

HOUSE BILL REPORT

ESSB 6704

As Reported by House Committee On:
Select Committee on Community Security

Title: An act relating to the state's measured response to terrorism.

Brief Description: Increasing penalties for terrorist acts.

Sponsors: Senate Committee on Judiciary (originally sponsored by Senators Kline, Hargrove, Kastama, Winsley, Oke, Keiser and Johnson).

Brief History:

Committee Activity:

Select Committee on Community Security: 2/27/02, 2/28/02 [DPA].

Brief Summary of Engrossed Substitute Bill
(As Amended by House Committee)

- Provides new and expanded authority under the state's Privacy Act for gathering evidence in terrorism investigations.
- Provides for the sharing, use and admissibility of evidence gathered in terrorism investigations by local, state, and federal investigative and law enforcement officers.
- Enacts the Washington Anti-Terrorism Act of 2002.
- Creates specific felony terrorism crimes.
- Makes terrorism in the first-degree an alternate means of committing aggravated first degree murder.
- Adds terrorism crimes to the criminal profiteering law, regardless of financial gain.
- Creates definitions for unconventional weapons.

HOUSE COMMITTEE ON SELECT COMMITTEE ON COMMUNITY SECURITY

Majority Report: Do pass as amended. Signed by 14 members: Representatives Hurst, Chair; Simpson, Vice Chair; Lisk, Ranking Minority Member; Ballasiotes, Barlean, Benson, Buck, Campbell, Haigh, Jackley, Kessler, Morris, O'Brien and Schmidt.

Minority Report: Do not pass. Signed by 1 member: Representative Schual-Berke.

Staff: Ilene Miller (786-7310).

Background:

Terrorist Attacks.

On September 11, 2001, terrorists hijacked four commercial airliners and crashed them into the twin towers of the World Trade Center, into the Pentagon, and onto a field in Pennsylvania, killing thousands of people. Shortly after these attacks occurred, anthrax-contaminated mail was found in various locations, including postal facilities, Congressional offices, and the United States Supreme Court. As a result of exposure to anthrax contaminated mail, some people became infected with inhalation or cutaneous anthrax, and some died from inhalation anthrax.

After the September 11, 2001 attacks, the United States began a military campaign to eliminate terrorism. The federal government and numerous state legislatures also have begun reviewing current laws and considering and enacting legislation to prevent and respond to terrorism and to punish persons committing or attempting to commit terrorist attacks.

On October 26, 2001, President Bush signed the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT). USA PATRIOT creates new terrorism crimes, increases criminal penalties, and broadens application of the death penalty to terrorist acts.

Offenses.

The Explosives Act includes criminal provisions making malicious placement or explosion or intimidation or harassment with an explosive felonies under Washington law. In 1997, the Explosives Act was amended to include terrorism-related crimes.

Definitions.

The definition of "terrorist act" pertains specifically to certain crimes within the Washington State Explosives Act (Explosives Act). The definition of "terrorist act" means an act that is intended to:

- Intimidate or coerce a civilian population;
- Influence the policy of a branch or level of government by intimidation or coercion;
- Affect the conduct of a branch or level of government by intimidation or coercion; or

- Retaliate against a branch or level of government for a policy or conduct of the

government.

The definition of "explosive" or "explosives" is defined for purposes of the Explosives Act and includes any chemical compound or mechanical mixture that is commonly used or intended for the purpose of producing an explosion, that contains any oxidizing and combustible units, or other ingredients, in such amounts that any type of ignition may cause such a sudden generation of highly heated gases that the resultant gaseous pressures are capable of producing destructive effects on contiguous objects or of destroying life or limb.

Criminal Profiteering.

There are provisions in law that provide for forfeitures of both real and personal property if the property was used or gained in the commission of a crime.

Sentencing.

An adult offender who commits a felony on or after July 1, 1984, is subject to the provisions of the Sentencing Reform Act (SRA), and a court generally must impose a sentence within the standard sentence range based on the severity of the crime and the offender's felony convictions. Crimes are categorized into one of 16 "seriousness levels" depending on the seriousness of the offense. An adult offender is also assigned an "offender score" generally based on the number of the offender's prior convictions. A table that matches the "seriousness level" of the crime with the "offender score" is used to determine the offender's sentence.

