Financing of Terror through Smuggling

Informal paper prepared by Loretta Napoleoni from extracts from *Terror Incorporated* and new material for the Congressional briefing on July 22, 2005. None of this material can be quoted or reproduced without the author's consent

The most dramatic failure of tracking terror money has been governments' inability to predict the next move of terror's sponsors. To date there has not been any attempt to think and act in a pro-active way; investigative authorities are systematically a step behind those who traditionally bankroll armed organizations. They base their analysis on past and present events while they should look forward, i.e. anticipating what terror's sponsors are going to do in the near future. This approach is linked to the relatively low priority which has been given to the role of funding in the fight against armed organizations. Insufficient resources and man power have been allocated to it. While the analysis of the root causes of terrorism is paramount to find a solution to the problem, a strategy aimed at reducing its funding could help weaken the immediate treat posed by terror to Western and Eastern societies. If we want to financially starve armed organizations, a change in culture and in the overall approach to countering terror financing are very much needed

By far the most significant entry in the terror balance of payments is smuggling, drug smuggling being one of the best know business. From the analysis of contraband over the last five decades, it emerges that criminal and armed groups can adapt to changing economic circumstances and environments, including *ad hoc* policies to destroy their businesses, quickly and efficiently. For example, far from curbing money laundering, the Patriot Act has simply shifted the bulk of such activity from the US to Europe, where a similar legislation does not exist. To be effective, anti-terrorism financial measures must anticipate the reaction of sponsors and armed organization and block any possible avenues to circumvent them or alternative sources of revenues. The example of gold smuggling from Congo, discussed below, will show how a forward looking approach can prevent the opening of new channels of terror financing.

State Sponsored Terrorism using Drug Smuggling

simply cannot accept the government's position that the Executive Branch possesses the unchecked authority to imprison indefinitely any persons, foreign citizens included, on territory under the sole jurisdiction and control of the United States, without permitting such prisoners recourse of any kind to any judicial forum, or even access to counsel, regardless of the length or manner of their confinement. We hold that no lawful policy or precedent supports such a counter-intuitive and undemocratic procedure, and that, contrary to the government's contention, *Johnson* [*Johnson v. Eisentrager*] neither requires nor authorizes it. In our view, the government's position is inconsistent with fundamental tenets of American jurisprudence and raises most serious concerns under international law." (And see fn.7). Court finds that Guantanamo Bay is within US sovereign authority even if the actual base is on Cuban soil, since under terms of that arrangement, US has complete jurisdiction and control of the area (under a 1903 lease agreement and 1934 treaty continuing the lease–see detailed discussion of the lease agreements, noting that under the agreements, sovereignty over Guantanamo Bay base, "vests in the United States" and comparing these lease agreements also with the Panama Canal Zone agreements). Court finds the *Johnson* situation too different from present matter, to allow Johnson to control decision of jurisdiction now. (And see discussion at fn. 12 of other S.Ct. cases). The Court said, "we conclude that by virtue of the United States' exercise of territorial jurisdiction over Guantanamo, habeas jurisdiction lies in the present case). (See fn. 12 distinguishing or declining to follow *Al Odah* from D.C. Circuit). The Court found support for its view of the sovereign situation not only in the lease agreement but also in respective conduct of the nations involved, stating that in this circumstance "our sovereignty over Guantanamo is complete." Therefore, the sovereignty allows federal court jurisdiction regarding detainees. (See also comment by court at 18082). (Dissent by Graber, J. (at 18094 et seq.)).

Coalition of Clergy, et al. v. Bush, 310 F.3d 1153 (9th Cir. 2002). AFFIRMED the decision of the United States District Court (Matz, J.) and determined that the persons who had petitioned the District Court under *habeas corpus* on behalf of Guantanamo Bay detainees did not have "standing" and were not proper "next friends" of the detainees. Therefore, they had no basis to present the petition challenging legality of confinement or conditions of confinement. The Court also affirmed the decision that the federal courts have no jurisdiction to review conditions of persons under military detention and held outside the boundaries of the United States. This marks a significant decision from an appeals court often considered "liberal" or "progressive" which effectively shut down any attempt to bring *habeas corpus* petitions in any federal district court in any State that is within this Circuit, on behalf of the Guantanamo Bay detainees. However, the Court decided that the District Court might have jurisdiction under another basis, such as its interpretation of *Johnson v. Eisentrager*, 339 U.S. 763 (1950) (no U.S. court jurisdiction over petition by German prisoners detained there after being tried and sentenced by military commission in Nanking, China for offenses supposedly committed by prisoners after German surrender at end of WW II).

Coalition of Clergy , et al. v. Bush, 189 F.Supp.2d 1036 (C.D.Cal. 2002) (Matz, J.) (February 21, 2002)

[Denying action by group of individuals and clergy seeking *habeas corpus* on behalf of detainees at "Camp X-Ray" in Guantanamo Bay (Cuba). Groups alleged that *habeas corpus* was available because conditions of detention are unconstitutional and violate other laws and treaties. Court finds that group lacked standing to bring action and that "next friend" standing is rarely if ever

the opium and smuggling heroin to rich Western markets. As the Mujaheedin advanced and conquered new regions, they were told to impose a levy on opium to finance the revolution. To pay the tax farmers began planting more poppies. Drug merchants from Iran, who had moved to Afghanistan after the revolution, offered growers credit in advance of their crops.[2] They also provided the expertise needed to refine opium into heroin. In less than two years, opium production boomed. Soon the narcotics-based economy took over the traditional agrarian economy of Afghanistan and, with the help of the ISI, hundreds of heroin laboratories were opened. Within two years the Pakistan-Afghanistan borderland became the biggest centre for the production of heroin in the world and the single greatest supplier of heroin on American streets, meeting 60 per cent of the US demand for narcotics. Annual profits were estimated between 100 and 200 billion dollars.[3]

The preferred smuggling route went through Pakistan. The ISI used the Pakistani army to carry the drugs across the country,[4] while the BCCI, the Bank of Credit and Commerce International, provided financial and logistical support for the whole operation. Although most of it was sold and consumed in the streets of North America, no investigation from the US narcotics or the DEA was ever carried out; no action was taken to stop the well-documented flow of heroin from Pakistan to the United States.[5] By 1991, yearly production from the tribal area under the control of the Mujaheedin[6] had risen to an astonishing 70 metric tonnes of premium quality heroin,[7] up 35 per cent from the previous year.[8] In 1995, the former CIA director of the Afghan operation, Charles Cogan, admitted that the CIA had indeed sacrificed the drug war to fight the Cold War.

Elizabeth Richards 11/17/04 12:08 PM
Comment: No basis for comparison

The Commercial War Economy of Sendero Luminoso

The most devastating consequences of superpowers interference in the affairs of other nations have been the destabilisation of entire regions and the disintegration of their economies. The shocking legacy of state-sponsored terrorism in Latin America was the proliferation of armed groups and the subsequent birth of terror-run micro-economies. In the 1980s, parts of El Salvador, Nicaragua, Honduras, Colombia and Peru fell under the military control of right and left wing guerrillas. This happened to the people living in the Upper Huallaga valley in Peru. The valley, also known as Selva Alta because of its altitude, which ranges from 1,500 to 6,000 feet, is located on the eastern slopes of the

north-eastern Andes. The region was restructured under the agrarian reforms of the late 1960s, which proved to be a great failure. Due to the harsh climate, none of the crops introduced managed to flourish and the local population was on the brink of starvation. Only one marketable plant appeared to be sufficiently resilient to thrive at such an altitude: Erythroxylum Coca. Local people have chewed its leaves for centuries to gain energy and calm hunger. Therefore, when the Colombian drug traffickers came to the valley to buy coca crops the impoverished farmers saw it as a blessing. Almost overnight, farmers became growers, catering for more than their own needs, and almost as quickly they fell victim to the exploitation of the powerful Medellin cartel.

In 1978, under mounting US pressure, the government of Francisco Morales Bermudez attempted to eradicate coca production. The programme was extremely unpopular and never took off. Despite military intervention, coca planting in Selva Alta increased to supply the buoyant drug traffic. In 1980, militants from the Sendero Luminoso armed group (*Senderistas*) moved to the Upper Huallaga valley and began living with the locals. They soon discovered that the population was harassed both by the drug traffickers and the police. So the *Senderistas* launched a two-pronged campaign: to undermine government policies, an easy task among a population constantly threatened by Lima, and to defend growers from the Colombian cartel.

During the same year, the Peruvian government introduced another project for coca eradication in the Upper Huallaga valley. The local population was apprehensive about the new agrarian programme that was going to take away their only viable means of survival: coca production. Capitalising on these fears, the *Senderistas* visited villages and small towns to sympathise with the people and to denounce the United States as the initiator of the reforms. They explained to the growers that cocaine was not a threat to Peru, but to the US. However, they added, Americans did not want to start a war against their own drug dealers and stop the monetary flow generated by the laundering of drug money. Therefore they put pressure upon the Peruvian government to curb coca production. Neither Washington nor Lima, stressed the *Senderistas,* cared that the livelihood of the entire valley was economically dependent on coca crop. The Sendero Luminoso offered protection against the military, who were about to enforce the new programme, and against the cocaine syndicate, which had been exploiting the growers.

The illicit trade of narcotics is one of the areas where criminal organizations and terror groups have successfully established a commercial co-operation. The explosive used in the Madrid bombing was obtained by bartering Moroccan hashish. In a globalised world, both criminal and armed groups utilise the illegal economy, an international network of banks, financial institutions, offshore facilities and brokers, to wash the dirty profits of the drug trade. Narcotics, therefore, are one of the key links between the criminal, illegal and terror economy. The international battle against terror should be conducted bearing in mind that drugs' huge profits bankrolled not only criminal organizations but armed groups and illicit financial organizations. The use of illicit drug trade to fund armed organization is not a new phenomenon. During the Cold War, it became a feature of state sponsored terrorism. In the late 1940s, during the war in Indochina, Marxist armed groups, facing a serious shortage of cash, confiscated Laos' opium crop, sold it on the open market in Thailand and used the profits to buy arms from China. The French, who at the time struggled to bankroll the *Maquis*, the counterinsurgency groups created by the Service de Documentation Extérieure et du Contre-Espionage (SDECE), took a page from the enemy's book and formulated Operation X. The following year, the SDECE secretly negotiated to buy the entire Laotian crop from local tribes, who welcomed both the revenue and the opportunity to strike back at the communists. Soon after the harvest, the opium was loaded on a French DC-3 and transported to South Vietnam. From there it was trucked to Saigon and handed over to a gang of criminals well known to the SDECE for drug trade. Part of the opium was sold directly in Saigon dens and shops, part was purchased by Chinese merchants who exported it to Hong Kong and part was sold to the Union Coarse, the Corsican Mafia, who smuggled it to France[1] and to various European and North American markets. Thus the SDECE netted a handsome profit that was channelled to finance the *Maquis*.

In the 1980s, as the anti-Soviet Jihad progressed, costs soared. There was constant shortage of money along the Afghan pipeline and so the ISI, the Pakistani Secret Service, and CIA began looking for additional sources of income, such as drug smuggling. Afghanistan was already a producer of opium, but it supplied only small neighboring regional markets. The ISI took upon itself the task of increasing production, processing

Almost enthusiastically, people rallied around the *Senderistas*. 'They are professional agitators,' dismissed the Peruvian Army General Hector John Caro, former chief of the secret police, 'they are always prepared to act.'[9] Under Sendero Luminoso's supervision the growers were organised into unions, a move which allowed them to negotiate better prices.

Employing terror tactics, the Sendero Luminoso began taking military control of the entire valley. A common ploy was to move into a town accompanied by at least 30 armed men, gather the inhabitants together, lecture them and proceed with interrogations to find out who was working for the local authorities or with the gangs. These individuals were then publicly executed and local authority was replaced by general assemblies composed of the *Senderistas*. Once an area was 'liberated', the *Senderistas* moved to the next town. By 1985 the group had established a strong military presence throughout the entire region. Bridges were blown up to prevent regular troops from reaching the valley and road blocks were established to search every vehicle approaching along the Marginal Highway, the sole communication link to the outside world. Selva Alta soon became a no-go area for police or government troops.

Meanwhile, the growers were content with the valley being under the grip of the *Senderistas* because they felt protected from the drug traffickers and criminal gangs as well as from the government's agrarian reforms. Interestingly, the cocaine producers and drug traffickers also welcomed the change because discipline among growers pushed production up. By 1988, 211,000 hectares of the valley were covered with coca plants. In addition, under the Sendero's rule, shipment procedures were streamlined. It was the Sendero's responsibility to protect airstrips scattered around the valley, a task it continued to carry out in 2002 without interference. Shipping by small aeroplanes became not only easier, it became more efficient as well.

The Sendero's activities did not remain limited to the control of coca production. In some areas they also took over other businesses, for example foreign exchange. In Xiòn local banks stopped exchanging dollars into Peruvian Intis for the intermediaries of the Medellin Cartel. Instead, the Sendero Luminoso, for a small commission, provided the Colombians with domestic currency to pay growers. Naturally, bankers were extremely unhappy about these arrangements, but there was nothing they could do

because the Sendero Luminoso was the de facto governing authority in the valley. Control over foreign exchange allowed the *Senderistas* access to a considerable amount of hard cash in a country starved for foreign exchange. Part of the money was used to maintain its authority in Selva Alta and other enclaves; part was allocated to buy weapons to promote the group's Marxist dream in Peru. The Sendero Luminoso was - before the Colombian FARC - by far the best-armed group in Latin America. Between February and September 1989, for example, it successfully undermined the government's efforts to eradicate drug trafficking in the valley. In retaliation for the use of the herbicide Spike, which destroyed coca plantations, members of the Sendero Luminoso assaulted a military garrison in the town of Uchiza and shot dead the 50 soldiers who had surrendered after being outnumbered by the *Senderistas*. That same year the government declared the Upper Huallaga valley a military emergency zone under the control of a zone commander.[10]

In the Upper Huallaga valley, the Sendero Luminoso succeeded in creating a terror-run economy based upon drug revenues, which formed the core of a micro-state. Selva Alta is one of the many 'state-shells', de facto state entities created around a war economy generated by the activities of violent armed groups. The Sendero Luminoso's model is that of a "commercial war economy", based on the commercialisation of local resources, i.e. coca plantations and trafficking in illegal products such as narcotics. In this model 'armed groups create economic sanctuaries by gaining military control of economically profitable areas [such as Selva Alta] and develop commercial networks with third parties, i.e. the Colombian drug cartels; they even work in collusion with rival groups. The impact can be positive by contributing to [...] the protection of illegal sectors, [for example coca production].'[11]Some of these economies can generate vast amounts of income, as is the case in the Upper Huallaga valley. In the late 1980s, total revenues for Peruvian coca leaves and coca paste yielded an estimated 28 billion dollars in the United States. Of this figure, the share of Peruvian paste producers and local traffickers was 7.48 billion dollars, equivalent to 20 per cent of legitimate Peruvian GNP, which in 1990 was 35 billion dollars. Growers got 240 million dollars for cultivating the coca. Sendero Luminoso's share of this business in Selva Alta was estimated at 30 million dollars,[12] sufficient to purchase arms and expand its racket of protection and

extortion across Peru. The benefits of the commercial war economy are also apparent among the population. The 66,000 families living in the Upper Huallaga valley enjoyed annual average earnings of 3,639 dollars, more than three times the 1,000-dollar per capita average income in the rest of Peru.

