THE COMPREHENSIVE TERRORISM PREVENTION ACT OF 1995

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Table of Contents

I. Introduction

On April 19, 1995, at approximately 9 a.m., the United States of America was changed forever.[1] A van placed outside the Alfred P. Murrah Federal building in Oklahoma City exploded, destroy-

* B.A., Criminal Justice, University of Maryland; J.D., Seton Hall University School of Law, anticipated 1997. The author would like to dedicate this note to his parents, Robert H. and Marilyn A.

1 David Johnston, *At Least 31 Are Dead, Scores Are Missing After Car Bomb Attack in Oklahoma City Wrecks 9-Story Federal Office Building: Clues Are Lacking -U.S. Officials Scurry for Answers - Reno to Ask for the Death Penalty*, N.Y. TIMES, Apr. 20, 1995, at A1. The day after the bombing, those responsible were yet to be ascertained. *Id.* As the bodies were still being pulled from the rubble, the search for the bombers began in earnest. *Id.* Immediately following the bombing, President Clinton, referring to the bombers as "killers," stated in a White House press conference, that he promised to track down the "evil cowards" that were responsible for the bombing. *Id.* Attorney General Janet Reno, also speaking on the day of the bombing, reported that the casualty figures from the scene were still climbing and of the 550 people working in the building 300 were still unaccounted for. *Id.*

ing the building, and killing 167 of the people inside, including nineteen children under the age of six.[2] Initially, because the majority of Americans vividly remembered the images of other recent international terrorist attacks, such as the bombing of both Pan Am flight 103 and the World Trade Center, foreign agents were assumed to be responsible.[3] This assumption was not unique to the American people, the scenario conveyed by the many news reports reminded terrorist experts throughout the world of recent attacks they had faced as a result of international terrorist organizations.[4]

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2 141 CONG. REC. S7672 (daily ed. June 5, 1995) (listing the names and ages of the Oklahoma City bombing victims). Senator Bill Bradley (D-N.J.) commented that "[t]he Oklahoma City bombing brought into sharp focus the reality and horror of domestic terrorism in America. The death toll of the bombing now stands at 167, making it the deadliest mass murder in the history of the United States." 141 CONG. REC. S7851 (daily ed. June 7, 1995) (statement of Sen. Bradley).

3 Johnston, *supra* note 1, at B8. Initial news reports speculated that those responsible for the bombing were members of high profile foreign terrorist groups.

> Several news organizations, including CNN, reported that investigators were seeking to question several men, described as being Middle Eastern in appearance, who had driven away from the building shortly before the blast. There were also reports that the authorities had interviewed employees at a National Car Rental office in Dallas about a recently leased truck. But Federal officials . . . could not confirm those reports. Indeed, investigators said they did not know whether the bombers were domestic or international terrorists.

Id. See also Jonathan Alter, *Jumping to Conclusions*, NEWSWEEK, May 1, 1995, at 55. After the American people realized the attack was not international, but from within, the prevailing feelings of many Americans could be summarized as follows:

> Had 'they' been responsible, as so many suspected, the grief and anger could have been channeled against a fixed enemy, uniting the country as only an external threat can do. We might have ended up in war, but what a cathartic war it would have been! Or so it felt, in brief spazams of outrage, to more Americans than would care to admit it. And if we couldn't identify a country to bomb, at least we could have the comfort of knowing that the depravity of the crime - its subhuman quality - was the product of another culture unfathomably different from our own.

Id.; See also Joseph B. Treaster, *The Tools of a Terrorist: Everywhere for Anyone*, N.Y. TIMES, Apr. 20, 1995, at B9. Mr. Treaster, citing terrorism expert Neil C. Livingstone, theorized that Oklahoma City was selected for this bombing because of the "greater vigilance against terrorism in cities like New York, Washington, and Los Angeles. As we make it tougher for terrorists in New York and Washington, . . . the terrorists are forced to go out and look for softer targets in places like Lincoln, Neb.; Boise, Idaho; and Oklahoma City." *Id.*

4 141 CONG. REC. S7485 (daily ed. May 25, 1995) (statement of Sen. Biden). One such expert was General Sir Michael Rose, a British general with extensive experience dealing with international terrorist organizations such as the IRA. *Id.* On April 19, 1995, Senator Joe Biden, D-Del., stated that as he was watching the reports unfold on

Pan Am flight 103,[5] the World Trade Center bombing,[6] and now the Oklahoma City tragedy have caused irreparable harm to the psyche of all Americans.[7] The intrusive levels of security needed to combat the fear of terroristic attacks is something that the majority of Americans are not accustomed.[8]

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television with "General Rose, [the] British general, turned to me and said, 'That's a fertilizer bomb.'" *Id.* General Rose detailed that the British solved their problem with the IRA's use of fertilizer bombs by: "reduc[ing] the amount of nitrogen in the fertilizer and [by] add[ing] a requirement to fertilizer . . . to make it impossible . . . [to] be used to blow up something." *Id.*

[5] *See* Barbara Toman, ET AL., *British Say Bomb Caused Pan Am Crash; U.S. Vows to Increase Airport Security*, WALL ST. J., Dec. 29, 1988, at A3. The bomb aboard Pan American flight 103 from London to New York killed 259 people on board and 11 residents of Lockerbie. *Id.*

[6] Robert D. McFadden, *Many Are Trapped for Hours In Darkness and Confusion*, N.Y. TIMES, Feb. 27, 1995, at A1. Mr. McFadden described the aftermath of the World Trade Center bombing:

> An explosion apparently caused by a car bomb in an underground garage shook the World Trade Center in lower Manhattan with the force of a small earthquake shortly after noon yesterday [February 26, 1995], collapsing walls and floors, igniting fires and plunging the city's largest building complex into a maelstrom of smoke, darkness and fearful chaos.

Id. The Police said that hundreds were trapped in the dark for seven hours. *Id. See also* N.R. Kleinfield, *First, Darkness, Then Came the Smoke*, N.Y. TIMES, Feb. 27, 1993, at A1, A22. A childrens' gathering was to be held the day of the bombing in an area that was hard hit by the blast:

> In a ballroom of the Vista Hotel, right above what appeared to be the center of the eruption, tables and dressing rooms had been prepared for a children's beauty contest [to be held on the day of the explosion]. There were cracks in the floor. A big piece of the ceiling dangled crazily. Rubble was everywhere. But the children were not yet there.

Id.

[7] *See* Mark Halpern, *What to Do About Terrorism, Really*, WALL ST. J., May 10, 1995, at A14 (commenting on the lasting effect international and domestic terrorism has had on American politics).

[8] *See* 141 CONG. REC. S2502-03 (daily ed. Feb. 10, 1995) (statement of Sen. Biden). Senator Biden stated in reference to the World Trade Center bombing, "[T]he revelation that terror networks are operating in our midst undeniably has its intended effect on our national psyche - it undermines the sense of security of all Americans both at home and abroad." *Id.*

See also Norman Dorsen, *The Need For A New Enlightenment: Lessons in Liberty from the Eighteenth Century*, in THE CONSTITUTION, THE LAW, AND FREEDOM OF EXPRESSION 1789-1987 22, 36 (James Brewer Stuart ed., 1987). Mr. Dorsen further expanded on the psychological damage terrorism has on people: "Terrorism has us in its psychological grip . . . . We feel a loss of control. Order unravels. Institutions lose their self-confidence. Reason itself - the belief that human problems have rational solutions - is under attack." (alteration in original) (citation omitted). *Id.*

Additionally, many Americans would find some of the methods foreign law enforcement agencies use to deter terrorism as brutal and barbaric. *See* William M. Car-

Recent public opinion polls illustrate that the fear of future terroristic activity, from both overseas and domestic sources, has increased considerably since the World Trade Center bombing.[9] This sudden increase can be traced to two reasons: (1) the sophistication of terrorist organizations continues to grow at an alarming rate;[10] and (2) the realization that the Oklahoma City bombers were American citizens has left many Americans feeling particularly vulnerable to future attacks.[11] The problems presented by terrorism are further complicated by the fact that the search for a solution often occurs at the expense of one's own personal liberties and freedom.[12]

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ley, *Keeping Terrorists' Bombs Off Airplanes*, WALL ST. J., July 28, 1989, at B1. Mr. Carley details the ultimate solution for airport security known as the 'Madrid technique.' *Id.* Concerns over booby-trapped electronic devices, rigged to explode if the batteries are removed, has led to tight security measures like the 'Madrid technique.' *Id.* "If a passenger is an unwitting carrier of a bomb . . . he might cheerfully remove the batteries. And if an airline security officer is standing too close, says one carrier's security director, 'I guess they both go up in smoke.' At the airport in Madrid, Spain, a passenger with a suspicious device may be told to take it into a *concrete* room and, while monitored by video cameras, remove the batteries." *Id.* (emphasis added). As of 1989, no United States airlines considered the "Madrid technique." *Id.*

9 Gerald F. Seib, *Terrorism Fear Running Deep, U.S. Poll Says*, WALL ST. J., Apr. 27, 1995, at A4. "Nearly 6 in 10 Americans . . . said they were very concerned that terrorists will commit acts of violence in the U.S., . . . and 33% say they are somewhat concerned." *Id.* This percentage is a marked increase from the survey conducted immediately following the World Trade Center bombing where only 48 percent of Americans said they were concerned about future terrorist attacks in the United States. *Id.*

10 Carley, *supra* note 8. According to the FAA such explosives can "fit inside a candy tin 6 inches high and 8 inches in diameter." *Id.* This reality of modern life has led some foreign carriers to ban "tins of Halawi candy from their flights." *Id.*

11 Seib, supra note 9. "Roughly half of all those surveyed said they think the Oklahoma City bombing won't be an isolated incident but rather the start of a 'major' increase in terrorism in the U.S." *Id. See also* Halpern, *supra* note 7 (criticizing the Clinton administration's ability to cope with terrorism).

12 *See, e.g.*, Joseph D. McNamara, *Bombs and the Bill of Rights*, WALL ST. J., May 5, 1995, at A14. Mr. McNamara commented:

> If terrorism increases here, it will be necessary to take additional precautions to protect the nation. However, the most reliable way to prevent terrorism is by conducting government in a manner that wins the public's trust and destroys the appeal of the lunatic fringe. It would be ironic if anti-terrorist legislation helped destroy the protections of our Constitution and turned the delusions of the paranoids into reality.

Id.

See also 141 CONG. REC. S7479 (daily ed. May 25, 1995) (statement of Sen. Hatch). Senator Hatch stated that a very delicate balance needed to be obtained in the fight against terrorism in the United States:

On June 7, 1995, in response to the threat terrorism represents, and the Catch-22[13] its solutions create, the Senate passed the Comprehensive Terrorism Prevention Act of 1995 ("S. 735")[14] Debate spanned only four days and S. 735 passed the Senate with wide bipartisan support.[15] Support for S. 735 ranged from Senate majority leader Bob Dole (R-Kan.),[16] to President Clinton.[17] The bipartisanship is further demonstrated by the fact that the Republican controlled Senate adopted eleven of the twelve amendments offered by the Democrats.[18] However, before the debate con-

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> We must . . . remember that our response to terrorism carries with it the grave risk of impinging on the rights of free speech, assembly, petition for the redress of grievances, and the right to keep and bear arms. We cannot allow this to happen. It would be a *cruel irony* if, in response to the acts of evil and misguided men hostile to our Government, we stifled true debate on the proper role of Government.

Id. (emphasis added).

13 JOSEPH HELLER, CATCH-22 (1955). A Catch-22 is defined as: "a legal loophole that means just when you're sure you've won . . . you lose!" *Id.*

14 S. 735, 104th Cong., 1st Sess. (1995) [hereinafter S. 735]. S. 735 easily passed the Senate by a vote of 91 to 8 with 1 abstention. 141 CONG. REC. S. 7857 (daily ed. June 7, 1995) (Rollcall Vote Number 242).

15 *See* Joe Davidson, *Senate Approves Anti-terrorism Legislation, 91-8*, WALL ST. J., June 9, 1995, at B9.

16 *Id.* Senator Dole declared that "[w]e can look back on this legislation . . . and say we produced a good product that will not trample on anyone's constitutional rights." *Id.* Senator Biden further remarked: "[S. 735] is a big step forward in giving law enforcement new tools to fight and prevent terrorism. I urge my colleagues to support the bill." 141 CONG. REC. S7856-57 (daily ed. June 7, 1995) (statement of Sen. Biden).

17 Holly Idelson, *Senate Passes Bipartisan Bill To Combat* Terrorism, 53 CONG. Q. 1643 (June 10, 1995) [hereinafter Idelson, *Senate*]. Referring to Oklahoma City, President Clinton said that "[S. 735] will give law enforcement the tools it needs to prevent this kind of tragedy." *Id.*

18 141 CONG. REC. S7856 (daily ed. June 7, 1995) (statement of Sen. Biden). Senator Biden stated that the following democratic amendments were passed: (1) the Liebermann amendment, expanding the wiretap authority of law enforcement officers, by allowing federal authorities to use multiple-point wiretaps; (2) the Feinstein amendment, which allowed the Secretary of the Treasury to require explosives to contain taggants, a means by which authorities can trace the origin of an explosive; (3) the Nunn-Thurmond-Biden-Warner amendment, giving new assistance to authorities in their fight against chemical and biological weapons; (4) the Kerry amendment, increasing the funding by $262 million for Federal antiterrorist enforcement, including new explosives investigators and new Secret Service initiatives; (5) the Boxer amendment, increasing the penalties for crimes that involves guns or explosives; (6) a Levin amendment, increasing the penalties that could be given to a person using explosives; (7) a second Feinstein amendment, prohibiting the distribution of any bombmaking material that was intended to be used in the commission of a crime; (8) a Leahy amendment, providing compensation and assistance to victims of terrorist

cluded, Senator Dole took the opportunity to admonish the Democrats for delaying the process, and even threatened to remove S. 735 from consideration.[19] The only serious opposition to S. 735 was the civil libertarians, who believed this bill would infringe on our Constitutional rights.[20] On June 20, 1995, H.R. 1710, a bill that parallels S. 735, was approved by the House Judiciary Committee and now awaits presentation to the full House.[21]

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attacks; (9) the Leahy-McCain amendment, increasing the special assessment of criminal penalties; (10) the Specter-Simon-Kennedy amendment, allowing the deportation of aliens who commit crimes, and enhanced protection of classified information when an alien terrorist is deported; and (11) a third Feinstein amendment, increasing international efforts against terrorism, by prohibiting the sales of arms to countries who refuse to fully cooperate with U.S. antiterrorist efforts. *Id.* The only amendment proposed by the Democratic Senators that was not adopted was a fourth Feinstein amendment which was designed to give law enforcement authorities "emergency wiretaps" when investigating terrorist activities. *Id.* Congress had already allowed such "emergency wiretaps" for officials investigating organized crime. *Id.*

19 141 CONG. REC. S7657 (daily ed. June 5, 1995) (statement of Sen. Dole). Senator Dole remarked that:

> If we do not complete action by the close of business tomorrow, I will have no other choice but to withdraw the antiterrorism bill and move on to other legislative business. . . . [W]e will find out how many people want this bill, or whether this bill will become a *Christmas tree* where everybody has a political agenda and they want to put it on the antiterrorism bill.

Id. (emphasis added). *See also* Idelson, *Senate*, supra note 17 (Senator Dole accused the Democrats of adding unnecessary amendments, and concluded that the Democrats have "already forgotten what happened in Oklahoma City").

