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USA PATRIOT Act: Background and Comparison of House- and Senate-Approved Reauthorization and Related Legislative Action

Updated September 15, 2005

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Summary

The House and Senate have each passed USA PATRIOT Reauthorization Acts, H.R. 3199 and S. 1389. Both make permanent most of the expiring USA PATRIOT Act sections, occasionally in modified form. After amending two of the more controversial expiring sections, 206 (roving Foreign Intelligence Surveillance Act (FISA) wiretaps) and 215 (FISA tangible item access orders (business records-library records)), they postpone their expiration date, S. 1389 until December 31, 2009; H.R. 3199 until December 31, 2015. Both address questions raised as to the constitutionality of various “national security letter” (NSL) statutes by providing for review, enforcement and exceptions to the attendant confidentiality requirements in more explicit terms. S. 1389 limits its NSL adjustments to the statute that affords federal foreign intelligence investigators access to communications records; H.R. 3199 amends the communications, and the financial institution and credit bureau NSL statutes.

H.R. 3199 contains a substantial number of sections that have no counterpart in S. 1389, although many of them have been passed or reported by committee in one House or the other. Its treatment of seaport security, for example, is similar in many respects to that of S. 378, the Reducing Crime and Terrorism at America’s Seaports Act of 2005, as reported by the Senate Judiciary Committee. Its first responder grant program sections are virtually identical to legislation which the House sent to the Senate as H.R. 1544. And its death penalty sections are reminiscent of sections found in H.R. 10 in the 108th Congress as reported the House Judiciary Committee.

H.R. 3199 alone permits wiretapping in the investigation of a greater range of federal crimes. It alone expands the use of forfeiture authority against money laundering particularly in terrorism cases. An abbreviated version of this report is available as CRS Report RS22216, *USA PATRIOT Act Reauthorization in Brief*.

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USA PATRIOT Act: Background and Comparison of House- and Senate-Approved Reauthorization and Related Legislative Action

Introduction

The House and Senate have each approved legislation that would among other things make permanent most of the USA PATRIOT Act sections now subject to the act's sunset provision. The House passed H.R. 3199 on July 21, 2005, 151 *Cong.Rec.* H6307. The Senate passed S. 1389 on July 29, 2005, 151 *Cong.Rec.* S9559-562.¹ The bills differ. This is a brief description of what they say and how they differ. It builds upon and borrows from earlier reports.²

Title II of the USA PATRIOT Act, P.L. 107-56, amended existing law relating primarily to the collection of communications-related information during law enforcement and national security investigations. In a law enforcement context such matters are governed generally by the Electronic Communications Privacy Act (ECPA); in a national security context they lie principally within the realm of the Foreign Intelligence Surveillance Act (FISA). ECPA consists of three chapters which general prohibitions and procedures for judicially supervised law enforcement exceptions. They involve:

- the interception of wire, oral or electronic communications (wiretapping), 18 U.S.C. ch. 119 (18 U.S.C. 2510-2522);
- access to the content of stored electronic communications and to communications transaction records, 18 U.S.C. ch. 121 (18 U.S.C. 2701-2712); and
- the use of trap and trace devices and pen registers (essentially in and out secret caller id devices), 18 U.S.C. ch. 206 (18 U.S.C. 3121-3127).

¹ The Senate by unanimous consent substituted the text of S. 1389, as reported by the Judiciary Committee, after striking all but the enacting clause from H.R. 3199, 151 *Cong.Rec.* S9559, S9562 (daily ed. July 29, 2005). The *Record*, however, reprints the House-passed bill and identifies it as H.R. 3199 as passed by the Senate, 151 *Cong.Rec.* S9562-579 (daily ed. July 29, 2005). For purposes of convenience, we assume that Senate-passed version of H.R. 3199 is S. 1389 as reported and will refer to it as S. 1389.

² E.g., CRS Report RL32186, *USA PATRIOT Act Sunset: Provisions That Expire on December 31, 2005*; and CRS Report RL31377, *The USA PATRIOT Act: A Legal Analysis*.

FISA is concerned with gathering information, under FISA court supervision, about foreign powers and their agents including international terrorists; it has four parts devoted to:

- electronic surveillance (wiretapping), 50 U.S.C. 1801-1811;
- physical searches, 50 U.S.C. 1821-1829;
- pen registers and trap and trace devices, 50 U.S.C. 1841-1846; and
- production of tangible items (access to business records), 50 U.S.C. 1861-1862.

Most of the sections in Title II of the USA PATRIOT Act are temporary amendments to FISA or ECPA. By operation of section 224 of the act, 115 Stat. 295 (18 U.S.C. 2510 note), they expire on December 31, 2005 unless they are reauthorized or their expiration date postponed. Their expiration has been closely linked in public debate with two other temporary provisions, both enacted as part of the Intelligence Reform and Terrorism Prevention Act of 2004, P.L. 108-458 (2004). One, section 6001 of that act, relates to so-called lone wolf agents of a foreign power under FISA, 50 U.S.C. 1801(b)(1)(C), and expires on December 31, 2005, 50 U.S.C. 1801 note. The other, section 6603, relates to the criminal law sections including those proscribing material support of terrorists and terrorist organizations, 18 U.S.C. 2339A, 2339B, and expires a year later on December 31, 2006, 18 U.S.C. 2332b note.

The USA PATRIOT Act sections scheduled to expire on December 31, 2005 are:

- Sec. 201* (ECPA wiretapping in certain terrorism investigations)
- Sec. 202* (ECPA wiretapping in computer fraud and abuse investigations)
- Sec. 203(b)* (law enforcement sharing of court-ordered wiretap-generated foreign intelligence information wiretap information)
- Sec. 203(d)* (law enforcement sharing of foreign intelligence information notwithstanding any other legal restriction)
- Sec. 204* (technical exception for foreign intelligence pen register/trap & trace device use)
- Sec. 206* (assistance in conducting roving FISA wiretaps)
- Sec. 207* (duration of FISA wiretap and search orders involving agents of a foreign power)
- Sec. 209* (seizure of stored voice mail by warrant rather than ECPA order)
- Sec. 212* (communications providers emergency disclosures of communications content or related records to authorities)
- Sec. 214* (FISA pen register order amendments including extension to electronic communications, e.g., Internet use)
- Sec. 215* (FISA tangible items access orders)
- Sec. 217* (law enforcement access to computer trespassers' communications within the intruded system)
- Sec. 218* (FISA wiretap or search orders with an accompanying law enforcement purpose (removal of the wall of separation between criminal catchers and spy catchers))
- Sec. 220* (nation-wide service of court orders directed to communication providers)
- Sec. 223* (civil liability and disciplinary action for certain ECPA or FISA violations)
- Sec. 225* (civil immunity for assistance in executing a FISA order).

The Senate-passed bill, S. 1389, makes the material support amendments and each of these temporary sections permanent except for sections 206 and 215 and the lone wolf amendment whose expiration it postpones until December 31, 2009. It also makes substantive changes in sections 206 (roving FISA wiretaps), 207 (duration of FISA orders), 212 (emergency ISP disclosures), 213 (delayed notice of sneak and peek searches), 214 (FISA pen register/trap and trace orders), 215 (FISA orders for access to tangible items), 505 (national security letters), and in the law relating to “enhanced FISA sunshine.”

The House-passed bill, H.R. 3199, eliminates the temporary status of the lone wolf, material support and each of the USA PATRIOT Act temporary sections except for sections 206 and 215 whose expiration it postpones until December 31, 2015. H.R. 3199 has a more extensive inventory of substantive changes both to the USA PATRIOT Act and to related provisions of law. It amends in its own way the USA PATRIOT Act sections amended in the Senate bill, except section 214 (FISA pen register/trap and trace orders). In addition it changes USA PATRIOT sections 203(b)(wiretap information sharing), 801 (attacks on mass transit), 806 (forfeiture of terrorist assets), and 1014 (first responder grants). It also includes provisions dealing with terrorist death penalty enhancement and terrorism financing reminiscent of proposals in S. 2679 (108th Cong.) and H.R. 10 (108th Cong.)(as reported by the House Judiciary Committee, H.Rept. 108-724, pt.5 (2004). Its seaport security provisions are comparable to those of S. 378 in this Congress as reported in the Senate.

Expiring Law Enforcement Sections

Seven of the temporary USA PATRIOT Act sections and the material witness amendments from the Intelligence Reform and Terrorism Prevention Act deal with substantive criminal and procedure, most often with ECPA.

Section 201 (ECPA Terrorism Predicates). ECPA authorizes federal courts to approve law enforcement requests to intercept wire, oral or electronic communications as a last resort in the investigation of certain serious federal crimes (predicate offenses), 18 U.S.C. 2516-2581. By virtue of section 201 the ECPA predicate offense list temporarily includes violations of:

- 18 U.S.C. 229 (chemical weapons)
- 18 U.S.C. 2332 (violence committed against Americans overseas)
- 18 U.S.C. 2332a (weapons of mass destruction)
- 18 U.S.C. 2332b (multinational terrorism)
- 18 U.S.C. 2332d (financial transactions with a nation designated a sponsor of terrorism)
- 18 U.S.C. 2339A (material support of a terrorist)
- 18 U.S.C. 2339B (material support of a foreign terrorist organization), 18 U.S.C. 2516(1).

P.L. 107-197, 116 Stat. 728 (2002), adds two more crimes to the temporary ECPA predicate offense list, violations of 18 U.S.C. 2332f (bombing public buildings or places) and 18 U.S.C. 2339C (financing terrorism). Both H.R. 3199 (sec.102) and S. 1389 (sec.9) make the section and its additions permanent.

