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Antiterrorism and Effective Death Penalty Act of 1996: A Summary

Charles Doyle

Senior Specialist

American Law Division

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ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996: A SUMMARY

SUMMARY

The Antiterrorism and Effective Death Penalty Act of 1996 is the product of legislative efforts stretching back well over a decade and stimulated to passage in part by the tragedies in Oklahoma City and the World Trade Center.

Title I of the Act substantially amends federal habeas corpus law as it applies to both state and federal prisoners whether on death row or imprisoned for a term of years by providing:

a bar on federal habeas reconsideration of legal and factual issues ruled upon by state courts in most instances;

creation of a general 1 year statute of limitations ;

creation of a 6 month statute of limitation in death penalty cases;

encouragement for states to appoint counsel for indigent state death row inmates during state habeas or unitary appellate proceedings; and

a requirement of appellate court approval for repetitious habeas petitions.

Title II recasts federal law concerning restitution, expands the circumstances under which foreign governments that support terrorism may be sued for resulting injuries, and increases the assistance and compensation available to the victims of terrorism.

Title III is crafted to help sever international terrorists from their sources of financial and material support. It enlarges the proscriptions against assisting in the commission of various terrorist crimes. It authorizes the regulation of fundraising by foreign organizations associated with terrorist activities. It adjusts the Foreign Assistance Act to help isolate countries who support terrorists and to bolster counterterrorism efforts in those who oppose them.

Title IV addresses immigration-related terrorism issues. It establishes or adjusts mechanisms to bar alien terrorists from the U.S., to remove from the U.S. any who are here, to narrow asylum provisions which allow terrorists to frustrate efforts to bar or remove them, and to expedite deportation of criminal aliens. It may prove to be a staging ground for more comprehensive immigration law revision now pending before the Congress.

Title V adjusts the restrictions on possession and use of materials capable of producing catastrophic damage in the hands of terrorists.

Title VI implements the treaty requiring the countries of the world to limit plastic explosives to those with pre-explosion detection devices implanted within them.

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ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996:

A SUMMARY

INTRODUCTION

The Antiterrorism and Effective Death Penalty Act of 1996, Pub.L.No. 104-132, 110 Stat. 1214 (1996)(the Act), is the culmination and amalgamation of disparate legislative efforts, some them stretching back well over a decade. The bombing of the Alfred P. Murrah Federal Building in Oklahoma City, and to a lesser extent the bombing of the World Trade Center in New York, supplied the most obvious stimuli for its enactment, but concern over other issues like habeas corpus and immigration contributed to its passage as well. This is a brief summary of the Act.

The Act has several sources. The first of the major comprehensive terrorism bills in the 104th Congress, H.R.896/S.390, was introduced on behalf of the Administration on February 10, 1995.⁽¹⁾ At about the same time the House passed individual bills on habeas corpus,⁽²⁾ restitution,⁽³⁾ and deportation of criminal aliens,⁽⁴⁾ whose successors became important parts of the Act.

Following the Oklahoma City bombing on April 19, 1995, Senator Dole offered S.735, Representative Hyde submitted H.R.1710, and revised omnibus comprehensive bills, H.R.1635/S.761, were presented for the Administration.⁽⁵⁾ The Senate sent an amended version of S.735 to the House on June 7, 1995.⁽⁶⁾

After the House Judiciary Committee reported out H.R.1710, H.R.Rep.No. 104-383 (1995), the House passed a revised version, H.R.2703, in its stead and then substituted its language for that of S.735.⁽⁷⁾ Each house accepted the conference committee report reconciling conflicts in the two versions,⁽⁸⁾ and the President signed the bill on April 24, 1996.

TITLE I -- HABEAS CORPUS REFORM

The Act substantially amends federal habeas corpus law as it applies to both state and federal prisoners whether on death row or imprisoned for a term of years. Federal habeas corpus is the statutory procedure, 28 U.S.C. 2241 et seq., under which state and federal prisoners may petition the federal courts to review their

convictions and sentences to determine whether the prisoners are being held contrary to the laws or Constitution of the United States.

At common law, the writ we know as habeas corpus was a judicial procedure whereby prisoners, held without trial, without being admitted to bail, or confined by order of a court without subject matter jurisdiction, might secure their release. The writ was not available to those convicted by courts with jurisdiction.

And so it began in this country, but over time it became a common method of securing federal judicial review of a state criminal conviction. In the late 60's the courts began to define the availability of federal habeas corpus more narrowly.

Habeas for inmates on death row raises different issues than habeas for other prisoners. There are slightly over 3000 prisoners awaiting execution in the United States. Over 300 join them every year. They have by definition been convicted of murders committed under the most despicable circumstances. Since 1972 fewer than 350 have been executed. Sentence is carried out for fewer than 50 per year.⁽⁹⁾ The delays between pronouncement and execution of sentence average over eight years, and delays of 15 to 20 years are not uncommon.⁽¹⁰⁾ Capital punishment jurisprudence is exceptionally complex,⁽¹¹⁾ and federal habeas is the last stage of review in most capital cases. Many considered federal habeas the bottleneck in the process.⁽¹²⁾

By contrast, there are over 1 million prisoners in state correctional facilities and another 100,000 in federal facilities who are not on death row.⁽¹³⁾ Their crimes range from the petty to the most severe. Their sentences are being executed. The legal issues associated with their convictions and sentences run the gamut from settled to questions of first impression. Since habeas can only speed their release, there is every incentive for them to file perpetually.

Questions of habeas reform had vexed Congress for some years and in the recent past their isolation has often been the price of passage for major crime legislation.⁽¹⁴⁾ In fact, as noted earlier, many of the Act's habeas provisions passed the House as separate legislation in February of 1995.

Highlights of the Act's habeas amendments include:

a bar on federal habeas reconsideration of legal and factual issues ruled upon by state courts in most instances;

creation of a general 1 year statute of limitations within which habeas petitions must be filed after the completion of direct appeal;

creation of a 6 month statute of limitation in death penalty cases;

encouragement for states to appoint counsel for indigent state death row inmates during state habeas or unitary appellate proceedings; and

a requirement of appellate court approval for repetitious habeas petitions.⁽¹⁵⁾

Section by Section Summary

Sec. 101 establishes a one year deadline within which state prisoners must file their federal habeas petitions, 28 U.S.C. 2244(d). The period of limitations begins with the latest of:

the date of final completion of direct state review procedures;

the date of removal of a government impediment preventing the prisoner from filing for habeas relief;

the date of Supreme Court recognition of the underlying federal right and of the right's retroactive application;
or

the date of uncovering previously undiscoverable evidence upon which the habeas claim is predicated.

The period is tolled during the pendency of state collateral review.⁽¹⁶⁾

Until fairly recently, a federal habeas corpus petition could be filed and the writ granted at any time as long as the petitioner remained under government confinement, *United States v. Smith*, 331 U.S. 469, 475 (1947) ("habeas corpus provides a remedy . . . without limit of time"), but court rules applicable to both state and federal prisoners were then adopted to permit the dismissal of stale petitions if the government's ability to respond to the petition has been prejudiced by the passage of time, Rule 9(a), *Rules Governing Section 2254 Cases in the United States District Courts*; see also Rule 9(a), *Rules Governing Section 2255 Cases in the United States District Courts*. The Rules did not preclude federal habeas merely because the government's ability to retry the petitioner had been prejudiced by the passage of time, *Vasquez v. Hillery*, 474 U.S. 254 (1986); nor did they apply where the petitioner could not reasonably have acquired the information necessary to apply before prejudice to the government occurred, Rules 9(a), *supra*.

In criticizing earlier proposals which would have established a statute of limitations for petitions in all habeas cases, both capital and noncapital punishment cases, one commentator argued, "[t]he proposed shift from this framework to a statute of limitations is unjustified and unjustifiable. First, the challenge in habeas is to detention *simpliciter* and not to a prisoner's conviction. A statute of limitations is tied to the date and the proposal is, accordingly, theoretically unsound. Second, it is in the nature of collateral claims that they come to litigants' attention well after judgment. Time is required thereafter to define federal issues precisely, to marshal all available arguments, and to file a well-drafted petition. Moreover, habeas litigation is typically carried on by undereducated prison inmates proceeding pro se. They cannot be expected to act with the dispatch that might reasonably be demanded of professional advocates," Yackle, *The Reagan Administration's Habeas Corpus Proposals*, 68 Iowa Law Review 609, 612-13 n.22 (1983).

One of the arguments on the other side builds upon the premise that the interests of justice are best advanced by a single, orderly, straight-forward review of the constitutional claims of a state prisoner. Stale petitions are as destructive of this goal as successive and repetitious petitions.⁽¹⁷⁾

Secs. 102 & 103 amend 28 U.S.C. 2253 and Rule 22 of the Federal Rules of Appellate Procedure, respectively, to narrow the circumstances under which a federal or state prisoner may appeal a federal district court's denial of his or her petition for habeas relief.

Previously, a state prisoner's appeal from a federal district court's habeas decision could only proceed upon the issuance of a probable cause certification issued by either the district court judge or a federal appellate judge that the appeal involved an issue meriting appellate consideration, 28 U.S.C. 2254, granted only after the prisoner has made a "substantial showing of the denial of [a] federal right," *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983).

The amendments codify *Barefoot*, impose the probable cause certification requirement on federal as well as state prisoners, and withdraw the authority of trial judges to certify probable cause.

The changes are said to further screen groundless appeals from the appellate process.⁽¹⁸⁾ Under earlier proposals opponents might have argued that the amendments were more likely to lengthen than shorten the process since they excluded the district court judges, those best situated to quickly assess the merits of a prisoner's appeal, from the process. The Act addresses this concern by providing for the district court to issue a certificate for appealability or a written statement why such a certificate is not appropriate, F.R.App.P.

22(b).

Sec. 104 adjusts the weight to accorded prior state court rulings and modifies the "exhaustion" doctrine to permit federal courts to dismiss groundless petitions notwithstanding the fact that state courts have not been afforded the opportunity to find them without merit, 28 U.S.C. 2254.

Out of deference to state courts and to eliminate unnecessary delay, the Act bars federal habeas relief on a claim already passed upon by a state court "unless the adjudication of the claim -- (1) resulted in a decision that was contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding," 28 U.S.C. 2254(d).

Before passage of the Act, state court interpretations or applications of federal law were not binding in subsequent federal habeas proceedings. The debate that led to passage was marked by complaints of delay and wasted judicial resources countered by the contention that federal judges should decide federal law.⁽¹⁹⁾

The Act also strips from the presumption of accuracy, afforded state court findings of fact, the exceptions to which it was previously subject.⁽²⁰⁾ And it limits the introduction of evidence not previously presented to the state courts to cases where either the evidence supports a newly recognized, retroactively applicable constitutional claim or was not reasonably discoverable earlier, however only if the petitioner clearly and convincingly shows that but for the constitutional error established by the newly presented evidence no reasonable jury would have found the petitioner guilty.⁽²¹⁾

State prisoners were formerly required to exhaust the opportunities for state remedial action before federal habeas relief could be granted, 28 U.S.C. 2254(b),(c)(1994). This "exhaustion doctrine is principally designed to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings. Under our federal system, the federal and state courts [are] equally bound to guard and protect rights secured by the Constitution," *Ex parte Royall*, 117 U.S. 241, 251 (1886). Because "it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation," federal courts apply the doctrine of comity, which "teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereign with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter," *Darr v. Burford*, 339 U.S. 200, 204 (1950).

"A rigorously enforced total exhaustion rule encourage[s] state prisoners to seek full relief first from the state courts, thus giving those courts the first opportunity to review all claims of constitutional error. As the number of prisoners who exhaust all of their federal claims increases, state courts may become increasingly familiar with and hospitable toward federal constitutional claims. Equally important, federal claims that have been fully exhausted in state courts will more often be accompanied by a complete factual record to aid the federal courts in their review," *Rose v. Lundy*, 455 U.S. 509, 518-19 (1982).

On the other hand, Congress appears to have been persuaded that while as a general rule constitutional questions may be resolved more quickly if state prisoners initially bring their claims to state courts, in some cases where a state prisoner has mistakenly first sought relief in federal court, operation of the exhaustion doctrine may contribute to further delay:

"This reform will help avoid the waste of state and federal resources that now result when a prisoner presenting a hopeless petition to a federal court is sent back to the state courts to exhaust state remedies. It will also help avoid potentially burdensome and protracted inquiries as to whether state remedies have been exhausted, in cases in which it is easier and quicker to reach a negative determination of the merits of a petition. . . . The [Act] further provides that a state shall not be deemed to have waived the exhaustion

requirement or be estopped from reliance on the requirement unless it waives the requirement expressly through counsel. This provision accords appropriate recognition to the important interests in comity that are implicated by the exhaustion requirement in cases in which relief may be granted. This provision is designed to disapprove those decisions which have deemed states to have waived the exhaustion requirement, or barred them from relying on it, in circumstances other than where the state has expressly waived the requirement." H.R.Rep.No. 104-23 at 9-10 (1995).

Section 104 authorizes, subject to regulation by Supreme Court rule, the payment of the fees of attorneys who represent indigent state prisoners in noncapital federal habeas cases under 18 U.S.C. 3006A (the provision governing the fees paid to attorneys who represent indigent defendants in federal criminal cases generally). Finally, section 104 declares that state prisoners may not be afforded federal habeas relief based upon claims of ineffective or incompetent legal representation during federal or state habeas proceedings.

Sec. 105 amends habeas procedure for federal prisoners to include the 1 year statute of limitations, attorneys' fees, and limitations on successive petitions which the Act makes applicable to the habeas procedure for state prisoners, 28 U.S.C. 2255.

Sec. 106 bars repetitious habeas petitions by state and federal prisoners, 28 U.S.C. 2244(b). Under earlier law, state prisoners could not petition for habeas relief on a claim they had included or could have included in earlier federal habeas petitions unless they could show "cause and prejudice" or a miscarriage of justice. Cause may be found in the ineffective assistance of counsel, *Kimmelman v. Morrison*, 477 U.S. 365 (1986); the subsequent development of some constitutional theory which would have been so novel at the time it should have been asserted as to be considered unavailable, *Reed v. Ross*, 468 U.S. 1 (1984); or the discovery of new evidence not previously readily discoverable, *Amadeo v. Zant*, 486 U.S. 214 (1988).

A prisoner unable to show cause and prejudice might nevertheless be entitled to federal habeas relief upon a showing of a "fundamental miscarriage of justice." As noted above, until recently this required a showing "by clear and convincing evidence that but for a constitutional error, no reasonable juror would find [the petitioner guilty or] eligible for the death penalty under [applicable state] law," *Sawyer v. Whitney*, 505 U.S. 333, 348 (1992). The Supreme Court in *Schlup v. Delo*, 115 S.Ct. 851 abandoned the "clear and convincing" standard of *Sawyer* in favor of a "more likely than not" standard, i.e., "the habeas petitioner [must] show that a constitutional violation has probably resulted in the conviction of one who is actually innocent. . . . To satisfy [this] gateway standard, a petitioner must show that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt" but for the constitutional error, 115 S.Ct. at 867.

The Act returns to the *Sawyer* "miscarriage of justice" standard for claims supported by newly discovered evidence, and otherwise bars habeas in cases of successive petitions unless the prisoner is proceeding under a newly recognized, retroactively applicable constitutional interpretation. Even under these circumstances a federal district court may only consider a second or successive habeas petition if a three judge panel of the court of appeals determines that the petition qualifies for either the newly discovered evidence or the new recognized constitutional interpretation exception. The panel's decision may not be appealed nor made the subject of the petition for certiorari to the Supreme Court. The Supreme Court has granted certiorari in *Felker v. Turpin*, 116 S.Ct. 1588 (1996), for expeditious consideration of whether the Act unconstitutionally restricts the jurisdiction of the Court and whether application of the Act's limitation on habeas violates the suspension clause. [\(22\)](#)

Sec. 107 streamlines federal habeas procedures for state death row inmates in states that have or adopt an appointment and compensation system for attorneys representing indigent state prisoners in connection with collateral review or unitary review proceedings, 28 U.S.C. 2261-2266. Prior to the enactment of the Act, federal law called for the appointment of counsel to assist indigent state prisoners charged with or convicted of a capital offense at every stage of the proceedings other than during collateral review in state court. The

Act offers a streamlined habeas procedure in cases involving state death row inmates to those states that fill this gap, 28 U.S.C. 2261, 2265.