20 141 CONG. REC. S7603 (daily ed. May 26, 1995) (statement of Sen. Biden). Not all of the opposition to S. 735 came from civil libertarians. *Id.* Larry Pratt, Executive Director of Gun Owners of America, urged the Senate to take time to consider the ramifications of anti-terrorism legislation,

> It may well be the Congress, after due consideration, will decide that some changes in federal law are necessary. But this is not an area where legislation should be adopted prior to full consideration of the ramifications of that legislation. I therefore urge you to step back, hold hearings, and take time to consider what, if any, changes in federal law would genuinely address the issue of terrorism, rather than merely serving as a *political placebo.* The country and the Constitution would both be healthier as a result of your efforts.

Id. (emphasis added).

21 Holly Idelson, *Anti-Terrorist Measure Heads to House Floor*, 53 CONG. Q. 1848 (June 24, 1995) [hereinafter Idelson, *Anti-Terrorist*]. "The House Judiciary Committee approved . . . (H.R. 1710) on a 23-12 vote June 20, after four days of complicated and sometimes contentious debate." *Id.* The Chairman of the House Judiciary Committee, Rep. Henry Hyde (R., Ill.), "drafted the House version, which tracks the Senate-passed bill (S. 735) and includes many of Clinton's anti-terrorism proposals." *Id.* For a general overview of the provisions of H.R. 1710 and S. 735 see, *Status of Major Legislation*, 53 CONG. Q. 2112 (July 15, 1995). *See also* Holly Idelson, *Senate, House Bills Compared*, 53 CONG. Q. 1849 (June 24, 1995) [hereinafter Idelson, *Bills Compared*].

This note will discuss the threatening world of terrorism in America. It will briefly examine the Alien and Sedition Acts and the Espionage Act, two acts passed at a time when America faced problems strikingly similar to problems it faces today. It will then examine the legislative history of S. 735 including an in depth analysis of six important provisions of S. 735. The six provisions include: (1) expedited alien removal,[22] (2) use of the military in national emergencies,[23] (3) wiretapping authority,[24] (4) taggants,[25] (5) free speech restrictions,[26] (6) and habeas corpus reform.[27] Finally, salient constitutional issues will be addressed.[28]

II. History of Anti-Terrorism Legislation in America

Early in American history, Congress attempted to balance the need for national security with the newly enacted Bill of Rights.[29] The first attempt occurred in 1978 with the passage of the Alien and Sedition Acts which were designed to deal with the 18th century analog to modern day terrorism.[30] The Sedition Act provided

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22 *See infra* section IV. A.

23 *See infra* section IV. B.

24 *See infra* section IV. C.

25 *See infra* section IV. D.

26 *See infra* section IV. E.

27 *See infra* section IV. F.

28 *See infra* section V.

29 *See infra* note 30.

30 The Alien Act June 25, 1798, 1 Stat. 570; The Alien Act of July 6, 1798, 1 Stat. 577 [hereinafter Alien Acts]. *See also* The Sedition Act of July 14, 1798, 1 Stat. 596. Surprisingly, many of the provisions of the Alien and Sedition Acts are similar to the provisions of S. 735, compare section one of the Sedition Act:

> persons [who] shall unlawfully combine or conspire together, with intent to oppose any measure or measures of the government of the United States, which are or shall be directed by proper authority, or to impede the operation of any law of the United States, or to intimidate or prevent any person holding a place or office in or under the government of the United States, from undertaking, performing or executing his trust or duty . . . .

Sedition Act § 1, with Section 1114 of S. 735 which states:

> Whoever kills or attempts to kill a current or former employee of the United States or its instrumentalities, or an immediate family member of such officer or employee, or any person assisting such officer or employee in the performance of official duties, during or on account of the performance of such duties . . . .

S. 735 at § 1114.

The critical difference, illustrated above, is that unlike the Sedition Act of July 14, 1798, S. 735 is focused directly at murder or attempted murder of employees of the

penalties which ranged from six months imprisonment[31] to an indefinite prison term that was to be determined by the President.[32] However, the Alien and Sedition Acts were not used to combat terrorism, but were primarily used to persecute detractors of the political party in power.[33]

The second attempt Congress made to reach this delicate balance occurred on June 1, 1917 when the sixty-fifth Congress passed the Espionage Act.[34] The period leading up to the outbreak of World War I and the passage of the Espionage Act presented the United Stated with many unforeseen problems with respect to ter-

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United States and eliminates amorphous language dealing with impeding such employees. 141 CONG. REC. S7873 (daily ed. June 7, 1995). In this regard, it is less likely to be abused in the manner the Sedition Act was. *Id.*

For an in depth commentary, *see generally* David M. Rabban, *The First Amendment in Its Forgotten Years*, 90 YALE L.J. 514 (1981) (Analyzing free speech in America between the American Revolution and World War I).

31 Sedition Act, *supra* note 30, at § 1. Punishment for violation of Section 1 of the Sedition Act was set at "a fine not exceeding five thousand dollars, and by imprisonment during a term of not less than six months nor exceeding five years . . . ." *Id.* Seditious libel carried a penalty of "a fine not exceeding two thousand dollars, and by imprisonment not exceeding two years." *Id.* at § 2.

32 Alien Acts, *supra* note 30 at § 2. Section 2 of the Alien Act of June 25, 1798 was as follows:

> if any alien so removed or sent out of the United States by the President shall voluntarily return thereto, unless by permission of the President of the United States, such alien on conviction thereof, shall be imprisoned so long as, in the opinion of the President, the public safety may require.

Id.

The standard used to determine if an alien was "dangerous to the peace and safety of the United States," and therefore subject to the Alien Acts, was set at the discretion of the President. *Id.* § 1. In addition, "After the President had established such regulations as he deemed necessary in relation to alien enemies, it was not necessary to call in the aid of the judicial authority, on all occasions, to enforce them; and the marshall may act without such authority." *Id.*

33 Dorsen, *supra* note 8, at 28. Justice William O. Douglas offered the following examples of politically motivated use of the Alien and Sedition Acts:

> Matthew Lyon of Vermont was fined and imprisoned for criticizing President Adams and condemning his policies toward France. Thomas Cooper was fined and imprisoned for criticizing Adams for delivering an American citizen to the British Navy for courtmartial. . . . James T. Calendar of Virginia was fined and imprisoned for [writing] "Take your choice, then, between Adams, war and beggary, and Jefferson, peace and competency.

Id. (quoting William O. Douglas, *The Society of the Dialogue*, in HUMANISTIC EDUCATION AND WESTERN CIVILIZATION 44, 48 (Arthur A. Cohen ed., 1964).

34 Espionage Act of June 15, 1917, Pub. L. No. 24, ch. 30, 40 Stat. 217 (1917).

rorism.[35] In an effort to meet the demands of the day, while preserving constitutional rights, the Espionage Act provided penalties for the following activities: participating in a conspiracy,[36] violently interfering with foreign commerce,[37] and counterfeiting.[38] The Espionage Act also set forth the requirements a law enforcement officer needed to meet in order to obtain a search warrant.[39] Despite the many First Amendment challenges to the Act, the Supreme Court interpreted the internal security benefits to be more significant than the First Amendment free speech concerns.[40] Justice

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35 Rabban, *supra* note 30, at 519. Rabban sets forth the following events that americans were not prepared for:

> During the generation that preceded World War One, the consequences of industrialization led to substantial social unrest and radical activity. The industrial violence associated with the Homestead and Pullman strikes in the 1890's, the fear of anarchists generated by the Haymarket riot of 1886 and revived by the assassination of President McKinley in 1901, the nativist response to mass immigration, and the notoriety of the IWW and Emma Goldman in the early 1900s are among the best known examples.

Id.

36 Espionage Act, *supra* note 30, at tit. 1, § 4 (this section states that the Espionage Act applies to both individuals and conspiracies). *See also* title three, section 1 of the Espionage Act:

> Whoever shall set fire to vessels of foreign registry, or any vessel of American registry entitled to engage in commerce with foreign nations . . . or shall place bombs or explosives in or upon such vessel . . .or whoever shall attempt or *conspire* to do any such acts with . . . shall be fined not more than $10,000 or imprisoned not more than twenty years or both.

Id. at tit. 3 § 1 (emphasis added).

37 *See id.* at tit. 4, § 1. Title four, section one of the Espionage Act states:

> Whoever, with intent to prevent, interfere with, or obstruct, or attempt to prevent, interfere with, or obstruct the exportation to foreign countries of articles from the United States shall injure or destroy, by fire or explosives, such articles or the places where they may be while in such foreign commerce shall be fined not more than $10,000, or imprisoned not more than ten years, or both.

Id.

38 *Id.* at tit. 5, § 2 (this section states that any person who posses, makes or assists in the making of a counterfeit seal of the United States is subject to a fine or imprisonment, or both).

39 *Id.* at tit. 11, § 3. Section three of title eleven states, "A search warrant can not be issued but upon probable cause, supported by affidavit, naming or describing the person and particularly describing the property and the place to be searched." *Id.* at § 3.

40 *See, e.g.*, Frohwerk v. United States, 249 U.S. 204 (1918); Schenk v. United States, 250 U.S. 47 (1919); and Abrams et al. v. United States, 250 U.S. 616 (1919) (upholding the Espionage Act of 1917 over First Amendment challenges to the Act on free speech grounds).

Holmes, however, was wary of an expansive interpretation, and argued the Act should be strictly read.[41]

III. Legislative History of (S. 735)

A. *The Clinton Plan*

On February 10, 1995, two months prior to the tragedy in Oklahoma City, Senator Joe Biden (D-Del.) introduced the Omnibus Counterterrorism Act of 1995.[42] President Clinton intended this Act to prevent international terrorist attacks such as the bombing of the World Trade Center in 1993.[43] This bill was essentially

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41 *Abrams*, 250 U.S. at 624 (Holmes, J., dissenting). Justice Holmes viewed the Court's expansive interpretation of the Espionage Act of 1917 as against the dictates of the First Amendment stating, "It seems to me that this statute [Espionage Act] must be taken to use its words in a strict and accurate sense. They would be absurd in any other way." *Id.* at 627.

42 141 CONG. REC. S2502 (daily ed. Feb. 10, 1995). *See also* Holly Idelson, *Details of Anti-Terrorism Proposals*, 53 CONG. Q. 1178 (Apr. 29, 1995) [hereinafter Idelson, *Details*]. Ms. Idelson stated, "Terrorism was on the national agenda even before the April 19 bombing in Oklahoma City, but the 'to do' list has lengthened in the days since the attack." *Id.* Prior to the Oklahoma City bombing the Clinton administration had introduced the Omnibus Counterterrorism Act of 1995 (H.R. 896 and S. 390). *Id.* This bill arose out of the World Trade Center bombing in 1993, and focused on the danger presented by international terrorists. *Id.*

43 Idelson, *Details*, *supra* note 42. "The starting point was the Clinton administration's Ominbus Counterterrorism Act of 1995 (HR 896; S 390), which grew out of recommendations after the 1993 World Trade Center bombing. It focuses on the threat from international terrorism." *See also* 141 CONG. REC. S2502 (daily ed. Feb. 10, 1995) (statement of Sen. Biden). Senator Biden stated during the introduction of S. 735,

> Two days ago, Ahmed Ramzi Yousef the alleged mastermind of New York's World Trade Center bombing [two] years ago was arrested and extradited from Pakistan. Explosives and United and Delta Airlines timetables were recovered from his hotel room in Pakistan.
>
> Even as legal proceedings now begin against him, 11 other men are on trial in Federal court in New York City for conspiracy to commit several heineous acts of terrorism in and around Manhattan - including the World Trade Center bombing. These incidents demonstrate that the United States and its citizens continue to be the focus of extremists who are willing and able to use violence to advance their cause. The damage this terrorism causes extends beyond the tragic loss of life and damage of the World Trade Center bombing.

Id.

James McKinley further explained the involvement Eyad Ismoil and Mr. Yousef had in the World Trade Center bombing,

> Mr. Ismoil and Mr. Yousef parked the van and lighted a 12-minute fuse that was lying on the floor between the front seats, Federal law enforcement officials said. They leaped out of the van and jumped into another

designed to increase the ability of federal law enforcement agencies to discover and prevent terroristic acts before they occur.[44]

On April 26, 1995, one week after federal authorities arrested

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car, driven by a companion. But as they tried to pull out of the garage, the entrance was blocked by a truck for five minutes. "They were just sitting there, sweating themselves," one official said. The men did escape, but the bomb in the parking garage killed 6 people, injured more than 1,000 and shook America's sense of immunity from foreign terrorism.

See, James C. McKinley, Jr., *Suspect is Said to Be Longtime Friend of Bombing Mastermind,* N.Y. TIMES, Aug. 4, 1995, at B1.

Mr. McKinley continued to explain that six months prior to Ismoil's arrest in August of 1995, federal officials had located his whereabouts. *Id.* at B5. Even though Ismiol's whereabouts where known, federal officials said that he could not be arrested until the United States and King Hussein of Jordan signed an extradition treaty. *Id.* One suspect, Abdul Rahman Yasmin, remains a fugitive and is believed to be living in Iraq. *Id.*

To date, twenty men have been arrested in connection with the World Trade Center bombing. James C. McKinley, Jr., *Bomb Plot, Chapter 3: Trying to Illuminate a Devastating Blast,* N.Y. TIMES, Oct. 3, 1995, at B1. Of the twenty, eighteen have already been convicted: four pled guilty; four were convicted last year; and ten, including Sheik Omar Abdul Rahman, were convicted on October 1, 1995 of conspiracy to carry out a terrorism campaign throughout New York City. *Id.* Next spring, the two remaining suspects, Ramzi Ahmed Yousef and Eyad Ismoil, will stand trial in federal court in Manhattan. *Id.* Prosecutors believe that Yousef was the mastermind of the bombing and that without his knowledge of chemistry and physics, the remaining bombers could not have carried out their plans. *Id.* at B5. Although not considered to be an expert terrorist, Mr. Ismoil's fingerprints were found all over the Jersey City apartment where the explosives were mixed, and is charged with helping Yousef deliver the explosives. *Id.*

For more on the World Trade Center bombing defendants, *see* United States v. El-Gabrowny, 876 F. Supp. 495 (S.D.N.Y. 1994) (denying defendant's motion to suppress evidence taken at the time of his arrest because the evidence would have been inevitably discovered after a valid inventory search), and United States v. Rahman, 854 F. Supp. 254 (S.D.N.Y. 1994) (holding that defendants' motion to strike references to prior murders as prejudicial, and to sever counts for a separate trial was denied in part and granted in part).

44 Idelson, *Details, supra* note 42. The original Clinton bill created a new federal crime - international terrorism. *Id.* In order to prevent this new federal crime, the bill's provisions were designed to broaden federal jurisdiction over terrorist related offenses. *Id.* Federal authorities were to be given the authority to obtain a court authorized "roving wiretap." *Id.* Thus, allowing the wiretap to follow a suspect instead of being fixed to a telephone. *Id.* Additionally, the Clinton plan would make it easier for federal immigration authorities to deport aliens who were linked to any terrorist activities. *Id.* The plan would also give the President the authority to designate individual foreign entities as "terrorist" organizations, thus prohibiting any United States citizen from contributing to these groups. *Id.* Finally, President Clinton's original bill would implement an international treaty requiring manufacturers of plastic explosives to place a "taggant" on their explosives. *Id.* This "taggant" would help law enforcement authorities find the origin of a plastic explosive. *Id.*

Timothy McVeigh, the alleged Oklahoma City bomber,[45] President Clinton introduced his second plan to combat terrorism in the United States.[46] The President's expanded version was embodied in a series of amendments known as the Antiterrorism Amendments Act of 1995.[47] This Act was combined with S. 390, creating S. 761, which was presented to the Senate for consideration on May 3, 1995.[48] The President's amended anti-terrorism bill (S. 761) focused more attention on an aspect of terrorism that was largely ignored by the original bill,[49] the potential threat of domestic terrorism.[50] The entire counterterrorism bill is estimated by Presi-

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45 Evan Thomas ET AL., *Cleverness - And Luck*, NEWSWEEK, May 1, 1995, at 30.

