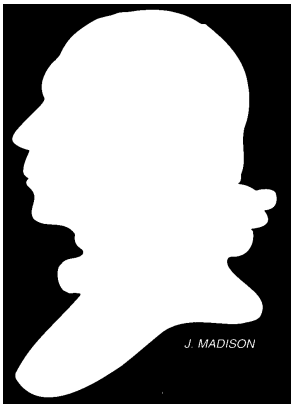
FEDERALIST SOCIETY WHITE PAPER

on

The USA PATRIOT Act of 2001

Criminal Procedure Sections

November 2001



KENT SCHEIDEGGER
CHARLES HOBSON
MARITZA MESKAN
Criminal Justice Legal Foundation

KANNON SHANMUGAM
Kirkland and Ellis

STEPHEN HENDERSON
Chicago-Kent College of Law

The USA PATRIOT Act of 2001

Criminal Procedure Provisions

A. Introduction.

The antiterrorism bill recently enacted by Congress makes a number of significant changes to criminal procedure and related topics. This paper describes some of these changes and discusses some of the legal implications. Many of the most important changes relate to the laws on wiretapping and surveillance. These sections are the subject of a separate paper.

Four different versions of the bill were considered before final passage. The Administration proposed a bill shortly after the terrorist attacks of September 11, 2001. On October 11, the Senate passed S. 1510, the Uniting and Strengthening America Act, containing most of the Administration's proposals, but with some modifications, deletions, and additions, largely as the result of negotiations between the Attorney General, Senator Leahy, and Senator Hatch.[1] The same day, the House Judiciary Committee reported H. R. 2975, the PATRIOT Act of 2001, which contained substantial differences.[2] The next day, this bill was amended on the House floor to substitute the text of H. R. 3108, a bill similar to, and titled the same as, the Senate bill.[3] This bill passed the House the same day.[4] On October 23, H. R. 3162, the USA PATRIOT Act, was introduced, reconciling the remaining differences between the House and Senate versions, and it passed the House the next day, 357 to 66.[5] On October 25, H. R. 3162 passed the Senate 98 to 1.[6] The President signed it on Saturday, October 26, as Public Law 107-56.[7]

The provisions of the bill which deal with criminal procedure or related topics, other than those addressed in the wiretapping and surveillance paper, include:

---

1. 147 Cong. Rec. S10548 (daily ed. Oct. 11, 2001) (statement of Senator Leahy) (discussing process); *id*., at S10604 (vote).

2. Provide Appropriate Tools Required to Intercept and Obstruct Terrorism (PATRIOT) Act of 2001, Report of the Committee on the Judiciary, House of Representatives, to accompany H. R. 2975, H. R. Rep. No. 107-236, 107th Cong., 1st Sess., pt. 1 (2001).

3. See 147 Cong. Rec. H6712-H6713 (daily ed. Oct. 12, 2001); *id*., at H6716 (statement of Mr. Sensenbrenner) (noting differences from Senate-passed version); *id*., at H6725-H6726 (vote on amendment).

4. *Id*., at H6739-H6759 (text); *id*., at H6775-H6776 (vote).

5. 147 Cong. Rec. H7224 (daily ed. Oct. 24, 2001).

6. 147 Cong. Rec. S11059 (daily ed. Oct. 25, 2001).

7. 115 Stat. 272. For the remainder of this paper, Public Law 107-56 is referred to simply as "the Act."

• § 203 amends Federal Rule of Criminal Procedure 6(e)(3)(C) to permit sharing of grand jury information with other agencies if it involves foreign intelligence information, as defined. It also amends 18 U. S. C. § 2517 to permit similar sharing of information from wiretaps.

• § 213 adds subsection (b) to 18 U. S. C. § 3103a to authorize delayed notice of execution of a warrant, if three conditions are met: (1) immediate notice would have an "adverse result," defined as physical danger, flight from prosecution, destruction of evidence, intimidation of witnesses, jeopardizing investigation, or delay of a trial; (2) no tangible property or wire, electronic, or stored communications are to be seized, with exceptions; and (3) notice will be given "within a reasonable period."

• § 219 amends Federal Rule of Criminal Procedure 41(a) to authorize nationwide search warrants in terrorism investigations.

• § 223 creates remedies for unauthorized disclosures. Subsection (a) amends 18 U. S. C. § 2520, relating to wiretapping, to provide for court referrals for administrative discipline of employees. It also provides that use of intercepted information beyond that authorized by § 2517 is a violation for the purpose of the civil remedy of the existing § 2520(a). Subsection (b) makes similar changes to 18 U. S. C. § 2707, on stored communications. Subsection (c) creates a civil action against the United States for money damages with a $10,000 minimum. It provides for costs but not attorney's fees.

• § 412(a) adds § 236A to the Immigration and Nationality Act. The new section requires the Attorney General to take into custody any alien certified to be inadmissible or deportable on one of six grounds: 8 U. S. C. § 1182(a)(3)(A)(i) (espionage, sabotage, or export restrictions); § 1182(a)(3)(A)(iii) (attempt to overthrow U. S. Government); § 1182(a)(3)(B) (terrorist activities, amended by § 411 of the Act); and parallel provisions of § 1227, *i.e.* subds. (a)(4)(A)(i) & (iii) and (a)(4)(B). In addition, it authorizes certification for an alien "engaged in other activity that endangers the national security of the United States."

