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Kimberly A. Felix

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Weapons of Mass Destruction: The Changing Threat and the Evolving Solution

Kimberly A. Felix

Code Sections Affected

Penal Code §§ 11417, 11418.5, 11419 (amended).

SB 1287 (Alarcon); 2002 STAT. Ch. 611 (*Effective August 29, 2002*).

I. INTRODUCTION

Following the gruesome terrorist attacks on the United States, state legislators nationwide embarked on urgent missions to review and revise existing state anti-terrorism laws.¹ Some states responded to the national crisis and the threat of terrorist activity within their borders by establishing task forces on terrorism to boost homeland security.² Other states, such as Arizona and Georgia, established state-run centers to gather information and coordinate with federal authorities.³ New York responded by introducing and passing legislation that would make using weapons of mass destruction a capital crime.⁴ California, however, already had similar measures in place.⁵

Recognizing the threat of terrorism years before the events of September 11, 2001 (September 11th), the State enacted the Hertzberg-Alarcon California Prevention of Terrorism Act (HACPTA) in 1999.⁶ In response to the attacks on September 11th, the California Governor's Office of Emergency Services joined forces with federal, state, and local agencies to establish a committee known as the State Strategic Committee on Terrorism (SSCOT), a committee focused on planning for and addressing terrorist threats.⁷ Additionally, the Order required the SSCOT to evaluate potential threats of terrorist attacks and make recommendations for prevention and response.⁸ California legislators drafted several bills that sought to expand existing crimes and increase punishments for terrorist crimes.⁹ Senate

1. Blake Harrison, *Terrorism in State Criminal Codes*, National Conference of State Legislatures, at <http://www.ncsl.org/programs/press/2002/issues/criminalcode.htm> (last visited Feb. 27, 2003) (copy on file with the *McGeorge Law Review*).

2. *Id.*

3. Kae Warnock, *Combating Terrorism—What States Are Doing*, ST. LEGISLATURES, Dec. 2001, at 14.

4. Harrison, *supra* note 1.

5. See CAL. PENAL CODE §§ 11415-11419 (West 2000 & Supp. 2003) (detailing the provisions of the Hertzberg-Alarcon California Prevention of Terrorism Act which addresses the use of weapons of mass destruction).

6. *Id.* § 11415.

7. Exec. Order No. D-47-01 (Oct. 10, 2001), at <http://www.oes.ca.gov> (last visited July 11, 2002) (copy on file with the *McGeorge Law Review*).

8. *Id.*

9. See 2002 Cal. Stat. ch. 606. AB 1838 sought to expand the definition of weapons of mass destruction (WMD) and to define murder by means of a WMD as first degree murder. *Id.* See also 2002 Cal. Stat. ch. 281.

Bill 1287, now titled Chapter 611, was among the bills introduced to update terrorism legislation.

II. LEGAL BACKGROUND

In the aftermath of the terrorist attacks of September 11th, and the numerous anthrax incidents and hoaxes, Chapter 611 seeks to update the California Prevention of Terrorism Act.¹⁰ In response to the overwhelming number of hoaxes that caused widespread fear of death, injury, or destruction of property, Senator Alarcon authored Chapter 611, designing the bill to expand the definitions of weapons of mass destruction and to update the 1999 version of HACPTA.¹¹ As Senator Alarcon stated concerning Chapter 611: “Today, we must go further with legislation and we must be ready for the possibility of another terrorist attack.”¹²

A. *The Hertzberg-Alarcon California Prevention of Terrorism Act—Penal Code Sections 11415-11419*

In 1999, California’s State Legislature enacted HACPTA in response to a “rash of anthrax threats that occurred” in the months before the legislation was introduced.¹³ Prior to the 1999 Act, California law was largely silent on the threat posed by the use of specific weapons of mass destruction (WMD).¹⁴ In response to the growing concern of terrorism and the gap in the California statutes, Senator Alarcon and Assemblymember Hertzberg introduced separate legislation that the Senate Public Safety Committee later consolidated and named the Hertzberg-Alarcon California Prevention of Terrorism Act.¹⁵

