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

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Summary

This is a brief description of the substantive criminal law and procedures provisions of the House-passed version of H.R. 10. They have no equal in Senate-passed S. 2845. The provisions are largely devoted to increasing the penalties for various existing terrorist crimes and increasing the jurisdictional circumstances under which they may be prosecuted under federal law. The provisions include “lone wolf” FISA and grand jury information sharing amendments; increased penalties for hoaxes and obstructions of justice in terrorism cases, for identification offenses, and for smuggling aliens; clarification and expansion of terrorist support offenses, crimes involving weapons of mass destruction, and counterfeiting offenses. The provisions also increase the penalties and expand the jurisdictional reach of federal crimes barring the production, traffic in, and use as terrorist weapons of anti-aircraft missiles, atomic weapons, radiological dispersal devices, and smallpox virus. They merge the train wrecking and mass transit attacks proscriptions of existing law. They establish capital punishment as a permissible sanction for those existing federal terrorist crimes resulting in death that do not already carry the death penalty, deny federal benefits to terrorists, and make the 1994 death penalty procedures retroactively applicable to certain air piracy offenses committed after enactment of the 1974 capital punishment procedures. They establish a no-bail presumption for terrorists and subjects terrorists to post-imprisonment supervision for life.

This report will be revised as appropriate and is an abridged version of CRS Report RL32632, *The 9/11 Recommendations Implementation Act: Comparison of the Criminal Law and Procedure Provisions in H.R. 10 and S. 2845 as Passed by Their Respective Houses*.

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

Individual Terrorists as Agents of Foreign Powers (H.R. 10: Sec.2001/S. 2845: No similar provision): The Foreign Intelligence Surveillance Act (FISA) authorizes orders permitting surveillance (wiretapping), physical searches, pen register/trap & trace device use, and tangible item access in connection with the activities in the U.S. of foreign powers and “agents of foreign” powers. Existing law defines agents of a foreign power to include anyone who engages in or prepares to commit acts of international terrorism on behalf of a foreign power. Section 2001 amends the definition of “agent of a foreign power” so that FISA authority may be used against so-called “lone wolf” foreign terrorists without having to first establish their connection to any foreign group or government as is now required. The new authority sunsets on December 31, 2005.

Hoaxes and Recovery Costs (H.R. 10: Sec.2022/S. 2845: No similar provision): Section 2022 creates a new section that establishes criminal and civil liability for various false statements. Intentional, creditable false statements relating to the purported commission of various violent federal crimes subject offenders to imprisonment for not more than five years, not more than 25 years if serious injury results, and imprisonment for any term of years or for life if death results. Offenders are likewise subject to reimbursement orders for fire and rescue costs and to civil liability for expenses incurred as a consequence of the violation. The same criminal penalties apply to intentional false statements concerning death, injury, capture or disappearance of a member of the U.S. armed forces during an armed conflict, *see*, H.Rept. 108-505 (2004).

Obstruction of Justice and False Statements in Terrorism Cases (H.R. 10: Sec.2023/ S. 2845: No similar provision): Material false statements upon a matter within the jurisdiction of a federal agency or department are punishable by imprisonment for not more than five years as is obstructing or impeding administrative agency or Congressional proceedings, corruptly or by threat. Section 2023 increases the penalties to imprisonment for not more than 10 years in terrorism cases.

Receiving Military-Type Training from a Foreign Terrorist Organization (H.R. 10: Sec. 2042/S. 2845: No similar provision): Federal law proscribes providing material support in aid of the commission of certain designated violent federal crimes or providing material support to terrorist organizations. Members of “terrorist cells” in Buffalo and Portland have been convicted for providing material support based on their training in Afghanistan. Some courts have indicated, however, that application of the definition of “material support” may be subject to constitutional challenge under some circumstances. Section 2042 creates a new federal crime which outlaws the knowing receipt (from or for the benefit of a foreign terrorist organization) of military training including instruction on the use of explosives and weapons of mass destruction under a series of jurisdictional circumstances. Violations are punishable by imprisonment for not more than 10 years. The jurisdictional circumstances include the fact that the offense is committed in the U.S. in whole or in part; or that the offender is a U.S. national or later found in the U.S.

