT Act sections and extended the sunset on section 206 (regarding FISA court orders for multipoint, or "roving," wiretaps) and section 215 (access to business records requested under FISA), as well as the sunset on section 6001(a) of IRTPA. The two bills differed in several respects, including the new sunset date (under S. 1389, December 31, 2009, while H.R. 3199 offered a ten-year extension to December 31, 2015). On December 8, 2005, House and Senate

¹ P.L. 107-56, 115 Stat. 272 (2001).

² 50 U.S.C. 1801-1862.

³ 18 U.S.C. 2510-2522, 2701-2712, 3121-3127.

⁴ 115 Stat. 295 (2001).

⁵ H.R. 3199 was introduced by Representative Sensenbrenner; S. 1389 by Senator Specter for himself and Senators Feinstein and Kyl. H.R. 3199 was reported by committee, H.Rept. 109-174, and initially passed the House on July 21, 2005, 151 CONG. REC. H6308-309 (daily ed. July 21, 2005). The Senate by unanimous consent substituted the text of S. 1389, as reported by the Judiciary Committee, after striking all but the enacting clause from H.R. 3199, 151 CONG. REC. S9559, S9562 (daily ed. July 29, 2005). The Record, however, reprints the House-passed bill and identifies it as H.R. 3199 as passed by the Senate, 151 CONG. REC. S9562-9579 (daily ed. July 29, 2005). For purposes of convenience, we assume that the Senate-passed version of H.R. 3199 is S. 1389 as reported and will refer to it as S. 1389.

conference committee members filed a report representing a compromise between the Senate version and the version passed by the House, H.Rept. 109-333 (2005).

The House agreed to the conference report accompanying H.R. 3199 on December 14, 2005. However, with several Members of the Senate raising concerns about the sufficiency of the conference report's safeguards for civil liberties, the Senate voted to reject a motion to invoke cloture on the conference report, thus taking no action before the end of 2005. To provide the Senate with additional time to consider the conference report, Congress enacted legislation to postpone the expiration of the USA PATRIOT Act provisions and of IRTPA's "lone wolf" amendment,⁶ until February 3, 2006,⁷ and thereafter further extended the sunset until March 10, 2006.⁸

On March 1, 2006, the Senate passed a separate bill, the USA PATRIOT Act Additional Reauthorizing Amendments Act of 2006 (S. 2271), that provides three civil liberties safeguards not included in the conference report.⁹ Passage of S. 2271 helped to pave the way for the Senate to invoke cloture on the conference report upon reconsideration, and the Senate agreed to the conference report on March 2. Under suspension of the rules, the House passed S. 2271 on March 7, and both H.R. 3199 and S. 2271 were signed into law by the President on March 9.

This report provides a summary and legal analysis of the USA PATRIOT Improvement and Reauthorization Act of 2005 (the Act), P.L. 109-177, 120 Stat. 192 (2006), and, where appropriate, discusses the modifications to law made by the USA PATRIOT Act Additional Reauthorizing Amendments Act of 2006, P.L. 109-178, 120 Stat. 278 (2006). For organizational purposes, the report is divided according to the seven titles of the Act and, within those titles, arranged by topic headings.

Title I: USA PATRIOT Improvement and Reauthorization Act

Title I is in many ways the heart of the Act. It makes permanent most of the USA PATRIOT Act sections that were scheduled to expire. To several, like section 215, it adds substantive changes such as civil liberties safeguards. It addresses issues raised by USA PATRIOT Act sections other than those for which the sun was setting. It more clearly states the "National Security Letter" provisions of law, in ways perhaps necessary to make them constitutionally viable. Elsewhere, it looks at the issues faced in the USA PATRIOT Act four years after the fact. In some instances it adds to the tools available; in others it adds further checks against abuse.

⁶ P.L. 108-458, 118 Stat. 3742 (2004).

⁷ P.L. 109-160, 119 Stat. 2957 (2005).

⁸ P.L. 109-170, 120 Stat. 3 (2006).

⁹ Technically, these provisions were not amendments to the conference report itself, but rather the bill amended specified sections of FISA and the national security letter (NSL) statutes *after* they have been amended by H.R. 3199.

Temporary USA PATRIOT Act Sections Made Permanent.

Section 102(a) of the Act repeals section 224 of the USA PATRIOT Act that had mandated 16 of its sections to expire initially on December 31, 2005, and later extended to March 10, 2006 by P.L. 109-170, 120 Stat. 3 (2006). Although the Act adopts a new sunset date on two of the sections, as discussed below, it makes permanent the following 14 sections:

- Sec. 201* (ECPA wiretapping in certain terrorism investigations)
- Sec. 202* (ECPA wiretapping in computer fraud and abuse investigations)
- Sec. 203(b)* (law enforcement sharing of court-ordered wiretap-generated foreign intelligence information wiretap information)
- Sec. 203(d)* (law enforcement sharing of foreign intelligence information notwithstanding any other legal restriction)
- Sec. 204* (technical exception for foreign intelligence pen register/trap & trace device use)
- Sec. 207* (duration of FISA wiretap and search orders involving agents of a foreign power)
- Sec. 209* (seizure of stored voice mail by warrant rather than ECPA order)
- Sec. 212* (communications providers emergency disclosures of communications content or related records to authorities)
- Sec. 214* (FISA pen register order amendments including extension to electronic communications, e.g., Internet use)
- Sec. 217* (law enforcement access to computer trespassers' communications within the intruded system)
- Sec. 218* (FISA wiretap or search orders with an accompanying law enforcement purpose [removal of "the wall" of separation between criminal catchers and spy catchers])
- Sec. 220* (nationwide service of court orders directed to communication providers)
- Sec. 223* (civil liability and disciplinary action for certain ECPA or FISA violations)
- Sec. 225* (civil immunity for assistance in executing a FISA order)

USA PATRIOT Act Sections Still Subject to Sunset.

The Act adopts a sunset of December 31, 2009, for USA PATRIOT Act sections 206 (regarding FISA court orders for multipoint, or "roving," wiretaps) and 215 (access to business records requested under FISA).¹⁰

Extension of the "Lone Wolf" Amendment, and the Material Support of Terrorism Amendments Made Permanent.

The Act makes two changes to the Intelligence Reform and Terrorism Prevention Act (IRTPA) of 2004, P.L. 108-458, 118 Stat. 3638 (2004). First, it postpones the expiration of section 6001(a) of IRTPA, 118 Stat. 3742 (2004), until December 31, 2009.¹¹ Section 6001(a) defines an "agent of a foreign power" to include any person, other than a United States person, who "engages in international

¹⁰ § 102(b), P.L. 109-177, 120 Stat. 195 (2006).

¹¹ § 103, P.L. 109-177, 120 Stat. 195 (2006).

terrorism or activities in preparation therefore.”¹² Thus, so-called “lone wolf” terrorists may be subjected to foreign intelligence surveillance despite not being an agent of a foreign power or an international terrorist organization.¹³

Second, the Act makes permanent section 6603 of IRTPA by repealing the sunset provision (section 6603(g)) that would have caused the section to be ineffective on December 31, 2006.¹⁴ Section 6603 of IRTPA amends federal law regarding material support of terrorists and terrorist organizations, primarily in 18 U.S.C. 2339A¹⁵ and 2339B.¹⁶ Briefly, section 6603: (1) amends the definitions of “material support or resources,” “training,” and “expert advice or assistance” as those terms are used in 18 U.S.C. 2339A and 2339B, and of “personnel” as used in section 2339B; (2) adds a more explicit knowledge requirement to section 2339B; (3) expands the extraterritorial jurisdiction reach of section 2339B; (4) enlarges the list of federal crimes of terrorism, 18 U.S.C. 2332b(g)(5); (5) adds the enlarged list to the inventory of predicate offenses for 18 U.S.C. 2339A (material support for the commission of certain terrorist crimes) and consequently for 18 U.S.C. 2339B (material support for designated terrorist organizations); and (6) precludes prosecution for certain violations committed with the approval of the Secretary of State and concurrence of the Attorney General.¹⁷

Section 215 FISA Orders for “Business Records”.

Section 215 of the USA PATRIOT Act amended the business record sections of FISA to authorize the Director of the Federal Bureau of Investigations (FBI) or a designee of the Director, to apply to the FISA court to issue orders granting the government access to any tangible item (including books, records, papers, and other documents), no matter who holds it, in foreign intelligence, international terrorism, and clandestine intelligence cases.¹⁸ The Act contains several provisions to guard

¹² 50 U.S.C. 1801(b)(1)(C).

¹³ For more information on the “lone wolf” amendment, see CRS Report RS22011, *Intelligence Reform and Terrorism Prevention Act of 2004: “Lone Wolf” Amendment to the Foreign Intelligence Surveillance Act*, by Elizabeth B. Bazan.

¹⁴ § 104, P.L. 109-177, 120 Stat. 195 (2006).

¹⁵ Section 2339A outlaws providing, attempting to provide, or conspiring to provide, material support or resources for the commission of any of several designated federal crimes that a terrorist might commit.

¹⁶ Section 2339B outlaws providing, attempting to provide, or conspiring to provide, material support or resources to a designated foreign terrorist organization.

¹⁷ For more information regarding section 6603 of IRTPA, see CRS Report RL33035, *Material Support of Terrorists and Foreign Terrorist Organizations: Sunset Amendments*, by Charles Doyle.

¹⁸ Section 215 authority appears to have been relatively little used. In April 2005, Justice Department officials testified to the House Judiciary Committee that, as of March 31, 2005, only 35 orders have been issued under section 215 authority, none of which involved library, book store, medical, or gun sale records. *Oversight Hearing on the “Implementation of the USA PATRIOT Act: Foreign Surveillance Intelligence Act (FISA)”*: Hearings Before the (continued...)

against abuses of section 215 authority, including greater congressional oversight, enhanced procedural protections, more elaborate application requirements, and a judicial review process.

Greater Congressional Oversight. Section 106(h) of the Act directs the Attorney General to submit to Congress an annual report regarding the use of section 215 authority. This report is to be filed with the House and Senate Committees on the Judiciary, the House Permanent Select Committee on Intelligence, and the Senate Select Committee on Intelligence. The annual report, due every April, must contain the following information regarding the preceding year:

- the total number of applications made for section 215 production orders (“215 orders”) approving requests for the production of tangible things,
- the total number of such orders granted as requested, granted as modified, or denied, and
- the number of 215 orders either granted, modified, or denied for the production of each of the following: library circulation records, library patron lists, book sales records, or book customer lists; firearms sales records; tax return records; educational records; and medical records containing information that would identify a person.¹⁹

Prior to the Act, the law had required public disclosure of only the first two items listed above; by adding the third reporting requirement, the Act provides for a more detailed account of whether and when section 215 authority has been used to request these categories of sensitive information.

Section 106A of the Act provides for the Inspector General of the Department of Justice to conduct a comprehensive audit to determine the effectiveness, and

¹⁸ (...continued)

Subcomm. on Crime, Terrorism, and Homeland Security of the House Comm. on the Judiciary, 109th Cong., 1st Sess. (2005) (statement of Kenneth L. Wainstein, U.S. Attorney for the District of Columbia), at 8, *available on Jan. 13, 2006 at* [<http://judiciary.house.gov/media/pdfs/wainstein042805.pdf>]. At the same time, the Justice Department argues against the creation of a safe haven in public services that terrorists have been known to use. *Oversight Hearing on the “Implementation of the USA PATRIOT Act: Foreign Surveillance Intelligence Act (FISA)”*: *Hearings Before the Subcomm. on Crime, Terrorism, and Homeland Security of the House Comm. on the Judiciary*, 109th Cong., 1st Sess. (2005) (statement of James A. Baker, Counsel for Intelligence Policy, Office of Intelligence Policy and Review, U.S. Dep’t of Justice), at 3, *available on Jan. 13, 2006 at* [<http://judiciary.house.gov/media/pdfs/baker042805.pdf>] (“While section 215 has never been used to obtain such records, last year, a member of a terrorist group closely affiliated with al Qaeda used Internet service provided by a public library to communicate with his confederates. Furthermore, we know that spies have used public library computers to do research to further their espionage and to communicate with their co-conspirators A terrorist using a computer in a library should not be afforded greater privacy protection than a terrorist using a computer in his home.”).

¹⁹ § 106(h)(2), P.L. 109-177, 120 Stat. 200 (2006), adding new 50 U.S.C. 1862(b)(3).

identify any abuses, concerning the use of section 215 authority, for calendar years 2002-2006. The audit is to be performed in accordance with the detailed requirements set forth in this section. The results of the audit are to be submitted in an unclassified report to the House and Senate Committees on the Judiciary and Intelligence; for calendar years 2002, 2003, and 2004, the report is due not later than March 9, 2007; for calendar years 2005 and 2006, the report is due not later than December 31.

Enhanced Procedural Protections. Section 106(a)(2) of the Act adds 50 U.S.C. 1861(a)(3), requiring that an application for a 215 order for the production of certain sensitive categories of records, such as library, bookstore, firearm sales, tax return, educational, and medical records, must be personally approved by one of the following three high-level officials: the FBI Director, the FBI Deputy Director, or the Executive Assistant Director for National Security. This provision was included as an attempt to allay concerns over federal authorities abusing section 215 authority to obtain sensitive types of records.²⁰

The Act also instructs the Attorney General to promulgate specific minimization standards that apply to the collection and dissemination of information obtained through the use of the section 215 authority.²¹ These procedures are intended to limit the retention, and regulate the dissemination, of nonpublicly available information concerning unconsenting U.S. persons, consistent with the need of the United States to obtain, produce, and disseminate foreign intelligence information. Federal authorities are required to observe these minimization procedures regarding the use or disclosure of information received under a 215 order; furthermore, they may not use or disclose such information except for lawful purposes. Finally, the Act clarifies that otherwise privileged information does not lose its privileged character simply because it was acquired through a 215 order.

Application Requirements and Orders. Prior to the Act's enactment, an application for a 215 order to be submitted to the FISA court for approval only needed to state that the requested records were sought for an authorized investigation. The Act amends 50 U.S.C. 1861(b)(2) to require that such an application must include a "statement of facts" demonstrating that there are reasonable grounds to believe that the tangible things sought are "relevant" to an authorized or preliminary investigation to protect against international terrorism or espionage, or to obtain foreign intelligence information not concerning a U.S. person.²² Section

²⁰ 50 U.S.C. 1861(a)(2)(B) already prohibits the government from seeking a section 215 order in an investigation of a U.S. person solely upon the basis of activities protected by the First Amendment to the U.S. Constitution. For more information about section 215 under existing law and its potential use against libraries or their patrons, see CRS Report RS21441, *Libraries and the USA PATRIOT Act*, by Charles Doyle and Brian T. Yeh.

²¹ §106(g), P.L. 109-177, 120 Stat. 198, 199 (2006), adding new 50 U.S.C. 1861(g).

²² The "relevancy" standard set forth in the Act was criticized by several Members of Congress during the floor debate on the conference report. See, e.g., 152 CONG. REC. S1382 (daily ed. Feb. 16, 2006) (statement of Sen. Feingold) ("Relevance is a very broad standard that could arguably justify the collection of all kinds of information about law-abiding
(continued...)

106(b)(2)(A) of the Act also provides that certain tangible items are “presumptively relevant” to an investigation if the application’s statement of facts shows that the items sought pertain to:

- a foreign power or an agent of a foreign power,
- the activities of a suspected agent of a foreign power who is the subject of such authorized investigation, or
- an individual in contact with, or known to, a suspected agent of a foreign power who is the subject of such authorized investigation.

Finally, the application for a 215 order must include an enumeration of the minimization procedures applicable to the retention and dissemination of the tangible items sought.²³

The FISA court judge shall approve an application for a 215 order as requested or as modified, upon a finding that the application complies with statutory requirements. The order must contain a particularized description of the items sought, provide for a reasonable time to assemble them, notify recipients of nondisclosure requirements, and be limited to things subject to a grand jury subpoena or order of a U.S. court for production.²⁴ The ex parte order shall also direct that the retention and dissemination of the tangible things obtained under the order must adhere to the minimization procedures.

Judicial Review and Enforcement. Section 106(f) of the Act establishes a detailed judicial review process for recipients of 215 orders to challenge their legality before a judge selected from a pool of FISA court judges. If the judge determines that the petition is not frivolous after an initial review, the judge has discretion to modify or set aside a FISA order upon a finding that it does not comply with the statute or is otherwise unlawful.²⁵ However, if the judge does not modify or rescind the 215 order, then the judge must immediately affirm the order and direct the recipient to comply with it.

The FISA Court of Review and the Supreme Court are granted jurisdiction to consider appeals of the FISA court judge’s decision to affirm, modify, or set aside a 215 order. The Chief Justice of the United States, in consultation with the Attorney

²² (...continued)

Americans.”). The Senate-passed version of the USA PATRIOT Improvement and Reauthorization Act, S. 1389, required that the statement of facts show that the records or things sought are relevant to an authorized investigation *and* that the things sought pertain to, or are relevant to the activities of, a foreign power or agent of foreign power, or pertain to an individual in contact with or known to a suspected agent of a foreign power. The Act does not require such a connection.

²³ §106(b), P.L. 109-177, 120 Stat. 196 (2006), adding new 50 U.S.C. 1861(b)(2)(B).

²⁴ §106(d), P.L. 109-177, 120 Stat. 197 (2006), amending 50 U.S.C. 1861(c)(2).

²⁵ §106(f)(2), P.L. 109-177, 120 Stat. 198 (2006), adding new 50 U.S.C. 1861(f)(1). The review of a petition challenging a 215 order shall be conducted in camera, new 50 U.S.C. 1803(e)(2).

General and the Director of National Intelligence, is directed to establish security measures for maintaining the record of the 215 order judicial review proceedings.

Nondisclosure Requirement for 215 Orders. A section 215 order is accompanied by a nondisclosure requirement that prohibits the recipient from disclosing to any other person that the FBI has sought the tangible things described in the order. Prior to the Act’s enactment, the only exception to this “gag order” was for disclosure to those persons necessary for compliance with the production order.²⁶ The Act expands the list of exceptions, expressly permitting a recipient of a 215 order to disclose its existence to an attorney to obtain legal advice, as well as to other persons approved by the FBI.²⁷

Under the Act, the recipient is not required to inform the FBI or the authorized government agency of *the intent* to consult with an attorney to obtain legal assistance; however, upon the request of the FBI Director (or his designee), the recipient *must* disclose to the FBI the identity of the person to whom the disclosure will be or was made, which could include the name of the attorney.²⁸ During the Senate debate over the conference report, some Members of Congress raised concerns that this provision of the Act might have an unintended “chilling effect” on the individual’s right to seek legal counsel regarding the Section 215 order.²⁹ Thus, section 4 of the USA PATRIOT Act Additional Reauthorizing Amendments Act of 2006, P.L. 109-178, 120 Stat. 280 (2006), amends FISA to exempt explicitly from the identification disclosure requirement the name of the attorney sought to obtain legal advice with respect to the Section 215 production order.³⁰

While the Act provided a judicial review process for recipients of 215 orders to challenge their legality, the Act does not expressly grant the right to petition the FISA court to modify or quash the nondisclosure requirement imposed in connection with the production order. The Act was criticized for its lack of an express right to

²⁶ 50 U.S.C. 1861(d).

²⁷ §106(e), P.L. 109-177, 120 Stat. 197 (2006), adding new 50 U.S.C. 1861(d)(1)(B), (C).

²⁸ §106(e), P.L. 109-177, 120 Stat. 197 (2006), adding new 50 U.S.C. 1861(d)(2)(C).

²⁹ *See, e.g.*, 152 CONG. REC. S1326 (daily ed. Feb. 15, 2006) (statement of Sen. Sununu) (“[W]e feel the provision in the conference report that required the recipient ... to disclose the name of their attorney to the FBI was punitive and might have the result of discouraging an individual from seeking legal advice.”).

³⁰ Under the Act, the recipient of a Section 215 order is prohibited from disclosing to any other person that the FBI has sought the tangible things described in the order, except to the following individuals:

- (A) those persons necessary for compliance with the order,
- (B) an attorney to obtain legal advice with respect to the order, or
- (C) other persons as permitted by the FBI Director or his designee.

The USA PATRIOT Act Additional Reauthorizing Amendments Act of 2006 amends FISA to provide that the FBI Director or his designee may require anyone to disclose the identity of persons falling within categories A and C only. It notably omits B, which effectively removes from the identity disclosure requirement attorneys sought for legal assistance.

challenge the nondisclosure order during the Senate debate over the conference report.³¹

Section 3 of the USA PATRIOT Act Additional Reauthorizing Amendments Act of 2006, P.L. 109-178, 120 Stat. 278 (2006), addresses this omission by establishing a judicial review procedure for a section 215 nondisclosure orders. For one year after the date of the issuance of a 215 production order, the nondisclosure requirement remains in full effect and may not be challenged.³² During the floor debates over S. 2271, this one-year mandatory moratorium and automatic gag order had been criticized and defended by Members of Congress.³³

After the one-year waiting period has expired, the recipient of the production order may petition the FISA court to modify or set aside the nondisclosure requirement. Within 72 hours, if the judge assigned to consider the petition determines after an initial review that the petition is frivolous, the judge shall immediately deny the petition and affirm the nondisclosure order. If, after the initial review, the judge determines that the petition is not frivolous, the judge shall promptly consider the petition under procedural measures that the FISA court has established to protect national security, including conducting the review *in camera*.³⁴

The FISA court judge has discretion to modify or set aside a nondisclosure order upon a finding that there is no reason to believe that disclosure may endanger the national security of the United States; interfere with a criminal, counterterrorism, or counterintelligence investigation; interfere with diplomatic relations; or endanger the life or physical safety of any person. If, at the time the individual files the petition for judicial review of a nondisclosure order, the Attorney General, Deputy Attorney General, an Assistant Attorney General, or the Director of the FBI certifies that disclosure may endanger the national security of the United States or interfere with

³¹ *See, e.g.*, 152 CONG. REC. S1326 (daily ed. Feb. 15, 2006) (statement of Sen. Sununu) (“I think it is important that we stand for the principle that a restriction on free speech such as a gag order can be objected to in a court of law before a judge. You can at least have your case heard. That does not mean you will win, necessarily, but you can at least have your case heard.”).

³² By contrast, the Act does *not* impose a one-year moratorium on challenging the nondisclosure order accompanying a NSL, § 115, P.L. 109-177, 120 Stat. 211 (2006), adding new 18 U.S.C. 3511(b)(1).

³³ *Compare* 152 CONG. REC. S1496 (daily ed. Feb. 27, 2006) (statement of Sen. Specter) (“My own view is it is preferable there not be a waiting period at all, that the court have the discretion to enter the orders [modifying or quashing a gag order] immediately if it finds cause to do so.”) with 152 CONG. REC. S1559 (daily ed. Mar. 1, 2006) (statement of Sen. Kyl) (“The delay is perfectly appropriate and necessary to preserve valuable personnel resources — these orders are approved by judges before issuance, so it makes little sense to allow recipients to challenge the non-disclosure requirement only a week or even a day after the court issues them.”).

³⁴ § 3, P.L. 109-178, 120 Stat. 178 (2006), amending new 50 U.S.C. 1861(f)(2)(A)(ii).

diplomatic relations, then the FISA judge must treat such government certification as *conclusive* unless the judge finds that the certification was made in bad faith.³⁵

If the judge grants a petition to quash the nondisclosure requirement, upon the request of the government, such order is stayed pending review of the decision to the FISA Court of Review. If the judge denies the petition to modify or set aside the nondisclosure requirement, the recipient of the 215 order is *precluded* from filing another such petition for one year.³⁶ The FISA Court of Review has jurisdiction to consider a petition by the government or by the recipient of a 215 order and to review a FISA judge's decision to affirm, modify, or set aside such production order or the nondisclosure order imposed in connection with it. The U.S. Supreme Court has jurisdiction to review a decision of the FISA Court of Review concerning this matter.

National Security Letters.

