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February 2, 2009

Congressional Research Service

Report RL31314

*Anti-Hoax Legislation in the 107th Congress: Addressing
Problems Since September 2001*

Paul Starett Wallace, Jr. American Law Division

Updated March 1, 2002

Abstract. Since September 11, 2001, the number of false claims of terrorist acts has ballooned. These false claims have become a serious headache for law enforcement officials, who are overwhelmed with working overtime to prevent actual terrorist acts and the investigations of all suspicious and fake events. Under current law, it is a felony to perpetrate a hoax by claiming there is a bomb on an airplane or to communicate in interstate commerce a threat to do bodily harm or personal injury to another. However, current law does not address a hoax related to biological, chemical, or nuclear dangers where there is no specific threat. On December 12, 2001, the House passed H.R. 3209 which is designed to punish a variety of hoaxes not covered under current law. On December 12, 2001, H.R. 3209 was received in the Senate and referred to the Committee on the Judiciary. A companion bill, S. 1719, which is identical to H.R. 3209 was also introduced in the Senate as well as other similar Senate bills with several significant differences regarding the standard of knowledge reflecting the degree of intent necessary for a conviction.

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CRS Report for Congress

Received through the CRS Web

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March 1, 2002

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Anti-Hoax Legislation in the 107th Congress: Addressing Problems since September 2001

Summary

Since September 11, 2001, the number of false claims of terrorist acts has ballooned. These false claims have become a serious headache for law enforcement officials, who are overwhelmed with working overtime to prevent actual terrorist acts and the investigations of all suspicious and fake events. Under current law, it is a felony to perpetrate a hoax by claiming there is a bomb on an airplane or to communicate in interstate commerce a threat to do bodily harm or personal injury to another. However, current law does not address a hoax related to biological, chemical, or nuclear dangers where there is no specific threat. On December 12, 2001, the House of Representatives by a 423 to 0 vote passed H.R. 3209 which is designed to punish a variety of hoaxes not covered under current law. The bill would impose civil and criminal penalties to deter and punish a person or persons for perpetrating a hoax that others could reasonably believe is or may involve a biological, chemical, or nuclear attack or an attack using some other type of weapon of mass destruction. Also, a convicted person could be responsible for the reimbursement of any emergency or investigative expense due to the hoax. The House Judiciary Committee by voice vote favorably reported H.R. 3209 on November 15, 2001, which was introduced by Representative Lamar Smith, Chairman of the Crime Subcommittee on November 1, 2001. On December 12, 2001, H.R. 3209 was received in the Senate and referred to the Committee on the Judiciary. A companion bill (S. 1719) which is identical to H.R. 3209 was also introduced in the Senate as well as other similar Senate bills with several significant differences regarding the standard of knowledge reflecting the degree of intent necessary for a conviction.

Contents

Background	1
Legislation	3
New Crimes	3
Intent	4
Intended Consequences	4
Jurisdiction	4
Sentences	5
Civil Liability/Civil Penalties	5
Reimbursement	6
Constitutional Questions	7
First Amendment	7
Double Jeopardy	9
Appendix A. Threats, Hoaxes and Related State Statutes	11
Appendix B. Comparison of Anti-Hoax Proposals	15

Anti-Hoax Legislation in the 107th Congress: Addressing Problems since September 2001¹

Background

The United States has experienced a proliferation of hoax anthrax attacks against its citizens since September 11, 2001, thus placing the United States at war at home and abroad.² On November 7, 2001, CNN News reported that “[t]he U.S. Postal Service said ... it has been plagued in recent days by nearly 12,000 hoaxes, threats and suspicious mail incidents – an average of 654 daily – that have resulted in the evacuation of 429 postal facilities for varying amounts of time.”³ Thus, this would suggest that the cost of responding to these hoaxes, both in financial and emotional terms, has been substantial.⁴

The Director of the F.B.I., Robert Mueller, noted that the Bureau has received 2,300 reports of anthrax incidents since October 1, 2001. The overwhelming majority of them, he said, are obviously hoaxes but he pointed out that investigating these hoaxes has wasted millions of dollars of anti-terrorism resources.⁵

Federal law already prohibits bomb scares and similar hoaxes that: (1) involve public transportation,⁶ (2) are transmitted by mail, telephone, or computer,⁷ (3) involve false reports affecting interstate or foreign commerce that a consumer product has been tainted and if true would create a risk of death or bodily injury to another person,⁸ (4) are statements or entries made with respect to any matter within the jurisdiction and related to the business or concern of the executive, legislative, or judicial branch of the Government of the United States (*e.g.*, the protection of federal property).⁹ Federal

¹This report was prepared with the assistance of Charles Doyle, Senior Specialist, CRS, American Law Division.

²H. Rept. No. 306, 107th Cong., 1st Sess. 3 (2001).

³November 7, 2001, Posted: 7:59 PM EST.

⁴See H.Rept. No. 306, *supra* note 1, at 3. The House Report states: “At home, emergency responders, law enforcement and investigation officials have been working overtime to prevent terrorist acts and investigate suspicious events and actual terrorist acts. The efforts on the home front have understandably drained Federal, state and local resources.”