Maximum Punishments.

Felonies defined within the criminal code are designated as A, B, or C class felonies. These felonies carry the following maximum penalties:

- Class A felony - Life in prison, \$50,000 fine.
- Class B felony - 10 years in prison, \$20,000 fine.
- Class C felony - Five years in prison, \$10,000 fine.

Death Penalty.

A person is guilty of aggravated first-degree murder if the person committed premeditated first-degree murder and at least one aggravating circumstance exists. Some examples of aggravating circumstances are: the victim was a law enforcement officer, corrections officer, or firefighter who was performing his or her official duties; the person murdered more than one victim as part of a common scheme or in a single act; or the murder was committed in the course of, in furtherance of, or in immediate flight from one of several specified crimes. The sentence for aggravated first-degree murder is either life

imprisonment without the possibility of release or death.

Serious Violent Offenses.

Serious violent offenses are a subcategory of violent offenses. Those convicted of two or more serious violent offenses are subject to consecutive sentences instead of concurrent.

Exceptional Sentence.

The court may impose a sentence outside the standard range if substantial and compelling reasons justify an exceptional sentence. Sentences that depart from the standard range must meet certain requirements and may be appealed by either the defendant or the state. The SRA lists a number of illustrative factors both mitigating and aggravating that the court may consider in determining whether an offender should receive an exceptional sentence.

Statute of Limitations.

The criminal code provides various statute of limitation periods during which the prosecution of a crime must take place. The general statute of limitations for felony crimes is three years. There are several exceptions to this general time period. For example, there is no statute of limitations for the crimes of murder, homicide by abuse, arson if a death results, vehicular homicide, vehicular assault if a death results, and hit-and-run injury-accident if a death results.

Summary of Amended Bill:

Washington State AntiTerrorism Act of 2002.

The Washington AntiTerrorism Act of 2002 is established. The act establishes new terrorism crimes and amends state criminal law to include specific terrorism crimes and to enhance sentencing ranges for these crimes. Civil remedies for victims of terrorist acts are also provided for in state law.

Terrorism-Related Definitions

Definitions related to unconventional weapons are added to the criminal code. "Weapon of mass destruction" is defined as any device, object, or substance designed or intended to be used to cause multiple human deaths and includes intentional unlawful release or dissemination of a biological or chemical agent or of radioactive material. "Biological agent" is defined to include any naturally occurring or engineered microorganism, virus, infectious substance, biological product, toxin, or vector or any of their components capable of causing:

- human, plant, or animal death, disease, or biological malfunction;
- deterioration of food, water equipment, supplies or materials; or
- deleterious alteration of the environment.

A "chemical agent" is defined as any weapon, device, material, or substance designed or intended to cause widespread death or physical injury through release, dissemination, or impact of toxic or poisonous chemicals or their precursors. "Radioactive material" is defined to include any material containing, emitting, or releasing radiation or radioactivity at a level dangerous to human life. Other definitions related to dissemination of chemical and biological agents are added to the criminal code.

Criminal Law Provisions

Terrorism crimes are added to the criminal code. Some new crimes focus directly on persons committing or attempting to commit terrorist acts. These crimes are; terrorism in the first degree, terrorism in the second degree, unlawful use or possession of a weapon of mass destruction, and threatening acts of terrorism in the first degree and the second degree.

Other terrorism crimes focus on persons assisting with terrorist activities. These crimes are; providing material support or resources to terrorists, and unlawful possession of false identification for terrorist purposes.

Terrorism crimes have no statute of limitations.

Criminal Sentencing

Terrorism crimes are added to the seriousness level ranking order in the Sentencing Reform Act (SRA).

- Terrorism in the first degree is punishable by life imprisonment or death.
- Terrorism in the second degree has a presumptive sentencing range of 240-320 months.
- Unlawful use or possession of a weapon of mass destruction has a presumptive sentencing range 123-220 months.
- Threatening acts of terrorism in the first degree has a presumptive sentencing range of 93-123 months.
- Threatening acts of terrorism in the second degree is unranked, and an offender can be sentenced anywhere from 0-12 months.

The crimes committed by persons aiding terrorists are class B felonies and accorded seriousness level ranking orders in the SRA.