Five federal statutes, in roughly the same terms, authorize federal intelligence investigators (generally the FBI) to request that communications providers, financial institutions and credit bureaus provide certain types of customer business records, including subscriber and transactional information related to Internet and telephone usage, credit reports, and financial records.³⁷ Unlike a section 215 production order for tangible items, an NSL need not receive prior approval of a judge. However, NSLs are more limited in scope compared to a section 215 order, in terms of the types of information that can be obtained. For example, NSLs cannot be used to receive “content information” — the content of a telephone communication or e-mail message is unavailable through a NSL, but a NSL could request the phone number dialed or the e-mail addresses used.

A federal court in the Southern District of New York has held that the FBI's practices and procedure surrounding the exercise of its authority under one of these national security letter (NSL) statutes, 18 U.S.C. 2709, violate the Fourth and First Amendments.³⁸ In the opinion of the court, the constitutional problem stems from the effective absence of judicial review before or after the issuance of an NSL under section 2709 and from the facially absolute, permanent confidentiality restrictions (“gag order”) that the statute places on NSL recipients.³⁹

³⁵ *Id.*, amending new 50 U.S.C. 1861(f)(2)(C)(ii).

³⁶ *Id.*, amending new 50 U.S.C. 1861(f)(2)(C)(iii).

³⁷ 12 U.S.C. 3414; 15 U.S.C.1681u, 1681v; 18 U.S.C. 2709; 50 U.S.C. 436. For more information concerning national security letters, see CRS Report RL32880, *Administrative Subpoenas and National Security Letters in Criminal and Foreign Intelligence Investigations: Background and Proposed Adjustments*, by Charles Doyle.

³⁸ *Doe v. Ashcroft*, 334 F.Supp.2d 471 (S.D.N.Y. 2004); see also, *Doe v. Gonzalez*, 386 F.Supp.2d 66 (D.Conn. 2005)(reaching a similar conclusion on First Amendment grounds).

³⁹ *Ashcroft*, 334 F.Supp.2d at 526-27.

Section 115 of the Act attempts to address these potential constitutional deficiencies by authorizing judicial review of a NSL.⁴⁰ In addition to providing the right to challenge the validity of the NSL request, section 115 expressly grants NSL recipients the power to petition a federal district court to modify or quash a nondisclosure requirement that may be imposed in connection with the request.

Judicial Review and Enforcement of NSL requests. Under the Act, the recipient of a NSL request may petition a U.S. district court for an order modifying or setting aside the request. The federal court may modify or quash the NSL request if compliance would be unreasonable, oppressive, or otherwise unlawful.

Section 115 also provides the government with the means to enforce the NSL through court action. If a NSL recipient fails to respond to the request for information, the Attorney General may seek a federal district court order to compel compliance with the request.⁴¹ Disobedience of the U.S. district court's order to respond to a NSL is punishable as contempt of court.

Section 115 directs that any court proceedings concerning NSL matters must be closed, subject to any right to an open hearing in a contempt proceeding, to prevent unauthorized disclosure of the NSL request. In addition, all petitions, filings, records, orders, and subpoenas must be kept under seal to prevent unauthorized disclosure. Finally, the government may request that its evidence be considered *ex parte* and *in camera*.

Nondisclosure Orders for NSLs. Section 116 of the Act amends all five NSL statutes to prohibit service providers from disclosing to any person that the FBI has sought or obtained access to the information sought through the NSL, *only if* the investigative agency has certified that disclosure may endanger any individual or the national security of the United States, interfere with diplomatic relations, or interfere with a criminal or intelligence investigation. Thus, a nondisclosure order does *not* automatically attach to the NSL, as it does in the case of a Section 215 order under FISA.

Assuming that this certification occurs and the gag order is in place, disclosure by the NSL recipient is permitted to any person whose assistance is needed to comply with the NSL request or to an attorney to obtain legal advice or legal assistance concerning the NSL.⁴² Although the individual is not required to inform the FBI or the authorized government agency of *the intent* to consult with an attorney to obtain legal assistance, upon the request of the FBI Director (or his designee), or upon the

⁴⁰ § 115, P.L. 109-177, 120 Stat. 211 (2006), adding new 18 U.S.C. 3511.

⁴¹ § 115, P.L. 109-177, 120 Stat. 212 (2006), adding new 18 U.S.C. 3511(c). Critics of this new provision claim that it effectively transforms NSLs into national security subpoenas. See ACLU, *ACLU Letter to Congress Urging A "No" Vote On the USA PATRIOT Improvement and Reauthorization Act Conference Report* (Dec. 12, 2005), available on Jan. 13, 2006 at [<http://www.aclu.org/safefree/general/22394leg20051207.html>].

⁴² § 116, P.L. 109-177, 120 Stat. 213-217 (2006), amending 18 U.S.C. 2709(c)(1); 15 U.S.C. 1681u(d)(1); 15 U.S.C. 1681v(c)(1); 12 U.S.C. 3414(a)(3)(A); 12 U.S.C. 3414(a)(5)(D)(I); and 50 U.S.C. 436(b)(1).

request of the government agency authorized to issue the NSL, the recipient *must* disclose to the FBI or the government agency the identity of the person to whom the disclosure will be or was made.⁴³ According to the sponsor of H.R. 3199, “without this safeguard, a recipient could disclose the government’s investigative efforts to a person with ties to hostile foreign governments or entities.”⁴⁴

However, the potential that this identity disclosure requirement may chill the right to seek legal counsel was reduced by Section 4 of the USA PATRIOT Act Additional Reauthorizing Amendments Act of 2006, P.L. 109-178, 120 Stat. 280 (2006). (Section 4 also had removed a similar disclosure requirement concerning a Section 215 production order under FISA.) Section 4 amends the five NSL statutes by adding language expressly exempting the identity of attorneys from the disclosure requirement established by the Act:

At the request of the Director of the Federal Bureau of Investigation or the designee of the Director, any person making or intending to make a disclosure under this section shall identify to the Director or such designee the person to whom such disclosure will be made or to whom such disclosure was made prior to the request, *except that nothing in this section shall require a person to inform the Director or such designee of the identity of an attorney to whom disclosure was made or will be made to obtain legal advice or legal assistance with respect to the [NSL] request...*⁴⁵

Section 117 of the Act punishes a person who was notified of a NSL nondisclosure requirement but nevertheless knowingly and willfully violates that directive, with imprisonment of not more than one year, or not more than five years if committed with the intent to obstruct an investigation or judicial proceeding.⁴⁶ The law prior to the Act’s enactment did not provide a felony charge for such disclosure to an unauthorized person.

Section 115 of the Act grants a NSL recipient with an explicit statutory right to challenge in court the gag order that may attach to the NSL request — a right that a recipient of a section 215 FISA production order lacks under the Act but which was subsequently provided by the USA PATRIOT Act Additional Reauthorizing Amendments Act of 2006. Section 115 creates a bifurcated procedure for handling petitions for judicial review of the nondisclosure requirement accompanying a NSL:

(1) If the petition is filed within one year of the NSL request, the U.S. district court may modify or set aside the gag order if it finds no reason to believe that disclosure may:

⁴³ § 116, P.L. 109-177, 120 Stat. 213-217 (2006), amending 18 U.S.C. 2709(c)(4); 15 U.S.C. 1681u(d)(4); 15 U.S.C. 1681v(c)(4); 12 U.S.C. 3414(a)(3)(D); 12 U.S.C. 3414(a)(5)(D)(iv); and 50 U.S.C. 436(b)(4).

⁴⁴ 152 Cong. Rec. H583 (daily ed. Mar. 7, 2006) (statement of Rep. Sensenbrenner).

⁴⁵ § 4, P.L. 109-178, 120 Stat. 280 (2006), amending 18 U.S.C. 2709(c)(4) (emphasis added). The language used to describe this exception in 18 U.S.C. 2709(c)(4) is substantially similar to that used in the amendments to the other NSL statutes.

⁴⁶ § 117, P.L. 109-177, 120 Stat. 217 (2006), adding new 18 U.S.C. 1510(e).

- endanger the national security of the United States,
- interfere with a criminal, counterterrorism, or counterintelligence investigation,
- interfere with diplomatic relations, or
- endanger the life or physical safety of any person.

If, at the time of the petition, a high-ranking government official⁴⁷ certifies that disclosure may:

- endanger the national security of the United States, or
- interfere with diplomatic relations,

then the court must treat the government certification as *conclusive* unless the court finds that the certification was made in bad faith.

(2) If the petition challenging the gag order is filed one year or more after the NSL issuance, a high-ranking government official must, within 90 days of the petition, either terminate the gag order or re-certify that disclosure may:

- endanger the national security of the United States,
- interfere with a criminal, counterterrorism, or counterintelligence investigation,
- interfere with diplomatic relations, or
- endanger the life or physical safety of any person.

If such recertification occurs, then a court may modify or quash the gag order if it finds no reason to believe that disclosure may:

- endanger the national security of the United States,
- interfere with a criminal, counterterrorism, or counterintelligence investigation,
- interfere with diplomatic relations, or
- endanger the life or physical safety of any person.

However, if the recertification was made by the Attorney General, Deputy Attorney General, an Assistant Attorney General, or the Director of the FBI, and if such recertification stated that disclosure may:

- endanger the national security of the United States, or
- interfere with diplomatic relations

then such certification is to be treated by the court as *conclusive* unless it was made in bad faith.

⁴⁷ If the NSL is issued by the Department of Justice, this person must be the Attorney General, Deputy AG, or the Director of the FBI; if the NSL information is requested by any agency, department, or instrumentality other than the Justice Department, then the individual must be its head or deputy. New 18 U.S.C. 3511(b)(2).

If court denies the petition for an order to modify the nondisclosure requirement, the NSL recipient is *precluded* from filing another such petition for one year.

Although the Act provides a process to challenge the nondisclosure requirement, critics believe that this judicial review is not meaningful, in light of the “conclusive presumption” provision: “A recipient would technically be given a right to challenge the gag order but if the government asserted national security, diplomatic relations or an ongoing criminal investigation the court would be required to treat that assertion as conclusive, making the ‘right’ an illusion.”⁴⁸ In addition, some Members of Congress have raised First Amendment and due process concerns over the indefinite gag order and the conclusive presumption.⁴⁹ However, others have defended the conclusive presumption as necessary to ensure that sensitive information is not publicly disclosed:

Only the FBI, the people who are investigating the matter, not individual district judges, are in a position to determine when the disclosure of classified information would harm national security. Obviously, that is not something that a Federal district judge has any expertise on. ... It is also important that the FBI make the final determination whether the disclosure would harm national security. And only the agents in charge of these counterterrorism investigations will be able to evaluate how the disclosure of a particular piece of information could potentially, for example, reveal sources and methods of intelligence and who, therefore, might be tipped off as a result of the disclosure.⁵⁰

NSLs Not Applicable to Libraries. Section 5 of the USA PATRIOT Act Additional Reauthorizing Amendments Act of 2006, P.L. 109-178, 120 Stat. 281 (2006), entitled “Privacy Protections for Library Patrons,” addresses the concern that a library could potentially be subject to an NSL issued under 18 U.S.C. 2709 to obtain certain transactional and subscriber records pertaining to its patrons.⁵¹ Because libraries often offer patrons the ability to access the Internet, the law prior to the Act was unclear as to whether libraries might be considered “electronic communication service providers” for purposes of 18 U.S.C. 2709. Section 5 amends 18 U.S.C. 2709 by adding the following section:

⁴⁸ ACLU, *ACLU Letter to Congress Urging A “No” Vote On the USA PATRIOT Improvement and Reauthorization Act Conference Report* (Dec. 12, 2005), available Jan. 13, 2006 at [<http://www.aclu.org/safefree/general/22394leg20051207.html>].

⁴⁹ See, e.g., 152 CONG. REC. S1567 (daily ed. Mar. 1, 2006) (statement of Sen. Leahy); 152 CONG. REC. H588 (daily ed. Mar. 7, 2006) (statement of Rep. Nadler); 152 CONG. REC. S1382, 1383 (daily ed. Feb. 16, 2006) (statement of Sen. Feingold).

⁵⁰ 152 CONG. REC. S1394, 1395 (daily ed. Feb. 16, 2006) (statement of Sen. Kyl).

⁵¹ However, a library could still be subject to a Section 215 order under FISA for the production of tangible items such as loan records. S. 2271 does not carve out any exception for libraries under Section 215. For more information on this issue, see CRS Report RS21441, *Libraries and the USA PATRIOT Act*, by Charles Doyle and Brian T. Yeh.

“A library ..., the services of which include access to the Internet ..., is *not* a wire or electronic communication service provider for purposes of this section, *unless* the library is providing the services defined in section 2510(15) of this title...”⁵²

This provision “makes very clear that libraries operating in their traditional role, including the lending of books, including making books available in digital form, including providing basic Internet access, are not subject to National Security Letters.”⁵³ However, if the library “provides” the services described in 18 U.S.C. 2510(15), which are “electronic communication services,” then such library would *still* be subject to NSLs. 18 U.S.C. 2510(15) defines “electronic communication service” to mean any *service* that *provides* to users the *ability* to send or receive wire or electronic communications. A reasonable interpretation of this definition suggests that to be considered an electronic communication service provider under 18 U.S.C. 2510(15), a library must independently operate the means by which transmission, routing, and connection of digital communication occurs.⁵⁴ In contrast, a local county library likely has a service contract with an Internet Service Provider (ISP) to furnish the library with the electronic communication service, as many businesses and individuals do; the fact that the library has set up a computer with Internet access for the use of its patrons probably does not, by itself, turn the library into a communications service “provider.” Under this characterization, the actual “provider” of Internet access is the ISP, not the library.⁵⁵ Therefore, a public library offering “basic” Internet access would likely *not* be considered an electronic communication service provider, at least for purposes of being an entity subject to the NSL provisions in 18 U.S.C. 2709.⁵⁶

Congressional Oversight of NSLs. Section 118 of the Act requires that any reports to a Congressional committee regarding NSLs shall also be provided to the House and Senate Judiciary Committees. In addition, the Attorney General must submit a report semiannually on all NSL requests made under the Fair Credit

⁵² 18 U.S.C. 2709(f) as amended by P.L. 109-178, 120 Stat. 281 (emphasis added).

⁵³ 152 CONG. REC. S1326 (daily ed. Feb. 15, 2006) (statement of Sen. Sununu).

⁵⁴ *See* 152 CONG. REC. S1558 (daily ed. Mar. 1, 2006) (statement of Sen. Leahy) (“[A] library may be served with an NSL only if it functions as a true internet service provider, as by providing services to persons located outside the premises of the library. I expect that this will occur rarely or never and that in most if not all cases, the Government will need a court order to seize library records for foreign intelligence purposes.”)

⁵⁵ *See* 152 CONG. REC. S1390 (daily ed. Feb. 16, 2006) (statement of Sen. Sununu) (“Some have noted or may note that basic Internet access gives library patrons the ability to send and receive e-mail by, for example, accessing an Internet-based e-mail service. But in that case, it is the website operator who is providing the communication service — the Internet communication service provider itself — and not the library, which is simply making available a computer with access to the Internet.”). Thus, the NSL request could be served on the ISP rather than the library.

⁵⁶ *See* 152 CONG. REC. S1390 (daily ed. Feb. 16, 2006) (statement of Sen. Durbin) (“By way of comparison, a gas station that has a pay phone isn’t a telephone company. So a library that has Internet access, where a person can find an Internet e-mail service, is not a communications service provider; therefore, it would not fall under the purview of the NSL provision in 18 U.S.C. 2709. It is a critically important distinction.”).

Reporting Act, to the House and Senate Judiciary Committees, the House and Senate Intelligence Committees, and the House Committee on Financial Services and the Senate Committee on Banking, Housing, and Urban Affairs.⁵⁷

The Attorney General is also instructed to submit to Congress an annual report describing the total number of requests made by the Department of Justice under the NSL statutes. This report is to be unclassified, in order to permit public scrutiny.

Section 119 of the Act directs the Inspector General of the Department of Justice to perform a comprehensive audit of the effectiveness and use of NSLs, including any improper or illegal use, for submission to the House and Senate Judiciary and Intelligence Committees for calendar years 2003-2006. This report is to be unclassified. Section 119 also requires the Attorney General and Director of National Intelligence to analyze the feasibility of applying minimization procedures to NSL to ensure the protection of the constitutional rights of U.S. persons. This feasibility study is to be submitted to the House and Senate Judiciary and Intelligence Committees by February 1, 2007, or upon completion of the audit of the use of NSLs for calendar years 2003 and 2004, whichever is earlier.

Section 206 FISA “Roving” Wiretaps.

Unlike a criminal wiretap order issued under Title III of the Omnibus Crime Control and Safe Streets Act of 1968,⁵⁸ which may be approved if a judge finds probable cause for believing that an individual is committing, has committed, or is about to commit a particular enumerated offense,⁵⁹ a FISA wiretap may be issued upon a finding of probable cause to believe that the target of the electronic surveillance is a foreign power or agent of a foreign power.⁶⁰ Section 206 of the USA PATRIOT Act amended FISA to authorize the installation and use of multipoint, or “roving,” wiretaps, for foreign intelligence investigations.⁶¹ A roving wiretap order applies to the suspect rather than a particular phone or computer that the target might use, and thus allows law enforcement officials to use a single wiretap order to cover any communications device that the target uses or may use.⁶² Without this authority, investigators must seek a new FISA court order each time they need

⁵⁷ § 118(b), P.L. 109-177, 120 Stat. 217, 218 (2006), adding new 15 U.S.C. 1681v(f).

⁵⁸ 18 U.S.C. 2510 et seq.

⁵⁹ See list of predicate offenses at 18 U.S.C. 2516(1)(a)-(r).

⁶⁰ 50 U.S.C. 1805(a).

⁶¹ 50 U.S.C. 1805(c)(2)(B).

⁶² According to the Department of Justice, “This new authority has put investigators in a better position to avoid unnecessary cat-and-mouse games with terrorists, who are trained to thwart surveillance.” U.S. Dep’t of Justice, *Report from the Field, The USA PATRIOT Act at Work*, 22 (July 2004), available on Jan. 13, 2006 at [http://www.lifeandliberty.gov/docs/071304_report_from_the_field.pdf].

to change the name of the location to be monitored, as well as the specified person or entity that is needed to assist in facilitating the wiretap.⁶³

Section 206 of the USA PATRIOT Act permits a general command for the assistance of third parties (for example, common carriers and Internet service providers) for the installation and use of these multipoint wiretaps, where the target of the surveillance has taken steps to thwart the identification of a communications company or other person whose assistance may be needed to carry out the surveillance. Thus, if the FISA court finds that the target's actions may have the effect of thwarting specific identification, section 206 temporarily authorizes FISA orders that need not specifically identify the communications carriers, landlords or others whose assistance the order commands.⁶⁴

Prior to the enactment of the Act, a FISA roving surveillance order had to specify the identity of the target only if it was known; otherwise, it was sufficient for the order to describe the target.⁶⁵ Section 108 of the Act amends the FISA roving surveillance authority to require that an application for an order, as well as the wiretap order itself, describe the *specific* target of the electronic surveillance if the target's identity is not known.⁶⁶ It also clarifies that the FISA court must find that the prospect of a target thwarting surveillance is based on specific facts in the application. Furthermore, if the government begins to direct surveillance at a new facility or place, the nature and location of which were unknown at the time the original surveillance order was issued, the government must notify the FISA court within 10 days⁶⁷ after such change, of the following information:⁶⁸

- the nature and location of each new facility or place at which the surveillance is directed,
- the facts and circumstances relied upon by the applicant to justify the applicant's belief that each new facility or place is or was being used, or is about to be used, by the target of the surveillance,
- an explanation of any proposed minimization procedures that differ from those contained in the original application or order, if such change is necessitated by the new facility or place, and

⁶³ *Oversight Hearing on "Reauthorization of the USA PATRIOT Act": Hearings Before the House Comm. on the Judiciary*, 109th Cong., 1st Sess. (2005) (statement of James B. Comey, Deputy Attorney General, U.S. Dep't of Justice), at 9-10, available on Jan. 13, 2006 at [<http://judiciary.house.gov/media/pdfs/comey060805.pdf>].

⁶⁴ 50 U.S.C. 1805(c)(2)(B).

⁶⁵ 50 U.S.C. 1805(c)(1)(A). Furthermore, a roving wiretap order need not identify the nature and location of the places or facilities targeted for surveillance if they are unknown. 50 U.S.C. 1805(c)(1)(B). This provision remains unchanged after enactment of the Act.

⁶⁶ § 108(a), P.L. 109-177, 120 Stat. 203 (2006), amending 50 U.S.C. 1804(a)(3) and 50 U.S.C. 1805(c)(1)(A).

⁶⁷ The 10 day period may be extended up to 60 days if the court finds good cause to justify the longer period.

⁶⁸ § 108(b)(4), P.L. 109-177, 120 Stat. 203 (2006), adding new 50 U.S.C. 1805(c)(3).

- the total number of electronic surveillances that have been or are being conducted under the roving surveillance order.

The Act also enhances congressional oversight over the use of all foreign intelligence electronic surveillance authority, by adding the Senate Judiciary Committee as a recipient of the semi-annual FISA reports that the Attorney General currently must submit to the House and Senate Intelligence committees,⁶⁹ and by modifying the FISA report requirements to include a description of the total number of applications made for orders approving roving electronic surveillance.⁷⁰

Delayed Notice Search Warrants.

A delayed notice search warrant, or “sneak and peek” warrant, is one that authorizes law enforcement officers to secretly enter a home or business, either physically or virtually, conduct a search, and depart without taking any tangible evidence or leaving notice of their presence. The Department of Justice has defended the necessity and legality of delayed notification search warrants:

This tool can be used only with a court order, in extremely narrow circumstances when immediate notification may result in death or physical harm to an individual, flight from prosecution, evidence tampering, witness intimidation, or serious jeopardy to an investigation. The reasonable delay gives law enforcement time to identify the criminal’s associates, eliminate immediate threats to our communities, and coordinate the arrests of multiple individuals without tipping them off beforehand. In all cases, law enforcement must give notice that property has been searched or seized.⁷¹

Until the USA PATRIOT Act was enacted, the Federal Rules of Criminal Procedure required contemporaneous notice in most instances.⁷² At the time, the courts were divided over whether the failure to provide contemporaneous notice, in the absence of exigent circumstances, constituted a constitutional violation or a violation of the Rule, and over the extent of permissible delay in cases presenting exigent circumstances.⁷³ Section 213 of the USA PATRIOT Act created an express statutory authority for delayed notice search warrants in any criminal investigation, not just those involving suspected terrorist activity.⁷⁴ Delayed notification of the

⁶⁹ § 108(c)(1), P.L. 109-177, 120 Stat. 204 (2006), amending 50 U.S.C. 1808(a)(1).

⁷⁰ § 108(c)(2), P.L. 109-177, 120 Stat. 204 (2006), amending 50 U.S.C. 1808(a)(2).

⁷¹ U.S. Dep’t of Justice, *Dispelling Some of the Major Myths about the USA PATRIOT Act*, available on Jan. 13, 2006 at [http://www.lifeandliberty.gov/subs/u_myths.htm].

⁷² FED. R. CRIM. P. 41(d), 18 U.S.C. App. (2000 ed.).

⁷³ See *United States v. Pangburn*, 983 F.2d 449 (2d Cir. 1993); *United States v. Freitas*, 800 F.2d 1451 (9th Cir. 1986); *United States v. Simmons*, 206 F.3d 292 (4th Cir. 2000).

⁷⁴ 18 U.S.C. 3103a. Critics have expressed concerns about the constitutionality of delayed notice search warrants as well as potential abuse of the power. See, e.g., *EPIC Report* (“The expansion of this extraordinary authority to all searches constitutes a radical departure from Fourth Amendment standards and could result in routine surreptitious entries by law (continued...)”).

execution of a sneak and peek search warrant is permissible for a reasonable period of time (with the possibility of court-approved extensions for good cause shown), if:

- the court that issued the warrant finds reasonable cause to believe that contemporaneous notice of the search may result in adverse consequences (flight, destruction of evidence, intimidation of a witness, danger to an individual, serious jeopardy to an investigation, or undue trial delay), and
- the warrant prohibits the seizure of any tangible property, any wire or electronic communication, and any stored wire or electronic information, except where the court finds reasonable necessity for the seizure.