The international ramifications of terror-run economies, such as that in the Upper Huallaga valley, are staggering. On a global scale, billions of dollars generated by narcotics have been laundered in the United States; in the 1990s between 30 to 40 per cent enter the US economy,[13] while the rest were pumped into the international illegal economy and used to fuel the New Economy of Terror.

The Birth of Narco-terrorism

At dawn on 10 March 1984, a cluster of Colombian police helicopters appeared in the sky near the river Yari, about 700 miles south of Bogota. The camouflage birds landed on the riverbank and opened their bellies. A commando unit of elite anti-terrorist agents leaped out, quickly moving to attack a complex of nearby buildings, which were believed to be a hideout for local drug barons. As they advanced towards the target, the men were ambushed by heavy gunfire coming from the jungle around the clearing. It took them two hours to reach the compound and take control of it. Inside they found 13.8 tons of cocaine with a street value of about 1.2 billion dollars.[14]

The operation was successful in many respects. It destroyed an important drug base in the jungle, it inflicted huge financial losses on the drug barons and, more importantly, it unveiled a dangerous liaison between the FARC and the buoyant Colombian drug business. Investigators soon learned that the gunfire unleashed on the police at Yari had come from a commando unit of 100 FARC men. Documents found inside the buildings confirmed that the FARC was providing drug barons with armed protection.

In Colombia the alliance of terrorism and drugs is a recent and deadly phenomenon. Until 1980, the FARC and M19 (Movimiento 19 Avril) were struggling to survive on income from armed robbery and the kidnapping of local businessmen. The number of their followers had dropped to 200, a handful of hard-core militants; recruitment was at a standstill because the two organisations had no cash to spare for salaries and the leaders feared their own extinction. However, they soon learned that in

the vast jungle of Colombia there was immense wealth waiting to be gathered. In 1981, Colombia produced 2,500 metric tons of coca leaf;[15] by 1986 this figure, fuelled by North America's insatiable appetite for drugs, had risen to a whopping 13,000 metric tons.[16] In the mid 1980s, the drug economy contributed 5 billion dollars a year in cash to the Colombian balance of payments.[17] Revenues from cocaine exports well exceeded revenues from coffee and cut flowers, the country's other two largest foreign exchange earners. The bulk of the drugs business was under the control of a handful of men running powerful cartels. In 1981 the FARC and M19 struck a deal with the Colombian drug mafia: they would provide armed protection against the army in exchange for a share in the coca profits.

The FARC levied a 10 per cent protection tax on all coca growers in areas under its control, which alone netted a monthly income of 3.3 million dollars.[18] By 1984, the FARC and M19 earned 150 million dollars per year from the business of protecting drug smugglers and traffickers. A large percentage of the profits was spent on recruitment, so that by 1988 both groups commanded a militia of 10,000 people, large enough to be feared by members of the government.[19] Another percentage was used to bribe top politicians to ensure that entire areas of Colombia came under rebel control, regions where the regular Colombian army could no longer venture. In the grip of the FARC and M19, the economy of these territories was quickly reduced to drug production and its armed defence. Coca was the single export and source of foreign exchange or income. Business became either ancillary to it or an indirect beneficiary of its profits.

As the alliance between the drug barons, FARC and M19 consolidated, the narco-terror business expanded and partnership was extended to fourth parties. A deal was struck with the Cuban authorities whereby Colombian vessels could use Cuban ports as a stopover for the shipment of drugs to the US. In exchange Cuba received as much as 500,000 dollars in cash for each vessel and the right to sell the Colombians arms for the FARC and M19.[20] The dynamics of the operation were explained by David Perez, an American drug dealer, at his trial in Miami in 1983. The Colombian cargo left Colombia bearing its own flag. When it entered international waters, however, it hoisted the Cuban colours and radioed Cuba with an estimated time of arrival. Once in Cuban waters, several small boats sailed to the ship. The drugs were loaded onto these boats and

smuggled to Florida. Often this procedure resulted in barter deals whereby drugs were exchanged for arms. Profits for the Cubans varied from cargo to cargo, depending on the type of drugs; for example a 10-dollar per pound tax was levied on each cargo of marijuana. For a vessel of methaqualone (known in the US as Mandrax), Havana received a third of 7 million dollars.[21] In the 1980s, Castro netted a yearly 200 million dollars in foreign currency from the Colombian drugs and arms smuggling businesses alone.

Domestically, the impact of the Colombian narco-terrorist economy has been tragic. Widespread political corruption, coupled with assassinations, curtailed any serious effort to fight the narco-traffickers. The massive amount of hard cash generated by the cocaine trade tilted the country's balance of payment into surplus and inevitably sustained business growth. As the drug barons' rivers of cash trickled down to the economy, it became more and more difficult to attack them as criminals. In the mid 1980s, President Betancour[22] attempted to fight back, only to be faced with the drug barons' threat to close down 1,800 businesses and to assemble an army of 18,000 people.[23] The weakness of the Colombian government in dealing with the phenomenon of narco-terror is underlined by its unsuccessful attempts to negotiate a peace treaty with the FARC, a desperate gesture which stresses the power this group has attained.

The extraordinary growth of the Colombian drug cartel affected not just the home front, but also produced a serious spillover into neighbouring countries. In Peru, as seen previously, the Sendero Luminoso was able to gain strength and eventually control large regions by mediating between local coca growers and Colombian drug traffickers. In August 2000 the Peruvian government was implicated in an arms smuggling scandal while supplying weapons to the Colombian FARC. It emerged that the Peruvian military had produced a regular purchase order to buy from the Jordanian government 50,000 AK-47 assault rifles made in Bulgaria. The shipment was flown from Amman on a Ukrainian cargo plane with a Russian-Ukrainian crew. The plane flew via the Canary Islands, Mauritania and Granada and, eventually, before landing in Iquitos, Peru, air dropped the arms into the Guainia region, near the border with Venezuela and Brazil, the territory controlled by the FARC.[24] The cargo flew back with narcotics, estimated at up to 40 tons of cocaine, which went partly to Jordanian brokers and partly to the former Soviet Union.

The involvement of high-ranking Peruvian government officials in the smuggling contributed to the scandal, which eventually led to the resignation of President Fujimori[25] on 20 November 2000.

Middle Eastern money brokers linked to Islamist groups are believed to be involved in the laundering of Latin America narcotics profits. Drug gangs from Peru, Colombia and other South American countries converge in Ciudad del Este to ship drugs and wash their money. Ciudad del Este is also known as the Tri-border because it is situated at the interception of Uruguay, Paraguay and Brazil. Illegal profits are washed through the CC5 account offered by the Central Bank of Brazil to foreigners in Ciudad del Este. Originally this special account was set up to speed up the conversion and transfer of Paraguayan money to Brazilian banks. The whole operation takes less than a day. However, contraband and money laundering are not the sole attractions of Ciudad del Este. The city is also a major hub for Latin America armed organisations to relax and do business at the same time. Members of the IRA, ETA and FARC are regular visitors.[26]

The Black Market Peso Exchange

In the mid 1980s, the Colombian drug smuggling trade contributed about 15 billion dollars per year to the economy of Florida. This huge injection of cash was mostly generated by the laundering of drug money;[27] money that inevitably corrupted Florida's financial establishment. Cash-hungry banks welcomed highly liquid businesses without asking too many questions. And even though they were legally required to report deposits of over 10,000 dollars in cash, they seldom did so, silently recycling the money.

After 9/11, the Patriot Act and other counter-terrorism financial measures, for example those imposed by the Financial Action Task Force (FATF), have reduced the flow of drug money being laundered in the US. Such measures, however, had a very limited impact, if any, in reducing the activities of both drug traffickers and terror groups handled through the informal banking system. This system can be described as a series of alternative and unregulated networks, through which money moves from country to country. One of these networks is the Black Market Peso Exchange, another one is the *hawala*. The Black Market Peso Exchange is the system of money laundering most commonly and widely used by the Colombian and other South American drug cartels. The *hawala*, which is very popular in the Muslim world, is predominantly used by

Islamist terror groups. Both networks are extremely elusive to traditional monetary controls because they do not involve the physical movement of cash from one country to another. Ironically both system functions according to principles of globalization and deregularization: they are truly trans-national, they are self-regulated (failure to deliver the cash often results in death) and they are fast (the *hawala* de facto operates in real time).

In the early days of the Medellin drug cartel, cash was flown back to Colombia by the same planes which took the drugs to America. Once in Colombia, dollars had to be converted into pesos with the help of corrupt bankers. But the process was slow and the drug traffickers had to store huge amounts of cash. Cash storage created several problems. One Colombian drug trafficker, for example, buried so much cash on his property that occasionally, when it rained heavily, the resultant floods washed US dollars downstream, clogging the sewage system[28]. According to Marci Forman, who directs the US custom services financial investigation unit, in Colombia today there are still warehouses full of US currency waiting to be exchanged into pesos[29]. US dollars are of no use to the Colombian drug cartel or to FARC, or to Sendero Luminoso in Peru. Members of these organizations live in secluded areas where they use local currencies and never travel abroad. They need domestic money to pay the growers, to buy protection, to corrupt politicians, to recruit and to purchase arms and explosives.

In the 1990s, to avoid storage problems and guarantee a steady flow of local currency, drug traffickers and terror groups successfully infiltrated the Colombian currency black market and transformed it into their own illegitimate and informal banking system: the Black Market Peso Exchange. The way the system works is fairly simple. The drug traffickers ship and sell the narcotics in the US; in exchange they receive US dollars in cash which they hand over to a money broker inside the US. The broker agrees to exchange it at a discount to the official rate, generally around 40%, and to deliver the corresponding pesos in Colombia within a few weeks. The broker then distributes the cash, which is generally handed over in boxes, suitcases or even inside the trunk of a car, among its vast staff of runners, who deposit it in small amounts into thousands of US bank accounts under their name. Once the money is in the bank, it is 'clean'.

At the same time the broker has an office in Colombia where legitimate businessmen go to buy foreign products, ranging from US cigarettes to TV sets, products that they acquire in pesos. The purchases are done with an exchange rate which generally is 20% above the official exchange rate. The US money broker buys the goods in the US using the drug money deposited by its runners, often from companies which know the origins of the funds; he then ships the products to his office in Colombia where they are sold in pesos. These pesos are then used to pay back the drug traffickers.

To avoid being monitored by the US monetary authorities, bank deposits and purchases are always below the $10,000 limit imposed by the IRS. The technique of breaking down large sums of deposits into several transactions of less than $10,000 is also illegal in the US. In January 2003, two women were sentenced to six years in prison for using their company, Pride International, an appliance export business, to money launder $5 million of drug money[30].

The Black Market Peso Exchange is also used by South American professionals, as well as politicians, to send dollars to their children studying in the US. Thus, it functions in a fashion similar to the *hawala*. It presents the same advantages: it is faster, cheaper and avoids any type of monetary controls.

According to the IRS, from 1999 to 2003, the volume of money laundered via the Black Market Peso Exchange, has risen from $1 to $6 billion[31]. According to Raymond Kelly, Commissioner of the US Custom Service, the Back Market Peso Exchange is "the ultimate nexus between crime and commerce, using global trade to mask global money laundering."[32]

Money Laundering in Europe

While the Patriot Act had reduced the flow of drug money laundered in the US, it has not hindered this activity, it has simply shifted it towards Europe. European drug enforcement agencies agree that the introduction of a common European currency has facilitated the activity of laundering bulk cash in Europe. The absence of a homogenous money laundering legislation coupled with the proliferation of offshore facilities in Europe, has encouraged organized crime to wash drug money in the Old Continent. The n'dragheta, the Calabrian Mafia, is today at the centre of a complex network of drug business which includes imports of cocaine from Colombia, sales of narcotics in Europe

and money laundering of the profits. Interestingly, the link between the n'drangheta and the Colombian drug cartel is Mancuso, the new leader of the AUC, the Colombian paramilitary group, who is of Italian origins.

In Italy, in the spring 2004, custom police busted a major operation run by the n'drangheta where drug money was laundered through real estate transactions in Brussels. The cash was shipped in bulk inside containers to Brussels, where it was used to buy existing properties or to fund the construction of new ones. The Italian police estimates that the n'drangheta bought an entire section of Brussels using this method. According to the Italian authorities, before the introduction of the Euro, the recycling of drug money was more expensive because funds had to be exchanged into various currencies. Italian organized crime groups, for example, used a money-exchange in Rome to convert cash denominated in European currencies into dollars. The cost was 50 liras per dollar. In addition, the operation was lengthy as the cash had to be exchanged over a long period of time to avoid alerting the monetary authorities. Italian police concurs that since 9/11, both the Mafia and the n'drangheta are laundering an increasing amount of drug money in Europe. The principal countries were this activity takes place are Belgium and Holland. Total earnings of the four major criminal organization, i.e. mafia, camorra, n'drangheta and sacra corona unita, amounts to 10% of Italian GDP (euro 100 billion).[33]

If Italian organized crime is increasingly using euros to conduct its drug trade activities, this means that the euro is also used along the drug route. 'It is unfeasible to think that curriers are paid in dollars', explains an Italian anti-drug covert agent, 'when the sales and the money laundering in Europe is conducted in euros." The agent also confirmed that the bulk of the drugs sold in Europe comes from Afghanistan and Central Asia, but there is an increasing amount of Colombian cocaine which also finds its way into the Old Continent, and that drug smuggling is an area where crime and terror have forged a joint-venture. In December 2003, for example, the US navy blocked a cargo sailing in the Persian Gulf. When they inspected it they discovered that it was carrying two tons of hashish and that it was operated by suspected al Qaeda's affiliates. The drug was stored in 54 bags, which weighted about 70 pounds each. Its street value ranges from $8 to 10 million dollars[34].