The 1999 version of HACPTA put into action a comprehensive scheme to control WMDs and to impose punishment on those who use or possess such weapons.¹⁶ More specifically, the Act defined a WMD as “chemical warfare agents, weaponized biological or biologic warfare agents, nuclear agents, radiological agents, or the intentional release of industrial agents as a weapon.”¹⁷

SB 1267 required a defendant convicted of a crime involving a hoax or a false report of a WMD to pay the cost of the emergency response. *Id.*

10. SENATE RULES COMMITTEE, FLOOR ANALYSIS OF SB 1287, at G (May 24, 2002).

11. See generally ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1287 (June 25, 2002) (describing the purpose and provisions of Chapter 611).

12. Press Release, Senator Alarcón, Alarcón Responds to Terrorist Attacks, Pushes to Beef-Up State Anti-Terrorism Act (Jan. 17, 2002), at <http://democrats.sen.ca.gov/senator/alarcon> (copy on file with the *McGeorge Law Review*).

13. SENATE RULES COMMITTEE, FLOOR ANALYSIS OF AB 140, at 10 (Sept. 4, 1999).

14. *Id.* at 9.

15. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1287, at H (Apr. 30, 2002).

16. SENATE RULES COMMITTEE, FLOOR ANALYSIS OF AB 140, at 1 (Sept. 4, 1999).

17. CAL. PENAL CODE § 11417(a)(1) (West 2000).

In addition, the 1999 version of HACPTA criminalized the possession, development, manufacture, production, transfer, acquisition, or retention of any WMD.¹⁸ The Act also criminalized threatening to use a WMD with the specific intent that the statement be taken as a threat, even if there is no actual intent of carrying out the threat.¹⁹ Finally, the Act created the crime of using recombinant technology or any other biological advances to create new pathogens or to make more virulent forms of existing pathogens for use as a WMD.²⁰

In addition, sections 11415 through 11419 of the Penal Code have the effect of giving California concurrent jurisdiction with the federal government in these crimes of terrorism.²¹ The recognition of concurrent jurisdiction allows California to prosecute for violations of sections 11415 through 11419 in the event the federal government does not prosecute or fails in its prosecution of the alleged perpetrators.²² Most importantly, HACPTA enables “California peace officers . . . to work to prevent or interdict” the use of WMDs before injury, death, or destruction occurs.²³

III. CHAPTER 611

A. *Weapons of Mass Destruction—Definitions*

Chapter 611 changes the current California Prevention of Terrorism law by defining a WMD to include a specified mode of transportation when used as a destructive weapon.²⁴ Chapter 611 expands the definition of WMDs to include aircraft, vessels, and vehicles used as a weapon.²⁵ In order for a mode of transportation to be “used as a destructive weapon,” Chapter 611 mandates that the mode of transportation must be “use[d] with the intent of causing widespread great bodily injury or death by causing a fire or explosion or the release of a chemical, biological, or radioactive agent.”²⁶ As noted by the Senate Committee on Public Safety, the definition of “weapons of mass destruction” as set forth by Chapter 611 seeks to address “conduct similar or equivalent to the attack on the World Trade Center.”²⁷ Chapter 611 shifts the definition of a WMD from the specific target to “the harm intended or caused through use of the weapon.”²⁸

18. *Id.* § 11418(a) (West 2000).

19. *Id.* § 11418.5(a) (West 2000).

20. *Id.* § 11418(d) (West 2000).

21. SENATE RULES COMMITTEE, FLOOR ANALYSIS OF AB 140, at 9 (Sept. 4, 1999).

22. *Id.* at 8.

23. *Id.* at 9.

24. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1287, at J (Apr. 30, 2002).

