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USA PATRIOT Improvement and Reauthorization Act of 2005 (H.R. 3199): A Brief Look

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Summary

On December 9, 2005, House and Senate conferees reported out the USA PATRIOT Improvement and Reauthorization Act (H.R. 3199). The House agreed to the conference report on December 14, 2005, whereas the Senate has yet to take action on it. On December 22, 2005, the House and Senate enacted a bill (S. 2167) that extended the sunset of certain provisions of the USA PATRIOT Act and the lone wolf provision of the Intelligence Reform and Terrorism Prevention Act of 2004, originally set to expire on December 31, 2005, until February 3, 2006. On February 2, 2006, Congress passed H.R. 4659, which further extended the sunset to March 10, 2006.

Among the conference report's other provisions, it makes permanent 14 of the 16 USA PATRIOT Act sections scheduled to expire at the end of the year. It provides for greater congressional and judicial oversight of section 215 Foreign Intelligence Surveillance Act (FISA) business records orders and section 206 FISA roving wiretaps and calls for both sections to sunset at the end of 2009. It expands law enforcement wiretap authority to cover more than 20 federal crimes. It establishes judicial review and enforcement procedures for national security letters. It revises federal criminal provisions relating to seaport and maritime security. It reenforces federal money laundering and forfeiture authority particularly in connection with terrorist offenses. It intensifies federal regulation of foreign and domestic commerce in methamphetamine precursors. It foregoes all but technical modifications in federal capital punishment procedures.

Title I of the USA PATRIOT Improvement and Reauthorization Act, incorporates several compromises between the House- and Senate-passed versions of H.R. 3199. The final version includes the following:

Foreign Intelligence Surveillance Act (FISA):

- Postpones expiration of Sections 206 and 215 of the PATRIOT Act (roving FISA wiretaps and FISA access to business records) until December 31, 2009: makes permanent the other temporary FISA amendments.
- Postpones until December 31, 2009 expiration of the Intelligence Reform Act authority to use FISA orders in “lone wolf” terrorist investigations.
- Provides that the FBI Director, Deputy Director, or the Executive Assistant Director for National Security must approve orders for the production of certain library, book store, firearm sale, medical, tax return, and educational records, 50 U.S.C. 1861(a)(3).
- Requires that a Section 215 FISA order application describe reasonable grounds for believing that the records sought are *relevant* to an ongoing international terrorism investigation, and that such materials pertain to foreign intelligence information *not* concerning a U.S. person, 50 U.S.C. 1861(b)(2).
- Establishes a judicial review process for recipients of FISA orders; judge may modify or set aside a FISA order if it does not comply with the statute; provides for appeal of FISA court decision to a Review Court and the Supreme Court, 50 U.S.C. 1803, 50 U.S.C. 1861(f).
- Requires the Attorney General to adopt specific “minimization procedures” governing the retention and dissemination by the FBI of the tangible things obtained under a FISA order, 50 U.S.C. 1861(g).
- Extends the tenure of FISA surveillance and search orders to *any* agents of a foreign power who are not U.S. persons (e.g., lone wolf terrorists), 50 U.S.C. 1805(e) and 50 U.S.C. 1824(d).
- Extends duration of orders (or extension of an order) authorizing installation and use of FISA pen registers, trap, and trace devices from 90 days to one year, 50 U.S.C. 1842(e).
- Requires the Attorney General to report to both the Judiciary and Intelligence Committees concerning FISA order disclosures, 50 U.S.C. 1862; electronic surveillance orders, 50 U.S.C. 1808(a)(1); and physical searches, 50 U.S.C. 1826.
- Instructs the Inspector General to perform a comprehensive audit of the effectiveness and use of the FBI’s FISA authority, for submission to the Judiciary and Intelligence Committees for calendar years 2002-2006.

National Security Letters (NSL):

- Authorizes judicial enforcement of a NSL, 18 U.S.C. 3511; the court may quash or modify a NSL request if compliance would be unreasonable, oppressive, or otherwise unlawful.
- Permits a NSL recipient to petition a court to modify or quash a nondisclosure requirement of the NSL, if the court finds there is no reason to believe disclosure may endanger national security, or interfere with an investigation or diplomatic relations, or endanger a life.
- Amends NSL statutes to prohibit disclosure when the investigative agency determines that disclosure may endanger any individual or national security, or interfere with diplomatic relations, or interfere with a criminal or intelligence investigation; allows disclosure if necessary to

comply with the NSL request or to an attorney to obtain legal advice (without having to notify authorities of an intent to seek advice).

