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## **The 9/11 Recommendations Implementation Act: Comparison of the Criminal Law and Procedure Provisions in H.R. 10 and S. 2845 as Passed by Their Respective Houses**

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# The 9/11 Recommendations Implementation Act: Comparison of the Criminal Law and Procedure Provisions in H.R. 10 and S. 2845 as Passed by Their Respective Houses

## Summary

This is a brief description of the substantive criminal law and procedures provisions of the House-passed version of H.R. 10. They have no equal in Senate-passed S. 2845. . The provisions are largely devoted to increasing the penalties for various existing terrorist crimes and increasing the jurisdictional circumstances under which they may be prosecuted under federal law. The provisions include “lone wolf” FISA and grand jury information sharing amendments; increased penalties for hoaxes and obstructions of justice in terrorism cases, for identification offenses, and for smuggling aliens; clarification and expansion of terrorist support offenses, crimes involving weapons of mass destruction, and counterfeiting offenses.

Moreover, the provisions increase the penalties and expand the jurisdictional reach of federal crimes barring the production, traffic in, and use as terrorist weapons of anti-aircraft missiles, atomic weapons, radiological dispersal devices, and smallpox virus. They merge the train wrecking and mass transit attacks proscriptions of existing law. They establish capital punishment as a permissible sanction for those existing federal terrorist crimes resulting in death that do not already carry the death penalty, deny federal benefits to terrorists, and make the 1994 death penalty procedures retroactively applicable to certain air piracy offenses committed after enactment of the 1974 capital punishment procedures. They establish a no-bail presumption for terrorists and subject terrorists to post-imprisonment supervision for life.

This report will be revised as appropriate and is available in an abridged version as CRS Report RS21952, *The 9/11 Recommendations Implementation Act: An Abridged Comparison of H.R. 10 and S. 2845 as Passed by Their Respective Houses*.

## Contents

Introduction .....	1
Individual Terrorists as Agents of Foreign Powers .....	1
Hoaxes and Recovery Costs .....	2
Obstruction of Justice and False Statements in Terrorism Cases .....	3
Clarification of Definition .....	3
Material Support to Terrorism Prohibition Enhancement Act of 2004 .....	3
Receiving Military-Type Training from a Foreign Terrorist Organization ..	4
Providing Material Support to Terrorism .....	4
Financing of Terrorism .....	5
Weapons of Mass Destruction Prohibition Improvement Act of 2004 .....	6
Weapons of Mass Destruction .....	6
Participation in Nuclear and Weapons of Mass Destruction Threats to the United States .....	7
Conduct in Aid of Counterfeiting .....	9
Grand Jury Information Sharing .....	9
Short Title .....	10
Police Badges .....	10
Short Title .....	11
Attacks Against Railroad Carriers and Mass Transportation Systems .....	11
Short Title .....	12
Findings and Purpose .....	12
Missile Systems Designed to Destroy Aircraft .....	13
Atomic Weapons .....	14
Radiological Dispersal Devices .....	15
Variola Virus .....	16
Interception of Communications .....	17
Amendments to Section 2332b(g)(5)(B) of Title 18, United States Code ..	17
Amendments to Section 1956(c)(7)(D) of Title 18, United States Code ...	18
Export Licenses .....	18
Clerical Amendments .....	19
Short Title .....	19
Penalties for Terrorist Offenses Resulting in Death; Denial of Federal Benefits to Terrorists .....	19
Death Penalty in Certain Air Piracy Cases Occurring Before Enactment of the Federal Death Penalty Act of 1994 .....	20
Short Title .....	21
Presumption for Pretrial Detention in Cases Involving Terrorism .....	21
Postrelease Supervision of Terrorists .....	22
Bringing in and Harboring Certain Aliens .....	22
Increase in Penalties for Fraud and Related Activity .....	22
Criminal Penalty for False Claim to Citizenship .....	23

# The 9/11 Recommendations Implementation Act: Comparison of the Criminal Law and Procedure Provisions of H.R. 10 and S. 2845 as Passed by Their Respective Houses

## Introduction

The Senate passed S. 2845, on October 6, 2004. The House passed H.R. 10, its version of the legislation, on October 8, 2004. This is a description and brief analysis of provisions of H.R. 10, as passed by the House, that adjust federal law enforcement authority through either the creation of new federal crimes or the amendment of existing criminal procedure or of existing substantive criminal provisions. None of the provisions discussed below appear to have any counterparts in S. 2845 as passed by the Senate.

## Individual Terrorists as Agents of Foreign Powers

H.R. 10: Sec. 2001

S. 2845: No similar provision

The Foreign Intelligence Surveillance Act (FISA) authorizes the FISA court to issue orders permitting surveillance (wiretapping), physical searches, pen register/trap & trace device use, and tangible item access in connection with the activities in the United States of a foreign power and an “agent” of a foreign power, 50 U.S.C. 1801-1862. Existing law defines agent of a foreign power to include anyone who engages in or prepares to commit acts of international terrorism on behalf of a foreign power, 50 U.S.C. 1801(b)(2)(C).

Section 2001 amends the definition of an agent of a foreign power for purposes of the Foreign Intelligence Surveillance Act so that the court orders available under the act may be used to collect information relating to so-called “lone wolf” foreign terrorists without having to first establish their connection to any foreign group or government as is now required. The new authority sunsets on December 31, 2005 except with respect to investigations pending at the time.

Similar provisions passed the Senate in S. 113; *see*, CRS Report RS21472, *Proposed Change to the Foreign Intelligence Surveillance Act (FISA) Under S. 113*.

Stop Terrorist and Military Hoaxes Act of 2004

H.R. 10: Sec. 2021

S. 2845: No similar provision

Section 2021 designates Subtitle IIB as the Stop Terrorist and Military Hoaxes Act of 2004.

## Hoaxes and Recovery Costs

H.R. 10: Sec. 2022

S. 2845: No similar provision

Depending upon the circumstances, under existing law the communication of information that an act of violence has or will be committed may be punishable as a false statement, a threat, fraud, or extortion. False statements are generally punishable by imprisonment for not more than five years, e.g., 18 U.S.C. 35(b), 1001. Some threat statutes likewise carry a five year maximum, e.g., 18 U.S.C. 875(c), 876(c), but threats involving explosives or other weapons of mass destruction are likely to be more severely punished, e.g. 18 U.S.C. 844(e)(explosives: imprisonment for not more than 10 years), 2332a (weapons of mass destruction: imprisonment for any term of years or for life), 175 (biological weapons: same); 229A (chemical weapons: same). Recent terrorism hoax cases have been prosecuted under 18 U.S.C. 1001, 844(e), 2332a, 35(b), and 876, e.g., *United States v. Pickett*, 209 F.Supp.2d 84 (D.D.C. 2002); cases listed as *Hoax Cases*, at [<http://news.findlaw.com/legalnews/us/terrorism/cases/hoax.html>]

Section 2022 creates a new 18 U.S.C. 1038 that establishes criminal and civil liability for various false statements (other than those of federal intelligence or federal, state or local officers engaged in lawfully authorized activities). Intentional, creditable false statements relating to the purported commission of various violent federal crimes (predicate offenses) subject offenders to imprisonment for not more than five years, not more than 25 years if serious injury results, and imprisonment for any term of years or for life if death results. Offenders are likewise subject to reimbursement orders for the fire and rescue costs and to civil liability for expenses incurred as a consequence of the violation. The predicate offenses are those of:

- 18 U.S.C. ch. 2 (aircraft and motor vehicles)
- 18 U.S. ch.10 (biological weapons)
- 18 U.S. ch. 11B (chemical weapons)
- 18 U.S. ch. 39 (nuclear materials and fireworks)
- 18 U.S. ch. 40 (explosive materials)
- 18 U.S. ch. 44 (firearms)
- 18 U.S. ch. 111 (shipping)
- 18 U.S. ch. 113B (terrorism)
- 42 U.S. 2284 (sabotage of nuclear facilities)
- 49 U.S.C. 46502 (air piracy)
- 49 U.S.C. 46504 (assault of a flight crew member with a dangerous weapon)
- 49 U.S.C. 46505(b)(3)(placing an explosive or incendiary device aboard an aircraft)
- 49 U.S.C. 46505(c)(carrying weapon aboard an aircraft without regard for human life)
- 49 U.S.C. 46506 (homicide or attempted homicide aboard an aircraft)
- 49 U.S.C. 60123(b)(damage to interstate gas pipelines).