- Providing material support or resources to terrorists has a presumptive sentencing range of 51-68 months.
- Unlawful possession of false identification for terrorist purposes has a presumptive

sentencing range of 51-68 months.

All presumptive sentencing ranges are for first-time offenders.

Death Penalty

Terrorism in the first degree is added as an alternate means of committing aggravated first-degree murder. An offender convicted of terrorism in the first degree may be subject to a death sentence or to life in prison without release.

Criminal Profiteering

Terrorism crimes are added to the definition of crimes that constitute "criminal profiteering." Terrorism crimes are included as criminal profiteering regardless of whether they are committed for financial gain.

Investigation of Terrorism Under the Privacy Act.

Various changes are made to the state's Privacy Act. In all instances, the changes authorizing the interception of communications are limited to cases involving acts of terrorism.

An "act of terrorism" is defined as the commission, or conspiracy to commit, any of the following crimes:

- Terrorism in the first degree;
- Terrorism in the second degree;
- Unlawful use or possession of a weapon of mass destruction; or
- Threatening acts of terrorism in the first degree.

No-Party Consent Cases.

A new provision is added to the Privacy Act to allow for prior judicial authorization to intercept a communication involving acts of terrorism when no party to the communication has consented to the interception. The provision follows closely the federal law, except that the provision is limited to cases involving terrorism.

The state attorney general or a county prosecutor may authorize a law enforcement agency to apply to a superior court for authorization for an interception. The application must include, among other things, particularized information about the communication to be intercepted, the suspected offense, and the extent of prior attempts to gain information.

The court may authorize the interception if it determines that normal investigative procedures have been tried and have failed or are too dangerous to try, and that there is probable cause to believe that:

- A person is, has, or will commit an act of terrorism;
- Particular communications concerning that act of terrorism will be obtained by the interception;
- The facilities or place from which the interception is to occur is used by the suspect (with exceptions summarized below).

Unless the government makes a showing of good cause and obtains a postponement, not more than 90 days after an order expires, the court is to make an "inventory" indicating that an order was entered, what the period of authorization was, and whether interceptions were made. This inventory is to be served on the person named in the order.

One-Party Consent Cases.

A new provision is added to the Privacy Act to allow law enforcement agencies to authorize the interception of communications with post-interception judicial review when at least one party has consented to the interception and the communication involves an act of terrorism. This provision is patterned on the existing Privacy Act section relating to one-party consent cases involving drug crimes.

The chief law enforcement officer or specified designee of an agency can authorize an interception of a communication related to terrorism if:

- At least one party to the communication has consented to the interception;
- There is probable cause to believe the communication will concern an act of terrorism; and
- The officer completes a report that identifies the required probable cause; the authorizing and consenting parties and the suspect; the details of the suspected offense; the time and location of the communication; and whether prior judicial authorization has been sought.

These authorizations are good for 24 hours, with no more than two extensions.

If an interception occurs, the law enforcement agency must report to the court within 15 days after the authorization was made. Within two days after that, the court is to review the authorization to see if it met the requirements described above. If the court invalidates the authorization it is to order the destruction of any recordings or copies of the interception. If the court has determined that probable cause did not exist for the authorization, within six months of that determination any nonconsenting party to the intercepted communication is to be notified of the interception.

An intentional interception done in violation of the one-party consent interception requirements is a class C felony. In addition, a law enforcement agency may be liable for civil damages, including exemplary damages of \$25,000.

Pen Registers And Traps And Traces.

A new provision is added to the Privacy Act to allow the expanded use of pen registers and traps and traces in investigations of terrorism. This provision is based on the existing Privacy Act section allowing the use of pen registers and traps and traces on telephones. However, this new provision regarding terrorism has expanded definitions that are taken from the federal law and that also cover electronic communications such as e-mail.

An investigative or law enforcement officer may seek authorization from the superior court to use a pen register or a trap and trace. The court is to authorize the use if it finds there is probable cause to believe the use will lead to evidence of terrorism. The court's order must specify the suspect, if known, and the person who owns or uses the instrument or facility to which the device or process is to be attached or applied. It must also specify the attributes of the communication to which the order applies, including, if known, the location of the instrument or facility.

Sharing And Use Of Evidence Obtained.

A new provision is added to the Privacy Act detailing the ways in which law enforcement agencies may share and use information obtained through surveillance authorized in investigations of terrorism.