⁵147 *Cong. Rec.* H9191 (daily ed. Dec. 11, 2001).

⁶18 U.S.C. §35.

⁷18 U.S.C. §844(e).

⁸18 U.S.C. §1365(c).

⁹18 U.S.C. §1001.

coverage becomes more comprehensive if the hoax escalates to a threat.¹⁰ At that point, threats - whether real or hoaxes - that involve the use of biological,¹¹ chemical,¹² nuclear,¹³ or other weapons of mass destruction¹⁴ become federal offenses.

At the state level, most jurisdictions have threat statutes, as well as false alarm or bomb scare laws or both; the citations and descriptions of these statutes as they relate to threats and other related issues are appended.¹⁵ There are a few states which expressly proscribe hoaxes involving catastrophic events, *e.g.*, Florida,¹⁶ Georgia,¹⁷ Kentucky,¹⁸ Michigan,¹⁹ and South Carolina.²⁰ It is very likely that other states will soon follow this course.

Nevertheless, the fact remains that hoaxes involving biological, chemical, nuclear, or other weapons of mass destruction are not *per se* federal crimes. Several bills have been

¹⁰A threat announces or implies that the speaker can control the anticipated harm; the hoax need involve no such declaration or implication.

¹¹18 U.S.C. § 175.

¹²18 U.S.C. § 229(a)(1).

¹³18 U.S.C. § 831(a)(6).

¹⁴18 U.S.C. § 2332a.

¹⁵“A gap exists ... in the current [federal] law as it does not address a hoax related to biological, chemical, or nuclear dangers where there is no specific threat.” See H.Rept. No. 306, *supra* note 1, at 3.

¹⁶“Any person who, without lawful authority, manufactures, possesses, sells, delivers, displays, uses, threatens to use, attempts to use, or conspires to use, or who makes readily accessible to others, a hoax weapon of mass destruction with the intent to deceive or otherwise mislead another person into believing that the hoax weapon of mass destruction will cause terror, bodily harm, or property damage commits a felony of the second degree” Florida Statutes Annotated §790.166(d)(3) (2002).

¹⁷“It shall be unlawful for any person to manufacture, possess, transport, distribute, or use a hoax device or replica of a destructive device or detonator with the intent to cause another to believe that such hoax device or replica is a destructive device or detonator.” Official Code of Georgia Annotated §16-7-85(a) (1999).

¹⁸“A person is guilty of terroristic threatening in the first degree when he or she: (a) Intentionally makes false statements that he or she or another person has placed a weapon of mass destruction on [specified property of this subsection] or [i]ntentionally and without lawful authority, places a counterfeit weapon of mass destruction at any location or on any object specified in paragraph (1)(a) of this subsection. Kentucky Revised Statutes Annotated §508 (1)(a) and (b) (2001).

¹⁹“A person shall not manufacture, deliver, possess, transport, place, use, or release for an unlawful purpose ... [a]n imitation harmful substance or devise.” Michigan Compiled Laws Annotated §750.200j(1)(c)(2001).

²⁰It is a misdemeanor to communicate or transmit “to a person that a hoax device or replica is a destructive device or detonator with intent to intimidate or threaten injury, obtain property, or interfere with the ability of a person or government to conduct its affairs.” South Carolina Statutes Annotated §16-23-730 (2001).

proposed addressing hoaxes. The House has passed an Anti-Hoax Terrorism Act (H.R. 3209), and proposals have been offered by a number of Senators including several members of the Senate Judiciary Committee, *i.e.*, S. 1658 (Sens. Schumer, DeWine and Hatch), S. 1659 (Sens. Hutchinson and Sessions), S. 1665 (Sens. Biden and Hatch), S. 1666 (Sen. Leahy), and S. 1719 (Sen. Feinstein).

Legislation

New Crimes

The House-passed bill (H.R. 3209) and its Senate counterpart (S. 1719) would add a new section 1037 to title 18 providing for criminal and civil penalties. Proposed section 1037 provides that “whoever engages in any conduct, with intent to convey false or misleading information, under circumstances where such information may reasonably be believed and where such information concerns an activity which would constitute a violation of section 175, 229, 831, or 2332a, shall be fined under this title or imprisoned not more than 5 years, or both.” The other proposals are similar but with several significant differences.²¹

²¹S. 1658 (“whoever knowingly engages in any conduct – (1) knowing that the conduct is likely to impart the false impression that activity is or will take place that violates section 175, 229, 831, or 2332a; and (2) that may reasonably be expected to be believed to cause an emergency response by governmental agencies or that causes an emergency response by governmental agencies to that activity; shall be fined under this title or imprisoned not more than 5 years, or both,” proposed 18 U.S.C. 881(a)).

S. 1659 (“whoever communicates information, knowing the information to be false and under circumstances in which such information may reasonably be believed, concerning the existence of activity which would constitute a violation of section 175, 229, or 831 shall be fined under this title or imprisoned not more than 5 years, or both,” proposed 18 U.S.C. 881(a)).