New Developments, the case of gold from Congo

There is mounting evidence that the 'war on terror' has not reduced the volume and the profits generated by drug smuggling. It has also failed to curb the amount of drug profits which benefit armed organizations. Afghanistan poppy crop, for example, is significantly higher than before 11 September 2001. Since 2002 it has increased sevenfold and now constitutes 60 percent of the country's gross domestic product.[35] The links between poppy growers, war lords and Pakistani intelligence have also remained unchanged, as confirmed last December by the yearly UN report on drugs and crime. The report specifically talks about a growing evidence of a nexus between terror finances and opium profits. Unofficially, British military intelligence admits that very little is done to control a booming poppy industry because the territory is in the hands of war lords and tribal leaders which are 'protected' by the Pakistani secret services. Corruption within the Pakistani and Afghan army and the police is widespread.

The 'war on terror' has equally failed to curb terror profits generated by drugs and partnership with organised crime in other parts of the world, Latin America and the Middle East. These failures are due to several factors: the low priority given to the interdependencies between terror, crime and the illegal economy; the lack of cooperation between countries, weak coordination among international agencies, inadequate compliance by many states, failure to get the private sector engaged. However, what is needed is something more, a forward looking compliance, a policy aimed at preventing terror financing described in the appendix.

Smuggling remains the most profitable business of terror group and one which can be easily infiltrated and where joint-venture with criminal organizations can be achieved. A forward looking compliance approach will involve the analysis of potential smuggling products and routes which can be infiltrated by armed groups. The example of gold smuggling from Congo may illustrate such approach.

Congo's gold production has been traditionally smuggled via its neighbouring countries into the world market benefiting mostly shadowing networks of war lords, criminals business men and local armed groups. Gold in Congo is mined by an army of small miners; it is very much an artisan type of industry. Intermediaries purchase small quantities of gold from the miners and then consolidate it in large lots. These lots are then

smuggled to neighbouring countries. All these activities take place in territories controlled by war lords and terror groups.

Uganda is one of Congo neighbouring countries through which smuggling of gold takes place. Gold trade has been liberalised. In Kampala the gold is often consolidated in 100 kg and larger units. As the market is liberalised, no controls are levied on the origins of gold which is exported as if of Ugandan origins. Shipping documents contains only the names of the trading companies, mostly trading companies operating in East Africa. Every year 3,500-6,000 kg of gold are shipped from Uganda which does not produce such amount. Countries which have gold refineries, Switzerland, South Africa, United Arab Emirates and the US, purchase the gold from Kampala and other neighbouring countries without truly questioning its origins. For years, companies which own the refineries have accepted gold from Congo under the pretence that it comes from neighbouring countries and they still do it.

Smuggling of gold has trapped Congo inside a parasitical barter economy. Payment for gold smuggled often takes place in products, supplied by the same trading companies who purchase the gold. These products are then smuggled back to Congo and are sold in the black market by the same smugglers who control the gold trade. These are war lords and local armed organizations which control part of the territory. Thus gold smuggling has become an integrated part of the local economy which depends upon it for its sustenance.

A Human Rights Watch report published in June 2005 has denounced the Congo's gold smuggling. A UN panel of experts is at the present working on a set of sanctions related to smuggling of gold from Congo. Thought, neither the Human Rights Watch report nor the UN panel of experts have found al Qaeda or other Islamist group have infiltrated this business, this is distinct possibility. Privately a member of the UN panel has admitted that gold smuggling could offer a great vehicle for terror's sponsors to raise money and to move funds without being detected. Osama bin laden has often spoken of the importance to use gold instead of currencies as a means of exchange. More than diamonds and other precious stones, gold is an ideal asset for terror groups. He has advised his followers to use gold instead of currencies. Gold is more liquid than diamonds, whose price is controlled by a cartel of producers, it can be melted easily, it is

widely traded and its value is linked to world's currencies. The *hawala*, the informal banking system widely used in the Muslim world operated with gold, gold can be transfer as well as currencies. Gold also offers tremendous opportunities for speculation in today's world, where instability and volatility are the main characteristics of world's stock markets.

The nature of the gold smuggling chain inside Congo and neighbouring countries is such that international terror groups could easily infiltrate it at any level, the closer to the source the easier it is as intermediaries are willing to do businesses with anybody who offers them higher profits.

To prevent terror sponsors from infiltrating the gold market through smuggling from Congo, governments' must adopt a forward looking compliance approach. This will require an in depth analysis of the functioning of the smuggling of gold and a policy to destroy this business or monitoring it. Ad hoc legislations and mechanism must be put in place inside the industry which involved the full support of the private sector.

Conclusion

The example of smuggling of gold from Congo illustrates the problems we are facing when dealing with terrorism financing via smuggling. Gold from Congo is traded through Uganda into the world markets. Refineries have accepted that gold without seriously questioning the real source, while it should have been clear to them that checking the origins would have been safer and probably the most prudent business decision. In a similar fashion Western based trading companies have conducted no due diligence. Finally banks who while they buy and trade huge amounts of gold they apply the know your customers rule only to their immediate client, but not to the previous owners / traders of the gold in question. This gold could have come into the world market at the end of a chain of transactions that has terrorism interests intermingled somewhere along the way. Gold can not be easily traced, it can be melted and mixed with other gold consignments but it retains its value.

A changed culture, where one anticipates a problem and does not denies the existence of a problem is at the core of a solid forward looking compliance stance.

Obviously, the specific mechanisms to establish good practices depend on the circumstances of each industry. Senior management should not longer pretend that to

have a couple of compliance "specialists" in their back office is sufficient. They need to encourage an environment where real specialists can explore real problem areas in order to inoculate a business from transgressions.

What we find out with the gold from the Congo, we will also find out with many other precious natural resources from many different countries. All of these commodities are traded daily at significant quantities with very little controls. And we know that the originating countries and their neighboring trans-shipment points do not have the means to conduct proper due diligence. All of commodities, worth millions and billions of dollars eventually land on our shores where we then, finally begin with a somewhat half-assed effort compliance mechanism.

Obviously, that is not good enough, at the very least when it comes to terrorist funding issues, but also to prevent other sanction violations, and human rights abuses.

Compliance officers can no longer just follow a couple of rules (even if they are as sophisticated as the FATF 49), they have to invest real brain power to understand the economic chains, detect the weak spots and counteract them with appropriate measures.

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[1] Peter Harclerode, *Fighting Dirty*, p. 108-109
[2] Ahmed Rashid, 'The Taliban: Exporting Extremism', *Foreign Affairs*, November 1999
[3] Arundhati Roy, 'The Algebra of Infinite Justice', Source: <www.nation-online.com>
[4] In 1984 alone, 13 majors and 2 brigadiers were charged with drug-related crimes.
[5] Alfred Mc. Coy, 'Drug fallout, the CIA's forty year complicity in the narcotics trade', *The Progressive*, 1 August 1997
[6] With the exception of the North-West Frontier territories.
[7] Banerjee Dipankar, 'Possible Connections of ISI with the Drug Industry', *India Abroad*, 2 December 2000
[8] Source: United Nations Office on Drugs and Crime, global drugs trend report 2000
[9] 'Spring to Fall 2000: News from the people's War in Peru', *Revolutionary Worker*, no. 1082, December 10 2000. Source: <www.rwor.org>
[10] Alison Jamieson, *Terrorism and Drug Trafficking in the 1990s* (Darthmouth: Research Institute for the Study of Conflict and Terrorism, 1994) p. 86
[11] Philippe Le Billon, *The Political Economy of War*, p. 8
[12] Ibid.
[13] Gabriela Tarazona Sevillano, *Sendero Luminoso and the Threat of Narcoterrorism*, (New York: Praeger, 1990) chap. 6
[14] Associated Press file, 20 March 1984. See also *New York Times*, 21 March 1984, *Washington Post*, 21 March 1984
[15] '2500 metric tons of cocoa leaf', *Financial Times*, 13 June 1985
[16] Alison Jamieson, *Terrorism and Drug Trafficking in the 1990s*, p. 82
[17] *The Times*, 30 May 1984; see also *International Herald Tribune*, 23 June and 26 July 1984
[18] Adams, *The Financing of Terror*, p. 218

[19] Ibid. p. 245
[20] 'The Cuban Government Involvement in facilitating International Drug Traffic', US Government Printing Office, serial no. J-98-36, 1983
[21] Adams *The Financing of Terror*, p. 223
[22] He was in power from 1982 to 1986
[23] Adams, *The Financing of Terror*, p. 226
[24] 'Colombia-weapons, Colombian arms dealer who purchased arms for FARC arrested', *Financial Times*, 8 May 2002
[25] *Small Arms Survey, 2001*, Graduate Institute of International Studies, p. 187
[26] Ibid.
[27] 'A Colombian', *Washington Post*, 17 March 1983
[28] Oriana Zill and Lowell Bergman, *The Black Peso Money Laundering System*, www.pbs.org
[29] *The Black Market Peso Exchange*, Underworld Economy, , 12 November 2001
[30] Black Market Peso Exchange: two women jailed, 22 January 2003, <www.forum.transnationale.org>
[31] ibid
[32] Ibid
[33] Money Laundering: Vigna on Counterstrategies, Agenzia Giornalistica Italia, 5 April 2004, www.agi.it
[34] *Navy Makes Persian Gulf Drug Blast*, CBS News, 19 December 2003
[35] Maia Szalavitz, Let a Thousand Licensed Poppies Bloom, *the New York Times*, 13 July 2005

USA PATRIOT ACT
OVERVIEW OF STATUTE AND SUMMARY OF KEY SECTIONS
By C. William Michaels, Esq., author *No Greater Threat* (see www.nogreaterthreat.com).
[revised as of 12/30/04]
USA PATRIOT Act: "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism" P.L. 107-56 [H.R. 3162] October 26, 2001
Note: *Vast majority of PATRIOT Act is permanent and does not sunset. Some* Title II Sections scheduled to go inactive in 12/31/05; Title III in its entirety could have been inactivated *if Congress passed joint resolution so stating,* by 10/1/05, BUT a provision in Intelligence Reform and Terrorism Prevention Act of 2004 *eliminated* Title III section to invalidate it by resolution.]

TITLE I: ENHANCING DOMESTIC SECURITY AGAINST TERRORISM
[Creates or expands federal government offices for investigating terrorism, provides new or increased funding, sets tone for Sections to come]

Sec. 101 counterterrorism fund
(to assist with bringing back to operation any government office damaged by a terrorist attack, support in investigating and prosecuting international or domestic terrorism, conducting threat assessments)

Sec. 103 FBI tech support center
(originally established under Antiterrorism and Effective Death Penalty Act of 1996, with declining appropriations, now gets $200 million for each of fiscal years 2002, 2003, and 2004, likely to continue afterwards).

Sec. 105 electronic crimes task force
(further establishes government policy to be more aggressive in electronic crimes, task force to be part of Secret Service or Treasury, to establish a network to assist in preventing, detecting, and investigating "various forms of electronic crimes, including potential terrorist attacks against critical infrastructure and financial payment systems")

TITLE II: ENHANCED SURVEILLANCE PROCEDURES
[Establishes ongoing policy throughout Act of new or expanded information *gathering* authorities for federal investigative agencies (often without court order) coupled with new or expanded information *sharing* mandates between such agencies. Generally involves "foreign intelligence" or "foreign intelligence information" (see FISA) although these definitions can have wide interpretations. Objective: federal investigative agencies should be able to gather what they need, right away, and share terrorist-related information with other agencies, right away.]

Sec. 203 note definition of "foreign intelligence information"
has basically two definitions: 1) information that "relates to" the ability of the United States to protect against actual or potential attack or grave hostile acts, sabotage or international terrorism, or clandestine intelligence activities of "a foreign power or agent of a foreign power," OR 2) information "with respect to a foreign power or foreign territory" that "relates to" the "national defense or the security" of the United States or "the conduct of the foreign affairs" of the United States. First part of definition is specific, second part is potentially very broad.

This section establishes new levels of information sharing that are a part of the general policies or themes of the Act, *including sharing of grand jury information or testimony* (the grand jury information sharing DOES NOT SUNSET), and sharing of all types of information with wide range of government agencies so long as it involves "foreign intelligence"
(see new 18 U.S.C. 2517(6), USAPA at Sec. 203(b)(1) adding this section–very educational as to scope)

"Any investigative or law enforcement officer, or attorney for the Government, who by any means authorized by this chapter, has obtained knowledge of the contents of any wire, oral, or electronic communication, or evidence derived therefrom, may disclose such contents to any other Federal law enforcement, intelligence, protective, immigration, national defense, or national security official to the extent that contents include foreign intelligence or counterintelligence...or foreign intelligence information...to assist the official who is to receive that information in the performance of [his] official duties."

Sec. 218 — increase in scope of warrants under Foreign Intelligence Surveillance Act (1978) (FISA) (changing from "the purpose" to "a significant purpose", as the basis or rationale for seeking a FISA warrant, expands warrant reach)

Sec. 207*, 208 — increased duration of FISA warrants and increase in FISA judges (adds other FISA judges–from 7 to 11 judges–these are federal judges appointed by Chief Justice. Function of FISA court is to review FISA warrant and surveillance applications. Much of this process and the details of the FISA warrant applications are either highly confidential or classified. [Sec. 207 as to duration of FISA warrants, DOES SUNSET]

Sec. 209 — voice mail treated like e-mail, that is, taking voice mail out of requirements of certain wiretap statutes (and see also, Sec. 505 as to telephone and transaction records). This begins another theme of the PATRIOT Act to streamline and simplify warrant and surveillance requirements in other forms of criminal investigation, and reduce court involvement or scrutiny. [NO SUNSET]

Sec. 215* — access to "any tangible thing" in investigating terrorism, including that of US citizen (with 1st Amendment exception). [this amends FISA but could be viewed as going beyond FISA-type investigation], note that DOJ is to report to Congress on extent of these activities
[NOTE: This Section has received much of the attention that has been devoted to Title II. The access to any tangible thing is as broad as a statute can get, and the court "order" that is to be issued for such access, is not a standard warrant based on probable cause, but under other guidelines developed by FBI and upon certification that the information is needed. There also appears to be no allowance for court scrutiny, the section says

that upon receiving the application, the court "shall" issue the order. Although bookstores and libraries are not specifically mentioned, it has been pointed out that this Section would conceivably allow government access to records of library and bookstore patrons.] [DOES SUNSET]

Sec. 213 — delayed notification of "non-physical search warrants" (sneak and peek warrants [does not appear to be restricted to FISA although ordinarily used in FISA investigations]
There have been attempts in Congress to restrict or de-fund this Section (see "Otter Amendment"). Although "sneek and peak" warrants have been upheld by some federal courts as within Fourth Amendment scope, this is the first instance of a federal statute that acknowledges, recognizes, and plainly permits use and execution of these warrants. [NO SUNSET]

Sec. 212* — voluntary and required disclosures by ISPs of customer information
Allows ISPs to provide information relating to e-mails that may indicate activity of an emergency or harmful nature, directly to federal investigators. [DOES SUNSET]

Sec. 215*/216 — expanded authorities as to electronic surveillance and investigation of communication networks and ISPs ("Carnivore" program?)
FBI's "Carnivore" program (see DCS 1000), extensive computer program to track/monitor or read e-mails, technically was suspended due to public concern, but through this Section, investigative programs or methods of this type are clearly permitted.
[Sec. 215 will sunset, but Sec. 216 DOES NOT SUNSET].