Section 202 (ECPA Computer Crime Predicates). Section 202 temporarily adds violations of 18 U.S.C. 1030 (computer fraud and abuse) to the ECPA predicate offense list, 18 U.S.C. 2516(1). Both H.R. 3199 (sec.102) and S. 1389 (sec.9) make the addition permanent.

Section 203(b) (Disclosure of Wiretap Information). Section 203(b) authorizes federal officials to disclose “foreign intelligence, counterintelligence, or foreign intelligence information”³ obtained through a ECPA wiretap with various federal officials (law enforcement, protective, immigration, national defense and national security officials), 18 U.S.C. 2517(6).

Section 203(b) aside, ECPA allows federal officials to share wiretap information with other law enforcement officials, 18 U.S.C. 2517(1); with foreign law enforcement officials, 18 U.S.C. 2517(7); and in order to prevent or investigate terrorism, sabotage or espionage, with federal, state, local and foreign officials, 18 U.S.C. 2517(8) — under authority that does not expire.

Both bills make section 203(b) permanent, H.R. 3199 (sec.102) and S. 1389 (sec.9). *H.R. 3199 alone requires notification to the issuing court of the recipient departments, agencies, or entities with whom wiretap information has been shared under the section (sec. 105), 18 U.S.C. 2518(6).*

Section 203(d) (Disclosure of Law Enforcement Information). Section 203(d) of the USA PATRIOT Act permits law enforcement to share foreign intelligence, counterintelligence or foreign intelligence information unearthed in a criminal investigation with certain other federal officials “notwithstanding any other law.” It is unclear what other law the drafters had in mind.

Both bills make section 203(c) permanent, H.R. 3199 (sec.102) and S. 1389 (sec.9).

Section 209 (Voice Mail Seizures). The interception of a telephone conversation in progress requires an ECPA court order, 18 U.S.C. 2511, 2516-2518. E-mail stored with a provider can be seized under a search warrant, 18 U.S.C. 2703.

³ The term “foreign intelligence” means “information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities,” 50 U.S.C. 401a(2). The term “counterintelligence” means “information gathered and activities conducted to protect against espionage, other intelligence activities, sabotage, or assassinations conducted by or on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities,” 50 U.S.C. 401a(3). The term “foreign intelligence information” means: “(a) information, whether or not it concerns a United States person, that relates to the ability of the United States to protect against — actual or potential attack or other grave hostile acts of a foreign power or its agent; sabotage or international terrorism by a foreign power or its agent; or clandestine intelligence activities by an intelligence service or network of a foreign power or by its agent; or (b) information, whether or not it concerns a United States person, with respect to a foreign power or foreign territory that relates to — the national defense or the security of the United States; or the conduct of the foreign affairs of the United States,” 18 U.S.C. 2510(19).

Some courts have held that prior to retrieval voice mail messages stored with a service provider could only be seized under an ECPA court order (that is until retrieved they could be “intercepted”), *United States v. Smith*, 155 F.3d 1051 (9th Cir. 1998). Section 209 permits them to be seized by means of a search warrant.

Both bills make section 209 permanent, H.R. 3199 (sec.102) and S. 1389 (sec.9).

Section 212. Law enforcement officials who wish access to the content of stored electronic communications or to the records of communications transactions are generally required to get a search warrant or a court order, 18 U.S.C. 2703. Section 212 allowed service providers to disclose contents and records in an emergency situation, 115 Stat. 284-85. Later amendments repealed that portion of section 212 that related to disclosure of stored communications and replaced it with a permanent provision, 18 U.S.C. 2702(b)(8), which authorizes voluntary provider disclosure to federal, state or local authorities in emergency cases involving a risk of serious injury. The portion of section 212 relating to voluntary emergency disclosure of communications records remains unchanged, 18 U.S.C. 2702(c)(4) and is scheduled to expire on December 31, 2005.

Both bills make the section (or as much as still survives) permanent, H.R. 3199 (sec.102) and S. 1389 (sec.9). Both require annual reports on the extent of voluntary good faith disclosures of stored communications under 18 U.S.C. 2702(b)(8), H.R. 3199 (sec.108) and S. 1389 (sec.4(a)). *The Senate bill alone removes from the emergency communications record disclosure provisions of 18 U.S.C. 2702(c)(4) the requirement that the danger be immediate, S. 1389 (sec. 4(b)).*

Section 213. The Fourth Amendment only applies where there is a reasonable expectation of privacy, *Smith v. Maryland*, 442 U.S. 735, 740 (1979). The Supreme Court has held that there is no reasonable expectation of privacy in commercial transaction records maintained by third parties, *United States v. Miller*, 425 U.S. 435, 443 (1976). Federal law, however, provides a procedure for delayed notification of governmental acquisition of customer transaction records from communications service providers, 18 U.S.C. 2703-2706.

Where the Fourth Amendment applies, it requires that law enforcement officers announce their presence and purpose *before* entering to execute a search warrant, but recognizes that under certain exigent circumstances (flight of a suspect, destruction of evidence, risk of injury) the requirement may be excused, *Wilson v. Arkansas*, 514 U.S. 927, 934-36 (1996). ECPA permits delayed notification of the existence of a wiretap until *after* the order authorizing the tap has expired, 18 U.S.C. 2518(8)(d), under the exigent circumstance that the evidence sought will never be created if its authors are aware of the tap. In all other cases prior to the USA PATRIOT Act the Federal Rules of Criminal Procedure required that a copy of the search warrant and a receipt for property seized (tangible and intangible) be presented or left at the place searched and that an inventory of the property seized be part of the return to the issuing magistrate, F.R.Crim.P. 41(d)(2000 ed.). The lower courts were divided over whether sneak and peek warrants with delayed notification constituted a violation of

the Rule or the Fourth Amendment and extent of the delay that might be authorized should the magistrate find exigent circumstances.⁴

Section 213 permits delayed notification of the execution of a “sneak and peek” search warrant for a reasonable period of time if contemporaneous notice might have adverse consequences, 18 U.S.C. 3103a(b). The definition of adverse consequences comes from the statutory procedure for law enforcement seizures of records in which the subject has no Fourth Amendment interest, 18 U.S.C. 2705. The consequences mentioned there are both those whose status as exigent circumstances is clear (flight, destruction of evidence, risk of injury) and those whose status is at best unclear (jeopardize an investigation or delay a trial).

Section 213 is not scheduled to expire, but both bills amend it to provide more specific limits on the extent of permissible delays and to require reports by the Administrative Office of the United States Courts on its use, as noted below.

| S. 1389 | H.R. 3199 |
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| No comparable provision. | Eliminates trial delay as an adverse result justifying delayed notice (sec. 121), proposed 18 U.S.C. 3103a(b)(1). |
| Requires notice not later than seven days after execution or on a later date certain if the facts justify a longer delay (sec. 4(b)), proposed 18 U.S.C. 3103a(b)(3). | Requires notice not later than 180 days after execution (sec. 114(1)), proposed 18 U.S.C. 3103a(b)(3). |
| Permits extensions of up 90 days or longer if the facts justify (sec. 4(b)), proposed 18 U.S.C. 3103a(c). | Permits extensions of up to 90 days (sec. 114(2)), proposed 18 U.S.C. 3103a(b)(3). |
| Requires the Administrative Office of the United States Courts to annually report to Congress the number of delay notice warrants requested, granted, and denied during the year (sec. 4(c)), proposed 18 U.S.C. 3103a(c). | Requires the Administrative Office of the United States Courts to annually report to the Judiciary Committees the number of warrants and of delayed notices authorized indicating the triggering adverse result (sec. 121), proposed 3103a(c). |
| Authorizes the Administrative Office in consultation with the Attorney General to promulgate regulations implementing the reporting requirements (sec. 4(c)), proposed 18 U.S.C. 3103a (c). | No comparable provision. |

Section 217 (Computer Trespassers). As a general rule ECPA requires a court order or consent of one of the parties to a conversation before it can be intercepted, 18 U.S.C. 2511. Section 217 permits law enforcement officials to

⁴ *United States v. Freitas*, 800 F.2d 1451 (9th Cir. 1986); *United States v. Pangburn*, 983 F.2d 449 (2d Cir. 1993); *United States v. Simmons*, 206 F.3d 392 (4th Cir. 2000).

intercept the communications of a computer trespasser within the invaded computer system if they have the consent of the system owner or operator, 18 U.S.C. 2511(2)(i). Both bills make section 217 permanent, H.R. 3199 (sec.102) and S. 1389 (sec.9).

Section 220 (Service of Electronic Evidence Warrants). As a general rule, federal magistrates may only issue search warrants to be executed within the judicial district in which they sit, F.R.Crim.P. 41. Section 220 permits federal courts in the district in which an offense occurs to issue search warrants and court orders for access to relevant stored electronic communications or communications transaction records wherever the evidence are located, 18 U.S.C. 2703, 3127. Both bills make section 220 permanent, H.R. 3199 (sec.102) and S. 1389 (sec.9).