The same criminal penalties apply to intentional false statements concerning death, injury, capture or disappearance of a member of the U.S. armed forces during an armed conflict.

The House Judiciary Committee has reported out comparable legislation, H.R. 1678, H.Rept. 108-505 (2004), for which there is a Senate companion, S. 2204. Legislative efforts in an earlier Congress are discussed in CRS Report RL31314, *Anti-Hoax Legislation in the 107<sup>th</sup> Congress: Addressing Problems Since September 2001*.

## **Obstruction of Justice and False Statements in Terrorism Cases**

H.R. 10: Sec. 2023

S. 2845: No similar provision

Material false statements upon a matter within the jurisdiction of a federal agency or department are punishable by imprisonment for not more than five years, 18 U.S.C. 1001. Obstructing or impeding administrative agency or Congressional proceedings, corruptly or by threat, is likewise punishable by imprisonment for not more than five years, 18 U.S.C. 1505. International and domestic terrorism are defined in 18 U.S.C. 2331, as amended by the USA PATRIOT Act, to include violent criminal activities that appear intended to coerce or intimidate a government or population.

In cases involving international or domestic terrorism, section 2023 increases the penalties (1) for false statements on matters within the jurisdiction of a federal agency or department or for obstructing federal administrative or Congressional proceedings from imprisonment for not more than five years to not more than 10 years.

## **Clarification of Definition**

H.R. 10: Sec. 2024

S. 2845: No similar provision

Section 2024 makes grammatical corrections in provisions which outlaw the use of the facilities of interstate or foreign commerce in furtherance of the commission of murder for hire, 18 U.S.C. 1958.

## **Material Support to Terrorism Prohibition Enhancement Act of 2004**

H.R. 10: Sec. 2041

S. 2845: No similar provision

Section 2041 designates Subtitle IIC as the Material Support to Terrorism Prohibition Enhancement Act of 2004.

## Receiving Military-Type Training from a Foreign Terrorist Organization

H.R. 10: Sec. 2042

S. 2845: No similar provision

Federal law proscribes providing material support or resources in aid of the commission of certain designated violent federal crimes, 18 U.S.C. 2339A. It also outlaws providing material support to a designated terrorist organization, 18 U.S.C. 2339B. For purposes of both prohibitions, “material support or resources” means “currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials,” 18 U.S.C. 2339A(b), 2339B(g)(4). Members of “terrorist cells” in Buffalo and Portland have been convicted for providing material support based on their training in Afghanistan (CRS Briefing Book ebter125, “Federal Crimes Implicated” by Charles Doyle.) Some courts have indicated, however, that application of the definition of “material support” may be subject to constitutional challenge under some circumstances, *Humanitarian Law Project v. United States Department of Justice*, 352 F.3d 382, 403-404 (9<sup>th</sup> Cir. 2003), *vac’d for reh’g en banc*, \_\_\_ F.3d \_\_\_ (9<sup>th</sup> Cir. Sept. 8, 2004); *United States v. Sattar*, 272 F.Supp.2d 348, 357-61 (S.D.N.Y. 2004).

Section 2042 creates a new federal crime, 18 U.S.C. 2339D which outlaws the knowing receipt (from or for the benefit of a foreign terrorist organization) of military training including instruction on the use of explosives and weapons of mass destruction under a series of jurisdictional circumstances. Violations are punishable by imprisonment for not more than 10 years and/or a fine of not more than \$250,000. The jurisdictional circumstances include the fact that the offense is committed in the U.S. in whole or in part; or that the offender is a U.S. national, a U.S. permanent resident alien, a stateless habitual resident of the U.S., or later brought to or found in the U.S.; or that the offense involves aiding and abetting a violation of section under which there is U.S. jurisdiction.

## Providing Material Support to Terrorism

H.R. 10: Sec. 2043

S. 2845: No similar provision

Existing law prohibits providing material support for the commission of any of a list of designated offenses, 18 U.S.C. 2339A. In addition, anyone who aids or abets the commission of any federal offense is subject to the same penalties as those whose violations they have made possible, 18 U.S.C. 2. It is likewise a federal crime to provide material support to a designated terrorist organization, 18 U.S.C. 2339B. Sections 2339A and 2339B apply within the United States and in some instances to violations occurring overseas. In the case of section 2339A, the section has the same extraterritorial application as its predicate offenses. If the United States has prosecutorial jurisdiction over the terrorist crime that has been materially supported,

then it has prosecutorial jurisdiction over the violation of section 2339A. In the case of section 2339B, there is an explicit state of extraterritorial application, 18 U.S.C. 2339B(d). As noted above, some courts have indicated that application of the definition of “material support” may be subject to constitutional challenge under some circumstances, *Humanitarian Law Project v. United States Department of Justice*, 352 F.3d 382, 403-404 (9<sup>th</sup> Cir. 2003), *vac’d for reh’g en banc*, \_\_\_ F.3d \_\_\_ (9<sup>th</sup> Cir. Sept. 8, 2004); *United States v. Sattar*, 272 F.Supp.2d 348, 357-61 (S.D.N.Y. 2004).

Section 2043 amends 18 U.S.C. 2339A and 2339B. With respect to section 2339A in addition to clarifying amendments, the bill adds to the designated offense list any crime of international or domestic terrorism (as defined in the USA PATRIOT Act), 18 U.S.C. 2331, committed under particular jurisdictional conditions. The jurisdictional conditions include the fact that:

- U.S. jurisdiction exists over the underlying terrorist offense
- the offense occurs in or affects interstate or foreign commerce
- the underlying domestic terrorism offense is calculated to coerce the U.S. government;
- no matter where the offense occurs, the offender is a U.S. national, a U.S. permanent resident alien, or a stateless habitual residence of the U.S. and the international terrorism offense is calculated to coerce the U.S. or a foreign government
- the act of international terrorism is committed within the U.S. by a foreign national and calculated to coerce the U.S. or a foreign government;
- the act of international terrorism is committed outside the U.S. by a foreign national and calculated to coerce the U.S. government

With respect to section 2339B, the bill identifies specific circumstances under which the U.S. has jurisdiction over the offense:

- the offense occurs in whole or in part in the U.S.
- the offender is a U.S. national, a U.S. permanent resident alien, or a stateless habitual resident of the U.S.
- the offense occurs in or affects interstate or foreign commerce
- the offender is later brought to, or found in, the U.S.
- the offense involves aiding or abetting a violation over which there is U.S. jurisdiction.