Sec. 219/220* — single jurisdiction search warrants, nationwide service of warrants
[Sec. 219 DOES NOT SUNSET, but Sec. 220 DOES SUNSET]

Sec. 223* — (civil action provision, suits OK'd for violations of civil rights, but such actions even if brought, can be stayed, see new 21 U.S.C. 2712(e))
[Sec. 223 DOES SUNSET (although that seems illogical)]

Sec. 225* — immunity for compliance with FISA wiretap order, amends FISA Sec. 105 (50 U.S.C. Sec. 1805)
[Sec. 225 DOES SUNSET]

TITLE III: INTERNATIONAL MONEY LAUNDERING ABATEMENT AND ANTI-TERRORIST FINANCING ACT OF 2001

[Longest PATRIOT Act Title, *bulk of Act Sections*, rewrites federal banking law, provides broader and in some instances, unprecedented investigative authority as to bank and bank records for particular accounts, establishes "minimal" and "enhanced" due diligence requirements for bank procedures as to certain types of accounts, essentially enlists banks as "partners" with government in tracking and investigating wide range of accounts in effort to prevent, detect or prosecute suspected terrorist financing. Expanded or new forfeiture and jurisdictional powers. Little public or media attention paid so far to this Title. A "sleeper" Title of Act. NO LONGER CAN BE INVALIDATED BY CONGRESS 10/1/05 BY JOINT RESOLUTION, by virtue of provision in Intelligence Reform and Terrorism Prevention Act of 2004]

[Note that amendment to Intelligence Authorization Act of 2003 (signed December, 2003), further expands "financial institution" to include, among other things: securities broker or dealer, currency exchanges, entity that issues or redeems cashier's checks or traveler's checks or money orders, insurance companies, dealers of precious metals or precious stones (jewelers), pawnbrokers, travel agencies, telegraph companies, retail dealers of cars or planes or boats, (potentially) real estate brokers, casinos with annual revenue exceeding $1 million, Post Offices, and any other business designated by the Treasury Department "whose cash transactions have a high degree of usefulness in criminal, tax, or regulatory matters."]

Sec. 311	(money laundering/terrorist financing): "special measures" as to financial entities [note also expanded definition of "domestic financial institution", see Sec. 321] applies to any sort of account, although focused generally on payable-through and correspondent accounts
Sec. 312	(money laundering/terrorist financing): minimal and enhanced due diligence for certain accounts (these procedures are quite complex and involve various details such as Treasury regs., OFAC, FATF. See also, IRS' Operation Green Quest, DHS' Operation Cornerstone in DHS/BICE Office of Intelligence, etc)
Sec. 319	(money laundering/terrorist financing): 120-hour rule for information (of almost any kind) sought from a domestic financial institution by federal authorities relating to compliance with new anti money laundering requirements (new 31 U.S.C. 5318(k)) [Note: special measures order, 120-hr order, etc. *are NOT court orders*]
Sec. 319	(money laundering/terrorist financing): immediate access by federal authorities of records of foreign bank accounts regarding a correspondent account in domestic financial institution (no restriction as to account balance, etc., extreme non-compliance penalties)

Sec. 326	new or expanded requirements to verify identities of persons applying for new accounts (appears to apply to any person, any account) Many of these requirements have to do with what is called "minimal" and "enhanced" due diligence for banks and financial institutions regarding accounts of various types or descriptions. These are more specifically detailed in Treasury Department regulations that have been issued since the Act. The overall effect of these provisions, the regulations, and new policies are to make banks and domestic financial institutions essentially "partners" with federal investigators in tracking suspicious accounts or transactions and investigating money laundering or terrorist financing activities. Much of these provisions or language is not specifically restricted to terrorism.
Sec. 326	study to be done for new system of tracking foreign nationals, similar to social security numbers (see Sec. 326(b))
Sec. 355	allowing information on suspicious activities of a bank employee to be included in employment reference
Sec. 358	information as to consumer records to be revealed by consumer reporting agency (does not appear to be restricted to FISA investigations)
Sec. 36 1/Sec. 362	new FinCEN office in Treasury, duties and powers, increased funding, new or expanded "highly secure network" for including or sharing information (this "network" to have been ready 9 mos. from date of Act)
Sec. 316	long arm jurisdiction, new and expanded US District Court jurisdiction These new jurisdiction provisions allow for expanded federal court jurisdiction beyond what had been available in criminal law of this sort.
Sec. 316/319	forfeiture provisions including forfeitures of interbank account funds, and also of "substitute property" which may not have had anything to do with crime involved (possible unconstitutional extension of forfeiture authority as a violation of ancient prohibition against "corruption of blood")
	[other Title III sections as to increased penalties, etc. expanded requirements in currency reporting–such as expanded requirements of Suspicious Activity Reports which will identify suspicious financial activity to government agents]

TITLE IV: PROTECTING THE BORDER

[Much of what has been written and discussed about PATRIOT Act has focused on Title II, Title IV, and some of Title VIII. Title IV takes immigration law to its outer limits with respect to seizure and detention of aliens suspected to be terrorists, identifies three types of terrorist groups (designations are left solely to the government and appears to be not subject to challenge), shifts border security policy with Canada and Mexico, sets up new guidelines or mandates for border security and entry-exit points including renewed commitment to machine-readable passports and biometric identification, and provides new or expanded information gathering authorities.]

Sec. 403	new information system and access system between State, FBI, DOJ, as to NCIC-III and related files, with respect to visa applicants, etc.
Sec. 403	new technology standard including use of biometric technology for obtaining and tracking information on visa applicants, etc. (and see related Sec. 1008)
Sec. 414, 415, 417	new entry and exit system data system for entry points, machine-readable passports, etc. (obviously will link w/ Sec. 403 info) [new technologies] These new technologies are now being rapidly implemented, especially as part of new systems designed and installed through the Department of Homeland Security. Databases are being developed, such as through the Special Registration program, and persons are now being photographed and fingerprinted. These new systems will electronically link databases of various types to immigration authorities in reviewing visa applications, granting applications, monitoring entry and exit at border points, and if necessary tracking individuals. Even minor visa violations are being given increased or enhanced immigration emphasis. Much of these requirements are in place and were part of the Special Registration Program conducted by "INS" in 2002 and 2003–"database" is thus being "constructed." [Note: Many of these mandates are in programs now being managed chiefly by DHS, including NSEERS, US-VISIT, and other security or border protection initatives]
Sec. 411	new definitions of "terrorism" for purposes of Title IV, *three* types of terrorist organization including (type III) (special note): **"a group of two or more individuals, whether organized or not"** that "engages in" certain terrorist activities (total latitude for federal authorities to identify such groups, including type III group, need not be restricted to aliens)
Sec. 412	mandatory detention of certain aliens, seven bases for such detention, including that alien has "engaged in any other activity that endangers the national security of the United States."

limited court review under *habeas corpus* or appeal, virtually indefinite "administrative" detention, person can be held for seven days without any charge or action (amend Immigration and Nationality Act for new 8 U.S.C. Sec. 1226A)

[Note: This mandatory detention can be under conditions that are very suspect. The Office of Inspector General of the Department of Justice issued a report on the more than 1,200 detainees swept up immediately after September 11--although these actions were not under this Section--severely criticizing agency communication difficulties and processing delays in addressing those detained, and pointing out the often extreme conditions of confinement endured by the detainees, in some cases for 90 days or more. A follow up OIG Report added to this criticism. A limited number of the detainees may still be in custody. Note: to date, DOJ has said that it has not yet made use of this Section.]

Sec. 412(c) — reports by INS/DOJ to Congress on detentions under this Section, but report noteworthy for information *not* required or specified
Reports do not have to state *exact names, locations of confinement, charges pending, names of counsel, date of detention, and the like*.
[Note: A decision by the Court of Appeals for the District of Columbia Circuit approved a government policy of declining to release information of individuals detained under suspicion of terrorism, under an exception to the Freedom of Information Act. Supreme Court declined review. This basically allows for *secret arrests* in cases of aliens suspected of terrorism.]

Sec. 416 — expansion and increased funding of foreign student monitoring program (increased funding for this monitoring)

TITLE V: REMOVING OBSTACLES TO INVESTIGATING TERRORISM
[Continues with Act objectives of providing for new information gathering authorities. Notably, greatly expands DNA information bank, allows for government access to financial, educational and other records (upon certification by federal agent, without court order, and in secret), reaffirms commitment to coordination with law enforcement agencies.]

Sec. 503 — expanded DNA information bank (very greatly expanded under Act)
Was a databank for crimes of violence or certain specific other crimes, but now the databank can include terrorist crimes--and if that includes material support for terrorism, the databank therefore would be expanded for various crimes that are not crimes of violence.

Sec. 504 — links investigation *of any crime* with information on foreign intelligence or terrorism, for purposes of information sharing.
Again, expanded information sharing is part of the overall plan and approach for the PATRIOT Act, and will continue to be a new emphasis in government law enforcement policy.

Sec. 505(c) — expands Fair Credit Reporting Act to allow information access to consumer reports [not restricted to FISA-type investigation]

Sec. 507/508 — disclosure of educational records [not restricted to FISA-type investigation] (note that in many of these sections, court order is not required and information can be obtained upon "certification" by an appropriate federal official that information is needed in particular investigation, there appears to be no opportunity for party who is to provide information to challenge "certification," and disclosure is secret and not subject to civil liability)

TITLE VI: PROVIDING FOR VICTIMS OF TERRORISM, PUBLIC SAFETY OFFICERS, AND THEIR FAMILIES

[Not of overall concern, many of these sections are finite and very specific, several of them are directed to addressing situations of aliens whose applications of one sort or another were in process during September 11. Note: victims' fund set up here is not the same compensation fund for September 11 victims and families now being administered through Special Master, that was established in another statute.]

TITLE VII: INCREASED INFORMATION SHARING FOR CRITICAL INFRASTRUCTURE PROTECTION

[Single-section "Title." Reaffirms infrastructure protection as major theme of governmental policy and one of the centerpieces of anti-terrorism investigation and planning. Establishes and funds a new "secure information sharing system" which apparently will be accessible to ALL law enforcement agencies (federal and State)]

Sec. 701 — major initiative for "secure information sharing systems" to assist (apparently ALL law enforcement agencies) to investigate and prosecute "multi-jurisdictional" terrorist "conspiracies" AND "activities" (gets significant funding: $50 M in FY '02, $100 M in FY '03)

TITLE VIII: STRENGTHENING CRIMINAL LAWS AGAINST TERRORISM

[New federal crime of "domestic terrorism," revised expanded definition of existing "federal crime of terrorism," changes and for some crimes eliminates s/l, increased penalties, among them providing for possible LIFE in supervised release (see Sec. 812)]

Sec. 801 — expanded definitions of terrorist attack against mass transport systems [Note: further expansion of these Sections in other statutes, including Homeland Security Act, amendments to other Acts, and Intelligence Reform and Terrorism Prevention Act of 2004].

Sec. 802	definition of new crime of "domestic terrorism" 1–act dangerous to human life 2–violation of Federal or State law 3–"appear to be intended" to intimidate or coerce a civilian population, influence government policy by intimidation or coercion, or affect government conduct by "mass destruction, assassination or kidnapping," and 4–occur primarily in United States. First requirement would take ordinarily political protest, marches, and rallies, etc. out of scope of domestic terrorism, but scenarios could be imagined where protest activity could technically be in the definition. [Note: Although this cannot be stated with certainty, to date it appears that there have been no federal prosecutions directly utilizing this statute.]
Sec. 803, 805	expands or clarifies crime of harboring or concealing, or providing material support for, terrorists, including expert advice or assistance This expansion of the material support for terrorism is also under criticism, for it includes a wide range of activity. "Material support" for terrorism as a separate crime was part of the Antiterrorism and Effective Death Penalty Act of 1996, but has been given a new emphasis with the PATRIOT Act. Further investigations and prosecutions of those supposedly linked to terrorism have been under these "material support" provisions and this will be expected to continue. Federal courts will be asked to look carefully at what is protected and private activity and what is actually material support for a terrorist act or terrorist group. [Note: so far, at least one federal district court (in California) has struck down the "material support" language as too vague, so far the only successful challenge to the Act. A previous federal district court (in California) had struck down or criticized a similar "material support" provision in the AEDPA and this (appeared to be) affirmed by the Ninth Circuit–*Humanitarian Law Project v. Reno*–but provisions in Intelligence Reform and Terrorism Prevention Act of 2004 seek to clarify the scope and effect of "material support for terrorism" language.]
Sec. 808	expanded "federal crime of terrorism," adding several new crimes to already very long list of crimes of violence against certain identified persons, entities, properties (government officials, mass transit systems, airlines, trains, government buildings and installations, etc.), also computer crimes (and see Sec. 814 as to cyberterrorism) (NOTE: as in all crimes, "attempt to commit" and "conspiracy to commit" are also crimes).
Sec. 809, 810, 812	no S/L for certain terrorist crimes, increased penalties, including supervised release of up to life (unheard-of in fed. system until now)
Sec. 816	new computer forensic laboratories and increased funding

TITLE IX: IMPROVED INTELLIGENCE

[Sets as new and public objective more direct information sharing between agencies such as FBI and CIA than has previously existed as a matter of plainly-stated statutory authority or governmental policy, establishes cross-agency training program to recognize "foreign intelligence information," in one rather dramatic section "deputizes" nearly every employee at any level of "intelligence community" (13 agencies) to aid in investigating terrorism, establishes or expands "foreign terrorist asset tracking center."]

Sec. 901	mandates CIA to share "foreign intelligence" information with DOJ/FBI or similar federal law enforcement agency
Sec. 903	"deputizes" all officers and employees (no restriction as to employment level) of the "intelligence community" (which is 13 agencies) and turns them into mini-CIA
Sec. 905	the reverse of Sec. 901, mandates DOJ/FBI and similar federal law enforcement agencies to share "foreign intelligence" information with CIA (agencies "shall expeditiously disclose" such information)
Sec. 908	cross-agency training to help all agents of various law enforcement to recognize "foreign intelligence information" when they see it in their investigations (links to Secs. 901 and 905) (Note: this training expressly is to include officials of *State and local governments*) [and see HSA]
Sec. 906	potential new duties of Foreign Terrorist Asset Tracking Center This adds additional emphasis to the concern and government attention to financial activities and domestic bank accounts when it involves supposed terrorists, as well as adds international emphasis and authority to track assets and activity of suspected terrorists. Overall, these provisions and similar provisions through the Act, close any loopholes and provide greater governmental authority to investigate and monitor this activity.