It offers the states three options. The states may "opt" out and work to make the existing system function efficiently and fairly. Alternatively, they may elect to provide a mechanism for the appointment and compensation of counsel to assist indigent state prisoners under sentence of death in a manner that fills the gaps identified by the Powell Committee. Finally, rather than use the mechanism for appointment of counsel for a separate level of state collateral proceedings, the states may use the mechanism in conjunction with a unified system of review which merges direct appeals and collateral review.

The states that opt for the development of a counsel appointment and compensation mechanism under either approach may claim the benefits of the streamlining amendments which the law offers with respect to limited stays of execution, statutes of limitations, reduced scope of review, and federal court time tables. States that opt out may only claim the benefits of the general modifications to federal habeas described above.

In 28 U.S.C. 2262, the Act establishes a one-time automatic stay of execution for state death row inmates carrying through until the completion of the federal habeas process. Previously, the federal habeas statute authorized federal courts to stay the execution of a final state court judgment during the pendency of a state prisoner's federal habeas proceedings and related appeals, 28 U.S.C. 2251 (1994). Federal appellate courts could consider motions for a stay, pending review of the district court's decision or at the same time they considered the merits of the appeal. This regime encouraged unnecessary litigation over whether a stay was or was not in order and often resulted in state death row inmates waiting until the last hour before simultaneously filing a motion for a stay and an appeal from the district court's denial of the writ.

The Act establishes a 180 day statute of limitations for filing federal habeas petitions after the close of state proceedings with the possibility of one 30 day extension upon a good cause showing, 28 U.S.C. 2263.

Federal habeas review of a claim filed by a state death row inmate is limited to issues raised and decided on the merits in state court unless the state unlawfully prevented the claim from being raised in state court, or the claim is based on a newly recognized, retroactively applicable constitutional interpretation or on newly unearthed, previously undiscoverable evidence, 28 U.S.C. 2264.

In cases where the federal habeas application has been filed by a prisoner under sentence of death under the federal law or the laws of a state which has "opted in," the government has a right, enforceable through mandamus, to a determination by the district court within 120 days of the filing of an application and by the federal court of appeals within 120 days of the filing of the parties' final briefs, 28 U.S.C. 2266.

Sec. 108 eliminates the automatic confidential nature of the request and approval of investigative, expert and other services available to indigent death row inmates in connection with the presentation of their federal habeas corpus petitions. The requests and court approval were once ex parte. The Act now declares that "[n]o ex parte proceeding, communication, or request may be considered . . . unless a proper showing is made concerning the need for confidentiality. Any such proceeding, communication, or request shall be transcribed and made a part of the record available for appellate review." This presumably means that the government is permitted to contest the approval of defense investigative services and to appeal any adverse determination. On its face this would appear to further delay rather than streamline the process. On the other hand, the amendment may reflect the view that delay can best be eliminated by tighter control of fishing expeditions by defense counsel and of the permissible scope of habeas review, 21 U.S.C. 848(q)(9).

TITLE II -- JUSTICE FOR VICTIMS

Title II recasts federal law concerning restitution, expands the circumstances under which foreign governments who support terrorism may be sued for resulting injuries, and increases the assistance and compensation available to the victims of terrorism.

Subtitle A -- Mandatory Victim Restitution

At early English law, the owner of stolen property was entitled to have it returned to him upon conviction of the thief, under a writ of restitution if necessary.⁽²³⁾ Restitution is now generally more broadly understood to include several forms of judicially imposed compensation paid by an offender to his or her victim.⁽²⁴⁾ The federal provisions were enacted as part of the Victim and Witness Protection Act of 1982, 96 Stat. 1248 (1982),⁽²⁵⁾ and have undergone periodic changes including some in the last Congress.⁽²⁶⁾

The Act adds --

a clear requirement for mandatory restitution for federal crimes of violence, consumer product tampering, or property damage which cause injury or pecuniary loss;

uniform procedures for imposition and collection of both mandatory and discretionary restitution orders; and

a four-fold increase in the amount of special assessments imposed with every felony conviction (from \$50 to \$200 for individuals and from \$100 to \$400 for organizations)(the special assessments are used to provide funds for the federal victim compensation and assistance programs).⁽²⁷⁾

Section by Section Summary

Sec. 201 designates sections 201 through 211 as the "Mandatory Victims Restitution Act of 1996."

Sec. 202 inserts a reference to the Act's mandatory restitution provision into the statute that authorizes a federal sentencing court to order restitution, 18 U.S.C. 3556.

Sec. 203 adds compliance with a mandatory restitution order, payment of a special assessment, and notification to the court of changes in circumstances to the conditions that must be part of any federal court order granting probation, 18 U.S.C. 3563. Prior law demands compliance with discretionary restitution orders.

Sec. 204 requires clearly mandatory restitution for (a) violent felonies, felonies against property including fraud, tampering with consumer products, or controlled substance offenses which (b) involved physical injury or property loss for an identifiable victim. Those entitled to restitution include anyone directly and proximately harmed by the offense and anyone whom the parties included in a plea agreement, 18 U.S.C. 3663A.

Sec. 205 "rewrites 18 U.S.C. 3663, [pertaining to discretionary restitution orders] to provide one consistent set of procedures for the issuance and enforcement of all orders of restitution in criminal cases. In major part, this section: provides for compilation and consideration of information on the victims' losses and the defendants' assets sufficient for the court to enter a restitution order; provides for orders of full restitution for all victims; provides for a schedule of nominal payments in cases where the defendant's economic circumstances do not presently allow the defendant to pay the full amount of restitution ordered; specifies that restitution can be ordered in a single lump sum payment, installment payments, in-kind payments, or a combination of installment payments and in-kind payments; specifies that victims may not be required to participate in any phase of a restitution order.

"[It also] gives the court discretion either to make multiple defendants jointly and severally liable for payment of the full restitution award, or to apportion the restitution order among the various defendants; provides that if more than one victim has sustained a loss, the court may order different payment schedules with respect to each victim based on various factors, and provides that restitution owed to individual victims shall be paid before restitution owed to the United States; clarifies that if a victim receives, or is entitled to receive

compensation from some other source (including insurance proceeds), the court must order that, after the victim's losses have been fully satisfied, restitution be [paid] to the person providing that compensation; provides that the defendant has the duty to report any material changes in the defendant's ability to pay restitution, and permits the restitution order's payment schedule to be modified on the basis of the changed circumstances; provides for enforcement and collection of a restitution order in the same manner as fines under Title 18; provides that any substantial resources acquired by an incarcerated defendant owing restitution shall be applied to restitution still owed," S.Rep.No.104-179 at 14-5.

Where there is no identifiable victim and the defendant has been convicted under the federal drug trafficking laws, the court may order restitution, for the public harm caused, in an amount up to the maximum permissible fine. Subject to any applicable forfeitures and fines, such restitution is apportioned between the state entity administering crime victim assistance in the state in which the crime occurred (65%) and the state entity receiving federal drug abuse block grant funds (35%), 18 U.S.C. 3663.

Sec. 206, as noted in the Senate report, "provides one consolidated procedure for the issuance [of] restitution orders. Under present law, there are different procedures that apply for the issuance of orders under 18 U.S.C. 3663 the basic victim restitution statute, and the mandatory restitution provisions enacted as a part of the Violence Against Women Act (18 U.S.C. 2248, 2259, and 2264). . . . [T]he administration of justice will be better served by providing one set of procedures to govern the issuance of restitution orders in federal criminal cases.

"The procedures contained in this section [18 U.S.C. 3664] are intended to provide a streamlined process for the determination of both the amount of restitution owed to each victim and the terms of repayment based on a reasonable interpretation of the defendant's economic circumstances. . . . [R]estitution must be considered a part of the criminal sentence, . . . justice cannot be considered served until full restitution is made.

"This section requires the probation service to assemble, as a part of the presentence investigation process, information sufficient for the court to enter a restitution order. . . The prosecutor and all victims who have not waived restitution [are expected to] cooperate in the determination of the victims' losses. . . . [T]he defendant's affidavit stating the defendant's assets and ability to pay [should] be subject to strict review by the court. In particular, . . . defendants [should] not be able to fraudulently transfer assets that might be available for restitution. At the same time, . . . the rights of innocent third parties in assets jointly held with the defendant [should] be protected.

"This section also provides that the provisions of rule 32(c) of the Federal Rules of Criminal Procedure and of chapters 227 and 232 of title 18 shall be the only rules applicable to proceedings relating to the issuance of a restitution order. This provision is intended . . . to clarify that the issuance of a restitution order is an integral part of the sentencing process that is to be governed by the same, but no greater, procedural protection as the rest of the sentencing process.

". . . [W]ithout this clarification, the restitution phase of the sentencing process could devolve into a full-scale evidentiary hearing. . . . [S]uch a development would be contrary to the interests of the swift administration of justice.

". . . [T]his provision fully comports with the requirements of the due process clause of the fifth amendment. Although the sentencing phase of a criminal trial is subject to due process requirements, it does not require the same degree of protection as does the guilt determination phase. The sole due process interest of the defendant being protected during the sentencing phase is the right not to be sentenced on the basis of invalid premises or inaccurate information. These interests are adequately protected by the provisions of the Act. Moreover, the act also ensures the protection of the victim's right to a fair determination of restitution owed. . . . [T]his provision will ensure the streamlined administration of justice while at the same time protecting the rights of all individuals.

"A significant number of defendants required to pay restitution under this act will be indigent at the time of sentencing. Moreover, many of these defendants may also be sentenced to prison terms as well, making it unlikely that they will be able to make significant payments on a restitution payment schedule. At the same time, these factors do not obviate the victim's right to restitution or the need that defendants be ordered to pay restitution.

"For these reasons, [the act includes provisions] permitting the court to order full restitution under a schedule of nominal payments in those instances where the defendant cannot pay restitution. . . . Restitution is an integral part of the criminal sentence that must be complied with. For this reason, the defendant is also required to report material changes in his or her economic circumstances that might affect the ability to pay restitution, and the court is authorized to amend the payment requirements accordingly. . . . [This should] improve the implementation of restitution orders. Should the defendant's economic circumstances change to allow greater restitution payments, these payments should be required. Similarly, if the defendant's economic circumstances change so that the defendant's ability to pay is impaired, the court may adjust the payments accordingly without discharging the defendant's obligation to pay full restitution. In making such adjustments, however, the court should consider the willfulness, if any, of the defendant in avoiding the payment of restitution through changed circumstances.

"[A] clarification is necessary to ensure the proper interpretation of section 3664(j)(2) The purpose of this provision, like its predecessor in current law, is to ensure that the victim is not compensated twice for the same loss. . . . [C]larification is needed regarding the intended meaning of 'same loss.' '[S]ame loss' refers to a specific loss arising from the same criminal act, not to the criminal act or episode itself in which the loss occurred. For example, if a victim receives restitution for hospitalization resulting from a criminal act, but suffers emotional harm or other losses not included in the restitution order, any later award for civil damages for the injuries not included in the restitution order should not be deemed to reduce the total restitution owed. . . . [A]n order of restitution in a criminal case should in no way impair the ability of the victim to seek or obtain civil damages for losses arising from the same criminal act, but for which restitution is not awarded." S.Rep.No. 104-179, at 19-21 (1995).

Sec. 207 "provides for the postconviction enforcement of restitution orders by amending the provisions of title 18 governing the postconviction enforcement of criminal fines to include restitution orders, [Fed.R.Crim.Pro. R32(b); 18 U.S.C. 3572,3611-3614]. The provision also makes changes intended by the committee to strengthen the ability of the government to collect fines and restitution.

"This section removes the provisions in current law that limit the length of time over which the court may schedule fine and restitution payments, and replaces these provisions with a requirement that the payment period be the shortest period in which the debt can reasonably be paid. . . . [C]urrent limitations on the length of time over which a fine or restitution may be paid needlessly limit the court's discretion in fashioning an order, and may in fact discourage orders of restitution in those instances where a reasonable payment schedule would extend beyond the statutory limit. . . . [F]ines are a part of the criminal sentence, and restitution is owed the victim without regard to any sentence imposed. The obligation to pay these debts should not expire by the passage of time.

"This section also provides for a hearing to consider the delinquency or default of a defendant subject to an order to pay a fine or restitution. The [provision] recognizes, and seeks to mitigate, the burden repeated enforcement hearings could place on the courts. [T]he availability of progressively harsher penalties for failure to comply with an order of a criminal fine or restitution will [should] provide adequate tools to the court to ensure compliance. . . . [The provision] also encourages the courts to consider the failure of a defendant to meet a nominal payment schedule to be per se willful for the purpose of imposing sanctions.

"[It] establishes a priority for the application of payments by a criminal defendant. . . . [P]ayments would be applied first to special assessments under section 3013 of title 18, then to the restitution of all victims, and last

to the payment of any other fines, penalties, or costs imposed. . . . [S]pecial assessments, which are used to fund victims assistance programs, and restitution, which goes to individual victims, should take precedence over other criminal debts. However, . . . restitution, fines, and other penalties and assessments [should] not be construed to inhibit the criminal or civil forfeiture of assets. In particular, criminal debts should not be payable out of criminal proceeds otherwise forfeitable, as . . . this would, in effect, permit the defendant to profit from the offense." S.Rep.No. 104-179 at 22.

Sec. 208 directs the Sentencing Commission to issue guideline amendments to implement the bill's restitution provisions.

Sec. 209 instructs the Attorney General to promulgate guidelines to ensure the fullest possible use of restitution in plea bargained cases and that restitution be enforced fully.

Sec. 210 increases the special assessments imposed as part of the sentencing for felony convictions (from \$50 to \$100 for individuals and from \$200 to \$400) for organizations. The money raised from the assessments is used for victim compensation and victim assistance, 42 U.S.C. 10601.

Sec. 211 makes the new restitution provisions applicable to any federal sentence imposed on or after the date of enactment, to the extent a later effective date is not constitutionally required. The Constitution proscribes ex post facto laws, U.S.Const. Art.I, 9, cl.3, that is laws, that "retroactively alter the definition of crimes or increases the penalties for criminal acts," *California Dept. of Corrections v. Morales*, 115 S.Ct. 1597, 1601 (1995). To the extent that section 211 is interpreted to constitute an increase in the penalties available for violations of federal law, section 211 can only be applied with respect to crimes committed after the enactment of the section.

Subtitle B -- Jurisdiction for Lawsuits Against Terrorist States

Foreign governments enjoy general immunity from suit in the courts of the United States. This general immunity does not apply where a foreign government engages in the kind of conduct that a private individual might undertake, most notably commercial or tortious activities. The Foreign Sovereign Immunities Act (FSIA) codifies these general principles, 28 U.S.C. 1602-1611.⁽²⁸⁾ Subtitle B enlarges jurisdiction under the FSIA to permit suit based on certain acts of terrorism.⁽²⁹⁾

Section Summary

Sec. 221 narrows the immunity of foreign governments from suit in American courts. Foreign governments, designated as state sponsors of terrorism, which engage in torture, murder, aircraft sabotage, hostage taking, or providing material support for any of the various acts of terrorism prohibited by 18 U.S.C. 2339A as amended by section 323 of the Act,⁽³⁰⁾ become liable to suit for damages for the personal injuries or death these acts of terrorism cause American victims. Foreign governments may avoid suit in favor of international arbitration for cases arising within their borders. The section also establishes a 10 year statute of limitations for such suits, but requests for discovery related to such action may be stayed if the Attorney General certifies they would interfere with a related criminal investigation or national security operation.

Subtitle C -- Assistance to Victims of Terrorism

The provisions under which the federal government makes grants to state victim compensation and victim assistance programs, 42 U.S.C. 10601-10607 were designed to relieve victims of crime generally and were not particularly well suited to deal with some individualistic characteristics of terrorism. Subtitle C calls for special accommodation for the victims of mass violent attacks and for American victims of terrorism overseas and also authorizes limited closed circuit television procedures to permit victims to view the trial of terrorists when the trial is conducted hundreds of miles away from the site of the terrorist attack and in another state.