• § 412(b) limits judicial review of detentions under § 412(a) to habeas corpus. It expressly includes judicial review of the merits of the decision to detain, but it does not specify a standard of review. In most cases, the habeas petition would be in the district court in the place of detention. Appeal of the decision of that court is exclusively to the D.C. Circuit, regardless of where the district court is.

• § 412(c) requires the Attorney General to make semiannual reports to Congress on the use of this statute.

• § 503 amends 42 U. S. C. § 14135a, part of the DNA Analysis Backlog Elimination Act of 2000. That section requires collection of DNA samples from federal prisoners convicted of any of several violent crimes, including murder, sex crimes, kidnapping, and robbery or of burglary. The amendment replaces a temporary subsection, no longer needed, with one extending the scope

of DNA sampling to terrorism offenses (18 U. S. C. § 2332b(g)(5)(B)) and all crimes of violence (18 U. S. C. § 16). This change will considerably expand the size of the DNA database, although the federal government will not, as some states do, test defendants before trial.

- § 804 amends 18 U. S. C. § 7, defining the "special maritime and territorial jurisdiction of the United States." These are the places where federal law defines and punishes crimes that would normally fall under state jurisdiction. It includes military bases and ships at sea, among others. The amendment adds embassies, consulates, similar properties, and their adjacent residences, for the purpose of crimes committed by or against U. S. nationals.

- § 809 extends the statute of limitation for certain terrorism crimes to eight years and eliminates it altogether for a narrower set of crimes causing or risking death or serious bodily injury.

Many of these changes are matters of policy, well within the legislative authority. They raise few constitutional questions. The judicial role in the litigation of these statutes will therefore be primarily interpretation rather than review for validity. A few provisions do raise constitutional issues.

B. Grand Jury Disclosure

With English antecedents dating from the 12th century, the grand jury was used by the American colonial government to prosecute crown officials, including British soldiers, and as a way to protest abuses and to criticize the action/inaction of the Crown's government.[8] It emerged from the American Revolution with increased prestige and, therefore, was included in the 5th Amendment in the Bill of Rights.[9]

Traditionally thought of as both sword and shield, it served to protect citizens from government overbearance, but also to enable prosecution of offenses. Critics of the contemporary grand jury argue that, from post-revolutionary times to present, the screening role or "shield" has lost importance, while the "sword" or the investigative role and the government's power has expanded to make the present day role the opposite of what was originally intended by the Founding Fathers.[10]

The general rule is that grand jury proceedings are secret.[11] The rule of secrecy has generally been considered to serve a number of purposes. Grand jury secrecy strengthens the investigative function by safeguarding witnesses against possible reprisals and serves as a screening function to protect

---

8. 3 W. La Fave, Criminal Procedure § 8.2(a), at 11-13 (2d ed. 1999).

9. La Fave, *supra* note 8, at 11-14.

10. See *id*. § 8.2(c), at 19; Bernstein, Behind the Gray Door: *Williams*, Secrecy, and the Federal Grand Jury, 69 N. Y. U. L. Rev. 563, 563-564 (1994) ("ignominious prosecutorial puppet").

11. See Fed. Rule of Crim. Proc. 6(e)(2).

innocent suspects that the grand jury decides not to charge.[12] The secrecy of the proceedings serves as an investigative advantage. It keeps the target of the proceedings "in the dark" as to the focus of the inquiry, thus, preventing the target's flight and destruction or fabrication of evidence.[13] Secrecy encourages otherwise reluctant witnesses to be forthcoming by deterring possible witness intimidation and also keeps the investigation from coming to the attention of the public. Whether the target of a grand jury investigation is a prominent person or regular citizen, public disclosure that he is under investigation might cause irreparable harm to his reputation, even if no basis for prosecution is found. Moreover, where a prominent person is the target, prosecutors might be inhibited from initiating an investigation.[14]

Grand jury secrecy has never been absolute. Early on, courts recognized that secrecy needed to be imposed only as long as it furthered the effectiveness of a grand jury's investigative and screening functions.[15] Over the second half of the 20th century, courts and legislatures have moved towards relaxing the rules of secrecy.[16] Courts often strike a balance between weighing the justification of grand jury secrecy against the various interests served by disclosure.[17]

One view is that the secrecy requirements of the grand jury are basically right for reasons beyond its historical use. Grand jury targets are more deserving of protection because they exist in an institutional framework that involves a moderate level of coercion and because they are often prominent people who suffer greater reputational losses when their coerced testimony or targeting is disclosed.[18]

Another view considers the grand jury as a "prosecutorial puppet" that uses the blanket secrecy to conceal the inequities of the grand jury system and insures that the public does not see that the proceedings lack safeguards. Originally a check on prosecutorial power, it has become a tool for prosecutorial overreaching.[19] At its inception, the grand jury's more important function was to protect the innocent from government persecution and to provide a forum for the public's grievances. In present times, the prosecutor dominates the grand jury proceedings. With few procedural

---

12. La Fave, *supra* note 8, § 8.1(a), at 7.

13. La Fave, *supra*, note 8, § 8.3(f), at 29; Richman, Grand Jury Secrecy: Plugging the Leaks in an Empty Bucket, 36 Am. Crim. L. Rev. 339, 345 (1999).