TITLE X: MISCELLANEOUS

[A grab-bag of Sections with varying effects: new DOJ office to investigate complaints of civil rights abuses (which is supposed to be widely advertised but is still virtually unknown), more authorities in infrastructure protection, sense of Congress as to bioterrorism (see later Act)]

Sec. 1001	mandates special office in DOJ-OIG to "receive complaints alleging abuses of civil rights and civil liberties by employees and officials of" DOJ, which office is to make itself known through various Internet, radio, tv, and print advertisements (and so far appears still to be virtually unknown) Note: to date, little appears to have been done to meet the statutory requirement that this office make its existence known to the public.

Sec. 1005	"First Responders Assistance Act" with considerable funding, allowing various "first responders" including those at State and local level, funds for among other things, terrorism investigation and anti-terrorism training
Sec. 1008	Study for use of fingerprint/biometric i.d. at entry-exit points Further emphasis on biometrics, a new age is dawning for monitoring and entry-exit systems through the United States and possibly internationally
Sec. 1013	Bioterrorism preparedness (and see recent statute passed by Congress) Much more on this is found in other statutes and in the Homeland Security Act through the Department of Homeland Security
Sec. 1016	(mention): critical infrastructure protection, new studies, duties, funding (note: "infrastructure" includes computers, etc. and see Sec. 701)

SOME OVERALL THEMES OF USA PATRIOT ACT OF 2001:
New technologies in investigation, surveillance, tracking, visa applications, biometrics, etc.

New law enforcement emphasis across the board (federal, State, local, esp. FBI-CIA-SecrServ)

New or expanded definitions (domestic terrorism, federal crime of terrorism, terrorist activity)

Greater use of current definitions under, until now, rather obscure Foreign Intelligence Surveillance Act of 1978 (FISA) (foreign intelligence, clandestine intelligence activities)

Greater use of and expanded purpose of FISA investigations ("significant purpose")

New or expanded definition of terrorism and terrorist groups as to aliens/foreign nationals

New or expanded authorities for investigation, surveillance, and information gathering (sneak and peek warrants/delayed notice, pen register and trap and trace devices, Carnivore-type computer investigative programs, single jurisdiction search warrants, national service of search warrants, voice mail treated like e-mail, much information gathering such as consumer records, educational records, business records, tangible objects not requiring a search warrant or any similar court order under standards of probable cause)

Greatly expanded authorities, investigation, and requirements as to domestic financial institutions with respect to money laundering/terrorist financing, but this clearly goes far beyond just foreign nationals or aliens with bank accounts, and reaches various other accounts and transactions as well as affecting virtually every bank in the U.S. (and international)

New information data banks, such as FinCEN, information sharing systems

Information sharing of incredibly wide variety, especially dealing with "foreign intelligence" (but note how broad that definition is) even as to grand jury testimony

Increased law enforcement cooperation between federal and State and local governments, including new law enforcement mandates and cross-agency training

Reduced role of courts in information gathering (and even if court order were required, search warrant applications are routinely granted and FISA court has turned down perhaps one)

New emphasis on infrastructure security, with wide definitions of infrastructure

Extremely expanded federal agency powers to seize and detain suspected aliens (*habeas corpus* relief may be available but *habeas corpus*, such as with its history in the past 10 to 15 years with inmate petitions (and see AEDPA), has limited utility in federal system–in any case chances are slim of federal court granting *habeas corpus* and ordering release of alien detained under these provisions, given political climate and PATRIOT Act)

Increased penalties/terrorist acts–conspiracy, attempt, and material support can be terrorist act

SOME OVERALL PUBLIC POLICY AND LONG TERM EFFECTS/PATRIOT ACT

A new emphasis and greatly increased governmental and public attention to law enforcement, including a greater sense of legitimacy of pronouncements of FBI, CIA, White House

State statutes similar to PATRIOT Act in various ways, considered or passed in various States (with respect especially to search and seizure, investigation, law enforcement, information sharing, and terrorism), with similar long term effects and little or no sunset provisions (this is also happening on an international basis, especially with laws in Britain, Canada, Australia).

Long term effects on public sense of and concern about "national security"

Moving the goal posts as to what is and is not acceptable law enforcement and investigatory behavior (law enforcement conduct that tries to push the boundaries, and it often does, will NOW be operating in ways hardly imagined on "Sept. 10")

New or expanded industries in computers, information, surveillance, etc., especially considering funds provided by PATRIOT Act, training mandated, new information systems
Domestic financial institutions have been made partners with federal government in investigating terrorism especially as to finances

Greater sense of need to track population, movements and whereabouts of people

Tremendous resources and governmental attention to investigation of "terrorism"

Operating under new or expanded definitions of crimes, increased sense of propriety purposefulness of investigatory activity (suppression motions will be a waste of time)

Significant, profound, and permanent effects upon 1st, 4th, 5th, and 6th Amendments
Erosion of due process to which aliens are entitled

OTHER AREAS AND POTENTIAL ISSUES WHICH BEAR MENTIONING

Private sector and corporations, which often take their cues from government conduct, statutes, and regulations as to what is and is not acceptable in society, will find it easier to conduct surveillance of employees, monitor computer activity, track movements, request personal information, conduct background checks, review employee behavior, and monitor activity

Linked with many other things: aviation security legislation, Av&TrSA, Executive Orders, Department of Homeland Security (through HSA), bioterrorism statutes, revised FBI guidelines, military tribunals, war in Afghanistan, war in Iraq, other likely military activity, infrastructure protection, threat levels, operation Noble Eagle, operation Liberty Shield, CAPPS, VISIT, Special Registration, and several White House POLICY DOCUMENTS: *National Strategy on Homeland Security* (July, 2002), *National Security Strategy of United States* (September, 2002), *National Strategy for Combating Terrorism* (February, 2003), *The National Strategy for Protection of Critical Infrastructures and Key Assets* (February, 2002), and *The National Strategy to Secure Cyberspace* (February, 2003).

Government agencies will be more inclined to operate without deference to checks and balances, often in secret, and their activities could be less subject to challenge by public or courts

SOME RECENT COURT DECISIONS (with citation where available, not exclusive list)
–UNITED STATES SUPREME COURT–

Rasul v. Bush. US Supreme Court (No. 03-334) 542 U.S. ___ (2004). (June 28, 2004) (And Al Odah v. United States, 03-343). REVERSED the United States Court of Appeals for the District of Columbia Circuit. (This decision would have affirmed the Ninth Circuit's decision in a related case, but the Ninth Circuit case is not expressly made part of this decision). *This is the "Guantanamo Bay" case.*

The Supreme Court decides that US federal courts have jurisdiction over (can consider) a claim by detainees in Guantanamo Bay challenging the conditions of their confinement or the legality of their confinement at Camp Delta. This claim would be the traditional *habeas corpus* petition that is filed in federal courts (and sometimes in State courts) by someone, usually inmates, claiming that they are being detained illegally. With this Supreme Court decision that detainees can file their *habeas corpus* claims in federal court, the detainees now will have an opportunity in a court to state that their detention is unlawful or unconstitutional, or that the conditions of their confinement violate whatever constitutional rights would apply to them.

The case is a rather involved and detailed discussion of the background of the *habeas corpus* petition and how it can be available to persons like the Camp Delta detainees. A major concern of the other federal courts is the fact that the Guantanamo Bay base, technically, is not US "soil" but actually belongs to Cuba and is leased by the US from Cuba (in a lease agreement that is more than 100 years old and dates back to the Spanish-American war). If federal courts only have jurisdiction over US sovereign territory, perhaps they do not have jurisdiction over persons in areas "controlled" or managed by the US but not part of the "sovereign territory" of the US (unless Congress authorizes it by statute, such as in situations like Puerto Rico, Guam, or other US island territories). The Supreme Court decided that the lease document gave the US such total control over the Guantanamo Bay base, that the base can be considered within the reach of US courts. The Supreme Court also said that history of the *habeas corpus* petition was significant enough to allow the petition to be available to persons detained there. Also, the federal courts have jurisdiction over the persons in charge of the detainees (Secretary of Defense and Defense Department and Base Commander) and so should have jurisdiction over the detainees. "We therefore hold that §2241 [habeas corpus statute] confers on the District Court jurisdiction to hear petitioners' habeas corpus challenges to the legality of their detention at the Guantanamo Bay Naval Base." (pp. 15-16). [The Court also said that there may be jurisdiction under the federal question statute, 18 U.S.C. §1350, and the Alien Tort Statute, 18 U.S.C. §1350.]

The Supreme Court said that "military necessity" did not require that federal courts remain on the sidelines in this situation, especially when the Government is saying that it has the military authority to hold the detainees indefinitely and in conditions that the military decides for itself. "Indefinite detention without trial or other proceeding presents altogether different considerations. It allows friends and foes alike to remain in detaintion. It suggests a weaker case of military necessity and a much greater alignment with the traditional function of habeas corpus. Perhaps, where detainees are taken from a zone of hostilities, detention without proceedings or trial would be justified by military necessity for a matter of weeks; but as the period of detention stretches from months to years, the case for continued detention to meet military exigencies becomes weaker." (Kennedy, J., concurring).

It is not clear what happens next, however. The Supreme Court did not decide whether the Guantanamo Bay detainees actually can prove that their detentions violate the Constitution or that their conditions would violate any Constitutional right they would have. The Supreme Court did not order the release of the detainees. And the Supreme Court did not say when a petition should be filed by the detainees, or in what federal district court. These results are unclear. It should be noted that the actual petitions involved in the Supreme Court case were brought on behalf of persons in Camp Delta who are not from Afghanistan and who are claiming that they were not involved in any hostilities against the US and were wrongfully captured. The Supreme Court mentioned this, perhaps hinting that habeas corpus claims by those who clearly were involved in hostilities might not be successful in their claims.

It is possible also, that different claims could be filed on behalf of different detainees (there are already nearly 650) in different federal courts and that the results might be different court decisions, on certain parts of the Camp Delta detainees. Those decisions then might be appealed to the federal Circuit Courts, also with different results, and perhaps again reach the Supreme Court. Time will tell what would be the ultimate results. Still, the Supreme Court did say that federal courts can consider the petitions–a decision that the US Court of Appeals for the District of Columbia Circuit had declined to make.

Hamdi v. Rumsfeld US Supreme Court (No. 03-6696) 542 U.S. ____ (2004) (June 28, 2004).
This is the "enemy combatants" case.

The Supreme Court in this case decides that the "enemy combatants" being held by the Department of Defense can petition federal courts (*habeas corpus*) to challenge the legality of their detention and the conditions of their detention. These persons are being held in places in the United States (not Guantanamo Bay) and have been held indefinitely and without criminal charges. Two of these persons are US citizens: Yaser Esam Hamdi was seized on the battlefield in Afghanistan but happens to have been born in the US of Saudi parents, moved with his family out of the United States when he was young, and eventually made his way to Afghanistan where supposedly he was seized there during the initial fighting. Originally, he was brought to Guantanamo Bay but was moved to Navy brig in Norfolk, Virgnia and then South Carolina. Jose Padilla was seized at Chicago Ohare Airport on suspicion of ties to Al Qaida and of being involved in a "dirty bomb" plot (a claim that the government later withdrew but Padilla has not been released–see case discussed below).

The Court said that the Government may have the authority to declare a person, even a US citizen as an enemy combatant. "There is no bar to this Nation's hold one of its own citizens as an enemy combatant.")p. 11). The Court also said that the President and the Department of Defense had the Congressional authority to make these seizures through Congress' authorization of the use of military force in Afghanistan (and also later in Iraq). (Authorization for Use of Military Force 115 Stat. 224). This Congressional authority gives the President and the Executive Branch the justification to use military authority under Constitutional provisions making the President the Commander-in-Chief of the military. Hamdi had challenged his detention and sought the reasons for his detention. He claimed among other things that he was not engaged in any hostilities when he was captured and poses no threat to the United States. In

various decisions, the United States Court of Appeals for the Fourth Circuit said that the Government's evidence, which was little more than a declaration that Hamdi is dangerous (Mobbs Declaration) was enough to support the Government's claim that he was an "enemy combatant." The Fourth Circuit said that the District Court did not have the authority to inquire further into the Government's evidence.

The Supreme Court said that more evidence than has been provided by the Government would be needed to justify the indefinite detention of a person as an enemy combatant. But the Court did not prohibit the government from detaining a US citizen as an enemy combatant. The Court said that any review of a habeas corpus petition in these situations requires "meaningful judicial review" of the circumstances. The Government's evidence does not have to be accepted without question, but there does not have to be a full scale trial just on the enemy combatant situation. There must be "some opportunity" for the petitioner to present and rebut facts and the courts should have "some ability" to consider comprehensive evidence. Because as a US citizen, Hamdi has Constitutional rights, those rights cannot be violated without due process.

The federal courts also have authority to review the situation because of the Government's claim that an "enemy combatant" can be held indefinitely. The Government has said that an "enemy combatant" can be held until the end of "hostilities"–which might mean the end to the "war on terrorism." The Court said, "If the Government does not consider this unconventional war won for two generations, and if it maintains during that time that Hamdi might, if released, rejoin forces fighting against the United States, then the position it has taken throughout the litigation of this case suggests that Hamdi's detention could last for the rest of his life." (p. 12). The Court was also concerned that the Government has not established who can be considered an "enemy combatant" and in what situations that label can apply.

The Court said, "Moreover, as critical as the Government's interest may be in detaining those who actually pose an immediate threat to the national security of the United States during ongoing international conflict, history and common sense teach us that an unchecked system of detention carries the potential to become a means of oppression and abuse of others who do not pose that sort of threat." (p. 23) "It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad." (p. 25).

The Court said, "We therefore hold that a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker." (p. 26). The Court said that this could be a military tribunal type arrangement or some other shortened version of a federal evidentiary trial. "Any process in which the Executive's factual assertions go wholly unchallenged or are simply presumed correct without any opportunity for the alleged combatant to demonstrate otherwise falls constitutionally short." (p. 30).

The next step is not very clear. Hamdi and Padilla would receive the hearings that the Supreme Court requires, but that does not mean that they would be released. The Supreme Court did not order their release. The Supreme Court did not say that the Government had no right to hold Hamdi. So it cannot exactly be predicted what the result of these "hearings" will be.