Section 6603 (Terrorist Support). Section 6603 of the Intelligence Reform and Terrorism Prevention Act made several temporary changes in the federal law relating to the support of terrorists and terrorist organization, primarily in 18 U.S.C. 2339A and 2339B. Section 2339A outlaws providing material support for the commission of certain designated terrorist offenses (predicate offenses); section 2339B outlaws providing material support to a designated foreign terrorist organization. Section 6603 modifies the definition of “material support” used in the two statutes in an attempt to bolster their ability to survive constitutionally-based vagueness challenges.⁵ It also more precisely describes the level of knowledge required for a conviction under section 2339B to avoid judicial decisions suggesting that conviction requires either knowledge of the grounds upon which an organization was designated a foreign terrorist organization or knowledge that the assistance provided would be used for terrorist purposes.⁶ In addition, section 6603 expands the list of 2339A predicate offenses to include any “federal crime of terrorism” (18 U.S.C. 2332b(g)(5) (B)), and permits federal prosecution of a violation of 2339B committed overseas by a foreign national, 18 U.S.C. 2339B(d).

Section 6603 is scheduled to expire on December 31, 2006; both bills make section 6603 permanent, H.R. 3199 (sec.104) and S. 1389 (sec.9).

Expiring FISA Sections

Section 204 (ECPA and FISA). Pre-existing federal law made it clear that the general prohibitions against wiretapping, 18 U.S.C. 2511, and against the

⁵ See *A Review of the Tools to Fight Terrorism Act: Hearing Before the Senate Comm. on the Judiciary*, 108th Cong., 2d Sess. (2004)(joint prepared statement of Assistant Attorney General Daniel J. Bryant and Counterterrorism Section Chief Barry Sabin), describing the rationale behind identical language contained in earlier legislation and citing *Humanitarian Law Project v. U.S. Dept. of Justice*, 352 F.3d 382 (9th Cir. 2003) and *Humanitarian Law Project v. Ashcroft*, 309 F.Supp.2d 1218 (C.D.Cal. 2004). In the view of at least one federal court the effort proved only partially successful, *Humanitarian Law Project v. Gonzales*, 380 F.Supp.2d 1134 (C.D.Cal. 2005), discussed in CRS Report RL33035, *Material Support of Terrorists and Foreign Terrorist Organizations: Sunset Amendments*.

⁶ *Id.* citing *Humanitarian Law Project v. U.S. Dept. of Justice*, 352 F.3d 382 (9th Cir. 2003) and *United States v. Al-Arian*, 308 F.Supp.2d 1322 (M.D.Fla. 2004).

acquisition of communications and stored electronic communications, 18 U.S.C. 2701, do not preclude federal foreign intelligence gathering activities in international or foreign communications systems, 18 U.S.C. 2511(2)(f) (2000 ed.). Section 204 amends paragraph 2511(2)(f) to make it clear that the general prohibitions against the installation and use of pen registers and trap and trace devices are equally inapplicable.

Section 204 is scheduled to expire on December 31, 2005; both bills make it permanent, H.R. 3199 (sec.102) and S. 1389 (sec.9).

Section 206 (FISA Roving Wiretaps). FISA authorizes roving wiretaps; section 206 forgives under some circumstances the need to specifically identify the communications carriers or landlords who will be directed to help execute the roving wiretap. FISA courts may issue FISA surveillance orders that describe but do not identify the target and that do not specifically identify the nature and location of the places or facilities targeted for surveillance, 50 U.S.C. 1805(c)(1)(A),(B). If the target’s actions may have the effect of thwarting specific identification, section 206 temporarily authorizes FISA orders that need not specifically identify the communications carriers, landlords or others whose assistance the order commands, 50 U.S.C. 1805(c)(2)(B).

ECPA roving wiretaps likewise do not insist that assistants be specifically identified, 18 U.S.C. 2518(4). They do, however, require that the target be identified, 18 U.S.C. 2518(11)(b)(ii), that intercept be limited to times when the target is proximate to the targeted instrument, 18 U.S.C. 2518(11)(b)(iv), and that the communications provider be allowed to petition the court to modify or quash the order because the interception cannot be performed in a timely or reasonable manner, 18 U.S.C. 2518(12).

Section 206 is scheduled to expire on December 31, 2005; both bills postpone its expiration date and make other adjustments:

| S. 1389 | H.R. 3199 |
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| Postpones sunset until December 31, 2009 (sec. 9). | Postpones sunset until December 31, 2015 (sec. 102(b)). |
| Requires that the target of a FISA surveillance order be described with particularity when the target’s identity and the nature and location of the target place or facilities are unknown (sec. 2(a)). | Requires that the FISA court’s finding that the target’s action may thwart identification of assistants be based on specific facts in the application (sec. 109(a)). |
| Within 10 days of when the target’s action requires relocation of the surveillance’s focus, the issuing FISA court must be advised and provided with additional justification and minimization information (sec. 2(b)). | Within 15 days of when the target’s action requires relocation of the surveillance’s focus, the issuing FISA court must be advised and provided with additional justification and information on the number of surveillances conducted or planned (sec. 109(b)). |

| S. 1389 | H.R. 3199 |
|---|--------------------------|
| Directs that required FISA reports to Congressional Intelligence Committees be expanded to include roving wiretap information and be provided to the Judiciary Committees as well (sec.2(c)). | No comparable provision. |

Section 207 (Duration of FISA Orders). FISA surveillance orders directed at the agent of a foreign power were good for 90 days with the possibility of 90 day extensions prior to the USA PATRIOT Act, 50 U.S.C. 1805(e)(2000 ed.). At the same time, FISA physical search orders directed against agents of a foreign power were good for 45 days, again with the possibility of 90 day extensions, 50 U.S.C. 1824(d)(2000 ed.). Section 207 temporarily changed the time lines so that both FISA surveillance orders and FISA physical search orders are good for 120 days with the possibility of one year extensions, when they are directed at agents of a foreign power who are officers or employees of a foreign power or members of an international terrorist group, 50 U.S.C. 1805(e), 1824(d), 1801(b)(1)(A).

Section 207 is schedule to expire on December 31, 2005; both bills make it permanent, H.R. 3199 (sec.102) and S. 1389 (sec.9), but modify its provisions. Under both bills the 120 day/1year tenure of surveillance and search orders and extensions apply to all agents of a foreign power (who are not U.S. persons) not merely to those who are officers or employees or members of an international terrorist group, H.R. 3199 (sec.106) and S. 1389 (sec.3), proposed 50 U.S.C. 1805(e), 1824(d).

They change the tenure of FISA pen register/trap and trace device orders as well. Under present law, those orders and their extensions are good for 90 days, 50 U.S.C. 1842(e). Both bills give them a life time of one year with one year extensions upon certification that the information likely to be secured is foreign intelligence information not concerning a U.S. person, H.R. 3199 (sec.106) and S. 1389 (sec.3), proposed 50 U.S.C. 1842(e).

Section 214 (FISA Pen Register/Trap and Trace Orders). As originally enacted, the FISA pen register/trap and trace provisions permitted orders for their installation and use in investigations to gather foreign intelligence information or information concerning international terrorism, and were issued on the basis of information giving reason to believe that the targeted telephone line had been, was, or would be, used either by an individual engaged in criminal acts of international terrorism or espionage or by the agent of foreign power discussing criminal acts of international terrorism or espionage, 50 U.S.C. 1842(a),(c) (2000 ed.).

Section 214 temporarily makes the procedure available for electronic communications (e-mail, Internet use); eliminates the required close nexus to criminal activity; and permits issuance upon the certification that the information likely to be secured is foreign intelligence information not concerning a U.S. person or is relevant to an investigation to protect against international terrorism or espionage, 50 U.S.C. 1842(a), (c).

Section 214 is scheduled to expire on December 31, 2005; the bills make it permanent, H.R. 3199 (sec.102) and S. 1389 (sec.9). *S. 1389 (sec. 6) alone modifies its provisions by authorizing FISA pen register/trap and trace orders that direct service providers to supply the intelligence investigators with related customer information and by requiring the Attorney General to provide the Judiciary Committees with full reports on the use of the FISA pen register/trap and trace authority, proposed 50 U.S.C. 1842(d)(2)(C), 1846(a).*

Section 215 (FISA Tangible Item). Prior to the USA PATRIOT Act, FISA authorized orders giving the FBI access to the business records of vehicle rental, storage locker rental, travel, and lodging business that pertained to foreign powers or the agents of foreign powers, 50 U.S.C. 1861, 1862 (2000 ed.). Section 215 temporarily permits FISA orders for the production of any tangible item sought for an investigation to obtain foreign intelligence information (not concerning a U.S. person) or to protect against international terrorism or espionage, as long as the investigation is not based solely on the First Amendment protected activities of a U.S. person, 50 U.S.C. 1861.