14. La Fave, *supra* note 8, at 29; Richman, *supra* note 13, at 345.

15. La Fave, *supra* note 8, at 57-58.

16. La Fave, *supra* note 8, at 58-59.

17. La Fave, *supra* note 8, at 59.

18. Richman, *supra* note 13, at 355.

19. Bernstein, *supra* note 10, at 570.

safeguards, *i.e.*, no defense attorneys present, no judge present, no evidentiary rules, no double jeopardy rule, broad subpoena power, and limited judicial interference after *United States* v. *Williams*,[20] grand juries operate largely outside the courts' control.

The existing rule provides for six exceptions. Three of these exceptions require court authorization: disclosures in connection with a judicial proceeding, request of a defendant, or to state officials to prosecute violations of state law.[21] Three exceptions permit disclosure by the attorney for the government without judicial authorization: to another federal government attorney, to other state or federal government personnel assisting in the federal prosecution, or to another federal grand jury.[22] The three exceptions to disclosure without judicial approval are internal to government, in a broad sense, and for the purpose of federal law enforcement only.

The Act rewrites Rule 6(e)(3)(C), expanding the authority to share criminal investigative information. The present exceptions in paragraphs (C)(i)-(iv) are renumbered (C)(i)(I)-(IV), and a new exception (V) is added. This new exception allows disclosure of matters that involve foreign intelligence or counterintelligence (as defined in section 3 of the National Security Act of 1947)[23] or foreign intelligence information to any other Federal law enforcement, intelligence, protective, immigration, national defense, or national security official as necessary in order to assist them in performing their duties, subject to any limitations on unauthorized disclosure of such information. Foreign intelligence information is defined as information, whether or not concerning a United States person, that relates to the ability of the United States to protect against actual or potential attack or other grave hostile acts of a foreign power or agent. Foreign intelligence information also includes information necessary to protect against sabotage or international terrorism by a foreign power or agent, a foreign power's clandestine intelligence activities conducted by its intelligence services, networks, or agents, or information about the national defense and security or the conduct of the foreign affairs of the United States.[24]

As the Act was moving through Congress, there was little controversy regarding whether to expand the disclosure exceptions. The principal controversy was over whether to make the new

20. 504 U. S. 36, 54-55 (1992).

21. Fed. Rule Crim. Proc. 6(e)(3)(C)(i), (ii), (iv).

22. Fed. Rule Crim. Proc. 6(e)(3)(A)(i), (ii), (C)(iii).

23. 50 U. S. C. § 401a.

24. Fed. Rule Crim. Proc. 6(e)(3)(C)(iv)(I)-(II).

exception subject to prior court approval.[25] The House Judiciary Committee version would have required court permission.[26] The final legislation does not require court permission.

The amendment to Rule 6 presents no substantial constitutional questions. The grand jury secrecy rule is a rule of policy which has always had exceptions, and it has been frequently modified.[27] The secrecy rule has no credible claim to constitutional stature. The notices required by Rule 6(e)(3)(C)(iii) will provide a database for Congress to consider when it reviews Title II of this Act four years hence. Although the grand jury provision does not "sunset" automatically,[28] a review of it may be expected to be on the agenda when Congress considers renewal of the sections that will expire.

C. Delayed Notice of Warrant Execution

When premises are searched or movable property is seized, the owner is generally given immediate notice of the search or seizure. Federal Rule of Criminal Procedure 41(d) expressly requires the officer to give an inventory for the seizure of personal property. Where nothing tangible is taken, however, there is no express provision in the law for notice that an entry was made.

In wiretapping cases, prompt notice would obviously defeat the purpose of the tap.[29] After-the-fact notice appears to be both necessary and sufficient. In *Berger* v. *New York*,[30] the Supreme Court noted the lack of a notice provision in striking down the New York wiretapping law. The next year, Congress included a notice provision in the federal wiretapping law.[31] The Supreme Court has said this notice provision, along with a companion return provision, satisfies constitutional requirements.[32]

In *Dalia* v. *United States*,[33] the Supreme Court rejected a contention that the Fourth Amendment completely forbids covert entry. In *Dalia*, the purpose of the entry was to plant a "bug." Relying

---

25. See 147 Cong. Rec. S10556 (daily ed. Oct. 11, 2001) (statement of Sen. Leahy).

26. H. R. Rep. No. 107-236, *supra* note 2, at 73, 135.

27. See Bernstein, *supra* note 10, at 599.

28. Pub. L. No. 107-56 § 224(a) (exception for § 203(a)).

29. See 2 W. La Fave, Search and Seizure § 4.12(b), at 720 (3d ed. 1996).

30. 388 U. S. 41, 60 (1967).

31. 18 U. S. C. § 2518(8)(d).

32. *United States* v. *Donovan*, 429 U. S. 413, 428-429, n. 19 (1977).