Rumsfeld v. Padilla. US Supreme Court (No. 03-1027) 542 U.S. ____ (2004) (June 28, 2004). This is the other "enemy combatant" case.

The Supreme Court did not decide this case on the actual issues. Instead, the Supreme Court said that Padilla's *habeas corpus* petition was not filed in the correct court. After Padilla was seized at Chicago OHare Airport, he was taken to New York on a material witness warrant and held there. He challenged his material witness warrant in New York federal court, and before that challenge could be decided by that Court, the Government claimed he was an "enemy combatant" and then took him to South Carolina. Because he was originally brought to the New York courts, he filed his petition there. It was appealed to the United States Court of Appeals for the Second Circuit, which found generally in his favor.

However, the Supreme Court did not discuss the details of his case because the Supreme Court said that once Padilla had been moved to South Carolina, he was in a different federal court area and should have filed his petition there. The appeal in that situation would have been to the Fourth Circuit.

The Supreme Court was rather involved in its discussion of which court the petition should be filed in, and its discussion takes up 23 pages of opinion, without counting concurring opinions. Still, the Court decides the issue on procedure alone, and says that Padilla must file his petition in a federal court where he is now located.

The petition will be filed in that court and then the federal court would need to have the sort of hearing that the Supreme Court had discussed in the *Hamdi* decision. However, the result of that hearing cannot be predicted. It could still occur that in either of these cases (and there is at least one other enemy combatant case) the court could have a full due process hearing and still allow the Government to continue to hold the individual. There is no guarantee that the hearing will result in release of the individual. The Supreme Court did not order release of Hamdi or of Padilla.

**The Supreme Court in these three cases, did give a complete victory to those concerned about civil liberties or to the Government. In the Guantanamo Bay case, the Supreme Court said that the detainees could be held under military authority and said only that the federal courts have jurisdiction to hear the habeas corpus claims. It did not order the detainees releases and made no indications of what the result of the hearings should be. In the enemy combatant cases, the Court said that the Government can hold a person, even a US citizen, as an enemy combatant and can continue to do so under Congressional authority. The Court required a procedure to challenge that detention in which an impartial tribunal would consider evidence and the Government's evidence does not have to be considered at face value, but the Court did not say that the Government could never prove its case.

More will have to take place in the federal courts on these developments before the situation of the Guantanamo Bay detainees is clearer and before it can be said what kind of evidence the Government needs to support an enemy combatant designation.
Note: to date the US Supreme Court has take no case on the USA PATRIOT Act and has not decided that any part of the USA PATRIOT Act is unconstitutional.

-FISA COURT AND SPECIAL FISA CASES-

In re: Sealed Case. FISA Court of Review (Foreign Intelligence Surveillance Act Court of Review). 310 F.3d 717 (2002). Reportedly, only decision ever by the FISA Court of Review. [REVERSED the FISA Court decision which had criticized government activity in FISA warrants and had expressed doubt as to whether results of FISA investigations can be used in standard criminal cases. The FISA Court of Review suggested that there is little actual and practical constitutional distinction between FISA-type investigations and surveillance and information obtained by federal agencies through other warrant or wiretap authorities. *The FISA Court therefore found that there is little restriction on the use of information from FISA investigations.* Overrules years of Federal Court interpretation of FISA, to the contrary. Makes it much easier for FISA warrant information to be used in standard criminal cases. The decision stands as the ruling decision in FISA cases and is not subject to any further appeal. Specifically mentions PATRIOT Act. Little attention paid by the FISA Court of Review's decision to the FISA Court's criticism of inaccurate or misleading warrant information supplied by FBI in numerous cases.]

In re: All Matters Submitted to Foreign Intelligence Surveillance Act Court , FISA Court, (May 17, 2002, No. 02-424) [no citation available] REVERSED by Court of Review (see above). [Decision by U.S. Foreign Intelligence Surveillance Act Court (in rare action, released by Court and through Senate Judiciary Committee), notes the expanded authorities for FISA investigation and warrants (although does not directly mention PATRIOT Act), casts doubt on the propriety of current FBI minimization procedures, modifies, on its own, those procedures in certain respects, *comments on the incomplete or misleading information provided by FBI in seeking FISA warrants in more than 70 cases* (which supposedly came to light through FBI admissions as to such conduct) , and criticizes any FBI approach to using information from FISA investigations for standard criminal investigation and prosecution. Did not specifically mention or extensively discuss the PATRIOT Act. (*Reversed* by FISA Review Court-see above notation)]

-D.C. CIRCUIT-

Khaled A.F. Al Odah, et al. v. United States, 355 U.S.App. D.C. 189, 321 F.3d 1134 (D.C. Cir. 2003). [REVERSED BY U.S. SUPREME COURT]
[Consolidated three separate cases seeking relief on behalf of Guantanamo Bay detainees (see *Rasul v. Bush*, noted below-in each instance the federal District Court stated that it did not have jurisdiction to review the cases). Decided that the federal government under military power and authority can detain persons as enemy combatants or otherwise captured in field of conflict, and can do so outside the boundaries of the United States, and *federal courts do not have appropriate jurisdiction or review power to consider issues of legality of detention*, so long as that legality is sufficient demonstrated on its face, or the conditions of detention. Legal action was brought by "next friends" of various detainees under the Great Writ (28 U.S.C. 2241-2242), Alien Tort Act (28 U.S.C. 1350), and *habeas corpus* provisions. In some instances the detainees contended that they are not combatants at all of any sort but nevertheless were seized by military forces and transferred to Guantanamo Bay, where they remain. The court did not dismiss on the basis that there was no "next friend" status, but still determined that the government had authority to hold the detainees. It said of the detainees, "they too were captured during military operations, they

were in a foreign country when captured, they are now abroad, they are in the custody of the American military, and they have never had any presence in the United States." Therefore, there is no availability for habeas corpus relief. Also, there is no Fifth Amendment due process right available to the detainees. "If the Constitution does not entitle the detainees to due process, and it does not, they cannot invoke the jurisdiction of our courts to test the constitutionality or the legality of restraints on their liberty." (pp. 10-12 of Opinion). The Court also stated that the Guantanamo Bay facility is not within the territory of the United States because it is actually on land belonging to Cuba and leased by the United States. That also affects the federal court's jurisdiction over the detainees. In a more complex discussion (see concurring opinion), the Court found that there is no jurisdiction under other statutes, such as the Alien Tort Act, to review detainee claims. There is no waiver of sovereign immunity in the Alien Tort Act or under the Administrative Procedure Act (military ordinarily exempt from any blanket waiver of sovereign immunity) that would allow federal court jurisdiction. Result: *No federal court can even consider legal claims made by the detainees regarding their detention or conditions of detention.*

Rasul, et al. v. Bush, 215 F.2d 55 (D.D.C. 2002) (Kollar-Kotelley, J.) [REVERSED]
[No trial rights for Cuban detainees, Court finds no jurisdiction to consider merits of case, and indicates that aliens held by United States but outside U.S. sovereign territory might not be able to make use of U.S. courts to challenge confinement justifications or conditions. (Affirmed)]

Center for National Security Studies v. United States (D.C. Cir. 2003, No. 02-5254–June 17, 2003) 356 U.S.App.D.C. 333, 331 F.3d 918, 189 ALRFed 541 (D.C. Cir. 2003)[CERT DENIED]
[REVERSED the decision of the United States District Court for the District of Columbia (Kessler, J.) which had ruled that information about post September 11 detainees, including name, location, and counsel, must be released by the federal government. (See 215 F.Supp.2d 94). The Court of Appeals found that the government's "national security interests" and rationale were sufficient to entitle the government to claim an exception to the Freedom of Information Act. Therefore, the government can refuse to disclose information on these detainees. This was under exemption 7(A) of the Freedom of Information Act. District of Columbia Court of Appeals approves government secrecy of arrests and detentions of persons suspected of terrorist acts. Court declares that government is in best position to determine whether national security will be implicated or damaged by release of information involving detainees who are suspected of terrorist offenses.] NOTE: Strong dissent (Tatel, J.) severely criticizes opinion.

CNSS v. DOJ (Center for National Security Studies v. Department of Justice), U.S. District Court, District of Columbia (Gladys Kessler, J.) 217 F.Supp.2d 58 and 94 (August 2002). REVERSED BY District of Columbia Circuit (see above).
[Ruling, 47 pages in slip opinion, that government cannot keep secret, names of remaining detainees seized or detained by INS and DOJ during post-September 11 and post-PATRIOT Act arrests of suspected aliens or terrorists. Excellent decision but did not survive on appeal]

National Council of Resistance of Iran v. Department of State, 251 F.3d 192 (D.C. Cir. 2001). Confirms that group which is about to be designated by State Department as "terrorist organization" and therefore may be affected in terms of property, bank accounts, and so forth, is entitled to due process. State Department must given group reasonable notice that designation is impending and must give group opportunity to present evidence in any challenge to the

designation. (However, Administration is challenging this approach and wishes to limit all judicial review of its designations of groups as terrorist organizations.)

–SECOND CIRCUIT–

Padilla v. Rumsfeld, 352 F.3d 695 (2nd Cir. 2003). Considers Padilla's *habeas corpus* petition challenging his status as "enemy combatant" (upon certified question by US District Court). (Text opinion is more than 50 pages, and is typical of the length and detail of discussion, of these opinions). *Court finds that Congressional authorization is required before President or Executive Branch can detain American citizens on American soil*. Therefore, Padilla's designation of "enemy combatant" and his detention do not have valid authorization. Notes the "Non Detention Act" (see 18 U.S.C. Sec. 4001(a)), and finds that Congress' authorization to use military force (Pub.L. No. 107-40, 115 Stat. 224 (2001) is not such an authorization. President's inherent Constitutional powers under Art. II do not incorporate such designations and detentions. The court said, "we find that the President lacks inherent constitutional authority as Commander-in-Chief to detain American citizens on American soil outside a zone of combat." The Non-Detention Act confirms this. However, whether there is an "undeclared war" between the U.S. and Al Queda is a political question which the Court will not review. Even if so, the President cannot "lay claim" to powers that belong only to Congress (such as suspension of writ of *habeas corpus*). Congress has taken no action to define "enemy combatant" or to determine how and when a President may so designate and detain such a person. Prior Supreme Court cases authorizing military tribunals to try enemy combatants arose from declared wars and Congressional action, and also in different circumstances (such as there was no "Non Detention Act"). Distinguishes the Fourth Circuit decision of *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003) (Hamdi III), because Hamdi was seized in Afghanistan during combat and then taken to U.S. The Court found that the petition could be filed on Padilla's behalf by "next friend," that Rumsfeld was proper respondent, and that U.S. District Court in New York had jurisdiction. [JURSIDICTION]

United States v. Awadallah, [cite] (No. 02-1269) (2nd Cir. April 10, 2003). REVERSES U.S. District Court decision that indictments against Awadallah must be dismissed due to abuse of material witness warrant and improper search and seizure and obtaining of statements by Awadallah at time of his arrest (see 173 F.Supp.2d 186 (S.D.N.Y. 2001), 202 F.Supp.2d 17 (S.D.N.Y. 2002), 202 F.Supp.2d 55, and 202 F.Supp.2d 96, and noting related case of In re Material Witness Warrant, 213 F.Supp.2d 287 (S.D.N.Y. 2002). Court found that material witness warrant statutes allow for arrest and detention of witnesses, although it said that "it would be improper for the government to use Sec. 3144 for other ends, such as the detention of persons suspected of criminal activity for which probable cause has not yet been established." It found the affidavit for the warrant appropriate and not misleading by the FBI, and otherwise found the warrant valid, despite supposed FBI threats and harassment to obtain the warrant or any other consent by Awadallah to searches. It also found that evidence from these seizures need not be suppressed. (Reversal of U.S. District Court opinion. No word on any further review).

United States v. Awadallah, 202 F.Supp.2d 55 (S.D.N.Y. 2002) (Scheindlin, J.) (May 13, 2002). REVERSED–SEE ABOVE

[Finding that defendant who was held as material witness in investigation of suspected terrorist crime–September 11 attacks–cannot be continually detained under material witness statute, finding violation of statute in several respects, granting suppression of grand jury testimony (strong language, very detailed decision)]

United States v. Awadallah, 202 F.Supp.2d 82 (S.D.N.Y. 2002) (Scheindlin, J.) (April 30, 2002) REVERSED–SEE ABOVE
[Granting suppression motion as to defendant seized and detained and then charged with perjury as to grand jury testimony with respect to investigation of September 11 attacks. Court finds government's affidavit did not support arrest under material witness statute, defendant "seized" in violation of Fourth Amendment when questioned by FBI, "consent" to search of apartment and vehicles was involuntary and cannot be used to justify search, etc. (very extensive)]

–THIRD CIRCUIT–

North Jersey Media Group v. Ashcroft, 308 F.3d 198 (3rd Cir. 2002), *cert.denied* No. 02-1289 (May 27, 2003). REVERSED District Court and allowed closed immigration hearings.
[Third Circuit decides that closed immigration hearings can be held, due to the potential harm to national security or ongoing investigations that, according to the government, may result if the hearings were open to the public. The court said that it was "quite hesitant" to review the security concerns stated by the government and that "national security is an area where courts have traditionally extended great deference to Executive expertise." To the extent that national security concerns of the government "seem credible" the court will not "second-guess" them.

North Jersey Media Group v. Ashcroft, 205 F.Supp.2d 288 (D.N.J. 20002) (Bissell, C.J.) (May 28, 2002)
[Granting preliminary injunction preventing government from denying press and public access to deportation hearings in "special interest" cases, extensive decision discussing First Amendment issues] [BUT U.S. Supreme Court stayed preliminary injunction pending appeal to 3rd Circuit–and 3rd Circuit REVERSED the District Court.]

–FOURTH CIRCUIT–

Hamdi v. Rumsfeld, 316 F.3d 450 (4th Cir. 2003). [REVERSED BY SUPREME COURT]
[Fourth Circuit considered the *habeas corpus* petition of Hamdi, the so-called "dirty bomber" who is being held in military detention under "enemy combatant" status by the federal government. Supposedly under this status, the government can hold the individual indefinitely without charge or trial and with no or limited access to family or to counsel. Hamdi has not been charged with any crime. He submitted his petition challenging his military detention and his designation as an enemy combatant. The Court dismissed the petition, ruling that the government had authority to make this designation. The court did not strike down "enemy combatant" status.

Hamdi v. Rumsfeld, 296 F.3d 278 (4th Cir. 2002) [ALSO REVERSED BY SUPREME COURT]
[United States citizen held as "enemy combatant," court remands to U.S. District Court for Eastern District of Virginia, various issues related to "enemy combatant" status–court stating, however, that "It has long been established that if Hamdi is indeed an `enemy combatant' who was captured during hostilities in Afghanistan, the government's detention of him is a lawful one." Court also remands District Court's order allowing Hamdi free and unmonitored access to counsel, mandating further review by District Court of "implications" of such order].