Responding to concerns that the “reasonable period” for delaying notification of a search warrant is an undefined and indefinite standard under current law, section 114 of the Act establishes a specific limitation on the length of the delay, requiring notice to be given no more than 30 days after the date of the warrant’s execution, with the possibility for 90 day extensions if the facts of a case justify.⁷⁵ Several Members of Congress have criticized this 30-day delayed notice provision, arguing instead for notice to be given to the target of the search warrant within 7 days.⁷⁶ However, it should be noted that the Act’s 30-day delay period was itself a compromise between the House and Senate-passed versions of the Reauthorization Act; the House bill allowed 180 days, while the Senate limited the delay to 7 days.

In addition, section 114 removes “unduly delaying a trial” as one of the “adverse consequences” that justifies delayed notification. Some commentators have noted that “seriously jeopardizing an investigation,” which is retained by the Act as a ground for permitting delayed notice, is an overly broad “catch-all” provision that

⁷⁴ (...continued)

enforcement agents.”); American Civil Liberties Union (ACLU), *Surveillance Under the USA PATRIOT Act* (April 3, 2003), available on Jan. 13, 2006 at [<http://www.aclu.org/safefree/general/17326res20030403.html>] (“Notice is a crucial check on the government’s power because it forces the authorities to operate in the open, and allows the subjects of searches to protect their Fourth Amendment rights. For example, it allows them to point out irregularities in a warrant. ... Search warrants often contain limits on what may be searched, but when the searching officers have complete and unsupervised discretion over a search, a property owner cannot defend his or her rights.”).

⁷⁵ § 114, 109-177, 120 Stat. 210 (2006), amending 18 U.S.C. 3103a(b)(3).

⁷⁶ See, e.g., 152 CONG. REC. S1384 (daily ed. Feb. 16, 2006) (statement of Sen. Feingold) (asserting that seven days is what courts have previously approved), and 152 CONG. REC. S1495 (daily ed. Feb. 27, 2006) (statement of Sen. Specter) (stating that, in his view, seven days is “the best requirement”). However, other Members of Congress have challenged the argument that seven days is the constitutionally-permissible limit. See 152 CONG. REC. S1397 (daily ed. Feb. 16, 2006) (statement of Sen. Sessions) (claiming that the Court of Appeals for the Fourth Circuit has previously allowed a 45-day period for delayed notice of a search warrant, although the court did not suggest that this was necessarily a constitutional upper limit).

law enforcement officials could abuse.⁷⁷ There may also be some question of whether it qualifies as a constitutionally acceptable exigent circumstance. However, Justice Department officials defend this provision, observing that before the delayed notice can be approved, a federal judge must agree with the government's evaluation of the circumstances that indicate that contemporaneous notice of a search might seriously jeopardize an ongoing investigation.⁷⁸

Finally, section 114 enhances oversight of delayed notice search warrants, by requiring that no later than 30 days after the expiration or denial of such a warrant, the issuing or denying judge must notify the Administrative Office of the U.S. Courts of:

- the fact that the delayed notice search warrant was applied for,
- the fact that the warrant was either granted, modified, or denied,
- the length of time of the delay in giving notice, and
- the offense specified in the warrant or the application.⁷⁹

Beginning with the fiscal year ending September 30, 2007, the Director of the Administrative Office is required to transmit a detailed, annual report to Congress that summarizes the use and number of warrants authorizing delayed notice.

Emergency Disclosures by Service Providers.

Section 212 of the USA PATRIOT Act permits electronic communications service providers to disclose voluntarily the contents of stored electronic communications to a Federal, State, or local governmental entity in emergency situations involving a risk or danger of death or serious physical injury to any person.⁸⁰ Service providers are also permitted to disclose customer records to governmental entities in emergencies involving an immediate risk of serious physical injury or danger of death to any person.⁸¹

⁷⁷ See ACLU, *ACLU Letter to Congress Urging A "No" Vote On the USA PATRIOT Improvement and Reauthorization Act Conference Report* (Dec. 12, 2005), available on Jan. 13, 2006 at [<http://www.aclu.org/safefree/general/22394leg20051207.html>].

⁷⁸ *Oversight Hearing on the "Implementation of the USA PATRIOT Act: Sections 201, 202, 223 of the Act that Address Criminal Wiretaps, and Section 213 of the Act that Addresses Delayed Notice": Hearings Before the Subcomm. on Crime, Terrorism, and Homeland Security of the House Comm. on the Judiciary*, 109th Cong., 1st Sess. (2005) (statement of Chuck Rosenberg, Chief of Staff to Deputy Attorney General, U.S. Dep't of Justice), at 3-4, available Jan. 13, 2006 at [<http://judiciary.house.gov/media/pdfs/rosenberg050305.pdf>] (stating that "[t]here are a variety of ways in which investigators and prosecutors should not be precluded from obtaining a delayed notice search warrant simply because their request does not fall into one of the other four circumstances listed in the statute").

⁷⁹ § 114, 109-177, 120 Stat. 210, 211 (2006), amending 18 U.S.C. 3103a(d)(1).

⁸⁰ 18 U.S.C. 2702(b)(8).

⁸¹ 18 U.S.C. 2702(c)(4).

To provide congressional oversight over the use of this authority, section 107(a) of the Act requires the Attorney General annually to report to the Judiciary Committees of the House and Senate concerning the number of service providers' voluntary emergency disclosures of the contents of electronic communications to the Department of Justice. The report must also summarize the basis for the voluntary disclosure in circumstances where the investigation pertaining to the disclosure was closed without the filing of criminal charges. In addition, section 107(b) of the Act removes the immediacy requirement from the customer records provision and defines "governmental entity" to mean a department or agency of the United States or any State or political subdivision thereof.

Duration of FISA Surveillance and Physical Search Orders and Congressional Oversight Of Their Usage.

The Act extends the maximum duration of FISA electronic surveillance and physical search orders against any agent of a foreign power who is not a U.S. person (e.g., a lone wolf terrorist), by amending section 105(e) of FISA.⁸² Initial orders authorizing such searches may be for a period of up to 120 days, with renewal orders permitted to extend the period for up to one year.

In addition, the Act extends the life time for both initial and extension orders authorizing installation and use of FISA pen registers, and trap and trace surveillance devices⁸³ from a period of 90 days to one year, in cases where the government has certified that the information likely to be obtained is foreign intelligence information not concerning a U.S. person.⁸⁴

Section 109(a) of the Act enhances congressional oversight over the use of physical searches under FISA, by requiring, on a semi-annual basis, the Attorney General:

- to make full reports concerning all physical searches to the Senate Judiciary Committee in addition to the House and Senate Intelligence committees, and
- to submit to the House Judiciary Committee a report with statistical information concerning the number of emergency physical search orders authorized or denied by the Attorney General.⁸⁵

Section 109(b) requires that the report the Attorney General submits to the House and Senate Judiciary Committees semi-annually concerning the number of

⁸² § 105, P.L. 109-177, 120 Stat. 195 (2006), amending 50 U.S.C. 1805(e) and 50 U.S.C. 1824(d).

⁸³ These surveillance devices are used to intercept non-content transactional information which reveals the source and destination of wire and electronic communications, such as telephone dialing information, Internet IP addresses, and e-mail routing and addressing. See definitions of these terms, 18 U.S.C. 3127(3), 18 U.S.C. 3127(4).

⁸⁴ § 105(c), P.L. 109-177, 120 Stat. 195, 196 (2006), adding new 50 U.S.C. 1842(e)(2).

⁸⁵ § 109(a), P.L. 109-177, 120 Stat. 204 (2006), amending 50 U.S.C. 1826.

applications and orders for the FISA use of pen registers or trap and trace devices, must include statistical information regarding the emergency use of such devices.⁸⁶

Information Related to FISA Pen Register and Trap & Trace Devices.

Law enforcement officials may secure an order authorizing the installation and use of a pen register or trap and trace device to obtain information relevant to a criminal investigation, 18 U.S.C. 3122, 3123. They are also entitled to a court order directing a communications provider to supply certain customer information when relevant to a criminal investigation, 18 U.S.C. 2703.⁸⁷ Foreign intelligence officials are entitled to secure a FISA order for installation and use of a pen register or trap and trace device in connection with certain foreign intelligence investigations, 50 U.S.C. 1841-1846. Under its national security letter authority the FBI may request communications providers to supply customer name, address, length of service and local and long distance toll billing records, 18 U.S.C. 2709. Under section 215 of the USA PATRIOT Act, the FBI may obtain a FISA tangible item order for customer records held by a communications provider, 50 U.S.C. 1861.

Section 128(a) of the Act provides that the FISA court may, in its pen register/trap and trace order, direct a service provider to supply customer information relating to use of the device.⁸⁸ The information to be made available is more extensive than what is available under 18 U.S.C. 2709, or to law enforcement officials, but it is not as extensive as the scope of information under a FISA section 215 “tangible item” order; that is —

- (I) in the case of the customer or subscriber using the service covered by the order (for the period specified by the order) —
- (I) the name of the customer or subscriber;
- (II) the address of the customer or subscriber;
- (III) the telephone or instrument number, or other subscriber number or identifier, of the customer or subscriber, including any temporarily assigned network address or associated routing or transmission information;
- (IV) the length of the provision of service by such provider to the customer or subscriber and the types of services utilized by the customer or subscriber;
- (V) in the case of a provider of local or long distance telephone service, any local or long distance telephone records of the customer or subscriber;
- (VI) if applicable, any records reflecting period of usage (or sessions) by the customer or subscriber; and

⁸⁶ § 109(b), P.L. 109-177, 120 Stat. 204, 205 (2006), amending 50 U.S.C. 1846.

⁸⁷ The information available under section 2703 includes “the — (A) name; (B) address; (C) local and long distance telephone connection records, or records of session times and durations; (D) length of service (including start date) and types of service utilized; (E) telephone or instrument number or other subscriber number or identity, including any temporarily assigned network address; and (F) means and source of payment for such service (including any credit card or bank account number), of a subscriber to or customer of such service),” 18 U.S.C. 2703(c)(2).

⁸⁸ § 128(a), P.L. 109-177, 120 Stat. 228 (2006), adding new 50 U.S.C. 1842(d)(2)(C).

(VII) any mechanisms and sources of payment for such service, including the number of any credit card or bank account utilized for payment for such service; and

(I) if available, with respect to any customer or subscriber of incoming or outgoing communications to or from the service covered by the order —

(I) the name of such customer or subscriber;

(II) the address of such customer or subscriber;

(III) the telephone or instrument number, or other subscriber number or identifier, of the customer or subscriber, including any temporarily assigned network address or associated routing or transmission information;

(IV) the length of the provision of service by such provider to the customer or subscriber and the types of services utilized by the customer or subscriber.

The Senate Select Committee on Intelligence observed with respect to an identically worded section in S. 1266, “the FISA audit staff was informed that when a federal court issues an order for criminal pen register or trap and trace device, the court has the authority under 18 U.S.C. 2703(d) to routinely require the service provider to supply subscriber information in its possession for the numbers or e-mail addresses captured by the devices. The FISA pen register/trap and trace provision has no comparable authority. Section 215 of this bill addresses this discrepancy.”⁸⁹.

The amendment would likely simplify the process, but critics might ask why it is necessary since information already seems to be available through use of the national security letter authority under 18 U.S.C. 2709 or the FISA business records “tangible item” authority when used in conjunction with the FISA pen register/trap and trace authority.

Section 128(b) of the Act amends the FISA oversight reporting requirements so that Judiciary Committees receive full reports on the use of the FISA’s pen register and trap and trace authority every six months.⁹⁰

Additions to the Definition of Federal Crime of Terrorism.

Crimes designated as federal crimes of terrorism under 18 U.S.C. 2332b(g)(5) trigger the application of other federal laws, for example, 18 U.S.C. 1961(1)(g) (RICO predicates), 18 U.S.C. 3142 (bail), 18 U.S.C. 3286 (statute of limitations), and 18 U.S.C. 3583 (supervised release). Section 112 of the Act adds two additional offenses to the definition of federal crimes of terrorism: receiving military-type training from a foreign terrorist organization,⁹¹ and drug trafficking in support of terrorism (the “narco-terrorism” provisions of Section 1010A of the Controlled Substances Import and Export Act).⁹²

⁸⁹ S.Rept. 109-85, at 8 (2005).

⁹⁰ § 128(b), P.L. 109-177, 120 Stat. 229 (2006), amending 50 U.S.C. 1846(a).

⁹¹ 18 U.S.C. 2339D.

⁹² § 122, P.L. 109-177, 120 Stat. 225 (2006) adds new 21 U.S.C. 960A concerning “narco-terrorism.”

Expanded List of Predicate Offenses For Wiretaps.

Generally, federal law requires the government to obtain a court order authorizing the interception of wire, oral or electronic communications in the investigation of certain crimes (“predicate offenses”) specifically enumerated in 18 U.S.C. 2516(1). Section 113 of the Act expands the list of predicate offenses in which law enforcement may seek wiretap orders to include crimes relating to biological weapons, violence at international airports, nuclear and weapons of mass destruction threats, explosive materials, receiving terrorist military training, terrorist attacks against mass transit, arson within U.S. special maritime and territorial jurisdiction, torture, firearm attacks in federal facilities, killing federal employees, killing certain foreign officials, conspiracy to commit violence overseas, harboring terrorists, assault on a flight crew member with a dangerous weapon, certain weapons offenses aboard an aircraft, aggravated identity theft, “smurfing” (a money laundering technique whereby a large monetary transaction is separated into smaller transactions to evade federal reporting requirements on large transactions), and criminal violations of certain provisions of the Sherman Antitrust Act.

Attacks Against Railroad Carriers and Mass Transportation Systems.

Section 110 of the Act merges 18 U.S.C. 1992 (outlawing train wrecking) and 18 U.S.C. 1993 (outlawing attacks on mass transportation system) into a new 18 U.S.C. 1992 intended to provide uniform offense elements and penalties for attacks on all transportation systems on land, on water, or through the air. In addition, the Act explicitly provides criminal punishment for the *planning* of terrorist attacks and other acts of violence against railroads and mass transportation systems;⁹³ previous law had only criminalized committing such attacks or attempting, threatening, or conspiring to do so.

Punishment under this new criminal statute is imprisonment for not more than 20 years, but if the offense results in the death of any person, then imprisonment of any years or for life or the death penalty, although the death penalty is not available for inchoate forms of the offense (planning, conveying false information, attempting, threatening, or conspiring). Furthermore, the new 18 U.S.C. 1992 enhances the penalties for committing these criminal acts in circumstances that constitute an aggravated offense, by authorizing imprisonment for any term of years or life, or where death results, the death penalty. Finally, the new 18 U.S.C. 1992 defines covered conveyances and their systems to include passenger vessels.⁹⁴

⁹³ § 110(a), P.L. 109-177, 120 Stat. 206 (2006), adding new 18 U.S.C. 1992(a)(8) (making it a crime to surveil, photograph, videotape, diagram, or otherwise collect information with the intent to plan or assist in planning, an attack against mass transportation systems).

⁹⁴ § 110(a), P.L. 109-177, 120 Stat. 207, 208 (2006), adding new 18 U.S.C. 1992(d)(7).

Asset Forfeiture.

Federal law permits U.S. confiscation of property derived from certain drug offenses committed in violation of foreign law,⁹⁵ and also permits U.S. confiscation of all assets, foreign or domestic, associated with certain terrorist offenses.⁹⁶ Section 111 of the Act amends the general civil forfeiture statute to authorize seizure of property within U.S. jurisdiction constituting, derived from, or traceable to, any proceeds obtained in (or any property used to facilitate) an offense that involves trafficking in nuclear, chemical, biological, or radiological weapons technology or material, if such offense is punishable under foreign law by death or imprisonment for a term exceeding one year or would be so punishable if committed within U.S. jurisdiction.⁹⁷

In addition, the Act changes the reference for the definition of terrorism as used in the asset forfeiture provision under section 806 of the USA PATRIOT Act. Prior to the Act, 18 U.S.C. 981(a)(1)(G) called for the confiscation of property of those planning or engaged in acts of domestic or international terrorism (as defined in 18 U.S.C. 2331) against the United States or its citizens. Domestic terrorism is defined in 18 U.S.C. 2331 (section 802 of the USA PATRIOT Act), and includes acts dangerous to human life in violation of state or federal law committed to influence the policy of a government or civilian population by intimidation or coercion, 18 U.S.C. 2331(5). Critics might suggest that the juxtaposition of the definition and the confiscation provisions of section 981(a)(1)(G) could result in the confiscation of the property of political action organizations whose members became involved in a picket sign swinging melee with counter-demonstrators.⁹⁸ In contrast, 18 U.S.C. 2332b(g)(5)(B) seems less susceptible to such challenges since it defines terrorism by reference to violations of specific federal terrorist offenses rather than the generic, violation of state or federal law found in section 2331.

Thus, section 120 of the Act replaces terrorism defined in 18 U.S.C. 2331 with terrorism defined in 18 U.S.C. 2332b(g)(5)(B) as the ground for confiscation under

⁹⁵ 18 U.S.C. 981(a)(1)(B).

⁹⁶ 18 U.S.C. 981(a)(1)(G).

⁹⁷ §111, P.L. 109-177, 120 Stat. 209 (2006), amending 18 U.S.C. 981(a)(1)(B)(I).

⁹⁸ 151 CONG. REC. H6262 (daily ed. July 21, 2005)(statement of Rep. Delahunt) (“This is about domestic terrorism and the definition of domestic terrorism. And while it does not create a new crime under the PATRIOT Act, the definition triggers an array of expanded governmental authorities, including enhanced civil asset seizure powers. It is so broadly defined that it could include acts of civil disobedience because they may involve acts that endanger human life...”); 151 CONG. REC. H6262-263 (daily ed. July 21, 2005) (statement of Rep. Sensenbrenner)(“There are various definitions of terrorism under Federal law. In title XVIII there has been a confusion over a new definition created in the USA PATRIOT Act for domestic terrorism. That provision is supposed to be used for administrative procedures such as nationwide searches, but another part of the PATRIOT Act, section 806, uses the reference for asset forfeiture, which is more of a penalty. This has raised concerns about those who exercise their first amendment rights. As a result, groups from both sides of the political spectrum have wanted to change the definition for domestic terrorism. This amendment fixes the problem...”).

section 981(a)(1)(G). It does so by amending 18 U.S.C. 981(a)(1)(G) so that it calls for the confiscation of property of those planning or engaged acts of domestic or international terrorism (as defined in 18 U.S.C. 2332b(g)(5)(B)) against the United States or its citizens.

Victims Access Forfeiture Fund. Section 981 of title 18 of the United States Code describes various forms of property that are subject to confiscation by the United States because of their proximity to various federal crimes. The proceeds from the confiscation of crime-related property are generally available for law enforcement purposes to the law enforcement agencies that participate in the investigation and prosecution that results in the forfeiture, e.g., 18 U.S.C. 981(e). The funds realized from the collection of criminal fines are generally available for victim compensation and victim assistance purposes, 42 U.S.C. 10601. Victims of violent federal crimes are entitled to restitution, 18 U.S.C. 3663A, and victims of other federal crimes are eligible for restitution, 18 U.S.C. 3663.

Section 127 of the Act expresses the sense of Congress that under section 981 victims of terrorist attacks should have access to the assets of terrorists that have been forfeited.

Miscellanea.

This section of the report discusses miscellaneous provisions of Title I of the Act which are not easily classifiable within the subheadings above.

FISA Court Rules and Procedures. Section 109(d) of the Act requires the FISA court to publish its rules and procedures and transmit them in unclassified form to all judges on the FISA court, the FISA Court of Review, the Chief Justice of the United States, and the House and Senate Judiciary and Intelligence Committees.

The U.S. Citizenship and Immigration Services. The Act directs the Secretary of Homeland Security to report to the House and Senate Judiciary Committees semi-annually regarding the internal affairs operations and investigations of the U.S. Citizenship and Immigration Services. The first such written report is to be submitted no later than April 1, 2006.⁹⁹

Cigarette Smuggling. Federal law proscribes trafficking in contraband cigarettes.¹⁰⁰ Violations are punishable by imprisonment for up to five years,¹⁰¹ and constitute racketeering predicate offenses.¹⁰² During debate on the House floor,

⁹⁹ § 109(c), P.L. 109-177, 120 Stat. 205 (2006).

¹⁰⁰ 18 U.S.C. 2341-2346

¹⁰¹ 18 U.S.C. 2344.

¹⁰² 18 U.S.C. 1961(1). Federal racketeer influenced and corrupt organization laws (RICO) proscribe the acquisition or operation of an enterprise, whose activities affected interstate or foreign commerce, through the patterned commission of other specifically designated crimes (predicate offenses); offenders face imprisonment for up to 20 years and confiscation

several Members pointed to the fact that in at least one instance terrorists had resorted to cigarette smuggling as a financing mechanism.¹⁰³

Section 121 amends federal law by lowering the threshold definition of contraband cigarettes, from “a quantity in excess of 60,000 cigarettes” to 10,000 cigarettes, and adds a new provision for contraband smokeless tobacco, defined as a quantity in excess of 500 cans or packages of smokeless tobacco. Additionally, the Act creates a federal cause action against violators (other than Indian tribes or Indians in Indian country) for manufacturers, exporters, and state and local authorities.¹⁰⁴

Narco-Terrorism. The federal Controlled Substances Act prohibits drug trafficking with severe penalties calibrated according to the kind and volume of drugs and the circumstances involved¹⁰⁵ (e.g., trafficking in 50 grams or more of crack cocaine is punishable by imprisonment for not less than 10 years and for not more than life; distributing a small amount of marijuana for no remuneration is punishable by imprisonment for not more than one year).¹⁰⁶ Drug offenses that involved additional egregious circumstances are often subject to multiples of the sanctions for the underlying offense.¹⁰⁷ Providing material support for the commission of a terrorist crime or to a designated foreign terrorist organization is likewise a federal crime, punishable by imprisonment for not more than 15 years.¹⁰⁸

Section 122 of the Act outlaws drug trafficking — for the benefit of a foreign terrorist organization as defined in the immigration laws, 8 U.S.C. 1182(a)(3)(B), or of a person who has or is engaged in terrorism as defined in 22 U.S.C. 2656f(d)(2) (politically motivated violence against civilian targets) — under a wide range of jurisdictional circumstances.¹⁰⁹ The offense can only be committed with the

¹⁰² (...continued)

of offense related property, 18 U.S.C. 1961-1963.

¹⁰³ 151 CONG. REC. H6284 (daily ed. July 21, 2005) (statements of Reps. Coble, Sensenbrenner, Cantor, and Kildee).

¹⁰⁴ § 121(f), P.L. 109-177, 120 Stat. 223, 224 (2006), adding new 18 U.S.C. 2346(b).

¹⁰⁵ 21 U.S.C. 841-971.

¹⁰⁶ 21 U.S.C. 841, 844.

¹⁰⁷ *See, e.g.*, 21 U.S.C. 859 (sale of drugs to a child: twice the normal penalty); 861 (use a child in drug trafficking: twice the normal penalty); 861(f) (sale of drugs to a pregnant woman: twice the normal penalty).

¹⁰⁸ 18 U.S.C. 2339A, 2339B.