Section 215 is scheduled to expire on December 31, 2005; the bills postpone its expiration date and make several other modifications:

| S. 1389 | H.R. 3199 |
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| Postpones expiration until December 31, 2009. (Sec. 9). | Postpones expiration until December 31, 2015. (Sec. 102). |
| Predicates issuance upon a court finding of relevancy and that the things sought pertain to, or are relevant to the activities of, a foreign power or agent of foreign power, or pertain to an individual in contact with or known to a suspected agent of a foreign power. (Sec. 7(a), (c)). | Predicates issuance upon a court finding that the application requirements are met (i.e., specification that the records concern an authorized investigation, not based solely on 1 st Amendment protected activities of a U.S. person, to obtain foreign intelligence information (not concerning a U.S. person) or to protect against international terrorism or espionage. (Sec. 107(a), (b)). |
| Requires that the order describe the items sought with particularity and provide a reasonable time for them to be assembled and made available. (Sec. 7(b)). | No comparable provision. |
| Requires the Director <i>or Deputy Director</i> of the FBI approve applications for orders seeking access to library, book store, <i>firearm sales, or medical records.</i> (Sec. 7(c)). | Requires the Director of the FBI approve applications for orders seeking access to library or book store records. (Sec. 107(e)). |

| S. 1389 | H.R. 3199 |
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| Recognizes exceptions to confidentiality restrictions for disclosure to the recipient's attorney, those necessary to comply with the order, <i>and others approved by the FBI</i> , all of whom are bound the confidentiality requirements of which they must be advised upon disclosure. (Sec. 7(d)). | Recognizes exceptions to confidentiality restrictions for disclosure to the recipient's attorney, and those necessary to comply with the order, all of whom are bound the confidentiality requirements of which they must be advised upon disclosure. (Sec. 107(c)). |
| Allows recipients to challenge FISA tangible item orders and confidentiality orders in the FISA court with the opportunity of appeal to the FISA review court and of certiorari to the Supreme Court. (Sec. 7(e)). | Allows recipients to challenge FISA tangible item orders in the FISA court; <i>the Presiding Judge may dismiss frivolous petitions and assigns others to one of the 3 FISA court judges assigned to a review panel</i> ; with the opportunity of appeal to the FISA review court and of certiorari to the Supreme Court. (Sec.10 7(d)). |
| Unlawful orders <i>or confidentiality requirements and orders requiring production that could be quashed in the case of a grand jury subpoena (unreasonable, oppressive, or privileged)</i> may be modified or set aside. (Sec. 7(b),(e)). | Unlawful orders may be modified or set aside. (Sec. 107(d)). |
| Review petitions are filed under seal; government material may be reviewed ex parte and in camera. (Sec. 7(e)). | Review petitions are filed under seal; government material may be reviewed ex parte and in camera. (Sec.107(d)). |
| The Chief Justice in consultation with the Attorney General and Director of National Intelligence is to establish security measures; <i>and the FISA court is to establish review procedures</i> . (Sec. 7(e)). | The Chief Justice in consultation with the Attorney General and Director of National Intelligence is to establish security measures. (Sec. 107(d)). |
| Requires inclusion of statistical information concerning orders for the production of library, book store, firearm sales, medical or tax records with the statistical report to Congress. (Sec. 7(f)). | No comparable provision. |
| Adds the Judiciary Committees to the list of recipients of full reports on the use of FISA tangible item orders. (Sec. 7 (f)). | No comparable provision. |

Section 218 (The "Wall"). FISA once authorized issuance of surveillance and search orders upon certification that the quest for foreign intelligence information

was *the* purpose for an application, 50 U.S.C. 1804(a)(7)(B), 1823(a)(7)(B)(2000 ed.). The provision was one of the reasons frequently cited for the need to isolate criminal and national security investigators from one another. Section 218 temporarily amends the provision to permit certification where the request for foreign intelligence information is a *significant* purpose for the application. Permanent provisions elsewhere in FISA make it clear that cooperation between law enforcement and intelligence investigators does not preclude certification, 50 U.S.C. 1806(k), 1825(k).

Section 218 expires on December 31, 2005; both bills make the section permanent, S. 1389 (sec. 102), H.R. 3199 (sec. 9).

Section 223 (Sanctions for FISA/ECPA Violations). Prior federal law established criminal and civil sanctions for various violations of FISA or ECPA, 18 U.S.C. 2511, 2520, 2707, 3121; 50 U.S.C. 1809, 1810, 1827, 1828 (2000 ed.), but there were gaps. For instance, it was a federal crime to disclose unlawfully intercepted conversations, 18 U.S.C. 2511(c), (d), but it is not to a federal crime to leak conversations lawfully intercepted under a court order. Section 223 confirms the authority of agency heads to discipline federal officers and employees who willfully violate electronic surveillance and stored communications chapters of ECPA, 18 U.S.C. 2520(f), 2707(d). It also imposes civil liability for any willful use or disclosure of information beyond that authorized by those two statutory schemes, 18 U.S.C. 2520(g), 2707(g). Finally, it creates a cause of action against the United States for the benefit of victims of willful violations of federal wiretap law, the stored communications proscriptions, or the FISA limitations relating to surveillance, physical searches or the use or installation of pen registers or trap and trace devices, 18 U.S.C. 2712.

Section 223 expires on December 31, 2005; both bills make the section permanent, S. 1389 (sec. 102), H.R. 3199 (sec. 9).

Section 225 (Immunity for FISA Assistance). FISA authorizes orders commanding the assistance of landlords, communication service providers, and others in the execution of its orders. Section 225 temporarily affords them immunity from civil liability for good faith compliance with orders to assist, 50 U.S.C. 1805(h).

Section 225 expires on December 31, 2005. Both bills make the section permanent, S. 1389 (sec. 102), H.R. 3199 (sec. 9).

Section 6001 (Lone Wolf Agents of a Foreign Power). FISA authorizes surveillance, searches, the use of pen registers and trap and trace devices, and tangible item orders, all in relation to the investigation of the activities of foreign powers (including international terrorist groups) and the agents of foreign powers, 50 U.S.C. 1801-1862. Agents of a foreign power include those who “knowingly engage[] in sabotage or international terrorism, or activities that are in preparation therefor on behalf of a foreign power,” 50 U.S.C. 1801(b)(2)(C). Section 6001 of the Intelligence Reform and Terrorism Prevention Act, 118 Stat. 3742 (2004), temporarily amends FISA so that agents of a foreign power include foreign nationals (non U.S. persons) who without the necessity of their acting on behalf of a foreign

power, “engage[] in international terrorism or activities that are in preparation therefor,” 50 U.S.C. 1801(b)(1)(C).

Section 6001 is scheduled to expire on December 31, 2005; *H.R. 3199 makes the section permanent (sec. 103)*; *S. 1389 postpones its expiration date until December 31, 2009 (sec. 9(b))*.

National Security Letters

Five federal statutes, in roughly the same terms, authorize federal intelligence investigators (generally the FBI) to request that communications providers, financial institutions and credit bureaus provide certain customer information relating to a national security investigation, 12 U.S.C. 3414; 15 U.S.C.1681u, 1681v; 18 U.S.C. 2709; 50 U.S.C. 436. Section 358 of the USA PATRIOT Act created one of these NSL statutes, 15 U.S.C. 1681v. Section 505 of the act enlarged the scope of most of the others in several ways including elimination of the requirement that the records sought pertain to a foreign power or the agent of a foreign power, a permanent section of the act, 12 U.S.C. 3414(a)(5)(A); 15 U.S.C.1681u; 18 U.S.C. 2709(b).

A federal court in the Southern District of New York subsequently held that the FBI’s practices and procedure surrounding the exercise of its authority under one of these national security letter (NSL) statutes, 18 U.S.C. 2709, violated the Fourth and First Amendments, *Doe v. Ashcroft*, 334 F.Supp.2d 471 (S.D.N.Y. 2004). In the mind of the court, the difficulty stemmed from the effective absence of judicial review before or after the issuance of an NSL under section 2709 and from the facially absolute, permanent confidentiality restrictions enshrined in the statute, 334 F.Supp.2d at 526-27.

The bills address the issues raised by *Doe* in similar if distinctive ways. The most obvious difference is that Senate amendments address only 18 U.S.C. 2709, while the House amendments deal with the procedure under each of the NSL statutes. Other similarities and differences are noted below:

| S. 1389 | H.R. 3199 |
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| Amends 18 U.S.C. 2709 to permit judicial enforcement in U.S. district court. (Sec. 8(c)). | Authorizes judicial enforcement of the NSLs in a new judicial review section (18 U.S.C.3511); disobedience of the court’s order is punishable as contempt of court. (Sec. 116). |
| Amends the confidentiality provisions of 18 U.S.C. 2709 to permit disclosure to those necessary for compliance and to an attorney for legal advice. (Sec. 8(d) (2)). | Amends the confidentiality provisions of the NSL statutes to permit disclosure to those necessary for compliance and to an attorney for legal advice. (Sec. 117). |

| S. 1389 | H.R. 3199 |
|---|---|
| No comparable provision. | Amends the NSL statutes to provide for nondisclosure orders only when the investigative agency determines that the disclosure may endanger any individual or national security, or interfere with diplomatic relations or a criminal or intelligence investigation. (Sec. 117). |
| No comparable provision. | Violations of a confidentiality requirement are punishable by imprisonment for not more than one year (imprisonment for not more than five years if committed with an intent to obstruct). (Sec. 118). |
| Amends 18 U.S.C. 2709 to permit a motion to quash or modify in district court. (Sec. 8). | Creates a new section (18 U.S.C. 3511) establishing district court review procedures for NSLs. (Sec. 116). |
| Permits the court to modify or quash NSLs under 18 U.S.C. 2709 if compliance would be unreasonable, oppressive, or violate any constitutional or other legal right or privilege. (Sec. 8). | Permits the court to modify NSLs if compliance would be unreasonable or oppressive. (Sec. 116). |
| The court may modify NSL confidentiality restrictions under 18 U.S.C. 2709 if there is no reason to believe disclosure will endanger national security, or interfere with an investigation or diplomatic relations, or endanger a life. (Sec. 8). | Recipients may petition the court to have NSL confidentiality restrictions modified once a year and the petition may be granted upon a finding that there is no reason to believe disclosure will endanger national security, or interfere with an investigation or diplomatic relations, or endanger a life. Good faith government certification of such a danger is conclusive. (Sec. 116). |
| No comparable provision. | Requires that any report to a Congressional committee on NSLs shall also be provided to the Judiciary Committees. (Sec. 119). |

Provisions in S. 1389 With No Counterpart in H.R. 3199

Rules. FISA is silent as to the rule making authority of the FISA court or the FISA court of review. Section 10 of S. 1389 authorizes the FISA courts to establish rules and procedures for the administration of the act, and to transmit them in unclassified form (possibly with a classified annex) to the judges of the FISA courts, the Chief Justice, and the Congressional Judiciary and Intelligence Committees, proposed 50 U.S.C. 1803(e).