33. 441 U. S. 238, 248 (1979).

on its earlier approval of notice after the completion of the surveillance, the Court held, "There is no reason why the same notice is not equally sufficient with respect to electronic surveillances requiring covert entry."[34]

This leaves the question of whether there is a Fourth Amendment requirement of notice of entry to search rather than to plant a device, and, if so, whether delayed notice of the type used in wiretapping cases is sufficient. The Supreme Court has not addressed this question, and there is a division in the Courts of Appeals regarding whether the notice requirement is constitutionally based at all. The Ninth Circuit held in the *Freitas* case that notice was constitutionally required, the time must be short, and it "should not exceed seven days except upon a strong showing of necessity."[35] In the *Pangburn* case, the Second Circuit declined to follow the holding of *Freitas* that notice is constitutionally required. Instead, *Pangburn* derived a notice requirement from Rule 41.[36] The nonconstitutional status of the rule was important in *Pangburn* because of the differing standard for suppression as a remedy.[37] It is even more important now, since the constitutional status of a rule limits the power of Congress to modify it, although it does not completely preclude a legislative role in defining adequate protection.[38]

The new statute provides only for delayed notice, not absence of notice, so the constitutional question would be whether the grounds and length of delay are constitutionally sufficient. The statute does not provide a fixed period, but rather "a reasonable period [after the warrant's] execution," with extensions "for good cause shown." This standard would probably not pass muster under the Ninth Circuit's relatively rigid constitutional rule in *Freitas*, but would under a more flexible approach.

Although not squarely on point, we can derive some indication of the likely outcome from the Supreme Court's recent cases on the legality of "no-knock" warrants. These cases involve the manner of execution of the entry, and specifically the timing of notice, rather than the issues of determining whether a search is legal at all, which make up the bulk of Fourth Amendment cases.

Remarkably, the constitutional status of the common-law "knock and announce" rule was not settled until 1995, over two centuries after the adoption of the Fourth Amendment, when the Supreme Court held that it was generally part of the reasonableness of searches required by that

---

34. *Ibid*.

35. *United States* v. *Freitas*, 800 F. 2d 1451, 1456 (9th Cir. 1986).

36. *United States* v. *Pangburn*, 983 F. 2d 449, 455 (2d Cir. 1993).

37. See *ibid*.

38. See *Dickerson* v. *United States*, 530 U. S. 428, 440 (2000).

amendment.[39] At the same time, the Court cautioned that the "flexible requirement of reasonableness should not be read to mandate a rigid rule of announcement that ignores countervailing law enforcement interests."[40]

Two years later, the high court expanded on this caveat in its unanimous decision in *Richards* v. *Wisconsin*. "In order to justify a 'no-knock' entry, the police must have a *reasonable suspicion* that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, *or that it would inhibit the effective investigation* of the crime by, for example allowing the destruction of evidence . . . . This showing is not high, but the police should be required to make it whenever the reasonableness of a no-knock entry is challenged."[41]

If the new statute is judged along the lines of the relatively lenient standard of *Richards*, it should clear the hurdle with ease. The statute requires "reasonable cause,"[42] which is at least as high as "reasonable suspicion." It requires danger of an "adverse result," incorporating by reference the definition of 18 U. S. C. § 2705(a)(2), relating to access to stored communications. The definition of paragraph (E) that disclosure would "seriously jeopardiz[e] an investigation" is no less stringent than *Richards* and possibly more so. The other criteria also fit within the principle of reasonableness of *Richards*.

Richards does not, of course, address length of delay, as that is not an issue in the "no-knock" situations. However, its broad allowance for the legitimate needs of law enforcement, coupled with the Court's earlier approval of the 90-day delay authorized in § 2518(8)(d) make it unlikely that the 7-day limit of *Freitas* will survive Supreme Court scrutiny.

The final question is whether the "sneak and peak" warrant would be subject to a greater degree of constitutional scrutiny than the "no-knock" warrant. That seems unlikely. To be sure, the *Freitas* court was correct in its observation that "surreptitious searches . . . strike at the very heart of the interests protected by the Fourth Amendment."[43] Yet however unsettling such a search in one's absence may be, it pales in comparison to the terror of unknown intruders suddenly kicking in one's door and bursting in while the residents are home. In the delayed notice case, the police are doing what the warrant allows them to do in the resident's absence in any event, and the only difference is how long after the fact they will receive their notice.

---

39. *Wilson* v. *Arkansas*, 514 U. S. 927, 931 (1995).

40. *Id.*, at 934.

41. 520 U. S. 385, 394-395 (1997) (emphasis added).

42. 18 U. S. C. § 3103a(b)(1).

43. 800 F. 2d, at 1456.

In light of the Supreme Court's recent no-knock cases and earlier covert entry cases, it seems unlikely that any constitutional challenge to section 3103a(b) will succeed.

D. Remedies for Surveillance Violations

A recurring and controversial question in the area of search, seizure, and surveillance concerns the remedy for violations of the legal requirements. In 1914, the Supreme Court excluded illegally obtained evidence from federal criminal trials,[44] and in 1961 it extended this rule to the states.[45]

The other principal remedy has been a civil suit against the offending officer. For state and local officers, these suits are brought under the civil rights private action statute, 42 U. S. C. § 1983,[46] and for federal officers they are brought under a judicially-created cause of action, first announced by the Supreme Court in the *Bivens* case in 1971.[47] As a practical matter, recovery under these sections is limited by two corollary rules. First, the employing government entity is generally not liable as employer, although local governments can be liable for a pattern of violations committed as a matter of policy or custom.[48] Second, the doctrine of qualified immunity shields the officers for any actions which were not clearly illegal at the time of the action.[49] These two rules operating in tandem may leave no one liable for a violation.[50]

In 1995, Senator Hatch proposed eliminating the Fourth Amendment exclusionary rule in federal courts and replacing it with a civil action against the United States.[51] An action directly against the government provides a deeper pocket and avoids the immunity problem. This proposal was highly controversial,[52] and it was not adopted.