- Punishes knowing violations of NSL nondisclosure provisions with imprisonment of not more than five years if committed with intent to obstruct an investigation or judicial proceeding, 18 U.S.C. 1510(e).
- Requires that any reports to a congressional committee regarding NSL shall also be provided to the Judiciary Committees.
- Instructs an Inspector General's audit of the effectiveness and use of NSL, for submission to the Judiciary and Intelligence Committees for calendar years 2003-2006.
- Requires the Attorney General and Director of National Intelligence to analyze the feasibility of applying minimization procedures to NSL to ensure the protection of the constitutional rights of U.S. persons.

Other Terrorism-Related Matters:

- Authorizes confiscation of property within U.S. jurisdiction constituting proceeds from, or used to facilitate, offenses that involve trafficking in nuclear, chemical, biological, or radiological weapons technology or material, 18 U.S.C. 981(a)(1)(B)(I).
- Expands the list of predicate offenses in which law enforcement may intercept wire, oral, or electronic communications, 18 U.S.C. 2516(1), including some 20 federal crimes that might be committed for terrorist purposes such as those involving weapons of mass destruction, arson, aggravated identity theft.
- Makes the material support of terrorism amendments in the Intelligence Reform and Terrorism Prevention Act permanent, 18 U.S.C. 2339B.
- Outlaws "narco-terrorism," drug trafficking in support of terrorism (punishable by imprisonment for 20 years to life), 21 U.S.C. 960A.
- Adds narco-terrorism, 21 U.S.C. 960A and foreign military training, 18 U.S.C. 2339D to the definition of federal crimes of terrorism, 18 U.S.C. 2332b(g)(5)(B).
- Expresses the sense of Congress that victims of terrorist attacks should have access to the assets forfeited.

Law Enforcement Amendments:

- Enhances procedural protections and oversight concerning "sneak and peek" search warrants, 18 U.S.C. 3103a(b): permits notification delays of no more than 30 days, with 90-day extensions as the facts justify; removes undue trial delay as a ground for delayed notification of a sneak and peek search warrant, 18 U.S.C. 3103a(b)(1); requires annual reports on use of the authority.
- Merges 18 U.S.C. 1992 (train wrecking) and 1993 (attacks on mass transit), in a new 18 U.S.C. 1992.
- Amends federal criminal law concerning destruction of aircraft, 18 U.S.C. 32, to include interfering with or disabling a pilot or air navigation facility operator with intent to endanger or with reckless disregard for human safety.

Miscellanea:

- For the penal prohibition concerning trafficking in contraband cigarettes or smokeless tobacco, lowers the threshold quantity to 10,000 cigarettes or 500 cans or packages of smokeless tobacco, 18 U.S.C. 2341-2343; creates a federal cause of action against violators of this offense (other than an Indian tribe or an Indian in Indian country), 18 U.S.C. 2346.
- Creates immunity from civil liability for donors of fire equipment to a volunteer fire company (other than a fire equipment manufacturer), unless such conduct involves gross negligence or intentional misconduct.
- Instructs the Attorney General to report to Congress on the data-mining activities conducted by various federal agencies and departments.
- Directs the Secretary of Homeland Security to report to the Judiciary Committees semi-annually regarding the operations and investigations of the U.S. Citizenship and Immigration Services.
- Pronounces the sense of Congress that federal criminal investigations should not be based solely upon a citizen's membership in a non-violent political organization or for engaging in lawful political activity.

Title II speaks of terrorism and the death penalty, but does not mention several of the changes found in H.R. 3199 as initially passed by the House. It does include a clarifying amendment that provides an adjusted procedure for capital air piracy cases occurring between 1974 and 1994. It authorizes a term of post-incarceration supervision for any term of years or for life in the case of federal crimes of terrorism regardless of whether the offense involved any risk of serious injury, 18 U.S.C. 3583(j). It also moves the provisions for appointment of counsel for indigent capital defendants from title 21 (21 U.S.C. 848) to a new section in title 18, 18 U.S.C. 3599.