Reports. FISA directs the Attorney General to report statistical information concerning FISA surveillance orders to the Administrative Office of the United States Courts, 50 U.S.C. 1807. Section 10 of S. 1389 asks that the report include statistical information on the use of FISA emergency surveillance authority, proposed 50 U.S.C. 1807(d).

The Attorney General must submit complete reports concerning the use of FISA physical search authority to the Congressional Intelligence Committees and statistical reports concerning the same authority to the Congressional Judiciary Committees, 50 U.S.C. 1826. Section 10 of S. 1389 requires complete reports be provided to the Congressional Judiciary Committees as well, proposed 50 U.S.C. 1826.

FISA requires the Attorney General to provide the House and Senate Judiciary Committees with statistical reports on the use of FISA pen register/trap and trace authority, 50 U.S.C. 1846. Section 10 of S. 1389 expands the requirement to include statistical information on the use of emergency pen register/trap and trace authority, proposed 18 U.S.C. 1946.

Sections in H.R. 3199 With No Counterpart in S. 1389

Attacks on Mass Transit. It is a federal crime to wreck a train, 18 U.S.C. 1992. Attacking mass transit is a separate crime, 18 U.S.C. 1993. The two have roughly the same penalty structure:

| 18 U.S.C. 1992 | 18 U.S.C. 1993 |
|--|---|
| Generally: imprisonment for not more than 20 years. | Generally: imprisonment for not more than 20 years. |
| Imprisonment for any term of years but not less than 30 or for life if the train is carrying high-level radioactive waste or spent nuclear fuel. | No comparable provision. |
| No comparable provision. | Imprisonment for any term of years or for life if there are passengers aboard the vehicle or ferry at the time of the attack. |
| Death or imprisonment for life, if death results. | Imprisonment for any term of years or for life, if death results. |
| Attempts and conspiracies are subject to the same penalties. | Attempts, conspiracies and threats are subject to the same penalties. |

Section 115 merges the two sections into a single composite 18 U.S.C. 1992 with a penalty structure under which the previous more severe penalty applies regardless of the form of transit involved, e.g., violations where death results are punishable by death or imprisonment for life, violations involving trains or other forms of mass transit carrying passengers are punishable by imprisonment for any term of years or for life; attempts, conspiracies and threats are punishable to the same extent as the underlying offense whether they involve trains or other forms of mass transit.

The same approach applies with regard to federal jurisdiction over the offense. Section 1992 now bases federal jurisdiction on the fact that the train is used or operated in interstate or foreign commerce; while section 1993 now bases federal jurisdiction on the fact the victimized transit provider is engaged in or affects interstate or foreign commerce, or the offender travels, communicates, or transports material across a state line during the course of the offense. The broader jurisdiction base of 18 U.S.C. 1993 is used in the new section, 18 U.S.C. 1992.

A second earlier section amends 18 U.S.C. 1993 to make it a federal crime to collect information with the intent to plan or assist in a violation of 1993 or to attempt, conspire or threaten to do so, section 110. Presumably, the amendment in section 110 will be added to the new 18 U.S.C. 1992, since otherwise it will be repealed when in section 115 the provision section 110 amends (18 U.S.C. 1993) is repealed. Section 304 presents a variation of the same theme when it amends the no longer existing section 1993 to specifically include passenger vessels among those forms of transportation protected by terrorist attack.

Crime There Forfeiture Here. Federal law permits the confiscation of property, within the jurisdiction of the United States, which is derived from or used to facilitate overseas drug trafficking or certain other overseas crimes that are punishable as felonies under the laws of the country in which they were committed and that would be punishable as felonies if they had been committed in the United States, 18 U.S.C. 981(a)(1)(B).

Section 111 of the H.R. 3199 amends 18 U.S.C. 981(a)(1)(B)(i) to allow for U.S. confiscation of property, within the jurisdiction of the United States, which is derived from or used to facilitate felonious trafficking in “nuclear, chemical, biological, or radiological weapons technology or material” committed in violation of foreign law.

Federal Crimes of Terrorism. Federal law affords special treatment to crimes listed as “federal crimes of terrorism” in 18 U.S.C. 2332b(g)(5). Among other things, there are longer statutes of limitation for their prosecution, 18 U.S.C. 3286; more stringent bail provisions for those charged with them, 18 U.S.C. 3142; they carry the possibility of being on supervised release for life after conviction and service of sentence, 18 U.S.C. 3583(j); they are automatically predicate offenses under 18 U.S.C. 2339A(material support to terrorist), racketeering predicate (RICO) offenses, 18 U.S.C. 1961(1)(G), and money laundering predicates, 18 U.S.C. 1956(c)(7)(A).

Section 112 designates as federal crimes of terrorism, 18 U.S.C. 2339D (receipt of military training from a foreign terrorist organization) and 18 U.S.C. 832 (material support to a foreign program for nuclear weapons or weapons of mass destruction).

Wiretapping Predicates. ECPA permits federal courts to authorize law enforcement wiretapping (interception of wire, oral or electronic communications) as a last resort in the investigation of certain serious crimes (predicate offenses), 18 U.S.C. 2510-2518.

Together sections 113 and 122 add the following crimes to the wiretapping predicate offense list:

- 18 U.S.C. 37(violence at international airports)
- 18 U.S.C. 81(arson within U.S. special maritime and territorial jurisdiction)
- 18 U.S.C. 175b(biological agents)
- 18 U.S.C. 832 (nuclear and weapons of mass destruction threats)
- 18 U.S.C. 842(m) and (n)(plastic explosives)
- 18 U.S.C. 930(possession of weapons in federal facilities)(added by sec. 113; sec. 122 adds 18 U.S.C. 930(c)(firearm assault in federal facilities)
- 18 U.S.C. 956 (conspiracy to commit violence overseas)
- 18 U.S.C. 1028A (aggravated identity theft)
- 18 U.S.C. 1114 (killing federal employees)
- 18 U.S.C. 1116 (killing certain foreign officials)
- 18 U.S.C. 1361-1363 (destruction of federal property)
- 18 U.S.C. 1366 (destruction of an energy facility)
- 18 U.S.C. 1993 (attacks on mass transit)
- 18 U.S.C. 2155-2156 (national defense property offenses)
- 18 U.S.C. 2280 (violence against maritime navigation)
- 18 U.S.C. 2281 (violence against fixed maritime platforms)
- 18 U.S.C. 2339 (harboring terrorists)
- 18 U.S.C. 2339D (terrorist military training)
- 18 U.S.C. 2340A (torture)
- 49 U.S.C. 46504 (2d sentence)(assault on a flight crew member with a dangerous weapon)
- 49 U.S.C. 46505(b)(3), (c)(certain weapons offenses aboard an aircraft).

Forfeiture for Acts of Terrorism. 18 U.S.C. 981(a)(1)(G) calls for the confiscation of property of those planning or engaged in acts of domestic or international terrorism (as defined in 18 U.S.C. 2331) against the United States or its citizens. Domestic terrorism is defined in 18 U.S.C. 2331 (section 802 of the USA PATRIOT Act) among other things as acts dangerous to human life in violation of state or federal law committed to influence the policy of a government or civilian population by intimidation or coercion, 18 U.S.C. 2331(5). Critics might suggest that the juxtaposition of the definition and the confiscation provisions of section 981(a)(1)(G) could result in the confiscation of the property of political action organizations whose members became involved in a picket sign swinging melee with counter demonstrators. In contrast, 18 U.S.C. 2332b(g)(5)(B) seems less susceptible to such challenges since it defines terrorism by reference to violations of specific federal terrorist offenses rather than the generic, violation of state or federal law found in section 2331.

Section 120 replaces terrorism defined in 18 U.S.C. 2331 with terrorism defined in 18 U.S.C. 2332b(g)(5)(B) as the ground for confiscation under section 981(a)(1)(G). It does so by amending 18 U.S.C. 981(a)(1)(G) so that it calls for the confiscation of property of those planning or engaged acts of domestic or international terrorism (as defined in 18 U.S.C. 2332b(g)(5)(B)) against the United States or its citizens.

Cigarette Smuggling. Federal law proscribes trafficking in contraband cigarettes (i.e., trafficking in more than 60,000 cigarettes without the required tax stamps), 18 U.S.C. 2341-2346.

Section 123 recasts the federal statute lowering the threshold definition to 10,000 cigarettes and to 500 cans or packages of smokeless tobacco; and creates a federal cause action against violators (other than Indian tribes or Indians in Indian country) for manufacturers, exporters, and state and local authorities, proposed 18 U.S.C. 2341-2346.

Narco-Terrorism. Federal law prohibits drug trafficking with severe penalties calibrated according to the kind and volume of drugs and the circumstances involved, 21 U.S.C. 841-971 (e.g., trafficking in 50 grams or more of crack cocaine is punishable by imprisonment for not less than 10 years and for not more than life; distributing a small amount of marijuana for no remuneration is punishable by imprisonment for not more than one year, 21 U.S.C. 841, 844). Providing material support for the commission of a terrorist crime or to a designated foreign terrorist organization is likewise a federal crime, punishable by imprisonment for not more than 15 years, 18 U.S.C. 2339A, 2339B.