¹⁰⁹ § 122, P.L. 109-177, 120 Stat. 225 (2006), adding new 21 U.S.C. 960A(b) (“There is jurisdiction over an offense under this section if — (1) the prohibited drug activity or the terrorist offense is in violation of the criminal laws of the United States; (2) the offense, the prohibited drug activity, or the terrorist offense occurs in or affects interstate for foreign commerce; (3) an offender provides anything of pecuniary value for a terrorist offense that causes or is designed to cause death or serious bodily injury to a national of the United States while that national is outside the United States, or substantial damage to the property of a legal entity organized under the laws of the United States (including any of its States,

(continued...)

knowledge of the terrorist misconduct of its beneficiaries. Violators face imprisonment for not less than twice the minimum penalty for drug trafficking under 21 U.S.C. 841(b)(1) nor more than life, and period of supervised release of not less than five years.¹¹⁰ The Act also expressly prohibits attempts and conspiracies to violate the new section. It may be that 21 U.S.C. 963 would have produced the same result in the absence of an express provision, since it punishes attempts and conspiracies to commit any offense defined in the Controlled Substances Act. It may also be that in conjunction, section 963 and the new section outlaw conspiracies to attempt a substantive violation of the new section.

Interference With the Operation of an Aircraft. It is a federal crime to destroy an aircraft or its facilities under various circumstances giving rise to federal jurisdiction or to attempt, or conspire to do so, 18 U.S.C. 32. Violations are punishable by imprisonment for not more than 20 years. It is likewise a federal crime to interfere with a member of a flight crew in the performance of their duties; this too is punishable by imprisonment for not more than 20 years (or imprisonment for any term of years or for life in the case of assault with a dangerous weapon), 49 U.S.C. 46504.

Section 123 of the Act amends 18 U.S.C. 32 to make it a federal crime to interfere or disable the operator of an aircraft or aircraft facility with reckless disregard for human safety or with the intent to endanger, subject to the same sanctions that apply to other violations of the section. By operation of section 32, the new prohibition extends to attempts and conspiracies to engage in such conduct, 18 U.S.C. 32(a)(7)(redesignated 18 U.S.C. 32(a)(8)).

Investigation of Political Activities. FISA bars the use of various information collection techniques in the course of a foreign intelligence investigation, if the investigation is based solely on the exercise of First Amendment protected rights, 50 U.S.C. 1805(a)(3)(A), 1824(a)(1)(A), 1942(a)(1).

Section 124 of the Act expresses the sense of Congress that the federal government should not conduct criminal investigations of Americans based solely on their membership in non-violent political organizations or their participation in other lawful political activity.

¹⁰⁹ (...continued)

districts, commonwealths, territories, or possessions) while that property outside of the United States; (4) the offense or the prohibited drug activity occurs in whole or in part outside of the United States including on the high seas), and a perpetrator of the offense or the prohibited drug activity is a national of the United States or a legal entity organized under the laws of the United States (including any of its States, districts, commonwealths, territories, or possessions); or (5) after the conduct required for the offense occurs an offender is brought into or found in the United States, even if the conduct required for the offense occurs outside the United States.”) In cases where neither the support, the drug offense, nor the terrorism have any connection to the U.S. other than the later presences of the offender here, paragraph 960A(b)(5) may exceed Congress’s legislative reach unless the benefit of a treaty obligation can be claimed.

¹¹⁰ § 122, P.L. 109-177, 120 Stat. 225 (2006), adding new 21 U.S.C. 960A.

Immunity for Fire Equipment Donors. Section 125 grants immunity from civil liability to the donors (other than manufacturers) of fire equipment to volunteer fire organizations.

Federal Data Mining Report. Section 126 directs the Attorney General to submit a report to Congress within a year after the date of the Act’s enactment, concerning the Department of Justice’s use or development of “pattern-based” data mining technologies. While the Act provides a definition of “data-mining,”¹¹¹ it does not define “pattern-based.”¹¹²

Title II: Terrorist Death Penalty Enhancement Act of 2005

Title II of the Act makes several adjustments in federal death penalty law, which concern air piracy cases arising before 1994, a redundant procedural mechanism in federal capital drug cases, supervised release for terrorism offenses, and a transfer of the law governing the appointment of counsel in capital cases.

Pre-1994 Capital Air Piracy Cases.

In the late 1960s and early 1970s, the U.S. Supreme Court held unconstitutional the imposition of capital punishment under the procedures then employed by the federal government and most of the states.¹¹³ In 1974, Congress established a revised

¹¹¹ § 126, P.L. 109-177, 120 Stat. 228 (2006).

¹¹² The want of definition may be significant because the terms are not hermetically sealed legal concepts, *see, e.g., Safeguarding Privacy in the Fight Against Terrorism, Report of the Technology and Privacy Advisory Committee*, 45 (March 2004) (“data mining includes ‘pattern-based’ searches . . . These [might] involve developing models of what terrorist behavior might look like and then examining databases for similar patterns. This is similar to commercial data mining techniques — businesses develop a pattern of attributes or behaviors that their good customers have in common, and then search databases to find people meeting those patterns — but potentially far more powerful given the range of data to which the government has access and the capacity of data mining to eliminate the need to aggregate data before searching them. As we use the term, data mining may also include ‘subject-based’ searches, which look for information about a specific individual or links to known terrorist suspects. This has long been a basic tool of criminal investigators everywhere: start with known suspects and, with proper authorization (in many cases, a warrant or a subpoena), look for information about them and the people with whom they interact. However, the power of data mining technology and the range of data to which the government has access have contributed to blurring the line between subject- and pattern-based searches. The broader the search criteria, and the more people other than actual terrorist who will be identified by those criteria, the more pattern-like these searches become. Even when a subject-based search starts with a known suspect, it can be transformed into a pattern-based search as investigators target individuals for investigation solely because of their connection with the suspect. The more tenuous the connection, the more like a pattern-based search it becomes. Searches that lack specific focus on identified suspects do pose greater risk for U.S. persons and should be subject to greater scrutiny and accountability”).

¹¹³ *Furman v. Georgia*, 408 U.S. 238 (1972).

procedure for imposition of the death penalty in certain air piracy cases.¹¹⁴ In 1994, when Congress made the procedural adjustments necessary to revive the death penalty as a sentencing option for other federal capital offenses, it replaced the air piracy procedures with those of the new regime.¹¹⁵ At least one court, however, held that the new procedures could not be applied retroactively to air piracy cases occurring after the 1974 fix but before the 1994 legislation, in the absence of an explicit statutory provision.¹¹⁶

Section 211 of the Act adds an explicit provision to the end of the 1994 legislation.¹¹⁷ The amendment provides for the application of the existing federal capital punishment procedures, 18 U.S.C. ch.228, in addition to consideration of the mitigating and aggravating factors in place prior to the 1994 revival.¹¹⁸ Section 211 also provides for severance should any of the 1994 factors be found constitutionally invalid, and includes a definition of “especially heinous, cruel, or depraved” used as an aggravating factor in section 46503, to avoid the vagueness problems that might otherwise attend the use of such an aggravating factor.¹¹⁹

The conference report accompanying H.R. 3199 notes that the changes apply to a relative small group of individuals responsible for murders committed during the course of hijackings in the mid 1980’s who would otherwise be eligible for parole within 10 years of sentencing and could not be effectively sentenced to more than 30 years in prison.¹²⁰

¹¹⁴ P.L. 93-366, 88 Stat. 409 (1974), 49 U.S.C. 1473 (1976 ed.)

¹¹⁵ P.L. 103-322, 108 Stat. 1796, 1970 (1994), 18 U.S.C. 3591-3598.

¹¹⁶ *United States v. Safarini*, 257 F.Supp.2d 191, 202-3 (D.D.C. 2003).

¹¹⁷ § 211(a), P.L. 109-177, 120 Stat. 230 (2006), adding subsection 60003(c) to P.L. 103-322, 108 Stat.1970 (1994).

¹¹⁸ P.L. 103-272, 108 Stat. 1242 (1994). Because the 1994 legislation was enacted almost immediately after recodification of title 49, 49 U.S.C. 46503 never appeared in the official United States Code or any of its supplements. The predecessor to 49 U.S.C. 46503 as repealed in the 1994 capital punishment revival statute appears in 49 U.S.C. App. 1473 (1988 ed.).

¹¹⁹ *See, e.g., Maynard v. Cartwright*, 486 U.S. 356, 359-61 (1988).

¹²⁰ H.Rept. 109-333, at 101 (2005) (“This provision is particularly important for several reasons. In the absence of a death penalty that could be implemented for pre-FDPA hijacking offenses resulting in death that also occurred before the effective date of the Sentencing Guidelines on November 1, 1987, the maximum penalty available would be life imprisonment. Under the pre-Sentencing Guidelines structure, even prisoners sentenced to life imprisonment were eligible for a parole hearing after serving only ten years. While there is a split in the Circuit Courts of Appeals as to whether a sentencing judge can impose a sentence that could avert the 10-year parole hearing requirement, the current position of the Bureau of Prisons is that a prisoner is eligible for a parole hearing after serving ten years of a life sentence. Even if parole is denied on that first occasion, such prisoners are eligible to have regularly scheduled parole hearings every two years thereafter. Moreover, in addition to parole eligibility after ten years, the old sentencing and parole laws incorporated a presumption that even persons sentenced to life imprisonment would be released after no
(continued...)”)

Life Time Supervised Release Regardless of Risks.

Prior to the Act, a federal court could have imposed a sentence of supervised release, to be served upon release from prison, of any term of years or life *if* the defendant has been convicted of a federal crime of terrorism (18 U.S.C. 2332b(g)(5)(B)) involving the foreseeable risk of physical injury of another, 18 U.S.C. 3583(j).¹²¹ Section 212 of the Act amends section 3583(j) to eliminate the

¹²⁰ (...continued)

more than 30 years. In the context of the individuals responsible for the hijacking incidents described above, most of the perpetrators were no older than in their twenties when they committed their crimes. The imposition of a pre-Guidelines sentence of life imprisonment for these defendants means that many, if not all of them, could be expect to be released from prison well within their lifetime. Given the gravity of these offenses, coupled with the longstanding Congressional intent to have a death penalty available for the offense of air piracy resulting in death, such a result would be at odds with the clear directive of Congress.”)

¹²¹ The federal crimes of terrorism are violations of: 18 U.S.C. 32 (destruction of aircraft or aircraft facilities), 37 (violence at international airports), 81 (arson within special maritime and territorial jurisdiction), 175 or 175b (biological weapons), 175c (variola virus), 229 (chemical weapons), subsection (a), (b), (c), or (d) of section 351 (congressional, cabinet, and Supreme Court assassination and kidnaping), 831 (nuclear materials), 842(m) or (n) (plastic explosives), 844(f)(2) or (3) (arson and bombing of Government property risking or causing death), 844(I) (arson and bombing of property used in interstate commerce), 930(c) (killing or attempted killing during an attack on a Federal facility with a dangerous weapon), 956(a)(1) (conspiracy to murder, kidnap, or main persons abroad), 1030(a)(1) (protection of computers), 1030(a)(5)(A)(I) resulting in damage as defined in 1030(a)(5)(B) (ii) through (v) (protection of computers), 1114 (killing or attempted killing of officers and employees of the United States), 1116 (murder or manslaughter of foreign officials, official guests, or internationally protected persons), 1203 (hostage taking), 1361 (government property or contracts), 1362 (destruction of communication lines, stations, or systems), 1366(a) (destruction of an energy facility), 1751(a), (b), (c), or (d) (Presidential and Presidential staff assassination and kidnaping), 1992 (train wrecking), 1993 (terrorist attacks and other acts of violence against mass transportation systems), 2155 (destruction of national defense materials, premises, or utilities), 2156 (national defense material, premises, or utilities), 2280 (violence against maritime navigation), 2281 (violence against maritime fixed platforms), 2332 (certain homicides and other violence against United States nationals occurring outside of the United States), 2332a (use of weapons of mass destruction), 2332b (acts of terrorism transcending national boundaries), 2332f (bombing of public places and facilities), 2332g (missile systems designed to destroy aircraft), 2332h (radiological dispersal devices), 2339 (harboring terrorists), 2339A (providing material support to terrorists), 2339B (providing material support to terrorist organizations), 2339C (financing of terrorism), 2340A (torture); 42 U.S.C. 2122 (prohibitions governing atomic weapons), 2284 (sabotage of nuclear facilities or fuel); 49 U.S.C. 46502 (aircraft piracy), the second sentence of 46504 (assault on a flight crew with a dangerous weapon), 46505(b)(3) or (c) (explosive or incendiary devices, or endangerment of human life by means of weapons, on aircraft), 46506 if homicide or attempted homicide is involved (application of certain criminal laws to acts on aircraft), and 60123 (b) (destruction of interstate gas or hazardous liquid pipeline facility). Section 112 of the Act adds 18 U.S.C. 2339D (foreign military training) and 21 U.S.C. 1010A (narco-terrorism) to the list, 18 U.S.C. 2332b(g)(5)(B) as amended by the Act.

requirement that the defendant be convicted of a crime involving a foreseeable risk of injury; conviction of any federal crime of terrorism is sufficient.

Capital Procedures in Drug Cases.

Prior to the Act, federal law provided two sets of death penalty procedures for capital drug cases, the procedures applicable in federal capital cases generally, 18 U.S.C. 3591-3598, and the procedures specifically applicable in federal capital drug cases, 21 U.S.C. 848. The two procedures are virtually identical according to *United States v. Matthews*, 246 F.Supp.2d 137, 141 (N.D.N.Y. 2002). Section 221 of the Act eliminates the specific drug case procedures so that only the general procedures apply in such cases. According to the conference report accompanying H.R. 3199, this “eliminates duplicative death procedures under title 21 of the United States code, and consolidates procedures governing all Federal death penalty prosecutions in existing title 18 of the United States Code, thereby eliminating confusing requirements that trial courts provide two separate sets of jury instructions.”¹²²

Appointment of Counsel in Capital Cases.

Prior to the Act, the federal capital drug provisions housed provisions for the appointment of counsel to assist indigents facing federal capital charges and indigent federal and state death row inmates during federal habeas proceedings, 21 U.S.C. 848(q)(4)-(10). Section 222 of the Act transfers these provisions to title 18.¹²³

Title III: Reducing Crime and Terrorism at America’s Seaports Act of 2005

Title III of the Act, among other things, creates more severe criminal penalties concerning criminal and terrorist activities committed at U.S. seaports or aboard vessels.

Seaport Entry by False Pretenses.

The Maritime Transportation Security Act requires the submission to the Department of Homeland Security of vessel and facility security plans that include provisions for establishing and controlling secure areas, 46 U.S.C. 70103(c). It also calls for issuance of transportation security cards in order to regulate access to secure areas, 46 U.S.C. 70105. It contains no specific provisions regarding trespassing upon security areas, but the Coast Guard and Maritime Transportation Act amended its provisions in a manner that suggests the application of state criminal laws as well as criminal sanctions found in the Deepwater Port Act, 33 U.S.C. 1514 (imprisonment for not more than one year); the Ports and Waterways Safety Act, 33 U.S.C. 1232

¹²² H.Rept. 109-333, at 102 (2005).

¹²³ § 222, P.L. 109-177, 120 Stat. 231 (2006), adding new 18 U.S.C. 3599.

(imprisonment for not more than 10 years); and the act of June 15, 1917, 50 U.S.C. 192 (imprisonment for not more than 10 years).¹²⁴

As a general matter, it is a federal crime to use fraud or false pretenses to enter federal property, a vessel or aircraft of the United States, or the secured area in an airport, 18 U.S.C. 1036. The offense is punishable by imprisonment for not more than five years if committed with the intent to commit a felony and imprisonment for not more six months in other cases. The same maximum penalty applies to making a false statement to federal officials or in any matter within the jurisdiction of a federal agency or department, 18 U.S.C. 1001. Possession of phony government identification to defraud the U.S. is a one-year felony, absent further aggravating circumstances under which the sanctions are increased, 18 U.S.C. 1028 (a)(4), (b)(6). Moreover, except to the extent covered by 18 U.S.C. 1036 or 18 U.S.C. 1863 (trespassing in the national forests), unlawful entry to property (federal or otherwise) with the intent to commit a second crime is punishable under the laws of the state in which it occurs, cf., 18 U.S.C. 13.

Section 302 of the Act expands 18 U.S.C. 1036 to cover seaports and increases the penalty for violations with respect to any of the protected areas committed with the intent to commit a felony, from imprisonment for not more than five years to imprisonment for not more than 10 years, amended 18 U.S.C. 1036.¹²⁵ The section also provides a definition of “seaport.”¹²⁶

¹²⁴ 46 U.S.C. 70119 expressly authorizes state and local law enforcement officers to make arrests for violations of these Acts, and notes that the authority is in addition and should not be construed to limit any other authority they may possess.

¹²⁵ “(a)Whoever, by any fraud or false pretense, enters or attempts to enter — (1) any real property belonging in whole or in part to, or leased by, the United States; (2) any vessel or aircraft belonging in whole or in part to, or leased by, the United States; (3) *any secured or restricted area of any seaport, designated as secure in an approved security plan, as required under section 70103 of title 46, United States Code, and the rules and regulations promulgated under that section*; or (4) any secure area of any airport, shall be punished as provided in subsection (b) of this section.

“(b) The punishment for an offense under subsection (a) of this section is — (1) a fine under this title or imprisonment for not more than [5 years] *10 years*, or both, if the offense is committed with the intent to commit a felony; or (2) a fine under this title or imprisonment for not more than 6 months, or both, in any other case,” 18 U.S.C. 1036(a),(b) as amended by the Act (changes are in italics - deletions in bold).

¹²⁶ “As used in this title, the term ‘seaport’ means all piers, wharves, docks, and similar structures, adjacent to any waters subject to the jurisdiction of the United States, to which a vessel may be secured, including areas of land, water, or land and water under and in immediate proximity to such structures, buildings on or contiguous to such structures, and the equipment and materials on such structures or in such buildings,” new 18 U.S.C. 26 as added by the Act. The term “seaport” does not appear to have been used in any other section of title 18; elsewhere in federal law the term “port” is more commonly used, *see, e.g.*, 6 U.S.C. 468 (Coast Guard’s homeland security mission), 18 U.S.C. 2199(stowaways), perhaps to make clear that ports such as those on Great Lakes are covered notwithstanding the fact they may not ordinarily be thought of as “seaports.”

The conference report accompanying H.R. 3199 quotes the Interagency Commission report and describes the problems the amendments are designed to address:

According to the Report of the Interagency Commission ... '[c]ontrol of access to the seaport or sensitive areas within the seaport is often lacking.' Such unauthorized access is especially problematic, because inappropriate controls may result in the theft of cargo and more dangerously, undetected admission of terrorists. In addition to establishing appropriate physical, procedural, and personnel security for seaports, it is important that U.S. criminal law adequately reflect the seriousness of the offense.¹²⁷

However, critics might point out that the section does not deal with all "unauthorized access," only access accomplished by fraud. And, they argue, even if the seriousness of such unauthorized access to seaport restricted areas with criminal intent might warrant imprisonment for up to 10 years, there is nothing in conference or Commission reports to explain the necessity for the comparable penalty increase for the other forms of trespassing upon the other areas covered under section 1036.

Obstructing Maritime Inspections.

Various federal laws prohibit the failure to heave to or otherwise obstruct specific maritime inspections under various circumstances.¹²⁸

Section 303 of the Act establishes a new, general federal crime that outlaws, in the case of vessel subject to the jurisdiction of the United States, the failure to heave to, or to forcibly interfere with the boarding of the vessel by federal law enforcement or resist arrest, or to provide boarding federal law enforcement officers with false information concerning the vessel's cargo, origin, destination, registration, ownership, nationality or crew.¹²⁹ The crime is punishable by imprisonment for not more than five years.

Interference with Maritime Commerce.

Federal law prohibits violence against maritime navigation, 18 U.S.C. 2280, burning or bombing vessels, 18 U.S.C. 2275, burning or bombing property used in or whose use affects interstate or foreign commerce, 18 U.S.C. 844(I), destruction of property within the special maritime and territorial jurisdiction of the United States, 18 U.S.C. 1363. None of them are punishable by life imprisonment unless death results from their commission.¹³⁰

¹²⁷ H.Rept. 109-333, at 103 (2005).

¹²⁸ *See, e.g.*, 16 U.S.C. 2435, 2438 (enforcement of the Antarctic Marine Living Resources Convention); 16 U.S.C. 5505, 5508 (high seas fishing compliance).

¹²⁹ § 303(a), P.L. 109-177, 120 Stat. 233, 234, adding new 18 U.S.C. 2237.

¹³⁰ For example, section 2280, which among other things, "prohibits destroy[ing] a ship or caus[ing] damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship" or attempting or conspiring to do so is punishable by imprisonment for not more
(continued...)

Section 304 of the Act creates two new federal crimes. The first makes it a federal crime punishable by imprisonment for any term of years or for life (or the death penalty if death results) to place a dangerous substance or device in the navigable waters of the United States with the intent to damage a vessel or its cargo or to interfere with maritime commerce.¹³¹

The second of section 304's provisions makes it a federal crime punishable by imprisonment for not more than 20 years to tamper with any navigational aid maintained by the Coast Guard or St. Lawrence Seaway Development Corporation in manner likely to endanger navigation, new 18 U.S.C. 2282B as added by the Act. Opponents may find the sanctions a bit stiff, but in the words of the conference report, "the Coast Guard maintains over 50,000 navigational aids on more than 25,000 miles of waterways. These aids ... are inviting targets for terrorists."¹³² There may also be some question why the new section is necessary given that section 306 of the Act provides, "Whoever knowingly ... damages, destroys, or disables ... any aid to navigation ... shall be ... imprisoned not more than 20 years," new 18 U.S.C. 2291(a)(3) as added by the Act; *see also*, new 18 U.S.C. 2291(a)(4) as added by section 306 of the Act ("Whoever knowingly interferes by force or violence with the operation of ... any aid to navigation ..., if such action is likely to endanger the safety of any vessel in navigation").

Transporting Dangerous Materials or Terrorists.

Section 305 of the Act establishes two other federal terrorism-related transportation offenses, one for transporting dangerous materials and the other for transporting terrorists.

Transporting Dangerous Materials. It is a federal crime to possess biological agents, chemical weapons, atomic weapons, and nuclear material, each punishable by imprisonment for any term of years or for life.¹³³ And although the penalties vary, it is likewise a federal crime to commit any federal crime of terrorism.¹³⁴ Moreover, it is a federal crime to provide material support, including transportation, for commission of various terrorist crimes or for the benefit of a designated terrorist organization, 18 U.S.C. 2339A, 2339B, or to transport explosives in interstate or foreign commerce with the knowledge they are intended to be used in injure an individual or damage property, 18 U.S.C. 844(d). Most of these offenses

¹³⁰ (...continued)

than 20 years or if death results by death or imprisonment for life or any term of years, 18 U.S.C. 2280(a)(1)(C),(H).

¹³¹ § 304, P.L. 109-177, 120 Stat. 235, adding new 18 U.S.C. 2282A

¹³² H.Rept. 109-333, at 103 (2005).

¹³³ 18 U.S.C. 175, 229, 831; 42 U.S.C. 2272.

¹³⁴ Each crime designated in 18 U.S.C. 2332b(g)(5)(B) carries its own penalty.

condemn attempts and conspiracies to commit them, and accomplices and coconspirators incur comparable liability in any event.¹³⁵

Section 305 of the Act establishes a new federal offense which prohibits transporting explosives, biological agents, chemical weapons, radioactive or nuclear material knowing it is intended for use to commit a federal crime of terrorism — aboard a vessel in the United States, in waters subject to U.S. jurisdiction, on the high seas, or aboard a vessel of the United States.¹³⁶ The crime is punishable by imprisonment for any term of years or for life and may be punishable by death if death results from commission of the offense.

Transporting Terrorists. While it is a crime to harbor a terrorist, 18 U.S.C. 2339, or to provide material support, including transportation, for the commission of a terrorist offense or for the benefit of a foreign designated terrorist organization, 18 U.S.C. 2339A, 2339B, such offenses are only punishable by imprisonment for not more than 15 years. The same perceived defect may appear to some in the penalties for aiding and abetting commission of the various federal crimes of terrorism and in the penalties available for committing many of them.¹³⁷

Section 305 creates a new federal offense, 18 U.S.C. 2284, punishable by imprisonment for any term of years or for life for transporting an individual knowing he intends to commit, or is fleeing from the commission of, a federal crime of terrorism. Unlike the new 18 U.S.C. 2282A(c), created in section 304, neither of the section 305 offenses have an explicit exception for official activities. Of course, even though facially the new section 2284 forbids transporting terrorists for purposes of extradition or prisoner transfer, it would never likely be read or applied to prevent or punish such activity.