The bill also provides a clarifying definition under section 2339B of providing assistance in the form of personnel, and it supplies a rule of construction that precludes prosecution so as to abridge the exercise of First Amendment rights.

## **Financing of Terrorism**

H.R. 10: Sec. 2044

S. 2845: No similar provision

Section 2044 provides clarifying amendments to 18 U.S.C. 2339C, which outlaws financing terrorism or concealing such financing, to make it clear that the



concealment proscription applies to direct and indirect funding and to material support as defined in sections 2339B and 2339A.

## **Weapons of Mass Destruction Prohibition Improvement Act of 2004**

H.R. 10: Sec. 2051

S. 2845: No similar provision

Section 2051 designates Subtitle IICD as the Weapons of Mass Destruction Prohibition Improvement Act of 2004.

## **Weapons of Mass Destruction**

H.R. 10: Sec. 2052

S. 2845: No similar provision

Present law condemns the use, the threat to use, and the attempt or conspiracy to use, weapons of mass destruction which it defines to include biological and atomic weapons as well as destructive devices (bombs), 18 U.S.C. 2332a, when the crime is committed overseas by or against an American, when the crime is committed within the U.S. and the use affects or would affect interstate or foreign commerce, or when the crime is committed against federal property in the U.S. or elsewhere. Individual parallel proscriptions cover biological weapons, 18 U.S.C. 175; chemical weapons, 18 U.S.C. 229; nuclear materials, 18 U.S.C. 831; and to somewhat lesser extent, explosives, 18 U.S.C. 842, 844.

Thus, section 175 outlaws the production, acquisition, or possession of biological materials for use as a weapon, or attempting, threatening, or conspiring to do so. The prohibition applies within the U.S. without the need for further jurisdictional justification, and overseas if the offense is committed by or against an American. By the same token, section 229 outlaws production, acquisition, possession, or use of a chemical weapons, or the attempt, conspiracy or threat to do so. There is federal jurisdiction over the offense if it is committed within the U.S., or committed by or against an American overseas, or committed against federal property located in this country or elsewhere. And section 831 outlaws possession or use of nuclear material under circumstances likely to endanger person or property, or to threaten, attempt, or conspire to do so. Federal jurisdiction exists if the offense is committed within the U.S.; the offender or victim is an American; the offender is later found or brought to the U.S.; the offense involves a threat directed against the federal government or U.S. territory; or the offense involves a shipment in interstate or foreign commerce. Although somewhat less comprehensive particularly with regard to attempts and misconduct committed by Americans overseas, section 844 outlaws burning or bombing property used in, or used in an activity affecting, interstate or foreign commerce; burning or bombing federal property; using the mails or some other medium in interstate or foreign commerce to threaten to burn or bomb; or conspiring to do so. A host of other federal laws prohibit violence regardless of the form it takes under a variety of jurisdictional circumstances, e.g., 18 U.S.C. 1114

(killing federal officers, employees or members of the armed forces), 2332 (acts of violence committed against Americans overseas).

Section 2052 enlarges the jurisdictional coverage of the generic weapons of mass destruction section, 18 U.S.C. 2332a, so that it more closely approximates the jurisdictional reach of the individual proscriptions covering nuclear material as well as biological and chemical weapons. In addition to section 2332a's commerce clause foundation, section 2052 permits prosecution when a violation of section 2332 involves the use of the mails or interstate or foreign commerce in furtherance of the offense; or when the offender travels in interstate or foreign commerce; or when the offense is committed against the property of a foreign government within this country.

Section 2052 makes 18 U.S.C. 2332a applicable to chemical weapons in addition to the other weapons of mass destruction already included in the section (chemical weapons were dropped when the individual provisions of 18 U.S.C. 229 were enacted). Section 2052 also enlarges the classes of restricted individuals, who may not possess biological toxins under 18 U.S.C. 175b, to include members and agents of designated terrorist organizations and agents of nations that support terrorism.

Finally, section 2052 adds 18 U.S.C. 175-178 (biological weapons and materials), 18 U.S.C. 229-229F (chemical weapons), and 18 U.S.C. 831 (nuclear materials) to the RICO predicate offense list and consequently to the money laundering predicate offense list. RICO, the federal racketeer influenced and corrupt organization provisions, outlaws the acquisition or operation — through the patterned commission of any of a series of serious crimes (predicate offenses) — of an enterprise whose activities affect interstate or foreign commerce, 18 U.S.C. 1961-1962. The federal money laundering statutes outlaw financial transactions involving the proceeds of various serious crimes (predicate offenses), 18 U.S.C. 1956, 1957. RICO predicate offenses are by definition money laundering predicate offenses, 18 U.S.C. 1956(c)(7)(A). The purpose of section 2052 here seems to be one of emphasis, since each of the offenses it appears to add to the RICO predicate offense list is already there by virtue of its standing as a federal crime of terrorism under 18 U.S.C. 2332b(g)(5)(B), which RICO includes in its predicate offense list by cross reference, 18 U.S.C. 1961(1)(G).

## **Participation in Nuclear and Weapons of Mass Destruction Threats to the United States**

H.R. 10: Sec. 2053

S. 2845: No similar provision

Anyone who aids or abets the commission of a federal crime is treated as a principal, 18 U.S.C. 2, that is, is treated as if he committed the offense himself. One aids or abets the crime of another for purposes of section 2 when one “in some sort associate[s] himself with the venture, that he participate[s] in it as in something that he wishe[s] to bring about, [and] that he [seeks] by his action to make it succeed,” *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 190 (1994),

*quoting, Nye v. Nissen*, 336 U.S. 613, 619 (1949). In much the same way, anyone who conspires to commit a federal crime is liable for the underlying offense, *Pinkerton v. United States*, 328 U.S. 640, 646-47 (1946) — in addition to the separate crime of conspiracy, 18 U.S.C. 371.

Section 57(b) of the Atomic Energy Act of 1954 (42 U.S.C. 2077(b)) outlaws engaging in the production of special nuclear material outside the U.S. Moreover, it is also a federal crime to use or to threaten to use or to attempt or conspire to use a weapon “designed to release radiation or radioactivity at a level dangerous to human life,” when the offense occurs within the U.S. and affects or would affect interstate or foreign commerce; when the offense is committed against an American outside the U.S.; or when the offense is committed against federal property regardless of where the property is located, 18 U.S.C. 2332a. It is likewise a federal crime to possess or use nuclear material or nuclear by-product material under circumstances likely to cause serious injury or substantial property damage, or to attempt, threaten or conspire to do so in the U.S.; or overseas when the victim or offender is an American, when the offender is subsequently brought or otherwise found in the U.S., or when the offense is directed against the U.S. territory or the U.S. government, 18 U.S.C. 831.

Section 2053 amends section 57(b) of the Atomic Energy Act, 42 U.S.C. 2077(b) and creates a new 18 U.S.C. 832. The amendment to the Atomic Energy Act adds a proscription against *participation in the development* of special nuclear material outside the U.S. to the existing prohibition against *production* of special nuclear material outside the U.S. Presumably one who participated in the development of special nuclear material outside the U.S. would at the same time be either aiding and abetting the production of special nuclear material or conspiring to produce special nuclear material in violation of 42 U.S.C. 2077(b) in its present form. On the other hand, the proposal takes conspiracy and aiding and abetting liability one step back, for under its provisions conspiring to participate or aiding and abetting a participant in the development of nuclear material becomes a crime.