S. 1665 (“whoever, through the use of the mail, telephone, telegraph, or other instrument of interstate or foreign commerce, or in or affecting interstate or foreign commerce, knowingly engages in any conduct that is likely to impart the false impression that activity is taking place, or will take place that violates section 175, 229, 831, or 2332a of this title shall be fined under this title or imprisoned not more than 5 years, or both,” proposed 18 U.S.C. 2339C(a)).

S. 1666 (“whoever knowingly and maliciously imparts, conveys, or communicates information or material, knowing that information or material to be false or fraudulent, and under circumstances in which such information or material may reasonably be believed and is reasonably likely to cause any responses by a Federal, State, or local government agency, concerning the existence of activity that would constitute a violation of section 175, 229, 2332a, or 831 of this title, shall be fined under this title or imprisoned not more than 5 years, or both,” proposed 18 U.S.C. 881(a)).

A general overall comparison of the various proposals is appended.

Intent.

The House bill requires that the perpetrator have a *mens rea* (intent) to impart the false impression or misleading information. The Judiciary Committee believed “that this *mens rea* requirement will protect innocent individuals who have acted inadvertently. As an additional protection against prosecuting innocent or inadvertent behavior, the legislative language requires that the information be reasonably believable and concern activities that would constitute a violation of criminal law relating to biological, chemical, nuclear or weapons of mass destruction.”²²

A minority of the House Committee members favored the “knowingly and maliciously” standard found in S. 1666 and reminiscent of the transportation hoax language of 18 U.S.C. 35 under the view that the section would otherwise apply to the ill-advised jokester, *Id.* at 23-5 (additional views of Reps. Conyers, Scott, Jackson-Lee, and Waters).²³ Each of the other bills uses a “knowing” standard.

Intended Consequences.

Each of the bills requires that the offender intend to impart the imminence of a violation of 18 U.S.C. 175, 229 and 831 (relating to unlawful possession or use of biological, chemical or nuclear material, respectively). The Hutchinson/Sessions bill (S. 1659) goes no further. The House version and the other Senate proposals add 18 U.S.C. 2332a to the predicate offense list. Section 2332a proscribes unlawful use, attempted use, or threatened use of weapons of mass destruction, a term which it defines to include not only biological, chemical and nuclear weapons, but firearms and explosives as well. Thus, under their terms the new law would reach false reports of “a man with a gun.”

Both the Leahy and Schumer/DeWine/Hatch bills include section 2332a as a predicate, but narrow the scope of their offerings by requiring that the hoax be one which is reasonably likely to cause a response by a governmental agency.

Jurisdiction.

Only the Biden/Hatch bill, using language similar to that in the federal bomb scare statute (18 U.S.C. 844(e)), contains an explicit federal jurisdictional element (“through the use of the mail, telephone . . . or other instrument of interstate or foreign commerce. . . .”). The other proposals rely upon the jurisdictional foundations of the predicate offenses. Instead of a free standing crime, their hoax prohibitions might as easily have been added as subsections to the predicate offenses (biological, chemical, nuclear and massively destructive weapons offenses). Thus their jurisdictional pedigree would seem to be as good as that of the predicate offenses to which they relate.

²²H. Rept. No. 306, *supra* note 2, at 5.

²³18 U.S.C. 35 has alternative *mens rea*: “whoever willfully and maliciously, or with reckless disregard for the safety of human life. . . .”

Sentences.

The proposals punish offenders by imprisonment for not more than 5 years and a fine of the greater of \$250,000 or twice the amount of damage caused.

The House Committee observed that, “This new provision is consistent with current provisions in the criminal code that treat hoaxes related to certain crimes as felonies. For example, 18 U.S.C. §1365(c)(1) provides ‘whoever knowingly communicates false information that a consumer product has been tainted . . . shall be fined under this title or imprisoned not more than 5 years or both.’”²⁴ The same penalties attach to violations of 18 U.S.C. 35 (transportation hoaxes), although 844(e) (threats and bomb scares) carries a 10-year maximum term of imprisonment.

Civil Liability/Civil Penalties

Violations of 18 U.S.C. 35 (hoaxes involving transportation facilities) subject the offender to the possibility of civil penalties of not more than \$1000 recoverable by the United States in a civil cause of action. Other than the Leahy and Schumer/DeWine/Hatch bills, the proposals adopt a variation of this approach. The House-passed legislation and its Senate companion create a cause of action for expenses incurred as a consequence of responding to a hoax or more precisely: “Whoever engages in any conduct, with intent to convey false or misleading information under circumstances where such information concerns an activity which would constitute a violation of 175, 229, 831, or 2332a, is liable in a civil action to any party incurring expenses incident to any emergency or investigative response to that conduct, for those expenses.” The Biden/Hatch and Hutchinson/Sessions proposals call for civil penalties in an amount equal to the greater of \$10,000 or the cost of response.²⁵ The House bill permits recovery by federal, state, local, and private entities and individuals even if damage is less than \$10,000. The civil penalties are set at a minimum of \$10,000 and are recoverable only by the federal government in the case of the Hutchinson/Sessions bill and only by the federal or state governments in the case of the Biden/Hatch legislation. Unlike restitution or reimbursement under the proposals, neither the cause of action nor the civil penalties require a prior criminal conviction.