> Tim McVeigh was tooling along I-35, about 60 miles north of Oklahoma City last wednesday morning, [the morning of April 19, 1995] when a state trooper pulled him over because McVeigh's yellow 1977 Mercury Marquis didn't have any license tags. As trooper Charlie Hanger looked in McVeigh's window, he noticed a bulge under the young man's jacket. Reaching into McVeigh's coat, he pulled out a handgun - a Glock 9-mm semiautomatic, loaded with Black Talon 'cop killer' bullets. "What's going on here?" asked McVeigh. The young man, dressed in black pants and combat boots, seemed perfectly calm. "You don't have to worry about it," he told the trooper.

Id.

46 Holly Idelson, *Plans To Expand Police Powers Follow in Bombing's Wake*, 53 CONG. Q. 1177 (Apr. 29, 1995) [hereinafter Idelson, *Police Powers*]. "Clinton led the charge, proposing a dramatic new commitment of money and police powers to combat terrorist threats." *Id.*

47 *Oklahoma City Supplemental Appropriations: Hearings on S. 735 Before the Subcomm. on Commerce, Justice, and State, the Judiciary, and Related Agencies of the Senate Appropriations Comm.*, 104th Cong. 1st Sess. (1995) (testimony of Janet Reno), *available in* WESTLAW, 1995 WL 283325 (F.D.C.H.) [hereinafter *Subcomm. Hearings*] (on file with the *Seton Hall Legislative Journal*).

48 *Id.*

49 141 CONG. REC. S2504 (daily ed. Feb. 10, 1995) (statement of Sen. Biden). Under section 3 of S. 390, Findings and Purposes, the President's original bill was strictly concerned with international terrorism. *Id.* Subsection 23 of section three, delineates 24 terrorist bombings, kidnappings, and other murders perpetrated by international terrorists against the United States. *Id.* A partial list of the above terrorist acts is as follows: (1) the 1983 bombing of the Marine Corps barracks in Lebanon; (2) the hijacking of TWA flight 847 and murder of a U.S. Navy diver; (3) the 1985 murder of an American tourist on the Achille Lauro cruise liner; (4) the 1986 hijacking of Pan Am flight 73 in Karachi, Pakistan resulting in the murder of two Americans; (5) the 1988 bombing of Pan Am flight 103 that killed 270; (6) the murder of a United States Marine Corps officer assigned to a United Nations peacekeeping force in Lebanon; (7) the 1993 bombing of the World Trade Center and the accompanying conspiracy to destroy government buildings and landmarks; and (8) numerous terrorist acts in Northern Ireland over the past decade. *Id.*

50 *See* Idelson, *Details*, *supra* note 42, at 1178. President Clinton intended to combat domestic terrorism by the following means: (1) hire 1,000 new federal law en-

dent Clinton to cost $1.5 billion over five years.[51]

Critics of the expanded Clinton bill say that it is a perfect example of the expression 'bad facts make bad law.'[52] However, in an effort to maintain bipartisan support,[53] the Clinton bill left FBI regulations pertaining to investigations of domestic terrorism untouched.[54] The final Clinton anti-terrorism initiative received overall approval from the Speaker of the House, Newt Gingrich (R-Ga.).[55]

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forcement authorities to track potential terrorist activities; (2) create a new FBI agency called the center on counterterrorism; (3) provide the FBI with greater access to certain consumer credit records; (4) broaden the federal wiretap authority, including allowing surveillance information that was improperly obtained to be used in the federal courts as long as the authorities acted in good faith; (5) permit the military to participate in any case that involves biological or chemical weapons; (6) require manufactures of explosives to add a tracing agent known as a taggant, thus allowing the streamlined determination of the source of an explosive; and (7) require mandatory minimum prison sentences for the transfer of any firearm or explosive by a person that has knowledge it will be used to commit a violent crime. *Id.*

See also Rick Wartzman and Viveca Novak, *Clinton Unveils Plan to Combat Terrorist Acts*, WALL ST. J., Apr. 27, 1995, at A3. "Deputy Attorney General Jamie Gorelick said that these hires, along with a new interagency domestic counter-terrorism center, are the 'two most important things we can do to address the kind of tragic event that we had in Oklahoma City, and to prevent similar occurrences in the future." *Id.*

51 Wartzman, *supra* note 50. The $1.5 billion price tag includes the cost of investigating the Oklahoma City tragedy. *Id.* Clinton Administration officials conceded that it was uncertain how funding would be obtained. *Id.*

52 *Id.* "James X. Dempsey of the Center for National Security Studies [said that] 'This is the worst possible scenario from a civil-liberties standpoint. They're taking a specific crisis and using it for an unrelated expansion of government power.'" *Id. See also* Idelson, *Police Powers, supra* note 46, at 1180; Holly Idelson, *Complaints Slow Panel Action On Anti-Terrorism Bill*, 53 CONG. Q. 1750 (June 17, 1995) [hereinafter Idelson, *Complaints*].

53 Wartzman, *supra* note 50, at A16. Expressing reluctance at changing any of the existing FBI guidelines, Deputy Attorney General Jamie Gorelick said, "the administration is still actively reviewing the guidelines for possible changes, but that it would take any alterations 'very, very seriously.'" *Id.*

54 *Id.* FBI regulations "require a 'reasonable indication' of criminal activity to launch a full-blown domestic-terrorism investigation." *Id.*

55 *Id.* Rick Wartzman reported that after a meeting with the president,

> Mr. Gingrich said he was confident that legislation could emerge that 'protects our civil liberties, but also protects us.' He and others said the exact cost and dimensions of the package would have to be studied, but 'we are prepared to do whatever is necessary' to pass legislation giving the government more tools to battle terrorism.

Id. See also Idelson, *Police Powers, supra* note 46, at 1177. President Clinton said, "We cannot allow our entire country to be subjected to the horror that the people of Oklahoma City have endured . . . [W]e must do everything we can to prevent it." *Id.*

B. *Introduction of S. 735*

On April 27, 1995, one day after the Clinton plan was introduced, Senators Bob Dole (R-Kan) and Orrin Hatch (R-Utah) introduced their own anti-terrorism legislation (S. 735).[56] Although S. 735 mirrors the Clinton plan, it still contains notable differences.[57] Similarities between the two include increased power to the FBI for access to credit records,[58] and streamlined alien deportation procedures.[59] Beyond the limited amount of overlap, S. 735 has provisions that would deny visas to those who have links to terrorist organizations,[60] deny foreign aid to governments that sponsor terrorism,[61] enhance the pre-emptive striking power of law enforcement to stop terrorist violence before it happens,[62] and reform habeas corpus.[63] The cost of the Senate initiative is $1.8 billion spread out over five years.[64] President Clinton and many members of the Senate pledged to support S. 735.[65]

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56 Idelson, *Details*, *supra* note 42.

57 *Id.* Although generally similar to the President's bill, some of the provisions of S. 735's go further than the expanded Clinton bill. *Id.*

58 *Id.*

59 *Id.*

60 *Id.*; *see also* 141 CONG. REC. S7479 (daily ed. May 25, 1995) (statement of Sen. Hatch). Senator Hatch said during the debate on the floor of the Senate, "Our bill provides a constitutional mechanism to the Government to deport aliens suspected of engaging in terrorist activity without divulging our national security secrets." *Id.*

61 *Id.* Senator Hatch further stated, "It gives the President enhanced tools to use his foreign policy powers to combat terrorism overseas, and it gives those of our citizens harmed by terrorist acts of outlaw states the right to sue their attackers in our own courts of law." *Id.*

62 *Id.* "This legislation increases the penalties for acts of foreign and domestic terrorism, including the use of weapons of mass destruction, attacks on officials and employees of the United States, and conspiracy to commit terrorist acts." *See also* Idelson, *Details*, *supra* note 42.

63 *Id.* For additional commentary on the additional provisions of S. 735 see Idelson, *Details*, *supra* note 42.

64 S. 735, *supra* note 14, at tit. V, subtit. C, § 521(b). The appropriations for the FBI under S. 735 are as follows:

(1) $300,000,000 for fiscal year 1996;
(2) $225,000,000 for fiscal year 1997;
(3) $328,000,000 for fiscal year 1998;
(4) $190,000,000 for fiscal year 1999; and
(5) $183,000,000 for fiscal year 2000.

Id.

65 Idelson, *Police Powers*, *supra* note 46. "President Clinton and [C]ongressional leaders have pledged swift and bipartisan cooperation on a package of anti-terrorism initiatives, with several predicting they can complete work on a bill by Memorial Day." *Id.* *See also* 141 CONG. REC. S7487 (daily ed. May 25, 1995) (statement of Sen. Biden).

The promised cooperation paid off and on April 25, 1995 with a unanimous Senate resolution condemning the Oklahoma City bombing and declaring the intention of the Senate to quickly promulgate tough legislation on terrorism.[66] These same sentiments were echoed on May 25, 1995, the day S. 735 was introduced in the Senate for debate.[67] Senator Joe Biden (D-Del.), the ranking minority member of the Senate Committee on the Judiciary, agreed that the United States must advance a united front on terrorism.[68] Dianne Feinstein (D-Calif), minority member of the Judiciary Committee, was even more adamant about the necessity of showing the world our condemnation of violent acts of terrorism.[69]

The expressions of Congressional solidarity on the Oklahoma

Early in the debate Senator Biden expressed his belief that partisan politics would not bog down passage of S. 735,

> I believe we can enter into a time agreement on most of the amendments that we will have and hopefully we can move quickly, after the recess, to finish and complete this bill. Because, as I understand the majority leader, he is looking for a couple of amendments to be brought up tomorrow . . . which we are ready to do. We will give time agreements on those amendments and then we will move back to the bill when we come back. Again, I thank my Republican colleague, the chairman of the committee, for the areas in which we have cooperated. I look forward to vigorous debate on those areas where we do not agree. But ultimately, we will produce a bill.

Id.

66 Idelson, *Police Powers*, *supra* note 46, at 1180. The vote was 97-0. *Id.*

67 141 CONG. REC. S7483 (daily ed. May 25, 1995) (statement of Sen. Hatch). Senator Hatch stated:

> The people of the United States and around the world must know that terrorism is an issue that transcends political parties. Our resolve in this matter must be clear: Our response to the terrorist threat and to acts of terrorism, will be certain, swift, and unified . . . [w]e must now redouble our efforts to combat terrorism and to protect our citizens. A worthy first step is the enactment of these sound provisions [(S. 735)] to provide law enforcement with the tools to fight terrorism.

Id.

68 *Id.* at S7484 (statement of Sen. Biden). Senator Biden reinforced the statements of Senator Hatch by stating:

> [T]he Oklahoma City bombing and earlier bombing of the World Trade Center demonstrates clearly that the United States must respond seriously to those, whether foreign or domestic, who kill and seek to make their point through killings and mass killings of Americans. These events demand that we examine our current laws and practices to ensure that we are doing everything that is necessary and appropriate to guard against the threat.

Id.

69 Idelson, *Police Powers*, *supra* note 46, at 1180. Dianne Feinstein stated during the

City bombing, however, have not united the Senate on all issues.[70] Accusations of rushing S. 735 through the Senate were made against the Republicans early in the debate.[71] Additionally, Senator Hatch (R-Utah) expressed his concern with respect to Senator Lieberman's (D-Conn) proposed amendment to expand federal wiretap authority by calling it particularly troubling.[72]

C. *The Senate Committee on the Judiciary*

On May 11, 1995, Attorney General Janet Reno testified before the Senate Committee on Appropriations, and various subcommittees, concerning appropriations for the President's expanded anti-terrorism bill.[73] In the wake of Oklahoma City, the

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debate, "I'm going to vote for everything because I think we need to take an unparalleled step in our society to put an end to this." *Id.*

[70] *Id.* Senator Arlen Specter (R-Pa.) expressed misgivings about the Senate plan to expand federal wiretap authority to use 'roving wiretaps.' *Id.* Sen. Bob Dole (R-Kan.) also expressed concern over the plan to give the military the authority to help clean up in cases where chemical or biological weapons have been used. *Id.*

[71] 141 CONG. REC. S7487 (daily ed. May 25, 1995) (statement of Sen. Biden). Senator Biden pointed out that his concern over quick passage stemmed from the fact that:

> Having received a final version of the bill at only about 6:30 tonight, I have not been able to review it carefully to see whether any of my concerns have already been addressed in the bill - maybe some of the things I have said now have been addressed by this new version - or whether or not additional concerns have been raised by the new bill.

Id.

[72] 141 CONG. REC. S7601 (daily ed. May 26, 1995) (statement of Sen. Hatch). Hatch rose in opposition to the proposed Lieberman amendment No. 1200 as overinclusive and unnecessary:

> Virtually every act of terrorism one can imagine which would require an emergency wiretap - that is, the threat is so immediate that the Government cannot obtain a court order before instituting the wiretap - will certainly also involve an "immediate danger of death or serious physical injury," or "a conspiratorial activity threatening the national interest," as defined in current law. Thus [Senator Lieberman's amendment], expanding the Government's emergency wiretap powers to any conspiratorial activity characteristic of domestic or international terrorism would add little to existing authority. However, the little that it does add or will add is *particularly troubling.*

Id. (emphasis added); *see also infra* note 112.

[73] *Subcomm. Hearings, supra* note 47. Attorney General Reno highlighted President Clinton's promised legislation and urged the committee to appropriate 570 positions and over $71 million for the fiscal year 1995. *Id.* In anticipation of the fiscal year 1996, Reno suggested an amendment to increase personnel to 1000 positions, and a $4 million budget. *Id.*

Attorney General explained that coordination of our counterterrorism agencies would greatly improve our ability to combat terrorism.[74] Citing the need to advance the government's technology, Attorney General Reno testified that increased use of encryption devices by private organizations presents a new kind of national security problem.[75] On May 18, 1995, citing the international impact of recent terrorist attacks, Secretary of State Warren Christopher urged quick passage of the President's bill.[76]

The hearings continued on May 24, 1995, with testimony from James X. Dempsey, the Deputy Director of the Center for National Security Studies.[77] He described the Center for National Security

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[74] *Id.* Attorney General Reno explained to the Appropriations Committee that an information clearinghouse established by the FBI would be available to federal, state, and local law enforcement officials. *Id.* She described how such a system would work. *Id.* The interagency counterterrorism center was created by President Clinton following the bombing. *Id.* Since then, the center has received thousands of leads dealing with the Oklahoma City bombing as well as other matters. *Id.* Reno urged funding to develop the center in order to enable Federal authorities to follow up on these matters and to make counterterrorism resources available to federal, state, and local law enforcement agencies. *Id.* According to Reno, a "center will provide the means by which critical information about terrorism and terrorists can be coordinated and shared among the law enforcement community, and it will substantially enhance the ability of the United States to combat terrorism." *Id.*

[75] *Id.* According to Reno, criminals and terrorists have increasingly used encryption, a method used to protect the communication of sensitive information, to conceal their activity. *Id.* Once used primarily by governments to protect military secrets, these devices are now used privately to evade the detection of criminal and terrorist activity. *Id.* Reno asserted that it was imperative to develop and implement the technology necessary to combat this threat in both state and local law enforcement agencies as well as federal agencies. *Subcomm. Hearings, supra* note 47.