Title III deals with maritime crime and features many of the revisions found in S. 378, Reducing Crime and Terrorism at America's Seaports as reported. It: (a) amends the prohibition against entering airport secured areas to include seaport secure areas as well and increases the maximum penalty for violations in both cases to imprisonment for 10 years, 18 U.S.C. 1036; (b) outlaws obstructing law enforcement maritime inspections (penalty: not more than five years in prison), 18 U.S.C. 2237; (c) prohibits placing in U.S. waters a dangerous device or substance likely to destroy or damage ships or interfere with maritime commerce (penalty: death or imprisonment for life or any term of years), 18 U.S.C. 2282A; (d) condemns violence against certain aids to maritime navigation (penalty: death or imprisonment for life or any term of years), 18 U.S.C. 2282B; (e) prohibits maritime transportation of weapons of mass destruction for use in a federal crime of terrorism (penalty: death or imprisonment for life or any term of years), 18 U.S.C. 2283; and (f) proscribes maritime transportation of terrorists (penalty: imprisonment for life or any term of years), 18 U.S.C. 2284.

Title III also: (a) outlaws damaging a vessel or maritime facilities if the offense is committed in waters subject to U.S. jurisdiction or against a U.S. vessel, the offender or victim is a U.S. national, or a U.S. national is aboard the victimized vessel; prosecution is barred in the case of certain labor disputes; offenders are punishable by imprisonment for not more than 20 years (by death if death results; by imprisonment for any term of years or for life if radioactive waste or spent nuclear fuel are involved; by imprisonment for not more than five years for threatened violations or hoaxes), 18 U.S.C. 2290-2293; (b) increases the maximum penalties for theft from interstate or foreign shipments (from

one to three years for property worth less than \$1,000 and from 10 to 15 years otherwise); (c) adds vessels to the interstate transportation, receipt and sale of stolen conveyances prohibitions, 18 U.S.C. 2311, 2312, 2313; (d) increases the maximum penalty for stowing away (from one to five years, generally; from 1 to 20 years if planned infliction of serious injury to another occurs; by imprisonment for any term of years or for life, if a planned death results), 18 U.S.C. 2199; (e) prohibits bribery relating to port security; offenders are subject to imprisonment for not more than 15 years, 18 U.S.C. 226; (f) increases the maximum term of imprisonment for smuggling goods into the U.S. from five years to 20 years, 18 U.S.C. 545; and for removing goods from customs custody from two years to 10 years, 18 U.S.C. 549; and (g) proscribes smuggling goods out of the U.S.; offenders are subject to imprisonment for not more than 10 years, 18 U.S.C. 554; the offense is a money laundering predicate, 18 U.S.C. 1956(c)(7)(D); the goods are subject to confiscation, 19 U.S.C. 1595a(d).

Title IV, the Combating Terrorism Financing Act, with slight modifications reflects title IV of H.R. 3199 as passed by the House; it: (a) increases the maximum penalties for violation of the International Emergency Economic Powers Act (IEEPA) from 10 to 20 years imprisonment and from a civil penalty of \$10,000 to one of \$50,000, 50 U.S.C. 1705; (b) adds 18 U.S.C. 1960 (illegal money transmissions) to the racketeering (RICO) predicate offense list, 18 U.S.C. 1961(1), and 18 U.S.C. 2339C (financing terrorism) and 2339D (receipt of foreign military training) to the money laundering predicate offense list, 18 U.S.C. 1956(c)(7)(D); (c) authorizes the confiscation of property, located in the U.S., related to certain acts of international terrorism against a foreign government or international organization, 18 U.S.C. 981(a)(1)(G); (d) expands federal money laundering prohibitions to encompass related “dependent transactions,” 18 U.S.C. 1956(a)(1); (e) clarifies the rights of property owners in international terrorism confiscation cases, 18 U.S.C. 987; (f) subjects conspiracies to damage commercial motor vehicles or energy facilities, to the same penalties as apply to the completed offenses, 18 U.S.C. 33, 1366; (g) makes the criminal drug forfeitures procedures generally applicable to the forfeitures ordered following conviction, 28 U.S.C. 2461(c).

Title V houses miscellanea. Its provisions (a) include a retroactive exemption for U.S. Attorneys and Assistant U.S. Attorneys on special assignment from otherwise applicable residency requirements, 28 U.S.C. 545(a); (b) strike the provision under which the court may fill a vacancy in the office of U.S. Attorney, 28 U.S.C. 546(d); (c) add the Secretary of Homeland Security to line of presidential succession, 3 U.S.C. 19(d)(1); (d) make the Director of the Bureau of Alcohol, Tobacco, Firearms and Explosives an advice and consent position, 6 U.S.C. 531(a)(2); (e) identify various qualifications that every U.S. Marshall should have, 28 U.S.C. 561(i); (f) create a National Security Division within the Department of Justice headed by a statutory Assistant Attorney General for National Security, 18 U.S.C. 509, 509A; and (g) amend the habeas corpus provisions applicable to state death row inmates upon the Attorney General’s certification that a state established sufficient assistance of counsel provisions, 28 U.S.C. 2261, 2265.