²⁴H. Rept. No. 306, *supra* note 2, at 5.

²⁵S. 1659 (“whoever communicates information, knowing the information to be false, concerning the existence of activity which would constitute a violation of section 175, 229, or 831 is liable to the United States for a civil penalty of the greater of \$10,000 or the amount expended by the United States incident to the investigation of such conduct, including the cost of any response made by any Federal military or civilian agency to protect public health or safety,” proposed 18 U.S.C. 881(b)).

S. 1665 (“whoever, through the use of the mail, telephone, telegraph, or other instrument of interstate or foreign commerce, or in or affecting interstate or foreign commerce, knowingly engages in any conduct that is likely to impart the false impression that activity is taking place, or will take place that violates section 175, 229, 831, or 2332a of this title shall be liable to the United States or any State for a civil penalty of the greater of \$10,000 or the amount of the money expended by the United States or the State in responding to the false information,” proposed 18 U.S.C. 2339C(b)).

Reimbursement

Under existing law, victim restitution is a sentencing option in most federal felony cases, 18 U.S.C. 3663, and a required sentencing feature in the case of any violent crime, property crime, or violation of 18 U.S.C. 1365 (product tampering, including hoaxes involving product tampering), 18 U.S.C. 3663A. Defendants may be ordered to pay restitution to governmental entities – federal or state – when the governmental body is the direct victim of the offense, as in the case of embezzlement of federal or state funds for example.²⁶ In most instances, however, a defendant may not be ordered to pay restitution to federal or state entities for the cost of investigating or prosecuting or providing other governmental services related to the offense for which he was convicted.²⁷ The bills seek to change that with respect to the hoaxes they proscribe.²⁸

²⁶*United States v. Ruffen*, 780 F.2d 1493 (9th Cir. 1986).

²⁷*Ratliff v. United States*, 999 F.2d 1023 (6th Cir. 1993).

²⁸H.R. 3209/S. 1719 (“The court, in imposing a sentence on a defendant who has been convicted of an offense under subsection (a), shall order the defendant to reimburse any party incurring expenses incident to any emergency or investigative response to that conduct, for those expenses. A person ordered to make reimbursement under this subsection shall be jointly and severally liable for such expenses with each other person, if any, who is ordered to make reimbursement under this subsection for the same expenses. An order of reimbursement under this subsection shall, for the purposes of enforcement, be treated as a civil judgment,” proposed 18 U.S.C. 1037(c))

S. 1658 (“(1)The court, in imposing a sentence on a defendant who has been convicted of an offense under subsection (a), shall order the defendant to reimburse for any expenses incurred incident to the investigation of the commission by that person of such offense, including the cost of any response made by any Federal military or civilian agency to protect public health or safety. (2) A person ordered to reimburse for expenses under this subsection shall be jointly and severally liable for such expenses with each other person, if any, who is ordered to make reimbursement under this subsection for the same expenses,” proposed 18 U.S.C. 811(b) (captions omitted))

S. 1659 (“(1) The court, in imposing a sentence on a defendant who has been convicted of an offense under subsection (a), shall order the defendant to reimburse the United States for any expenses incurred by the United States incident to the investigation of the commission by that person of such offense, including the cost of any response made by any Federal military or civilian agency to protect public health or safety. (2) A person ordered to reimburse the United States for expenses under this subsection shall be jointly and severally liable for such expenses with each other person, if any, who is ordered to make reimbursement under this subsection to reimburse the United States for those expenses,” proposed 18 U.S.C. 811(c)(captions omitted))

S.1655 (“(1) The court, in imposing a sentence on a defendant who has been convicted of an offense under subsection (a), shall order the defendant to reimburse the United States or a State for any expenses incurred by the United States or a State incident to the investigation of the offense, including the cost of any response made to protect public health or safety. (2) A person ordered to reimburse the United States for expenses under paragraph (1) shall be jointly and severally liable for such expenses with each other person, if any, who is ordered under this chapter to reimburse the United States or any State,” proposed 18 U.S.C. 2339C(c) (captions omitted)).

S. 1666 (“Notwithstanding and in addition to sections 3663 and 3663A of this title and

(continued...)

Federal authorities would be entitled to mandatory reimbursement for the costs of hoax-related investigations under each of the proposals. The Schumer/DeWine/Hatch, Hutchinson/Sessions and Biden/Hatch bills explicitly include the costs of responses made to protect public health and safety. The Hutchinson/Sessions proposal extends only to federal costs. Biden/Hatch requires reimbursement of both federal and state authorities. The Schumer/DeWine/Hatch offering covers expenses incurred incident to the investigation regardless of who incurs them. The House-passed bill and its Feinstein counterpart insist on reimbursement of any party for expenses incident to any emergency or investigative response. Most explicitly sweeping of all, the Leahy proposal requires restitution to victims for losses suffered and reimbursement for federal and state governmental entities for expenses incurred in response.

Some members of the House Judiciary Committee objected to the mandatory nature of the reimbursement provision in the House bill on the grounds that it would negate any prospect of individualized sentencing and that its impact would be disproportionately felt by the economically disadvantaged, H.Rept.No. 306.²⁹

Constitutional Questions

First Amendment.