In addition, Reno called for support to advance a "digital telephone initiative" to allow authorities to intercept court ordered communications. *Id.* The initiative requires replacing existing equipment and developing intercept equipment compatible with digital telephony. *Id.*

The expanded version of S. 390 would have asked for an appropriation of $1.6 million for the FBI to develop and acquire the means to effectively address the threat to public safety. *Id.*

[76] *FY 96 Foreign Operations Appropriations, 1995: Hearings Before the Senate Foreign Operations Comm.*, 104th Cong., 1st Sess. (1995) (testimony of Warren Christopher, Secretary of State), *available in* WESTLAW, 1995 WL 311637 (F.D.C.H.) [hereinafter Christopher testimony] (on file with the *Seton Hall Legislative Bureau*) Citing the World Trade Center bombing and the Oklahoma City bombing, Warren Christopher noted the "ruthlessness of terrorists and the frightening ease with which they can obtain destructive technology," and urged congressional passage of the President's Omnibus Counterterrorism Act of 1995. *Id.*

[77] *Counterterrorism Intelligence Gathering, 1995: Hearings on S. 735 and S. 761 Before the Committee of the Judiciary of the Senate*, 104th Cong., 1st Sess., (1995) (statement of James

Studies as a government watchdog organization seeking to balance national security interests against the Bill of Rights.[78] Mr. Dempsey discussed the Senate bill (S. 735) and the President's revised plan (S. 761) in light of the protections of the Bill of Rights.[79] Criticizing a provision to expand federal wiretap authority included in both bills,[80] Dempsey reluctantly preferred S. 735 for what it lacked more than for what it contained.[81] Additionally, Mr. Dempsey testified that, in his opinion, the prohibitions on fund raising for terrorist organizations found in S. 735 and S. 761 were uncon-

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X. Dempsey), *available in* WESTLAW, 1995 WL 319430 (F.D.C.H.) [hereinafter Dempsey testimony].

78 *Id.* Mr. Dempsey described the non-profit, civil liberties organization as a center "guided by the conviction that our national security must and can be protected without curtailing the fundamental rights of individuals guaranteed by the Bill of Rights." *Id.* The center has undertaken to ensure that government actions taken to protect national security do not, in effect, curtail individual rights. *Id.* The center had worked on issues concerning wire tapping, FBI investigations, and First Amendment rights and is now solely funded by the Fund for Peace. *Id.*

79 *Id.*

80 *Id.* Dempsey characterized the wiretap provisions in the President's revised bill (S. 761) as a "monkey wrench." *Id.* Dempsey admonished the bill's authority to allow courts to admit evidence obtained from intrusive wiretaps unless it can be proven that the government's actions were in "bad faith." *Id.* Contrary to its description that it is a "good faith" provision, Dempsey described it as a "bad faith" exception that would "throw a monkey wrench into a complex statutory scheme." *Id.* He supported his position by pointing out that these government wiretaps could be used by foreign officials investigating United States citizens, and current law expedites the process that foreign governments must follow in order to obtain wiretaps and these provisions make it even easier. *Id.* With the foregoing in mind, Dempsey concluded that "Americans who already are highly distrustful of U.S. government wiretapping are rightly concerned about the proposal that foreign officials would be listening to their telephone conversations." *Id.*

Dempsey also criticized S. 735, and recommended certain changes. *Id.* Over the past several months, the administration has proposed two changes to the authority to place a roving wiretap: (1) allowance of roving taps without showing of need or meeting a requisite standard to investigate international terrorism; (2) dispensing with the requirement that government must show that the use of facilities is to thwart government detection which could effectively open up wiretapping authority abuse. *Id.*

81 *Id.* Discussing the standard for obtaining a wiretap, Dempsey testified that wiretap authority has always been limited to certain, specific offenses. *Id.* He stated that "there have been numerous additions to the list of felony investigations for which wiretapping is authorized, but each expansion was in response to a specific concern, and the principle has always been maintained that wiretapping should be limited to the most serious offenses." *Id.* Comparing S. 761 with S. 735, Dempsey concluded that S. 735 would authorize wiretapping if a senior official finds that a federal felony "involves or may involve terrorism." *Id.* Dempsey reasoned that "there is no need for such a catch-all, and it would be hard to limit it to terrorism cases (why not drug cases or organized crime cases?)." *Id.*

stitutional[82] because they could not be reconciled with the First Amendment.[83]

IV. Hatch Amendment Number 1199

A. *Alien Terrorist Removal Act*

On May 25, 1995 the Senate began consideration of S. 735.[84] Senator Hatch opened the debate by outlining the purpose and several of the major provisions of S. 735.[85] The discussion began with the Alien Terrorist Removal Act, a measure designed to expe-

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82 Dempsey testimony, *supra* note 77. Dempsey cited *Buckley v. Valeo*, for the proposition that "[t]he contribution of funds to an organization is a critical and protected means of exercising First Amendment associational rights," and "[t]he right of association is a 'basic constitutional freedom . . . that is closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society.' " *Id.* (quoting Buckley v. Valeo, 424 U.S. 1, 15 (1976)).

83 *Id.* To support his conclusion, Dempsey cited NAACP v. Alabama, 357 U.S. 449 (1958) (holding state law requiring NAACP to produce membership list unconstitutional under First Amendment freedom of association); Lamont v. Postmaster General, 381 U.S. 301 (1965) (extending freedom of association to association with foreign organizations); Healy v. James, 408 U.S. 169 (1972) (holding the government must prove that a member of a foreign organization that has both legal and illegal goals is specifically acting to further that organization's illegal goals); and United States v. O'Brien, 391 U.S. 367 (1968) (holding that a government regulation that affects conduct involving both speech and nonspeech elements is justified only if 'the incidental restriction of alleged First Amendment freedoms is no greater than is essential to the furtherance' of the governmental interest). *Id.*

Dempsey summarized his testimony by stating:

> There is a fundamental flaw in the approach to fundraising taken in both the Administration bill [S. 761] and S. 735. While both bills would punish support for peaceful activities of foreign groups designated by the President as terrorist, neither bill would punish the providing of material support for the express purpose of carrying out terrorist acts by groups that are not listed. Nor would either bill prohibit support to individuals to commit terrorist acts.

Id.

84 141 CONG. REC. S7479 (daily ed. May 25, 1995).

85 *Id.* (statement of Sen. Hatch) Senator Hatch, opened debate on S. 735 by stating:

> This legislation represents a landmark bipartisan effort to address the issue of grave national importance; that is, the prevention and punishment of acts of domestic and international terrorism. This legislation adds important tools to the Government's fight against terrorism and does so in a temperate manner that is protective of civil liberties. In short, I believe that this bill is the most *comprehensive* antiterrorism bill ever considered in the Senate.

Id. (emphasis added).

dite the removal of alien terrorists from the United Stated.[86] This Act would allow the federal government, at an alien deportation hearing, to present classified information in a summary report without revealing the classified information to the alien.[87] Senator Hatch explained that such a procedure was necessary because, to do otherwise, could jeopardize an ongoing terrorism investigation.[88]

A second provision of the Alien Terrorist Removal Act was Title III section 303(e) which removed any opportunity of a criminal alien to appeal a final order of deportation.[89] One of the Senators strongly opposed to section 303(e) was Senator Kennedy (D-Mass.).[90] Senator Kennedy, who otherwise supported S. 735, ar-

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86 *See* 141 CONG. REC S7852 (daily ed. June 7, 1995) (statement of Senator Kennedy).

87 141 CONG. REC. S7480 (daily ed. May 25, 1995) (statement of Sen. Hatch). The Act allows for "a special deportation hearing and in camera, ex parte review by a special panel of Federal judges" when national security would be threatened by disclosure of the government's evidence in open court. *Id.*

88 *Id.* Concerned over the integrity of criminal investigations and the safety of law enforcement officials, Hatch opined that the alien deportation provisions of S. 735 are examples of sound policy designed to maintain our ability to infiltrate terrorist organizations while protecting the lives of those who penetrate them. *Id.* Pointing out that removal under this procedure is not tantamount to a criminal conviction, Hatch explained that the government should not have to turn over secrets in open court. *Id.* Senator Hatch concluded that the lives of those who conduct anti-terrorism investigations should not be placed in danger by exposing classified information. *Id.*

89 141 CONG. REC. S7480 (daily ed. May 25, 1995) (statement of Sen. Hatch). The Alien Terrorist Removal Act is now found under title III of S. 735. Section 303 (e) stipulates that: "[A]ny *final* order of deportation against an alien who is deportable by reason of having committed a criminal offense . . . *shall not* be subject to review by *any* court." S. 735, tit. V, sec. 303 (e) (emphasis added).

See also 141 CONG. REC. S7823 (daily ed. June 7, 1995) (statement of Sen. Abraham). Senator Abraham indicated that crime statistics and abuses of judicial review warranted a final non-appealable decision. *Id.* Senator Abraham explained that:

> More than 53,000 crimes have been committed by aliens in this country recently enough to put the perpetrators in our State and Federal prisons right now. An estimated 20 to 25 percent of all Federal prison inmates are noncitizens; in California, almost one-half of the prison populations are noncitizens.

Id.

Senator Abraham further stated that the 1995 Senate Report on criminal aliens in the United States found that there are an estimated 450,000 deportable criminal aliens who presently reside in this country. *Id.* At least one serious crime has been committed by all of these aliens. *Id.* Although this has been a reason for deportation, all have been deported because of repetitious application for judicial review. *Id.*

90 141 CONG. REC. S7851 (daily ed. June 7, 1995) (statement of Sen. Kennedy). In

gued that the expanded definition of a criminal alien in section 303(e) would hinder the Attorney General's efforts to focus on and remove the most serious alien offenders.[91] Additionally, such an expansion would result in the overcrowding of jails instead of relieving congestion.[92] Lastly, Senator Kennedy asserted that section 303(e)'s mandatory deportation of alien terrorist within thirty days of the issuance of a deportation order would shorten the time that law enforcement officials would have to interrogate and charge members of terrorist conspiracies.[93]

Senator Hatch, anticipating Senator Kennedy's objections, defended the provisions of the Alien Removal Act by outlining the procedural protections that aliens would not lose under S. 735.[94] Senator Hatch stated that the first procedural safeguard is the creation of a special court to determine whether or not the alien is a terrorist.[95] Only after that determination is made can the Attorney General decide to release the evidence against the alien or apply to the special court to withhold the evidence against the terrorist in the interest of national security.[96] If the Attorney General deter-

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reference to section 303(e), Senator Kennedy stated that the elimination of the appeals process for criminal deportations "is a step backward" and "a major departure from fundamental principles of due process" because it restricts the Attorney General's ability to intervene. *Id.*; *See also infra* note 92.

91 *Id.* Senator Kennedy pointed out that section 303, regardless of the severity of the offense, applies to all aliens guilty of an offense and requires removal within 30 days. *Id.* Those guilty of the most severe offenses are placed within expedited proceedings under current law. *Id.*

92 *Id.* Kennedy believes that section 303(e) will have the unintended effect of increasing jail overcrowding because it would inevitably compel the Attorney General to detain criminal aliens indefinitely even for relatively minor offenses. *Id.* Furthermore, it has no contingency plans in case the foreign country refuses to accept the deported alien. *See* 141 CONG. REC. S7852 (daily ed. June 7, 1995) (statement of Sen. Kennedy).

93 *Id.* The problem of mandatory deportation within 30 days was presented in the World Trade Center bombing case. *Id.* At the time of the bombing, one of the co-conspirators was already in prison on a lesser charge. If he were deported before the FBI discovered his involvement in the conspiracy, he would have been unavailable for prosecution under terrorism charges. *Id.*

94 141 CONG. REC. S7480 (daily ed. May 25, 1995) (statement of Sen. Hatch).

95 S. 735, *supra* note 14, at § 301 tit V. Under S. 735, a panel of up to five judges, would conduct a vetting process to determine whether the alien was a terrorist. *Id.* The panel then addresses both the extent and the nature of the evidence the government may present before these panels. *Id.*

96 141 CONG. REC. S7480 (daily ed. May 25, 1995) (statement of Sen. Hatch). Title V, section 301 of S. 735 stipulates that once the Attorney General has applied for a special removal hearing, "a single judge of the special court shall consider the applica-

mines the alien poses a threat, the Attorney General must provide a written summary of all evidence against the alien, except that information which would pose a risk to national security.[97] The judge must approve the summary if he finds that it is sufficient for the alien to mount a defense.[98] If the judge finds the summary to be inadequate, the Attorney General has fifteen days to submit a revised summary.[99] In the event that the revised summary is again inadequate, the special removal hearing will not occur unless the judge has also determined that the alien's presence in the United States poses a threat to national security[100] or to the foreign interests of the United States.[101]

H.R. 1710, the House of Representatives' version of S. 735, includes a similar section to expedite the deportation of alien ter-

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tion in camera and ex parte." *Id.* Such a special hearing "shall [be] invok[ed] . . . if the judge determines that there is probable cause to believe that . . . the alien . . . has been correctly identified and . . ." an open deportation proceeding would pose a risk to the national security of the United States because such proceedings would disclose classified information. S. 735, *supra* note 14, at § 301, tit. V.

97 S. 735, *supra* note 14, at § 301, tit V.

98 *Id.* The contents of the summary report must allow the alien to mount a similar defense if he had full disclosure of the classified information. *Id.*

99 *Id.*

100 *Id.* If the revised summary is still inadequate, the court will terminate the special removal hearing, upon an in camera and ex parte review, unless:

> (i) the alien's continued presence in the United States would likely cause-
>
> (I) serious and irreparable harm to the national security; or
>
> (II) death or serious bodily injury to any person; and
>
> (ii) provision of either the classified information or [that] an unclassified summary . . . would likely cause-
>
> (I) serious and irreparable harm to the national security; or
>
> (II) death or serious bodily injury to any person; and
>
> (iii) the unclassified summary prepared by the Justice Department is adequate to allow the alien to prepare a defense.

Id.

101 *See e.g.*, Quinn v. Robinson, 783 F.2d 776 (9th Cir. 1986); Eain v. Wilkes, 641 F.2d 504 (7th Cir. 1981). Although S. 735 does not address it, an interesting question is presented when foreign governments seek to extradite a citizen of the United States for foreign terrorist acts. For cases discussing the issue of extradition and habeas corpus, *see generally* Quinn v. Robinson, 783 F.2d 776 (9th Cir. 1986) (holding that a member of the Irish Republican Army was not protected by the political offenses exception to extradition where he murdered a police constable and was wanted in connection with several bombings in England), and Eain v. Wilkes, 641 F.2d 504 (7th Cir. 1981) (holding Palestine Liberation Organization bomber was not protected from extradition because he could not overcome the Secretary of State's proper determination that foreign country's request for extradition was not to punish him for a political crime).

rorists and an additional provision to make the exclusion of immigrants, who cannot show that they are political refugees, easier.[102] At the time this paper was written, H.R. 1710 had not yet reached the floor of the House of Representatives for full debate.[103]

B. *Posse Comitatus*

On June 6, 1995, one day before final passage of S. 735, Senator Sam Nunn (D-Ga.) proposed amendment number 1213.[104] Amendment number 1213 would allow the Attorney General to ask for assistance from the military in clean-up situations where chemical or biological weapons have been used.[105] This amendment would mark a new exception to the Posse Comitatus Act of 1878[106]

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102 Idelson, *Bills Compared*, supra note 21; *see also* Idelson, *Senate*, supra note 17.