Section 124 of H.R. 3199 outlaws drug trafficking for the benefit of a foreign terrorist organization or of a person planning or committing a terrorist offense including a crime recognized as such in one of our several anti-terrorist treaties (identified in 18 U.S.C. 2339C(e)(7)). Violations are punishable by imprisonment for not less than 20 years nor more than life, proposed 21 U.S.C. 960A.

Interfering With the Operation of An Aircraft. It is a federal crime to destroy an aircraft or its facilities under various circumstances giving rise to federal jurisdiction or to attempt, or conspire to do so, 18 U.S.C. 32. Violations are punishable by imprisonment for not more than 20 years, *id.* It is likewise a federal crime to interfere with a member of a flight crew in the performance of their duties; this too is punishable by imprisonment for not more than 20 years (or imprisonment for any term of years or for life in the case of assault with a dangerous weapon), 49 U.S.C. 46504.

Section 125 amends 18 U.S.C. 32 to make it a federal crime to interfere or disable the operator of an aircraft or aircraft facility with reckless disregard for human safety or with the intent to endanger, subject to the same sanctions that apply to other violations of the section. By operation of section 32 the new prohibition extends to attempts and conspiracies to engage in such conduct, 18 U.S.C. 32(a)(7)(to be redesignated 18 U.S.C. 32(a)(8)).

Investigation of Political Activities. FISA bars the use of various information collection techniques in the course of a foreign intelligence investigation, if the investigation is based solely on the exercise of First Amendment protected rights, 50 U.S.C. 1805(a)(3)(A), 1824(a)(1)(A), 1942(a)(1).

Section 126 expresses the sense of Congress that the federal government should not conduct criminal investigations of Americans based solely on their membership in non-violent political organizations or their participation in other lawful political activity.

First Responder Funding. Section 1014 of the USA PATRIOT Act establishes a grant program for state and local domestic preparedness support, 42

U.S.C. 3714. The 108th Congress ended before proponents for adjustment in the grant effort were able to reach consensus,⁷ although the sense of Congress statement in section 7401 of the Intelligence Reform and Terrorism Prevention Act bespeaks a resolution to do so during the 109th Congress.⁸ The provisions of sections 127 through 131 of H.R. 3199 have passed the House separately as H.R. 1544, 151 *Cong.Rec.* H3236-237 (daily ed. May 12, 2005).⁹

Section 127 of H.R. 3199 repeals subsection 1014(c) of the USA PATRIOT Act. Other than H.R. 1544's inclusion of a statement of findings, this is the only apparent difference between H.R. 1544 and the treatment of the same provisions in H.R. 3199. Instead of repealing all of subsection 1014(c), H.R. 1544 repeals only paragraph 1014(c)(3), leaving in place the authorization of appropriations, sec. 1014(c)(1), and the limitation on administrative expenses, sec. 1014(c)(2).¹⁰

Section 128 of H.R. 3199 creates a new Title XVIII in the Homeland Security Act relating to funding for first responders. It identifies the programs that are covered by the Title — the State Homeland Security Grant Program, the Urban Area Security Initiative, and the Law Enforcement Terrorism Prevention Program — and those that are not — federal grant programs administered by departments or agencies other than the Department of Homeland Security, fire grant programs under the Federal Fire Prevention and Control Act, and certain emergency management planning and assistance account grants, proposed sec. 1802.

States that submit a three-year homeland security plan, certain regional applicants (regions covering the jurisdiction of two or more governmental entities and either home to more than 1.65 million people or consisting of 20,000 or more square miles) and certain tribes are eligible grant applicants, proposed secs. 1801, 1803. Grant applications are to be evaluated and given priority based on the extent to which they contribute to the prevention and recovery from the consequences of acts of terrorism for the population and the critical infrastructure of the United States, proposed sec. 1804. Each state with an approved three-year plan is assured of no less 0.25 percent of the available funds (no less than 0.45 if they satisfy high risk criteria),

⁷ See CRS Report RL32634, *First Responder Grant Formulas: A Comparison of Formula Provisions in S. 2845 and H.R. 10, 108th Congress.*

⁸ “It is the sense of Congress that Congress must pass legislation in the first session of the 109th Congress to reform the system for distributing grants to enhance State and local government prevention of, preparedness for, and response to acts of terrorism,” 118 Stat. 3849 (2004).

⁹ See also H.Rept. 109-65 (2005).

¹⁰ Subsection 1014(c) as amended provides: (c) Authorization of appropriations. (1) In general. There is authorized to be appropriated to carry out this section such sums as necessary for each of fiscal years 2002 through 2007. (2) Of the amount made available to carry out this section in any fiscal year not more than 3 percent may be used by the Attorney General for salaries and administrative expenses. (3) Each State shall be allocated in each fiscal year under this section not less than 0.75 percent of the total amount appropriated in the fiscal year for grants pursuant to this section, except that the United States Virgin Islands, American Samoa, Guam, and the Northern Mariana Islands each shall be allocated not less than 0.25 percent,” 42 U.S.C. 3714(c).

id. An advisory Task Force on Terrorism Preparedness for First Responders is to be assembled to study and make periodic recommendations to the Secretary of Homeland Security on the essential capacities for terrorism preparedness, proposed sec. 1805. Grants may be used in a variety of ways consistent with the grant application but may not be used to purchase land, construct buildings, supplant state or local funds or to cover state or local government cost sharing obligations, proposed sec. 1806. The Department of Homeland Security is to support the development, promulgation, and currency of voluntary first responder equipment and training standards, proposed. sec. 1807.

Section 129 of H.R. 3199 instructs the Secretary of Homeland Security to establish an Office of the Comptroller within the Office of Domestic Preparedness to oversee the grant and financial management process.

Section 130 of H.R. 3199 calls for an Office of Government Accountability report on federal first responder training programs.

Section 131 grants immunity from civil liability to the donors (other than manufacturers) of fire equipment to volunteer fire organizations.

Federal Data Mining Report. Section 132 directs the Attorney General to prepare a report to Congress on data mining activities of federal agencies and departments including the legal authority for such activities and their privacy and civil liberties implications.

Victims Access Forfeiture Funds. Section 981 of title 18 of the United States Code describes various forms of property that are subject to confiscation by the United States because of their proximity to various federal crimes. The proceeds from the confiscation of crime related property are generally available for law enforcement purposes to the law enforcement agencies that participate in the investigation and prosecution that results in the forfeiture, e.g., 18 U.S.C. 981(e). The funds realized from the collection of criminal fines are generally available for victim compensation and victim assistance purposes, 42 U.S.C. 10601. Victims of violent federal crimes are entitled to restitution, 18 U.S.C. 3663A, and victims of other federal crimes are eligible for restitution, 18 U.S.C. 3663.

Section 133 expresses the sense of Congress that under section 981 victims of terrorists should have access to the assets forfeited.

Terrorist Death Penalty Enhancement. Title II of the H.R. 3199 enhances the consequence of conviction of various terrorists crimes that result in death.

New Capital Offenses. Some federal crimes of violence are punishable by death if death results from the commission of the offense, e.g., 18 U.S.C. 34 (destruction of aircraft, motor vehicles or their facilities); some are punishable by imprisonment for any term of years or for life when a death results from commission of the offense, but the death penalty is not a sentencing option, e.g., 18 U.S.C. 2339A (material support of a terrorist crime); still others are punishable by imprisonment but impose no greater penalty if death results from their commission, e.g., 18 U.S.C. 175(b) (unlawful possession of a biological agent).

Section 211 creates a new federal offense which outlaws committing a terrorist offense resulting in death and which is punishable by death or imprisonment for any term of years or for life, proposed 18 U.S.C. 2339E. The underlying “terrorist offenses” are the commission, attempt to commit, or conspiracy to commit (1) any federal crime of terrorism committed for terrorist purposes as defined by 18 U.S.C. 2332b(g)(except 18 U.S.C. 1363 relating to the destruction of property in federal enclaves); or (2) any violation of 18 U.S.C. ch. 113B (terrorism), 175 (biological weapons), 175b (biological materials), 229 (chemical weapons) 831 (nuclear material), or 42 U.S.C. 2284 (sabotage of nuclear facilities).

Several of these underlying crimes are already capital offenses; those which are not are:

- 18 U.S.C. 81 (arson within U.S. special maritime and territorial jurisdiction)
- 18 U.S.C. 175 (biological weapons)
- 18 U.S.C. 175b (biological materials)
- 18 U.S.C. 175c (small pox virus)
- 18 U.S.C. 831 (nuclear materials)
- 18 U.S.C. 832 (participation in foreign nuclear weapons or weapons of mass destruction programs)(sec. 112 of H.R. 3199 adds this section to 2332b(g)(5)(B))
- 18 U.S.C. 842(m), (n) (transportation of plastic explosives without detection agents)
- 18 U.S.C. 956 (conspiracy in the U.S. to commit certain violent crimes overseas)
- 18 U.S.C. 1030(a)(1), (a)(5)(A)(i) (computer fraud and abuse)
- 18 U.S.C. 1362 (destruction of communications systems)
- 18 U.S.C. 2155 (destruction of national defense material)
- 18 U.S.C. 2332d (financial transactions with nations sponsoring terrorism)
- 18 U.S.C. 2332h (radiological dispersal devices)
- 18 U.S.C. 2332g (anti-aircraft missiles)
- 18 U.S.C. 2339 (harboring terrorists)
- 18 U.S.C. 2339A (material support to terrorist offenses)
- 18 U.S.C. 2339B (material support to designated foreign terrorist organizations)
- 18 U.S.C. 2339C (financing terrorism)
- 18 U.S.C. 2339D (receipt of military training from a foreign terrorist organization) (sec. 112 of H.R. 3199 adds this section to 2332b(g)(5)(B))
- 42 U.S.C. 2284 (sabotage of nuclear facilities)
- 49 U.S.C. 46504 (assaulting a flight crew member with a dangerous weapon)
- 49 U.S.C. 46505 (carrying a weapon or explosive aboard an aircraft)
- 49 U.S.C. 60123 (sabotage of interstate gas pipelines).