---

44. *Weeks* v. *United States*, 232 U. S. 383, 398 (1914).

45. *Mapp* v. *Ohio*, 367 U. S. 643, 655 (1961).

46. See, *e.g.*, *Howlett* v. *Rose*, 496 U. S. 356, 358-359 (1990).

47. *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971).

48. *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658, 694 (1978).

49. See *Anderson* v. *Creighton*, 483 U. S. 635, 640 (1987).

50. See *Arizona* v. *Evans*, 514 U. S. 1, 22-23 (1995) (Stevens, J., dissenting).

51. S. 3, 104th Cong., 1st Sess. § 507 (1995).

52. See generally, The Jury and the Search for Truth: The Case Against Excluding Relevant Evidence at Trial, Hearing Before the Senate Comm. on the Judiciary, S. Hrg. 104-724, 104th Cong., 1st Sess. (1995).

For search limitations created by statute, the remedy is under legislative control.[53] Congress may forbid exclusion of evidence and make other remedies exclusive, as it did in the Right to Financial Privacy Act.[54] Conversely, Congress can require suppression, as it did in the original wiretapping statute.[55] The original wiretapping statute and its exclusionary rule apply only to "wire" or "oral communication," *i.e.*, voice.[56] When Congress added "electronic communication" in the Electronic Communications Privacy Act, it specifically decided not to extend the exclusionary rule.[57]

The House Judiciary Committee's version of the "PATRIOT Act" would have amended the exclusionary rule of § 2515 to include electronic communications, reversing Congress's 1986 decision.[58] This section was omitted from the substitute and from the final legislation, which instead contains a civil compensation remedy.

Section 223(c)(1) of the Act enacts 18 U. S. C. § 2712, creating a cause of action against the United States for "[a]ny person who is aggrieved by any willful violation of" Chapter 121 of Title 18 (stored wire and electronic communications), Chapter 119 (wiretapping), or of three sections of the Foreign Intelligence Surveillance Act: 50 U. S. C. §§ 1806(a), 1825(a), and 1845(a) (use of FISA information). Presumably, this action is only for violations by federal officers, although the language does not expressly contain this limitation. It would be remarkable, to say the least, for the federal government to shoulder liability for the actions of state or local officers or even private persons.

The statute provides for actual damages with a $10,000 floor and for litigation costs, but it does not provide for attorney's fees.[59] The damage floor helps to answer the argument that civil remedies are insufficient because violations without major tangible damages cannot be feasibly litigated, although it still requires a lean law practice to pursue a $10,000 claim economically.

---

53. See La Fave, *supra* note 29, § 1.5(b), at 132-133.

54. 12 U. S. C. § 3417(d); see *United States* v. *Daccarett*; 6 F. 3d 37, 52 (2d Cir. 1993).

55. 18 U. S. C. §§ 2515, 2518(10)(a).

56. See 8 U. S. C. § 2510(1), (2).

57. See 18 U. S. C. § 2518(10)(c); *Electronic Communications Privacy Act of 1986*, S. Rep. No. 99-541, 99th Cong., 2d Sess. (1986), *reprinted in* 1986 U. S. Code Cong. & Admin. News 3555, 3577.

58. H. R. Rep. 107-236, *supra* note 2, at 58.

59. 18 U. S. C. § 2712(a).

The new section further provides that the amount of the award is to be docked from the budget of the offending agency.[60] This provision is clearly intended to insure that the management of the agency has a direct interest in preventing violations.

This section may be most significant as a harbinger of future legislative action in the search and seizure area. By reaffirming its 1986 decision and enacting a new direct action against the government, Congress has taken another step toward a general recognition that excluding valid, probative evidence in criminal prosecution is the wrong way to enforce privacy protections. Compensation for the victims of violations, whether they be innocent or guilty, and hitting the offending agency in the budget, bureaucracy's most sensitive point, may be the path of the future.

E. Detention of Suspected Terrorists

Section 412 adds section 236A to the Immigration and Nationality Act.[61] Presumably it will be codified as 8 U. S. C. § 1226A.[62] It gives the Attorney General broad powers to detain aliens suspected of terrorism, and it sets forth the process for reviewing detentions pursuant to the statute. Although Section 412 raises real constitutional and statutory interpretation issues, it should survive judicial review intact.