The new 18 U.S.C. 832 consists of two crimes, one concerned with foreign weapons programs and the other with misconduct in this country involving radiological weapons. Proposed subsection 832(a) bars participation in, or providing material support to, the weapons of mass destruction program of a designated foreign terrorist organization or of a country designated a sponsor of terrorism, when the offense is committed either within the U.S. or by one subject to U.S. jurisdiction (e.g., a U.S. company or citizen). It also outlaws attempts or conspiracies to engage in such misconduct. The subsection supplements existing proscriptions against providing material support to terrorist organizations generally, 18 U.S.C. 2339B; against producing biological or chemical weapons or possessing nuclear materials under dangerous circumstances, attempting or conspiring to do so, 18 U.S.C. 175, 229, 831, or aiding or abetting such production or possession, 18 U.S.C. 2, or providing material support to such production or possession, 18 U.S.C. 2339A.

Proposed subsection 832(c) outlaws the development or possession of a radiological weapon or attempt or conspiracy to do so. It also outlaws the use or threatened use of such a weapon against anyone within the U.S., an American overseas, of federal property regardless of its location. “Radiological weapons” are

not defined either in proposed section 832 or in the existing United States Code. It is therefore difficult to determine to what extent, if any, it is intended to replicate the proscriptions of 18 U.S.C. 2332a (relating to “any weapon that is designed to release radiation or radioactivity at a level dangerous to human life”) or those of 18 U.S.C. 831 (relating to misconduct associated with nuclear material and nuclear byproduct material).<sup>1</sup>

The new section 832 is designated a federal crime of terrorism under 18 U.S.C. 2332b(g)(5)(B) and as a consequence is added to the list of: RICO predicate offenses, 18 U.S.C. 1961(1)(G); money laundering predicate offenses, 18 U.S.C. 1956(c)(7)(1), 1957(f)(3); aggravated identity theft predicate offenses, 18 U.S.C. 1028A; terrorist crimes involving a risk of serious injury for which there is no statute of limitations, 18 U.S.C. 3286; terrorist crimes for which a life-long term of supervised release may be ordered, 18 U.S.C. 3583.

## **Conduct in Aid of Counterfeiting**

H.R. 10: Sec. 2122

S. 2845: No similar provision

It is a federal crime to possess plates, or analog, digital or electronic images, for purposes of counterfeiting U.S. or foreign obligations or securities, 18 U.S.C. 474, 481; or to possess distinctive paper or counterfeit deterrents, 18 U.S.C. 474A. Section 474 has explicit extraterritorial application, 18 U.S.C. 470.

In addition to enlarging section 470 to provide explicit extraterritorial application for section 474A (distinctive paper and counterfeit deterrents), section 2122 augments existing proscriptions with a prohibition against possession with the intent to defraud of “any material that can be used to make, alter, forge or counterfeit” any obligation or security, U.S. or foreign, proposed 18 U.S.C. 474, 481.

## **Grand Jury Information Sharing**

H.R. 10: Sec. 2191

S. 2845: No similar provision

Testimony and other matters occurring before a federal grand jury are secret, F.R.Crim.P. 6(e). Violations of grand jury secrecy are punishable as contempt of court, F.R.Crim.P. 6(e)(7). Traditionally, such matters could be disclosed under a narrow set of circumstances with the permission of the court and without the court’s permission they could be disclosed to other federal prosecutors and to government personnel assisting the grand jury, F.R.Crim.P. 6(e)(18 U.S.C. App. 2000 ed.). The USA PATRIOT Act and later the Homeland Security Act expanded the exception to

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<sup>1</sup> There is also no clear indication of the relationship between this section and section 2405 of the bill that outlaws the production, acquisition, possession and use of radiological dispersal devices. Depending upon how the two are reconciled, section 2405 may provide some clarification, because it applies to weapons or devices designed or intended to endanger human life through the release of radiation or radioactivity, *see discussion infra*.

permit disclosure to various federal officials without court approval of grand jury matter involving foreign intelligence, counterintelligence, or foreign intelligence information, 115 Stat. 278 (2001), 116 Stat. 2256 (2002).

Section 2191 expands the exception in a number of ways. First, it enlarges the class of government personnel to whom grand jury material may be disclosed without court approval in order to assist in the grand jury's investigation. The class already includes state, local and tribal personnel, F.R.Crim.P. 6(e)(3)(A)(ii); section 2191 adds the personnel of foreign governments.

Second, with subsequent notification of the court but without prior court approval, it permits any attorney for the U.S. government to disclose any grand jury matter involving a threat of actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power, domestic or international sabotage, domestic or international terrorism, or clandestine intelligence gathering activities by an intelligence service or network of a foreign power or an agent of a foreign power to any state, local, Indian tribal, or foreign government official for the purpose of preventing or responding to the threat (the rule already permits disclosure to the appropriate federal officials under such circumstances). Any official receiving such information may use it only for his or her official duties, subject to any limitations on its unauthorized disclosure and may use it only in a manner consistent with guidelines jointly issued by the Attorney General and the National Intelligence Director.

Third, it allows disclosure to foreign courts or prosecutors to use in official criminal investigations, at their request and with the court's approval. In a related change, it amends the provision (F.R.Crim.P. 6(e)(3)(E)(iii)) — which now permits disclosure of evidence of a violation of state or tribal law to the appropriate state or tribal authorities, with court approval — to allow disclosure of evidence of foreign law violations to the appropriate foreign officials, again with court approval.

Finally, violations of the guidelines jointly issued by the Attorney General and the Director of Central Intelligence [sic, probably should read National Intelligence Director] are punishable as contempt of court, although the efficacy of such a sanction in the case of violations by foreign officials may be open to question.

## **Short Title**

H.R. 10: Sec. 2201

S. 2845: No similar provision

Section 2201 designates Subtitle II-I as the Badge Security Enhancement Act of 2004.

## **Police Badges**

H.R. 10: Section 2202

S. 2845: No similar provision

Existing law prohibits unauthorized possession of a police badge or counterfeit police badge that has been transported in interstate or foreign commerce, 18 U.S.C. 716(a). The law, however, recognizes certain affirmative defenses, including the fact that is used or intended for use exclusively for exhibit, collection, decorative, theatrical or other recreational purposes.

Section 2202 eliminates the affirmative defenses now available with respect to badges used for “decorative” or “other recreational purposes.”

## **Short Title**

H.R. 10: Sec. 2301

S. 2845: No similar provision

Section 2301 designates subtitle III as the Railroad Carriers and Mass Transportation Protection Act of 2004

## **Attacks Against Railroad Carriers and Mass Transportation Systems**

H.R. 10: Sec. 2302

S. 2845: No similar provision

Train wrecking is a federal crime, 18 U.S.C. 1992. The same statute outlaws destruction or the attempted destruction of railroad buildings, tunnels, trestles and the like. The USA PATRIOT Act outlawed terrorist attacks on mass transit, 18 U.S.C. 1993. More precisely, it is a federal crime to place biological weapons or destructive devices on mass transit with the intent to endanger; or to engage in such conduct proximate to mass transit facilities; or to impair the function of operational components of mass transit systems; or to interfere with mass transit personnel recklessly or with the intent to endanger; or to commit an act of violence against a mass transit employee or passenger; or to attempt, conspire, or threaten to do so.

Section 1992 applies to trains or railroad systems operated in interstate or foreign commerce; and section 1993 applies where the mass transit provider of the system attacked is engaged in or affects interstate or foreign commerce or if the offender traveled in interstate or foreign commerce in furtherance of the offense.