25. SENATE RULES COMMITTEE, FLOOR ANALYSIS OF SB 1287, at B (May 24, 2002).

26. CAL. PENAL CODE § 11417(a)(7) (amended by Chapter 611).

27. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1287, at I (Apr. 30, 2002).

28. *Id.*

Chapter 611 further expands the definition of “weapons of mass destruction” to include additional biological agents.²⁹ More specifically, Chapter 611 adds to the definition of “weapons of mass destruction” “[a]ny microorganism, virus, infectious substance, or biological product that has the same characteristics as, or is substantially similar to,” the biological agents listed under the original version of HACPTA.³⁰

B. Crimes and Penalties for the Use of a Weapon of Mass Destruction

The original version of Chapter 611, as drafted by Senator Alarcon, contained numerous provisions designed to increase the penalties for crimes involving the use, possession, or development of WMDs.³¹ However, the final version of the bill that Governor Davis signed into law did not include the penalty provisions that had once been integral to the purpose of the bill.³² Although penalty increases were not ultimately included in Chapter 611, the bill consistently removes alternatives for penalties, making both a prison term and monetary fine mandatory for violations of all sections, whereas the 1999 version of the Penal Code allowed for a prison term, a fine, or both.³³

C. Possession and Development of Weapons of Mass Destruction

In general, Chapter 611 expands the crime of possessing restricted biological agents and other similar infectious substances.³⁴ In particular, Chapter 611 amends section 11419(b) of the Penal Code to include a catch-all phrase to cover “[a]ny . . . microorganism . . . that has the same characteristics as, or is substantially similar to, the substances prohibited in [section 11419].”³⁵ Chapter 611 also clarifies the mandated penalties for violation of the newly amended section 11419 by underscoring that punishment shall include “imprisonment in the state prison for [four, eight, or twelve] years” in addition to a monetary fine capped at “two hundred fifty thousand dollars.”³⁶

29. *Id.* at C.

30. CAL. PENAL CODE § 11419(b)(6) (amended by Chapter 611).

31. *See* 2002 Cal. Stat. Ch. 611 (as introduced on January 16, 2002) (including amendments to sections 11418 and 11418.5 and including the addition of section 11418.1 which proposed to increase penalties for violations of the sections).

32. *Compare* 2002 Cal. Stat. ch. 611 (as amended by the Senate on May 7, 2002) (containing the proposed addition of Section 11418.1 and amendments to Section 11418, both of which include penalty increases), *with* CAL. PENAL CODE §§ 11418.5, 11419(a) (amended by Chapter 611).

33. *Compare id.* §§ 11418.5(a), 11419(a) (amended by Chapter 611) (eliminating alternative penalties), *with* CAL. PENAL CODE §§ 11418.5(a), 11419(a) (West 2000) (allowing a prison term or a fine or both as appropriate penalties for violations of the listed penal code sections).

34. *See supra* Part III.A (defining “restricted biological agents and infectious substances” for the purposes of this bill); SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1287, at C (Apr. 30, 2002).

35. CAL. PENAL CODE § 11419(b)(6) (amended by Chapter 611).

36. *Id.* § 11419(a) (amended by Chapter 611).

D. Credible Threats and Sustained Fear

Chapter 611 expands the existing crime of making a credible threat to use a WMD to provide that a “statement” conveying a threat may be communicated in any manner prescribed in section 225 of the Evidence Code, including verbal or written statements, statements transmitted by electronic devices, and nonverbal conduct.³⁷ Additionally, Chapter 611 eliminates the requirement that the threat result in an evacuation, quarantine, isolation, or decontamination effort.³⁸ Chapter 611 thus requires only that a threat to use a WMD “causes [a] person reasonably to be in sustained fear for his or her own safety, or for his or her immediate family’s safety.”³⁹

However, Chapter 611 does not completely disregard or eliminate the importance of the occurrence of any of the events listed above. Chapter 611 incorporates the requirement of an evacuation, quarantine, isolation, or decontamination effort into the new definition of “sustained fear.”⁴⁰ The end result is that the occurrence of such conduct becomes *evidence* of sustained fear.⁴¹