Subdivision (a) sets out the means for detaining aliens, (b) provides the sole means of reviewing the detention, and (c) establishes a reporting system. Subdivision (a)(1) gives the Attorney General the authority to take into custody any alien he certifies as a threat to national security under subdivision (a)(3). Subdivision (a)(2) limits release of the alien. Except for the limitation procedure provided for in subdivision (a)(6), the alien shall remain in custody until the alien is removed (*i.e.*, deported), "is finally determined not to be removable," or until the Attorney General determines that he is no longer subject to certification. Subdivision (a)(3) allows the Attorney General to certify an alien if he has "reasonable grounds to believe" that the alien has or will commit espionage or sabotage, try to overthrow the government, commit terrorist acts, or is otherwise engaged in activities that threaten national security. Subdivision (a)(4) limits delegation of this power to the Deputy Attorney General. Subdivision (a)(5) requires the Attorney General to begin criminal or deportation proceedings within seven days of the detention. Subdivision (a)(6) allows the detention of those aliens not likely to be deported "in the foreseeable future" for additional six-month periods if release would threaten national security or public safety. Subdivision (a)(7) requires the Attorney General to review the certification finding every six months and gives the alien the right to request review every six months.

---

60. 18 U. S. C. § 2712(b)(5).

61. 8 U. S. C. §§ 1101 et seq.

62. The present Immigration and Nationality Act § 236 is codified as 8 U. S. C. § 1226.

Subdivision (b) limits judicial review of this statute or any decision under it to habeas review in federal court. The mechanism for judicial review is set forth in (b)(1). This subdivision limits review of "any action or decision relating to this section," including the "merits" of an (a)(3) or (a)(6) determination, to "habeas corpus proceedings consistent with this subsection." Subdivision (b)(2) provides that the habeas petition can only be filed with a Supreme Court justice, D.C. Circuit justice, or "any district court otherwise having jurisdiction to entertain it." Paragraph (B) of this subdivision incorporates the rule that a petition filed with a higher court may be transferred to a district court. Under (b)(3) appellate jurisdiction over the habeas proceedings vests exclusively in the D.C. Circuit. Subdivision (b)(4) limits the rules of decision to Supreme Court and D.C. Circuit precedents. Subdivision (c) requires the Attorney General to provide reports regarding the detainees to the Senate and House Judiciary Committees.

The final language is confusing and possibly contradictory in subsection (a)(2) regarding the effect of the outcome of the removal proceedings. The second sentence retains language from the original Senate bill that "custody should be maintained irrespective . . . of any relief from removal granted the alien . . . ." Yet the last sentence, added in the final stages, says, "If the alien is finally determined not to be removable, detention pursuant to this subsection shall terminate." If the basis of detention was also the ground for removal, and if that ground has been finally adjudicated to be false, continued detention would raise serious constitutional questions. It seems likely the courts would avoid the questions by relying on the last sentence.

The primary constitutional issue raised by Section 412 is the legality of the detention under the Fifth Amendment's due process guarantee. Protection from government detention lies at the heart of due process.[63] This last term, the Supreme Court addressed the standards for reviewing immigration detention in *Zadvydas* v. *Davis*.[64] The question in *Zadvydas* was whether 8 U. S. C. § 1231(a)(6) "authorizes the Attorney General to detain a removable alien *indefinitely* beyond the removable period or only for a period *reasonably necessary* to secure the alien's removal" from the country.[65] The Court read the statute narrowly, holding that allowing the indefinite detention of resident aliens who were not likely to be deported "would raise a serious constitutional problem."[66]

Indefinite detention is constitutionally permissible in certain narrow situations involving special justification for the detention and sufficient procedural protections for the detainee.[67] Section 412 addresses both requirements. *Zadvydas* specifically mentions "suspected terrorists" as a " 'small

---

63. See *Foucha* v. *Louisiana*, 504 U. S. 71, 80 (1992).

64. 150 L. Ed. 2d 653, 121 S. Ct. 2491 (2001).

65. *Id.*, at 662, 121 S. Ct., at 2495 (emphasis in original).

66. *Id.*, at 666, 121 S. Ct., at 2498.

67. See *id.*, at 667, 121 S. Ct., at 2498-2499; see also *United States* v. *Salerno*, 481 U. S. 739, 746 (1987); *Kansas* v. *Hendricks*, 521 U. S. 346, 356 (1997).

segment of particularly dangerous individuals' " who could be subject to indefinite detention.[68] In *Zadvydas*, the Court was critical of the fact that the only procedural protections for the detainee in that case were found in administrative proceedings.[69] By contrast, Section 412 provides for a habeas review on the merits of any detention.

The *Zadvydas* standard must be met because aliens are subject to potentially indefinite detention under Section 412. Subdivision (a)(6), titled "Limitation on Indefinite Detention" provides that any alien "whose removal is unlikely in the reasonably foreseeable future, may be detained for additional *periods* of up to six months," (emphasis added), if release threatens national security or the safety of an individual or the community. Any doubt about this language is resolved by (a)(7) which requires the Attorney General to review certification "every 6 months" and allows the alien to request reconsideration of certification "each 6 months . . . ." So long as the certification is reviewed every six months, it may continue indefinitely. Since the (a)(6) review is also subject to review by a habeas court, there is once again more procedural protection than in *Zadvydas*.

Another potential constitutional problem is the evidentiary standard for detaining aliens. Section 412 authorizes detention whenever there is "reasonable grounds to believe" that the alien is engaged in terrorist activity. This phrase is taken from *Terry* v. *Ohio*.[70] Now known as the "reasonable suspicion" standard,[71] it requires less proof than probable cause.[72] Since the *Terry* standard only authorizes a brief "stop and frisk" in its Fourth Amendment context, allowing this standard to justify a potentially indefinite detention raises a constitutional issue.