- Federal law enforcement officers are expressly given authority to testify in state court as to evidence of terrorism obtained pursuant to federal law, if the evidence was obtained with prior judicial authorization.
- Federal or state officers may use or share information lawfully obtained under the terrorism provisions of the Privacy Act if the use or sharing is appropriate to their duties.
- Any person who has lawfully received information under the terrorism provisions of the Privacy Act may testify as to that information in a state court.
- Evidence of a crime other than terrorism may also be shared or used if the evidence was obtained lawfully during a terrorism surveillance authorized under the terrorism provisions of the Privacy Act. Such evidence of another crime may be testified to in state court upon a showing that it was obtained in accordance with the surveillance authorization.
- State officers are authorized to disclose to federal officials any evidence of foreign intelligence or counterintelligence obtained during a lawful surveillance under the

terrorism provisions of the Privacy Act.

- The interception of a communication does not change the nature of any privileged information in that communication.

Amended Bill Compared to Engrossed Substitute Bill:

The amended bill removes the definition of terrorist intent and instead makes terrorist intent an element of the crime. The amended bill replaces the terrorism crimes of hoax terrorist act, unlawful use and possession of agents for terrorist purposes, and releasing or possession of radioactive material with terrorist intent. These crimes are replaced with the crimes of terrorist intent with terrorism in the first degree, terrorism in the second degree, unlawful possession of a weapon of mass destruction, providing material support or resources to terrorists, threatening acts of terrorism in the first and second degree, and unlawful possession of false identification for terrorist purposes.

The amended bill adds definitions for imitation weapon of mass destruction, material support or resources, physical damage, public water system, radioactive material, vector, and weapon of mass destruction. The amended bill removes the definition of terrorist intent from the criminal profiteering law and replaces it with the specific terrorism crimes. The amended bill removes the definition of terrorist offender from the definition of aggravated first degree murder and replaces it with the crime of terrorism in the first degree. The amended bill adds the terrorism crimes to the juvenile offender sentencing standards. The amended bill adds in a severability clause and requires the act to take effect immediately.

The amended bill adds provisions authorizing the interception of communications in cases involving acts of terrorism. Acts of terrorism are defined to include the crime of terrorism in the first degree, terrorism in the second degree, unlawful use or possession of a weapon of mass destruction, and threatening acts of terrorism in the first degree.

The amended bill allows prior judicial authorization to intercept a communication involving acts of terrorism when no party to the communication has consented. The amended bill allows law enforcement agencies to authorize the interception of communications with postinterception judicial review when at least one party has consented to the interception and the communication involves an act of terrorism.

The amended bill allows for the expanded use of pen registers and traps and traces in investigations of terrorism and this covers electronic communications such as e-mail as well as telephones. The amended bill details the ways in which law enforcement agencies may share and use information obtained through surveillance authorized in investigations of terrorism.

The amended bill also defines the various terms related to terrorism surveillance and

gives the state attorney general the same existing concurrent authority with county prosecutors with respect to other provisions of the Privacy Act.

Appropriation: None.

Fiscal Note: Not Requested.

Effective Date of Amended Bill: Bill contains an emergency clause and takes effect immediately.

Testimony For: (Original bill) This bill was crafted to stay within existing Washington state felonies so that terrorism crimes could survive a constitutional attack. We don't know where or when these terrorists will strike next. This bill will help to protect us against another terrorist strike.

Testimony Against: (Original bill) The cardinal rule of statutes is that statutes be simple and understandable. This is so that the average person is put on notice of the statute and so that an attorney can go before a jury with simple and understandable law. This bill does not follow this cardinal rule. Contrary to the intent of the drafters, terrorist intent as defined in this bill, is very broad. It would catch any protestor who causes any loss of property, even if the loss is not significant.

The bill does not make a distinction between a real terrorist and a prankster, as both would face the very same punishment. The death of an innocent victim and a criminal accomplice are treated the same in this bill. This bill leaves considerable doubt about the crimes and consequences. This bill punches through existing statutory maximums and allows a person who commits a prank to face a lengthy sentence.

Testified: (In support - Original bill) Senator Kline, prime sponsor.

(Opposed - Original bill) Christine Gregoire, Washington State Attorney General; and Dick Van Wagenen, Governor's Policy Office.