The new section 18 U.S.C. 2339E only makes a life taking federal crime of terrorism a capital offense if it is a federal crime of terrorism as defined in 18 U.S.C. 2332b(g)(5) that is, if it is one of the crimes listed in 18 U.S.C. 2332b(g)(5)(B) and if it satisfies the requirements of 18 U.S.C. 2332b(g)(5)(A)(“is calculated to influence or affect the conduct of government by intimidation or coercion or to retaliate against government conduct”). Section 221 of H.R. 3199 takes four of these life taking federal crimes of terrorism (that under existing law are punishable only by imprisonment) and makes them punishable by death or imprisonment regardless of whether they satisfy 18 U.S.C. 2332b(g)(5)(A): 18 U.S.C. 172c (small pox virus), 832 (participation in a foreign nuclear weapons or weapons of mass destruction program), 2332g (anti-aircraft missiles), and 2332h (radiological dispersal devices).

The same is true, if somewhat less obvious, of a fifth life taking statute that section 221 makes punishable by death or imprisonment. Section 92 of the Atomic Energy Act, 42 U.S.C. 2122, prohibits production, transfer, or possession of atomic weapons. Section 222 of the Atomic Energy Act, 42 U.S.C. 2272, establishes the penalties for anyone who willfully violates section 92 (42 U.S.C. 2122). Section 92 is a federal crime of terrorism and so like the other four is punishable by death under section 211 of H.R. 3199 (new 18 U.S.C. 2339E) when 18 U.S.C. 2332b(g)(5)(A) is satisfied. Here too, section 221 makes life-taking violations of section 222 (42 U.S.C. 2272) punishable by death or imprisonment regardless of whether 2332b(g)(5)(A) is satisfied or not.

Denial of Benefits for Potential Capital Offenses. When federal courts sentence a defendant for a violation of the Controlled Substances Act, they may include a sentence for a term of ineligibility for certain federal benefits, 21 U.S.C. 862; in the case of certain other federal benefits, ineligibility is a consequence of a Controlled Substance conviction, 21 U.S.C. 862a.

Section 212 of H.R. 3199 authorizes federal courts sentencing a defendant for a terrorist offense, as defined in 18 U.S.C. 2339E, to a term of federal benefit ineligibility¹¹ for any term of years or for life, proposed 18 U.S.C. 2339F. The terrorist offenses in section 2339E are the federal crimes of terrorism,¹² the crimes

¹¹ Federal benefits for purposes of proposed 18 U.S.C. 2339F include the food stamp program, the temporary assistance to needy families program, and “any grant, contract, loan, professional license, or commercial license provided by an agency of the United States or by appropriated funds of the United States;” but “does not include any retirement, welfare, Social Security, health, disability, veterans benefit, public housing, or other similar benefit, or any other benefit for which payments or services are required for eligibility,” 21 U.S.C. 862, 862a.

¹² The federal crimes of terrorism, adjusted to reflect other changes elsewhere in H.R. 3199 are: 18 U.S.C. 32 (destruction of aircraft or aircraft facilities), 37 (violence at international airports), 81 (arson within special maritime and territorial jurisdiction), 175 or 175b (biological weapons), 175c (variola virus), 229 (chemical weapons), subsection (a), (b), (c), or (d) of section 351 (congressional, cabinet, and Supreme Court assassination and kidnaping), 831 (nuclear materials), 832 (participation in nuclear and weapons of mass destruction threats to the United States), 842(m) or (n) (plastic explosives), 844(f)(2) or (3) (arson and bombing of Government property risking or causing death), 844(i) (arson and bombing of property used in interstate commerce), 930(c) (killing or attempted killing during an attack on a Federal facility with a dangerous weapon), 956(a)(1) (conspiracy to murder, kidnap, or maim persons abroad), 1030(a)(1) (protection of computers), 1030(a)(5)(A)(i) resulting in damage as defined in 1030(a)(5)(B) (ii) through (v) (protection of computers), 1114 (killing or attempted killing of officers and employees of the United States), 1116 (murder or manslaughter of foreign officials, official guests, or internationally protected persons), 1203 (hostage taking), 1361 (government property or contracts), 1362 (destruction of communication lines, stations, or systems), 1366(a) (destruction of an energy facility), 1751(a), (b), (c), or (d) (Presidential and Presidential staff assassination and kidnaping), 1992 (terrorist attacks and other acts of violence against mass transportation systems), 2155 (destruction of national defense materials, premises, or utilities), 2156 (national defense material, premises, or utilities), 2280 (violence against maritime navigation), 2281 (violence against maritime fixed platforms), 2332 (certain homicides and other violence against United States nationals occurring outside of the United States), 2332a

in the 18 U.S.C. ch. 113B that are not federal crimes of terrorism, i.e., violations of 18 U.S.C. 2332d (financial transactions with terrorism sponsoring countries), and attempts or conspiracies to commit them.

Pre-1994 Capital Air Piracy Cases. In the late 1960's and early 1970's the Supreme Court held imposition of capital punishment under the procedures then employed by the federal government and most of the states unconstitutional.¹³ In 1974, Congress established a revised procedure for imposition of the death penalty in certain air piracy cases.¹⁴ In 1994, when Congress made the procedural adjustments necessary to revive the death penalty as a sentencing option for other federal capital offenses, it replaced the air piracy procedures with those of the new regime.¹⁵ At least one court, however, held that the new procedures could not be applied retroactively to air piracy cases occurring after the 1974 fix but before the 1994 legislation, in the absence of an explicit statutory provision.¹⁶

Section 213 adds an explicit provision to the end of the 1994 legislation.¹⁷ The amendment provides for the application of the existing federal capital punishment procedures, 18 U.S.C. ch.228, in addition to consideration of the mitigating and aggravating factors in place prior to the 1994 revival.¹⁸ Section 213 also includes a definition of “especially heinous, cruel, or depraved” used as an aggravating factor in section 46503, to avoid the vagueness problems that might otherwise attend the use of such an aggravating factor.¹⁹

(use of weapons of mass destruction), 2332b (acts of terrorism transcending national boundaries), 2332f (bombing of public places and facilities), 2332g (missile systems designed to destroy aircraft), 2332h (radiological dispersal devices), 2339 (harboring terrorists), 2339A (providing material support to terrorists), 2339B (providing material support to terrorist organizations), 2339C (financing of terrorism), 2339D (receipt of military training from foreign terrorist organization), 2340A (torture); 42 U.S.C. 2122 (prohibitions governing atomic weapons), 2284 (sabotage of nuclear facilities or fuel); 49 U.S.C. 46502 (aircraft piracy), the second sentence of 46504 (assault on a flight crew with a dangerous weapon), 46505(b)(3) or (c) (explosive or incendiary devices, or endangerment of human life by means of weapons, on aircraft), 46506 if homicide or attempted homicide is involved (application of certain criminal laws to acts on aircraft), and 60123 (b) (destruction of interstate gas or hazardous liquid pipeline facility).

¹³ *Furman v. Georgia*, 408 U.S. 238 (1972).

¹⁴ P.L. 93-366, 88 Stat. 409 (1974), 49 U.S.C. 1473 (1976 ed.)

¹⁵ P.L. 103-322, 108 Stat. 1796, 1970 (1994), 18 U.S.C. 3591-3598.

¹⁶ *United States v. Safarini.*, 257 F.Supp.2d 191, 202-3 (D.D.C. 2003).

¹⁷ Proposed subsection 60003(c), amending P.L. 103-322, 108 Stat.1970 (1994).

¹⁸ P.L. 103-272, 108 Stat. 1242 (1994). Because the 1994 legislation was enacted almost immediately after recodification of title 49, 49 U.S.C. 46503 never appeared in the official United States Code or any of its supplements. The predecessor to 49 U.S.C. 46503 as repealed in the 1994 capital punishment revival statute appears in 49 U.S.C. App. 1473 (1988 ed.).

¹⁹ *See e.g., Maynard v. Cartwright*, 486 U.S. 356, 359-61 (1988).

Death-Resulting Capital Terrorist Offenses. Existing federal death penalty provisions recognize the death penalty as a sentencing option in three categories of cases: (1) certain controlled substance offense, 18 U.S.C. 3591(b); (2) certain homicides, 18 U.S.C. 3591(a)(2); and (3) treason and certain espionage offenses, 18 U.S.C. 3591(a)(1). The homicides covered by 18 U.S.C. 3591(a)(2) include those that involve, “intentionally and specifically engaged in an act of violence, knowing that the act created a grave risk of death to a person, other than one of the participants in the offense, such that participation in the act constituted a reckless disregard for human life and the victim died as a direct result of the act,” 18 U.S.C. 3591(a)(2)(D).