The fact that national security is involved weighs heavily in the Fourth Amendment balance. The *Zadvydas* Court explicitly distinguished "terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security."[73] It is difficult to estimate exactly how much deference the courts will give to the unprecedented national security concerns addressed by this bill, but it is clear that the constitutional calculus differs significantly from *Zadvydas*, or any other recent detention case. The principle of judicial deference pervades the area of national security.[74] During World War II, German saboteurs caught in the United States were

---

68. See 150 L. Ed. 2d, at 668, 121 S. Ct., at 2499 (quoting *Hendricks*, *supra*, 521 U. S., at 368).

69. See 150 L. Ed. 2d, at 668, 121 S. Ct., at 2499-2500.

70. 392 U. S. 1, 30 (1968).

71. See *California* v. *Hodari D.*, 499 U. S. 621, 635 (1991).

72. See *Terry*, *supra*, 392 U. S., at 27.

73. 150 L. Ed. 2d, at 670-671, 121 S. Ct., at 2502.

74. See, *e.g.*, *Department of Navy* v. *Egan*, 484 U. S. 518, 530 (1988); *CIA* v. *Sims*, 471 U. S. 159, 180-181 (1985).

tried before a miliary tribunal under the Articles of War.[75] Deference is also found in the Constitution's text, which authorizes the suspension of habeas corpus "in Cases of Rebellion or Invasion the public Safety may require it."[76] Given the current threat to security posed by alien terrorists, and given that habeas review is available to challenge the Attorney General's findings, due process should be satisfied.

Section 412's habeas review mechanism also raises important statutory interpretation issues for the courts. The vast majority of modern habeas corpus litigation concerns collateral attacks on state convictions. These proceedings have their own special rules of procedure.[77] Section 412 does not refer to these postconviction procedures, however. Instead, proceedings are governed under the general grant of habeas jurisdiction to the federal courts, which gives federal courts the power to grant writs of habeas to individuals held in federal custody and those held "in custody in violation of the Constitution or laws or treaties of the United States."[78] Outside the postconviction context, neither Congress nor the Supreme Court has promulgated rules for habeas procedures. Instead, the habeas courts applying section 412 will have to fill this vacuum.

A particularly important issue will be what standard of review to apply to the Attorney General's determination that the alien is in one of (a)(3)'s certification categories. In other words, how much deference must be paid to the Attorney General's conclusion that he has reasonable grounds to believe that an alien is a terrorist? There is a strong case for applying a deferential standard. Applying the "reasonable grounds" standard might be characterized as a discretionary act on the part of the Attorney General. Since discretionary acts are often reviewed under a deferential standard,[79] and courts generally defer to the political branches in national security matters, the (a)(3) certification could be reviewed deferentially by the habeas court.

The argument for a less deferential standard is that a more meaningful judicial review of the detention helps to alleviate due process concerns. The *Zadvydas* Court found a "serious constitutional problem" with allowing indefinite detention "without . . . significant later judicial review."[80] Given Section 412's low *Terry* standard, deferential review is almost no review at all. Only the most arbitrary detentions could be overturned by a habeas court applying such a standard. Although de novo review may not be mandated by the Constitution in light of the significant public

---

75. See *Ex Parte Quirin*, 317 U. S. 1, 48 (1942).

76. U. S. Const., Art. I, § 9, cl. 2; see *Ex parte Milligan*, 71 U. S. 2, 114-115 (1866) (discussing suspension during the Civil War).

77. See generally Rules Governing Section 2254 Cases in the United States District Courts.

78. 28 U. S. C. § 2241(c)(1), (3).

79. See, *e.g.*, *Cooler & Gell* v. *Hartmarx Corp.*, 496 U. S. 384, 400 (1990).

80. 150 L. Ed. 2d, at 668, 121 S. Ct., at 2500.

safety concerns confronting the country, applying a de novo standard would avoid a substantial constitutional issue. Since the Supreme Court took a similar approach to statutory interpretation in *Zadvydas*, the courts are likely to take the same approach to Section 412.

The remaining procedural questions will be answered by examining other habeas cases that do not involve collateral attacks on convictions. For example, the D.C. Circuit, which provides the rule of decision in Section 412 cases, allows a patient to utilize habeas corpus to challenge his confinement to a mental institution.[81] The needed procedures will be found in this and similar cases. Given the low evidentiary standard that must be met, and the need for expedited proceedings in these cases, the habeas hearing should be brief, much more like a preliminary hearing than a full trial. These expedited hearings should not place an excessive burden on the Justice Department.

F. DNA Database Expansion.

Congress has acted on several occasions to expand the government's databank of DNA samples of known offenders.[82] By comparing crime scene evidence against this database, perpetrators can be identified in cases where there is no other evidence of identity.[83] "DNA has been called 'the single greatest advance in the search for truth since advent of cross-examination.' "[84]

Despite its great potential to improve the accuracy and efficacy of the criminal justice system, expansion of the database is controversial. Some are concerned that the DNA gathered will be used for purposes other than identification.[85] Most controversial are proposals to test suspects upon arrest, rather than after conviction or even a preliminary hearing.[86] Whatever the merits of testing mere arrestees, these proposals have met a practical roadblock in the reality that the labs are badly backlogged with higher priority samples.[87]

---

81. See *Curry* v. *Overholser*, 287 F. 2d 137, 140 (D.C. Cir. 1960).

82. See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 811(a)(2), 110 Stat. 1214, 1312 (1996); DNA Analysis Backlog Elimination Act of 2000, Pub. L. No. 106-546, § 6, 114 Stat. 2726, 2733 (2000).