The two have roughly comparable penalty structures — imprisonment for not more than 20 years for most offenses. Section 1992, however, punishes offenses resulting in death by imprisonment for life or death, and punishes attacks on trains carrying high level radioactive waste by imprisonment for life or for any term of years subject to a 30 year mandatory minimum. Section 1993, on the other hand, punishes attacks that result in death or attacks on a vehicle or ferry while it is carrying at least one passenger by imprisonment for any term of years or for life.

Section 2112 merges the two sections into a single new 18 U.S.C. 1992. Conduct outlawed under the two remains unlawful. In addition, the broader and slightly expanded jurisdictional base of existing section 1993 applies throughout the

new section, i.e., train wrecking is covered if the carrier engages in or affects interstate or foreign commerce or if the offender travels, communicates, or transports facilitating material in such commerce in furtherance of the offense.

In like manner, the new section preserves and slightly expands the sanctions imposed for violations. The basic 20 year term remains, but offenses resulting in death are punishable by death or imprisonment for life (recall that 18 U.S.C. 1993 is not a capital offense under existing law). Moreover, under the new section the 30 year to life sentence that applies when nuclear waste is involved applies whether a rail carrier or some other form of transit is victimized (existing law applies the penalty only in the case of rail transit). The new section punishes violations with imprisonment of any term of years or for life when an employee or passenger is on board at the time of the attack or when certain hazardous material is being carried. Under existing law there is no penalty increase simply because a passenger is on board at the time of a train wreck (absent a death), and neither section 1992 nor 1993 increases the penalty for the presence of an employee or hazardous cargo (other than nuclear waste).

## **Short Title**

H.R. 10: Sec. 2401

S. 2845: No similar provision

Section 2401 designates subtitle IIK as the Prevention of Terrorist Access to Destructive Weapons Act of 2004

## **Findings and Purpose**

H.R. 10: Sec. 2402

S. 2845: No similar provision

Under subsection 2402(a), Congress finds that MANPADS (man-portable air defense systems)(anti-aircraft missiles here) pose a serious threat to civil aviation world wide; that atomic weapons and dirty bombs in the hands of terrorists could inflict enormous damage; that variola virus (smallpox) is extraordinarily dangerous and consequently may be appealing as a terrorist weapon; that as a result the U.S. has a national security interest in preventing the unlawful production, acquisition, possession, export and import of such materials; and that there is no legitimate reason for private production, possession, or traffic.

The stated purpose for the subtitle is “to combat the potential use of weapons that have the ability to cause widespread harm to United States persons and the United States economy (and that have no legitimate private use) and to threaten or harm the national security or foreign relations of the United States,” section 2332 (SA). The practical effect of the subtitle is to increase the penalties and to a lesser extent the coverage of misconduct associated with this type of material.

## Missile Systems Designed to Destroy Aircraft

H.R. 10: Sec. 2403

S. 2845: No similar provision

Any number of federal laws condemn the use of anti-aircraft missiles against civil aircraft, or military aircraft particularly within the United States. For instance, it is a federal crime to destroy any aircraft in U.S. special aircraft jurisdiction<sup>2</sup> or any civil aircraft used, operated or employed in interstate, overseas, or foreign air commerce; or to attempt, conspire or threaten to do so, 18 U.S.C. 32. And it is a federal crime to use a weapon of mass destruction (defined with sufficient breadth to cover anti-aircraft missiles, 18 U.S.C. 921) within the U.S. in a manner that affects interstate or foreign commerce, or when either the victim or the offender is an American regardless of where the crime is committed; or to attempt, conspire or threaten to do so, 18 U.S.C. 2332a. Moreover, it is a federal crime to burn or bomb (including by anti-aircraft missile) federal property, 18 U.S.C. 844(f), or property used in, or used in an activity that affects interstate or foreign commerce, 18 U.S.C. 844(i). Finally, anyone who aids or abets the commission of any such federal crimes (i.e., contributes to the success of the enterprise with the intent that it succeed) is subject to the same penalties as those who commit the crimes, 18 U.S.C. 2.

Aside from the prohibitions for use and attempts or conspiracies to use, coverage of production, possession, export, import exists if it is covered by somewhat fewer overlapping statutes, applies less extensively outside the U.S., and is somewhat less severely punished. Within the U.S., it is a federal crime to manufacture, possess, export or import any unregistered destructive device, e.g., an anti-aircraft missile, 26 U.S.C. 5861, or to import or export items on the munitions list (e.g., anti-aircraft missiles) without the required licenses, 22 U.S.C. 2778.

Section 2403 creates a new federal offense, 18 U.S.C. 2332g, under which it is a federal crime to produce, construct, acquire, transfer, receive, possess, export, use, or possess and threaten to use guided anti-aircraft missiles or their components under various jurisdictional circumstances. The offense is within federal jurisdiction when it occurs in or affects interstate or foreign commerce; when the victim or offender is an American overseas; when the offense is committed against federal property regardless of where it is located; or when the misconduct involves aiding or abetting

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<sup>2</sup> 49 U.S.C. 46501(2) (“‘special aircraft jurisdiction of the United States’ includes any of the following aircraft in flight: (A) a civil aircraft of the United States. (B) an aircraft of the armed forces of the United States. (C) another aircraft in the United States. (D) another aircraft outside the United States — (i) that has its next scheduled destination or last place of departure in the United States, if the aircraft next lands in the United States; [or] (ii) on which an individual commits an offense (as defined in the Convention for the Suppression of Unlawful Seizure of Aircraft) if the aircraft lands in the United States with the individual still on the aircraft . . . . (E) any other aircraft leased without crew to a lessee whose principal place of business is in the United States or, if the lessee does not have a principal place of business, whose permanent residence is in the United States”).



the commission of a violation over which jurisdiction exists.<sup>3</sup> Offenders are subject to imprisonment for life if the crime involves use, or an attempt, conspiracy or threat to use an anti-aircraft missile. Other violations are subject to imprisonment for not less than 30 years or for life. Offenders are subject to death penalty or imprisonment for life if death results. In any event, the offender is subject to a fine of not more than \$2 million.<sup>4</sup>

Existing law punishes use less severely and is considerably more lenient on lesser crimes. Section 32 and 2332a of title 18 carry the death penalty when death results from use and imprisonment for not more than 20 years (18 U.S.C. 32) and imprisonment for any term years or life (18 U.S.C. 2332) in other cases, but neither features a mandatory minimum of 30 years or any other mandatory minimum term. Although the overseas reach of existing law is comparable to or exceeds that of the proposed new section for use offenses, the scope of the existing manufacture, possession, export and import proscriptions (26 U.S.C. 5861; 22 U.S.C. 2778) are pretty much limited to activities within the U.S. (or efforts to import into the U.S.), and their 10-year maximum sentences are more lenient.

## Atomic Weapons

H.R. 10: Sec. 2404

S. 2845: No similar provision

The Atomic Energy Act outlaws the transfer or receipt of atomic weapons in interstate or foreign commerce, as well as their production or possession, 42 U.S.C. 2122. Possession, use, or transfer of nuclear material or any attempt or conspiracy to do so is also a federal crime when committed in the U.S., or when the offender or victim is an American or the offender is later brought to or found in the U.S. regardless of where the offense was committed, 18 U.S.C. 831. Use of atomic weapons in a manner that affects interstate or foreign commerce, against federal property, or when the offender or the victim is an American is a violation of 18 U.S.C. 2332a (weapons of mass destruction); as is any attempt or conspiracy to do so.