Section by Section Summary

Sec. 231 designates the subtitle the Justice for Victims of Terrorism Act of 1996.

Sec. 232 authorizes supplemental grants to the States to compensate and assist victims of terrorism and mass violence.

Sec. 233 amends the federal crime victim compensation provisions, 42 U.S.C. 10602, to permit compensation of American residents who become the victims of overseas terrorism (the law already provides for the compensation of victims of violent crime committed within this country).

Sec. 234 "prohibits the payment of federally-funded victim assistance to any individual who is delinquent in paying a fine, restitution, or other monetary penalty imposed pursuant to a conviction for a crime in federal court. To ensure that a burden is not imposed on state victim assistance programs, as well as to ensure that no person is wrongfully denied assistance, this prohibition would not take effect until such time as a criminal debt tracking system is in place." 141 *Cong.Rec.* H3333 (daily ed. April 15, 1996).

Sec. 235 calls for closed circuit television coverage of any criminal trial held more than 350 miles from and in a state other than that in which the events which are the subject of the trial occurred.

Sec. 236 corrects a typographical error in the crime victims assistance and compensation provisions, 42 U.S.C. 10601(d)(3)(B).

TITLE III -- INTERNATIONAL TERRORISM PROHIBITIONS

The Boston Tea Party may be the best known of the early acts of international terrorism in this country and the laws against pirates and privateers may be our earliest proscriptions against the acts of international terrorists.⁽³¹⁾ In this century, our attempts to prevent and punish international terrorism began with efforts to ensure the safety of international air travel⁽³²⁾ and to protect diplomatic personnel.⁽³³⁾ Title III follows a road laid out by earlier legislative efforts:⁽³⁴⁾ it outlaws terrorism and it seeks multinational cooperation against terrorists.

Title III is designed to help sever international terrorists from their sources of financial and material support. It enlarges the proscriptions against assisting in the commission of various terrorist crimes. It authorizes the regulation of fundraising by foreign organizations associated with terrorist activities. It adjusts the Foreign Assistance Act to help isolate countries who support terrorists and to bolster counterterrorism efforts of other countries.

First Amendment and due process limitations shadowed formulation of Title III and some portions of Title IV. The First Amendment grants no absolute rights, in spite of its absolute language.⁽³⁵⁾ "Thus, a physical assault is not by any stretch of the imagination expressive conduct protected by the First Amendment. . . . The First Amendment does not protect violence."⁽³⁶⁾ Nor does it protect calls to violence uttered under circumstances in which there is a grave risk that the call will be answered.⁽³⁷⁾

Even within those areas of expression entitled to First Amendment protection, limited government regulation will be permitted if "it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."⁽³⁸⁾

In any such balance, the safety of the Nation weighs heavily, for "it is obvious and unarguable that no

governmental interest is more compelling than the security of the Nation."⁽³⁹⁾ Moreover, expression in the form of a financial contribution, even a political contribution, may be brought within the realm of reasonable government regulation with no offense to the First Amendment.⁽⁴⁰⁾

On the other hand, the "[Supreme] Court has consistently disapproved government action imposing criminal sanctions or denying rights and privileges solely because of a citizen's association with an unpopular organization. In these cases it has been established that guilt by association alone, without [establishing] that an individual's association poses the threat feared by the government is an impermissible basis upon which to deny First Amendment rights. The government has the burden of establishing a knowing affiliation with an organization possessing unlawful aims and goals, and a specific intent to further those illegal aims."⁽⁴¹⁾

The provisions of Title III attempt to draw upon the principles articulated in *Mitchell, R.A.V., Buckley, Agee*, and *O'Brien* without running afoul of their limitations or those identified in *Healy*. Lower federal court decisions accent the difficulty of that task.⁽⁴²⁾

Subtitle A -- Prohibition on International Terrorist Fundraising

Subtitle A does three things. It establishes the procedure under which a foreign organization may be designated as a terrorist organization. It proscribes providing such an organization with "material support." And it establishes a system of civil penalties for banks and other financial institutions that fail to freeze and report the assets of such organizations.

In this regard it is similar to the International Emergency Economic Powers Act (IEEPA) in operation. In the case of "unusual and extraordinary" foreign threats "to the national security, foreign policy, or economy of the United States," 50 U.S.C. 1701, IEEPA authorizes the President to, among other things, "regulate . . . or prohibit . . . transactions involving, any property in which any foreign country or a national thereof has any interest; by any person, or with respect to any property, subject to the jurisdiction of the United States" 50 U.S.C. 1702.

The President has drawn upon this authority in the name of the Middle East Peace Process to prohibit the contribution, in the United States or by Americans outside the United States, of funds, goods or services to or for Jihad, Hizballah, the Popular Front for the Liberation of Palestine (PFLP), and several other groups and individuals, Exec.Ord.No. 12947, 60 Fed.Reg. 5079 (Jan. 23, 1995), 50 U.S.C. 1701 note. Violations are punishable by imprisonment for not more than 10 years, 50 U.S.C. 1705.

Section by Section Summary

Sec. 301 announces the findings and purpose for the subtitle.

Sec. 302 establishes the procedure for designating as foreign terrorist organizations those foreign organizations that engage in terrorist activities that threaten the national defense, foreign relations, or economic interests of the United States or the security of U.S. nationals, 8 U.S.C.1189.⁽⁴³⁾

The designation by the Secretary of State lasts for up to 2 years with the possibility of a 2 year renewal and may be withdrawn by the Secretary or by law. The designation is subject to judicial review on behalf of the designated organization if it is arbitrary, contrary to law or in excess of authority. The government may provide any supporting classified information to the court in secret. The designation may not be contested by a donor subsequently prosecuted for support nor by an alien excluded from the United States for association. Assets of a designated organization held by a financial institution may be frozen by order of the Secretary of the Treasury.

Sec. 303 outlaws providing support to a foreign terrorist organization. 18 U.S.C. 2339B. In addition to money

Sec. 303 outlaws providing support to a foreign terrorist organization, 18 U.S.C. 2332B. In addition to money and the instrumentalities of war, prohibited support extends to food, medical supplies, and any other physical asset except medicine itself and religious articles, 18 U.S.C. 2339A; 142 *Cong.Rec.* H3334 (daily ed. April 5, 1996). The fact that a particular contribution is made and used for humanitarian purposes is no defense since the gist of the offense is contributing to a tainted organization regardless of the purpose or use of the contribution. Violations are punishable by imprisonment for not more than 10 years and/or a fine of not more than \$250,000. Financial institutions that fail to report or comply with a freeze order are subject to civil penalties of up to the greater of twice the amount involved or \$50,000. The proscriptions apply both in the United States and to Americans and American institutions overseas.

Subtitle B -- Prohibition on Assistance to Terrorist States

Subtitle B seeks to isolate countries that support terrorism by --

outlawing financial transactions with countries that support terrorism;

prohibiting material support for commission of a wider range of terrorist offenses; and

using the Foreign Assistance Act to quarantine countries that sponsor terrorism and bolster counterterrorism efforts of countries that resist it.

Section by Section Summary

Sec. 321 makes it a federal crime, 18 U.S.C. 2332d, to engage in financial transactions with a nation designated under the Export Administration Act as a country supporting international terrorism, 50 U.S.C.App. 2405(j), except as provided in regulations of the Department of the Treasury.

Sec. 322 instructs the FAA to "require identical security measures for foreign flagged carriers serving airports in the United States as are required of U.S. carriers."⁽⁴⁴⁾

Sec. 323 modifies the prohibition against support for particular terrorist crimes, 18 U.S.C. 2339A, by --

excluding only medicine and religious materials from the definition of proscribed material support (prior law excluded "humanitarian assistance to persons not directly involved" in the underlying offenses);

repealing two former limitations on prosecution; the first of which required an indication that an individual or group had violated federal criminal law before an investigation for violation of the support proscription could be initiated or continued in the U.S., and the second of which barred an investigation of activities protected by the First Amendment;⁽⁴⁵⁾ and

adding to the list underlying offenses the following:

- 18 U.S.C. 81 (arson in the U.S.maritime and territorial jurisdiction),
- 18 U.S.C. 175 (biological weapons),
- 18 U.S.C. 831 (nuclear materials),
- 18 U.S.C. 842(m) & (n)(criminal violations of the legislation implementing the Plastics Convention),
- 18 U.S.C. 956(conspiracy within the U.S. to damage property or inflict injuries overseas),
- 18 U.S.C. 1366 (destruction of energy facilities),

- 18 U.S.C. 2155 (destruction of national-defense materials, premises or utilities),
- 18 U.S.C. 2156 (production of national-defense materials, premises or utilities),
- 18 U.S.C. 2332b (conspiracy overseas to commit terrorism in the U.S.), and
- 18 U.S.C. 2340A (torture).

Sec. 324 finds international terrorism deplorable and urges the President to increase the economic isolation of Libya and other state sponsors of international terrorism, 22 U.S.C. 2377 note.

Sec. 325 amends the Foreign Assistance Act of 1961 by adding a proscription (620G, 22 U.S.C. 2377) against assistance to any country the Secretary of State has designated a terrorist country, unless the President determines the assistance is in the national interest.

Sec. 326 amends the Foreign Assistance Act of 1961 by adding a proscription (620H, 22 U.S.C. 2378) against assistance to any country which has provided military equipment to a country the Secretary of State has designated a terrorist country unless the President determines such assistance is in the national interest.

Sec. 327 requires the Secretary of the Treasury to instruct U.S. representatives in the various international monetary institutions to vote against financial assistance to any country designated a terrorist country, 22 U.S.C. 262p-4q.

Sec. 328 repeals the Foreign Assistance Act limitation on providing overseas antiterrorism training for foreign law enforcement officials, 22 U.S.C. 2349aa-2(d); permits assistance in the form of arms and ammunition only to the extent directly related to antiterrorism assistance; repeals the prohibition on use of the funds to pay compensation; makes up to \$3 million a year available for explosive detection equipment and technology; provides up to \$1 million a year in assistance to be used to combat terrorism directed against the U.S. or American lives or property.

Sec. 329 defines "assistance" for purposes of the Foreign Assistance Act, to mean assistance to a government of a country by grant, sale, guaranty, insurance, or -- when more favorable than afforded by market conditions -- loans, lease, credits, debt relief, subsidies for exports into or tariff breaks for imports from a country; but does not include international disaster assistance, 22 U.S.C. 2349aa-10 note.

Sec. 330 prohibits, subject to a presidential waiver, the export of defense articles or services to a country the President has certified as failing to cooperate fully with U.S. antiterrorism efforts, 22 U.S.C. 2781.

TITLE IV -- TERRORIST AND CRIMINAL ALIEN REMOVAL AND EXCLUSION

Title IV is divided into four parts, the last of which, Subtitle D relating to criminal aliens can be traced in part to H.R.668 as it passed the House on February 10, 1995.⁽⁴⁶⁾ The other components of the Title deal with excluding and removing alien terrorists from the United States and narrowing the asylum provisions to prevent them from being used by terrorists to frustrate efforts to expel or remove them.

Like Title III, casting Title IV involved forging legislative solutions conscious of possible constitutional limitations:

"The removal of alien terrorists from the United States, and the prevention of alien terrorists from entering the U.S. in the first place, present among the most intractable problems of immigration enforcement. The stakes in such cases are compelling: protecting the very lives and safety of U.S. residents, and preserving the national security. Yet, alien terrorists, while deportable under section 241(a)(4)(D) of the INA [Immigration and Nationality Act], are able to exploit many of the substantive and procedural provisions available to all deportable aliens in order to delay their removal from the U.S. In addition, alien terrorists, including

deportable aliens in order to delay their removal from the U.S. In addition, alien terrorists, including representatives and members of terrorist organizations, often are able to enter the U.S. under a legitimate guise, despite the fact that their entry is inimical to the national interests of the U.S. In several noteworthy cases, the Department of Justice has consumed years of time and hundreds of thousands (if not millions) of dollars seeking to secure the removal of such aliens from the U.S.

"Starting in the first Administration of President Reagan, the Department of Justice has sought reform of immigration law and procedures to better enable this country to protect itself against the threat of alien terrorists. The chief target of these reforms is the statutory and administrative protection given to such aliens, many of which are not required by the due process clause of the Fifth or Fourteenth Amendment or any other provision of law, that enable alien terrorists to delay their removal from the U.S.

"The need for special procedures to adjudicate deportation charges against alien terrorists is manifest. Terrorist organizations have developed sophisticated international networks that allow their members great freedom of movement and opportunity to strike, including within the United States. They are attracting a more qualified cadre of adherents with increasing technical skills. Several terrorist groups have established footholds within immigrant communities in the U.S.

"The nature of these groups tends to shield the participants from effective counterterrorism efforts -- including the most basic measures of removing them from our soil. The U.S. relies heavily upon close and continued cooperation of friendly nations who provide information on the identity of such terrorists. Such information will only be forthcoming if it[s] sources continue to be protected. Thus, it is essential to the national security of the U.S. that procedures be established to permit the use of classified information in appropriate cases to establish the deportability of an alien terrorist.

"Such procedures also must be crafted to meet constitutional requirements. The government's efforts to safeguard lives and property and to protect the national security may be contested on the grounds that they conflict with the procedural rights of aliens. The interests of the government must therefore be balanced against the legitimate rights of those privileged to be present within the United States." 142 *Cong. Rec.* H3334-335 (daily ed. April 15, 1996).

Striking the balance in cases where classified information formed at least part of the basis for exclusion or deportation of an alien terrorist was made more difficult by a string of decisions holding unconstitutional in some instances reliance on such information under prior law.⁽⁴⁷⁾

The language of Title IV may prove to be but an interim stage in the development of more comprehensive immigration law revision now under consideration by the Congress.

Subtitle A -- Removal of Alien Terrorists

This subtitle addresses the question of how to reconcile the need to remove alien terrorists from the United States on the basis of classified information with the need to preserve the confidentiality of the classified information. The case law suggested that the previous mechanism suffered from due process limitations when judged by the standards announced in *Mathews v. Eldridge*.⁽⁴⁸⁾ The procedure established in the Act relies upon the court to ensure that the alien receives such notice as due process demands.

Section by Section Summary

Sec. 401 creates special procedures for the removal of alien terrorists, 8 U.S.C. 1531 to 1538. It authorizes the Chief Justice to name 5 district court judges to serve 5 year terms as judges of a special removal court, 8 U.S.C. 1532. The special removal procedure is initiated by an application from the Attorney General indicating that an identified alien is a terrorist⁽⁴⁹⁾ and that recourse to normal removal procedures would pose a risk to national security. 8 U.S.C. 1533. A judge of the special court considers the application *ex parte* and

... to national security, a circuit court judge of the special court considers the application *ex parte* and in camera and orders a hearing upon a determination that there is probable cause to believe that the alien is an alien terrorist and that use of normal remove procedures would risk national security, *id.*

The hearing is public and held before the judge who approved the application; the alien has a right to notice, representation by counsel, appointment of counsel in cases of indigence, to present evidence, and examine witnesses; evidence gathered under the Foreign Intelligence Surveillance Act may be introduced; the Federal Rules of Evidence do not apply; and the Department of Justice has the burden of demonstrating by a preponderance of the evidence that the alien is subject to removal as a alien terrorist, 8 U.S.C. 1534.

Classified information may be introduced in camera and considered by the court; the alien receives a court approved summary sufficient to permit the preparation of a defense and informing him or her of the general nature of the evidence; the removal hearing must be terminated if the government is unable to provide an unclassified summary of classified information used to support removal which the court finds sufficient to permit the alien to prepare a defense, *id.*

The United States Court of Appeals for the District of Columbia Circuit may review the denial of an application for a special removal hearing, determinations of the court with respect to the summaries of classified information, determinations of whether the alien should be detained during the pendency of proceedings, and determinations made in the special removal hearing; and either party may petition for certiorari from the Supreme Court following the appellate court's decisions, proposed 8 U.S.C. 1535.