Whenever communications are outlawed First Amendment free speech questions are likely to arise. A statute “which makes criminal a form of pure speech, must be interpreted with the commands of the First Amendment clearly in mind.”³⁰ Not all speech, however, enjoys First Amendment protection. The Supreme Court has observed on a number of occasions that the First Amendment affords violence and the threat of violence no protection.³¹ But only “true threats” are unshielded; political hyperbole, obvious jokes, and the like, do not qualify as threats. “First Amendment concerns are satisfied by . . . excluding statements which are, when taken in context, not ‘true threats’ because they are conditional and made in jest.”³² The speaker need not intend, or even have the capacity, to carry out his promise of criminal harm.³³ It is enough under the circumstances that those to whom the threat is communicated reasonably believe the speaker is able and

²⁸(...continued)

any other civil or criminal penalty authorized by law, the court shall order – (1) restitution to all victims of an offense under subsection (a), including any losses suffered by a victim as a proximate result of the offense; and (2) the defendant to reimburse all Federal, State, and local government, entities for any expenses incurred in response to the offense to protect public health or safety,” proposed 18 U.S.C. 881(b) (captions omitted)).

²⁹*Supra*, note 1, at 25-6 (additional views of Reps. Conyers, Scott, Jackson-Lee and Waters).

³⁰*Watts v. United States*, 397 U.S. 705, 707 (1969).

³¹*E.g., R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992).

³²*United States v. Francis*, 164 F.3d 120, 123 (2d Cir. 1999).

³³*United States v. Viehhaus*, 168 F.3d 392, 395-96 (10th Cir. 1999).

intends to carry it out. The true threat, one beyond the pale, is one “that the recipient of the in-context threat reasonably feared . . . would be carried out.”³⁴

And so it is with the hoax which differs from the threat in that the speaker need not be the agent of harm. The courts have long observed, as the Second Circuit noted when considering a First Amendment challenge to the transportation hoax statute:³⁵ “If the statute so far as it applied to aircraft were limited to making criminal the imparting of false information with respect to the existence of a bomb on a loaded aircraft, there could be little doubt that the giving of the false information would be beyond the protection of the First Amendment. It would fall within the principle of the false cry of fire in a crowded theater, the classic illustration of unprotected speech given by Mr. Justice Holmes.”³⁶

The fact that the speaker knows the hoax is false removes it even farther from the shelter of the First Amendment. Even in the arena of public debate where free speech concerns are most strongly felt, those who make harmful statements of fact that they know to be false may claim no First Amendment protection.³⁷

The criminal sanctions in each of the bills would appear to survive First Amendment scrutiny since each is cast so that criminal liability turns upon the offender’s knowing, creditable but false communication of the existence of a dangerous criminal condition or threat of such a condition.

The civil liability and civil penalty provisions might pose a more difficult issue. Two of the bills (S. 1658 and S. 1666) have only criminal and reimbursement components. One (S. 1665) uses identical language to describe the elements of the criminal and civil wrongs it proscribes. The others (H.R. 3209/S. 1719 and S. 1659), however, use identical language except that their civil penalty/civil cause of action omits one of the elements found in their criminal prohibition, *i.e.*, that the hoax be objectively creditable (“under circumstances where such information may reasonably be believed”). In the case of a threat, this deletion would appear to usher in First Amendment problems. The presence of some creditable anticipation of the announced harm is what separates the true threat from the statement protected by the First Amendment. On the other hand, the First Amendment is less protective of intentional false statements. A threat need not be false, but a hoax must be. In the case of a hoax, the courts have given no clear indication of whether a less than creditable statement of impending harm loses its First Amendment protection because the speaker also knows the statement is false.

Moreover, hoax sentences might be thought to raise First Amendment issues, similar to those raised by “hate crimes” statutes. Following enactment of the proposals, the Sentencing Guidelines would increase the sentencing range for a hoax if the offender were motivated by the victim’s race, color, *i.e.*, religion, national origin, ethnicity, gender, disability,

³⁴*United States v. Morales*, 272 F.3d 284, 287 (5th Cir. 2001).

³⁵18 U.S.C. 35.

³⁶*United States v. Rutherford*, 332 F.2d 444, 446 (2d Cir. 1964).

³⁷*New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964).

or sexual orientation.³⁸ The question would be, when two people commit the same crime, should the sentencing guidelines provide that a person with hate in his or her mind receive a higher sentence than the person with a more trivial motive.³⁹ The Supreme Court has made it clear, however, that motivation is a valid basis for sentencing distinctions, the First Amendment notwithstanding.⁴⁰

Double Jeopardy.