Interference With Maritime Navigation.

Chapter 111 of title 18 of the United States Code relates to shipping and by and large outlaws violence in various forms committed against vessels within U.S. jurisdiction.¹³⁸ Other sections of the Code proscribe the use of fire, explosives or violence with sufficient breath of protect shipping under some circumstances. For

¹³⁵ 18 U.S.C. 2; *United States v. Pinkerton*, 328 U.S. 640, 647-48 (1946).

¹³⁶ §305(a), P.L. 109-177, 120 Stat. 236 (2006), adding new 18 U.S.C. 2283.

¹³⁷ For example, destruction of aircraft or violence at international airports in violation of 18 U.S.C. 32 and 73 respectively are punishable by imprisonment for not more than 20 years, unless a death results; and the same penalties apply to computer fraud and abuse violations considered federal crimes of terrorism, 18 U.S.C. 1030(a)(5), (c)(4). Aiding and abetting carries the same penalties as the underlying offense, 18 U.S.C. 2.

¹³⁸ The offenses include 18 U.S.C. 2271 (conspiracy to destroy vessels), 2272 (destruction of vessel by owner); 2273 (destruction of vessel by nonowner); 2274 (destruction or misuse of vessel by person in charge); 2275 (firing or tampering with vessel), 2276 (breaking and entering a vessel); 2277 (explosives or dangerous weapons aboard vessels); 2278 (explosives on vessels carrying steerage passengers); 2279 (boarding vessels before arrival); 2280 (violence against maritime navigation); and 2281 (violence against maritime fixed platforms).

example, one section condemns the use fire or explosives against property used in (or used in an activity affecting) interstate or foreign commerce, 18 U.S.C. 844(I). Another prohibits destruction of property within the maritime jurisdiction of the United States, 18 U.S.C. 1363, and a third, arson within the maritime jurisdiction, 18 U.S.C. 81. Hoaxes relating to violations of chapter 111 are punishable by imprisonment for not more than five years (not more than 20 years if serious injury results and if death results, by imprisonment for any term of years or for life or by death), 18 U.S.C. 1038.

Section 306 of the Act enacts a new chapter 111A supplementing chapter 111 as well as section 1038 and consists of four sections. Of the four sections, two are substantive, proscribing hoaxes and the destruction of vessels or maritime facilities, new 18 U.S.C. 2291, 2292; and two procedural, one providing the jurisdictional base for the substantive offenses, new 18 U.S.C. 2290, and the other barring prosecution of certain misdemeanor or labor violations, new 18 U.S.C. 2993.

According to the conference report accompanying H.R. 3199, “this section harmonizes the somewhat outdated maritime provisions with the existing criminal sanctions for destruction or interference with an aircraft or aircraft facilities in 18 U.S.C. 32, 34, and 35.”¹³⁹ It is not surprising, therefore, that the new destruction offense mirrors the substantive provisions for the destruction of aircraft and their facilities, 18 U.S.C. 32,¹⁴⁰ although it differs from the aircraft prohibition in several

¹³⁹ H.Rept. 109-333, at 104 (2005).

¹⁴⁰ “Whoever knowingly — (1) sets fire to, damages, destroys, disables, or wrecks any vessel; (2) places or causes to be placed a destructive device or substance, as defined in section 31(a)(3), or explosive, as defined in section 844(j) in, upon, or near, or otherwise makes or causes to be made unworkable or unusable or hazardous to work or use, any vessel, or any part or other materials used or intended to be used in connection with the operation of a vessel; (3) sets fire to, damages, destroys, disables or places a destructive device or substance in, upon, or near, any maritime facility, including any aid to navigation, lock, canal, or vessel traffic service facility or equipment; (4) interferes by force or violence with the operation of any maritime facility, including any aid to navigation, lock, canal, or vessel traffic service facility or equipment, if such action is likely to endanger the safety of any vessel in navigation; (5) sets fire to, damages, destroys, or disables or places a destructive device or substance in, upon, or near, any appliance, structure, property, machine, or apparatus, or any facility or other material used, or intended to be used, in connection with the operation, maintenance, loading, unloading or storage of any vessel or any cargo carried or intended to be carried on any vessel; (6) performs an act of violence against or incapacitates any individual on any vessel, if such act of violence or incapacitation is likely to endanger the safety of the vessel or those on board; (7) performs an act of violence against a person that causes or is likely to cause serious bodily injury, as defined in section 1365(h)(3), in, upon, or near, any appliance, structure, property, machine, or apparatus, or any facility or other material used, or intended to be used, in connection with the operation, maintenance, loading, unloading or storage of any vessel or any cargo carried or intended to be carried on any vessel; (8) communicates information, knowing the information to be false and under circumstances in which such information may reasonably be believed, thereby endangering the safety of any vessel in navigation; or (9) attempts or conspires to do anything prohibited under paragraphs (1) through (8) of this subsection, shall be fined under this title or imprisoned not more than 20 years, or both,” 18 U.S.C. 2291(a) as added
(continued...)

respects. First, it has exceptions for lawful repair and salvage operations and for the lawful transportation of hazardous waste, new 18 U.S.C. 2291(b). Second, in the manner of 18 U.S.C. 1993 (attacks on mass transit), it increases the penalty for violations involving attacks on conveyances carrying certain hazardous materials to life imprisonment, new 18 U.S.C. 2291(c). Third, it tightens the “death results” sentencing escalator so that a sentence of death or imprisonment for life or any term of years is only warranted if the offender intended to cause the resulting death, new 18 U.S.C. 2291(d).

In addition to these, the substantive prohibitions of the new section 2291 differ from the otherwise comparable prohibitions of 18 U.S.C. 2280 (concerning violence against maritime navigation) in two major respects. The proscriptions in section 2280 and those of section 32 generally require that the prohibited damage adversely impact on safe operation;¹⁴¹ new section 2291 is less likely to feature a comparable demand.

On the other hand, because it is treaty-based, section 2280 enjoys a broader jurisdictional base than new section 2291 is able to provide for new section 2291. By virtue of new section 2290, a violation of new section 2291 is only a federal crime if it is committed within the United States, or the offender or victim is a U.S. national, or the vessel is a U.S. vessel, or a U.S. national is aboard the vessel involved. In the case of subsection 32(b) or section 2280, there need be no more connection to the United States than that the offender is subsequently found or brought here, 18 U.S.C. 32(b), 2280(b)(1)(c). Like section 2280, however, new section 2291 is subject to exceptions for misdemeanor offenses and labor disputes.¹⁴²

¹⁴⁰ (...continued)

by the Act. Section 2291 carries a 20 year maximum sanction for violations. The other sections cited in the report refer to the death penalty (18 U.S.C. 34) and hoax (18 U.S.C. 35) provisions relating to violations of 18 U.S.C. 32.

¹⁴¹ “A person who unlawfully and intentionally — (A) seizes or exercises control over a ship by force or threat thereof or any other form of intimidation; (B) performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship; (C) destroys a ship or causes damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship; (D) places or causes to be placed on a ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or cause damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship; (E) destroys or seriously damages maritime navigational facilities or seriously interferes with their operation, if such act is likely to endanger the safe navigation of a ship; (F) communicates information, knowing the information to be false and under circumstances in which such information may reasonably be believed, thereby endangering the safe navigation of a ship; (G) injures or kills any person in connection with the commission or the attempted commission of any of the offenses set forth in subparagraphs (A) through (F); or (H) attempts or conspires to do any act prohibited under subparagraphs (A) through (G), shall be fined under this title, imprisoned not more than 20 years, or both; and if the death of any person results from conduct prohibited by this paragraph, shall be punished by death or imprisoned for any term of years or for life,” 18 U.S.C. 2280(a)(1).

¹⁴² “It is a bar to prosecution under this chapter if — (1) if the conduct in question occurred within the United States in relation to a labor dispute, and such conduct is prohibited as a
(continued...)”

New section 2292 creates a hoax offense in the image of 18 U.S.C. 35 which relates to hoaxes in an aircraft context. It sets a basic civil penalty of not more than \$5000 for hoaxes involving violations of the new section 2291 or of chapter 111, the existing shipping chapter.¹⁴³ If the misconduct is committed “knowingly, intentionally, maliciously, or with reckless disregard for the safety of human life,” it is punishable by imprisonment for not more than five years.¹⁴⁴ The Act also requires that in both instances, jurisdiction over the offense is governed by the jurisdiction of the offense that is the subject to the hoax.¹⁴⁵

In the case of hoaxes involving violations of chapter 111, the new section affords the government an alternative ground for prosecution to that offered by 18 U.S.C. 1038.

Theft From Maritime Commerce.

Section 307 of the Act expands or clarifies the application of various criminal provisions particularly in the case of maritime commerce.

Theft From Interstate Commerce. Federal law prohibits theft from shipments traveling in interstate or foreign commerce; violations are punishable by imprisonment for not more than 10 years (not more than one year if the value of the property stolen is \$1000 or less), 18 U.S.C. 659.

Section 307 increases the penalty for theft of property valued at \$1000 or less to imprisonment for not more than three years, 18 U.S.C. 659 as amended by the Act. It also makes it clear that theft from trailers, cargo containers, freight stations, and warehouses are covered, and that the theft of goods awaiting transshipment is also covered, 18 U.S.C. 659 as amended by the Act.

Interstate or Foreign Transportation of Stolen Vessels. Interstate or foreign transportation of a stolen vehicle or aircraft is punishable by imprisonment for not more than 10 years, 18 U.S.C. 2312; receipt of a stolen vehicle or aircraft that has been transported in interstate or foreign commerce carries the same penalty, 18 U.S.C. 2313.

¹⁴² (...continued)

felony under the law of the State in which it was committed; or (2) such conduct is prohibited as a misdemeanor, and not a felony, under the law of the State in which it was committed,” new 18 U.S.C. 2293(a) as added by § 306 of the Act, 120 Stat. 239 (2006).

¹⁴³ “Whoever imparts or conveys or causes to be imparted or conveyed false information, knowing the information to be false, concerning an attempt or alleged attempt being made or to be made, to do any act that would be a crime prohibited by this chapter or by chapter 111 of this title, shall be subject to a civil penalty of not more than \$5,000, which shall be recoverable in a civil action brought in the name of the United States,” new 18 U.S.C. 2292(a) as added by § 306 of the Act, 120 Stat. 239 (2006).

¹⁴⁴ § 306, P.L. 109-177, 120 Stat. 239 (2006), adding new 18 U.S.C. 2292(b).

¹⁴⁵ § 306, P.L. 109-177, 120 Stat. 239 (2006), adding new 18 U.S.C. 2292(c).

Section 307 expands the coverage of federal law to cover the interstate or foreign transportation of a stolen vessel and receipt of a stolen vessel that has been transported in interstate or overseas, 18 U.S.C. 2311 as amended by the Act. The United States Sentencing Commission is to review the sentencing guidelines application to violations of 18 U.S.C. 659 and 2311. The Attorney General is to see that cargo theft information is included in the Uniform Crime Reports and to report annually to Congress on law enforcement activities relating to theft from interstate or foreign shipments in violations of 18 U.S.C. 659.

Stowaways.

Stowing away on a vessel or an aircraft is a federal crime; offenders are subject to imprisonment for not more than one year, 18 U.S.C. 2199. Section 308 of the Act increases the penalty for stowing away from imprisonment for not more than one year to not more than five years (not more than 20 years if the offense is committed with the intent to inflict serious injury upon another or if serious injury to another results; or if death results, by death or imprisonment for any term of years or for life), 18 U.S.C. 2199 as amended by the Act. The “death results” capital punishment provision of the Act is only triggered if the offender *intended* to cause a death, 18 U.S.C. 2199(3) as amended by the Act.

Port Security Bribery.

Bribery of a federal official is punishable by imprisonment for not more than 15 years, 18 U.S.C. 201; many federal crimes of terrorism carry maximum penalties of imprisonment for not more than 20 years or more.¹⁴⁶ Those who aid and abet or conspire for the commission of such crimes are subject to sanctions.¹⁴⁷

Section 309 of the Act makes it a federal crime to bribe any individual (private or public) with respect to various activities within any secure or restricted area or seaport — with the intent to commit international or domestic terrorism (as defined in 18 U.S.C. 2331). Offenders face imprisonment for not more than 15 years, new 18 U.S.C. 226 as added by the Act.

Smuggling Goods Into the United States.

Section 310 increases the sentence of imprisonment for smuggling into the United States from not more than five years to not more than 20 years, 18 U.S.C. 545 as amended by the Act.

Smuggling Goods From the United States.

The penalty for smuggling goods into a foreign country by the owners, operators, or crew of a U.S. vessel is imprisonment for not more than five years, 18

¹⁴⁶ See, e.g., 18 U.S.C. 32 (destruction of aircraft, 20 years), 81 (arson, 25 years), 2332a (weapons of mass destruction, life imprisonment).

¹⁴⁷ 18 U.S.C. 2; *United States v. Pinkerton*, 340 U.S. 640 (1946).

U.S.C. 546. Other penalties apply for smuggling or unlawfully exporting specific goods or materials out of the U.S. or into other countries.¹⁴⁸

Section 311 of the Act creates a new federal crime which outlaws smuggling goods out of the United States; offenders face imprisonment for not more than 10 years, new 18 U.S.C. 554 as added by the Act. Once smuggling from the U.S. is made a federal offense, corresponding changes in federal forfeiture and custom laws become a possibility.

Federal law proscribes laundering the proceeds of various federal crimes (predicate offenses), 18 U.S.C. 1956, 1957. Smuggling goods into the U.S. in violation of 18 U.S.C. 545 is a money laundering predicate offense, 18 U.S.C. 1956(c)(7)(D). The proceeds involved in financial transactions in violation of the money laundering statutes are generally subject to confiscation, 18 U.S.C. 981(a)(1)(A). Section 311 adds the new overseas smuggling crime, 18 U.S.C. 554, to the money laundering predicate offense list, 18 U.S.C. 1956(c)(7)(D) as amended by the Act.

Federal law calls for the confiscation of goods smuggled into the United States and of the conveyances used to smuggle them in, 19 U.S.C. 1595a. Section 311 calls for the confiscation of goods smuggled out of the U.S. and of any property used to facilitate the smuggling, new 19 U.S.C. 1595a(d) as added by the Act.

It is a federal crime to remove property from the custody of the Customs Service. Section 311 increases the penalty for violation of this crime to imprisonment for not more than 10 years, 18 U.S.C. 549 as amended by the Act.

Title IV: Combating Terrorism Financing Act of 2005

Title IV of the Act strengthens penalties for money laundering, particularly related to financing terrorism, and makes changes to forfeiture authority. There is also a provision that might be construed to permit pre-trial asset freezes in certain civil forfeiture cases made part of the property owner's criminal trial.

International Emergency Economic Powers Act Penalties.

The International Emergency Economic Powers Act (IEEPA), 50 U.S.C. 1701-1707, grants the President the power to impose economic restrictions "to deal with unusual and extraordinary [external] threats to the national security, foreign policy, or economy of the United States," 50 U.S.C. 1701(a). The authority has been invoked among other instances to block Iranian assets, Exec. Order No. 12170, 44 Fed.Reg. 65729 (Nov. 1979); to prohibit trade and certain other transactions with Libya, Exec. Order No. 12543, 51 Fed.Reg. 875 (Jan. 7, 1986); to impose economic sanctions on countries found to be contributing to the proliferation of weapons of mass destruction, Exec. Order No. 12938, 59 Fed. Reg. 59099 (Nov. 14, 1994); to block the assets and prohibit financial transactions with significant narcotics

¹⁴⁸ See, e.g., 31 U.S.C. 5332 (bulk cash), 21 U.S.C. 953 (controlled substances), 18 U.S.C. 553 (stolen motor vehicles).

traffickers, 60 Fed.Reg. 54579 (Oct. 21, 1995); and to block the property and prohibit transactions with persons who commit, threaten to commit, or support terrorism, Exec. Order No. 13224, 66 Fed.Reg. 49079 (Sept. 23, 2001).

The Act increases the imprisonment and civil penalty for violations of presidential orders or related regulations issued under IEEPA, including but not limited to those that bar financial dealings with designated terrorists and terrorist groups. Violations are now punishable by a civil penalty of not more than \$50,000 (previously \$10,000) and by imprisonment for not more than 20 years (previously 10 years).¹⁴⁹

Terrorist Money Laundering.

RICO. The federal Racketeer Influenced and Corrupt Organizations (RICO) law imposes severe penalties (up to 20 years imprisonment) for acquiring or operating an enterprise through the commission of a pattern of other crimes (predicate offenses), 18 U.S.C. 1961-1965. One federal money laundering statute prohibits, among other things, using the funds generated by the commission of a predicate offense in a financial transaction designed to conceal the origin of the funds or promote further predicate offenses, 18 U.S.C. 1956. A second statute condemns financial transactions involving more than \$10,000 derived from a predicate offense, 18 U.S.C. 1957. Crimes designated RICO predicate offenses automatically qualify as money laundering predicate offenses, 18 U.S.C. 1956(c)(7)(A), 1957(f)(3). Property associated with either a RICO or money laundering violation is subject to confiscation, but RICO forfeiture requires conviction of the property owner, 18 U.S.C. 1963, money laundering forfeiture does not, 18 U.S.C. 1956, 1957, 981.

It is a federal crime to operate a business that transmits money overseas either directly or indirectly, without a license, or for a licensed business to either fail to comply with applicable Treasury Department regulations or to transmit funds that it knows will be used for, or were generated by, criminal activities, 18 U.S.C. 1960.

The Act adds 18 U.S.C. 1960 (illegal money transmissions) to the RICO predicate offense list and consequently to the money laundering predicate offense list, 18 U.S.C. 1961(1) as amended by the Act. The House-passed version of the Reauthorization Act also added 8 U.S.C. 1324a (employing aliens) to the RICO list; however, this provision was *not* included in the conference bill and consequently is not part of the Act as enacted.

Direct Money Laundering Predicates. Section 403(b) of the Act states, “Section 1956(c)(7)(D) of title 18, United States Code, is amended by striking ‘or any felony violation of the Foreign Corrupt Practices Act’ and inserting ‘any felony violation of the Foreign Corrupt Practices Act.’” However, this grammatical change relating to the Foreign Corrupt Practices Act (dropping the “or” before the reference) is redundant. The Intelligence Reform and Terrorism Prevention Act already made this grammatical fix, 118 Stat. 3774 (2004).

¹⁴⁹ §402, P.L. 109-177, 120 Stat. 243 (2006), amending 50 U.S.C. 1705.

Investigative Jurisdiction. The Act makes conforming amendments to 18 U.S.C. 1956(e), 1957(e) concerning the money laundering investigative jurisdiction of various components of the Department of Homeland Security.¹⁵⁰ Procedures for coordination, to avoid duplication of efforts, and because investigative agencies share in the distribution of forfeited property to the extent of their participation in the investigation that led to confiscation, may prove necessary in implementing these provisions, 18 U.S.C. 981(d), (e); 19 U.S.C. 1616a.

Forfeiture for Foreign Crimes.

The property of individuals and entities that prepare for or commit acts of international terrorism against the United States or against Americans is subject to federal confiscation, 18 U.S.C. 981(a)(1)(G). Criminal forfeiture is confiscation that occurs upon conviction for a crime for which forfeiture is a consequence, e.g., 18 U.S.C. 1963 (RICO). Civil forfeiture is confiscation accomplished through a civil proceeding conducted against the “offending” property based on its relation to a crime for which forfeiture is a consequence, e.g., 18 U.S.C. 981. Criminal forfeiture is punitive; civil forfeiture is remedial, *Calderon-Toledo v. Pearson Yacht Leasing*, 416 U.S. 663, 683-88 (1974). A convicted defendant may be required to surrender substitute assets if the property subject to criminal forfeiture is located overseas or otherwise beyond the reach of the court, 18 U.S.C. 853(p). Civil forfeiture ordinarily requires court jurisdiction over the property, but when forfeitable property is held overseas in a financial institution that has a correspondent account in this country the federal government may institute and maintain civil forfeiture proceedings against the funds in the interbank account here, 18 U.S.C. 9871(k).

Article III, section 2 of the United States Constitution declares in part that, “no attainder of treason shall work corruption of blood, or forfeiture of estate except during the life of the person attainted,” U.S.Const. Art.III, §3, cl.2. Forfeiture of estate is the confiscation of property simply because it is the property of the defendant, without any other connection to the crime for which gives rise to the forfeiture. The constitutional provision applies only in cases of treason, but due process would seem likely to carry the ban to forfeiture of estate incurred as a result

¹⁵⁰ “Violations of this section may be investigated by such components of the Department of Justice as the Attorney General may direct, and by such components of the Department of the Treasury as the Secretary of the Treasury may direct, as appropriate and, *with respect to offenses over which the Department of Homeland Security has jurisdiction, by such components of the Department of Homeland Security as the Secretary of Homeland Security may direct, and, with respect to offenses over which the United States Postal Service has jurisdiction, by the Postal Service.* Such authority of the Secretary of the Treasury, *the Secretary of Homeland Security*, and the Postal Service shall be exercised in accordance with an agreement which shall be entered into by the Secretary of the Treasury, *the Secretary of Homeland Security*, the Postal Service, and the Attorney General. Violations of this section involving offenses described in paragraph (c)(7)(E) may be investigated by such components of the Department of Justice as the Attorney General may direct, and the National Enforcement Investigations Center of the Environmental Protection Agency,” 18 U.S.C. 1956(e) as amended by the Act (language added by the Act in italics); the Act amends 18 U.S.C. 1957(e) with similar language.

of other crimes, particularly lesser crimes.¹⁵¹ The assumption may be hypothetical because with a single Civil War exception, until very recently federal law only called for the forfeiture of property that had some nexus to the confiscation-triggering crime beyond mere ownership by the defendant.¹⁵² Subparagraph 981(a)(1)(G) calls for the confiscation the property of individuals and entities that engage in acts of terrorism against the United States or Americans, 18 U.S.C. 981(a)(1)(G)(i), and under separate clauses any property derived from or used to facilitate such misconduct, 18 U.S.C. 981(a)(1)(G)(ii),(iii). As yet, there no reported cases involving 18 U.S.C. 981(a)(1)(G)(i).

Section 404 of the Act authorizes the federal government to confiscate under civil forfeiture procedures all property of any individual or entity planning or committing an act of international terrorism against a foreign nation or international organization without any further required connection of the property to the terrorist activity other than ownership. The section contemplates forfeiture of property located both here and abroad, since it refers to “all assets, foreign or domestic,” but with respect to property located outside of the United States, it requires an act in furtherance of the terrorism to have “occurred within the jurisdiction of the United States.”¹⁵³ It is unclear whether the jurisdiction referred to is the subject matter jurisdiction or territorial jurisdiction of the United States or either or both. The due process shadow of Article III, section 3, clause 2 may limit the reach of the proposal to property with some nexus other than ownership to the terrorist act.

Money Laundering Through “Hawalas”.

Money laundering in violation of 18 U.S.C. 1956 may take either of two forms (1) engaging in a prohibited financial transaction involving the proceeds of a predicate offense, 18 U.S.C. 1956(a)(1), or (2) internationally transporting, transmitting, or transferring the proceeds of a predicate offense, 18 U.S.C. 1956(a)(2). Section 405 of the Act extends the financial transaction offense to include related, parallel transactions and transmissions.¹⁵⁴

¹⁵¹ *United States v. Grande*, 620 F.2d 1026,1038 (4th Cir. 1980)(“We would agree. . . that if §1963 revives forfeiture of estate as that concept was expressed in the Constitution it is almost certainly invalid because of the irrationality of a ruling that forfeiture of estate cannot be imposed for treason but can be imposed for a pattern of lesser crimes”).