The Attorney General may detain the alien beginning with the filing of an application for a special removal hearing; a permanent resident alien may be released by order of the court upon a demonstration that he or she is not likely to flee, will pose no danger to any member of the community and will pose no danger to national security; if an application is denied the alien may be ordered released under conditions necessary to assure future appearance and safety of the community and the national security, 8 U.S.C. 1536.

If the alien is ordered removed he or she may be removed, following the completion of any appeals, to a country of his or her election consistent with the treaty obligations and foreign policy interests of the United States, 8 U.S.C. 1537.

Section 401 also makes it a federal crime punishable by imprisonment for not more than 10 years to reenter the U.S. without the approval of the Attorney General after having been denied entry as a terrorist or having been expelled as a terrorist, 8 U.S.C. 1326(b)(3).

Finally, section 401 strikes the language formerly found in 8 U.S.C. 1105a(a)(10) which permitted judicial review of deportation orders in habeas corpus proceedings. Section 441, appearing later in the Act, adds a new 8 U.S.C. 1105a(a)(10)(declaring nonreviewable the deportation order of a criminal alien under 8 U.S.C. 1252, and any administrative review of that order). Other subsections of section 1105a state that exclusion can only be reviewed under habeas, 8 U.S.C. 1105a(b), and that review of deportation under 8 U.S.C. 1252a (relating to deportation of criminal aliens) is even more limited, 8 U.S.C. 1105a(d). The impact of the repeal of paragraph (a)(10) on the review of deportation orders, other than those under the terrorist removal or the criminal alien deportation provisions, is not as clear. The language of subsection 1105a(a) suggests they are appealable to the court of appeals as final agency decisions.

Subtitle B -- Exclusion of Members and Representatives of Terrorist Organizations

Sec. 411 establishes membership in or representation of a terrorist organization as a ground for denying an alien entry into the U.S., 8 U.S.C. 1182.

Sec. 412 allows the Attorney General to waive notice of visa application denials (now required under 8 U.S.C. 1182(b)) to any individual or class of excludable individuals, except in cases of visas sought with the intent to

immigrate. [\(50\)](#)

Sec. 413 limits the discretion of the Attorney General with respect to those who have engaged in terrorist activities to: withhold deportation, 8 U.S.C. 1253, suspend deportation, 8 U.S.C. 1254(a), permit voluntary departure, 8 U.S.C. 1254(e), adjust status of nonimmigrant to that resident alien, 8 U.S.C. 1255(c), or enter a record of lawful admission for alien who entered the U.S. prior to January 1, 1972, 8 U.S.C. 1259(d). The Attorney General may stay deportation upon a determination that otherwise the alien may be persecuted and would be contrary to the U.N. protocol on refugees, 8 U.S.C. 1253(h).

Sec. 414, "by operation of law, returns `to the border' any alien who has entered the United States unlawfully, regardless of the duration of his or her presence in the United States," 142 *Cong.Rec.* H3335 (daily ed. April 15, 1996). The Attorney General, however, is required to establish a procedure whereby aliens cited under this section have the opportunity to demonstrate that they were in fact lawfully admitted, 8 U.S.C. 1251(d).

Subtitle C -- Modification to Asylum Procedures

Sec. 421 precludes a grant of asylum by the Attorney General for any alien terrorist unless the Attorney General determines there is no reasonable to consider the alien a threat to the national security of the U.S., 8 U.S.C. 1158(a).

Sec. 422 crafts the procedure for exclusion and asylum determinations by immigration officers at an alien's point of entry into the United States, 8 U.S.C. 1225(b). [\(51\)](#)

Sec. 423 limits judicial review of entry determinations made at the point of entry to instances where the individual has a substantial claim of American citizenship, was in fact not determined to be excludable, or where the individual has been admitted for permanent residence, 8 U.S.C. 1105a(e).

Subtitle D -- Criminal Alien Procedural Improvements

Sec. 431 authorizes disclosure of certain confidential information concerning alien legalization (8 U.S.C. 1255a(c)(5)) and special agricultural worker status (8 U.S.C. 1160(b)) pursuant to a court order if the court finds that the confidential information relates to an alien who has been killed or severely incapacitated or is the subject of a criminal investigation. [\(52\)](#)

Sec. 432 adjusts the provisions calling for a criminal alien tracking station to authorize the creation of a criminal alien identification system to assist in identifying and locating aliens deportable by virtue of their conviction for aggravated felonies, 8 U.S.C. 1252 note.

Sec. 434 adds a number of immigration offenses to the list of RICO predicate offenses, 18 U.S.C. 1961. The Racketeer Influenced and Corrupt Organization (RICO) provisions, 18 U.S.C. 1961-1965, prohibit (1) the acquisition or conduct of the affairs of (2) an enterprise whose activities affect interstate or foreign commerce (3) through the patterned commission of predicate crimes. RICO violations are punishable by imprisonment for not more than 20 years, by criminal forfeiture of any proceeds of the offense, and may result in civil liability to injured parties. The new predicate offenses include:

18 U.S.C. 1028 (relating to fraud concerning identification documents) when committed for financial gain;

18 U.S.C. 1542 (relating to false statement to secure a passport) when committed for financial gain;

18 U.S.C. 1543 (relating to forgery or false use of a passport) when committed for financial gain;

18 U.S.C. 1544 (relating to misuse of a passport) when committed for financial gain;

18 U.S.C. 1546 (relating to fraud and misuse of immigration entry documents) when committed for financial

18 U.S.C. 1540 (relating to fraud and misuse of immigration entry documents) when committed for financial gain;

18 U.S.C. 1581-1588 (relating to peonage and slavery);

8 U.S.C. 1324 (relating to bringing in, transporting, or harboring illegal aliens);

8 U.S.C. 1327 (relating to aiding illegal reentry by aliens excludable as terrorists or for conviction of aggravated felonies); and

8 U.S.C. 1328 (relating to importing aliens for immoral purposes) when committed for financial gain.

Sec. 435 enables law enforcement officials to use court ordered wiretapping to investigate various immigration offenses, 18 U.S.C. 2516, i.e.:

18 U.S.C. 1028 (relating to fraud concerning drivers' licenses, social security cards and other forms of identification);

18 U.S.C. 1542 (relating to false statements made to secure a passport);

18 U.S.C. 1546 (relating to forgery or false statements concerning immigration cards or other documents);

8 U.S.C. 1324 (relating to bringing in, transporting, or harboring illegal aliens);

8 U.S.C. 1327 (relating to aiding illegal reentry by aliens excludable as terrorists or for conviction of aggravated felonies); and

8 U.S.C. 1328 (relating to importing aliens for immoral purposes).

Sec. 436 amends the description of the crimes of moral turpitude which render an alien deportable, 8 U.S.C. 1251(a)(2)(A)(i)(II), to make it clear that "crimes of moral turpitude" refers to those punishable by imprisonment for one year or more rather than those for which the alien is actually sentenced to imprisonment for one year or more.

Sec. 437 permits, with the agreement of the parties, deportation proceedings to be conducted by telephone conference call or in the absence of the alien; it also contains a retroactively applicable declaration that nothing in the Immigration and Nationality Technical Corrections Act of 1994, Pub.L.No. 103-416, 108 Stat. 4305, is intended to create a right or benefit against the United States.

Sec. 438 directs the development and implementation within 180 days of a plan to relocate at least 500 kilometers from the U.S. border any alien who has entered the U.S. illegally and been returned to a contiguous country at least 3 times.

Sec. 438 permits the deportation before complete service of sentence of aliens convicted of nonviolent crimes (but excluding alien smuggling) under federal or state law; aliens who subsequently reenter the U.S. unlawfully would be required to serve the remainder of their sentences in addition to any other penalties that might be imposed.

Sec. 439 authorizes state and local law enforcement officers, unless contrary to state law, to arrest and detain aliens unlawfully reentering the U.S., 8 U.S.C. 1252c.

Sec. 440 provides for more expeditious deportation of certain criminal aliens. It adds to the list of "aggravated felon[ies]," 8 U.S.C. 1101(a)(43), conviction for which constitutes grounds for deportation:

violations of 18 U.S.C. 1094 (other than a first offense relating to transportation of weapons information) or

violations of 18 U.S.C. 1064 (other than a first offense relating to transportation of wageing information) or 18 U.S.C. 1955 (running a gambling business)

18 U.S.C. 2421, 2422, 2423 (relating to transportation in interstate or foreign commerce for purposes of criminal sexual activity) for commercial purposes;

8 U.S.C. 1324(a)(2) bringing aliens into the U.S. in reckless disregard of their authority to enter if the offender has been previously convicted, the arrangement is commercial, or the alien is not presented to immigration officials upon entry (existing law includes knowingly smuggling, transporting, or harboring illegal aliens);

18 U.S.C. 1543 (relating to forgery of a passport) or 18 U.S.C. 1546(a) (relating fraud, false impersonation, or false statements in connection with documents for entry into the U.S.), when a sentence of at least 18 months imprisonment is imposed; previous law included violations of 1546 (relating to trafficking in forged entry documents) punishable by imprisonment for at least 5 years

failure to appear to serve a sentence for an offense punishable by imprisonment for a term of 5 years or more; prior law included failure to appear to serve a sentence for an offense punishable by imprisonment for a term of 15 years or more;

when committed by an alien previously deported on the bases of a conviction for an aggravated felony, 8 U.S.C. 1325(a)(relating to improper entry by an alien) or 1326 (relating to reentry by a deported alien);

when punishable by imprisonment for 5 years or more, commercial bribery, counterfeiting, forgery, or trafficking in vehicles with altered identification numbers;

when punishable by imprisonment for 5 years or more, obstruction of justice, perjury, subornation of perjury, or bribery of a witness; and

failure to comply with a court order to appear to answer or dispose of a felony charge punishable by imprisonment for 2 years or more.

The section provides expedited procedures for aliens who commit aggravated felonies or violate the drug laws, the firearms laws, the espionage, sabotage, selective service, trading with the enemy, or sedition laws, or threaten the President, or launch an invasion from the United States or commit a second crime of moral turpitude. Expedited procedures in such cases include:

no judicial review after the Board of Immigration Appeals (prior law permitted subsequent review under habeas provisions or appeal to the U.S. court of appeals), 8 U.S.C. 1105a(a)(10), 1101(a)(47);

arrest for expeditious deportation following release from incarceration (prior law applied only to those convicted of aggravated felonies), 8 U.S.C. 1252(a)(2);

exclusion of permanent resident aliens who commit such offenses, then leave the country temporarily and seek to reenter (prior law applied only to those convicted of aggravated felonies), 8 U.S.C. 1182(c);

conducting deportation proceedings at correctional institutions prior to the alien's release from incarceration (prior law applied only to those convicted of aggravated felonies), 8 U.S.C. 1252a;

require the Attorney General to effect deportation within 30 days of the final order rather than 6 months afforded in other cases, 8 U.S.C. 1252(c).

Sec. 441 modifies the section outlawing illegal reentry by deported aliens to bar challenges to the underlying deportation order unless --

the alien has exhausted administrative review;

was previously denied the opportunity for judicial review; and

can show that the deportation order was fundamentally unfair, 8 U.S.C. 1326(d).

Sec. 442 modifies the expedited procedures for deportation of aliens (other than permanent resident aliens) convicted of aggravated felonies, 8 U.S.C. 1252a to:

exclude from application of the procedure those under conditional permanent resident alien status rather than, as is now the case, those who entitled to deportation relief under immigration law;

shorten the notice period from 30 to 14 days;

provide for the translation of the proceedings into a language the alien understands;

require an explicit determination as to whether the alien appearing at the proceedings is the alien against whom the proceedings were brought and whether he or she is appropriately subject to the procedure;

bar the exercise of discretionary relief from deportation by the Attorney General;

limit habeas corpus or other review of a final deportation order for criminal aliens to identification of the alien, 8 U.S.C. 1105a(c); and

establishes a "conclusive" presumption that an alien convicted of an aggravated felony is deportable, 8 U.S.C. 1252a(c).

Sec. 443 expands U.S. extradition law to permit the U.S. to surrender, notwithstanding the absence of an applicable extradition treaty, foreign nationals charged with crimes of violence committed against Americans overseas when the Attorney General certifies that the case is not political and that offense would constitute a crime of violence under federal law had it been committed within the U.S., 18 U.S.C. 3181.

TITLE V -- NUCLEAR, BIOLOGICAL AND CHEMICAL WEAPONS RESTRICTIONS

Title V adjusts the restrictions on possession and use of materials capable of producing catastrophic damage in the hands of terrorists.

Subtitle A -- Nuclear Materials

Sec. 501 states findings and purpose concerning illicit nuclear proliferation.

Sec. 502 expands existing proscriptions concerning the misuse of nuclear materials to include nuclear byproducts; adds environmental harm to the damage that can trigger criminal penalties; and supplements the jurisdictional conditions under which the U.S. may prosecute to include instances where the federal government is the target of threats or extortion based on crimes involving nuclear materials or their byproducts, 18 U.S.C. 831.

Sec. 503 directs the Attorney General and Secretary of Defense to report to Congress within 6 months on the extent of the theft of firearms, explosives and other terrorist useful materials from military arsenals.

Subtitle B -- Biological Weapons Restrictions

Sec. 511 makes it a federal crime to threaten to use a weapon of mass destruction (it was previously a crime to use, attempt to use or conspire to use such a weapon, 18 U.S.C. 2332a) or to threaten, attempt or conspire to use a biological weapon (18 U.S.C. 175).

to use a biological weapon (18 U.S.C. 175).

It enlarges the definitions of 18 U.S.C. 178 (used to outlaw misuse of biological weapons) to include components of (a) infectious substances, (b) toxic materials including those to which the definition was previously limited, and (c) recombinant molecules. [\(53\)](#)

It adds these new defined biological weapons to the definition of weapons of mass destruction for purposes of the prohibition against misconduct associated with those weapons (the prior definition used "disease organism" instead), 18 U.S.C. 2332a(a).

It directs the Secretary of Health and Human Services to promulgate regulations identifying biological agents that pose a potential threat to public health and safety and governing their intentional or inadvertent transfer, 42 U.S.C. 262 note.

Subtitle C -- Chemical Weapons Restrictions

Sec. 521 makes it a federal crime to unlawfully use chemical weapons within the U.S. or against federal property or against an American overseas, 18 U.S.C. 2332c (it was already a federal crime to unlawfully use poison gas under the same jurisdictional circumstances, 18 U.S.C. 2332a); the section also calls for an interagency task force to study the feasibility of establishing a research facility to study chemical and biological weapons.

TITLE VI -- IMPLEMENTATION OF PLASTIC EXPLOSIVES CONVENTION

Title VI provides implementing legislation for the Convention on the Marking of Plastic Explosives for the Purpose of Detection negotiated in Montreal on March 1, 1991. Under its terms, the Convention becomes effective when ratified by at least 5 explosives producing nations and by a total of 35 countries. Title V is not contingent upon sufficient international ratification to render it effective.

Sec. 601 announces the findings and purpose of Congress.

Sec. 602 supplies the definitions used in the title, 18 U.S.C. 841.

Sec. 603 proscribes the manufacture, import/export, or possession of plastic explosives which do not contain a detection agent with (1) a 15 year exception for pre-existing explosives manufactured or imported for federal military or law enforcement agencies or a state national guard, (2) a 3 year exception for pre-existing explosives made or imported for anyone else, and (3) a 120 day exception for civilian reporting of pre-existing explosives, 18 U.S.C. 842(l), (m), (n).

Sec. 604 makes violation of the proscriptions of section 603 punishable by imprisonment for not more than 10 years, 18 U.S.C. 844(a).

Sec. 605 provides an affirmative defense for small amounts used for training, research or forensic purposes and, for 3 years, an affirmative defense for plastic explosives used in military devices, 18 U.S.C. 845.

Sec. 606 makes unlawfully imported plastic explosives forfeitable to the United States under the customs laws, 19 U.S.C. 1595a(c).

Sec. 607 delays the effective date of the title for 1 year.