E. Urgency Clause Adopted

Citing the need for immediate preservation of public peace, health, or safety, the Senate adopted an urgency clause for Chapter 611.⁴² The urgency clause provides that the provisions and amendments set forth by Chapter 611 are immediately effective, unlike other recently chaptered bills which are not effective until January 1, 2003.⁴³ Furthermore, the urgency clause provides “for immediate authority to effectively address the [threat posed by WMDs] in California.”⁴⁴

IV. ANALYSIS OF CHAPTER 611

Chapter 611 compliments existing federal law concerning WMDs.⁴⁵ As noted, in 1999, when the Legislature enacted HACPTA, sections 11415 through

37. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1287, at 6-7 (June 25, 2002); *see also* CAL. EVID. CODE § 225 (West 1995) (defining “statement” as an oral, written, or nonverbal communication).

38. CAL. PENAL CODE § 11418.5(a) (amended by Chapter 611); *see also* SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1287, at M (Apr. 30, 2002) (stating that the previous definition of a credible threat to use a WMD was too limited).

39. CAL. PENAL CODE § 11418.5(a) (amended by Chapter 611).

40. *Id.* § 11418.5(b) (amended by Chapter 611) (stating that such conduct establishes “sustained fear”).

41. *Id.*

42. 2002 Cal. Stat. ch. 611, sec. 5.

43. *Id.*

44. *Id.*

45. *See* ASSEMBLY COMMITTEE ON PUBLIC SAFETY, ASSEMBLY COMMITTEE ANALYSIS OF SB 1287, at 3-4 (June 25, 2002) (enumerating existing federal law regarding weapons of mass destruction).

11419 gave California law enforcement agencies concurrent jurisdiction with federal agencies.⁴⁶ The Act allows state law enforcement agencies to take preventative measures to quash potential terrorist attacks without the delay of waiting for federal intervention.⁴⁷ However, in terms of the prosecutions under HACPTA as amended by Chapter 611, since existing law in California is derived from federal law, “[t]he number of individuals likely to be prosecuted and sentenced under [HACPTA and Chapter 611] is not expected to be high.”⁴⁸ In fact, “[t]he Department of Corrections reports that no inmates were sent to prison during [the period of 1999 through 2000] with the WMD felony [as defined by the 1999 Hertzberg-Alarcon legislation] as a principal offense.”⁴⁹

Nevertheless, the purposes served by Chapter 611 remain important, given the real danger of future terrorist threats and attacks, and the more creative, unexpected, and advanced instruments being used as WMDs.⁵⁰ Proponents of Chapter 611 favor penalty increases for the possession, use, or threat of use of a WMD, stating “that the Penal Code [must] keep pace with criminal actions.”⁵¹ Given the broader potential for more aggressive terrorist attacks in California and nationwide, Chapter 611 is necessary to “update and more accurately define the terminology, threats, and types of terrorist crimes that must now be codified and the consequences that need to be prescribed for such heinous crimes committed in one time and place against potentially thousands of innocent people.”⁵²

Furthermore, taking into consideration the events and trends that have precipitated the introduction of Chapter 611, supporters of Chapter 611 consider the amendments “reasonable and necessary.”⁵³ The amendments are also considered necessary because the 1999 version of sections 11415 through 11419 of “the Penal Code acknowledges acts of terror” and related threats, but only provide a “factual but limited scope”⁵⁴ that is no longer sufficient to address the post-September 11th climate of terrorism.⁵⁵

46. SENATE RULES COMMITTEE, SENATE FLOOR ANALYSIS OF AB 140, at 9 (Sept. 4, 1999).

47. *Id.* at 9-10.