103 Stephen Labaton, *Bill on Terrorism, Once a Certainty, Derailed in House*, N.Y. TIMES, Oct. 3, 1995, at A1. The anti-terrorism bill that "sailed through the full Senate and the House Judiciary Committee . . . " may have become the "casualty of a political moodswing in Congress." *Id.* Hearings on the incident at Ruby Ridge, Idaho and Waco, Texas have raised serious questions about the need for anti-terrorism legislation. *Id.* Laura Murphy of the American Civil Liberties Union commented:

> Since the Oklahoma City bombing, we've had hearings on Waco and Ruby Ridge which demonstrate the ability of the Federal Government to overreach . . . . The thinking, which has crossed party lines, is that if law enforcement can do these things without a counterterrorism bill, imagine what would happen with one.

Id. at A1. An unlikely coalition of diametrically opposed organizations has found common ground in opposition to H.R. 1710. *Id.* Such organizations include: Frontiers of Freedom, the American Civil Liberties Union, the Cato Institute, Americans for Tax Reform, and the Gunowners of America. *Id* at A19. Representative Charles E. Schumer (D-N.Y.) opined that the failure of the terrorism bill would show that the Republicans are unable to "deliver." *Id.* Representative Schumer made it clear that "[t]here is no question that the President will use this as an issue against the Republicans." *Id.*

The House version of S. 735, H.R. 1710, has not yet been introduced to the full House. *Id.* Sources within the Republican party said that "their private counts showed that [H.R. 1710] would be defeated." *Id.* They explained that, currently, "the only hope now for passage would be for a dramatically scaled back version." *Id.*

104 141 CONG. REC. S7768 (daily ed. June 6, 1995) (statement of Sen. Nunn).

105 *Id.* Expressing the dire need to allow the military to intervene and to help clean up terrorist attacks involving chemical and biological weapons, Senator Nunn noted that law enforcement officials do not have the capabilities of the military to handle these situations. *Id.* Present statutory authority only allows the Armed Forces to use military capabilities in regards to nuclear materials. *Id.*

106 A Posse Comitatus is defined as "[T]he power or force of the county. The entire population of a county above the age of fifteen, which a sheriff may summon to his assistance in certain cases, as to aid him in keeping the peace, in pursuing and

which prohibits the use of the armed forces to execute state and federal law.[107] Some Republicans expressed concern over the idea of expanding the role of the military into the civilian population.[108] In response to these objections, Senator Nunn (D-Ga.) indicated the circumstances under which the military could be used was extremely narrow, and the potential for any abuse was very low.[109] The Republicans formerly in opposition to the amendment

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arresting felons, etc." BLACK'S LAW DICTIONARY 806 (6th ed. 1991). For more on the Posse Comitatus, *see generally* Kurt Andrew Schlichter, Comment, *Locked and loaded: Taking aim at the growing use of the American military in civilian law enforcement operations*, 26 LOY. L.A. L. REV. 1291 (1993).

107 141 CONG. REC. S7771 (daily ed. June 6, 1995) (statement of Sen. Biden). Senator Biden explained the origins and the meaning of the proposed exception to the Posse Comitatus Act this way:

> Following the Civil War, Federal troops were often used extensively in the South, as well as to quell labor unrest in the North. Dissatisfaction with this practice led to pressure from Congress for explicit restrictions on the use of the military in law enforcement operations. The result was the Posse Comitatus Act enacted in 1878. The Act is brief and straightforward: Whoever, except in cases and under circumstances expressly authorized by the Constitution or act of Congress, willfully uses any part of the army or the air force as a Posse Comitatus or otherwise to execute the laws shall be fined not more than $250,000 or imprisoned not more than two years, or both. Over the past century Congress has enacted numerous exceptions to this general principle. [One exception for cases involving nuclear materials], enacted in 1982, gives the military broad authority to assist in the enforcement of the law. The provision explicitly provides that the armed forces may be used to arrest persons and conduct searches and seizures.

Id.

108 *See* Idelson, *Police Powers*, supra note 46 (for an example of Senator Dole's misgivings about the plan to create another exception to Posse Comitatus). In addition, Senator Craig (R-Id.) expressed the concerns of many about the importance of the separation between the military and civilian population which has become highly guarded throughout the history of the United States and limited to only a few exceptions. 141 CONG. REC. S7771 (daily ed. June 6, 1995) (statement of Sen. Craig).

109 *See* 141 CONG. REC. S7770 (daily ed. June 6, 1995) (statement of Sen. Nunn). Senator Nunn contended that since the circumstances under which the military could be used were narrowly tailored, the potential for abuse of the exception was low, and therefore, it should be included as a part of S. 735. Senator Nunn outlined the restrictions inherent to his amendment number 1213:

> Military assistance could be provided under the amendment only if the Attorney General and the Secretary of Defense jointly determine that each of the following five conditions is present: First, that the situation involves a biological or chemical weapon of mass destruction. Second, that the situation poses a serious threat to the interests of the United States. Third, that civilian law enforcement expertise is not readily available to counter the threat posed by the biological or chemical weapon of mass destruction involved. Fourth, that Department of Defense special

agreed with Senator Nunn's narrow interpretation, and now supported the amendment.[110] Amendment 1213 was included with S. 735 under title IX, section 908.[111]

C. *Wiretapping*

On May 26, 1995, in an effort to relax the government's standard for obtaining an emergency wiretap and to aid in the tracking of terrorists, Senator Lieberman (D-Conn.) proposed amendment number 1200.[112] Senator Hatch (R-Utah) argued that Senator Lieberman's amendment number 1200 was unnecessary and possibly subject to abuse.[113] The amendment was subsequently tabled by

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capabilities and expertise *are needed* to counter the threat posed by the biological or chemical weapon of mass destruction involved. Fifth, that enforcement of the law would be *seriously impaired* if the [Department of Defense] assistance were not provided.

Id. (emphasis added).

110 141 CONG. REC. S7771 (daily ed. June 6, 1995) (statement of Sen. Hatch). Senator Hatch (R-Utah) expressed satisfaction with the new exception to the Posse Comitatus Act in this way:

> Everybody knows I was not very enthusiastic about changing the emergency powers of the President or by changing the current posse comitatus law. But after having worked with these two great Senators [Nunn and Biden], and seeing the compromises that have been worked out to try to resolve the problems with this issue that have existed in the minds of a number of Senators on the Senate floor, I am happy to say I believe we are in a position to accept the amendment, and if the distinguished Senator from Delaware is also in the same position, I think we can urge passage of this amendment at this time.

Id.

111 *See* S. 735 *supra* note 14.

112 141 CONG. REC. S7600 (daily ed. May 26, 1995) (statement of Sen. Lieberman). Senator Lieberman explained that since the current law allows emergency wiretaps for cases of organized crime, the law should be expanded to cover threats from domestic and international terrorism:

> The . . . amendment I am offering would add the words 'domestic or international terrorism' to the limited number of situations in which the Attorney General, the Deputy Attorney General, or the Assistant Attorney General can obtain an emergency 48 - hour wiretap without having to go to court in that first period of time. Under current law, those three Justice Department officials and no others may authorize emergency electronic surveillance where there is 'first, immediate danger of death or serious physical injury to any person; second, conspiratorial activities threatening our national security; and third, conspiratorial activities characteristic of organized crime.'

Id.

113 141 CONG. REC. S7601 (daily ed. May 26, 1995) (statement of Sen. Hatch). Senator Hatch charged that this amendment defined terrorism in a poor manner that

the Senate.[114]

On June 6, 1995, to ease wiretapping standards, Senator Lieberman (D-Conn.) advanced a second amendment, number 1215.[115] Amendment 1215 would lower the standard that the government must meet when trying to obtain a multipoint wiretap.[116] Currently, the law permits law enforcement officials to obtain a multipoint wiretap only where they can show that the suspect is changing telephones with the intent to prevent surveillance.[117] The Lieberman amendment number 1215 would lower that standard from proving the intent of the suspect to merely showing the effect of the suspect's conduct in changing telephones.[118]

Originally opposed to amendment 1215,[119] Senator Hatch (R-

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would allow for varying interpretations and the potential for abuse. Hatch argued that since the current law covers conduct that poses "an immediate danger of death or serious physical injury" or "a conspiratorial activity threatening the national interest" terrorism is certainly covered by these standards. *Id.* Moreover Senator Hatch stated that any expansion of federal wiretap authority "would add little to existing authority . . . [and is] *particularly troubling.*" *Id.* (emphasis added).

114 141 CONG. REC. S7607 (daily ed. May 26, 1995). The vote was 52 in favor and 28 opposed to tabling the amendment with 20 not voting. *Id.*

115 141 CONG. REC. S7756 (daily ed. June 6, 1995) (statement of Sen. Lieberman).

116 141 CONG. REC. S7757 (daily ed. June 6, 1995) (statement of Sen. Biden). Senator Biden, in support of amendment number 1215, stated that a multipoint wiretap would allow law enforcement officers "to obtain a judicial order to intercept the communications of a particular person - not just for one specified phone, as with most wiretap orders, but on any phone that person may use." *Id.*

117 141 CONG. REC. S7756 (daily ed. June 6, 1995) (statement of Sen. Lieberman). Senator Lieberman pointed out that current multipoint wiretaps require proof that criminals are "switching phones with the specific intent to thwart detection . . . ." *Id.* The most difficult point, according to Senator Lieberman, is the proof of specific intent in the situation where an offender moves so frequently as to render a standard wiretap useless. *Id.*

118 *Id.* Elaborating on his proposed amendment, Sen. Lieberman continued:

> So my amendment would allow courts to authorize multipoint wiretaps, either where law enforcement could persuade a judge that a criminal was changing phones frequently for the purpose of avoiding interception, or where the very fact that the criminal was moving around and changing phones had the *effect* of thwarting surveillance, regardless of why he or she is doing it. And it would ease the difficult task of proving the intention of the criminal to thwart detection. It captures situations also where the target is frequently moving and changes phones for any reason.

Id. (emphasis added).

119 141 CONG. REC. S7757 (daily ed. June 6, 1995) (statement of Sen. Hatch). Hatch's original opposition to amendment number 1215 was based on the Fourth Amendment because it implicated the "fundamental tenet that the right of the people to be secure in their persons, house, papers, and effects against unreasonable searches and seizures limit the permissibility in Government interception of elec-

Utah) supported the amendment's proper balance between the power of the government and the protection of civil liberties.[120] Senator Arlen Specter (R-Pa.), however, opposed the idea of expanding federal wiretap authority for multipoint wire taps[121] and voted against the Lieberman amendment number 1215.[122] Senator Hatch voted in favor of the Lieberman amendment number 1215 and it passed the Senate[123] and became part of S. 735 under title IX, section 909.[124]

D. *Taggants*

On June 5, 1995, Senator Dianne Feinstein (D-Calif.) proposed amendment number 1202 which would instruct the Secretary of the Treasury to conduct a study to determine the feasibility of adding taggants[125] to explosives.[126] Taggants would allow law enforcement officials to trace the origin of explosives back to the

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tronic communications." *Id.* Senator Hatch analogized that such an imposition would be like allowing the government to "listen to our private telephone conversations whenever it feels like it." *Id.*

120 *See* 141 CONG. REC. S7758 (daily ed. June 6, 1995) (statement of Sen. Hatch). Senator Hatch felt that the Lieberman amendment number 1215 properly balanced the interests of the Bill of Rights and the exigencies of the day. *Id.* Senator Hatch concluded:

> I think this is a reasonable compromise. It is important that we give law enforcement the critical tools it needs to combat terrorism and protect our free society, but because we are a free society we must be leery of expanding the surveillance powers of law enforcement intemperately. We must not, even in the aftermath of tragedy such as Oklahoma City, trade off our constitutional protections for a generic promise of increased security. I, personally, am confident that the proposed amendment by my friend and colleague from Connecticut satisfies civil liberty concerns and meets the needs of law enforcement at the same time.

Id.

121 *See* Idelson, *Police Powers*, *supra* note 45.

122 141 CONG. REC. S7773 (daily ed. June 6, 1995).

123 *Id.*

124 *See* S. 735 *supra*, note 14.

125 141 CONG. REC. S7660 (daily ed. June 5, 1995) (statement of Sen. Feinstein). Senator Feinstein described a taggant as a "tiny, microscopic, color-coded plastic or ceramic piece which can be mixed with explosive materials to allow law enforcement agencies to trace a batch of explosives like we currently do with car serial numbers." *Id.* As a result, it would allow law enforcement agencies to possibly trace the explosives back to the purchaser. *Id.*

126 141 CONG. REC. S7660 (daily ed. June 5, 1995) (statement of Sen. Feinstein introducing amendment number 1202). For an overview of the Senate version of adding taggants compared with the House proposal, *see* Idelson, *Bills Compared*, supra note 21.

manufacturer.[127] The Feinstein amendment sets the duration of the study at one year.[128] At the end of the year, the Secretary would present his conclusions and recommendations to Congress.[129] Additionally, the Feinstein amendment included language calling for a study to examine the possibility of rendering the kinds of chemicals used in the Oklahoma City bombing inert.[130] Taggants have been in use for twenty years in other countries[131] and had been tested in the United States in the 1970s.[132] Senator Feinstein concluded that mandatory use of taggants would provide law enforcement officials with crucial evidence in bombing cases.[133]

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127 *Id.*

128 *Id.* Senator Feinstein explained that her amendment was "complicated" in that:

> [i]t requires the Secretary of the Treasury to do a study within 12 months, and then within 18 months to implement the results of that study or put into place a system by which taggants can be included in across-the-counter explosives. The affected explosives would include dynamite, water gels, slurries, emulsions, and black powder.

Id.

129 *Id.*

130 *Id.* Senator Feinstein further explained that her amendment would:

> require a study on the use of diffusers in another body of agents used in explosives, and those are common chemicals such as the ammonium nitrate fertilizer that was used in the Oklahoma City bombing - common chemicals, these kinds of chemicals, as well as pool chemicals that can be utilized. This part of the amendment would only require a study, however, as to how these chemicals can be made inert, or diffused, or nonexplosive. The amendment also has language so that it will not impair the effectiveness, the safety, nor the environmental impact of the explosive materials which are covered.

Id.

131 141 CONG. REC. S7660 (daily ed. June 5, 1995) (statement of Sen. Feinstein). Senator Feinstein warned of the consequences of delay:

> If we had required taggants years before, we could have had crucial evidence in about 17 percent of the bomb[ ] cases that occurred between the years of 1987 and 1993. People will say taggants do not work or should not work. They will say they should not be included. But I will tell my colleagues that Switzerland for some time has incorporated taggants into explosives, and it has resulted in the conviction of many who have perpetrated bombings.

Id.