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<sup>3</sup> As a general rule, one may only be liable as a principal under 18 U.S.C. 2 for aiding or abetting a crime over which federal jurisdiction exists. Listing the fact as a jurisdictional element simply states a fact that is generally assumed; it does not expand the jurisdictional reach of the statute, *cf.*, *United States v. Yousef*, 327 F.3d 56, 85-111 (2d Cir. 2003)(discussing the extraterritorial application 18 U.S.C. 32 in the context of indictment count that charged violations of 18 U.S.C. 32 and 18 U.S.C. 2, i.e., assuming the question of the extraterritorial application section 2 turned upon whether section 32 applied extraterritorially); *United States v. Felix-Gutierrez*, 940 F.2d 1200, 1205 (9<sup>th</sup> Cir. 1991)(“We have inferred extraterritorial application of conspiracy statutes on the basis of a finding that the underlying substantive statutes reach extraterritorial offenses. We see no reason why a different rule should apply in accessory after the fact cases”).

<sup>4</sup> Although the \$2 million maximum fine seems an increases over the \$250,000/\$500,000 maximums that apply to felonies under existing law, existing law permits imposition of an alternative fine of twice the profit or loss associated with the offense if that amount is higher than the standard maximum, 18 U.S.C. 3571. Consequently existing law provides for a higher maximum in any case where the profit or loss exceeds \$1 million.

Section 2404 amends the Atomic Energy Act in 42 U.S.C. 2122 and 2272 to expand and clarify its jurisdictional reach and increase the penalties that attend violation. As presently phrased it is unclear whether section 2122 bars production or possession in the U.S. under all circumstances or only when there is some nexus to interstate or foreign commerce. The amendment provides for federal jurisdiction under the same circumstances as it is used in connection with its anti-aircraft missile proscriptions: the offense occurs in or affects interstate or foreign commerce; the offense is committed overseas by or against an American; the offense is committed against federal property regardless of where it is located; or the offense involves aiding or abetting the commission of violation of the section by another.

Violations of 2122 are punishable under existing law by a fine of not more than \$250,000 (not more than \$500,000 for legal entities) and/or by imprisonment for not more than 10 years or by imprisonment for any term of years or for life when the offense is committed to injure the U.S. or aid a foreign nation, 42 U.S.C. 2272. As in the case of anti-aircraft missiles, the amendment increases the penalties so that offenders are subject to a fine of not more than \$2 million and to imprisonment for life in the case of use of an atomic weapon or attempting or conspiring to use or possessing and threatening to use such a weapon. In cases where death results the fine remains the same but the offender must be sentenced either to death or to life imprisonment. In the case of other crimes under the section — production, simple possession, importing, or exporting — the penalties are a fine of not more than \$2 million and imprisonment for not less than 30 years or for life.

## **Radiological Dispersal Devices**

H.R. 10: Sec. 2505

S. 2845: No similar provision

Existing federal law bans the use, threat to use, attempt to use, and conspiracy to use, any weapon designed to release radiation or radioactivity at a level dangerous to human life when the offense affects or would affect interstate or foreign commerce, when it is committed by or against an American overseas, or when it is committed against federal property regardless of where the property is located, 18 U.S.C. 2332a (weapons of mass destruction). It is likewise a federal crime to possess or use nuclear material or nuclear byproduct material under circumstances likely to cause human injury, property damage, or environmental degradation, or to attempt, conspire or threaten to do so in various jurisdictional settings, 18 U.S.C. 831. Federal jurisdiction exists if the offense is committed within the U.S., or is committed by or against an American overseas, or the offender is later brought to or found in the U.S., or the offense constitutes a threat against the U.S. Government or U.S. territory.

Section 2405 creates a new 18 U.S.C. 2332h that outlaws production, construction, acquisition, transfer, receipt, possession, importing or exporting weapons, devices, or other objects designed or intended to release radiation or radioactivity dangerous to human life. It supplies the standard array of jurisdictional predicates: the offense occurs in or affects interstate or foreign commerce; the offense is committed by or against an American overseas; the offense is committed against federal property wherever located; or the offense involves aiding or abetting a

violation of the section over which jurisdiction exists. And it carries the usual array of penalties: capital punishment or imprisonment for life if death results; imprisonment for life if the offense otherwise involves the use, attempt to use, conspiracy to use, or possession and threat to use the proscribed devices; imprisonment for not less than 30 years or for life in all other instances; and a fine of not more than \$2 million in all cases.

The section differs from existing law in several ways. First, its penalties are more severe. Existing law has no mandatory minimums under either 18 U.S.C. 2332a or 18 U.S.C. 831, and even where death results violations of section 831 are not punishable by death. Second, it more clearly covers production of and trafficking in proscribed devices up until the time to they contain radiological material than does section 831. Third, its jurisdictional reach is comparable to that of 18 U.S.C. 2332a, but somewhat shorter than that of 18 U.S.C. 831 which extends to all violations within the U.S. (without any required commerce nexus) or elsewhere (since prosecution may occur anytime the offender can be brought to or found in the U.S.).

## Variola Virus

H.R. 10: Sec. 2406

S. 2845: No similar provision

It is a federal crime to use, attempt to use, conspire to use, or threaten to use a weapon involving a biological agent, toxin, or vector in a manner that affects or would affect interstate or foreign commerce in this country, or by or against an American overseas, or against federal property wherever it is located, 18 U.S.C. 2332a. It is also a federal crime to produce, acquire, or possess biological agents, toxins or delivery systems as a weapon, or to assist a foreign national or entity to do so, or to attempt, conspire, or threaten to do so, 18 U.S.C. 175(a).<sup>5</sup> Section 175(b)

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<sup>5</sup> 18 U.S.C. 178(1) to (4): “(1) the term ‘biological agent’ means any microorganism (including, but not limited to, bacteria, viruses, fungi, rickettsiae or protozoa) or infectious substance, or any naturally occurring, bioengineered or synthesized component of any such microorganism or infectious substance, capable of causing — (A) death, disease, or other biological malfunction in a human, an animal, a plant, or another living organism; (B) deterioration of food, water, equipment, supplies, or material of any kind; or (C) deleterious alteration of the environment;

“(2) the term ‘toxin’ means the toxic material or product of plants, animals, microorganisms (including, but not limited to, bacteria, viruses, fungi, rickettsiae or protozoa), or infectious substances, or a recombinant or synthesized molecule, whatever their origin or method of production, includes — (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;

“(4) the term ‘vector’ means a living organism, or molecule, including a recombinant or synthesized molecule, capable of carrying a biological agent or toxin to a host.

outlaws possession of biological agents in unjustifiable quantities or of unjustifiable types.

Section 2406 creates a new federal crime, 18 U.S.C. 175c, that outlaws production, acquisition, transfer, possession, importing, exporting, or possessing and threatening to use variola virus (smallpox). It uses the same jurisdictional array (commerce, American victim or offender, federal property) and the same penalty structure (mandatory minimum of 30 years generally, mandatory life imprisonment for use and use related crimes, possible capital punishment if death results) as the other crimes under the subtitle.

The jurisdictional scope of the new section is comparable to that of 18 U.S.C. 2332a (use of weapons of mass destruction), less comprehensive domestically than 18 U.S.C. 175 (that requires neither commerce nor federal property nexus), but more comprehensive extraterritorially than section 175 (that applies where an American is the victim or offender but not, without more, where federal property is the victim of the offense). As in other instances, the penalty structure of existing law is more lenient than that of the new section. Neither 18 U.S.C. 2332a nor 175 carry mandatory minimums, and even where the offense results in a death violations of 175 are not punishable by death.