83. See National Commission of the Future of DNA Evidence, What Every Law Enforcement Officer Should Know About DNA Evidence 2, 5 (1999).

84. Report of the National Task Force on Privacy, Technology, and Criminal Justice Information 45 (NCJ 187669) (quoting New York State Judge Joseph Harris, 1988).

85. See *ibid.*; Juengst, I-DNA-fication, Personal Privacy, and Social Justice, 75 Chi.-Kent L. Rev. 61, 64-65 (1999).

86. See National Task Force, *supra* note 84, at 46.

87. See Recommendation of the National Commission on the Future of DNA Evidence to the Attorney General Regarding Arrestee DNA Sample Collection (Jan. 16, 2000), http://www.ojp.usdoj.gov/nij/dna/arrestrc.html.

Present law provides for sampling of federal prisoners convicted of murder, sexual abuse and related offenses, peonage and slavery, kidnapping, offenses involving robbery or burglary, a similar list of offenses within Indian country, and attempts to commit the above offenses.[88] Section 503 of the Act expands the list to include a list of terrorism, sabotage, and assassination crimes,[89] and all crimes of violence, as defined in 18 U. S. C. § 16. The latter definition is quite broad, including uses of force against property as well as persons. However, it is not as broad as some state laws, which extend to all felonies.[90] Further, the statute remains limited to convicted felons and therefore does not raise the issues involved in sampling indicted defendants before trial or arrestees.

Constitutional attacks on DNA sampling laws have been uniformly unsuccessful. A recent case observes, "although all 50 states have enacted . . . DNA profiling laws, and although a number of other jurisdictions have considered the question of whether such laws violate Fourth Amendment principles, and have used any of several theories to resolve that question, appellant has been unable to cite one that has resolved it against DNA profiling."[91]

One of the few jurists to accept an anti-databank argument was Judge Murnaghan of the Fourth Circuit, dissenting in the *Jones* case. He concluded that the government's "articulated interest in the testing of non-violent felons does not counter-balance the privacy violation in the procedure."[92] The basis for this conclusion of attenuated interest is Judge Murnaghan's belief that a person convicted of a nonviolent offense is "not significantly more likely to commit a violent crime in the future than a member of the general population."[93] He cites no authority for this remarkable hypothesis.

In reality, people convicted of nonviolent crimes are vastly more likely to commit violent crimes in the future than are members of the general population, and this has been well known for a long time. As far back as 1981, a RAND study found that "offenders tend to be nonspecialists," and there was no "identifiable group of career criminals who commit only violence."[94] A more recent survey of state prison populations by present and prior offense found that, of recidivists incarcerated for a

---

88. 42 U. S. C. § 14135a(d).

89. 42 U. S. C. § 141351(d)(2)(A) (as amended), incorporating the list of 18 U. S. C. § 2332b(g)(5).

90. See, *e.g.*, Va. Code § 19.2-310.2.

91. *People* v. *King*, 82 Cal.App.4th 1363, 1370, 99 Cal. Rptr. 220 (2000); see also *Jones* v. *Murray*, 962 F. 2d 302, 305-310 (4th Cir. 1992), cert. denied, 506 U. S. 977 (1992) (rejecting Fourth Amendment and *Ex Post Facto* claims); *Roe* v. *Marcotte*, 193 F. 3d 72 (2d Cir. 1999) (Fourth Amendment and equal protection, criticizing *Jones*'s reasoning but coming to the same conclusion); *Johnson* v. *Commonwealth*, 529 S. E. 2d 769, 779 (Va. 2000) (Fourth Amendment, self-incrimination, cruel and unusual punishment).

92. *Jones* v. *Murray*, 962 F. 2d, at 311 (dissenting opinion).

93. *Id.*, at 313-314.

94. M. Peterson & H. Braiker, Who Commits Crimes? xxiv, xxvii (1981).

violent offense, the number with only nonviolent priors actually exceeds the number with a violent prior.[95] The notion that criminality is neatly segmented into violent and nonviolent is fundamentally wrong. Criminals share a general disregard of the law and the rights of others that makes them more likely to commit crimes of all types than the general population. The government has an interest in including as many such people in the databank as is feasible.

In light of the uniform rejection of constitutional attacks on similar laws, and the strong government interests furthered by this project, the expansion of sampling in this statute is virtually certain to be upheld, if attacked.

G. Conclusion.

The criminal procedure and related sections of the USA PATRIOT Act of 2001 generally do not "push the envelope" of constitutional limits. The most serious issues arise in the alien detention provision, where it is likely that the courts will construe the language so as to minimize the constitutional difficulty.

95. Bureau of Justice Statistics, Correctional Populations in the United States—1997, Table 4.10, at 57 (2000). Inmates with a current violent offense and a previous sentence are 35% of the state prison population, of which 18.2% have only nonviolent priors.