TITLE VII -- CRIMINAL LAW MODIFICATIONS TO COUNTER TERRORISM

Title VII makes a number of changes in existing federal criminal law and procedure, primarily expanding the reach of federal law and increasing penalties to more effectively combat terrorism. It makes it a federal crime

to kill, kidnap or assault any federal officer or employee, to conspire in the United States to commit crimes of violence overseas, or to commit a crime of violence within the United States with related conduct such as a conspiracy occurring overseas. It also increases the penalties for misconduct involving explosives and for conspiracy to commit several of the federal crimes associated with international terrorists.

Subtitle A -- Crimes and Penalties

Sec. 701 establishes an alternative provision, 18 U.S.C. 844(n), under which conspiracy to violate the various arson and explosives subsections of 18 U.S.C. 844 may be prosecuted. Under the general conspiracy statute, 18 U.S.C. 371, conspiracy to violate any federal law is punishable by imprisonment for not more than 5 years. Conviction under section 371 requires that one of the conspirators commit an overt act in furtherance of the purposes of the conspiracy. Section 202 has no overt act requirement and carries a penalty equal to the sanction for the completed offense. So for example, one who conspired to bomb a federal building in violation of 18 U.S.C. 844(f) might be prosecuted under either 18 U.S.C. 844(n) (punishable by imprisonment for not more than 25 years) or 18 U.S.C. 371 (punishable by imprisonment for not more than 5 years). In either case under existing law, conspirators are each punishable for any federal crime committed by a coconspirator in the foreseeable furtherance of the conspiracy.

Sec. 702 outlaws acts of terrorism involving more than one country, 18 U.S.C. 2332b (terrorism transcending national boundaries). It makes it a crime for international terrorists to commit other crimes. More specifically, if a basis for federal jurisdiction exists, it proscribes killings, kidnapping, serious assaults, or acts creating a substantial risk of personal injury or property damage in the United States.

The bases for federal jurisdiction include:

use of the mails or travel in or use of a facility of interstate or foreign commerce in furtherance of the offense;

obstruction, delay, or affect on interstate or foreign commerce;

a federal official or employee as a victim;

federal property threatened with damage;

commission of the crime within a territorial sea of the United States; and

commission of the offense within the special maritime or territorial jurisdiction of the United States (e.g., commission upon an American flagged vessel or within a federal enclave).

The section also prohibits threats, attempts and conspiracies to commit such an offense, applies overseas, and offers federal investigators and prosecutors a number of procedural advantages:

an 8 year statute of limitations within which to bring charges rather than the usual 5 year statute of limitations (similar extensions are applicable in other violent federal crimes which a terrorist might commit, 18 U.S.C. 3286);

bail for those charged with a violation involves a rebuttable presumption that no series of conditions will ensure the safety of the community or that the accused will appear for subsequent judicial proceedings;

conviction does not require proof of the defendant's knowledge of the circumstances that give rise to federal jurisdiction (e.g., that the victim of the offense was a federal officer or employee);

conviction for conspiracy does not require proof of any overt act on the part of any of the conspirators; and

where the prosecution is based upon the commission of a state crime of violence which transcends

international boundaries, conviction only requires proof of the elements of the state crime and does not demand compliance with otherwise applicable state law concerning evidence or procedure.

The penalties, to be served consecutively with the addition to those imposed for the underlying federal offense, are:

for homicide -- death or imprisonment for life or any term of years;

for kidnapping -- imprisonment for life or any term of years;

for maiming -- imprisonment for not more than 35 years;

for assault with a dangerous weapon or resulting in injury -- imprisonment for not more than 30 years;

for property damage -- imprisonment for not more than 25 years;

for threats -- imprisonment for not more than 10 years;

for attempt or conspiracy -- imprisonment for a maximum term ranging from 5 years to life depending upon the maximum penalty for the crime which is the object of the attempt or conspiracy.

Finally, the section notes the primary investigative jurisdiction of the FBI over all federal crimes of terrorism, but disavows any intent to limit the jurisdiction of the Secret Service.

Sec. 703 expands the prohibition against property destruction within the special maritime and territorial jurisdiction of the U.S. to include the destruction of any real or personal property, 18 U.S.C. 1363; as previously worded the section applied only to buildings, military stores, vessels, machinery and building supplies.

Sec. 704 amends 18 U.S.C. 956 which previously outlawed conspiracies within the United States to damage specific overseas property of a foreign government with whom the U.S. was at peace.

The amendment addresses two areas. First, with respect to conspiracies to damage property overseas, it:

increases the maximum penalty for the conspiracy to imprisonment from not more than 3 years to not more than 25 years;

expands the property protected from such conspiracies to include airports and airfields in foreign countries;

expands the property protected from such conspiracies to include religious, cultural and educational property in foreign countries; and

embraces conspiracies where only one of the conspirators is ever present in the United States (it is not clear whether in such cases the communication whereby the conspiracy is formed may be thought to satisfy the overt act requirement).

Second, it condemns plotting in the U.S. to murder, kidnap or maim a victim in a foreign country. The offense extends regardless of the absence of any terrorist element (i.e. no required political motive nor any required intent to instill fear) and is punishable by imprisonment for not more than 35 years in the case of conspiracy to maim or imprisonment for life or any term of years in the case of conspiracy to murder or kidnap.

Sec. 705 changes the penalties for --

torture committed within the special maritime and territorial jurisdiction of the U.S. by adding "torture, maim

or disfigure" to the provisions relating to maiming 18 U.S.C. 114 (punishable by imprisonment for not more than 20 years); previously, torture within such jurisdiction fell within the provisions relating to assault, 18 U.S.C. 113 (punishable by imprisonment for not more than 6 months, 5 years, 10 years or 20 years depending upon the nature of the assault);

custodian allowing a federal prisoner to escape (18 U.S.C. 755) *from* imprisonment for not more than 2 years *to* not more than 5 years;

aiding an interned member of the armed forces of a belligerent nation to escape U.S. custody (18 U.S.C. 756) *from* imprisonment for not more than 1 year *to* not more than 5 years;

attempt to commit manslaughter within the special maritime or territorial jurisdiction of the U.S. (18 U.S.C. 1113) *from* imprisonment for not more than 3 years *to* not more than 7 years;

engaging in physical violence overseas with the intent to cause, or resulting in, serious bodily injury of an American (18 U.S.C. 2332(c)) *from* imprisonment for not more than 5 years *to* not more than 10 years; and

within the special aircraft jurisdiction of the U.S., boarding a plane while armed with a dangerous weapon or attempting to place a loaded firearm or bomb aboard a plane *from* 1 year *to* 10 years (generally), and *from* 5 years *to* 15 years (willfully and either with regard for or with reckless disregard for the safety of human life), 49 U.S.C. 46505.

Sec. 706 forbids any transfer of an explosive knowing or having reason to know it will be used in a crime of violence or drug trafficking, 18 U.S.C. 844(o). Offenders face the same sentences as those who carry explosives during the commission of a crime of violence (imprisonment for not less than 5 nor more than 15 years), 18 U.S.C. 844(h).

Sec. 707 makes it clear that the provision outlawing receipt of stolen explosives, 18 U.S.C. 844(h), (1) includes a prohibition against possession of stolen explosives and (2) the proscription extends only to explosives "which are moving as, which are part of, which constitute, or which have been shipped or transported in, interstate or foreign commerce."

Sec. 708 increases the penalties for damaging federal property by fire or explosives, 18 U.S.C. 844(f), *from*:

imprisonment for not more than 20 years *to* imprisonment for not less than 5 nor more than 20 years (generally);

imprisonment for not more than 20 years *to* imprisonment for not less than 7 nor more than 40 years (substantial risk of injury to another);

death or imprisonment for life or any term of years *to* death or imprisonment for not less than 20 years or life (if death results).

It adjusts the penalties for using or carrying an explosive during the course of a federal felony, 18 U.S.C. 844(h), *from*:

imprisonment for not less than 5 nor more than 15 years *to* imprisonment for not less than 10 years (generally); and

imprisonment for not less than 10 nor more than 25 years *to* imprisonment for not less than 20 years (for second and subsequent violations).

The section also modifies the penalties for arson or bombing of property used in or used in an activity affecting interstate commerce, 18 U.S.C. 844(i), *from*:

affecting interstate commerce, 18 U.S.C. 844(1), *from*.

imprisonment for not more than 20 years *to* imprisonment for not less than 5 nor more than 20 years (generally);

imprisonment for not more than 40 years *to* imprisonment for not less than 7 nor more than 40 years (in personal injury to someone other than the offender results).

It increases the maximum penalty for arson within the U.S. special maritime and territorial jurisdiction *from* 5 *to* 25 years; the 20 year maximum available when the burned building is a dwelling or a life is jeopardized remains unchanged, 18 U.S.C. 81.

And it lengthens from 5 to 7 years the statute of limitations for (a) arson committed within U.S. special maritime and territorial jurisdiction, (b) using or carrying a bomb during the commission of another federal felony, (c) bombing or burning federal property, or (d) bombing property used in an activity affecting commerce, 18 U.S.C. 3295.

Sec. 709 instructs the Attorney General to study and report on the restrictions on dissemination of information on how to make a bomb including the First Amendment protection afforded such dissemination.

Subtitle B -- Criminal Procedures

Sec. 721 modifies the overseas applicability of various existing federal criminal laws:

49 U.S.C. 46502(a) now permits the U.S. to prosecute air piracy where the aircraft involved is owned by an American or is registered in the U.S or where the hijacking occurred on a flight to or from the U.S. This remains unchanged. 49 U.S.C. 46502(b) now permits the United States to prosecute air piracy in other instances (foreign aircraft on a foreign flight) if the flight is international or the aircraft is foreign to the country within which the entire flight is scheduled to occur. Section 721 amends subsection (b) to give the U.S. authority to prosecute any case of air piracy if an American is aboard the flight, the hijacker is an American, or the U.S. is able to seize the hijacker regardless of where the piracy occurs, the registry of the aircraft, the nature of the flight, or the nationality of the victims or hijackers (more precisely it confers extraterritorial jurisdiction on the U.S. where the offender "is afterwards found in the United States." This last phrase includes instances where the offender is discovered in the United States after federal officials have brought him into the U.S. by force for purposes of prosecution, *United States v. Yunis*, 924 F.2d 1086, 1090 (D.C.Cir. 1992));

18 U.S.C. 32(b) proscribing violence against or aboard a foreign aircraft if the offender is later found in the U.S., is expanded to include such violence if the victim or offender is an American as well as if the offender is later found in the U.S.;

18 U.S.C. 1116 forbids murder or manslaughter when the victim is a foreign dignitary and permits the U.S. to prosecute if the offender is in the U.S. regardless of where the offense occurred or the nationality of dignitary. Under an earlier version the provision was found to apply to the overseas murder of American diplomatic personnel by an American, *United States v. Layton*, 855 F.2d 1388, 1396-397 (9th Cir. 1988). The Act amends 1116 to permit prosecution under the section if the murder or manslaughter is committed by an American, if the foreign dignitary victimized is a U.S. employee, officer or agent, or if the offender is later found in the U.S.

Sec. 722 expands the circumstances under which violence against maritime navigation may be subject to federal prosecution, 18 U.S.C. 2280(b)(1)(A). Under present law federal prosecution is permitted, among under circumstances, (1) when the offense occurs aboard a ship within the U.S. territorial waters but is not a crime under applicable state law or (2) when the offense is committed by an American or an American resident on a ship of foreign registry or outside American territorial waters. With respect to the first of these

resident on a ship of foreign registry or outside American territorial waters. With respect to the first of these, section 110 drops the requirement that the offense be committed beyond the reach of state law as long as it is committed within U.S. territorial waters. In the case of offenses committed by Americans or American residents it strikes the descriptive language concerning ships of foreign registry and activity outside the territorial waters of the U.S. [\(54\)](#)

Sec. 723 essentially increases the penalties for various terrorist conspiracies. 18 U.S.C. 371 punishes conspiracy to commit any federal felony by imprisonment for not more than 5 years as long as some overt act is committed in furtherance of the conspiracy. Section 723 amends several laws to make it a separate offense to conspire to violate their provisions, avoids any reference to an overt act requirement, and makes the conspiracies subject to the same penalty as attempt to commit the underlying offenses -- for conspiracies to violate:

18 U.S.C. 32(a), (b) (destruction of aircraft or aircraft facilities),

18 U.S.C. 37 (violence at international airports),

18 U.S.C. 115(a)(1)(A), (a)(2), (b)(1) (b)(2), (b)(3) (influencing, impeding, or retaliating against a Federal official by injuring a family member),

18 U.S.C. 1203 (hostage taking),

18 U.S.C. 2280 (violence against maritime navigation),

18 U.S.C. 2281 (violence against maritime fixed platforms), and

49 U.S.C. 46502 (air piracy).

Sec. 724 makes it clear that the "other instruments of commerce" phrase in 18 U.S.C. 844(e) under which it is unlawful to communicate a bomb threat using "the mail, telephone, telegraph, or other instrument of commerce" refers to other instruments "in interstate or foreign commerce, or in or affecting interstate or foreign commerce."

Sec. 725 makes it a federal crime to *threaten* to use weapons of mass destruction; prior federal law outlawed attempts to use, conspiracies to use and use of such weapons, 18 U.S.C. 2332a. Pre-existing law authorized prosecution when the offense was committed in the U.S., against federal property, or against an American overseas; section 725 augments this jurisdictional list to include instances where an American is the offender, 18 U.S.C. 2332a(b).

Sec. 726 adds several crimes, some with a terrorism element and some with no such requirement, to the money laundering predicate offense list (i.e., the list of crimes whose proceeds it is a separate crime to launder). Additions include:

with respect to a financial transaction occurring at least in part within the U.S., murder or arson committed against a foreign national or his or her property

18 U.S.C. 32 (destruction of aircraft or their facilities),

18 U.S.C. 37 (violence at international airports),

18 U.S.C. 115 (influencing or retaliating against a federal law enforcement officer by threatening or injuring his or her family),

18 U.S.C. 351 (crimes of violence committed against Members of Congress, of the Cabinet and of the

Supreme Court),

18 U.S.C. 831 (nuclear weapons offenses),

18 U.S.C. 844 (f),(i) (damage to federal property or to property used in activities affecting interstate or foreign commerce by explosives),

18 U.S.C. 956 (conspiracy in the U.S. to damage property, kill, maim, or kidnap in a foreign country),

18 U.S.C. 1111 (murder within the special maritime and territorial jurisdiction of the U.S.),

18 U.S.C. 1114 (killing a federal officer or employee),

18 U.S.C. 1116 (killing a foreign dignitary),

18 U.S.C. 1361 (malicious mischief (property damage) committed against federal property),

18 U.S.C. 1363 (malicious mischief committed against property within the special maritime and territorial jurisdiction of the U.S.),

18 U.S.C. 1751 (crimes of violence committed against the President),

18 U.S.C. 2280 (violence against maritime navigation),

18 U.S.C. 2281 (violence on off-shore platforms),

18 U.S.C. 2332 (terrorism against Americans committed overseas),

18 U.S.C. 2332a (use of weapons of mass destruction),

18 U.S.C. 2332b (conspiracy overseas to commit terrorism in the U.S.),

18 U.S.C. 2339A (support of terrorists), and

49 U.S.C. 46502 (air piracy).

Sec. 727 makes it a federal crime to kill or attempt to kill any federal employee, any member of the armed services, or anyone assisting them in the performance of their duties by rewriting the statute which now outlaws killing a federal law enforcement officer, 18 U.S.C. 1114. Under its provisions attempted murder is punishable by imprisonment for not more than 20 years; first degree murder by death or life imprisonment; second degree murder by imprisonment for any term of years or for life; voluntary manslaughter by imprisonment for not more than 10 years and involuntary manslaughter by imprisonment for not more than 6 years.

By expanding the coverage of 18 U.S.C. 1114 to include all federal officers and employees, section 101(a) also expands the coverage of 18 U.S.C. 111 (assault), 18 U.S.C. 115 (influencing, impeding, or retaliating against a federal official by threatening or injuring a family member), and 18 U.S.C. 1201 (kidnapping) all of which define the scope of their protection by cross references to 18 U.S.C. 1114.