## **Interception of Communications**

H.R. 10: Sec. 2407

S. 2845: No similar provision

Federal law permits wiretapping and other forms of communications interception by federal law enforcement officers investigating designated serious federal offenses (predicate offenses), 18 U.S.C. 2516, 2518. Wiretapping predicate offenses under existing law include: 18 U.S.C. 2332a (use of weapons of mass destruction), 175 (biological weapons), 229 (chemical weapons), 831 (nuclear materials), 32 (destruction of aircraft); 22 U.S.C. 2778 (import/export of items on the munitions list); and 26 U.S.C. 5861 (unregistered destructive devices).

Section 2407 adds to the wiretap predicate offense list the crimes created or enlarged by the subtitle, 42 U.S.C. 2122 (Atomic Energy Act)(as amended), 18 U.S.C. 175c (variola virus), 2332g (missile systems designed to destroy aircraft), and 2332h (radiological dispersal devices). Since much of the misconduct described in those provisions is already outlawed by statutes listed on the wiretap predicate offense list, the impact of the section is limited to those cases where the Amendment enlarges either the misconduct covered or federal jurisdiction over it.

## **Amendments to Section 2332b(g)(5)(B) of Title 18, United States Code**

H.R. 10: Sec. 2408

S. 2845: No similar provision

Subparagraph 2332b(g)(5)(B) of title 18 lists the crimes described as federal crimes of terrorism. The existing list includes: 18 U.S.C. 32 (destruction of aircraft), 175 and 175b (biological weapons and materials), 229 (chemical weapons), 831 (nuclear materials), and 2332a (weapons of mass destruction). Among other consequences, crimes on the list become predicate offenses for purposes of the federal racketeer influenced and corrupt organizations (RICO) provisions, 18 U.S.C. 1961(1), and consequently for the federal money laundering statutes, 18 U.S.C. 1956(c)(7)(A), 1957(f)(3). Crimes on the list are subject to no statute of limitations if the offense involves a risk of serious injury, 18 U.S.C. 3286(b) and subject offenders to the prospect of life-long terms of supervised release, 18 U.S.C. 3583(j)(as amended by H.R. 10, sec. 2603 ), and possibly the loss of federal benefits, H.R. 10, sec. 2502.

Section 2408 adds to the list the crimes created or enlarged by the subtitle, 42 U.S.C. 2122 (Atomic Energy Act)(as amended), 18 U.S.C. 175c (variola virus), 2332g (missile systems designed to destroy aircraft), and 2332h (radiological dispersal devices). As with section 2407 since much of the misconduct described in those provisions is outlawed by statutes already listed, the impact of the section is limited to those cases where the Amendment enlarges either the misconduct covered or federal jurisdiction over it.

## **Amendments to Section 1956(c)(7)(D) of Title 18, United States Code**

H.R. 10: Sec. 2409

S. 2845: No similar provision

Existing federal law prohibits certain financial transactions involving the proceeds of designated criminal offenses (predicate offenses), 18 U.S.C. 1956, 1957. The money laundering predicate offense lists include any RICO predicate offense, 18 U.S.C. 1956(c)(7)(A), 1957(f)(3). The RICO predicate offense list includes any federal crimes of terrorism listed in 18 U.S.C. 2332b(g)(5)(B). Section 2218 (SA) adds the crimes of the subtitle to the federal crimes of terrorism list in that subparagraph.

Section 2409 adds the crimes the subtitle creates or enlarges to the money laundering predicate offense list. It is redundant. They are already there by operation of section 2408.

## **Export Licenses**

H.R. 10: Sec. 2410

S. 2845: No similar provision

The President as part of the Arms Export Control Act's licensing process, identifies individuals indicted or convicted for violations of various federal offenses, 22 U.S.C. 2778(g)(1)(A). Section 2410 adds the crimes created or enlarged in the subtitle to the list. It is a bit redundant in the case of 42 U.S.C. 2122 (atomic

weapons), but none of the other existing law counterparts to the bill's substantive offenses (18 U.S.C. 2332a, 175, 229, 831, etc.) appear on the existing list.

## Clerical Amendments

H.R. 10 : Sec. 2411

S. 2845: No similar provision

Section 2411 adds entries to the appropriate chapter tables of contents to reflect the new criminal sections it adds to the United States Code, 18 U.S.C. 175 (smallpox virus), 2332g (anti-aircraft missiles), and 2332h (radiological dispersal devices).

## Short Title

H.R. 10: Sec. 2501

S. 2845: No similar provision

Section 2501 designates subtitle III as the Terrorist Penalties Enhancement Act of 2004.

## Penalties for Terrorist Offenses Resulting in Death; Denial of Federal Benefits to Terrorists

H.R. 10: Sec. 2502

S. 2845: No similar provision

Some federal crimes resulting in the death of a victim are punishable by death, *e.g.*, 18 U.S.C. 1114 (murder of federal officer, employee or member of the armed forces), and others are not, *e.g.*, 18 U.S.C. 43 (animal enterprise terrorism where death results). It is not clear that capital punishment may be imposed for any crime that does not involve the taking of a life.<sup>6</sup> Where a killing is involved, the constitution may bar imposition of capital punishment upon a coconspirator or accomplice who “does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed.”<sup>7</sup>

While it is a crime to conspire to commit any federal crime, 18 U.S.C. 371, there is no general federal attempt statute. In a number of instances, however, the statute establishing a particular crime will make commission of the offense and attempts or conspiracies to commit it all subject to the same penalties, *e.g.*, 18 U.S.C. 175 (biological weapons offenses).

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<sup>6</sup> *Enmund v. Florida*, 458 U.S. 782, 797 (1982); *Coker v. Georgia*, 433 U.S. 584, 594 (1977).

<sup>7</sup> *Enmund v. Florida*, 458 U.S. at 797; *compare with the facts in, Tison v. Arizona*, 481 U.S.137, 158 (1987)(upholding the constitutionality of imposition of capital punishment under felony murder and accomplice-liability statutes).

Section 2502 establishes a new 18 U.S.C. 2339E under which the commission of a “terrorist offense” that results in a death is punishable by death or imprisonment for any term of years or for life. Somewhat repetitiously, the section defines the terrorist offenses to which it applies as: (1) a federal crime of terrorism (as defined in 18 U.S.C. 2332b(g)) other than 18 U.S.C. 1363 (destruction of property within U.S. special maritime or territorial jurisdiction); (2) any violation of 18 U.S.C. ch.113B (most of the chapter 113B crimes are federal crimes of terrorism), or of 18 U.S.C. 175 (biological weapons), 175b (biological materials), 229 (chemical weapons), or 831 (nuclear materials), or section 236 of the Atomic Energy Act, 42 U.S.C. 2284 (sabotage of nuclear facilities)(all federal crimes of terrorism); or (3) attempt or conspiracy to commit any of these offenses.