132 *Id.* A 1970's study highlighted the effectiveness of taggants. *Id.* In the study, the ATF seeded 10,000 lbs. of explosives with taggants. *Id.* The seeding resulted in the conviction of an individual responsible for a Maryland bombing. *Id.* For more on the story of how taggants led to the arrest the bombing suspect in Maryland in May of 1979, *see* 141 CONG. REC. S7692 (daily ed. June 5, 1995) (statement of Senator Levin).

133 141 CONG. REC. S7660 (daily ed. June 5, 1995) (statement of Sen. Feinstein). Senator Feinstein explained that her amendment would set clear deadlines so that we can take advantage of the benefits that taggants offer law enforcement officials as they

Senator Hatch opposed the Feinstein amendment number 1202,[134] attacking the authorization of power to the Treasury Department to formulate regulations.[135] Senator Hatch also raised concerns over the effect that adding taggants would have on the chemical stability of explosives,[136] as well as the possibility of evidence contamination.[137]

In defense of her amendment, Senator Feinstein asserted that Congress has extensively studied the issue.[138] Senator Feinstein urged the Senate, after a final year of study, to implement regulations mandating the addition of taggants to explosives.[139] Republi-

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track the source of explosives. *Id.* Senator Feinstein noted that although taggants have been available for 20 years, their use has been prevented by special interest groups. *Id.* Including a deadline in such a feasibility study of taggants, according to Senator Feinstein, would prevent an additional delay in their implementation. *Id.*

134 141 CONG. REC. S7663 (daily ed. June 5, 1995) (statement of Sen. Hatch).

135 *Id.* Senator Hatch commented that the Feinstein amendment number 1202 goes further than what the Republican plan calls for. *Id.* The Republican plan, without the Feinstein amendment, would initiate a similar study of taggants and requires the addition of an odorant in explosives enabling detection by security devices. *Id.* Senator Hatch stated:

> The amendment under consideration, however, goes much further. In addition to providing a study of tracing taggants, it also gives regulatory authority to the Bureau of Alcohol, Tobacco, and Firearms to implement the results of the study *without* [C]ongressional review. The amendment thus presupposes that the study will conclude that the use of tracing taggants is feasible, and the amendment criminalizes the failure to include these agents in the manufacture of explosives.

Id. at S7663-64 (emphasis added). Senator Hatch further stated, "It is pretty apparent that I and those on my side of this issue do not oppose taggants per se. Rather, we oppose granting regulatory authority to an agency before an updated study can be done which may solve some of these very important issues." *Id.* at S7666.

136 141 CONG. REC. S7664 (daily ed. June 5, 1995) (statement of Sen. Hatch). Hatch cited a 1980 report by the Office of Technology Assessment for the proposition that "placing these 'tracing' taggants in explosives seriously effects the stability of the explosive materials." *Id.*

137 *Id.* Senator Hatch commented that "these taggants could increase the risk of injury or death. *Id.* Tagging explosives may raise other very important issues, such as contamination of evidence, saturation of tagging agents where explosives are used for legitimate uses, and negative effects on small business." *Id.*

138 141 CONG. REC. S7664 (daily ed. June 5, 1995) (statement of Sen. Feinstein).

139 141 CONG. REC. S7664 (daily ed. June 5, 1995) (statement of Sen. Feinstein). Senator Feinstein laid out the issues that resulted from her amendment and why now is the time to adopt it:

> In my amendment we do provide for a study, but what we say is at some point you have to say enough of studyingand make a decision and go ahead. Twelve more months of study and then it is implementation, where taggants can be used with safety, with no increase in the volatility of

can opposition to the amendment remained strong[140] with concerns that requiring taggants in all explosives would, in effect, encompass all explosive powders, including those used in sporting activities.[141] Opponents argued that this would lead to serious questions pertaining to the costs of the Feinstein amendment number 1202.[142]

Senator Feinstein modified her amendment to add an exemption for smokeless and blackpowder in an effort to aid law enforcement as well as narrow the scope of the taggant mandate.[143] The modified version of Feinstein amendment number 1202 was accepted by the Senate.[144] It passed by a vote of ninety yeas to zero nays and ten not voting.[145] It is now part of S. 735 under title VII, section 708.[146]

E. *Free Speech Restrictions*

Senator Feinstein's second proposal, amendment number 1209,[147] addressed the possible First Amendment implications of S. 735.[148] The amendment would make it unlawful to communicate information regarding the manufacture of bombs to someone who is going to use it for terroristic acts.[149] The amendment was

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the explosive matter, and where they could lead to being able to trace suspects in bombings.

Id.

140 141 CONG. REC. S7690 (daily ed. June 5, 1995) (statement of Sen. Feinstein).

141 141 CONG. REC. S7680 (daily ed. June 5, 1995) (statement of Sen. Craig). Senator Craig read from the testimony of the Institute for Legislative Action of the National Rifle Association before the Senate Judiciary Committee meeting on April 22, 1995. *Id.* The Institute commented that all sporting powder would have to be mixed with taggants under this amendment. *Id.* In addition, the effects of the amendment on propellant powders used in rifle ammunition must be taken into consideration because this is now a matter of concern for millions of gun owners. *Id.*

142 *Id.* Senator Craig's source at the NRA testified that the Feinstein amendment would result in a significant increase in taxpayer and consumer costs. *Id.*

143 141 CONG. REC. S7690 (daily ed. June 5, 1995) (statement of Sen. Feinstein).

144 141 CONG. REC. S7694 (daily ed. June 5, 1995).

145 *Id.*

146 *See* S. 735 *supra*, note 14.

147 141 CONG. REC. S7682 (daily ed. June 5, 1995) (statement of Sen. Feinstein introducing Amendment Number 1209).

148 *Id.*

149 *Id.* The Feinstein Amendment Number 1209 originally read:

It shall be unlawful for any person to teach or demonstrate the making of explosive materials, or to distribute by any means information pertaining to, in whole or in part, the manufacture of explosive materials, if the per-

designed to enlarge the scope of pre-existing federal law.[150] This amendment would specifically reach those who use the internet to communicate such information.[151] Senator Feinstein quickly pointed out that her amendment was aimed at conduct and was not to be construed as a prior restraint[152] on free speech.[153]

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son intends, or knows that such explosive materials or information will *likely* be used for, or in furtherance of, an activity that constitutes a Federal criminal offense or a criminal purpose affecting interstate commerce.

Id. (emphasis added).

150 141 CONG. REC. S7684 (daily ed. June 5, 1995) (statement of Sen. Feinstein). Senator Feinstein cited 18 U.S.C. § 231(a)(1) for constitutional support of her amendment:

> Whoever teaches or demonstrates to any person the use, application, or making of any firearm or explosive or incendiary device . . . knowing or having reason to know or intending that the same will be unlawfully employed for use in, or in furtherance of, a civil disorder . . . shall be fined under this title or imprisoned not more than 5 years, or both.

Id. Senator Feinstein explained that her amendment would add sanctions for "distribut[ing] . . . information with the knowledge or intent that it will be used for a criminal act, then you are guilty of a Federal violation." *Id.*

151 141 CONG. REC. S7682 (daily ed. June 5, 1995) (statement of Sen. Feinstein). The Senator illustrated the need for the amendment on the floor of the Senate by reading material from the Terrorist Handbook, which was obtained off the internet:

> Whether you are planning to blow up the World Trade Center, or merely explode a few small devices on the White House lawn, the Terrorist Handbook is an invaluable guide to having a good time. Where else can you get such wonderful ideas about how to use up all the extra ammonium triiodide left over from last year's revolution?

Id.

152 A prior restraint is defined as:

> A system of "prior restraint" is any scheme which gives public officials the power to deny use of a forum in advance of its actual expression. A prohibited prior restraint is not limited to the suppression of a thing before it is released to the public; rather, an invalid prior restraint is an infringement upon constitutional right to disseminate matters that are ordinarily protected by the First Amendment without there first being a judicial determination that the material does not qualify for First Amendment protection.

BLACK'S LAW DICTIONARY 828 (6th ed. 1991).

153 141 CONG. REC. S7683 (daily ed. June 5, 1995) (statement of Sen. Feinstein). Senator Feinstein explained that her amendment is aimed at conduct (distribution) rather than speech. *Id.* Senator Feinstein laid out the purpose of the amendment:

> My amendment is specifically aimed at preventing and punishing the distribution of material that will be used to commit serious crimes external to the distribution itself, and only when there is intent or knowledge that the information will be used for a criminal purpose. In other words, it is not aimed at suppressing contents per se, or fashioned as a prior restraint. Its purpose is addressing the facilitation of unlawful criminal conduct.

Senator Biden (D-Del.) conditioned his support of the Feinstein amendment on the omission of the word "likely" to comport with recent decisions regarding the standard for criminal conviction for conveying such information.[154] Senator Feinstein immediately agreed to the omission.[155] Senator Hatch also asked Senator Feinstein to remove the words "or knows" from her amendment in an effort to protect those who legitimately teach the use of explosives.[156] Feinstein responded that the amendment is designed for use against terrorists, not legitimate users of explosives.[157] Senator Hatch eventually agreed to the modified Feinstein amendment despite Senator Feinstein's refusal to accommodate his request.[158] The Feinstein amendment number 1209 was passed as part of S. 735 under Title IX, section 901.[159]

Id.

154 141 CONG. REC. S7684 (daily ed. June 5, 1995) (statement of Sen. Biden). Senator Biden asked Senator Feinstein to modify the amendment to comport with a recent decision of the fifth circuit, *United States v. Featherstone*, which upheld the conviction "of two leaders of a militia group who showed their followers how to make explosives." *Id.* Senator Biden asked Senator Feinstein to drop the word 'likely,' in order to meet the fifth circuit standard. *Id.*

155 141 CONG. REC. 7684 (daily ed. June 5, 1995) (statement of Sen. Feinstein). The modified Feinstein Amendment Number 1209 reads:

> It shall be unlawful for any person to teach or demonstrate the making of explosive material, or to distribute by any means information pertaining to, in whole or in part, the manufacture of explosive materials, if the person *intends or knows* that such explosive materials or information will be used for, or in furtherance of, an activity that constitutes a federal criminal offense or a criminal purpose affecting interstate commerce.

Id. (emphasis added).

156 141 CONG. REC. S7684 (daily ed. June 5, 1995) (statement of Sen. Hatch). Senator Hatch expressed his opinion that "[t]here are a lot of explosives manufacturers and personnel who do teach others how to make explosives and how to use them legitimately." *Id.*

157 141 CONG. REC. S7685 (daily ed. June 5, 1995) (statement of Sen. Feinstein). Senator Feinstein stated that her concerns were those persons who intend dissemination for the purpose of committing crime, i.e. "somebody who writes a terrorist handbook, . . . [who] tell[s] somebody how to steal; how, in detail, to put together, let us say a light bulb bomb." *Id.* Senator Feinstein concluded:

> You come to them and say, 'You violated a criminal law.' They say, 'I did not intend this to be used for a crime.' Then the comeback is, 'You should know it is going to be used in a crime because that is the only purpose . . . for a toilet paper bomb, for a candy box bomb.'

Id.

158 141 CONG. REC. S7686 (daily ed. June 5, 1995) (statement of Sen. Hatch).

159 *See* S. 735, *supra* note 14, at Tit. IX, § 901.

F. *Habeas Corpus Reform*

The most controversial provisions of S. 735 are those involving habeas corpus[160] reform.[161] Many members of the Senate who challenge the validity of any habeas reform, opposed the inclusion of such a provision in S. 735.[162] Senator Hatch staunchly defended

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160 Habeas corpus is defined as:

> The name given to a variety of writs . . . having for their object to bring a party before a court or judge. The primary function of the writ is to release from unlawful imprisonment. The office of the writ is not to determine prisoner's guilt or innocence, and only issue which it presents is whether prisoner is restrained of his liberty by due process. A form of collateral attack. An independent proceeding to challenge a state conviction on constitutional grounds. It is not an appropriate proceeding for appeal-like review of discretionary decisions of a lower court.

BLACK'S LAW DICTIONARY 491 (6th ed. 1991). For a more detailed study on habeas corpus procedure, *see* VICTOR E. FLANGO PH.D., NATIONAL CENTER FOR STATE COURTS, STATE JUSTICE INSTITUTE: HABEAS CORPUS IN STATE AND FEDERAL COURTS (1994) (concluding that reform of habeas corpus in capital cases should be treated differently from noncapital habeas corpus).

161 141 CONG. REC. S7670 (daily ed. June 5, 1995) (statement of Sen. Hatch). In an effort to speed up debate on S. 735, Senator Hatch urged both parties to quickly present their amendments. *Id.* Senator Hatch, eager to debate habeas corpus reform, saw that the only real controversy which had salient consequences was the habeas corpus provision. *Id. See also* Idelson, *Senate*, supra note 17, at 1645. Idelson likened the Republican effort to reform habeas corpus to a "gamble [that] paid off." *Id.* "Republicans knew that including restrictions on death row appeals would make passing the bill more complicated, but insisted on such restrictions as vital measures that could effect those eventually convicted in the Oklahoma bombing." *Id.*

162 141 CONG. REC. 7815-7817 (daily ed. June 7, 1995) (statement of Sen. Feingold). Senator Feingold (D-Wis.) argued that in light of the atmosphere of rage associated with the Oklahoma City bombing, habeas corpus reform, especially concerning death row appeals, is inappropriate at best and dangerous at worst. *Id.* Senator Feingold, while rising in general support of S. 735, concluded that:

> Many of the stories we hear during this debate rely on their persuasive power on the grief and rage many of us feel after a brutal murder. But let me speak a word of caution to those who stir those feelings. Grief and rage are not good foundations for making good policy, and emotions that strong can lead us to bad decisions and unintended consequences, and in this case, to conclude, although it may not be very frequent and apparently is frequent enough, it literally can lead us to the execution of innocent people. I urge that the habeas provisions of this bill be removed. I do not think they are appropriate to this legislation. Certainly, the bill could go forward with out them, and it would be a far better piece of legislation.

Id. See also Idelson, *Senate, supra* note 17, at 1645. Opponents bristled at the idea of including a provision like habeas corpus reform in a bill as politically popular as the anti-terrorism bill. *Id.*

his decision to include habeas corpus reform in S. 735[163] by stating that the new procedures for habeas review contained in S. 735 would curtail frivolous appeals[164] without resulting in a suspension of the writ.[165] Democratic hopes of stopping habeas corpus reform ended when President Clinton changed his position to support the Republicans on habeas reform.[166]

The key provisions on habeas reform are embodied in title VI of S. 735.[167] These procedural reforms include a one year deadline, after a final state court judgment has been rendered, to file a federal habeas petition.[168] The reforms would also restrict the ability of a habeas court to hear successive petition[169] and would increase the level of deference that federal courts must give to the

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163 141 CONG. REC. S7659 (daily ed. June 5, 1995) (statement of Sen. Hatch). Throughout the debate on S. 735, Senator Hatch centered his attack on the current habeas corpus procedures by invoking the frustrations many Americans feel when death row inmates delay execution of their sentences by abusing the writ. *Id.* In support of his position on habeas corpus reform, Senator Hatch related a case from Utah that took 18 years to resolve:

> Abuse of the habeas process features strongly in the extraordinary delay between the sentence and the carrying out of that sentence. In my home State of Utah, for example, convicted murderer William Andrews, with his partner, murdered a number of people in the hi-fi murder case, but only after they had tortured them by ramming pencils through their ears and pouring drain cleaner down their throats, destroying their vocal boxes and their esophageal areas. There, the imposition of a constitutionally imposed death sentence for over 18 years. The State had to put up millions of dollars in precious criminal justice resources to litigate his meritless claims.