¹⁵² Under the Confiscation Act all the property of Confederate army and naval officers was forfeited, 12 Stat. 589 (1862), but owing to the constitutional reservations of President Lincoln, the forfeiture statute was followed by another declaring that confiscation would only apply during the life time of a member of the Confederate armed forces, 12 Stat. 627 (1862). The Supreme Court read the two together and as a matter statutory construction held that a life estate in the property of the former Confederate naval officer at issue was all that was subject to confiscation, *Bigelow v. Forest*, 76 U.S. 339, 350 (1869).

¹⁵³ § 404(3), P.L. 109-177, 120 Stat. 244 (2006), adding new subsection 18 U.S.C. 981(a)(1)(G)(iv).

¹⁵⁴ “For purposes of this paragraph, a financial transaction shall be considered to be one involving the proceeds of specified unlawful activity if it is party of a set of parallel or dependent transactions, any one of which involves the proceeds of specified unlawful (continued...) ”

As the conference report accompanying H.R. 3199 explains, the amendment addresses a feature of the often informal networks called “hawalas,” for transfer money overseas:

Alternative remittance systems are utilized by terrorists to move and launder large amounts of money around the globe quickly and secretly. These remittance systems, also referred to as “hawala” networks, are used throughout the world, including the Middle East, Europe, North American and South Asia. These systems are desirable to criminals and non-criminals alike because of the anonymity, low cost, efficiency, and access to underdeveloped regions. The United States has taken steps to combat the “hawala” networks by requiring all money transmitters, informal or formal, to register as money service businesses.

Under current Federal law, a financial transaction constitutes a money laundering offense only if the funds involved in the transaction represent the proceeds of some criminal offense. . . There is some uncertainty, however, as to whether the “proceeds element” is satisfied with regard to each transaction in a money laundering scheme that involves two or more transactions conducted in parallel, only one of which directly makes use of the proceeds from unlawful activity. For example, consider the following transaction: A sends drug proceeds to B, who deposits the money in Bank Account 1. Simultaneously or subsequently, B takes an equal amount of money from Bank Account 2 and sends it to A, or to a person designated by A. The first transaction from A to B clearly satisfies the proceeds element of the money laundering statute, but there is some question as to whether the second transaction — the one that involves only funds withdrawn from Bank Account 2 does so as well. The question has become increasingly important because such parallel transactions are the technique used to launder money through the Black Market Peso Exchange and “hawala” network.¹⁵⁵

Technical Amendments.

Section 406 of the Act corrects a number of typographical and grammatical errors in existing law including changing the reference in section 322 of the USA PATRIOT Act, 115 Stat. 315 (2001), from 18 U.S.C. 2466(b) to 28 U.S.C. 2466(b); changing the phrase “foreign bank” to “foreign financial institution” in 18 U.S.C. 981(k)(relating to forfeiture and interbank accounts); correcting a reference to the Intelligence Reform and Terrorism Prevention Act in 31 U.S.C. 5318(n)(4)(A); capitalizing a reference in the Intelligence Reform and Terrorism Prevention Act (amending 18 U.S.C. 2339C rather than 18 U.S.C. 2339c); and codifying the forfeiture procedure passed as section 316 of the USA PATRIOT Act, 115 Stat. 309 (2001), new 18 U.S.C. 987.

Civil Forfeiture Pre-trial Freezes and Restraining Orders.

Federal law permits pre-trial restraining orders to freeze property sought in criminal forfeiture cases, 21 U.S.C. 853(e), and pre-trial restraining orders or the

¹⁵⁴ (...continued)

activity, and all of which are part of a single plan or arrangement,” 18 U.S.C. 1956(a)(1) as amended by § 405, P.L. 109-177, 120 Stat. 244 (2006).

¹⁵⁵ H.Rept. 109-333, at 107 (2005).

appointment of receivers or conservators in civil forfeiture cases, 18 U.S.C. 983(j). In money laundering civil penalty and forfeiture cases, federal law also permits restraining orders and the appointment of receivers under somewhat different, less demanding procedures with respect to the property of foreign parties held in this country, 18 U.S.C. 1956(b). Section 406 of the Act removes the requirement that the property be that of a foreign party, by amending 18 U.S.C. 1956(b)(3),(4).

Conspiracy Penalties.

It is a federal crime to destroy or attempt to destroy commercial motor vehicles or their facilities, 18 U.S.C. 33. Offenders face imprisonment for not more than 20 years. It is also a federal crime to cause or to attempt to cause more than \$100,000 worth of damage to an energy facility, 18 U.S.C. 1366. Again, offenders face imprisonment for not more than 20 years. As a general rule, conspiracy to commit these or any other federal crime is punishable by imprisonment for not more than five years, 18 U.S.C. 371, and conspirators are liable for the underlying offense and any other offense committed by any of co-conspirators in the foreseeable furtherance of the criminal scheme, *United States v. Pinkerton*, 340 U.S. 640 (1946).

For several federal crimes, instead of the general five-year penalty for conspiracy, section 811 of the USA PATRIOT Act used the maximum penalty for the underlying offense as the maximum penalty for conspiracy to commit the underlying offense, 115 Stat. 381-82 (2001). Section 406(c) of the Act allows for the same penalty scheme for conspiracies to violate 18 U.S.C. 33 (destruction of motor vehicles) and 18 U.S.C. 1366 (damage an energy facility).

Laundering the Proceeds of Foreign Terrorist Training.

Federal law prohibits laundering the proceeds of various predicate offenses, 18 U.S.C. 1956; in addition to other criminal penalties, property associated with such laundering is subject to confiscation, 18 U.S.C. 981(a)(1)(A). Receipt of military training from a foreign terrorist organization is also a federal crime, 18 U.S.C. 2339D. Section 112 of the Act makes 18 U.S.C. 2339D a federal crime of terrorism under 18 U.S.C. 2332b(g)(5)(B). Federal crimes of terrorism are RICO predicate offenses by definition, 18 U.S.C. 1961(1)(G). RICO predicate offenses are by definition money laundering predicate offenses, 18 U.S.C. 1956(c)(7)(A). Section 409 of the Act makes 18 U.S.C. 2339D a money laundering predicate offense directly, 18 U.S.C. 1956(c)(7)(D). It is not clear why the duplication was thought necessary.

Uniform Procedures for Criminal Forfeitures.

The Act contains an amendment to 28 U.S.C. 2461(c), for which there is no explanation in the conference report accompanying H.R. 3199. Nor does the amendment appear in either of the two versions of H.R. 3199 sent to conference. Nor does the amendment appear to have been included in other legislative proposals and thus has not heretofore been the beneficiary of examination in committee or on the floor. The change is captioned “uniform procedures for criminal forfeitures,” but it is not facially apparent precisely how the procedures for various criminal forfeitures are disparate or how the amendment makes them more uniform. Part of the difficulty

flows from the fact that both section 2461(c) and the Act's amendment are somewhat cryptic. Nevertheless, it seems crafted to make a default procedure into an exclusive procedure.

In its original form, 28 U.S.C. 2461(c) states:

If a forfeiture of property is authorized in connection with a violation of an Act of Congress, and any person is charged in an indictment or information with such violation but no specific statutory provision is made for criminal forfeiture upon conviction, the Government may include the forfeiture in the indictment or information in accordance with the Federal Rules of Criminal Procedure, and upon conviction, the court shall order the forfeiture of the property in accordance with the procedures set forth in section 413 of the Controlled Substances Act (21 U.S.C. 853), other than subsection (d) of that section.

The Act amends section 2461(c) to read:

If a person is charged in a criminal case with a violation of an Act of Congress for which the civil or criminal forfeiture of property is authorized, the Government may include notice of the forfeiture in the indictment or information pursuant to the Federal Rules of Criminal Procedure. If the defendant is convicted of the offense giving rise to the forfeiture, the court shall order the forfeiture of the property as part of the sentence in the criminal case pursuant to the Federal Rules of Criminal Procedure and section 3554 of title 18, United States Code. The procedures in section 413 of the Controlled Substances Act (21 U.S.C. 853) apply to all stages of a criminal forfeiture proceeding, except that subsection (d) of such section applies only in cases in which the defendant is convicted of a violation of such Act.

A casual reading of the original section 2461(c) might suggest that it only applies in the case of a *criminal* forfeiture statute which fails to indicate what procedure should be used to accomplish confiscation. In fact, section 2461(c) originally allowed confiscation under its criminal forfeiture procedures where civil forfeiture was authorized by statute but criminal forfeiture otherwise was not.¹⁵⁶ On its face, however, it did not allow the government to merge every civil forfeiture with the criminal prosecution of the property owner. In its original form, section 2461(c) was only available if there was no other criminal forfeiture counterpart for the civil forfeiture.¹⁵⁷ Under the Act, the distinction no longer exists.

¹⁵⁶ *United States v. Razmilovic*, 419 F.3d 134,136 (2d Cir. 2005) (“Section 2461(c) thus authorizes criminal forfeiture as a punishment for any act for which civil forfeiture is authorized, and allows the government to combine criminal conviction and criminal forfeiture as a consolidated proceeding”).

¹⁵⁷ 18 U.S.C. 2461(c) (“If a forfeiture of property is authorized in connection with a violation of an act of Congress, ..an act. but no specific statutory provision is made for criminal forfeiture upon conviction . . .”); *United States v. Causey*, 309 F.Supp.2d 917, 920 (S.D. Tex. 2004) (“Section 981 [relating to civil forfeiture] forms the basis for criminal forfeiture through the application of 28 U.S.C. 2461(c), which allows criminal forfeiture to be sought anytime there is a civil forfeiture provision but no corresponding criminal forfeiture statute”); *United States v. Schlesinger*, 396 F.Supp.2d 267, 275 (E.D.N.Y. 2005)

(continued...)

Moreover, since section 2461(c) speaks of treating civil forfeitures as criminal forfeitures after conviction, some courts have held that pre-trial freeze orders available in other criminal forfeiture cases may not be invoked in the case of a section 2461(c) “gap filler.”¹⁵⁸ It is unclear whether the Act is intended to change this result as well. On the one hand, the language of conviction still remains. On the other hand, the description of the role of 21 U.S.C. 853 (which authorizes pre-trial restraining orders) may signal a different result. The statutory language prior to amendment is fairly clear, the procedures of section 853 come into play after conviction: “upon conviction, the court shall order the forfeiture of the property in accordance with the procedures set forth in section 413 of the Controlled Substances Act (21 U.S.C. 853),” 28 U.S.C. 2461(c). The statement in the Act is less conclusive: “The procedures in section 413 of the Controlled Substances Act (21 U.S.C. 853) apply to all stages of a criminal forfeiture proceeding.” This change in language suggests that a change in construction may have been intended.

Title V: Miscellaneous Provisions

Title V of the Act contains miscellaneous provisions added in conference and not previously included in either the House or Senate version of H.R. 3199, some of which — like the habeas amendments in the case of state death row inmates, or the adjustments in the role of the Office of Intelligence Policy and Review in the FISA process — may be of special interest.

Justice Department Residency Requirements.

United States Attorneys and Assistant United States Attorneys must live within the district for which they are appointed, except in the case of the District of Columbia and the Southern and Eastern Districts of New York, 28 U.S.C. 545. The Attorney supervises and directs litigation in which the United States has an interest, 28 U.S.C. 516-519. He enjoys the authority to marshal, move, and direct the officers, employees, or agencies of the Department of Justice to this end, 28 U.S.C. 509, 510, 547. Section 501 of the Act allows the Attorney General to waive the residency requirement with respect to U.S. Attorneys or Assistant U.S. Attorneys who have been assigned additional duties outside the districts for which they were appointed.¹⁵⁹ The conference report accompanying H.R. 3199 notes that the amendment will allow

¹⁵⁷ (...continued)

(“Constructing the statute in this manner makes §2461(c) a broad ‘gap filler’ that applies whenever civil forfeiture is permitted. In sum, when there is no provision for criminal forfeiture, the government may use a civil forfeiture provision if it includes such allegation in the indictment. In instances where there is a specific criminal forfeiture provision — that specific provision and the procedures that it sets forth — and not the civil forfeiture provision will apply”).

¹⁵⁸ *United States v. Razmilovic*, 419 F.3d 134,137 (2d Cir. 2005). Note that in some civil forfeiture cases, the government is entitled to a pre-trial freeze order, 18 U.S.C. 983(j).

¹⁵⁹ § 501, P.L. 109-177, 120 Stat. 246 (2006), amending 28 U.S.C. 545(a).

Justice Department personnel to be assigned to Iraq, but does not explain why the authority is made retroactive to February 1, 2005.¹⁶⁰

Appointment of U.S. Attorneys.

The Attorney General has the authority to temporarily fill vacancies in the office of United States Attorney, 28 U.S.C. 546. Prior to the Act, if a replacement had not been confirmed and appointed within 120 days, the district court was authorized to make a temporary appointment. The Act repeals the authority of the court and permits the Attorney General's temporary designee to serve until the vacancy is filled by confirmation and appointment.¹⁶¹

Presidential Succession: Homeland Security Secretary.

The heads of the various federal departments come within the line of presidential succession, 3 U.S.C. 19(d)(1). Section 503 of the Act adds the Secretary of the Department of Homeland Security to the list following the Secretary of Veterans Affairs.

Confirmation of the Director of BATFE.

Prior to the Act, the Attorney General had the responsibility of appointing the Director the Bureau of Alcohol, Tobacco, Firearms and Explosives (BATFE). Section 504 of the Act removes this power from the Attorney General, and vests the appointment in the President with the advice and consent of the Senate, amending section 1111(a)(2) of the Homeland Security Act of 2002, P. L. 107-296, 116 Stat. 2135 (2002).

Qualifications for U.S. Marshals.

The President appoints the marshal in each federal judicial district with the advice and consent of the Senate, 28 U.S.C. 561. There are no statutory qualifications. The Act describes a fairly demanding set of minimum qualifications that each marshal "should have,"¹⁶² which the conference report characterizes as clarifications.¹⁶³ Some may consider this an intrusion upon the constitutional prerogatives of the President. The Constitution does confer upon him the power to

¹⁶⁰ H.Rept. 109-333 at 109 (2005).

¹⁶¹ § 502, P.L. 109-177, 120 Stat. 246 (2006), amending 28 U.S.C. 546(c).

¹⁶² "Each marshal appointed under this section should have — (1) a minimum of 4 years of command-level law enforcement management duties, including personnel, budget, and accountable property issues, in a police department, sheriff's office or Federal law enforcement agency; (2) experience in coordinating with other law enforcement agencies, particularly at the State and local level; (3) college-level academic experience; and (4) experience in or with county, State, and Federal court systems or experience with protection of court personnel, jurors, and witnesses," 28 U.S.C. 561(I) as amended by the Act.

¹⁶³ H.Rept. 109-333 at 109 (2005)("Section 505 of the conference report is a new section. This section clarifies the qualifications individuals should have before joining the United States Marshals").

nominate and, with the advice and consent of the Senate, to appoint officers of the United States, U.S. Const. art. II, §2. It might be thought that to impose minimum qualifications for appointment impermissibly limits the President's power to nominate. But with few exceptions, the offices in question are creatures of statute. They exist by exercise of Congress's constitutional authority "to make all laws necessary and proper for carrying into execution" the constitutional powers of the Congress, the President or Government of the United States, U.S. Const. art. I, §8, cl.18. The imposition of minimum qualifications is consistent with long practice as to which the Supreme Court has observed:

Article II expressly and by implication withholds from Congress power to determine who shall appoint and who shall remove except as to inferior offices. To Congress under its legislative power is given the establishment of offices, the determination of their functions and jurisdiction, the prescribing of *reasonable and relevant qualifications* and rules of eligibility of appointees, and the fixing of the term for which they are to be appointed, and their compensation — all except as otherwise provided by the Constitution.¹⁶⁴

The terminology used in section 505 of the Act leaves some doubt whether it is intended to require or merely encourage the nomination of candidates exhibiting the statutory qualifications ("each marshal appointed under this section should have ..."). Perhaps more intriguing is why the conferees deemed this particular office and not others appropriate for such treatment. The office has existed since the dawn of the Republic, 1 Stat. 87 (1789), without a statement of required or preferred qualifications. Arguably comparable or more significant offices within the Department of Justice face no similar provisions. No such provisions attend the appointment of U.S. Attorneys, 28 U.S.C. 541; the Director the Federal Bureau of Investigation, 28 U.S.C. 532; the Director of the Marshals Service, 28 U.S.C. 561; or even the Attorney General himself, 28 U.S.C. 503. Even when the Act puts its hand anew to the appointment of an arguably comparable position — the appointment of the Director of BATFE, *supra* — it says nothing of minimum qualifications. Of course, the requirements seem relevant and it is difficult to argue that any federal office should not be filled with the most highly qualified individual possible.

¹⁶⁴ *Myers v. United States*, 272 U.S. 52, 129 (1926)(emphasis added). *See also*, Corwin, *Tenure of Office and the Removal Power Under the Constitution*, 27 COLUMBIA LAW REVIEW 353, 391 (1927)("From the first Congress has exercised its power under the 'necessary and proper' clause to fix the qualifications of officers, not only in respect to inferior offices but also in respect to superior offices, and this notwithstanding that in so doing it has obviously restricted the President's power of nomination"); 2 ROTUNDA & NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE 35 (3d ed. 1999)("Congress can limit the President's power to nominate by imposing qualifications that the appointee for the office must possess"); *Eldred v. Ashcroft*, 537 U.S. 186, 213 (2003)("This Court has repeatedly laid down the principle that a contemporaneous legislative exposition of the Constitution when the founders of our Government and framers of our Constitution were actively participating in public affairs, acquiesced in for a long term of years, fixes the construction to be given the Constitution's provisions"). Justice Brandeis in *Myers* footnotes literally hundreds of instances dating from the First Congress wherein Congress set minimum qualifications for various public office holders, 272 U.S. at 265 n.35 -274 n.56.

New National Security Division of the DOJ and new Assistant Attorney General.

Section 506 of the Act creates a new National Security Division within the Department of Justice (DOJ), headed by a new Assistant Attorney General, comprising prosecutors from the DOJ's Criminal Division's Counterespionage and Counterterrorism sections and attorneys from the DOJ's Office of Intelligence Policy and Review, the office that is responsible for reviewing wiretapping operations under FISA.

Background. The presidential Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction recommended that “[t]he Department of Justice’s primary national security elements — the Office of Intelligence Policy and Review, and the Counterterrorism and Counterespionage sections [of the Criminal Division] — should be placed under a new Assistant Attorney General for National Security.”¹⁶⁵ The Commission felt the then-existing organizational scheme might be awkward and that perhaps the system would benefit from a check on Office of Intelligence Policy and Review’s rejection of FISA applications as insufficient.¹⁶⁶

¹⁶⁵ The Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction, *Report to the President of the United States*, 471-73 (Mar. 31, 2005), available on Jan. 6, 2006 at, [http://www.wmd.gov/report/wmd_report.pdf].

¹⁶⁶ “The Justice Department’s three primary national security components are located in different divisions, with no individual below the Deputy Attorney General who can supervise all three. The Office of Intelligence Policy and Review (OIPR) is responsible for FISA requests, representing the Department of Justice on intelligence-related committees, and advising the Attorney General on ‘all matters relating to the national security activities.’ It is independent of any division and reports directly to the Deputy Attorney General. In contrast, both the Counterterrorism and Counterespionage sections are located in the Criminal Division, but they each report to two *different* Deputy Assistant Attorney Generals. If there is method to this madness, neither we, nor any other official with whom we spoke, could identify it.

“There is reason to believe that the this awkward (and outdated) organizational scheme has created problems between the Justice Department and the Intelligence Community. In our classified report we describe one such problem that cannot be discussed in our unclassified report.

“We believe that bringing the Office of Intelligence Policy and Review closer to its operational counterparts like the Counterespionage and Counterterrorism sections would give the office better insight into actual intelligence practices and make it better attuned to operational needs. Attorneys in the Counterterrorism and Counterespionage sections routinely work alongside FBI agents and other intelligence officers. By contrast, OIPR is largely viewed within the Department as an ‘assembly line operation not requiring any special grounding in the facts of a particular matter.’ OIPR’s job is to process and adjudicate FISA requests — not to follow a case from start to completion. One of the advantages of placing all three national security components under a single Assistant Attorney General is that they will see themselves as acting in concert to serve a common mission.

“The Bellows Report [*Final Report of the Attorney General’s Review Team on the Handling of the Los Alamos National Laboratory Investigation*] identifies a further reason

(continued...)

Critics might suggest that curtailing the independence of the Office of Intelligence Policy and Review (OIPR) with an eye to less rigorous examination of FISA applications is likely to have an adverse impact. They might argue that adding another layer of review to the FISA application process can only bring further delays to a process the Administration has continuously sought to streamline. In the same vein, should the judges of the FISA Court conclude that the OIPR has been shackled and ceased to function as an independent gatekeeper for the Court, they might examine applications more closely and feel compelled to modify or reject a greater number; further contributing to delay, or so it might be said. On the other hand, both the Act and the USA PATRIOT Act vest oversight on the exercise of sensitive investigative authority in senior officials in order to guard against abuse.

Be that as it may, the President notified various administration officials that he concurred in the Commission's recommendation.¹⁶⁷ Section 441 of the Intelligence Authorization Act for Fiscal Year 2006, S. 1803, as reported by the Senate Select Committee on Intelligence, contained similar provisions.¹⁶⁸

The Act makes the following provisions for the new Assistant Attorney General:

- Assistant Attorney General (AAG) is to be designated by the President and presented to the Senate for its advice and consent, adding new section 28 U.S.C. 507A(a); cf., H.Rept. 109-142 at 31;
- AAG serves as head of the DOJ National Security Division, as primary DOJ liaison with DNI, and performs other duties as assigned, new 28 U.S.C. 507A(b);
- the Attorney General is to consult with the DNI before recommending a nominee to be AAG, adding new subsection 50 U.S.C. 403-6(c)(2)(C);
- the Attorney General may authorize the AAG to perform the Attorney General's FISA-related duties, amending 50 U.S.C. 1801(g);
- AAG may approve application for a communications interception (wiretap) order under the Electronic Communications Privacy Act (Title III), amending 18 U.S.C. 2516(1);

¹⁶⁶ (...continued)

to have a single individual below the Deputy Attorney General to supervise the OIRP: the need to have a single individual who is knowledgeable about FISA to review FISA applications that are rejected by OIPR. *Id.* at pp.767-768. The lack of such an individual in the Wen Ho Lee investigation caused serious problems. An Assistant Attorney General for National Security would fit the bill perfectly,"*Id.* at 472, 482 n.94 (the last paragraph quoted above appears as footnote 94 in the *Report*).

¹⁶⁷ S.Rept. 109-142, at 31 (2005)("The President endorsed this recommendation in a June 29, 2005, memorandum for the Vice President, Secretary of State, Secretary of Defense, Attorney General, Secretary of Homeland Security, Director of OMB, DNI, Assistant to the President for National Security Affairs, and Assistant to the President for Homeland Security and Counterterrorism").

¹⁶⁸ *See generally*, H.Rept. 109-333, at 109 (2005); H.Rept. 109-142, at 31-33 (2005).

- the Attorney General may authorize the AAG to approve admission into the witness protection program, amending 18 U.S.C. 3521(d)(3);
- AAG must provide briefings for the DOJ officials or their designee of Division cases involving classified information, amending 18 U.S.C. App. III 9A(a);
- AAG replaces OIPR for purposes of advising the Attorney General on the development of espionage charging documents and related matters, amending 28 U.S.C. 519 note;
- the Attorney General may authorize the AAG to approve certain undercover operations, amending 28 U.S.C. 533 note;
- AAG joins those whom the Attorney General consult concerning a state application of emergency law enforcement assistance, amending 42 U.S.C. 10502(2)(L);
- the National Security Division headed by the AAG consists of the OIPR, the counterterrorism and counterespionage sections, and any other entities the Attorney General designates, adding new section 28 U.S.C. 509A;
- Division employees are barred from engaging in political management or political campaigns, amending 5 U.S.C. 7323(b)(3);
- subject to a rule change by the Senate, the Senate Select Committee on Intelligence enjoys 20 day sequential referral of AAG nominees, amending section 17 of S.Res. 94-400 of the Standing Rules of the Senate, *Senate Manual* §94 (2002).