-SIXTH CIRCUIT-

Detroit Free Press, et al. v. Ashcroft, 303 F.3d 681 (6th Cir., August 25, 2002)
[Affirms District Court in Michigan that immigration hearings cannot be held in secret, subject of considerable press reports, see case. Good decision on general concerns about secrecy in these hearings and constitutional protections. However, it appears to now be one of the few federal appeals cases which have ruled against government efforts to reaffirm powers granted to it in post September 11 environment and have criticized government secrecy. Review of decision recommended.]

Detroit Free Press, et al. v. Ashcroft, 195 F.Supp.2d 937 (E.D.Mich. 2002) (April 3, 2002) (Edmunds, J.)
[Decision (affirmed by 6th Circuit, see above) stating that hearing in question, which involved Rabih Haddad, native of Lebanon, detained and subject of immigration proceedings following September 11 investigations, cannot be declared closed. Court grants preliminary injunction against government and finds that proceedings must be open, that government's interest in closing proceedings was not compelling, press and others seeking access demonstrated bases for injunction including irreparable harm if access were not granted, etc.]

Detroit Free Press, et al. v. Ashcroft, 195 F.Supp.2d 948 (E.D.Mich. 2002) (April 3, 2002) (Edmunds, J.)
[Decision which was affirmed by 6th Circuit-denying government's motion to dismiss action brought by press, detainee, and others against closing immigration proceedings to public. Court finds that plaintiffs were not required to exhaust administrative review, action brought was not barred by existing statute such as Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), judicial review was otherwise available]

-SEVENTH CIRCUIT-

Global Relief Foundation v. O'Neill, 315 F.3d 748 (7th Cir. 2002)
[Determined that a portion of the USA PATRIOT Act was not subject to constitutional challenge. The challenged provisions allow for the *ex parte* use of classified evidence in proceedings to freeze the assets of a terrorist organization. Federal agents had raided offices of the Foundation and arrested or detained several of its corporate managers or members, claiming that the Foundation was not a charity but actually was a front to funnel financial assistance to terrorist organizations in the Middle East. The *ex parte* use of classified evidence, approved by the Court, allows the government to present this evidence without opportunity by the defendant to review it or challenge it.]

-NINTH CIRCUIT-

Gherebi v. Rumsfeld [cite] (No. 03-55785) (9th Cir., Dec. 18, 2003). [UNDER U.S. SUPREME COURT REVIEW]. Also on the Guantanamo Bay detainees. Modifies *Coalition of Clergy v. Bush* and finds that there IS federal court jurisdiction to consider petitions on behalf of Guantanamo Bay detainees. Government position that there is no jurisdiction is rejected: "we

appropriate in such cases, that in any event Court lacked jurisdiction to issue writ, and that further detainees under their justification and conditions of detention are not otherwise entitled to *habeas corpus*. (Later affirmed, see above notation as to Ninth Circuit)]

Humanitarian Law Project v. Ashcroft (D.Ca. 2004)
[Finding portion of USA PATRIOT Act involving "material support for terrorism" *unconstitutional* as being too vague (much of this language in statute was borrowed in turn from Anti Terrorism and Effective Death Penalty Act).

United States v. Rahmani, 209 F.Supp.2d 1045 (D. Cal. 2002) (Takasugi, J.) (June 21, 2002)
[Among other things, holds as unconstitutional certain procedures for designating terrorist groups under existing law, finding insufficient due process protections. Although not expressly mentioning PATRIOT Act, to extent that PATRIOT Act adopts and expands these procedures for designating terrorist groups, decision casts constitutional doubt on those provisions] (It does not appear that this decision was affirmed but given trend of federal courts on the question, this decision may not be viewed as persuasive by other courts.)

United States v. Mohammad Hammoud, (North Carolina) [no citation available]
[Found guilty by jury in June 2002, Court refuses to consider due process arguments against terrorist designation]
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TO DATE, *EIGHT* FEDERAL APPEALS CASES IN FAVOR OF GOVERNMENT IN ITS "WAR ON TERRORISM," *FOUR* FEDERAL *APPEALS* CASE AGAINST, *NO* FEDERAL APPEALS COURT RULING THAT ANY PART OF PATRIOT ACT IS UNCONSTITUTIONAL.
Foreign Intelligence Surveillance Act Court of Review (FISA Review Court): Decided in favor of Justice Department new guidelines and regulations regarding post-PATRIOT Act authorities and decided that information obtained through FISA-type surveillance can be used in standard criminal prosecutions, eliminating "wall" that was viewed by many federal courts to have existed between these two types of investigation and uses of evidence.

CNNS v. United States (D.C. Circuit): Decided that government cannot be required under Freedom of Information Act to release names or other pertinent information of individuals detained under suspicion of terrorism if national security could be at risk–a decision which if it is applied broadly to all subsequent such government activity, might allow for secret arrests.

Al Odah, et al. v. United States (D.C. Circuit): Decided that federal courts do not have any *jurisdiction* under *habeas corpus*, Fifth Amendment, Alien Tort Act, or other statutes, to review any claims of Guantanamo Bay detainees concerning legality or conditions of their confinement.

U.S. v. Awadallah (2nd Circuit)–Upholds FBI conduct in search and seizure and Government and FBI use of material witness warrants to detain suspects.

New Jersey Media Group v. Ashcroft (3rd Circuit): Allows for government to hold secret immigration or deportation hearings, if government deems closed hearings to be necessary.

Hamdi v. Rumsfeld (4th Circuit): Various decisions in general affirming the use of "enemy combatant" status, although it is possible that detained person could have access to counsel.

Global Relief Foundation v. O'Neil (7th Circuit): Approved use of ex parte classified evidence.

Coalition of Clergy v. Bush (9th Circuit): Finding no *habeas corpus* jurisdiction in federal courts for "next friend" petition on behalf of Guantanamo Bay detainees. Courts cannot review claims.

COMPARE:

National Council of Resistance of Iran (D.C. Circuit): Finding due process requirements applicable and must be followed in situations of designations of certain groups as "terrorist organizations."

Padilla v. Rumsfeld (2nd Circuit): Finding no Congressional or other authorization for President or Executive Branch to hold American citizen seized on American soil, as "enemy combatant"

Detroit Free Press v. Ashcroft (6th Circuit): Ruling AGAINST closed immigration hearings.

Gherebi v. Bush (9th Circuit): Finding that there IS jurisdiction in US federal courts to consider *habeas corpus* petition on behalf of Guantanamo Bay detainees, challenging legality and conditions of confinement.

DOMESTIC SECURITY ENHANCEMENT ACT OF 2003 (Proposed)
Overview of Statute and Summary of Key Sections (revised as of 5/1/04)
By C. William Michaels, Esq. author *No Greater Threat* (see www.nogreaterthreat.com).

Note: As of mid-2004, the Domestic Security Enhancement Act (DSEA) *is not an actual statute*. It is a proposed bill that is apparently not in final form, and has not yet been submitted by the Administration to Congress for consideration.

The DSEA was leaked from within the Department of Justice, in early February, 2003 to a DC advocacy group, the Center for Public Integrity. The whos and whys of that leak are not clear. The Center sent an alert out about it immediately through its website and others. It also passed the information to PBS "Now With Bill Moyers," which did a segment on the proposed bill around February 7, 2003. PBS and the Center made the bill and its Department of Justice section-by-section analysis, available in full text on their websites.

Since then, the proposed statute has been the subject of considerable commentary and analysis. It has made its way to various websites. There is no question that it would go considerably beyond the USA PATRIOT Act. So the proposed DSEA has quickly been called "PATRIOT Act II."

After the proposed bill was leaked, the Department of Justice issued a press release stating that there are many bills which the Department considers or drafts and which might not be submitted to Congress. Attorney General John Ashcroft has had little to say on the proposed DSEA and has declared in testimony to Congress that there is no such thing as a "PATRIOT Act II," although he recently declared that additional authority beyond the PATRIOT Act is needed to further meet the demands of the Justice Department's "war on terrorism" mission.

(This present review is taken to some degree from the DOJ analysis of the proposed bill and from some Internet articles or commentary. There are various Internet resources or commentary on the DSEA. Among them are websites for: ACLU, Center for Constitutional Rights, Friends Committee on National Legislation, Cato Institute, and Center for National Security Studies.)

TITLE I: ENHANCING NATIONAL SECURITY AUTHORITIES
Subtitle A: Foreign Intelligence Surveillance Act Amendments

The Foreign Intelligence Surveillance Act of 1978 (FISA) was designed to describe methods of governmental investigation of "agents of a foreign power" operating in the United States who may be engaging in activities threatening national security. The USA PATRIOT Act considerably expands these authorities and also allows wide sharing between federal government agencies of "foreign intelligence information." The DSEA would go beyond this in several ways:

Sec. 101 — Would *change the FISA definition of "foreign power" to include individuals*, not at present part of that definition. This means investigations of individuals who are not "*agents* of a foreign power" must proceed under

other federal statutes, such as federal wiretap statutes with more requirements than FISA warrants. The DOJ states this change will allow FISA investigation of "sleeper cells" or "lone wolf" terrorists. But it would also allow complete FISA authority over any individual whether or not the person is an "agent" of a foreign power or affiliated with any terrorist group.

Sec. 102 — Under FISA, an "agent of a foreign power" is defined as someone who "knowingly" engages in clandestine intelligence activity and this activity also must involve a federal crime. This Section would eliminate the federal crime aspect of the definition. An "agent of a foreign power" could engage in clandestine intelligence activity *even if not a crime.*

Sec. 103 — Under FISA, certain emergency surveillance powers can be conducted for 15 days after Congress declares a war, without approval from the FISA Court. These emergency powers include special surveillance, physical searches, and telephone monitoring. This Section would change the requirement from declaration of war *to any time Congress authorizes the use of military force* (such as the recent authorization of use of force in Iraq).

Sec. 104 — Changes an emergency Presidential authorization for electronic surveillance of foreign powers for up to a year, *by eliminating the restriction on spoken communications*. Spoken communications could be part of the surveillance.

Sec. 105 — At present, certain information obtained by FISA surveillance can be used in a criminal case only by approval of the Attorney General. This broadens the approval *to be required to be given by other Justice Department officials in addition to the Attorney General*.

Sec. 106 — Would allow the "good faith" defense in unauthorized surveillance or searches in those special situations where FISA Court approval for the surveillance or search was not required so long as the activity was approved by the President or Attorney General.

Sec. 107 — Would allow telephone monitoring methods on American citizens to obtain "foreign intelligence information," *eliminating the requirement that for American citizens, this surveillance can only be used regarding international terrorism or clandestine intelligence activity*.

Sec. 108 — Allows appointment by the FISA Court of counsel on behalf of the Court to defend a FISA decision should that decision be appealed by the government.

Sec. 109 — Would allow the FISA Court, a secret court that issues secret surveillance or investigation orders, *to enforce those orders against anyone who does not cooperate with execution of a FISA order*. This enforcement would include a hearing and contempt (most likely any such hearing would be conducted in secret, due to the sensitive or classified nature of these investigations).

Sec. 110 — *Takes Section 204 of the PATRIOT Act out of sunset provision*.

Sec. 111 — Allows for FISA to *treat terrorist organizations as foreign powers*, bringing longer surveillance activities and other conduct that is now allowed under FISA for certain foreign powers. This change would also appear to specifically include American citizens.

Subtitle B: Enhancement of Law Enforcement Investigative Tools

Sec. 121 — Clarifies that "terrorist activities" can be treated as a "criminal activity," for areas of federal law allowing for electronic surveillance for crimes.

Sec. 122 — Terrorist activities are added to the list of crimes that are likely to be committed by terrorists (18 U.S.C. §930, §956). The authorization would include electronic surveillance without a court order in emergency situations, which would also include telephone monitoring methods.

Sec. 123 — Makes changes in electronic monitoring and other search methods in situations of domestic terrorism or other similar terrorist activity, *eliminating requirements that this surveillance activity conform to federal wiretap laws* that are potentially more exacting than FISA warrants and orders. The changes would also give these warrants longer time periods and lessen requirements of reporting to the court of surveillance activity.

Sec. 124 — In the case of multi-function electronic devices, such as a cell phone with various capabilities, a warrant for a particular cell phone could only relate to the one aspect of the devices' capabilities, namely receiving or transmitting a telephone call. This change allows a warrant for any multi-function *device to extend to information available through any function of that device. (e.g. "Blackberry" devices that hold or store information, etc.)*

Sec. 125 — Nationwide search warrants or multi jurisdiction search warrants are now allowed under the PATRIOT Act, for investigation of terrorist crimes. But terrorism is in turn defined as involving violent acts or acts dangerous to human life. Other forms of terrorism such as conspiracy or terrorist financing are not included. This Section would change that definition to allow for these search warrants for investigations of computer crimes, attacks on infrastructure, and "providing material support" to terrorism.

Sec. 126

Allows equal *access by government investigators to consumer credit reports as quickly and easily as such reports are available to credit agencies or banks.* This would eliminate warrant requirements or subpoenas to obtain these reports, which according to the DOJ can be time consuming and can take up to three months "to learn where a terrorist keeps his accounts." However, there is no mention here of existing USA PATRIOT Act Title III authority for federal investigators to conduct wide ranging review of suspect bank accounts regarding terrorism, without a court order, or of other PATRIOT Act sections already extending some government investigation into credit reports. *The Section would prohibit the consumer credit agency from disclosing to the person involved that law enforcement authorities have sought or obtained the credit report.*

Sec. 127

Would allow *the federal government to order an autopsy immediately of a US citizen who was the fatal victim of a terrorist crime, especially one occurring overseas.* Some other offenses including acts of terrorism would come under this new provision, although the provision mentions only "criminal investigation" and not specifically terrorism. This eliminates any supposed difficulty of requiring that the victim's body be transported to the US for autopsy, which according to the DOJ adds to investigative delay. The Attorney General's authority to order such an autopsy could be delegated to other federal officials. The autopsies would be conducted by local or private parties.

Sec. 128

Expands the use of administrative subpoenas to terrorism investigations, eliminating the requirement that these subpoenas may be issued only by a grand jury or other similar methods. This use of the administrative subpoena would extend to investigations of domestic and international terrorism. These subpoenas can be enforced as with any other subpoena.

Sec. 129

In addition to the use of administrative subpoenas is *a "national security letter"* issued by certain officials to obtain certain information in a national security investigation such as involving international terrorism or espionage. At present, information to be obtained in this way includes: 1) electronic transaction records by communication service providers, 2) consumer information, 3) consumer reports, 4) financial records, and 5) information on persons with access to classified information. The changes would: 1) provide for a penalty for unlawful disclosure that the information has been sought, 2) allow for court enforcement of national security letters, 3) extend to all types of terrorist activity, 4) allow for broader information sharing of this material.