Under federal law at the time of enactment, killing, assaulting or kidnapping a federal employee or officer or a member of one of their families was a crime under the laws of the state or country in which it occurred, although it was not a *federal* crime except with respect to specific federal officers or employees or under other circumstances giving rise to federal jurisdiction, *e.g.*, the offender was a member of the armed services subject to prosecution under the Uniform Code of Military Justice, 10 U.S.C. 801 to 946 (arts.1 to 146).⁽⁵⁵⁾

Subsection 727(b) "amends section 115 (a)(2) of title 18, United States Code, by including within that statute's reach threats `to assault, kidnap, or murder, any person who formerly served' as a federal law enforcement officer or agent in retaliation for the exercise of his official duties. The statute currently provides this protection to currently employed federal law enforcement officers, and the family members of former law enforcement personnel. Curiously, former federal law enforcement officers are left out of the statute's coverage. This subsection of the bill corrects that omission.

"This section also clarifies [that] the use of a deadly or dangerous weapon in an assault on a federal employee or officer includes the use of a weapon that fails to cause death or danger due to a defective component," 142 *Cong.Rec.* H3337 (daily ed. April 15, 1996).

Sec. 728 establishes multiple killings or multiple attempted killings as an aggravating factor to be considered in federal capital punishment cases, 18 U.S.C. 3592(c)(16).

Sec. 729 adds intervening Saturdays, Sundays and legal holidays to the 3 day limit on government continuances available without a showing of cause prior to a detention hearing, 18 U.S.C. 3142(f). Thus the section appears to expand from 3 days to possibly 5 or 6 days the time an individual may be held in jail without a detention hearing. [\(56\)](#)

Sec. 730 directs the Sentencing Commission to revise the sentencing guidelines "so that the chapter 3 adjustment relating to international terrorism only applies to Federal crimes of terrorism," 28 U.S.C. 994 note. "Federal crime of terrorism" is specifically defined in 18 U.S.C. 2332b(g)(5). [\(57\)](#) Chapter 3 of the sentencing guidelines now calls for a minimum term of 210 months (17.5 years) imprisonment for any offense involving international terrorism. [\(58\)](#)

Sec. 731 "excludes from the definition of `electronic communications' under the wiretap statute `information stored in a communications system used for the electronic storage and transfer of funds,' This will allow law enforcement to obtain such bank records through the usual [and secret] grand jury subpoena

or other court order procedure, without requiring a wiretap order for these purposes," 142 *Cong.Rec.* H3337 (daily ed. April 15, 1996).

Subsection 731(b) "eliminates `electronic communication' [\(59\)](#) from the definition of `radio communications that are readily accessible to the general public.' This inclusion of `electronic communication' negated the need to exempt from the wiretap coverage radio transmissions, i.e., scanners, CBs, and Ham radio signals. It is not intended to preclude the need for a title III wiretap order for telephone conversations occurring over cordless telephones, which operate through radio signals not readily available to the general public. `Electronic communications' are already specifically and separately covered by the wiretap statutes, [unless they are `readily accessible to the general public,' 18 U.S.C. 2511(g)(1)]." 142 *Cong.Rec.* H3337 (daily ed. April 15, 1996). Thus the federal wiretap law prohibits the interception of only those radio communications which the statute declares beyond public access. [\(60\)](#)

Sec. 732 instructs the Secretary of the Treasury to study --

the feasibility of tagging explosives and precursor chemicals to permit post-explosion tracing;

the feasibility of regulating the sale and distribution of precursor chemicals other than black or smokeless powder

state regulation of high explosives for commercial use.

Thereafter the Treasury Secretary is authorized to promulgate regulations requiring the addition of tracer taggants to all manufactured and imported explosives to the extent he finds that the additions --

can be made without posing a risk to human life;

will aid law enforcement;

will not impair the effectiveness of the explosives;

will not adversely affect the environment; and

will not cost more than they are worth, 18 U.S.C. 841 note.

TITLE VIII -- ASSISTANCE TO LAW ENFORCEMENT

Title VIII authorizes the appropriation of an additional \$1 billion to fund anti-terrorism law enforcement efforts, authorizes overseas law enforcement placement and training as well as parking bans around federal buildings in D.C., and calls for various studies involving counterfeiting, computer crime, the focus of federal law enforcement, wiretapping, violence against federal employees, and armor piercing ammunition.

Section by Section Summary

Subtitle A -- Resources and Security

Sec. 801 authorizes the Attorney General and the Secretary of the Treasury, with the agreement of the Secretary of State, to support law enforcement training overseas in order to improve investigation and prosecution of international crime, 28 U.S.C. 509 note.

Sec. 802 notes the sense of Congress that funds authorized to be appropriated by the Act should be used to purchase American-made goods.

Sec. 803 authorizes the Attorney General and the Secretary of the Treasury to ban parking or vendors proximate to any federal property used for law enforcement purposes in the District of Columbia, 40 U.S.C. 137.

Sec. 804 requires telephone and other communication service providers, at the request of a governmental agency, to save records and other evidence for 90 days pending the issuance of a court order, 18 U.S.C. 2703(f).

Sec. 805 instructs the Sentencing Commission to study, report, and promulgate appropriately revised guidelines on the deterrent impact of the existing sentencing guidelines applicable to violations of 18 U.S.C. 1030(a)(4) & (5)(relating to unauthorized access to federal interest computers and damaging a computer or computer system used in interstate commerce), 28 U.S.C. 994 note.

Sec. 806 creates a Commission on the Advancement of Federal Law Enforcement, with members appointed by congressional leaders and the Chief Justice, to study the effectiveness, coordination and accountability of federal law enforcement agencies, 18 U.S.C. pref.note.

Sec. 807 instructs --

the Secretary of the Treasury to periodically audit and report on international counterfeiting of U.S. currency;

the Secretary of State to see to the posting of Secret Service agents in our embassies overseas; and

the Sentence Commission to enhance the sentencing ranges applicable to overseas counterfeiting of U.S. currency.

Sec. 808 directs the Attorney General to collect statistical information on threats and the use of violence against federal and state employees, 28 U.S.C. 534 note.

Sec. 809 calls for a Department of Justice study to determine what ammunition is capable of piercing body armor, 42 U.S.C. 3721 note. [\(61\)](#)

Sec. 810 instructs the Department of Justice to study and report upon wiretap, pen register, and trace and trace laws.

Subtitle B -- Funding Authorizations for Law Enforcement

"This subtitle provides \$1.0 billion in authorization for appropriations to enhance law enforcement ability to deter, investigation and prosecute terrorism.

"Of this \$1.0 billion authorization, \$468 million is authorized for the Federal Bureau of Investigation, \$172 million is authorized for the Drug Enforcement Administration, and \$100 million is authorized for State and Local law enforcement. The remaining \$260 million is divided among other enforcement and emergency response organizations." 142 *Cong.Rec.* H3337 (daily ed. April 15, 1996).

Sec. 811 authorizes appropriations for the FBI of \$114 million (FY1997), \$166 million (FY1998), \$96 million (FY1999), and \$92 million (FY2000) to combat terrorism to be used to:

provide for a command center and to support and enhance a technical support center and tactical operations;

create a counterintelligence and counterterrorism fund for the cost of investigating terrorism cases;

fund FBI academy enhancements;

increase personnel to support counterterrorism activities; and

make grants to the states to enhance computerized identification, DNA identification, and fingerprint identification systems.

Sec. 812 authorizes additional appropriations for increased responsibilities of the Customs Service of \$8 million for each of FY1997, FY1998, and FY1999, and \$7 million for FY2000.

Sec. 813 authorizes additional appropriations for increased responsibilities of the Immigration and Naturalization Service of \$5 million for each of FY1997, FY1998, FY1999, and FY2000.

Sec. 814 authorizes appropriations for the Drug Enforcement Administration (DEA) of \$35 million (FY1997), \$40 million (FY1998), \$45 million (FY1999), and \$52 million (FY2000) to be used to:

fund antiviolence initiatives;

fund major drug violator initiatives; and

enhance or replace DEA infrastructure.

Sec. 815 authorizes appropriations for the Department of Justice of \$10 million for each of FY1997, FY1998, and FY1999, and of \$11 million for FY2000 to be used to hire additional Assistant United States Attorneys and attorneys for the Criminal Division and to provide increased security at courthouses and other places of

federal employment.

The section also authorizes the Attorney General to pay rewards for assistance, and to receive funds from other agencies for those purposes, without limitation other than a requirement to report rewards in excess of \$100,000 the House and Senate Appropriations and Judiciary Committees, 18 U.S.C. 3059B. [\(62\)](#)

Sec. 816 authorizes additional appropriations for the Department of the Treasury of \$10 million for each of FY1997, FY1998, FY1999, and FY2000 to be used for counterterrorism efforts; and authorizes additional appropriations for Secret Service of \$11 million (FY1997), \$11 million (FY1998), \$13 million (FY1999), and \$15 million (FY2000) to be used to expand protection of the President.

Sec. 817 authorizes additional appropriations for the Park Police of \$500,000 for each of FY1997, FY1998, FY1999, and FY2000 to meet increased needs.

Sec. 818 authorizes additional appropriations for the federal courts of \$10 million for each of FY1997, FY1998, and FY1999, and of \$11 million for FY2000 to meet increased needs resulting from enactment of the Act.

Sec. 819 authorizes appropriations of \$5 million for FY1997 to enable the Attorney General to make grants to be used for training and equipment to enhance the capability of city fire and emergency agencies to respond to terrorist attacks.

Sec. 820 authorizes appropriations of \$20 million for FY1997 and \$10 million for FY1998 to enable the Department of Justice to assist foreign countries in the area of counterterrorism technology.

Sec. 821 authorizes appropriations of \$10 million for FY1997 to enable the Department of Justice to conduct research and development in the area of counterterrorism technology.

Sec. 822 authorizes additional appropriations of \$25 million for each of FY1997, FY1998, FY1999, and FY2000 for Byrne program state and local law enforcement equipment and antiterrorism training grants, 42 U.S.C. 3751(b)(26).

Sec. 823 permits appropriations authorized by the subtitle to be made out of the Violent Crime Reduction Trust Fund.

TITLE VIII -- MISCELLANEOUS

Sec. 901 codifies the Presidential Proclamation extending out to 12 miles that portion of our territorial sea to be considered within U.S. special maritime and territorial jurisdiction, 18 U.S.C. 7; Pres.Procl.No.5928 (Dec. 27, 1988), and notes the assimilation of the law of the most proximate state for purposes of the Assimilated Crimes Act, 18 U.S.C. 13.

Sec. 902 provides that a voter registration card may not be used a proof of citizenship, 42 U.S.C. 1973gg note.

Sec. 903 directs that the fees paid to represent indigent defendants in federal criminal proceedings be matters of public record, 18 U.S.C. 3006A, and sets the fee ranges for defense services provided in federal habeas corpus proceedings for state death row inmates, 21 U.S.C. 848(q)(10).

Sec. 904 contains a severability clause permitting courts to sever any provision found unconstitutional from the remainder of the Act.

1. Reprinted beginning at 141 *Cong.Rec.* S2503 (daily ed. Feb. 10, 1995).

2. H.R. 720, 141 *Cong.Rec.* H1434 (daily ed. Feb. 8, 1995); see also H.R. Rep. No. 104-23 (1995).

2. H.R. 727, 141 *Cong. Rec.* H1434 (daily ed. Feb. 6, 1995); see also, H.R. Rep. No. 104-23 (1995).

3. H.R. 665, 141 *Cong. Rec.* H1314 (daily ed. Feb. 7, 1995); see also, H.R. Rep. No. 104-16 (1995).

4. H.R. 668, 141 *Cong. Rec.* 1588 (daily ed. Feb. 10, 1995); see also, H.R. Rep. No. 104-22 (1995).

5. For a comparison of the proposals see, *Terrorism: Comparison of Senate Omnibus Bills of the 104th Congress*, CRS Rep. No. 95-600S (May 17, 1995).

6. 141 *Cong. Rec.* S7857 (daily ed. June 7, 1995). For a comparison of H.R. 1710 as introduced, S. 735 as passed by the Senate, and S. 761 see, *Terrorism: Comparison of Major Omnibus Bills of the 104th Congress* (June 19, 1995).

7. 141 *Cong. Rec.* H2304-305 (March 14, 1996). For a comparison of the House and Senate passed versions of S. 735 see, *Terrorism: Comparison of the House & Senate Versions of S. 735 of the 104th Congress*, CRS Rep. No. 96-220A (Mar. 29, 1996).

8. 142 *Cong. Rec.* S3477 (daily ed. April 17, 1996); H3617-618 (daily ed. April 18, 1996).

9. For more extensive statistical information see, NAACP Legal Defense and Education Fund, Inc., *Death Row, U.S.A.* (Summer, 1995).

10. See cases cited in Kirven, *Capital Crime and Punishment: Shortening the Time Between Them*, 42 *Federal Lawyer* 20, 22-3 (1995).

11. In 1972, the United States Supreme Court held that the cruel and unusual punishments clause of the Eighth Amendment to the United States Constitution, made binding upon the states by the due process clause of the Fourteenth Amendment, precluded imposition and execution of the death penalty under the procedures then employed by the federal government and most of the states, *Furman v. Georgia*, 408 U.S. 238 (1972). The Court subsequently concluded that capital punishment was not per se incompatible with the Eighth Amendment, *Gregg v. Georgia*, 428 U.S. 153 (1976). The difficulty has been determining which procedural devices are constitutionally offensive; the results have not been uniformly embraced. "[S]ome critics claim that the Court's work has burdened the administration of capital punishment with an overly complex, absurdly arcane, and minutely detailed body of constitutional law. . . . This set of critics notes the sheer volume of death penalty litigation, the labyrinthine nature of the doctrines that such litigation has spawned, the frequency with which federal courts overturn state-imposed death sentences and their delays that occur between the imposition of death sentences and their execution," Steiker & Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 *Harvard Law Review* 355, 358 (1995).

12. A committee appointed by Chief Justice Rehnquist and chaired by retired Justice Powell, recommended changes to deal with the delays in capital cases, *Ad Hoc Committee on Federal Habeas Corpus in Capital Cases Committee Report*, reprinted in 135 *Cong. Rec.* 24694 (1989).

13. Bea & O'Brien, *Prisons: Policy Options for Congress* IB92061 (May 15, 1996) ("As of June 30, 1995, 99,466 offenders were incarcerated in . . . federal facilities . . . on June 30, 1995, state prison systems held 1,004,608 inmates"). Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics -- 1994* tab.6.18 (1995) (estimated number of inmates in Federal Bureau of Prison correctional facilities for 1996, 114,579).

14. H.R. Rep. No. 104-23 at 8, 19 (1995). Habeas reform was dropped to ease passage consideration of the Violent Crime Control and Law Enforcement Act of 1994, 139 *Cong. Rec.* 15736-739 (remarks of Sen. Biden) (daily ed. Nov. 16, 1993). Omnibus crime legislation died in the 102d Congress in part because the House would not accept such legislation with habeas and the Senate would not accept it without habeas, 138 *Cong. Rec.* S2680, S2750 (remarks of Sens. Thurmond and Hatch respectively) (daily ed. Mar. 3, 1992). The major crime bill of the 101st Congress passed only after habeas and other controversial issues had been stripped out, 136 *Cong. Rec.* S9492 (Sept. 11, 1990). The 1988 anti-drug law avoided the pitfall with a promise of expeditious consideration of the Powell Committee recommendations when they became available, 102 *Stat.* 4467. And the decade long deadlock that preceded enactment of Comprehensive Crime Control Act of 1984 was broken by removing habeas and three other controversial issues, 130 *Cong. Rec.* 1569, 1571, 1582 (remarks of Sens. Thurmond, Baker and Kennedy respectively) (1984).

15. The conference report summarizes the law's habeas amendments as follows: "Sections 101-108 -- Sections 601-608 of the Senate bill and sections 901-908 of the House amendment are identical, and therefore were not modified by the conference committee.

"This title incorporates reforms to curb the abuse of the statutory writ of habeas corpus, and to address the acute problems of unnecessary delay and abuse in capital cases. It sets a one year limitation on an application for a habeas writ and revises the

unnecessary delay and waste in capital cases. It sets a one-year limitation on an application for a habeas writ and revises the procedures for consideration of a writ in federal court. It provides for the exhaustion of state remedies and requires deference to the determinations of state courts that are neither 'contrary to' nor an 'unreasonable application of,' clearly established federal law.