Habeas Corpus in State Capital Cases.

Federal law provides expedited habeas corpus procedures in the case of state death row inmates in those states that qualify for application of the procedures and have opted to take advantage of them, 28 U.S.C. ch. 154. As the Supreme Court stated, “Chapter 154 will apply in capital cases only if the State meets certain conditions. A state must establish ‘a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel’ in state postconviction proceedings, and ‘must provide standards of competency for the appointment of such counsel,’” *Calderon v. Ashmus*, 523 U.S. 740, 743 (1998). Thus far apparently, few if any states have sought and been found qualified to opt in.¹⁶⁹

¹⁶⁹ At least for a short period of time Arizona was qualified to opt in, *cf.*, *Spears v. Stewart*, 283 F.3d 992, 996 (9th Cir. 2002)(denying rehearing en banc)(“The three judge panel . . . determined that although (a) the question whether Arizona had opted-in to the short-fuse habeas scheme provided in Chapter 154. . . was entirely irrelevant to the outcome of the case before it; (b) the linchpin provision for the procedures by which Arizona had once sought to opt-in under Chapter 154 had already been repealed by the state; (c) the state did not even comply with its own procedures in the case before the panel; (d) Arizona was unquestionably not in compliance with Chapter 154 at the time the appeal was heard; (e) in fact, the state had never at any time effectively complied with its short-lived procedures; and (f) no other state in the nation has ever been held to have successfully opted-in under Chapter 154, the panel would seize this opportunity to issue an advisory opinion stating that the no-longer-existent Arizona procedures were in compliance with Chapter 154’s (continued...)”)

Critics implied that the states have been unable to take advantage of the expedited capital procedures only because the courts have a personal stake in the outcome. The solution, they contend, is the amendment found in section 507 of the Act,¹⁷⁰ which allows the Attorney General to determine whether a state qualifies, permits the determination to have retroactive effect, and allows review by the federal appellate court least likely to have an interest in the outcome, the U.S. Court of Appeals for the D.C. Circuit.¹⁷¹ Opponents of the proposal raised separation of powers issues and questioned whether the chief federal prosecutor or the courts are more likely to make an even handed determination of whether the procedures for providing capital defendants with qualified defense counsel are adequate.¹⁷²

¹⁶⁹ (...continued)

requirements”)(citing, *Ashmus v. Woodford*, 202 F.3d 1160, 1160 (9th Cir. 2000)(California has not opted-in); *Harris v. Bowersox*, 184 F.3d 744, 7848 (8th Cir. 1999)(Missouri has not opted-in); *Duvall v. Reynolds*, 139 F.3d 768, 776 (10th Cir. 1998)(Oklahoma has not opted-in); *Hill v. Butterworth*, 941 F.Supp. 1129, 1146-147 (N.D.Fla. 1996), *vac’d on other grounds*, 147 F.3d 1333 (11th Cir. 1998)(Florida has not opted-in); *Mata v. Johnson*, 99 F.3d 1261, 1267 (5th Cir. 1996), *vac’d on other grounds*, 105 F.3d 209 (5th Cir. 1997)(Texas has not opted-in); *Austin v. Bell*, 126 F.3d 843, 846 n.3 (6th Cir. 1997)(Tennessee has not opted-in); *Holloway v. Horn*, 161 F.Supp.2d 452, 478 n.11 (E.D.Pa. 2001), *rev’d on other grounds*, 355 f.3d 707 (3d Cir. 2004)(Pennsylvania has not opted- in); *Smith v. Anderson*, 104 F.Supp. 2d 773, 786 (S.D.Ohio 2000)(Ohio has not opted-in); *Oken v. Nuth*, 30 F.Supp.2d 877, 879 (D.Md. 1998)(Maryland has not opted-in); *Tillman v. Cook*, 25 F.Supp.2d 1245, 1253 (D.Utah 1998)(Utah has not opted-in); *Weeks v. Angelone*, 4 F.Supp.2d 467, 506 n.4 (E.D.Va. 1998)(Virginia has not opted-in); *Ryan v. Hopkins*, 1996 WL 539220, at *3-4 (D.Neb. 1996)(Nebraska has not opted-in)). Related cases include, *Grayson v. Epps*, 338 F.Supp.2d 699, 700-704 (S.D. Miss. 2004)(Mississippi has not opted-in); *Keel v. French*, 162 F.3d 263, 267 n.1 (4th Cir. 1998)(North Carolina has not opted-in); *High v. Head*, 209 F.3d 1257, 1262 n.4 (11th Cir. 2000)(Georgia does not claim to have opted-in); *Allen v. Lee*, 366 F.3d 319, 353 (4th Cir. 2004)(Luttig, J. dissenting)(noting that the Fourth Circuit has adopted by rule the section 2266 time lines).

¹⁷⁰ § 507, P.L. 109-177, 120 Stat. 250 (2006), amending 28 U.S.C. 2261(b), 2265.

¹⁷¹ See 151 CONG. REC. S5540, 5541 (daily ed. May 19, 2005) (statement of Sen. Kyl)(“The SPA [Streamlined Procedures Act] also expands and improves the special expedited habeas procedures authorized in chapter 154 of the United States Code. The procedures are available to States that establish a system for providing high-quality legal representation to capital defendants. Chapter 154 sets strict time limits on Federal court action and places limits claims. Currently, however, the court that decides whether a State is eligible for chapter 154 is the same court that would be subject to its time limits. Unsurprisingly, these courts have proven resistant to chapter 154. The SPA would place the eligibility decision in the hands of a neutral party — the U.S. Attorney General, with review of his decision in the D.C. Circuit, which does not hear habeas appeals.”)

¹⁷² “[T]he SPA intimates that courts can’t objectively evaluate whether states meet the ‘opt-in’ provisions detailed in the AEDPA because their dockets are implicated in the timelines created by opt-in status. The legislation attempts to resolve this by empowering the chief prosecutor in the United States, the Attorney General, to make these decisions. Giving federal prosecutors control over even part of the federal judiciary’s docket and decisionmaking authority would have serious implications for the separation of powers necessary for fair administration of criminal justice,” *Habeas Corpus Proceedings and Issues of Actual Innocence: Hearings Before the Senate Comm. on the Judiciary*, 109th

(continued...)

Under the Act, states would opt-in or would have opted-in as of the date, past or present, upon which the Attorney General determines they established or have established qualifying assistance of counsel mechanism. Opting-in to the expedited procedures of chapter 154 only applies, however, to instances in which “counsel was appointed pursuant to that mechanism [for the death row habeas petitioner], petitioner validly waived counsel, petitioner retained counsel, or petitioner was found not to be indigent.”¹⁷³ The standards of qualifying mechanism remain the same except that the Act drops that portion of subsection 2261(d) which bars an attorney from serving as habeas counsel if he represented the prisoner during the state appellate process, amending 28 U.S.C. 2261(d).

The Act establishes a *de novo* standard of review for the Attorney General’s determination before the D.C. Circuit, new 28 U.S.C. 2265(c)(3). It also extends the expedited time deadline for U.S. district court action on a habeas petition from a state death row inmate from 6 to 15 months (180 days to 450 days)(although the 60 days permitted the court for decision following completion of all pleadings, hearings, and submission of briefs remains the same), new 28 U.S.C. 2266(b).

In *McFarland v. Scott*, 512 U.S. 849, 859 (1994), the Supreme Court held that federal district courts might stay the execution of a state death row inmate upon the filing of a petition for the appointment of counsel but prior to the filing of a federal habeas petition in order to allow for the assistance of counsel in the filing the petition.

In an amendment described as overruling *McFarland*, H.Rept. 109-333, at 109 (2005), the Act amends federal law to permit a stay in such cases of no longer than 90 days after the appointment of counsel or the withdrawal or denial of a request for the appointment of counsel, new 28 U.S.C. 2251(b) as added by section 507(f) of the Act.

Title VI: Secret Service Authorization and Technical Modification Act of 2005

The Secret Service provisions of the Act were added to H.R. 3199 during conference. They have several intriguing aspects although the constitutional reach of two provisions may be somewhat limited.

Protection of the President and Certain Other Federal Officials.

Under 18 U.S.C. 1752, it is a federal crime:

¹⁷² (...continued)

Cong., 1st sess. (2005) (testimony of Bryan Stevenson, Executive Director of Equal Justice Initiative of Alabama, available on Jan. 6, 2006, at [http://judiciary.senate.gov/print_testimony.cfm?id=1569&wit_id=4458]).

¹⁷³ 28 U.S.C. 2261(b)(2) as amended by the Act.

(1) to willfully and knowingly trespass in areas designated as temporary offices or residences for (or as restricted areas in places visited by or to be visited by) those under Secret Service protection, 18 U.S.C. 1752(a)(1);

(2) to engage in disorderly conduct in or near such areas or places with the intent to and result of impeding or disrupting the orderly conduct of governmental business or functions there, 18 U.S.C. 1752(a)(2);

(3) to willfully and knowingly block passage to and from such areas or places, 18 U.S.C. 1752(a)(3);

(4) to willfully and knowingly commit an act of violence in such area or place, 18 U.S.C. 1752(a)(4); or

(5) to attempt of conspire to do so, 18 U.S.C. 1752(a),(b).

Obstructing Secret Service officers in the performance of their protective duties is also a federal crime and is punishable by imprisonment for not more than one year and/or a fine of not more than \$1,000, 18 U.S.C. 3056(d).

Section 602 of the Act increases the penalties for violation of 18 U.S.C. 1752 from imprisonment for not more than six months to imprisonment for not more than one year; unless the offense results in significant bodily injury¹⁷⁴ or the offender uses or carries a deadly or dangerous weapon during and in relation to the offense, in which case the offense is punishable by imprisonment for not more than 10 years, 18 U.S.C. 1752(b) as amended by the Act. As a general rule applicable here, crimes punishable by imprisonment for not more than six months are subject as an alternative to a fine of not more than \$5,000; crimes punishable by imprisonment for not more than one year by a fine of not more than \$100,000 as an alternative; crimes punishable by imprisonment for more than one year by a fine of not more than \$250,000; and in each case organizations are subject to maximum fines that are twice the amount to which an individual might be fined, 18 U.S.C. 3571, 3559.

The Act also amends section 1752 to provide a uniform scienter element (willfully and knowingly) for each of the offenses prescribed there.

Special Events of National Significance.

Section 602 of the Act also creates a new federal crime relating to misconduct concerning “special events of national significance.” It amends 18 U.S.C. 1752 to make it a federal crime “willfully and knowingly to enter or remain in any posted, cordoned off, or otherwise restricted area of a building or grounds so restricted in conjunction with an event designated as a special event of national significance,” 18 U.S.C. 1752(a)(2) as amended. The Act provides no definition of “special event of

¹⁷⁴ “‘Significant bodily injury’ means bodily injury which involves a risk of death, significant physical pain, protracted and obvious disfigurement, or a protracted loss or impairment of the function of a bodily member, organ, or mental or sensory faculty,” 18 U.S.C. 2118(e)(3), 1752(b)(1)(B) as amended by the Act.

national significance.” Nor is the term defined elsewhere in federal law, although it is used in 18 U.S.C. 3056, which authorizes the Secret Service to participate in the coordination of security arrangements for such activities.¹⁷⁵ The conference report accompanying H.R. 3199 explains that the provisions relate to misconduct at events at which individuals under Secret Service protection are not attendees and by implication are not anticipated to be attendees.¹⁷⁶ This may raise questions about the constitutional basis upon which the other criminal prohibitions in section 1752 rely.

Congress and the federal government enjoy only those powers which the Constitution provides; all other powers are reserved to the states and to the people, U.S. Const. Amends. X, IX. The Constitution does not vest primary authority to enact and enforce criminal law in the federal government. The Constitution does grant Congress explicit legislative authority in three instances — treason, piracy and offenses against the law of nations, U.S.Const. Art.III, §3; Art.I, §8, cl.10. And it vests Congress with other more general powers which may be exercised through the enactment of related criminal laws, such as the power to regulate commerce or to enact laws for the District of Columbia, U.S.Const. Art.I, §8, cls.3, 17. Nevertheless, “[e]very law enacted by Congress must be based on one or more of its powers enumerated in the Constitution,” *United States v. Morrison*, 529 U.S. 598, 607 (2000). It is not clear which of Congress’s enumerated powers individually or in concert supports under all circumstances the creation of a trespassing offense relating to “restricted areas” temporarily cordoned off or established for a “special event of national significance.”

Of course, the protection of such events under many circumstances may fall within one or more of Congress’s enumerated powers. For instance, Congress may enact a trespassing law protecting special events held in the District of Columbia by virtue of its power to enact laws for the District, U.S. Const. Art.I, §8, cl.17. Even here, however, the First Amendment may impose impediments when in a particular case the governmental interest in the special event is minimal and significant access restrictions are imposed on use of the streets or other public areas to prevent peaceful

¹⁷⁵ “(1) When directed by the President, the United States Secret Service is authorized to participate, under the direction of the Secretary of Homeland Security, in the planning, coordination, and implementation of security operations at special events of national significance, as determined by the President.

“(2) At the end of each fiscal year, the President through such agency or office as the President may designate, shall report to the Congress — (A) what events, if any, were designated special events of national significance for security purposes under paragraph (1); and (B) the criteria and information used in making each designation,” 18 U.S.C. 3056(e).

¹⁷⁶ H.Rept. 109-333, at 110 (2005)(“Section 602 of the conference report is a new section. 18 U.S.C. 1752 authorizes the Secret Service to charge individuals who breach established security perimeters or engage in other disruptive or potentially dangerous conduct at National Special Security Events (NSSEs) if a Secret Service protectee is attending [or will be attending] the designated event. Section 602 of the conference report expands 18 U.S.C. 1752 to criminalize such security breaches at NSSEs that occur when the Secret Service protectee is not in attendance [and will not be in attendance]”)(language in brackets added to demonstrate the reach of section 1752 prior to the Act, and the breadth of the Act’s amendment).

protest demonstrations.¹⁷⁷ Subject to some considerations, events which have an impact on interstate or foreign commerce seem to fall within Congress’s power to regulate such commerce, U.S. Const. Art.I, §8, cl. 3.

Interpretative regulations that limit the amendment’s application to areas within the scope of Congress’s legislative authority and consistent with the demands of the First Amendment offer the prospect of passing constitutional muster. Although the bill repeals the subsection of 1752 which in amended form might authorize curative implementing regulations, such regulatory authority is likely implicit.¹⁷⁸

Use of False Credentials to National Special Security Events.

Questions as to the breadth of the exercise of Congress’s legislative authority might also be raised about section 603 of the Act, which brings special event tickets and credentials within the folds of the statute that outlaws misuse of governmentally issued identification documents, 18 U.S.C. 1028. The structure of section 1028 makes the point more obviously than might otherwise be the case. In its form prior to the Act, section 1028 prohibited eight particular varieties of unauthorized possession or trafficking in identification documents¹⁷⁹ when committed under one

¹⁷⁷ *Boos v. Barry*, 485 U.S. 312, 318 (1988)(“public streets and sidewalk” are “traditional public fora that time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. In such places, which occupy a special position in terms of First Amendment protection, the government’s ability to restrict expressive activity is very limited”)(internal quotation marks and citations omitted).

¹⁷⁸ “The Secretary of the Treasury is authorized — (1) to designate by regulations the buildings and grounds which constitute the temporary residences of the President or other person protected by the Secret Service and the temporary offices of the President and his staff or of any other person protected by the Secret Service, and (2) to prescribe regulations governing ingress or egress to such buildings and grounds and to posted, cordoned off, or otherwise restricted areas where the President or other person protected by the Secret Service is or will be temporarily visiting,” 18 U.S.C. 1752(d). The authority vested in the Secretary of the Treasury passed to the Secretary of Homeland Security when the Secret Service was transferred to that Department, 6 U.S.C. 381. Of course, a conforming amendment to subsection 1752(d) would be required to implement the expanded “special event” area coverage.

¹⁷⁹ “Whoever, in a circumstance described in subsection (c) of this section — (1) knowingly and without lawful authority produces an identification document, authentication feature, or a false identification document; (2) knowingly transfers an identification document, authentication feature, or a false identification document knowing that such document was stolen or produced without lawful authority; (3) knowingly possesses with intent to use unlawfully or transfer unlawfully five or more identification documents (other than those issued lawfully for the use of the possessor), authentication feature, or false identification documents; (4) knowingly possesses an identification document (other than one issued lawfully for the use of the possessor), authentication feature, or a false identification document, with the intent such document or feature be used to defraud the United States; (5) knowingly produces, transfers, or possesses a document-making implement or authentication feature with the intent such document-making implement or authentication feature will be used in the production of a false identification document or another document-making implement or authentication feature which will be so used; (6) (continued...)

of three jurisdictional circumstances: the documents are issued or purport to be issued by a federal entity, the documents are used to defraud the United States, or the offense involves transportation in, or affects, interstate or foreign commerce, 18 U.S.C. 1028(a), (c).

The Act makes three changes in the scheme. First, it amends one of the eight prohibition subsections, that which outlaws unlawful possession of U.S. documents or facsimiles thereof, when committed under one of three jurisdictional circumstances. The change adds the documents of special event sponsors to the protected class, if the one jurisdictional predicates is satisfied.¹⁸⁰ Second, it amends the definition of “identification document” to include special events documents,¹⁸¹ so that each of the other eight prohibition subsections applies as long as one of the three jurisdictional predicates is satisfied. Third, it amends one of the jurisdictional predicates, that which is based on issuance by a federal agency. It treats sponsors of special events as federal agencies within the jurisdictional subsection of section 1028(c).¹⁸²

¹⁷⁹ (...continued)

knowingly possesses an identification document or authentication feature that is or appears to be an identification document or authentication feature of the United States which is stolen or produced without lawful authority knowing that such document or feature was stolen or produced without such authority; (7) knowingly transfers or uses, without lawful authority, a means of identification of another person with the intent to commit, or to aid or abet, any unlawful activity that constitutes a violation of Federal law, or that constitutes a felony under any applicable State or local law; or (8) knowingly traffics in false authentication features for use in false identification documents, document-making implements, or means of identification; shall be punished as provided in subsection (b) of this section,” 18 U.S.C. 1028(a).

¹⁸⁰ “Whoever, in a circumstance described in subsection (c) of this section. . . knowingly possesses an identification document or authentication feature that is or appears to be an identification document or authentication feature of the United States *or a sponsoring entity of an event designated as a special event of national significance* which is stolen or produced without lawful authority knowing that such document was stolen or produced without such authority. . . shall be punished as provided in subsection (b) of this section,” 18 U.S.C. 1028(a)(6)(amendment in italics).

¹⁸¹ “In this section . . . the term ‘identification document’ means a document made or issued by or under the authority of the United States Government, a State, political subdivision of a State, *a sponsoring entity of an event designated as a special event of national significance* a foreign government, political subdivision of a foreign government, an international governmental or an international quasi-governmental organization which, when completed with information concerning a particular individual, is of a type intended or commonly accepted for the purpose of identification of individuals,” 18 U.S.C. 1028(d)(3)(amendment in italics).

¹⁸² “The circumstance referred to in subsection (a) of this section is that — (1) the identification document, authentication feature, or false identification document is or appears to be issued by or under the authority of the United States *or a sponsoring entity of an event designated as a special event of national significance* or the document-making implement is designed or suited for making such an identification document, authentication feature, or false identification document,” 18 U.S.C. 1028(c)(1)(amendment in italics)

It is this third amendment that raises the issue. There is no doubt that Congress has the constitutional power to enact legislation prohibiting possession or trafficking in special event identification documents, if the third jurisdictional predicate is satisfied, i.e., the offense involves transportation in, or affects, interstate or foreign commerce.¹⁸³ Nor is there any dispute Congress enjoys such authority, if the second jurisdiction predicate is satisfied, i.e., the offense involves defrauding the United States.¹⁸⁴ There may be some question, however, as to the extent to which Congress may prohibit unlawful possession or trafficking in special event identification documents predicated solely upon the fact they were issued by a special event sponsor. “National significance” is not a term that by itself conjures up reference to any of Congress’s constitutionally enumerated powers, although the commerce clause might provide an arguably adequate foundation, particularly if regulations confined enforcement to events with an obvious impact on interstate or foreign commerce. Of course, legislation that cannot be traced to one or more of Congress’s enumerated powers lies beyond its reach, *United States v. Morrison*, 529 U.S. 598, 607 (2000).

Forensic and Investigative Support of Missing and Exploited Children Cases.

The PROTECT Act¹⁸⁵ authorizes “officers and agents of the Secret Service” to provide state and local authorities and the National Center for Missing Exploited Children with investigative and forensic services in missing and exploited children cases, 18 U.S.C. 3056(f). Within the Secret Service, officers and agents conduct investigations, but employees provide forensic services. Section 604 of the Act changes “officers and agents of the Secret Service” to simply “the Secret Service” to reflect this reality.

Secret Service Uniformed Division.

The Act amends and transfers the organic authority for the Secret Service Uniformed Division. The conference report’s explanation is terse:

¹⁸³ “[M]odern Commerce Clause jurisprudence has identified three broad categories of activity that Congress may regulate under its commerce power. First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress’ commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce,” *United States v. Morrison*, 529 U.S. 598, 608-609 (2000)(internal quotation marks and citations omitted); *United States v. Lopez*, 514 U.S. 549, 558-59 (1995).

¹⁸⁴ “Congress has authority under the Spending Clause to appropriate federal moneys to promote the general welfare, and it has corresponding authority under the Necessary and Proper Clause, to see to it that taxpayer dollars appropriated under that power are in fact spent for the general welfare, and not frittered away in graft or on projects undermined when funds are siphoned off or corrupt public officers are derelict about demanding value for dollars,” *Sabri v. United States*, 541 U.S. 600, 605 (2004).

¹⁸⁵ P.L. 108-21, 117 Stat. 650 (2003).

Section 605 of the conference report is a new section. This section places all authorities of the Uniformed Division, which are currently authorized under title 3, in a newly created 18 U.S.C. §3056A, following the core authorizing statute of the Secret Service (18 U.S.C. §3056), thereby organizing the Uniformed Division under title 18 of the United States Code with other Federal law enforcement agencies.¹⁸⁶

What makes the statement interesting is that the organic authority for most federal law enforcement agencies is not found in title 18. For example, the Federal Bureau of Investigation (FBI) and the Marshals Service provisions appear not in title 18 but in title 28, 28 U.S.C. 531-540, 561-569; the Inspectors General Offices in appendices to title 5, 5 U.S.C. App. III; the Coast Guard in title 14, 14 U.S.C. chs.1-25; the Customs Service in title 19, 19 U.S.C. 2071-2083.

What is also somewhat intriguing is what is not said. There is no further explanation of the additions, modifications, deletions or apparent duplications associated with the transfer. Existing law lists a series of protective duties the Uniformed Division is authorized to perform, 3 U.S.C. 202. Although it is more geographically specific, it essentially reflects a similar list of some of the duties of the Secret Service as a whole found in 18 U.S.C. 3056.¹⁸⁷ The Act adds four protective duties to the list: protection of former presidents and their spouses, protection of presidential and vice presidential candidates, protection of visiting heads of state, and security for special events of nation significance, new 18 U.S.C. 3056A(a)(10)-(13) as added by the Act. All but the special event provisions are already part of the general Secret Service authority under section 3056 (18 U.S.C. 3056(a)(3),(7), (5)). The Act also explicitly authorizes members of the Division to carry firearms, make arrests under certain situations, and perform other duties authorized by law, 18 U.S.C. 3056A(b)(1) as added by the Act — authority they are likely to already enjoy by operation of section 3056, 18 U.S.C. 3056(c)(1)(B), (C), (F), or by virtue of the fact they are vested with “powers similar to those of members of the Metropolitan Police of the District of Columbia,” 3 U.S.C. 202.