Double jeopardy concerns may have induced the creation of crimes and civil penalties or causes of actions with different elements. The Fifth Amendment's double jeopardy clause command that no person "be subject for the same offense to be twice put in jeopardy of life or limb," prohibits multiple prosecutions by the same sovereign for the same offense.⁴¹ A second prosecution is permissible if the offenses are not the same, that is if "each requires proof of a fact which the other does not."⁴²

The reference to "life or limb" notwithstanding, the clause is not restricted to instances where an individual is twice exposed to the peril of execution or imprisonment for the same offense. The Supreme Court articulated the applicable standards for whether a crime and a parallel "civil penalty" for the same misconduct may raise double jeopardy concerns in *Hudson v. United States*:⁴³

The clause protects only against the imposition of multiple *criminal* punishments for the same offense. . . . Whether a particular punishment is criminal or civil is, at least initially, a matter of statutory construction Even in those cases where the legislature has indicated an intention to establish a civil penalty, [the Court has] inquired further whether the statutory scheme was so punitive either in purpose or effect as to transform what was clearly intended as a civil remedy into a criminal penalty In making this latter determination, the factors listed in *Kennedy v. Mendoza-Martinez*,⁴⁴ provide useful guideposts, including: (1) whether the sanction involved an affirmative disability or restraint;

³⁸U.S.S.G. § 3A1.1(a).

³⁹*R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992); *Wisconsin v. Mitchell*, 508 U.S. 476 (1993).

⁴⁰"But motive plays the same role under the Wisconsin statute as it does under the federal and state antidiscrimination laws, which we have previously upheld against constitutional challenge. Title VI of the Civil Rights Act of 1964, for example, makes it unlawful for an employer to discriminate against an employee *because* of such individual's race, color, religion, sex, or national origin....[I]n *R.A.V. v. St. Paul*, 505 U.S. 377, 389-90 (1992), we cited Title VII...as an example of a permissible content-neutral regulation of conduct," *Wisconsin v. Mitchell*, 508 U.S. 476, 487 (1993)(emphasis in the original).

⁴¹*Monge v. California*, 524 U.S. 721, 727-28 (1998); *Abbate v. United States*, 359 U.S. 187, 196 (1959).

⁴²*Grady v. Corbin*, 495 U.S. 508, 515 (1990).

⁴³522 U.S. 93, 99-100 (1997)(emphasis in the opinion of the Court)(internal quotation marks and some citations omitted).

⁴⁴372 U.S. 144, 168-169 (1963).

(2) whether it has historically been regarded as a punishment; (3) whether it comes into play only on a finding of *scienter*; (4) whether its operation will promote the traditional aims of punishment-retribution and deterrence; (5) whether the behavior to which it applies is already a crime; (6) whether an alternative purpose to which it may rationally be connected is assignable for it; and (7) whether it appears excessive in relation to the alternative purpose assigned. It is important to note, however, that these factors must be considered in relation to the statute on its face, and only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty.

The House bill and its Senate companion seem likely to withstand double jeopardy challenges for at least three reasons. First as noted earlier, the crime and cause of action they create have different elements. Second, double jeopardy concerns would only be implicated if the United States brings the cause of action. Suit by a state or private party would have no double jeopardy consequences, since double jeopardy is only implicated if both prosecutions are initiated by the same party. Third, it is characterized as a civil cause of action to compensate those who have suffered by the wrong it defines. Nothing in its provisions implies a punitive purpose, certainly nothing so draconian as to warrant overcoming the basic presumption and concluding that the cause of action was created to punish, that it is a criminal sanction in disguise.

The same can be said for the civil penalty provision of the Hutchinson/Sessions proposal, except for the fact that its civil penalty may only be enforced by the United States consequently the proposal cannot claim the different party distinction.

The civil penalty established in the Biden/Hatch bill cannot assert a “different elements” defense because it uses the same elements of the crime and civil penalty it creates. Nevertheless, no double jeopardy questions would arise when a state seeks to enforce the civil penalties and the penalty it envisions seems both compensation-related and not so excessive as to overcome the basic presumption that the penalty should not be characterized as a criminal penalty.

Finally, the presence of a post-conviction reimbursement device available for the same costs covered by the civil penalty suggests that the civil penalty provisions may have been intended to provide an alternative to prosecution in less serious cases.

In much the same manner, exposing an individual to both criminal penalties and a reimbursement order as a consequence of conviction poses no double jeopardy problems.

Appendix A. Threats, Hoaxes and Related State Statutes

Alabama: *Ala. Code* §§13A-6-23 (menacing: by physical conduct causing another to reasonably fear imminent serious physical injury); 13A-10-8 (false alarms)

Alaska: *Alaska Stat.* §§11.61.120 (threatening telephone call); 11.56.810 (terroristic threatening, i.e., false report of a dangerous condition that causes fear in another, evacuation of a building or public inconvenience)

Arizona: *Ariz. Rev. Stat. Ann.* §§13-2916 (telephone threats to injure person or property), 13-2921 (harassment, i.e., continuous following or repeated threatening communications or actions)

Arkansas: *Ark. Code Ann.* §§5-71-208 (harassment is following, surveillance, repeatedly causing alarm in order to annoy or alarm another), 5-71-209 (harassing communications are those calculated to annoy or alarm); 5-71-210 (communicating a false alarm)

California: *Cal. Penal Code* §148.1 (false report of explosive or facsimile bomb)

Colorado: *Colo. Rev. Stat.* §§18-3-206 (menacing: placing another in fear of bodily injury); 18-8-110 (false report of explosives, chemical or biological agents, radioactive substance)