"The revision in capital habeas practice also sets a time limit within which the district court must act on a writ, and provides the government with the right to seek a writ of mandamus if the district court refuses to act within the allotted time period. Successive petitions must be approved by a panel of the court of appeals and are limited to those petitions that contain newly discovered evidence that would seriously undermine the jury's verdict or that involve new constitutional rights that have been retroactively applied by the Supreme Court.

"In capital cases, procedures are established for the appointment of counsel, conduct of evidentiary hearings, and the application of the procedures to state unitary review systems. Courts are directed to give habeas petitions in capital cases priority status and to decide those petitions within specific time periods. These procedures apply both to state and federal capital cases." Joint Explanatory Statement of the Committee on Conference (Statement), 142 *Cong.Rec.* H3333 (daily ed. April 15, 1996).

16. Most states have a state equivalent of federal habeas corpus sandwiched between direct appeal and federal habeas. In these jurisdictions there may be as many as eight levels of review: (1) direct appeal in state court, (2) an opportunity to petition for review by the United States Supreme Court, (3) petition for collateral review in state court, (4) appeal to state appellate courts of any denial of collateral relief in state court, (5) an opportunity to petition for review by the United States Supreme Court, petition for habeas relief in federal district court, (7) appeal of any denial in federal district court, and (8) an opportunity for United States Supreme Court review.

17. The law was "drafted to address a number of problems that presently exist in federal court criminal litigation, and especially in death penalty litigation. [Its] reforms can be grouped into two broad classifications. First, the bill is designed to reduce the abuse of habeas corpus that results from delayed and repetitive filings. . . . To help accomplish the first purpose, [it] imposes periods of limitation on federal habeas corpus petitions filed under 28 U.S.C. section 2254 This reform will curb the lengthy delays in filing that now often occur in federal habeas corpus litigation, while preserving the availability of review when a prisoner diligently pursues state remedies and applies for federal habeas review in a timely manner." H.R.Rep.No. 104-23 at 9 (1995).

18. "The bill will also broaden the range of proceedings in which the certificate of probable cause requirement applies. Under current law, state prisoners seeking federal habeas corpus relieve must obtain such a certificate to apply a district court's denial of the writ. The bill creates an identical certificate requirement for appeals of denials of federal prisoners' collateral motions. Since federal prisoners, like state prisoners, generate a high volume of meritless applications for collateral relief, it is appropriate to require that appeals of habeas petitions meet a threshold probable cause standard before such an appeal will be heard by an appellate panel." H.R.Rep.No. 104-23 at 9 (1995).

19. Litigation generally involves finding facts, identifying the legal principles necessary to resolve the dispute arising from the facts, and applying the legal principles to the facts. Federal courts, sitting to consider habeas petitions from state prisoners, generally deferred to the fact finding decisions of state courts. The habeas reform proposals called for deference to state court rulings of law and applications of the law to the facts.

Endorsing a similar proposal in an earlier Congress, the Senate Judiciary Committee cited finality and judicial economy, S. Rep. No. 226, 98th Cong., 1st Sess. 6-7 (1983). The report also noted academic support and that a comparable state of the law existed before the Court's decision in *Brown v. Allen*, 344 U.S. 443 (1954), *id.*, at 23, citing Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 *Harvard Law Review* 441, 444-62 (1963); Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 *University of Chicago Law Review* 142, 165 n.125 (1970).

Opponents of the proposals generally responded first to what they saw as a shrinking of the Great Writ and that prisoners with federal claims ought to be entitled to present them in a federal forum, 137 *Cong.Rec.* H 8000 (daily ed. Oct. 17, 1991) (remarks of Rep. Jenkins); Yackle, *The Reagan Administration's Habeas Corpus Proposals*, 68 *Iowa Law Review* 609, 621 (1983). But the "federal right/federal forum" argument was not without its detractors, *Withrow v. Williams*, 113 S.Ct. 1745, 1769-770 (1993) (Scalia, J., dissenting).

20. "(1) In a proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgement of a State court, a determination after a hearing on the merits of a factual issue . . . shall be presumed to be correct, unless the applicant shall establish . . .

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record," 28 U.S.C. 2254(d)(1994).

21. In *Schlup v. Delo*, 115 S.Ct. 851 (1995), the Supreme Court had replaced this clear-and-convincing-evidence-that-no-reasonable-jury-would-find-guilty-but-for-the-constitutional-error with a but-for-the-constitutional-error-a-jury-probably-would-not-have-found-petitioner-guilty. The Act returns the law to its pre-*Schlup* state. For further discussion of *Schlup*, see *The Supreme Court, 1994 Term: Leading Cases*, 109 Harvard Law Review 111, 259-69 (1995); *Schlup v. Delo: The Result of Curbing Unlimited Jurisdiction by Limiting Discretion*, 74 North Carolina Law Review 897 (1996).

22. More specifically, the Court granted Felker's motion for a stay of execution, his motion to proceed in forma pauperis, as well his petition for certiorari, and instructed the parties to "submit briefs limited to the following questions: (1) Whether Title I of the Anti-Terrorism and Effective Death Penalty Act of 1996 (the Act), and in particular Section 106(b)(3)(E), 28 U.S.C. 224 (b)(3) (E)[the grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari], is an unconstitutional restriction of the jurisdiction of this Court. (2) Whether and to what extent the provisions of Title I of the Act apply to petitions for habeas corpus filed as original matters in this Court pursuant to 28 U.S.C. 2241 [which empowers the Justices of the Supreme Court to grant habeas writs]. (3) Whether application of the Act in this case is a suspension of the writ of habeas corpus in violation of Art.I, 9, clause 2 of the Constitution [The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases or Rebellion or Invasion the public Safety may require it]," 116 S.C. at 1588.

23. IV Blackstone, Commentaries on the Laws of England 355-56 (1769); I Chitty, A Practical Treatise on the Criminal Law 817 (3d Amer.ed. 1836).

24. Campbell, Law of Sentencing 3.3 (2d ed. 1991); Rubin, The Law of Criminal Correction 295-96 (2d ed. 1973).

25. See generally, 3 Wright, Federal Practice and Procedure 528 (1995 Supp.); *Twenty-Fifth Annual Review of Criminal Procedure*, 84 Georgetown Law Journal 641, 1322-326 (1996).

26. Pub.L.No. 103-322, 108 Stat. 1928, 1947-948 40221 (restitution for domestic violence), 40504 (restitution generally), 40505 (same).

27. The conference report notes that the report of the "Senate Committee on the Judiciary to accompany H.R.665 (S.Rept. 104-179) should serve as the legislative history for this subtitle," 141 *Cong.Rec.* H3333.

The Senate report in turn notes that the "purpose of H.R. 665 is to improve the administration of justice in Federal criminal cases by requiring Federal criminal defendants to pay full restitution to the identifiable victims of their crimes. Crimes for which mandatory restitution would apply include crimes of violence, felony crimes against property (including crimes committed by fraud or deceit), product tampering, and certain drug crimes. Additionally, the bill has the further purposes of establishing one set of procedures for the issuance of restitution orders in Federal criminal cases, and of consolidating the procedures for the collection of unpaid restitution with existing procedures for the collection of unpaid fines, while at the same time strengthening these procedures. This legislation is needed to ensure that the loss to crime victims is recognized, and that they receive the restitution that they are due. It is also necessary to ensure that the offender realizes the damage caused by the offense and pays the debt owed to the victim as well as to society. Finally, this legislation is needed to replace an existing patchwork of different rules governing orders of restitution under various Federal criminal statutes with one consistent procedure," S.Rep.No. 104-179 at 12 (1995).

28. See generally, 1 Restatement (Third) of Foreign Relations Law 451-463 (1986 & 1993 Supp.); 14 Wright, Miller & Cooper, Federal Practice and Procedure 3662 (1985 & 1995 Supp.).

29. See e.g., *Cicippio v. Islamic Republic of Iran*, 30 F.3d 164 (D.C.Cir. 1994)(kidnapping by terrorist agents of a government do not come within either the commercial or tortious exception to immunity under the FSIA).
30. 18 U.S.C. 2339A prohibits providing support, knowing or intending that it be used in connection with a violation of 18 U.S.C. 32 (destruction of aircraft or aircraft facilities), 37(violence at international airports), 81 (arson within the special maritime and territorial jurisdiction of the United States), 175 (biological weapons offenses), 351 (crimes of violence committed against Members of Congress), 831 (nuclear material offenses), 842 (m) or (n) (plastic explosives detection offenses), 844(f) or (i)(use of arson or explosives to damage federal property or property used in an activity affecting interstate or foreign commerce), 956 (conspiracy within the U.S. to injure people or damage property overseas), 1114 (killing a federal officer or employee (as amended in 727 of the Act)), 1116 (killing a foreign dignitary), 1203 (hostage taking), 1361 (destruction of federal property), 1363 (destruction of buildings within the special maritime or territorial jurisdiction of the United States), 1751 (killing, kidnapping, or assaulting the President), 2280 (violence against maritime navigation), 2281 (violence against maritime fixed platforms), 2332 (killing an American overseas), 2332a (use of weapons of mass destruction), 2332b (terrorism transcending national boundaries), 2340A (torture) or 49 U.S.C. 46502 (air piracy).
31. 1 Stat. 114 (1790)("if any citizen shall commit any piracy or robbery aforesaid, or any act of hostility against the United States, or any citizen thereof, upon the high sea, under colour of any commission from any foreign prince, or state, or on pretence of authority of any person, such offender shall, notwithstanding the pretence of any such authority, be deemed, adjudged and taken to be a pirate, felon, and robber, and on being thereof convicted shall suffer death"), 18 U.S.C. 1652.
32. Pub.L.No. 87-197, 75 Stat. 466 (1961), 49 U.S.C. 46501-46507.
33. Pub.L.No. 92-539, 86 Stat. 1070 (1972), 18 U.S.C. 114, 1116, 1201.
34. See generally, House Comm. on Foreign Affairs, *International Terrorism: A Compilation of Major Laws, Treaties, Agreements, and Executive Documents*, 103d Cong., 2d Sess. (1994)(Comm.Print); Pub.L.No.103-322, 120001-120005, 108 Stat.2021-23 (1994).
35. U.S.Const. Amend.I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances"); *R.A.V. v. City of St.Paul*, 505 U.S. 377, 382-83 (1992)("The First Amendment generally prevents government from proscribing speech, or even expressive conduct, because of disapproval of the ideas expressed. . . . From 1791 to the present, however, our society, like other free but civilized societies, has permitted restrictions upon the content of speech in a few limited areas, which are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality")(internal citations omitted).
36. *Wisconsin v. Mitchell*, 113 S.Ct. 2194, 2199 (1993)(internal citations omitted).
37. *Brandenburg v. Ohio*, 395 U.S. 444, 447 ("the constitutional guarantees of free speech and free press do not permit [the government] to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is like to incite or produce such action").
38. *United States v. O'Brien*, 391 U.S. 367, 377 (1968), quoted with approval inter alia, *Turner Broadcasting System, Inc. v. F.C.C.*, 114 S.Ct. 2445, 2469 (1994).
39. *Haig v. Agee*, 453 U.S. 280, 307 (1981).
40. *Buckley v. Valeo*, 424 U.S. 1, 12-38 (1976).
41. *Healy v. James*, 408 U.S. 169, 185-86 (1972).
42. For example, one recent case demonstrates the difficult of translating foreign policy objectives that can be executed in a perfectly acceptable manner overseas (favoring one side or the other of a violent civil war) into a principle of prosecution within the U.S., *American-Arab Anti-Discrimination v. Reno*, 70 F.3d 1045, 1062-64 (9th Cir. 1995)(holding that constitutional limitations on selective enforcement of the law barred deportation of members of the Popular Front for Liberation of Palestine (PFLP) who committed no acts of terrorism when, by contrast, only those members of government-favored terrorist organizations who actually committed acts of terrorism were deported).

Some courts have afforded the government wide latitude to deal with foreign political organizations within the United States,

permitting the information office of such a group to be closed down as a foreign mission for instance, *Palestine Information Office v. Shultz*, 853 F.2d 932, 939-40 (D.C.Cir. 1988)(rejecting First Amendment arguments concerning the government's order to close the office because it constituted a "foreign mission" of an entity the United States had chosen not to recognize, after observing that the order did not preclude individuals associated with the Office from advocating support of the Palestine cause). Others have suggested the need to separate official from individual conduct, *Mendelsohn v. Meese*, 695 F.Supp. 1474, 1486 (S.D.N.Y. 1988)("The ATA [Anti-Terrorism Act], read in the broadest possible way, prohibits Hovsepian from establishing or maintaining his proposed informational office at the behest of the PLO. Hovsepian has specifically averred that he will in no way be acting as an official of the PLO. But he does wish to further the PLO's interests; and the PLO has requested him to open his office. Were the ATA to be read to prohibit that course of action, it would violate the [*O'Brien*] requirement that the restriction be no greater than essential. It would be prohibiting Hovsepian from operating in the United States, not the PLO").

See also, *Farrakhan v. Reagan*, 669 F.Supp. 506, 512 (D.D.C. 1987)(rejecting argument that for First Amendment purposes religious scruples demanding repayment of a loan from the Libyan Islamic Call Society outweighed the government's interest reflected in the freeze on financial transactions involving Libya under the International Emergency Economic Powers Act (IEEPA) -- after declining to pass on whether the IEEPA-based prohibition on foreign travel passed muster, because the plaintiff could not establish that the government intended to prosecute him for violating the prohibition).

43. Note that "engage in terrorist activity" is defined for purposes of 8 U.S.C. 1101 to 1524 to include "solicitation of funds or other things of value for terrorist activity or for any terrorist organization," 8 U.S.C. 1182(3(B)(iii)(IV).

44. "In 1990, after the tragic bombing of Pan Am Flight 103, Congress revamped the aviation security laws. It was the intent of Congress to ensure that all Americans would be guaranteed adequate protection from terrorist attacks on international flights arriving in or departing from the United States, regardless of the nationality of the air carrier providing the service. The 1990 law required the FAA to ensure that foreign carriers operated under security programs providing a similar level of safety to that of programs required of U.S. carriers. Unfortunately, since the 1990 enactment, ambiguity has developed over Congressional intent regarding the meaning of the terms 'similar.' This section is intended to resolve that ambiguity," 142 *Cong.Rec.* H3334 (daily ed. April 15, 1996).

45. "(c) Investigations . --

(1) In general. -- Within the United States, an investigation may be initiated or continued under this section only when facts reasonably indicate that --

"(A) in the case of an individual, the individual knowingly or intentionally engages, has engaged, or is about to engage in the violation of this or any other Federal criminal law; and

"(B) in the case of a group of individuals, the group knowingly or intentionally engages, has engaged, or is about to engage in the violation of this or any other Federal criminal law.

(2) Activities protected by the First Amendment. -- An investigation may not be initiated or continued under this section based on activities protected by the First Amendment to the Constitution, including expressions of support or the provision of financial support for the nonviolent political, religious, philosophical, or ideological goals or beliefs of any person or group," 18 U.S.C. 2339A(c)(1994 ed.), repealed by omission from a reworded 18 U.S.C. 2339A.

46. 141 *Cong.Rec.* 1588 (daily ed. Feb. 10, 1995); see also, H.R.Rep.No. 104-22 (1995).

47. *American-Arab Anti-Discrimination v. Reno*, 70 F.3d 1045, 1066-71 (9th Cir. 1995) (use of undisclosed classified information in a legalization proceeding under 8 U.S.C. 1255a would constitute a due process violation); *Rafeedie v. I.N.S.*, 795 F.Supp. 13 (D.D.C. 1992), on remand from, 880 F.2d 506 (D.C.Cir. 1988) (application of summary exclusion provisions, 8 U.S.C. 1225(c), on the basis of undisclosed classified information concerning permanent resident alien's alleged participation in activities of a terrorist organization would violate due process); *Massieu v. Reno*, 915 F.Supp. 681 (S.D.N.Y. 1996) (deportation, pursuant to 8 U.S.C.1251(a)(4)(C)(i), solely on the basis of the uncontestable assertion of the Secretary of State that such action would be in the foreign policy interests of the U.S. would be a violation of due process).