Section 605(b) of the Act specifically permits the Secretary of Homeland Security to contract out protection of foreign missions and foreign officials outside of the District of Columbia, amending 18 U.S.C. 3056(d).

The Act also repeals 3 U.S.C. 203 (relating to personnel, appointment and vacancies), 204 (relating to grades, salaries, and transfers), 206 (relating to privileges of civil-service appointees), 207 (relating to participation in police and firemen’s relief fund),¹⁸⁸ and 208(b)(relating to authorization of appropriations).

¹⁸⁶ H.Rept. 109-333, at 111 (2005).

¹⁸⁷ For example, while both 3 U.S.C. 202 and 18 U.S.C. 3056 authorize protection of the President, Vice President and their families, section 202 authorizes the Uniformed Division to protect the White House, any building housing presidential offices, the Treasury building and certain foreign diplomatic missions located outside of the District of Columbia, 3 U.S.C. 202.

¹⁸⁸ However, section 606 of the Act, 120 Stat. 256 (2006), states that the changes do “not (continued...)”

Secret Service as a Distinct Entity.

Section 607 of the Act statutorily declares the Secret Service a distinct entity within the Department of Homeland Security, reporting directly to the Secretary, adding new subsection 18 U.S.C. 3056(g).

Exemptions from the Federal Advisory Committee Act.

Major presidential and vice presidential candidates are entitled to Secret Service protection, 18 U.S.C. 3056(a)(7). The Secretary of Homeland Security identifies who qualifies as a “major” candidate and therefore is entitled to protection after consulting with an advisory committee consisting of House Speaker and minority leader, the Senate majority and minority leader and fifth member whom they select, *id.* The Secret Service’s electronic crime task forces consist of federal and state law enforcement members as well as representatives from academia and industry who share information concerning computer security and abuse, 18 U.S.C. 3056 note.

The Federal Advisory Commission Act imposes notice, open meeting, record keeping, and reporting requirements on groups classified as federal advisory committees, 5 U.S.C. App. II. Advisory committees are committees, task forces, and other groups established by the statute, the President, or an executive agency “in the interest of obtaining advice and recommendations for” the President or federal agencies, 5 U.S.C. App. II 3(2). No group consisting entirely of officers or employees of the United States is considered an advisory committee for purposes of the act, *id.*

It is not clear that either the candidates protection committee or the electronic crimes task forces would be considered advisory committees for purposes of the advisory act. Even if the committee were not exempt because it consists entirely of federal “officers or employees,” it seems highly unlikely that it is the type of committee envisioned by Congress when it enacted the act.¹⁸⁹ As for the task forces, it is not clear that their function is to provide advice and recommendations for agency action. In any event, section 608 of the Act exempts electronic crimes task forces and the candidates protection advisory committee from provisions of the Federal Advisory Committee Act, amending 18 U.S.C. 3056 note, 3056(a)(7).

Title VII: Combat Methamphetamine Epidemic Act of 2005

Title VII of the Act contains subtitles concerning regulation of domestic and international commerce in three methamphetamine (meth) precursor chemicals: ephedrine, pseudoephedrine, and phenylpropanolamine (EPP); increased penalties for methamphetamine offenses; expanded environmentally-related regulations; and

¹⁸⁸ (...continued)

affect the retirement benefits of current employees or annuitants that existed on the day before the effective date of this Act.”

¹⁸⁹ *Public Citizen v. Department of Justice*, 491 U.S. 440, 451-67(1989)(holding the act inapplicable to American Bar Association committee whose advice the Department sought regarding the qualifications of candidates for judicial appointment).

adjusted grant programs.¹⁹⁰ In many of its particulars, Title VII resembles H.R. 3889, the Methamphetamine Epidemic Elimination Act, as amended by the House Committees on Energy and Commerce and on the Judiciary, H.Rept. 109-299 (pts. 1 & 2)(2005).¹⁹¹

Domestic Regulation of Precursor Chemicals.

Sales Regulation of “Scheduled Listed Chemicals”. The first part of Title VII addresses the fact that certain cold and allergy medicines — widely and lawfully used for medicinal purposes and readily available in news stands, convenience stores, grocery stores, and drugstores — when collected in bulk can be used to manufacture methamphetamine. At the federal level, the Food and Drug Administration (FDA) regulates the commercial drug market to ensure the public of safe and effective medicinal products pursuant to the Federal Food Drug and Cosmetic Act, 21 U.S.C. 301-397. The Attorney General through the Drug Enforcement Administration regulates the commercial drug market with respect to drugs with a potential for addiction and abuse, pursuant to the Controlled Substances Act, 21 U.S.C. 801- 904, and the Controlled Substances Import and Export Act, 21 U.S.C. 951-971.

The degree of regulatory scrutiny afforded a particular drug classified as a controlled substance and sometimes certain of the chemicals essential for its production (precursor chemicals, also known as “list chemicals”) depends upon the drug’s potential for abuse weighed against its possible beneficial uses.¹⁹² Those who lawfully import, export, produce, prescribe, sell or otherwise dispense drugs classified as controlled substances must be registered, 21 U.S.C. 958, 822. In the case of controlled substances susceptible to abuse and therefore criminal diversion and for certain of their precursor chemicals, the Attorney General may impose production and import/export quotas, security demands, inventory control measures, and extensive registration, record keeping and inspection requirements, 21 U.S.C. 821-830, 954-71. A wide range of civil and criminal sanctions, some of them quite severe, may be imposed for violation of the Controlled Substances Act, the Controlled Substances Import and Export Act, or of the regulations promulgated for their implementation, 21 U.S.C. 841-863, 959-967.¹⁹³

¹⁹⁰ Related CRS Reports include CRS Report RS22325, *Methamphetamine: Legislation and Issues in the 109th Congress*, by Celinda Franco, and CRS Report RS22177, *The Legal Regulation of Sales of Over-the-Counter Cold Medication*, by Jody Feder.

¹⁹¹ In many respects, it is also compatible with S. 103 as reported by the Senate Committee on the Judiciary without written report.

¹⁹² For example, the so-called “schedule I controlled substances” are those drugs that have “high potential for abuse,” that have “no currently accepted medical use in treatment in the United States,” and for which there are no “accepted safety for use . . . under medical supervision,” 21 U.S.C. 812(b)(1).

¹⁹³ See generally, CRS Report 97-141, *Drug Smuggling, Drug Dealing and Drug Abuse: Background and Overview of the Sanctions Under the Federal Controlled Substances Act and Related Statutes*, by Charles Doyle.

Prior to the Act, the Controlled Substances Act, in a dizzying array of criss-crossing exceptions and definitions, permitted the over-the-counter sale, without regulatory complications, of cold remedies containing ephedrine, pseudoephedrine or phenylpropanolamine (EPP) — methamphetamine precursors — in packages containing less than 3 grams of EPP base (and in amounts not in excess of 9 grams of pseudoephedrine or phenylpropanolamine base per transaction).¹⁹⁴ Title VII eliminates the criss-crossing¹⁹⁵ and replaces it with a new regulatory scheme for “scheduled listed chemical products,” i.e., EPP products,¹⁹⁶ which:

- limits drugstore, convenience store, grocery store, news stand, lunch wagon (mobile retailer), and other retail sales of EPP products to 3.6 grams of EPP base per customer per day (down from 9 grams per transaction), 21 U.S.C. 830(d), 802(46), 802(47);
- limits mobile retail sales to 7.5 grams of EPP base per customer per month, 21 U.S.C. 830(e)(1)(A);
- insists that EPP products be displayed “behind the counter” (locked up in the case of mobile retailers), 21 U.S.C. 830(e)(1)(A);
- (other than for sales involving 60 milligrams or less of pseudoephedrine) requires sellers to maintain a logbook (for at least two years) recording for every purchase, the time and date of sale, the name and quantity of the product sold, and name and address of the purchaser, 21 U.S.C. 830(e)(1)(A);
- (other than for sales involving 60 milligrams or less of pseudoephedrine) demands that purchasers present a government-issued photo identification, sign the logbook for the sale noting their name and address, and the date and time of the sale, 21 U.S.C. 830(e)(1)(A);
- provides that the logbook must include a warning that false statements are punishable under 18 U.S.C. 1001 with a term of

¹⁹⁴ All three chemicals are defined as “list I chemicals,” 21 U.S.C. 802(34)(C),(I),(K). List I and List II chemicals are defined as “listed chemicals,” 21 U.S.C. 802(33). Several of the act’s regulatory provisions apply to “regulated transactions” described as including the distribution, receipt, sale, import or export of listed chemicals, 21 U.S.C. 802(39)(A). Regulated transactions, however, do not include transactions involving FDA approved drugs, 21 U.S.C. 802(39)(A)(iv), unless the drug contains EPP (except “ordinary over-the-counter products” defined as products containing not more than 3 grams of an EPP base and unless in liquid form are packaged in blister packs where feasible, 21 U.S.C. 802(45)), 21 U.S.C. 802(39)(iv)(I)(aa), or unless the drug is one the Attorney General has determined is subject to diversion, 21 U.S.C. 802(39)(iv)(I)(bb), and the drug is one with a EPP base in amounts in excess of a threshold established by the Attorney General (except that the threshold for pseudoephedrine and phenylpropanolamine products may be no more than 9 grams of base per transaction and in packages containing no more than 3 grams of base), 21 U.S.C. 802(39)(iv)(II).

¹⁹⁵ Section 711 of the Act replaces 20 U.S.C. 802(45); section 712 replaces 20 U.S.C. 802(39)(iv).

¹⁹⁶ The bill defines a “scheduled listed chemicals product” as one “that contains ephedrine, pseudoephedrine, or phenylpropanolamine” and “may be marketed or distributed lawfully in the United States under the Federal, Food Drug, and Cosmetic Act as a nonprescription drug,” new 21 U.S.C. 802(45) as added by the Act.

imprisonment of not more than five years and/or a fine of not more than \$250,000 (not more than \$500,000 for organizations), 21 U.S.C. 830(e)(1)(A), 830(e)(1)(D);

- states that sellers must provide, document, and certify training of their employees on the EPP product statutory and regulatory requirements, 21 U.S.C. 830(e)(1)(A), (B);
- directs the Attorney General to promulgate regulations to protect the privacy of the logbook entries (except for access for federal, state and local law enforcement officials), 21 U.S.C. 830(e)(1)(C);
- affords sellers civil immunity for good faith disclosure of logbook information to law enforcement officials (unless the disclosure constitutes gross negligence or intentional, wanton, or willful misconduct), 21 U.S.C. 830(e)(1)(E);
- requires sellers take measures against possible employee theft or diversion and preempts any state law which precludes them asking prospective employees about past EPP or controlled substance convictions, 21 U.S.C. 830(e)(1)(G);
- sets September 30, 2006 as the effective date for the regulatory scheme (but the 3.6 gram limit on sales would become effective 30 days after enactment).

Federal law imposes monthly reporting requirements on mail order sales of EPP products, 21 U.S.C. 830(b)(3). Under the Act, those subject to the reporting requirement must confirm the identity of their customers under procedures established by the Attorney General, and sales are limited to 7.5 grams of EPP base per customer per month.¹⁹⁷ If the Attorney General determines that an EPP product cannot be used to produce methamphetamine, he may waive the 3.6 gram limit on retail sales and 7.5 gram limits on mail order and mobile retail sales.¹⁹⁸

Sellers who knowingly violate the mail order regulations, or knowingly or recklessly violate the sales regulations, or unlawfully disclose or refuse to disclose EPP logbook sales information, or continue to sell after being prohibited from doing so as a result of past violations, are subject to imprisonment for not more than one year, and/or a fine of not more than \$100,000 (not more than \$200,000 for organizations), and to a civil penalty of not more than \$25,000, 21 U.S.C. 842 as amended by section 711(f) of the Act. During the 30 days after enactment but before the new purchase limits become effective, knowing or intentional retail purchases more than 9 grams of EPP base (7.5 grams in the case of mail order purchases) are punishable by imprisonment for not more than one year and/or a fine of not less than \$1,000 nor more than \$100,000 (not more than \$200,000 for an organization), 21 U.S.C. 844(a) as amended by section 711(e)(1) of the Act.

Authority to Establish Production Quotas. The Controlled Substances Act allows the Attorney General to assess the total annual requirements for various controlled substances and to impose manufacturing quotas accordingly, 21 U.S.C. 826. Section 713 of the Act extends that authority to reach EPP production. For

¹⁹⁷ § 711(c)(1), P.L. 109-177, 120 Stat. 261 (2006), adding 21 U.S.C. 830(e)(2).

¹⁹⁸ § 711(d), P.L. 109-177, 120 Stat. 261, 262 (2006), adding 21 U.S.C. 830(e)(3).

violations, manufacturers face imprisonment for not more than one year, and/or a fine of not more than \$100,000 (not more than \$200,000 for organizations), and to a civil penalty of not more than \$25,000.

Imports/Exports. The Attorney General enjoys broad general authority to regulate controlled substances imported and exported for legitimate purposes, 21 U.S.C. 952, 953 (neither section mentions listed chemicals). Importers and exporters of list I chemicals (which includes EPP), however, must register with the Attorney General, 21 U.S.C. 958. And they must notify the Attorney General 15 days in advance of any anticipated shipment of listed chemicals to or from the U.S. involving anyone other than a regular source or customer, 21 U.S.C. 971.

Section 715 of the Act expands the statutory statement of the Attorney General's authority to regulate controlled substance imports to include EPP, amending 21 U.S.C. 952. Moreover, it provides implicit statutory confirmation of the Attorney General's authority to set import quotas for EPP by authorizing him to increase the quantity of chemicals importer's registration permits him to bring into the country, new subsection 21 U.S.C. 952(d) as added by the Act. Here and its other adjustments concerning imports and exports, the Act instructs the Attorney General to confer with the U.S. Trade Representative in order to ensure continued compliance with our international trade obligations.

International Regulation of Precursors.

Foreign Distribution Chains. The Act also affords the Attorney General renewed notification when the listed chemical transaction, for which approval was initially sought and granted, "falls through," and the importer or exporter substitutes a new subsequent purchaser, 21 U.S.C. 971 as amended.¹⁹⁹ The Attorney General may require EPP importers to include "chain of distribution" information in their notices that traces the distribution trail from foreign manufacturers to the importer, new subsection 21 U.S.C. 971(h) as added by section 721 of the Act. The Attorney General may seek further information from foreign participants in the chain and refuse to approve transactions involving uncooperative participants, 21 U.S.C. 971(h)(2), (h)(3). Failure to comply with these expanded notice requirements or the bills's EPP import registration and quota provisions is punishable by imprisonment for not more than 10 years and /or a fine of not more than \$250,000 (not more than \$500,000 for organizations), 21 U.S.C. 960(d)(6) as amended by section 717 of the Act.

Foreign Assistance to Source Countries. The Foreign Assistance Act calls for an annual report on the drug trafficking and related money laundering

¹⁹⁹ H.Rept. 109-333 (2005) ("A problem can arise, however, when the sale that the importer or exporter originally planned falls through. When this happens the importer or exporter must quickly find a new buyer for the chemicals on what is called the "spot market" — wholesale market. Sellers are often under pressure to find a buyer in a short amount of time, meaning that they may be tempted to entertain bids from companies without a strong record of preventing diversion. More importantly, the Department of Justice has no opportunity to review such transactions in advance and suspend them if there is a danger of diversion to illegal drug production").

activities taking place in countries receiving assistance, 22 U.S.C. 2291h. Major illicit drug-producing and drug-transit countries are subject to a procedure featuring presidential certification of cooperative corrective efforts, 22 U.S.C. 2291j. The Act amends the reporting and certification requirements to cover the five largest EPP exporting and the five largest EPP importing countries with the highest rates of diversion, 22 U.S.C. 2291h, 2291j as amended by section 722 of the Act.²⁰⁰ It also directs the Secretary of State in consultation with the Attorney General to report to Congress on a plan to deal with the diversion. Section 723 of the Act further instructs the Secretary to take diplomatic action to prevent methamphetamine smuggling from Mexico into the United States and to report to Congress on results of the efforts; the first such report is due not later than one year after the Act's enactment, and every year thereafter.

Enhanced Criminal Penalties for Meth Production and Trafficking.

Smuggling Using Commuter Lanes. Unlawful possession of methamphetamine is punishable by imprisonment for terms ranging from not more than 20 years to imprisonment for life depending upon the amount involved and the offender's criminal record, 21 U.S.C. 841(b), 848. Unlawful possession of EPP is punishable by imprisonment for terms ranging from not more than five years to imprisonment for life depending upon the amount involved and the offender's criminal record, 21 U.S.C. 841(c), 848. Similar penalties follow smuggling methamphetamine or EPP, 21 U.S.C. 960, 848. Section 731 of the Act establishes a consecutive term of imprisonment of not more than 15 years to be added to the otherwise applicable sentence when the methamphetamine or EPP offense is committed in connection with quick entry border procedures.

Manufacturing Controlled Substances on Federal Property. The fines for controlled substance offenses that involve *cultivation* of a controlled substance on federal property are not more than \$500,000 individuals and \$1 million for organizations, 21 U.S.C. 841(b)(5). The Act establishes the same fine levels for *manufacturing* a controlled substance on federal property, 21 U.S.C. 841(b)(5) as amended by section 732 of the Act.²⁰¹

Increased Penalties for Drug Kingpins. The Controlled Substances Act punishes major drug traffickers (those guilty of continuing criminal enterprise offenses sometimes known as "drug kingpins"), 21 U.S.C. 848. Drug kingpins, whose offenses involve *300 or more times* the amount of controlled substance necessary to trigger the sentencing provisions of 21 U.S.C. 841(b)(1)(B) or whose offenses generate more than *\$10 million* in gross receipts a year, face sentences of mandatory life imprisonment. In the case of a drug kingpin trafficking in methamphetamine, section 733 of the Act lowers the thresholds to *200 or more times* the trigger amounts or *\$5 million* in gross receipts a year, new subsection 21 U.S.C. 848(s) as added by the Act.

²⁰⁰ Similar provisions appear in the House-passed Foreign Relations Authorization Act, Fiscal Years 2006 and 2007 (H.R. 2601)(§1007).

²⁰¹ The change confirms existing law since for purposes of the Controlled Substances Act, "manufacturing" includes "cultivating," 21 U.S.C. 802(15), (22).

Cooking or Dealing Near Children. The Controlled Substances Act doubles the otherwise applicable penalties for the distribution or manufacture of controlled substances near schools, playgrounds, video arcades and other similarly designated places likely to be frequented by children, 21 U.S.C. 860. Section 734 of the Act adds a penalty of imprisonment for not more than 20 years to the otherwise applicable penalties for distributing, possessing with the intent to distribute, or manufacturing methamphetamine anywhere where a child under 18 years of age is in fact present or resides, new section 21 U.S.C. 860a as added by the Act.

Reports to the Sentencing Commission. The United States Sentencing Commission establishes and amends federal sentencing guidelines, which must be considered when federal courts impose sentence in a criminal case, 28 U.S.C. 994; 18 U.S.C. 3553; *United States v. Booker*, 543 U.S. 220, 245 (2005). Every federal judicial district must provide the Commission with detailed reports on each criminal sentence imposed by the district's judges, 28 U.S.C. 994(w). Section 735 of the Act authorizes the Commission to establish the format for such reports and emphasizes the need for a written statement of reasons for the sentence imposed including the reasons for any departure from the sentence advised the by the guidelines, 28 U.S.C. 994(w) as amended by the Act.

Reports to Congress. Section 736 of the Act requires the Attorney General to report twice a year — to the Judiciary Committees; the House Energy and Commerce Committee; the Senate Commerce, Science and Transportation Committee; the House Government Reform Committee; and the Senate Caucus on International Narcotics Control — on the Drug Enforcement Administration's and the Federal Bureau of Investigation's allocation of resources to the investigation and prosecution of methamphetamine offenses.

Enhanced Environmental Regulation of Methamphetamine Byproducts.

Transportation of Hazardous Materials. Under the Hazardous Material Transportation Act, the Secretary of Transportation enjoys regulatory authority over the transportation of certain explosive, toxic or otherwise hazardous material, 49 U.S.C. 5103. Section 741 of the Act instructs the Secretary to report every two years to the House Committee on Transportation and Infrastructure and to the Senate Committee on Commerce, Science, and Transportation on whether he has designated as hazardous materials for purposes of the act, all methamphetamine production by-products, 49 U.S.C. 5103(d) as added by the Act.

Solid Waste Disposal. Under the Solid Waste Disposal Act, the Administrator of the Environmental Protection Agency identifies and lists toxic, flammable, corrosive and otherwise hazardous waste, 42 U.S.C. 6921. Section 742 of the Act requires the EPA Administrator to report within two years of enactment, to the House Committee on Energy and Commerce and the Senate Committee on Environment and Public Works, on the information received from law enforcement agencies and others identifying the by-products of illicit methamphetamine product and on which of such by-products the Administrator considers hazardous waste for purposes of the act, new subsection 42 U.S.C. 6921(j) as added by the Act.

Restitution for Methamphetamine Possession. The Act amends the provision under which offenders convicted of violations of the Controlled Substances Act or the Controlled Substances Import and Export Act involving the manufacture of amphetamine or methamphetamine may be ordered to pay restitution and to reimburse governmental entities for cleanup costs, to specifically include restitution and reimbursement in the case of offenses involving simple possession or possession with intent to distribute, 21 U.S.C. 853(q) as amended by section 743 of the Act.²⁰² This change was prompted by *United States v. Lachowski*, 405 F.3d 696, 700 (8th Cir. 2005), which had held that the “offenses involving the manufacture of amphetamine or methamphetamine” upon which a restitution or reimbursement order might be based did not include unlawful possession with intent to distribute methamphetamine. The conferees felt that *Lachowski* “undermined the ability of the Federal government to seek cleanup costs from methamphetamine traffickers who are convicted only of methamphetamine possession — even when the methamphetamine lab in question was on the defendant’s own property.”²⁰³

Drug Courts and Grant Programs.

Improvements to the DOJ Drug Court Program. The Attorney General may make grants to state, local and tribal governments for the operation of drug courts, 42 U.S.C. 3797u. The Act instructs the Attorney General to prescribe guidelines or regulations to ensure that such programs feature mandatory drug testing and mandatory graduated sanctions for test failures, new subsection 42 U.S.C. 3797u(c) as added by section 751 of the Act, and authorizes appropriations for FY2006 of \$70 million, new subsection 42 U.S.C. 3793(25)(A)(v)[inadvertently cited in the Act as 42 U.S.C. 2591(25)(A)(v)] as added by section 752 of the Act. The Attorney General is also directed to study the feasibility of a drug court program for low-level, non-violent federal offenders and to report on the results by June 30, 2006.

Grant Programs. The Act also creates three methamphetamine-related grant programs. One, provided by section 754 of the Act, addresses public safety as well as methamphetamine manufacturing, trafficking and use in “hot spots.” Appropriations of \$99 million for each of the next five fiscal years (2006-2010) are authorized for grants to the states under the program. The second, section 755 of the Act, authorizes appropriations of \$20 million for fiscal years 2006 and 2007 in order to provide grants to the states for programs for drug-endangered children. The third

²⁰² “The court, when sentencing a defendant convicted of an offense under this subchapter or subchapter II of this chapter involving the manufacture, *the possession, or the possession with the intent to distribute*, of amphetamine or methamphetamine, shall — (1) order restitution as provided in sections 3612 and 3664 of Title 18; (2) order the defendant to reimburse the United States, the State or local government concerned, or both the United States and the State or local government concerned for the costs incurred by the United States or the State or local government concerned, as the case may be, for the cleanup associated with the manufacture of amphetamine or methamphetamine by the defendant, *or on premises or in property that the defendant owns, resides, or does business in*; and (3) order restitution to any person injured as a result of the offense as provided in section 3663A of Title 18,” 21 U.S.C. 853(q)(amendments in italics).

²⁰³ H.Rept. 109-333, at 116 (2005).

program (services relating to methamphetamine use by pregnant and parenting women offenders), section 756 of the Act, is available to state, local, and tribal governments and supported an authorization of such appropriations as are necessary.