Connecticut: *Conn. Gen. Stat. Ann.* §§53a-180, 53a-180a (false alarms)

Delaware: *Del. Code Ann.* tit.11 §§602 (menacing: causing fear of imminent injury by physical action), 1311 & 1312 (harassment: communicating in a manner likely to alarm); 621 (terroristic threat: threat to inflict injury or damage or false alarm causing an evacuation, serious inconvenience or terror)

Florida: *Fla. Stat. Ann.* §§790.163-790.165 (false alarms)

Georgia: *Ga. Code Ann.* §§16-11-39 (telephone threats of bodily harm); 16-11-37 (terroristic threats to injure or damage property in order to terrorize, cause evacuation, or cause serious public inconvenience -- need not be false), 16-10-28 (false bomb scare)

Hawaii: *Hawaii Rev. Stat.* §§711-1106 (harassment: telephone threat of bodily injury or damage); 701-1014 (false alarms)

Idaho: *Idaho Code* §§18-7901 to 18-7904 (malicious harassment: threat to cause injury or damage); 18-3313 (false reports of explosives in public or private places)

Illinois: *Ill. Comp. Stat. Ann.* ch.720 §§5/12-9 (threaten a public official), 5/26-1 (false alarm or bomb scare), 135/1-1 (threatening phone calls)

Indiana: *Ind. Stats. Ann.* §§35-45-2-2 (harassment: communication made with the intent to alarm); 35-44-2-2 (false bomb scares or false reports of product contamination)

Iowa: *Iowa Code Ann.* §§708.7 (harassment: communicating a threat or false alarm), 712.8 (threaten or attempt to place an explosive); 712.7 (false alarm concerning the placement of a bomb or incendiary device)

Kansas: *Kan.Stat.Ann.* §§21-4113 (harassment by telephone: phone threats); 21-4110 (false alarm)

Kentucky: *Ky.Rev.Stat.* §§508.050 (menacing: placing another in fear of imminent injury), 508.080 (terroristic threatening includes both threats to inflict injury or damage and false alarms causing evacuation), 525.070 (harassment: subjects another to conduct causing alarm), 525.080 (harassing communication: communicates in a manner designed to cause alarm)

Louisiana: *La.Rev.Stat.Ann.* §§14:285 (threatening telephone communications), 14:40.1 (terrorizing: false alarm to cause fear of injury, evacuation, or serious public disruption); 14:54.1 (false alarm concerning arson), 14:54.5 (possession of a fake explosive device)

Maine: *Me.Rev.Stat.Ann.* tit.17-A §§210 (terrorizing: threaten to cause fear or evacuation of a building or facility -- threat need not be false), 506(harassment by telephone includes making threatening calls), 506-A (harassment: threatening conduct after being warned by law enforcement officer), 509 (false report or alarm)

Maryland: *Md.Ann. Code art.27* §§121A (threatening state officials with injury), 151A (false statement of rumor as to bomb)

Massachusetts: *Mass.Gen.Laws Ann.* ch.269 §14 (false report of explosives or other dangerous substances)

Michigan: *Mich.Comp.Laws Ann.* §750.540e (telephone threats of injury or damage)

Minnesota: *Minn.Stat.Ann.* §609.713 (bomb scares)

Mississippi: *Miss.Code Ann.* §§97-29-45 (telephone threats of injury or damage), 97-37-21 (false report of explosives)

Missouri: *Mo.Ann.Stat.* §§565.090 (harassment: written or telephone threat), 575.090 (false bomb report)

Montana: *Mont.Code Ann.* §§45-5-203 (intimidation: threat to inflict injury), 45-8-101 (bomb scares)

Nebraska: *Neb.Rev.Stat.* §28-907 (false bomb report)

Nevada: *Nev.Rev.Stat.* §§200.571 (harassment: threaten injury or damage), 199.300 (threatening public officials), 202.840 (false bomb threat)

New Hampshire: *N.H.Rev.Stat.Ann.* §§644:4 (harassment: threat of injury), 644:3 (false alarm of fire, explosion or other catastrophe)

New Jersey: *N.J.Stat.Ann.* §§2C:33-4 (harassment: repeated or alarming conduct committed to cause alarm), 2C:33-3 (false warning of fire, explosion, bombing, crime, catastrophe or emergency)

New Mexico: *N.M.Stat.Ann.* §§30-20-16 (bomb scares), 30-7-20 (mailing or sending a facsimile or hoax bomb), 30-7-21 (false report concerning fire or explosives,), 30-3A-2 (harassment: pattern conduct intended to terrorize)

New York: *N.Y.Penal Law* §§240.25-240.20 (harassment: repeated acts causing fear of injury), 240.50-240.60 (false report, likely to cause alarm, of crime, catastrophe or emergency), 120.15 (menacing: cause fear of imminent serious injury)

North Carolina: *N.C.Gen.Stat.* §§14-69.1 (false bomb report), 14-69.2(preparing a false bomb), 14-277.1 (communicating threats of physical injury)

North Dakota: *N.D.Cent.Code* §§12.1-17-05 (menacing: threat of imminent serious injury), 12.1-17-07 (harassment: threatening telephone call), 12.1-11-03 (false report to law enforcement officers of situation requiring emergency action)