Providing Material Support to Terrorism (H.R. 10: Sec.2043/S. 2845: No similar provision): Existing law prohibits providing material support for the commission of any of a list of designated offenses, 18 U.S.C. 2339A. In addition, anyone who aids or abets the commission of any of the offenses is subject to the same penalties as those violations they have made possible. It is likewise a federal crime to provide material support to a designated terrorist organization, 18 U.S.C. 2339B. Sections 2339A and 2339B apply within the U.S. and in some instances to violations occurring overseas. In the case of section 2339A, the section has the same extraterritorial application as its predicate offenses. Section 2339B has an explicit statement of extraterritorial application. Section 2043 amends 18 U.S.C. 2339A and 2339B. With respect to section 2339A in addition to clarifying amendments, the bill adds to the designated offense list any crime of international or domestic terrorism (as defined in the USA PATRIOT Act), committed under specific jurisdictional conditions which it describes. The bill also provides a clarifying definition under section 2339B of providing assistance in the form of personnel, and it supplies a rule of construction that precludes prosecution so as to abridge the exercise of First Amendment rights.

Weapons of Mass Destruction (H.R. 10: Sec.2052/S. 2845: No similar provision): Present law condemns the use, the threat to use, and the attempt or conspiracy to use, weapons of mass destruction which it defines to include biological and atomic weapons as well as destructive devices (bombs), when the crime is committed overseas by or against an American, when the crime is committed within the U.S. and the use affects or would affect interstate or foreign commerce, or when the crime is committed against federal property in the U.S. or elsewhere. Individual parallel proscriptions cover biological weapons, chemical weapons, nuclear materials, and explosives. Section 2052 enlarges the jurisdictional coverage of the generic weapons of mass destruction section so that it more closely approximates the jurisdictional reach of the individual proscriptions covering nuclear material as well as biological and chemical weapons. It makes the generic provision applicable to chemical weapons in addition to the other weapons of mass destruction already included in the section. It also enlarges the class of restricted individuals, who may not possess biological toxins to include members and agents of designated terrorist organizations and agents of nations that support terrorism. Finally, it adds biological weapon, chemical weapon, and nuclear materials offenses to the RICO predicate offense list and consequently to the money laundering predicate offense list. The purpose of section 2052 here seems to be one of emphasis, since each of the offenses it appears to add to the RICO predicate offense list is already there by virtue of its standing as a federal crime of terrorism which RICO includes in its predicate offense list.

Participation in Nuclear and Weapons of Mass Destruction Threats to the United States (H.R. 10: Sec. 2053/S. 2845: No similar provision): Section 57(b) of the Atomic Energy Act of 1954 (42 U.S.C. 2077(b)) outlaws engaging in the production of special nuclear material outside the U.S. Other laws ban (1) the use or threatened use or attempt or conspiracy to use a weapon “designed to release radiation or radioactivity at a level dangerous to human life,” under particular jurisdictional circumstances, and (2) possession or use of nuclear material or nuclear by-product material under circumstances likely to cause serious injury or substantial property damage, or to attempt, threaten or conspire to do so in the U.S., and some cases overseas. Section 2053 amends section 57(b) of the Atomic Energy Act and creates a new 18 U.S.C. 832. The amendment to the Atomic Energy Act adds a proscription against *participation in the development* of special nuclear material outside the U.S. to the existing prohibition against *production* of special nuclear material outside the U.S. The new 18 U.S.C. 832 consists of two crimes, one