TITLE II: PROTECTING NATIONAL SECURITY INFORMATION

Sec. 201 — Allows for, essentially, *secret detentions or arrests*. According to the DOJ analysis, "the release of information about persons detained in connection with terrorism investigations could have a substantial adverse impact on the United States' security interests, as well as the detainee's privacy." According to the DOJ, releasing such information could also allow co-conspirators to flee, hide, or destroy evidence. Under this Section, the DOJ states, "the government need not disclose information about individuals detained in investigations of terrorism until disclosure occurs routinely upon the initiation of criminal charges." So, if the detained person is not criminally charged, information concerning this detention--which would include, for example, where the person is held--would be secret. *THIS IS AN UNPRECEDENTED SECTION.* (However, it appears to already be an existing practice under D.C. Circuit Court of Appeals opinion which ruled that government need not provide such information through an FOIA request.)

Sec. 202 — Under the Clean Air Act, certain companies using dangerous chemicals are to submit to the EPA a "worst case scenario" report about community effects from the release of that chemical. According to the DOJ, these reports are "a roadmap for terrorists." *The Section would allow these reports to be shared among particular federal or state agencies but otherwise they would essentially be secret.* A "whistleblower" revealing this information would commit a federal crime in doing so.

Sec. 203 — This is a similar provision that makes information about *government buildings, such as blueprints and charts, secret, that is, exempt from being obtained by the Freedom of Information Act.*

Sec. 204 — Under the Classified Information Procedures Act, if a court is reviewing an investigation that supposedly involves classified material, the *court can decide if it wishes to grant* a government request to review sensitive material only in closed court chambers. If the court decides to review the material in open court, according to the DOJ, this sensitive material could be compromised. This Section would *require* that if the government requests court review of classified information, the court's review of this material *must be* in closed court chambers (without access by the defendant or counsel). That is, discretion by the court as to how the material can be reviewed, would be eliminated. DEFENDANT WOULD HAVE NO ACCESS TO THI S INFORMATION OR MATERIAL.

Sec. 205 — Security provided to certain officials would not be considered a value or income to be taxed.

Sec. 206 — Extends grand jury secrecy requirements to a broader class of subpoenas including danger to national security, flight of individual, danger to life or safety of a person, destruction of evidence, witness intimidation, or jeopardy to investigation. Secrecy can be imposed in all these situations.

TITLE III: ENHANCING INVESTIGATIONS OF TERRORIST PLOTS

Subtitle A: Terrorism Identification Database

Sec. 301 — The USA PATRIOT Act expanded the DNA database for crimes, to include those convicted of a long list of terrorist crimes. This Section would change "convicted" to *"suspected,"* allowing DNA database information for those suspected of terrorist crimes, including detainees at Guantanamo Bay. Specifically, these persons would be: *1) suspected of engaging in terrorism, 2) "enemy combatants," 3) suspected of being in a terrorist organization, or 4) aliens including those engaging in activity that endangers national security.* No federal law currently requires DNA sampling or DNA databank for a person who is merely "suspected" of a crime. **THIS WOULD BE AN UNPRECEDENTED SECTION.**

Sec. 303 — This would create what appears to be a separate DNA databank for terrorism. All federal agencies would contribute to this databank. The Justice Department could use the information to "detect, investigate, prosecute, prevent, or respond to" terrorist activities. Information could be shared with federal, state, local, or foreign agencies.

Sec. 304 — Defines suspected terrorists and expands on other similar definitions.

Sec. 305 — Allows these powers to be used in addition to any other authorities available.

Sec. 306 — Extends this DNA databank to persons under conditional release, parole, or other form of federal custody besides incarceration.

Subtitle B: Facilitating Information Sharing and Cooperation

Sec. 311 — Would expand information sharing under the PATRIOT Act to extend *to state and local law enforcement and law enforcement agencies of foreign governments.* This is similar to many such provisions in the Homeland Security Act. The provision also extends to visas, educational records, and consumer credit information. (Note: under HSA, the DHS or other similar agency can under certain circumstances, share classified information on terrorist individuals or activities with local law enforcement officers, upon signing of a non-disclosure agreement.)

Sec. 312 — *Would end the "consent orders" that eliminated or minimized the "Red Squad" practices certain State or City law enforcement agencies of the 50s, 60s, and 70s.* Due to certain excesses in the 1970s and 1980s of surveillance and investigation authorities by many state and municipal law enforcement agencies as well as the FBI, including keeping secret files, infiltration, and illegal surveillance, many "consent decrees" were entered to settle litigation over these excesses. The consent decrees limit police authority to conduct these sorts of investigation and keep such files. The DOJ contends that these consent decrees "handicap" and "frustrate" law enforcement and terrorism investigation. The Section would *invalidate them.* According to the DOJ, the Section "would discontinue most consent decrees that could impede terrorism investigations conducted by federal, state or local law enforcement agencies. It would immediately terminate most decrees that were enacted before September 11, 2001. All surviving decrees would have to be necessary to correct a current and ongoing violation of a Federal right, extend no further than necessary to correct the violation of the Federal right, and be narrowly drawn and the least intrusive means to correct the violation." (Modeled after the Prison Litigation Reform Act which did the same thing to prison related consent decrees.) *This is a substantial change in the long process of imposing these decrees to curb law enforcement surveillance and investigation excesses. It strikes down 30 years of organizing and court battles over these activities.*

Sec. 313 — Provides protection from or immunity for businesses and personnel who voluntarily provide information to federal agents "to assist in the investigation and prevention of terrorist activities."

Subtitle C: Facilitating International Terrorism Investigations

Sec. 321 — Allows electronic surveillance of various kinds to be conducted in the US and possibly involving US citizens, at the request of foreign governments. According to the DOJ, "Doing so will enhance our ability to assist foreign law enforcement investigations, as well as promote better cooperation from foreign allies when we seek evidence from within their borders."

Sec. 322 — Changes certain extradition and treaty arrangements to "update" them and permit extradition or *other acts allowed by the treaty for crimes that might not have been listed in the treaty* because the treaty was old or outdated. That is, a person could be sent to trial in a foreign court, even a dictatorship, to be prosecuted despite that there may be defects or other problems or other reasons for the extradition request. The court would not have the authority to review and consider challenges to extradition.

TITLE IV: ENHANCING PROSECUTION AND PREVENTION OF TERRORIST CRIMES

Subtitle A: Increased Penalties and Protections Against Terrorist Acts

Sec. 401 — Creates a new prohibition or crime against "terrorism hoaxes," such as deliberately false reports of a terrorist activity or deliberate attempt to fake a terrorist crime (letter made to look like it contains powdered anthrax but does not). A civil action for such hoaxes is allowed.

Sec. 402 — *Expands the crime of material support for terrorism* including international terrorism, and does not require a showing of intent if the act is sufficient enough to suggest intent to provide this material support. This also includes "training" or "instruction." This is a significant expansion because the definition of terrorism is so expanded, that material support to terrorism can now encompass a wide range of activities, many of which may appear to be without criminal intent or purpose. (Note: constitutionality of this section would be seriously in doubt, given that one federal court has struck down the existing "material support" language of the USA PATRIOT Act as too overbroad and vague.)

Sec. 403 — Expands terrorism, or federal court jurisdiction of terrorism, when the situation involves a weapon of mass destruction, to include 1) use of mails or other interstate commerce, 2) any property in interstate or foreign commerce, and 3) travel in interstate or foreign commerce. Also, attacks on foreign government property in US are included. And "chemical weapons" has an expanded definition, changing what DOJ believes was too-restrictive language in the Chemical Weapons Convention of 1998.

Sec. 404 — *Makes it a crime to use a computer with encryption technology in the furtherance of a federal felony or "to conceal any incriminating communication or information relating to" that felony.* This is not restricted to a terrorist offense. Basically, any use of computer encryption is suspect.

Sec. 405 — Under current federal law, those charged with certain crimes are not allowed pretrial release. The list of crimes includes drug offenses with a term of 10 years or more. *The Section would DENY pretrial release to those charged with terrorism offenses.* According to the DOJ, this is necessary "because of the unparalleled magnitude of the danger to the United States and its people posed by acts of terrorism, and because terrorism is typically engaged in by groups–many with international connections–that are often in a position to help their members flee or go into hiding."

Sec. 406 — Makes technical corrections in the definition of "mass transportation vehicle" concerning terrorist crimes. (Responding to certain court cases.)

Sec. 407 — Expands federal jurisdiction over someone who travels in interstate or foreign commerce in furtherance of a terrorism offense or criminal offense.

Sec. 408 — The PATRIOT Act permits post-supervision release of a person convicted of a terrorist crime in federal court to be up to life. *This Section would expand certain classifications as to post-supervision release and set a minimum of such release of 10 years for conviction of certain terrorist offenses*. This Section includes "all offenses in the standard list of crimes likely to be committed by terrorists and supporters of terrorism."

Sec. 409 — Allows for denial, suspension, or revocation of civil aviation certificates for national security reasons. This is at the discretion of the government and does not require suspicion or conviction of any terrorist crime.

Sec. 410 — Eliminates statutes of limitations for certain terrorist offenses. This goes beyond the expansion of statutes of limitation in the USA PATRIOT Act. For example, it eliminates the "death or serious injury" requirement and includes computer crimes which might not result in injury but can cause disruption and economic damage.

Sec. 411 — *Imposes the death penalty for terrorist murders or certain terrorist crimes that result in fatalities*. This in effect creates 15 new death penalties. Some of these crimes could include certain protest activities that could be considered a criminal offense. (USA PATRIOT Act increased penalties for certain terrorist crimes, including up to life sentence, but did not impose death penalty.)

Section B: Incapacitating Terrorism Financing

Sec. 421 — Increases penalties for violations of the International Emergency Economic Powers Act, from $10,000 per violation to $50,000 per violation.

Sec. 422 — Expands terrorist investigation or crime involving financing of terrorism to different sorts of financial transactions and also extends the federal jurisdiction to "all constituent parts" of a given transaction.

Sec. 423 — Eliminates tax-exempt status for a group classified as a "terrorist organization."

Sec. 424 — Extends the denial of "federal benefits" (such as government contracts, loans, licenses) to those convicted of terrorism.

Sec. 425 — Amendments or technical corrections to USA PATRIOT Act sections involving terrorist financing investigations. (NOTE: Some of these provisions have already been passed by Congress, in legislation signed by Bush in December, 2003, that expanded significantly, the definition of "financial institution" covered by existing Title III of PATRIOT Act.)

Sec. 426 — Adds other aspects of terrorist financing to government investigations. (NOTE: Some of these provisions have been passed by Congress, in legislation signed by Bush in December, 2003, expanding definition of "financial institution" covered by existing Title III of PATRIOT Act.)

Sec. 427 — Expands forfeiture provisions of PATRIOT Act, which related to crimes committed against the US or within the US, to crimes or acts of terrorism "against a foreign state or international organization" if this is in US jurisdiction.

Sec. 428 — Adds certain conspiracies and makes other technical corrections to USA PATRIOT Act involving money laundering and forfeiture.

TITLE V: ENHANCING IMMIGRATION AND BORDER SECURITY

Sec. 501 — Provides that a US citizen *can be considered to have forfeited US citizenship by serving in a hostile terrorist organization or providing material support to terrorism*. According to the DOJ, under this Section, "Specifically, an American could be expatriated if, with the intent to relinquish nationality, he becomes a member of, or provides material support to, a group that the United States has designated as a `terrorist organization,' if that group is engaged in hostilities against the United States." *An actual showing of intent or spoken intent is not required.* The act *itself* will suffice to provide the necessary intent, that is, this intent "can be inferred from conduct." So, "service in a hostile army or terrorist group" would be sufficient evidence of "an intent to renounce citizenship." This Section appears to go beyond what the Constitution allows for removal of citizenship and eliminates governments burden to prove intent. It is especially disturbing given that "material support for terrorism" can be very broadly defined. **THIS WOULD BE AN UNPRECEDENTED SECTION.**

Sec. 502 — Increases penalties for certain immigration crimes, including unlawful entries, alien smuggling, fraud, and failures to depart.

Sec. 503 — The Justice Department would have authority to *deny admission into the US or remove from the US any alien "whom the Attorney General has reason to believe would pose a danger to the national security of the United States, based on the statutory definition of `national security' under the Act in connection with the designation of foreign terrorist organizations."* This authority would extend to situations where the alien's presence in the US would have "potentially serious adverse foreign policy consequences." What this Section essentially does is allow for summary deportations.

Sec. 504 — Allows for *expedited removal* of criminal aliens, including all aliens not just nonpermanent residents, expands offenses for expedited removal, and eliminate "contested judicial removal," in favor of expedited removal. Again, the Section allows for essentially summary deportations of aliens, and eliminates due process requirements. These authorities were sought in the PATRIOT Act but were not permitted, now DOJ seeks them again. (However, it is difficult to imagine a swifter deportation or removal process or one with less due process guarantees and administrative attention or judicial review, than the process currently in place.)

Sec. 505 — Eliminates statutes of limitation for "failure to depart" as to an alien under a deportation or departure order, making it a continuing offense. An alien must depart 90 days from a final order requiring departure. *The authority of the court to suspend this requirement for good cause also is eliminated.*

Sec. 506 — Adds to places where an alien can be sent who is being removed from US if alien cannot be removed to a country stated in existing federal statute.

NOTE: Whether the DOJ and Administration ever intended actually to submit all or part of the DSEA to Congress as a proposed bill, is not known. Attorney General John Ashcroft and the DOJ public information office shrugged off the outcry after this text was leaked, by saying that this was merely draft language under discussion and such activity goes on all the time in various legal areas. (However, by the time it was leaked, the text already had been sent to offices outside DOJ for comment, including the office of the Vice President, indicating that this was more than a mere draft). Nevertheless, the public reaction after this text was leaked to the Center for Public Integrity and PBS' "NOW with Bill Moyers" certainly affected whatever plans DOJ and the Administration did have concerning all or part of these proposed sections That situation definitely shows the effect of public reaction to proposed legislation of this type. While it is unlikely now, that the DSEA will ever be proposed as an entire piece of legislation as a whole, it still could be passed in pieces or discrete sections, through other legislations or as amendments. Thus, there still must be watchfulness for such activity. *(It is also likely to get attention in the event of another major terrorist attack on US soil).* What is even more significant is that this proposed statute, much of which contains sections that are more extreme than anything ever seen, represents the "next step" thinking in DOJ and shows just how far this Administration is willing to go in the name of the "war on terrorism."