Id.

164 *Id.* Near the end of the Senate debate on S. 735, Hatch recounted the importance of the habeas corpus reform provisions of the bill as "the most important change in criminal law in the last 30 years, and maybe in our lifetime." *Id.*

165 U.S. CONST. art. I, § 9, cl. 2.

166 Idelson, *Senate*, *supra* note 17, at 1645. Clinton's endorsement derailed a Democratic initiative to block the death penalty provisions of S. 735. *Id.* *See also* 141 CONG. REC. S7725 (daily ed. June 6, 1995) (statement of Sen. Dole). Dole remarked that he was "delighted that [Clinton] has finally come around to our position that, of all the antiterrorism initiatives now before the Senate, the one that bears most directly on the Oklahoma City tragedy is habeas corpus reform." *Id.* Senator Dole quoted Clinton from his appearance on the Larry King Show: "We need to cut the time delay on appeals dramatically, and . . . it ought to be done in the context of this terrorism legislation so that it would apply to any prosecutions brought against anyone indicted in Oklahoma. And I think it ought to be done." *Id.*

167 *See* S. 735, *supra* note 14, at tit. V.

168 *Id.* at § 601(d)(1).

169 *Id.* at § 606.

factual determinations of state courts.[170] Critics, however, maintain that these reforms will lead to executions of innocent people through expedited procedures and limited safeguards.[171]

S. 735 grants more deference to state courts by amending title 28 U.S.C. section 2254.[172] Under S. 735, federal courts which review a petitioner's application for a writ of habeas corpus would now be limited to the narrow question of whether the state court made an unreasonable[173] determination of the facts or made an unreasonable application of the facts to federal law.[174] Thus, a state court's factual determinations would enjoy a presumption of validity and could only be changed by a showing of clear and convincing evidence to the contrary.[175]

Senator Biden attacked the state court deference standard of S. 735 by stating that it is a usurpation of the federal courts' power

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170 *Id.* at § 604.

171 141 CONG. REC. S7851 (daily ed. June 7, 1995) (statement of Sen. Pell). Senator Pell (D-R.I.) called into question the "true motivations" for attaching habeas corpus reform to S. 735:

> [a]s Congress rushes to respond, we can not let our fervor for action allow us to unwisely circumscribe basic protections long enshrined in our Constitution. Unfortunately, I believe that as the bill stands, the Senate has gone too far in changing and restricting the application and availability of the right to appeal court decisions under the writ of habeas corpus.

Id.

172 S. 735, *supra* note 14, at § 604. The relevant portions of S. 735 augmenting 28 U.S.C. § 2254 are:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court *shall not* be granted with respect to any claim that was adjudicated on the merits in State court proceedings *unless* the adjudication of the claim-(1) resulted in a decision that was contrary to, or involved an unreasonable application of *clearly established federal law,* as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an *unreasonable determination* of the facts in light of the evidence presented in the State court proceeding .... (e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court *shall* be *presumed* to be correct. The applicant shall have the burden of rebutting the presumption of correctness by *clear and convincing* evidence.

Id. (emphasis added).

173 141 CONG. REC. S7843 (daily ed. June 7, 1995) (statement of Sen. Biden). Senator Biden commented that "[b]eing wrong would not be enough to get it overturned. It would have to be unreasonable." *Id.*

174 *Id.*

175 *Id.*

pursuant to Article III of the United States Constitution.[176] Senator Biden also argued that the provisions of the deference standard are inappropriate because they require federal courts to evaluate the reasonableness of a state court decision rather than the application of the law.[177] This narrow interpretation would result in very few cases meeting these new requirements and thus actually getting reviewed on their merits.[178]

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176 141 CONG. REC. S7842 (daily ed. June 7, 1995) (statement of Sen. Biden). Senator Biden argued that the Republican proposals would extinguish the purpose of the writ:

> The general principle in this language in [S. 735] is that Federal courts shall not grant a claim that was adjudicated in State court proceedings. Of course, this is directly contrary to the purpose of habeas corpus, which is to have Federal courts, and in particular, the Supreme Court, decide issues of Federal constitutional law.

Id. See also Joseph D. Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 NW. U. L. REV. 100 n.359 (1985) (for the proposition "that courts have certain inherent authority that cannot be abrogated without destroying their ability to function as courts") (citations omitted). Additionally, Grano cited Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), and Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816), for the proposition that "the Supreme Court and lower federal courts have constitutional authority to review state court interpretations of federal law . . . ." Grano, *supra* at 129. *See also* 141 CONG. REC. S7844 (daily ed. June 7, 1995) (statement of Sen. Biden). Senator Biden, quoting Justice O'Connor, set forth a constitutional challenge to S. 735's provisions on Federal court deference to state court decisions:

> We have never held in the past that Federal courts must presume the correctness of State court legal decisions or that State courts' incorrect legal determination has ever been allowed to stand because it was reasonable. We have always held that Federal courts, even on habeas, have the independent obligation to say what the law is.

Id. Senator Biden also cited Brown v. Allen, 344 U.S. 443 (1953) to support his position that the Supreme Court must exercise independent review of habeas petitions form state courts. *Id.* For more on *Brown v. Allen*, which extended the scope of habeas review to federal constitutional challenges of state court convictions, *see* FLANGO, *supra* note 160, at n.14.

177 141 CONG. REC. S7842 (daily ed. June 7, 1995) (statement of Sen. Biden). Referring to the deferential standard set out in title VI, § 604 of S. 735, Senator Biden remarked:

> This is an extraordinary deferential standard to the State courts, and I believe it is an inappropriate one. It puts the Federal courts in the difficult position of evaluating the reasonableness of a State court judge rather than simply deciding whether or not he correctly applied the law, not whether he did it reasonably. You can have a reasonable mistake. They could reasonably conclude that on a constitutional provision, it should not apply, when in fact the Supreme Court would rule it must apply.

Id.

178 *Id.* Senator Biden asserted that the reasonableness standard of S. 735 was flawed in that it is "limited not only to the requirement that the decision must have

Finally, S. 735 changes the habeas corpus procedures governing appeals where the petitioner claims, through newly discovered evidence, that he is actually innocent of the crime.[179] Under title VI, section 606, a second or successive petition for a writ of habeas corpus based on new evidence must show clearly and convincingly that the applicant is actually innocent of the crime.[180] If the petitioner's new evidence cannot meet this burden, his application must be denied.[181]

In opposition to the change in the appellate procedures, Senator Levin (D-Mich.), relying on two recent Supreme Court decisions,[182] proposed amendment number 1245.[183] This amendment

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been unreasonable, but that it must have been unreasonable in light of Supreme Court law." *Id.* Senator Biden also pointed out that this would result in the disregard of a federal holding directly on point by state courts if the Supreme Court has not directly decided that particular issue. *Id.*

Senator Biden continued his attack on the narrowness of the deferential standard of S. 735 by stating: "Not only must the decision of the State court have been unreasonable, and not only must it have been unreasonable in light of Supreme Court law, not federal law, but it must have been unreasonable in light of Supreme Court law that is *clearly* established." *Id.* (emphasis added).

179 S. 735, *supra* note 14, at tit. VI, § 606. The relevant portions of title VI section 606 of S. 735 are as follows:

> (b) LIMITS ON SECOND OR SUCCESSIVE APPLICATIONS.-Section 2244(b) of title 28, United States Code, is amended to read as follows:
>
> (b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application *shall be dismissed.*
>
> (2) A claim presented in a second or successive habeas corpus petition under section 2254 that was *not* presented in a prior application shall be dismissed unless-
>
> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; *and*
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by *clear and convincing* evidence that, but for constitutional error, no *reasonable* factfinder would have found the applicant guilty of the underlying offense.

Id. (emphasis added).

180 *Id.*

181 *Id.*

182 *See* Murray v. Carrier, 477 U.S. 478 (1986); Schlup v. Delo, __ U.S.__, 115 S.Ct. 851 (1995). Senator Levin relied on these two cases for the proposition that in order to avoid a procedural bar to hearing the merits of a petition for a writ of habeas corpus, a capital prisoner seeking a second or successive petition need only demonstrate that he is *probably* actually innocent of the crime. 141 CONG. REC. S7824 (daily

would lower the standard a prisoner must meet to get a writ of habeas corpus.[184] Instead of the clear and convincing standard, an applicant would only need to make a showing that he was "probably" innocent of the crime to obtain a writ of habeas corpus.[185] Senator Levin asserted that his amendment was in line with recent Supreme Court decisions on the matter and, therefore, was the proper standard.[186] Senator Hatch, however, quickly dismissed the Levin amendment as an unnecessary complication of the habeas corpus appeals system.[187] Senator Hatch found that the proposed

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ed. June 7, 1995) (statement of Sen. Levin). The petitioner in *Schlup* sought to prove his innocence of the underlying murder of which he was accused through videotape evidence that placed him in a separate location away from the murder at the time it occurred. *Schlup*, 115 S.Ct. at 855.

183 141 CONG. REC. S7823-24 (daily ed. June 7, 1995) (statement of Sen. Levin introducing Amendment Number 1245).

184 *Id.*

185 *Id.*

186 *See* 141 CONG. REC. S7823-24 (daily ed. June 7, 1995) (statement of Sen. Levin). Referring to the two recent Supreme Court Decisions of *Murray* and *Schlup*, Levin explained:

> We are only talking about people who are probably innocent as found by a court and as to whether or not they should be denied a hearing on the ground that their application is a second application for the writ and not the first application but where a court now for the first time, faced with new evidence, is satisfied that the new applicant is probably innocent.

Id. See also Schlup, 115 S.Ct. at 867. In *Schlup*, the Supreme Court upheld the standard set in *Murray* by stating: "[A] constitutional violation has probably resulted in the conviction of one who is actually innocent," therefore a habeas court may grant the writ even for a second or successive appeal). *Id.* The *Schlup* Court further stated, "To establish the requisite probability, the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Id.*

Senator Levin specifically presented amendment number 1245 because he thought that the clear and convincing standard was contrary to the Constitution as interpreted by the Supreme Court. 141 CONG. REC. S7825 (daily ed. June 7, 1995) (statement of Sen. Levin) Senator Levin articulated the issue as follows:

> [T]he issue is whether we ought to adopt the majority in Schlup or whether we ought to reverse it. [S. 735] reverses it and goes with the dissent. The amendment [1245] would allow the majority of the Supreme Court in Schlup to utilize that test in *habeas corpus* proceedings, the test being that whether a constitutional violation has probably resulted in the conviction of one who is actually innocent.

Id.

187 141 CONG. REC. S7826 (daily ed. June 7, 1995) (statement of Sen. Hatch). Senator Hatch described the Levin amendment as granting an opportunity to convicted prisoners to raise frivolous appeals:

> The Levin amendment would simply serve to permit these prisoners who have been duly convicted, their convictions upheld, all of their constitu-

amendment was inimical to S. 735's goal of setting sharp limits on habeas corpus.[188] Senator Hatch construed the Levin amendment as presenting an excuse to overturn a death sentence for those who oppose the death penalty for ideological, as opposed to legal reasons.[189] To support his position, Senator Hatch stressed that the current system of judicial review in capital cases is more than adequate.[190] Therefore, the Levin amendment was subsequently tabled[191] in the Senate by a vote of sixty-two to thirty-seven.[192]

Although many of the supporters of S. 735 had reservations about some of its provisions, the Senate ultimately passed Senator Hatch's version.[193] S. 735, as amended by Hatch amendment number 1199, passed the Senate on June 7, 1995 by a vote of ninety-one to eight.[194]

> tional rights protected, their civil liberties protected to continue to raise new claims. It allows judges who do not like the death penalty to make subjective determinations, many years after the conviction, to proclaim the probable innocence of a long-convicted murderer. It simply serves to permit a prisoner to drag out his proceedings and further delay justice.

Id.

188 *Id.* at S7825. Senator Hatch argued that "the amendment guts the bill's [S. 735's] prohibition against subsequent provisions by allowing successive habeas corpus petitions where the death row inmate does not dispute his having committed the homicide in question but claims the death penalty should not be imposed." *Id.*

189 *Id.* at S7848. Senator Hatch pointed out the flaws with the habeas corpus review system and why S. 735 should be passed to correct them. *Id.* Hatch argued "that if you can get your habeas petition before the right liberal Federal judge, you can get out of State prison, regardless of your innocence or guilt." *Id.*

190 *Id.* at S7847. Stating that capital prisoners have at least six chances to prove their innocence, Hatch concluded that the Levin amendment would result in an increase in delay and a reduction in finality:

> Look at all the reviews these cases have: The trial, the direct review to the intermediate court, the direct review to the State Supreme Court, the direct review to the Supreme Court of the United States of America, petition to the Governor for clemency. . . . The prisoner then may file a second petition in the U.S. Supreme Court and may also, of course, seek a second review of that by the Governor. So after conviction we have at least six levels of review by State courts, two rounds of review at least in capital cases by the State executive.

Id.

191 Table is defined as: "To suspend consideration of a pending legislative bill or other measure." BLACK'S LAW DICTIONARY 1012 (6th ed. 1991).

192 141 CONG. REC. S7849 (daily ed. June 7, 1995) (Rollcall Vote Number 239).

193 *See, e.g.*, 141 CONG. REC. S7851-7856 (daily ed. June 7, 1995) (statements of Senators Bradley, Kennedy, Murray, and Craig). The concerns of the Senators centered on the inherent difficulty of protecting ourselves without trampling on the very rights we seek to preserve. *Id.*

194 *Id.* at S7857.

The passage of this amendment had the effect of overruling the Supreme Court decisions of *Murray v. Carrier*[195] and *Schlup v. Delo*[196] and re-establishing the clear and convincing evidentiary level of *Sawyer v. Whitley*.[197] Senator Hatch defended Congress' decision to overrule the Supreme Court by stating that decisions such as *Schlup* are improper because they create greater uncertainty in the finality of criminal convictions.[198]

V. Constitutional Issues

The Constitution grants power to regulate the jurisdiction of the federal courts to Congress.[199] In the past, the role of the federal courts in the area of habeas corpus reform has seen expansion[200] and, more recently, decline.[201]

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195 Murray v. Carrier, 477 U.S. 478 (1986).

196 Schulp v. Delo, 115 S. Ct 851 (1995).

197 Sawyer v. Whitley, 112 S. Ct. 2514 (1992). In an opinion by Chief Justice Rehnquist, a majority of the court held "that to show 'actual innocence' [one] must show by clear and convincing evidence that but for a constitutional error, no reasonable juror would have found the petitioner eligible of the death penalty under the applicable state law." *Id.* The facts of Sawyer involve a successive petition by a death row prisoner who, under a new theory, claimed that he was unable to form the requisite mental state to commit first degree murder, and that therefore he was innocent of the death penalty. *Id.* Innocence of the death penalty is different from claiming that one is innocent of the underlying crime as the petitioner in Schlup claimed. *See Schlup*, 115 S. Ct at 867.

198 141 CONG. REC S7825 (daily ed. June 7. 1995) (statement of Sen. Hatch). Senator Hatch viewed the Schlup decision as incorrect in that it allows a habeas corpus petition to turn into another full adjudication of the petitioner's guilt or innocence - one that should have been resolved once and for all at the trial court. *Id.* Senator Hatch stated:

> The proposed amendment attempts to follow the Supreme Court's recent decision in Schlup versus Delo in which the court exacerbates the confusion in the lower courts, undermines the finality of lawful convictions and creates a greater uncertainty as to the standard under which a court must hold an evidentiary subsequent hearing.