concerned with foreign weapons programs and the other with misconduct in this country involving radiological weapons. Proposed subsection 832(a) bars participation in, or providing material support to, the weapons of mass destruction program of a designated foreign terrorist organization or of a country designated a sponsor of terrorism, when the offense is committed either within the U.S. or by one subject to U.S. jurisdiction (e.g., a U.S. company or citizen). It also outlaws attempts or conspiracies to engage in such misconduct. The subsection supplements existing proscriptions against providing material to terrorist organizations. Proposed subsection 832(c) outlaws the development or possession of a radiological weapon or attempt or conspiracy to do so. It also outlaws the use or threatened use of such a weapon against anyone within the U.S., an American overseas, of federal property regardless of its location. The new section 832 is designated a federal crime of terrorism and as a consequence is added to the list of: RICO predicate offenses; money laundering predicate offenses; aggravated identity theft predicate offenses; terrorist crimes involving a risk of serious injury for which there is no statute of limitations; and terrorist crimes for which a life long term of supervised released may be ordered.

Conduct in Aid of Counterfeiting (H.R. 10: Sec.2122/S. 2845: No similar provision): It is a federal crime to possess analog, digital or electronic images, or plates for purposes of counterfeiting U.S. or foreign obligations or securities, 18 U.S.C. 474, 481; or to possess distinctive paper or counterfeit deterrents, 18 U.S.C. 474A. Section 474 has explicit extraterritorial application, 18 U.S.C. 470. In addition to enlarging section 470 to provide explicit extraterritorial application for section 474A (distinctive paper and counterfeit deterrents), section 2122 augments existing proscriptions with a prohibition against possession with the intent to defraud of “any material that can be used to make, alter, forge or counterfeit” any obligation or security, U.S. or foreign, proposed 18 U.S.C. 474, 481.

Grand Jury Information Sharing (H.R. 10: Sec.2191/S. 2845: No similar provision): Matters occurring before a federal grand jury are secret. Violations of grand jury secrecy are punishable as contempt of court. Traditionally, such matters could be disclosed in some cases with the permission of the court and they could be disclosed to other federal prosecutors and to government personnel assisting the grand jury without the court’s permission. The USA PATRIOT Act and later the Homeland Security Act expanded the exception to permit disclosure to various federal officials without court approval of grand jury matter involving foreign intelligence, counterintelligence, or foreign intelligence information. Section 2191 expands the exception in a number of ways. It enlarges the class of government officials to whom grand jury material may be disclosed without court approval in order to assist in the grand jury’s investigation. The class already includes state, local and tribal officials, section 2191 adds foreign government officials. With subsequent notification of the court but without prior court approval, it permits any attorney for the U.S. government to disclose any grand jury matter involving a threat of actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power, domestic or international sabotage, domestic or international terrorism, or clandestine intelligence gathering activities by an intelligence service or network of a foreign power or an agent of an foreign power to any state, local, Indian tribal, or foreign government official for the purpose preventing or responding to the threat (the rule already permits disclosure to the appropriate federal officials under such circumstances). Any official receiving such information may use it only for his or her official duties, subject to any limitations on its unauthorized disclosure and may use it only in a manner consistent with guidelines jointly issued by the Attorney General and the National

Intelligence Director. It allows disclosure to foreign courts or prosecutors to use in official criminal investigations, at their request and with the court's approval. In a related change, it amends the provision — which now permits disclosure of evidence of a violation of state or tribal law to the appropriate state or tribal authorities, with court approval — to allow disclosure of evidence of foreign law violations to the appropriate foreign officials, again with court approval. Finally, violations of the guidelines jointly issued by the Attorney General and the Director of Central Intelligence [sic, probably should read National Intelligence Director] are punishable as contempt of court, although the efficacy of such a sanction in case of violations by foreign officials may be open to question.

Police Badges (H.R. 10: Section 2202/S. 2845: No similar provision): Existing law prohibits unauthorized possession of a police badge or counterfeit police badge that has been transported in interstate or foreign commerce, 18 U.S.C. 716(a). The law, however, recognizes certain affirmative defenses, including the fact that it is used or intended for use exclusively for exhibit, collection, decorative, theatrical or other recreational purposes. Section 2202 eliminates the defenses for badges used for “decorative” or “other recreational purposes.”