Of these terrorist offenses, the following statutes do not authorize imposition of the death penalty for violation of their provisions under existing federal law even when a death results from their commission: 18 U.S.C. 81 (arson within U.S. special maritime and territorial jurisdiction);<sup>8</sup> 175 (biological weapons); 175 (biological materials); 831 (nuclear materials); 842(m),(n) (transportation of plastic explosives without detection agents); 956 (conspiracy in the U.S. to commit certain violent crimes overseas); 1030(a)(1), (a)(5)(A)(i) (computer fraud and abuse); 1362 (destruction of communications systems); 1366(a) destruction of energy facilities); 1993 (terrorist attacks on mass transit); 2155 (destruction of national defense material); 2339 (harboring terrorists); 2339A (providing material support for certain terrorist crimes); 2339B (providing material support for terrorist organizations); 2339C (financing terrorism); 42 U.S.C. 2284 (sabotage of nuclear facilities); 49 U.S.C. 467504 (assaulting a flight crew member with an dangerous weapon), 46505 (carrying a weapon or explosives aboard an aircraft), 60123 (sabotage of interstate gas pipelines).

Section 2502 also creates a new 18 U.S.C. 2339F under which persons convicted of a terrorist offense are thereafter denied federal benefits. The new section tracks a similar disqualification that attends conviction for certain drug offenses, 21 U.S.C. 862a, except that the new disqualification is contingent upon a motion by the Government.

Finally, section 2502 adds to the list of aggravating factors to be considered under federal death penalty procedures the fact that a particular murder occurred during the commission of one of the terrorist offenses which section 2222 defined in its new 18 U.S.C. 2339E (terrorist offenses result in death).

## **Death Penalty in Certain Air Piracy Cases Occurring Before Enactment of the Federal Death Penalty Act of 1994**

H.R. 10: Sec. 2503

S. 2845: No similar provision

In the late 1960’s and early 1970’s the Supreme Court held unconstitutional various elements in the procedures that governed imposition of capital punishment

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<sup>8</sup> *But see*, 18 U.S.C. 1111(murder within U.S. special maritime and territorial jurisdiction).

under most state and federal capital punishment schemes.<sup>9</sup> In 1974 Congress sought to address these defects with procedural adjustments in the capital punishment statute covering air piracy.<sup>10</sup> In 1994 when Congress made the procedural adjustments necessary to revive federal capital punishment statutes generally, it replaced the air piracy procedures with those of the new regime.<sup>11</sup> At least one court, however, held that the new procedures could not be applied retroactively to cases occurring after the 1974 fix but before the 1994 legislation.<sup>12</sup> The court's decision was predicated at least in part on the fact that Congress in 1994 had failed to indicate whether it intended the new procedures to apply retroactively.<sup>13</sup> Section 2223 makes that intent specific.

## Short Title

H.R. 10: Sec. 2601

S. 2845: No similar provision

Section 2601 designates subtitle IIM as the Pretrial Detention and Lifetime Supervision of Terrorists Act of 2004.

## Presumption for Pretrial Detention in Cases Involving Terrorism

H.R. 10: Sec. 2602

S. 2845: No similar provision

Existing law recognizes a rebuttable presumption in favor of the denial of bail pending trial when there is probable cause to believe the accused has committed a serious drug trafficking offense, or conspiracy to commit a crime of violence overseas, or terrorism transcending national boundaries, or a crime of violence while armed with a firearm, or certain offenses involving sexual abuse or exploitation of children, 18 U.S.C. 3142.

Under section 2602 the presumption applies where there is probable cause to believe the accused has committed any of the federal crimes of terrorism listed in 18 U.S.C. 2332b(g)(5)(B) when the Attorney General certifies that the offense appears to have been intended to coerce or intimidate a government or population.

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<sup>9</sup> E.g., *Furman v. Georgia*, 408 U.S. 238 (1972).

<sup>10</sup> Pub.L.No. 93-366, 88 Stat. 409 (1974), 49 U.S.C. 1473 (1976 ed.).

<sup>11</sup> Pub.L.No. 103-322, 108 Stat. 1796, 1970 (1994), 18 U.S.C. 3591-3598.

<sup>12</sup> *United States v. Safarini*, 257 F.Supp.2d 191 (D.D.C. 2003). Safarini was later sentenced under a plea bargain to what will amount to life imprisonment, *Jordanian Hijacker Sentenced to 160 Years in Prison for Deadly 1986 Hijacking of Pan Am Flight 73 as Victims from Around the World Recount Horrors* (Dec. 16, 2003), available on October 11, 2004 at [[http://www.usdoj.gov/usao/dc/Press\\_Releases/Dec\\_2003/03386.html](http://www.usdoj.gov/usao/dc/Press_Releases/Dec_2003/03386.html)].

<sup>13</sup> *United States v. Safarini*, 257 F.Supp.2d at 202-203.



## **Postrelease Supervision of Terrorists**

H.R. 10: Sec. 2603

S. 2845: No similar provision

Defendants sentenced to prison for a federal offense are also subject to imposition of a term of supervised release following their incarceration, 18 U.S.C. 3583(a). The maximum term of supervised release for virtually all serious federal crimes is five years, *id.*, although some major recidivist drug traffickers may be subject to a term of at least 10 years, 21 U.S.C. 841(b)(1)(A). The USA PATRIOT Act provided that those convicted of a federal crime of terrorism which involved the risk of serious bodily injury might be sentenced to supervised release for any term of years or for life, 18 U.S.C. 3583(j).

Section 2603 permits imposition of a sentence of supervised release for any term of years or for life upon conviction of a federal crime of terrorism without regard to whether the offense involved any risk of bodily injury.

## **Bringing in and Harboring Certain Aliens**

H.R. 10: Sec. 3041

S. 2845: No similar provision

Section 274(a) of the Immigration and Nationality Act, 8 U.S.C. 1324(a), sets forth an array of penalties for smuggling aliens beginning with imprisonment for not more than five years escalating to death or imprisonment for any term of years or for life, if death results from a violation.

Section 3041 increases the generally applicable maximum penalty from imprisonment for not more than five years to imprisonment for not more than 10 years when the offense is part of an ongoing commercial enterprise, when it involves smuggling groups of 10 or more aliens, when the manner of smuggling endangers the aliens' lives; or when smuggled aliens represent a life-threatening health risk.

## **Increase in Penalties for Fraud and Related Activity**

H.R. 10: Sec. 3085

S. 2845: No similar provision

Existing federal law bans the use of fraud and types of deception in relation to various forms of identification, 18 U.S.C. 1028.

Section 3085 amends 18 U.S.C. 1028 relating to fraud in connection with identification documents and the like to increase the penalties for violation of the section and to extend the statute's jurisdictional reach. The penalties for the production or transfer of fraudulent identification documents or "authenticating features" made to appear to be those of a state, local or foreign government are increased from imprisonment for three years to imprisonment for 15 years; for

violations committed in furtherance of drug trafficking or crimes of violence or committed by repeat offenders the increase is from 20 to 25 years; for violations in furtherance of international terrorism from 25 to 30 years; and for any other violation involving the production, transfer or use of a fraudulent means of identification, identification document, or authentication feature from three years to six years.

Where jurisdiction over the offense now rests on the fact that the fraudulent document or authentication feature purports to be one issued under the authority of the United States, section 3085 extends that reach to documents or authentication features purporting to be those of the United States, a state, local, foreign, or international government or of an international quasi-governmental organization.

## **Criminal Penalty for False Claim to Citizenship**

H.R. 10: Sec. 3086

S. 2845: No similar provision

Existing federal law penalizes various false statements relating to naturalization, citizenship or alien registry, 18 U.S.C. 1015.

Section 3086 adds to the proscriptions of 18 U.S.C. 1015 the offense of making a false claim of U.S. citizenship in order to enter or remain in this country and punishes the offense by imprisonment for not more than five years and/or a fine of not more than \$250,000.