Ohio: *Ohio Rev.Code Ann.* §§2903.21 (aggravated menacing: cause another to fear serious injury), 2903.22 (menacing: cause fear of injury), 2917.21 (telephone threats of injury or damage), 2917.31 (causing evacuation or serious public inconvenience by false warning of fire, explosion, crime, or other catastrophe), 2917.32 (false warning of fire, explosion, crime, or other catastrophe)

Oklahoma: *Okla.Stat.Ann.* tit.21 §1172 (threatening telephone calls)

Oregon: *Ore.Rev.Stat.* §§163.190 (menacing: place another in fear of imminent serious physical injury), 166.065 (harassment: conveying threats of serious injury), 162.375 (initiating false alarms to officials responsible for emergencies)

Pennsylvania: *Pa.Stat.Ann.* tit.18 §§2709 (harassment: threatening physical conduct or conduct designed to alarm with no legitimate purpose), 4905 (false report to agencies responsible for public safety)

Rhode Island: *R.I.Gen.Laws* §§11-42-4 (threatening public officials with injury), 11-32-9 (false bomb threats), 11-35-18 (telephone bomb threats)

South Carolina: *S.C.Code* §§16-17-430 (threatening telephone calls), 16-17-725 (false report to agencies responsible for emergencies); 16-11-550 (false threat to injure or damage by explosive or incendiary), 16-11-555 (fake bombs)

South Dakota: *S.D.Cod.Laws* §§49-31-31 (threatening telephone calls), 22-19A-1 to 22-19A-7 (false alarms), 22-14A-22 (falsely reporting a bomb)

Tennessee: *Tenn.Code Ann.* §§39-17-308 (harassment: telephone threats), 39-16-502 (false alarms)

Texas: *Tex.Penal Code* §§42.07 (harassment: telephone threats, false alarms), 42.06 (false bomb scares), 46.08 (hoax bombs)

Utah: *Utah Code Ann.* §§76-5-107 (threats against life or property), 76-5-106 (harassment: written threat to commit a violent crime), 76-9-105 (false alarms concerning fires, bombings, or catastrophes);

Vermont: *Vt.Stat.Ann.* tit.13 §§1751-1754 (false alarms), 1027 (threatening telephone calls)

Virginia: *Va.Code* §§18.2-60 (written threat to injure), 18.2-60.1 & 18.2-60.2 (threats against the Governor and the Governor's family), 18.2-427 (telephone threats), 18.2-83 (false information concerning property damage by bomb or incendiary)

Washington: *Wash.Rev.Code Ann.* §§9A.36.090 (threats against the Governor or the Governor's family), 9A.46.020-9A.46.060 (harassment: threats of injury or damage), 9.61.230 (telephone threats), 9A.84.040 (false reporting of fire, explosion, crime, catastrophe, or emergency likely to result in evacuation of a building or facility or to cause public inconvenience)

West Virginia: *W.Va.Code* §§61-6-17 (false reports concerning bombs and other explosives), 61-6-20 (false report of an emergency due to explosion, crime, catastrophe, accident, illness or other emergency)

Wisconsin: *Wis.Stat.Ann.* §§947.013 (harassment: threatening physical contact), 947.012 (telephone threats), 941.13 (false alarms made to public officials), 947.015 (bomb scares)

Wyoming: *Wyo.Stat.* §6-5-210 (false alarms made to public officials)

Appendix B. Comparison of Anti-Hoax Proposals

	H.R. 3209/S. 1719	S. 1658	S. 1659	S. 1665	S. 1666
<i>Crime:</i> <i>Intent</i>	knowingly	knowingly	knowingly	knowingly	knowingly and maliciously
<i>Predicates</i>	18 U.S.C. 175, 229, 831, 2332a	18 U.S.C. 175, 229, 831, 2332a	18 U.S.C. 175, 229, 831, 2332a	18 U.S.C. 175, 229, 831, 2332a	18 U.S.C. 175, 229, 831, 2332a
<i>Official Reaction</i>	none required	likely to cause government response	none required	none required	likely to cause government response
<i>Jurisdiction</i>	predicate offenses	predicate offenses	predicate offenses	use of mail, phone, telegraph, instrument of commerce; affect on commerce	predicate offenses
<i>Civil Liability:</i> <i>Generally</i>	cause of action for any party for emergency or investigation related expenses	no provision	civil penalty for U.S. for larger of \$10,000 or costs to investigate and respond (including public health and safety)	civil penalty for U.S. or State for larger of \$10,000 or costs of responding	restitution to any victim for proximately caused losses
<i>Creditable Hoax</i>	not required	no provision	not required	likely to impart false impression	reasonable to believe
<i>Reimbursement:</i> <i>To Whom?</i>	any party	unspecified	U.S.	U.S. or State	U.S. , State, or local
<i>For What?</i>	expenses incident to emergency and investigative response	expenses incident to investigation (including to protect public health or safety)	expenses incident to investigation (including to protect public health or safety)	expenses incident to investigation (including to protect public health or safety)	expenses incurred in response to protect public health or safety