48. 424 U.S. 319, 335 (1976)(the factors to be examined to determine due process compliance include, "[f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail"), cited and applied in *American-Arab Anti-Discrimination v. Reno*, 70 F.3d at 1068-70; *Massieu v. Reno*, 915 F.Supp. at 703-5; *Rafeedie v. I.N.S.*, 795 F.Supp. at 18-20.

49. "The term 'alien terrorist' means an alien described in 241(a)(4)(B) or 1251(a)(4)(B)." 8 U.S.C. 1521(1)

47. [The term alien terrorist means any alien described in 241(a)(4)(B)[8 U.S.C. 1251(a)(4)(B)], 8 U.S.C. 1251(1).

Section 241(a)(4)(B) declares, "an alien who has engaged, is engaged, or at any time after entry engages in any terrorist activity (as defined in section 1182(a)(3)(B)(iii) of this title) is deportable," 8 U.S.C. 1251(a)(4)(B).

Section 1182(a)(3)(B)(iii) states, "As used in this chapter, the term `engage in terrorist activity' means to commit, in an individual capacity or as a member of an organization, an act of terrorist activity or an act which the actor knows, or reasonable should know, affords material support to any individual, organization, or government in conducting a terrorist activity at any time, including any of the following acts:

"(I) The preparation or planning of a terrorist activity.

"(II) The gathering of information on potential targets for terrorist activity.

"(III) The providing of any type of material support, including a safe house, transportation, communications, funds, false identification, weapons, explosives, or training, to any individual the actor knows or has reason to believe has committed or plans to commit a terrorist activity.

"(IV) *The solicitation of funds or other things of value for terrorist activity or for any terrorist organization.*

"(V) *The solicitation of any individual for membership in a terrorist organization, terrorist government, or to engage in a terrorist activity,*" 8 U.S.C. 1182(a)(3)(B)(iii)(emphasis added).

The immigration laws do not define "terrorist organization" here or elsewhere, but they do authorize the Secretary of State in consultation with the Attorney General and the Secretary of the Treasury to designate as "terrorist organizations" those found, pursuant to the procedures established for the designation process, to be (A) "a foreign organization; (B) [an] organization [that] engages in terrorist activity (as defined in section 212(a)(3)(B)[8 U.S.C. 1182(a)(3)(B)]; and [that] the terrorist activity of the organization threatens the security of United States nationals or the national security of the United States," 8 U.S.C. 1189.

50. As the House Judiciary Committee report explained, "Currently, all foreign nationals who are denied a visa are entitled to notice of the basis for the denial. This creates a difficult situation in those instances where an alien is denied entry on the basis, for example, of being a drug trafficker or a terrorist. Clearly, the information that U.S. government officials are aware of such drug trafficking or terrorist activity would be highly valued by the alien and may hamper further investigation and prosecution of the alien and his or her confederates. An alien has no constitutional right to enter the United States and no right to be advised of the basis for the denial of such a privilege. Thus, there is no constitutional impediment to the limitation on disclosure in this section," H.R.Rep.No. 104-383 at 102.

51. "This section amends section 235(b), regarding the inspection and exclusion of aliens arriving at a port of entry. New section 235(b)(1) provides that if an examining immigration officer determines that an alien is inadmissible under section 212(a)((6)(C) (fraud or misrepresentation) or 212(a)(7)(lack of valid documents), the officer may order the alien removed without further hearing or review.

"An alien who states a fear of persecution or wishes to apply for asylum, will be referred for [an] interview by an asylum officer. If the officer finds that the alien has a credible fear of persecution, the alien shall be detained for further consideration of the application for asylum. If the alien does not meet this standard, and the officer's decision is upheld by a supervisory asylum officer, the alien will be ordered removed. An alien may consult with a person of his or her choosing before the interview, at no expense to the Government and without delaying the interview. A `credible fear of persecution' means that it is more likely than not that the alien is telling the truth and the alien has a reasonable possibility of establishing eligibility for asylum. The Attorney General is required to write and promulgate regulations of these procedures consistent with the intent of this provision.

"There is no administrative review of a removal order entered into under this paragraph, but an alien claiming under penalty of perjury to be lawfully admitted for permanent residence shall be entitled to administrative review of such an order. An alien ordered removed under this paragraph may not make a collateral attack against the order in a prosecution under section 275(a)(illegal entry) or 276 (Illegal reentry).

"New section 235(b)(2) provides that an alien who is not clearly and beyond a doubt entitled to enter (other than an alien subject to removal under paragraph (b)(1), or an alien crewman or stowaway) shall be detained for a hearing before a special inquiry officer (immigration judge)." 142 *Cong.Rec.* H3335 (daily e.d April 15, 1996).

52. "At present, it is very difficult to obtain crucial information contained in these files such as fingerprints, photographs, addresses, etc., when the alien becomes a subject of a criminal investigation. In both the World Trade Center bombing and the killing of CIA personnel on their way to work at CIA Headquarters, the existing confidentiality provisions hindered law enforcement efforts." 141

Cong.Rec. S2502 (daily ed. Feb.10, 1995)(explaining a comparable section in S.390).

53. "As used in this chapter --

"(1) the term `biological agent' means any microorganism, virus, or infectious substance, or *biological product that may be engineered as a result of biotechnology, or any naturally occurring or bioengineered component of any such microorganism, virus, infectious substance, or biological product*, capable of causing --

(A) death, disease, or other biological malfunction in a human, animal, a plant, or another living organism;

(B) deterioration of food, water, equipment, supplies, or material of any kind; or

(C) deleterious alternation of the environment;

"(2) the term `toxin' means *the toxic material of plants, animals, microorganisms, viruses, fungi, or infectious substances, or a recombinant molecule*, whatever its origin or method of production, *including --*

(A) any poisonous substance or *biological product that may be engineered as a result of biotechnology* produced by a living organism; or

(B) any poisonous isomer or *biological product*, homolog, or derivative of such a substance;

"(3) the term `delivery system' means --

(A) any apparatus, equipment, device, or means of delivery specifically designed to deliver or disseminate a biological agent, toxin, or vector; or

(B) any vector; and

"(4) the term `vector' means a living organism or *molecule, including a recombinant molecule, or biological product that may be engineered as a result of biotechnology* capable of carrying a biological agent or toxin to a host." 18 U.S.C. 178 (language added by 511 in italics).

54. The analysis accompanying a similar provision in H.R.896/S.360 explains the changes as follows:"In considering legislative proposals which were incorporated into the 1994 crime bill (Pub.L. 103-322), Congress altered the Department's proposed formulation of the jurisdictional provisions of the Maritime Violence legislation, the Violence Against Maritime Fixed Platforms legislation, and Violence at International Airports legislation, because of a concern over possible federal coverage of violence stemming from labor disputes. The altered language created uncertainties which were brought to the attention of Congress. Subsequently, the labor violence concern was addressed by adoption of the bar to prosecution contained in 18 U.S.C. 37(c), 2280(c) and 2281(c). With the adoption of this bar, the sections were to revert to their original wording, as submitted by the Department of Justice. While sections 37 and 2281 were properly corrected, the disturbing altered language was inadvertently left in section 2280.

"Consequently, as clauses (ii) and (iii) of subsection 2280(b)(1)(A) of title 18, United States Code, are presently written, there would be no federal jurisdiction over a prohibited act within the United States by anyone (alien or citizen) if there was a state crime, regardless of whether the state crime is a felony. Moreover, the Maritime Convention mandated that the United States assert jurisdiction when a United States national does a prohibited act anywhere against any covered ship. Limiting jurisdiction over prohibited acts committed by United States nationals to those directed against only foreign ships and ships outside the United States does not fulfill our treaty responsibilities to guard against all wrongful conduct by our own nationals.

"Moreover, as presently drafted, there is no federal jurisdiction over alien attacks against foreign vessels within the United States, except in the unlikely situation that no state crime is involved. This is a potentially serious gap. Finally, until the federal criminal jurisdiction over the expanded portion of the territorial sea of the United States is clarified, there remains some doubt about federal criminal jurisdiction over aliens committing prohibited acts against foreign vessels in the expanded portion of the territorial sea of the United States (*i.e.*, from 3 to 12 nautical miles out). Consequently striking the limiting phrases in clauses (ii) and (iii) ensures federal jurisdiction, unless the bar to prosecution under subsection 2280(c) relating to labor disputes is applicable, in all situations that are required by the Maritime Convention.," 141 *Cong.Rec.* S2526 (1995).

55. The section by section analysis accompanying the introduction of a similar provision in S.761 (902) notes, "Section 902 would expand federal criminal murder and assault jurisdiction to include all federal employees and their immediate families. The provision would also include the uniformed services of the military. Under existing federal law, only certain enumerated federal employees are protected under federal law and as federal employees become targets-- not only as the result of their specific job titles, but merely

because they are federal employees -- the need for federal protection grows." 141 *Cong. Rec.* S6215 (daily ed. May 5, 1995); see also, H.R.Rep.No. 104-383, 81 (1995).

56. "This section clarifies Section 3142(f) of title 18, United States Code, for judges involved in hearing detention motions pursuant to that statute.

"Despite the unambiguous language of Rule 45(a) of the Federal Rules of Criminal Procedure [relating to the computation of time], there has been inconsistent application of the time periods set out in this particular statute by judges and magistrate judges faced with motions for pre-trial detention. Currently, the statute provides that the detention hearing shall commence no later than three days after the making of the motion by the government for detention, and no longer than five days after the detention motion, if the defendant requests the delay.

"Rule 45(a) of the Federal Rule of Criminal Procedure applies generally to all time periods involved in criminal matters and this section does not seek to change that application, rather it clarifies that general rule in this specific context. Rule 45(a) does not count intervening Saturdays, Sundays, or federal holidays to any time period set by statute or rule of less than 11 days.

"Without adequate preparation time of such hearings, the government is often faced with proceeding without all available information. To assure that the government's statutory rights in detention hearings are upheld, it is necessary to Congress to restate a portion of the rule in the statute. Furthermore, it should be noted that Congress has always understood Rule 45(a) to have general application to all time periods to be calculated in any criminal proceeding or matter in federal court," H.R.Rep.No. 104-383 at 92 (explaining a comparable section in H.R.1710).

57. "[T]he term 'Federal crime of terrorism' means an offense -- that (A) is calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct; and (B) is a violation of (i) section 32 (relating to destruction of aircraft or aircraft facilities), 37 (relating to violence at international airports), 81 (relating to arson within special maritime and territorial jurisdiction), 175 (relating to biological weapons), 351 (relating to congressional, cabinet, and Supreme Court assassination, kidnapping, and assault), 831 (relating to nuclear materials), 842 (m) or (n)S(relating to plastic explosives), 844 (f) or (i) (relating to arson and bombing of certain property), 956 (relating to conspiracy to injure property of a foreign government), 1114 (relating to protection of officers and employees of the United States), 1116 (relating to murder or manslaughter of foreign officials, official guests, or internationally protected persons), 1203 (relating to hostage taking), 1361 (relating to injury of Government property or contracts), 1362 (relating to destruction of communication lines, stations, or systems), 1363 (relating to injury of buildings or property within special maritime and territorial jurisdiction of the United States), 1366 (relating to destruction of an energy facility), 1751 (relating to Presidential and Presidential staff assassination, kidnapping, and assault), 2152 (relating to injury of fortifications, harbor defenses or defensive sea areas), 2155 (relating to destruction of national defense materials, premises, or utilities), 2156 (relating to production of defective national defense materials, premises, or utilities), 2280 (relating to violence against maritime navigation), 2281 (relating to violence against maritime fixed platforms), 2332 (relating to certain homicides and other violence against United States nationals occurring outside the United States), 2332a (relating to use of weapons of mass destruction), 2332b (relating to acts of terrorism transcending national boundaries), 2339A (relating to providing material support to terrorists), 2339B (relating to providing material support to terrorist organizations), or 2340A (relating to torture) [of title 18]; (ii) section 236 (relating to sabotage of nuclear facilities or fuel) of the Atomic Energy Act of 1954 (42 U.S.C. 2284); or (iii) section 46502 (relating to aircraft piracy) or section 60123(b) (relating to destruction of interstate pipeline facility) of title 49," 18 U.S.C. 2332b(g)(5).

58. "3A1.4. International Terrorism. (a) If the offense is a felony that involved, or was intended to promote, international terrorism, increase by 12 levels; but if the resulting offense level is less than 32, increase to level 32. (b) In each such case, the defendant's criminal history category from Chapter Four (Criminal History and Criminal Livelihood) shall be Category VI" 60 *Fed.Reg.* 25086 (May 10, 1995).

The sentencing guidelines establish sentencing ranges between the maximum, and any minimum penalty, established by Congress for a particular offense. They assign every crime to one of 43 offense levels which are increased or decreased according to circumstances of a particular crime; each of the offense levels has 6 categories arranged according to the extent of the offender's past criminal record (his or her criminal history category). The guidelines have a grid identifying the appropriate sentencing range (months of imprisonment) for each criminal history category within each offense level. By dictating a minimum offense level of 32 and a required criminal history category of VI, the Commission has determined that, absent some extraordinary ground for departure an offender to whom the guideline applies must be sentenced to a term of imprisonment of no less than 210 months. Of course, if the offense for which the defendant is convicted carries a maximum penalty of less than 210 months, the statutory maximum applies. See generally, United States Sentencing Commission, *Guidelines Manual: 1994* (guidelines effective Nov.1, 1994); for a rudimentary introduction see, Doyle, *How the Sentencing Guidelines Work*, CRS Rep. No. 94-323 (April 15, 1994).

59. "As used in this chapter . . . (12) 'electronic communications' means any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce, but does not include . . .

that affects interstate or foreign commerce, but does not include --

(A) any wire or oral communication

(B) any communication made through a tone only paging device; or

(C) any communication from a tracking device (18 U.S.C. 3117). . .

(14) 'electronic communications system' means any wire, radio, electromagnetic, photooptical or photoelectronic facilities for the transmission of electronic communications, and any computer facilities or related electronic equipment for the electronic storage of such communications, 18 U.S.C. 2510(12),(14).

60. "It shall not be unlawful under this chapter [relating to the interception of wire, oral and electronic communications] or chapter 121 [relating to stored wire and electronic communications and transactional records access] of this title for any person -- (i) to intercept or access an electronic communication made through an electronic communication system that is configured so that such electronic communication is readily accessible to the general public," 18 U.S.C. 2511(g)(i).

"As used in this chapter . . . 'readily accessible to the general public' means, with respect to a radio communication, that such communication is not --

(A) scrambled or encrypted;

(B) transmitted using modulation techniques whose essential parameters have been withheld from the public with the intention of preserving the privacy of such communications;

(C) carried on a subcarrier or other signal subsidiary to a radio transmission;

(D) transmitted over a communication system provided by a common carrier, unless the communication is a tone only paging system communication;

(E) transmitted on frequencies allocated under part 25, subpart D, E, or F of part 74, or part 94 of the Rules of the Federal Communications Commission, unless, in the case of a communication transmitted on a frequency allocated under part 74 that is not exclusively allocated to broadcast auxiliary services, the communication is a two-way voice communication by radio," 18 U.S.C. 2510(16).

61. "The current practice is to outlaw bullets by brand-name without regard to their specific component qualities. To continue this practice could result in hunting-type bullets being outlawed indiscriminately, without regard to the nature and purposes of the ammunition, and without regard to the proximity of the target, or the type of weapon used to shoot the bullet," 142 *Cong.Rec.* H3337 (daily ed. April 15, 1996).

62. Previously, Congress had relieved the Attorney General of the monetary and other reward restrictions found in 18 U.S.C. 3058 and 3072, "Any funds made available to the Attorney General heretofore or hereafter in any Act shall not be subject to the spending limitations contained in sections 3059 and 3072 of title 18, United States Code: *Provided*, That any reward of \$100,000 or more, up to a maximum of \$2,000,000, may not be made without the personal approval of the President or the Attorney General, and such approval may not be delegated," Pub.L.No.104-19, 109 Stat. 250 (1995).