48. SENATE APPROPRIATIONS COMMITTEE, FISCAL SUMMARY OF SB 1287, at 1 (May 23, 2002).

49. *Id.*

50. See ASSEMBLY COMMITTEE ON PUBLIC SAFETY, ASSEMBLY COMMITTEE ANALYSIS OF SB 1287, at 5-6 (June 25, 2002) (noting that this bill expands the definition of “[u]sed as a destructive weapon” in response to the unexpected use of Anthrax, aircrafts, and WMDs).

51. Letter from Nick Warner, Legislative Advocate, California State Sheriffs’ Association, to Richard Alarcon, Senator (Apr. 10, 2002) [hereinafter Warner Letter] (on file with the *McGeorge Law Review*); E-mail from Claude Alber, Labor Consultant, Peace Officers Research Association of California, to Kimberly A. Felix, McGeorge School of Law (June 26, 2002) (on file with the *McGeorge Law Review*).

52. Letter from Pat McNamara, President and Timothy H.B. Yaryan, Legislative Counsel and Advocate, Riverside Sheriffs Association, to Richard Alarcon, Senator (Jan. 25, 2002) [hereinafter McNamara Letter] (on file with the *McGeorge Law Review*).

53. Warner Letter, *supra* note 51.

54. McNamara Letter, *supra* note 52.

55. *Id.*

Chapter 611, however, is not without opposition, or at the very least, concern. The American Civil Liberties Union (ACLU) registered concern about the far-reaching scope of Chapter 611⁵⁶ that echoes the concern the organization voiced in 1999 when the California Legislature considered HACPTA.⁵⁷ The ACLU stated no “major objections to most of the . . . amendments to” sections 11415 through 11419 of the Penal Code, but the organization did voice concern that the “new definition of . . . viruses and microorganism[s]” as set out in section 11419(b)(6) “is vague and ambiguous” and “imposes [substantial] penalties . . . for simple possession of [the enumerated] agents.”⁵⁸

V. CONCLUSION

At the heart of Chapter 611 is the desire to quiet the concerns of all Californians in the wake of the recent terrorist attacks on the United States and to update the laws that protect California’s citizens.⁵⁹ Chapter 611 supplies necessary amendments to expand the definition of “weapons of mass destruction” and to clarify the penalties imposed for violation of HACPTA.⁶⁰ Given the overwhelming sentiment of zero tolerance for terrorism following September 11th, Chapter 611 garnered strong support from law enforcement agencies statewide⁶¹ and received overwhelming support in both the Senate and the Assembly.⁶² While there is little possibility of prosecution occurring under the state law as amended by Chapter 611,⁶³ the very presence of such measures provides peace of mind to Californians and sends a clear message that terrorism has no place in California and in the United States.

56. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1287, at R (Apr. 30, 2002).

57. SENATE RULES COMMITTEE, SENATE FLOOR ANALYSIS OF AB 140, at 10 (Sept. 4, 1999).

58. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1287, at R (Apr. 30, 2002).

59. SENATE RULES COMMITTEE, FLOOR ANALYSIS OF SB 1287, at G (May 24, 2002).

60. *Id.*

61. See SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1287, at 1 (Apr. 30, 2002) (listing the organizations that have registered support for Senate Bill 1287, including the Association for Los Angeles Deputy Sheriffs, the California State Sheriffs’ Association, and the Los Angeles Police Protective League).

62. See Legislative Counsel of California, *SB 1287 Senate Vote–Roll Call*, at <http://www.leginfo.ca.gov> (Aug. 29, 2002) (copy on file with the *McGeorge Law Review*) (listing forty ayes and zero noes for the Senate vote on SB 1287); Legislative Counsel of California, *SB 1287 Assembly Vote–Roll Call*, at <http://www.leginfo.ca.gov> (Aug. 27, 2003) (copy on file with the *McGeorge Law Review*) (listing eighty ayes and zero noes for the Assembly vote on SB 1287).

63. SENATE APPROPRIATIONS COMMITTEE, COMMITTEE FISCAL SUMMARY OF SB 1287, at 1 (May 23, 2002).