Id.

199 *See* Barry Friedman, *A Different Dialogue: The Supreme Court, Congress, and Federal Jurisdiction*, 85 NW. U. L. REV. 1 (1990) (advocating a flexible interpretation of the Constitution as it pertains to Congressional power over the federal courts).

200 *See* Patrick H. Higgenbotham, *Reflection on Reform of s. 2254 Habeas Petitions*, 18 HOFSTRA L. REV. 1005 (1990) (tracing the expansion of the scope of habeas corpus from The Habeas Corpus Act of 1867 and the *Brown v. Allen* decision concluding that the writ had been "transformed into a much broader remedy that would protect federal constitutional rights left unvindicated by the state appellate process.")

201 FLANGO, *supra* note 160, at 6 (citing Posner, J., dissenting in *McKeever v. Israel*, 689 F.2. 1315 (7th Cir. 1982)); *see also* Henry P. Monaghan, *The Supreme Court 1974*

As an initial matter, it is axiomatic that the Supreme Court interprets the words of the Constitution and the Bill of Rights.[202] Jurisdiction of the Court, granted by the Constitution, however, remains subject to certain exceptions and limitations as Congress may determine.[203] The Supreme Court's interpretations are most susceptible to legislative augmentation or reversal in the area of substantive due process.[204]

Judicial review is also required where issues of the proper separation of powers are raised because the Court's interpretation gives rise to new procedures that are not expressly found in the Constitution or the Bill of Rights.[205] At a certain point,[206] judicial decisions

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Term — Foreword: Constitutional Common Law, 89 HARV. L. REV. 1, 22 (1975) (citation omitted). Monaghan stated:

> [T]here can be no doubt but that the administration of a standard of due process calling for the closest scrutiny of records to appraise essential fairness has proved to be increasingly intractable and burdensome, and to exert too little impact on the grave abuse in our practice so frequently revealed by the cases in the Court. The pressure to decree more rigid rules more easily applied has grown accordingly apace.

Id.

202 *Marbury*, 5 U.S. at 177. Chief Justice Marshall stated: "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two cases conflict with each other, the courts must decide on the operation of each." *Id.*

203 Ex parte McCardle, 74 U.S. (7 Wall.) 506 (1869) (quoting U.S. CONST. art. III, § 2, cl. 2). In this regard, the habeas provisions of S. 735 are nothing more than a constitutional exercise of legislative power over the Court's jurisdiction. *Id.*

204 *See* Monaghan, *supra* note 201. Although generally in favor "of the Supreme Court's power to fashion common law . . . .", Mr. Monaghan stated:

> Were our understandings of judicial review not affected by the mystique surrounding *Marbury v. Madison*, it might be more readily recognized that a surprising amount of what passes as authoritative constitutional 'interpretation' is best understood as something of a quite different order — a substructure of substantive, procedural, and remedial rules drawing their inspiration and authority from, but not required by, various constitutional provisions; in short, a constitutional common law subject to amendment, modification, or even reversal by Congress.

Id. at 2-3 (citation omitted). Mr. Monaghan cites as a prime example of constitutionally inspired procedures "*Roe v. Wade*'s trimester" approach. *Id.* at 45 (citation omitted). Viewed in the light of substantive due process, the Court's determination that the evidentiary standard of more likely innocent than not, adopted in Schlup, is constitutionally inspired, but not required, procedure is subject to change by the legislature. *Id.*

205 *Id.* at 9. Monaghan further states:

> To what extent can the Court insist upon adherence to constitutionally inspired, but not compelled, rules without considering as decisive whether the state has provided minimally satisfactory standards? Can the Court, in

constitutionally mandated by express provisions become strained interpretations grounded in theories not derived from the Constitution.[207]

Constitutional authority for the habeas corpus reforms of S. 735 can be found in the Necessary and Proper Clause[208] as well as Article III, section 2, clause 2.[209] Indeed, as Justice Scalia pointed out in his dissent in *Schlup*, the writ of habeas corpus is governed by the Suspension Clause[210] and by congressional statute.[211] Under this construction, Congress has the power, derived from the Necessary and Proper Clause and Article III, section 2, clause 2, to change the evidentiary standard that a habeas petitioner must show for a court to hear a second or successive habeas petition.[212]

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other words, create a sub-order of 'quasi-constitutional' law — of a remedial, substantive, and procedural character — to vindicate constitutional liberties?

Id.

206 *Id.* at 31. Monaghan points out that it is important to "distinguish[ ] between *Marbury*-shielded constitutional exegesis and congressionally reversible constitutional law." *Id.*

207 *Id.*

208 U.S. CONST. art. I, § 8, cl. 18. "To make all laws necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or any Department or Officer thereof." *Id.*

209 U.S. CONST. art. III, § 2, cl. 2. Article three, section 2 clause two of the Constitution states:

> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State may be a Party, the Supreme Court shall have Original Jurisdiction. In all other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

Id.

210 U.S. CONST. art. I, § 9, cl. 2. "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." *Id.*

211 28 U.S.C. §§ 2244, 2254. *See Schlup*, 115 S.Ct. at 875 (Scalia, J., dissenting). Scalia argued that because 28 U.S.C. s. 2244 allows a federal habeas court to dismiss an abusive or successive petition, the majority's decision contravened precedent. *Id.* It required a court to hear the merits of an abusive petition if a sufficient showing of actual innocence can be made. *Id.*

212 *Schlup*, 115 S. Ct. at 879. "I would say . . . that habeas courts need not entertain successive or abusive petitions." *Id.* Scalia saw the majority's opinion as a judicial relaxation of standards properly set by the legislature. *Id.* *See also* JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE (2d ed. 1993). Habeas Corpus Rule 9(b) states:

> SUCCESSIVE PETITIONS. A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for

Notwithstanding the above, the Supreme Court has already ruled on the issue of the meaning of habeas corpus.[213] Constitutional challenges to the habeas corpus provisions of S. 735 may lie within substantive due process based on the Fifth Amendment.[214]

Katzenbach v. Morgan sets out the relevant substantive due process framework.[215] Centering on section 5 of the Fourteenth Amendment,[216] Justice Brennan's majority opinion determined the minimum legal standards that the three branches of government must meet to satisfy the protections of substantive due process.[217] Under this analysis, Congress may add due process protections to the Supreme Court's interpretation under the 'wratchet theory.'[218] The legislature may not, however, reduce or lower these protections once the Court has rendered its

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relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a proper petition constituted an abuse of the writ.

Id.

213 *See generally Schlup*, 115 S. Ct. at 851; *Marbury*, 5 U.S. at 137.

214 U.S. CONST. amend. V. In relevant part the Fifth Amendment states: "No person shall be held to answer for a capital, or otherwise infamous crime . . . nor be deprived of *life*, liberty, or property, without due process of law . . . ." *Id.* (emphasis added).

215 Katzenbach v. Morgan, 384 U.S. 641 (1966).

216 U.S. CONST. amend. XIV, § 5. Section 5 states: "The Congress shall have power to enforce, by *appropriate* legislation, the provisions of this article." *Id.* (emphasis added).

217 *Katzenbach*, 384 U.S. at 651.

218 *Id.* at 651 n.10. Footnote 10 of the Katzenbach opinion explains what has become known as "wratchet" theory with respect to the powers of the federal legislature to enact "appropriate legislation" to carry out the end of the Fourteenth amendment. *Id.* "[Section] 5 [of the Fourteenth Amendment] does not grant power to exercise discretion in the other direction and to enact 'statutes so as in effect to dilute equal protection and due process decisions of this Court.' *Id.* We emphasize Congress' power under [section] 5 is limited to adopting measures to enforce the guarantees of the [XIV] Amendment." *Id.* The theory being that once the Supreme Court has spoken on an issue of substantive rights, the legislature may add greater protections to that right but it may not dilute or give less protection to that right than the Supreme Court has determined is appropriate. *Id.* at 641. Under this theory an analogy may be made to encompass the due process clause of the Fifth Amendment and the substantive right to life versus the state's interest in finality surrounding prisoners under a capital sentence. *Id.* Hypothetically, the "wratchet" theory would permit the legislature to, for example, raise due process protections of life, liberty or property by requiring the federal courts to hear a successive habeas petition if *any credible* evidence of actual innocence is presented. *Id.* (emphasis added). Similarly, Congress could not decrease due process protections of life by raising the evidentiary standard the habeas petitioner must meet to have the court hear his successive petition from a

decision.[219]

VI. Conclusion

This note sought to illustrate the problems of terrorism, both foreign and domestic, in today's world, and to respond to concerns of public safety fueled by terrorist activities at home and abroad. The Comprehensive Terrorism Prevention Act of 1995 (S. 735) has attempted to alleviate many of these fears by its far reaching provisions: the expeditious removal of alien terrorists, expansion of the Posse Comitatus Act, revisions to the federal wiretapping authority, the mandated use of taggants, restrictions on publication of bombmaking technology, and habeas corpus reforms. But S. 735 does more than passively respond to the fears of terrorism. It is designed to intercept terrorist activities before they are carried out. Yet, it maintains a cautious approach to the expansion of federal authority.

Before anyone should rush to approve S. 735, or other measures that would in effect increase the everyday role of Government, the Alien and Sedition Acts and the Espionage Act of 1917, included in this note as a reminder of past efforts to control this type of criminal violence, i.e. bombings, should be examined. By incorporating the lessons learned from prior mistakes, S. 735 appears to avoid the egregious results following the Alien and Sedition Acts and the Espionage Act of 1917.

Overall, the new criminal penalties, procedures, and evidence-gathering techniques are a valid constitutional exercise of legislative power. The extensive debate over habeas corpus reform belies the more insidious constitutional violation hidden within S. 735. For example, the Feinstein amendment number 1209 modifying 28 U.S.C. section 231,[220] has been criticized as having a chilling effect on free speech in its application to books and the internet.[221] Notwithstanding such allegations, the Feinstein amendment draws a line between acceptable speech and unlawful speech based on content.[222]

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showing of more likely innocent than not via Schlup to clear and convincing via S. 735. *Id.*

219 *See generally Marbury*, 5 U.S. at 137.

220 *See supra* note 155 for the final version of Feinstein amendment number 1209.

221 *See* 141 CONG. REC. S7682 (daily ed. June 5, 1995) (statement of Sen. Feinstein).

222 *Id.* Senator Feinstein pointed out that the information on explosives in sources

The Feinstein amendment is unnecessary because the law of aiders and abettors enables law enforcement officials to capture distributors of bomb making technology within the conspiracy net. We should be wary when a new substantive crime is created that has the effect of chilling free speech, and represents a duplication in the criminal law, as Feinstein Modified Amendment Number 1209 does.

Because 1209 covers speech that is of a technical nature, the speaker cannot know if his dissertation on explosives, for example, will be used to commit a crime until the crime has already occurred. It is true that 1209 restricts criminal penalties to those who "know or intend" that the information will be used in a crime.[223] However, intent and knowledge are judicial constructs and do not necessarily connotate actual knowledge or intent. Such knowledge or intent can usually be inferred from the surrounding circumstances. Therefore, 1209 is subject to abuse.

Moreover, the example that Senator Feinstein uses to illustrate her point is problematic. In support of 1209, Senator Feinstein cited speech, and the bombmaking information contained therein, retrieved from the internet. The difficulty with applying the knowledge or intent requirements of 1209 become apparent when applied to speech on the internet. Hypothetically, if a person places information concerning bombmaking to anonymous recipients on the internet, how can that person know or intend that such information will be used to commit federal offenses?

1209 is an unconstitutional restriction on speech of a technical nature. It has been singled out only because of its specificity. Senator Feinstein's amendment draws a line between acceptable speech that is too general for proper use[224] and unacceptable

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other than the Encyclopedia Britannica is in depth and of a different nature than that found in the encyclopedia. *Id.* This illustrates that it is the content and the source of the message that is under attack. *Id.* The Senator suggests that if the information in question were general and non-specific, as it is in the Encyclopedia Britannica, it would be acceptable. *Id.* However, specific, practical use instructions would be singled out as unacceptable and could lead to a conviction as part of a terrorism plot. *Id.* The problem with Feinstein amendment number 1209 is that it sets an unworkable standard that is impossible to control and will undoubtedly lead to abuse. *See* 141 CONG. REC. S7682 (daily ed. June 5, 1995) (statement of Sen. Feinstein).

223 *See supra* note 155.

224 *See* 141 CONG. REC. S7686 (daily ed. June 5, 1995) (statement of Sen. Feinstein). Senator Feinstein stated, "Well I have read the eight pages on explosives [in the Encyclopedia Britannica], and it does not say how to make a toilet paper roll booby trap.

speech that is specific and technical in nature. In this regard, 1209 restricts the robust exchange of ideas because the speech Senator Feinstein wants to restrict is speech that has "teeth."

On the other hand, 1209 presents a perfect example of the proactive nature of S. 735. Instead of relying on the law of aiders and abettors, 1209 makes a new substantive crime of communicating bombmaking technology to those whom the communicator knows are going to use it to commit a crime. This is akin to charging the person who gave the weapons to the terrorists as a co-conspirator. The government is already allowed to charge the supplier of weapons, so why not charge the supplier of information that is going to be used to commit acts of terrorism? 1209 will enable the government to charge the supplier of information to terrorists before they can carry out their plan, which may not be the case under the law of aiders and abettors.[225]

In conclusion, S. 735 is an appropriate response to the threat terrorists present to Americans. Charges that S. 735 was rushed through the Senate are unfounded. The record shows that debate was extensive. The critical difference between S. 735 and other bills is the gravity of the problem it was designed to deal with. Destructive forces that can be used against the United States are tremendous and they compel a response that adequately addresses the problem. Would critics hold strong to their rejection of S. 735's substance if Pan Am flight 103 detonated over New York City or if the World Trade Center fell like a cut tree?

The overwhelming reality of terrorism demands anti-terrorism legislation. S. 735 has been fashioned to head off the threat in a way that balances the compelling need for security against the Bill of Rights. In the final analysis, terrorists cannot hide from justice.[226]

What legitimate purpose is there for a toilet paper roll booby trap other than to kill somebody?" *Id.*

225 *See* Krulewitch v. United States, 336 U.S. 440, 450 (1949) (Jackson, J., concurring).

226 *See* McKinley, *supra* note 43 and accompanying text. *See also* John Kifner, *U.S. Indicts 2 In Bomb Blast In Oklahoma: McVeigh and Nichols Face Death Penalty*, N.Y. TIMES, Aug. 11, 1995. Kifner detailed the contents of the indictments handed down in the Oklahoma City bombing.

> The two men [(Timothy J. McVeigh and Terry L. Nichols)], the indictment charged, robbed a gun dealer in Arkansas to help finance their plot, stole dynamite and fuses from a quarry in Kansas, rented a series of

storage lockers under false names to hide their preparations, then mixed a deadly brew of ammonium nitrate fertilizer and diesel fuel by a lake in a Kansas park.

Id. Kifner detailed the indictment of a third accomplice as follows:

> Michael J. Fortier, a third former soldier from the same Fort Riley, Kan., infantry company as Mr. McVeigh and Mr. Nichols, pleaded guilty . . . to a separate lesser indictment centering on his knowledge of plans for the bombing, and is expected to become the prosecution's star witness. He could face 23 years in prison, although his sentence, prosecutors said, will most likely depend on the degree of his cooperation.

Id.