Railroad Carriers and Mass Transportation Protection (H.R. 10: Subtitle III (Secs. 2301-2302) /S. 2845: No similar provision): The subtitle merges the existing train wrecking proscription and the ban on terrorists attacks on mass transit apply uniformly the higher sentencing and jurisdictional levels.

Prevention of terrorist Access to Destructive Weapons (H.R. 10: Subtitle III (Secs. 2401-2411/S. 2845: No similar provisions): Subtitle III consists of eight substantive sections. Four in the form of new crimes increase the penalties and jurisdictional reach of existing proscriptions relating to the production, traffic in, and use as weapons of anti-aircraft missiles, atomic weapons, radiological dispersal devices, and variola (smallpox) virus. In each instance, the crimes are punishable by death or life imprisonment if death results from the commission of the offense; by imprisonment for life if the offense involves use, attempts to use, conspiracy to use, or a threat to use such weapons; by imprisonment for not less than 30 years in all other instances; and by a fine of not more than \$2 million in all cases. In each instance the subtitle creates federal jurisdiction over the offense when it occurs in or affects interstate or foreign commerce, when it is committed by or against an American overseas, or when it is committed against federal property no matter where the property is located. The subtitle then adds these four new crimes to the wiretapping and money laundering predicate offense lists, to the list of federal crimes of terrorism, and to export license screening list.

Terrorist Penalties Enhancement (H.R. 10: Subtitle III (Secs. 2501-2503)/S. 2845: No similar provisions): The subtitle provides capital punishment as a sanction for those existing death-causing terrorist offenses that do not already carry the death penalty. It also denies convicted terrorists the benefits of certain federal programs and makes commission of a terrorist offense an aggravating factor for capital punishment purposes. Finally, it makes 1994 capital punishment procedures retroactively available to cases of air piracy committed after establishment of earlier, now-repealed air piracy capital punishment procedures.

Pretrial Detention and Postrelease Supervision of Terrorists (H.R. 10: Subtitle III (Secs.2601-2603)/S. 2845: No similar provisions): The subtitle calls for preventive

detention of accused terrorists upon certification of the Attorney General, and for life long supervision of terrorists released from prison.

Bringing in and Harboring Certain Aliens (H.R. 10: Sec. 3041/S. 2845: No similar provision): Section 274(a) of the Immigration and Nationality Act sets forth an array of penalties for smuggling aliens. Section 3041 increases the generally applicable maximum penalty from five years to 10 years when the offense is part of an ongoing commercial enterprise, when it involves smuggling groups of 10 or more aliens, when the manner of smuggling endangers the aliens' lives, or when smuggled aliens represent a life-threatening health risk.

Increase in Penalties for Fraud and Related Activity (H.R. 10: Sec. 3085/S. 2845: No similar provision): Existing federal law bans the use of fraud and other forms of deception in relation to various forms of identification. Section 3085 amends the law relating to fraud in connection with identification documents and the like to increase the penalties for violation of the section and to extend the statute's jurisdictional reach. The penalties for the production or transfer of fraudulent identification documents or "authenticating features" made to appear to be those of a state, local or foreign government are increased from imprisonment for three years to imprisonment for 15 years; for violations committed in furtherance of drug trafficking or crimes of violence or committed by repeat offenders the increase is from 20 to 25 years; for violations in furtherance of international terrorism from 25 to 30 years; and for any other violation involving the production, transfer or use of a fraudulent means of identification, identification document, or authentication feature from three years to six years. Where jurisdiction over the offense now rests on the fact that the fraudulent document or authentication feature purports to be one issued under the authority of the United States, section 3085 extends that reach to documents or authentication features purporting to be those of the United States, a state, local, foreign, or international government or of an international quasi-governmental organization.

Criminal Penalty for False Claim to Citizenship (H.R. 10: Sec. 3086/S. 2845: No similar provision): Existing federal law penalizes various false statements relating to naturalization, citizenship or alien registry. Section 3086 adds the offense of making a false claim of U.S. citizenship in order to enter or remain in this country and punishes the offense by imprisonment for not more than five years.

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