Title VI resembles in name and content S. 1967, the Secret Service Authorization and Technical Modification Act. It provides for a rolling no trespass zone with regard to anyone under Service protection with violations punishable by imprisonment for up to six months (up to 10 years if the violation involves a serious injury or possession of a dangerous weapon), 18 U.S.C. 1752. It expands prohibitions against fraud in connection with U.S. identification documents to include documents issued by the sponsoring entity

of a presidentially designated nationally significant event (maximum penalties range from 5 to 30 years in prison), 18 U.S.C. 1028. It transfers and revises the organic Act for the United States Secret Service Uniformed Division, 18 U.S.C. 3056A (repealing 3 U.S.C. ch.3), and confirms the Secret Service as a distinct entity within the Department of Homeland Security, 18 U.S.C. 3056(g).

Title VII is reminiscent of H.R. 3889, the Methamphetamine Epidemic Elimination Act, and provides for increased regulation of domestic and international commercial transactions in methamphetamine precursor chemicals; enhanced criminal sanctions; expanded meth lab clean up measures; and grant programs to address problems associated with methamphetamine (meth) abuse. More specifically, it: (a) sets a daily 3.6 gram limit for over the counter sales of ephedrine, pseudoephedrine and phenylpropanolamine (EPP) products, 21 U.S.C. 830(d); (b) requires that the products be available only “behind the counter” and that purchasers of products containing more than 60 mg of pseudoephedrine present a photo Id and sign a log book, 21 U.S.C. 830(e); (c) limits mail orders of EPP products to 7.5 grams a month, 21 U.S.C. 830(e)(2); (d) makes regulatory sanctions applicable to violators, 21 U.S.C. 842; (e) permits the Attorney General to exempt certain products from coverage, 21 U.S.C. 830(e)(3); to establish production and import quotas for EPP, 21 U.S.C. 826, 952; (f) expands the notification and suspension of shipment requirements for the importation and exportation of listed chemicals, 21 U.S.C. 971, subject to criminal sanctions under 21 U.S.C. 960(d).

It also: (a) contains further import anti-diversion modifications, including additional reporting requirements and enforcement authority relating to EPP, 21 U.S.C. 971(h); (b) adds information concerning EPP exporting and importing countries to be included in the international narcotics control strategy report, 22 U.S.C. 2291h, and makes those nations subject to the annual certification procedure of the Foreign Assistance Act, 22 U.S.C. 2291j; (c) instructs the Secretary of State to take action to prevent meth smuggling from Mexico and report annually on its efforts; (d) adds a term of imprisonment of not more than 15 years to the already applicable penalties for smuggling meth using quick entry border procedures; (e) makes the manufacture of controlled substances on federal property subject to a maximum fine range of not less than \$500,000, 21 U.S.C. 841(b)(5); (f) reduces the drug volume and gross receipt drug kingpin thresholds in meth cases, 21 U.S.C. 848(s); (g) adds a term of imprisonment of not more than 20 years to the already applicable penalties for making or trafficking in meth where children are present or live, 21 U.S.C. 860a; (h) adjusts sentencing reporting requirements for federal judges, 28 U.S.C. 994(w); and (i) requires the Attorney General to report twice a year on meth enforcement efforts.

And it: (a) requires the Secretary of Transportation to report on designation of meth byproducts as hazardous materials for purposes of the Hazardous Material Transportation Act, 49 U.S.C. 5103; and the Administrator of the Environmental Protection Agency to report under the Solid Waste Disposal Act on meth production waste, 42 U.S.C. 6921; (b) adds those who possess meth to the list of those subject to restitution orders upon conviction, 21 U.S.C. 853(q); and (c) authorizes the Attorney General to award grants: (i) to address the use of meth by pregnant and parenting women offenders; (ii) to provide state services to drug endangered children; (iii) to combat meth trafficking and abuse, 42 U.S.C. 3796cc-1, 3796cc-2; and (iv) for drug courts whose programs include mandatory testing and sanctions, 42 U.S.C. 3797u(c) (the Attorney General is also directed to study the feasibility of federal drug courts).