The death penalty may only be imposed upon the finding of at least one aggravating factor, 18 U.S.C. 3593(d); and only if the aggravating factors found outweigh any mitigating factors, 18 U.S.C. 3593(e). Each category comes with its own set of aggravating circumstances, 18 U.S.C. 3592(b)(espionage and treason), 3592(c)(homicide), and 3592(d)(controlled substance offenses). Numbered among the homicide aggravating factors is the fact that “the defendant committed the offense after substantial planning and premeditation to . . . commit an act of terrorism,” 18 U.S.C. 3592(c)(9).²⁰ Another is the fact the homicide was committed during the course of any of more than a dozen federal crimes of terrorism, 18 U.S.C. 3592(c)(1). The short collection of treason/espionage aggravating factors consists of four: (1) a prior espionage or treason conviction; (2) a grave risk to national security; (3) “in the commission of the offense the defendant knowingly created a grave risk of death to another person;” and (4) a catch-all “any other aggravating factor,” 18 U.S.C. 3592(b).²¹

Section 214 adds violations of the new 18 U.S.C. 2339E (“whoever, in the course of committing a terrorist offense, engages in conduct that results in the death of a person”) to the treason/espionage category, proposed 18 U.S.C. 3591(a)(1), and creates an additional aggravating factor applicable to the category’s offenses, i.e., “the defendant committed the offense after substantial planning,” proposed 18 U.S.C. 3592(b)(4).

Life Time Supervised Release Regardless of Risks. A federal court may impose a sentence of supervised release, to be served upon release from prison, of any term of years or life if the defendant has been convicted of a federal crime of terrorism (18 U.S.C. 2332b(g)(5)(B)) involving the foreseeable risk of physical injury of another, 18 U.S.C. 3583(j).

Section 215 of H.R. 3199 amends section 3583 to eliminate the requirement that the defendant be convicted of a crime involving a foreseeable risk of injury. As proposed, conviction of any federal crime of terrorism is sufficient, proposed 18 U.S.C. 3583(j).

²⁰ Chapter 228 does not define “act of terrorism,” however, it is defined elsewhere in title 18, 18 U.S.C. 3077(1) (for purposes of the Attorney General’s authority to offer and pay rewards it means “an act of domestic or international terrorism as defined in section 2331”).

²¹ The homicide and controlled substance collection of aggravating factors have identical catch-alls, 18 U.S.C. 3592(c), (d).

Modification of Various Death Penalty Procedures. Section 231 modifies federal death penalty procedures in several ways, some limited to terrorists, others of more general application.

Congress created a separate procedure for imposition of the death penalty for murders associated with various drug offenses in 1988, 21 U.S.C. 848. In 1994, it established procedures for federal capital cases generally which differ slightly from the procedure established for the drug cases. Section 231 eliminates the duplicate drug procedures, 21 U.S.C. 848(g)-(p), (q)(1-3), (r).

Section 231 changes the wording of one of the mitigating factors in the federal capital punishment statute from, “Another defendant or defendants, equally culpable in the crime, will not be punished by death,” 18 U.S.C. 3592(a)(4), to “The Government could have, but has not, sought the death penalty against another defendant or defendants, equally culpable in the crime,” proposed 18 U.S.C. 3592(a)(4). The change appears to remove from the factor, cases in which co-defendants are tried separately, the first is not sentenced to death, and the second claim mitigation. It is not clear, however, whether this and other mitigating circumstances eliminated by the change in language might be claimed under the catch-all factor of 18 U.S.C. 3592(a)(8)(“... any other circumstance of the offense that mitigate against imposition of the death sentence”).

Section 231 makes three aggravating factor changes. It amends the “hired the killer” factor to include situations the defendant merely created the expectation that the killer would be paid, proposed 18 U.S.C. 3592(c)(7). It adds all other federal crimes of terrorism to the homicide aggravating factor that already mentions homicide committed during the course of over a dozen crimes of terrorism as an aggravating circumstance, proposed 18 U.S.C. 3592(c)(1). Finally, it creates a new obstruction of justice aggravating factor for those homicides committed “to obstruct investigation or prosecution of any offense,” proposed 18 U.S.C. 3592(c)(17).

“A finding with respect to any aggravating factor must be unanimous. If no aggravating factor . . . is found to exist, the court shall impose a sentence other than death. . .” 18 U.S.C. 3593(d). Based on consideration of the aggravating and mitigation factors in a case, the jury is to unanimously recommend the sentence to be imposed, 18 U.S.C. 3593(e). Section 231 permits impaneling a new jury if the jury is unable to reach a unanimous penalty verdict under subsection 3593(e), proposed 18 U.S.C. 3593(b)(2)(E), 3594.

Present law permits the parties, with the approval of the court, to stipulate a sentencing jury of less than 12 in capital cases, 18 U.S.C. 3593(b). Section 231 amends subsection 3593(b) to permit sentencing juries of less than 12 when “the court finds good cause” as well, proposed 18 U.S.C. 3593(b).

As a general rule in federal felony cases, the government is allowed 6 peremptory challenges to prospective regular jurors (the defendants or defendants jointly are entitled to 10), and regardless of the seriousness of the crime to be tried, each side is allowed 3 additional peremptory challenges to alternate jurors when either 5 or 6 alternate jurors are selected, F.R.Crim.P. 24(b)(2), (c)(4)(C). Section 231 increases the number of regular government peremptory challenges to 9 and

permits each side 4 additional peremptory alternate juror challenges when either 7, 8 or 9 alternates are impaneled, proposed F.R.Crim.P. 25(b)(2), (c)(4)(C) [proposed (c)(4)(C) probably should be proposed (c)(4)(D)].

Seaport Terrorism

Title III of H.R. 3199, Reducing Crime and Terrorism at America's Seaports Act of 2005, is identical in many respects to S. 378, a bill of the same popular name, reported by the Senate Judiciary Committee earlier this year, 151 *Cong. Rec.* 4108 (daily ed. April 21, 2005).

Seaport Entry by False Pretenses. It is a federal crime to use fraud or false pretenses to enter federal property, a vessel or aircraft of the United States, or the secured area in an airport, 18 U.S.C. 1036. The offense is punishable by imprisonment for not more than five years if committed with the intent to commit a felony and imprisonment for not more than six months in other cases, *id.*

Section 302 expands 18 U.S.C. 1036 to cover seaports and increases the penalty for violations committed with intent to commit a felony from imprisonment for not more than five years to imprisonment for not more than 10 years, proposed 18 U.S.C. 1036. The section also provides a definition of "seaport," proposed 18 U.S.C. 26.²²

Obstructing Maritime Inspections. Various federal laws prohibit the failure to heave to or otherwise obstruct specific maritime inspections under various circumstances.²³

Section 303 establishes a new, general federal crime that outlaws, in the case of vessel subject to the jurisdiction of the United States, the failure to heave to, or to forcibly interfere with the boarding of the vessel by federal law enforcement or resist arrest, or to provide boarding federal law enforcement officers with false information concerning the vessel's cargo, origin, destination, registration, ownership, nationality or crew, proposed 18 U.S.C. 2237. The crime is punishable by imprisonment for not more than five years.

Terrorist Attacks on Passenger Vessels. Federal law condemns terrorist attacks on mass transit including a "ferry" and its facilities, 18 U.S.C. 1993.

Section 304 adds "passenger vessels" to the forms of mass transit protected under section 1993. At this point in the bill, 18 U.S.C.1993 has already been

²² "As used in this title, the term 'seaport' means all piers, wharves, docks, and similar structures, adjacent to any waters subject to the jurisdiction of the United States, to which a vessel may be secured, including areas of land, water, or land and water under and in immediate proximity to such structures, buildings on or contiguous to such structures, and the equipment and materials on such structures or in such buildings," proposed 18 U.S.C. 26. The term "seaport" does not appear to have been used in any other section of title 18.

²³ See *e.g.*, 16 U.S.C. 2435, 2438 (enforcement of the Antarctic Marine Living Resources Convention); 16 U.S.C. 5505, 5508 (high seas fishing compliance).

repealed in favor of new 18 U.S.C. 1992, sec. 115 of H.R. 3199. Corresponding changes may well ultimately be made in the newly constructed 18 U.S.C. 1992.

Interference with Maritime Commerce. Existing federal law prohibits violence against maritime navigation, 18 U.S.C. 2280, burning or bombing vessels, 18 U.S.C. 2275, burning or bombing property used in or whose use affects interstate or foreign commerce, 18 U.S.C. 844(i), destruction of property within the special maritime and territorial jurisdiction of the United States, 18 U.S.C. 1363. None of them are punishable by life imprisonment unless death results from their commission, *id.*

Section 305 establishes a new crime, 18 U.S.C. 2282A under which it is a federal crime punishable by imprisonment for any term of years or for life (or the death penalty if death results) to place a dangerous substance or device in the navigable waters of the United States with the intent to damage a vessel or its cargo or to interfere with maritime commerce.

Section 305 creates a second new crime, 18 U.S.C. 2282B, under which it is a federal crime punishable by imprisonment for not more than 20 years to tamper in manner likely to endanger navigation with any navigational aid maintained by the Coast Guard or St. Lawrence Seaway Development Corporation.

Transporting Dangerous Materials or Terrorists.

Transporting Dangerous Materials. It is a federal crime to possess biological agents, chemical weapons, atomic weapons, and nuclear material, each punishable by imprisonment for any term of year or for life.²⁴ And although the penalties vary, it is likewise a federal crime to commit any federal crime of terrorism.²⁵ It is a federal crime to provide material support, including transportation, for commission of various terrorist crimes or for the benefit of a designated terrorist organization, 18 U.S.C. 2339A, 2339B, or to transport explosives in interstate or foreign commerce with the knowledge they are intended to be used in injure an individual or damage property, 18 U.S.C. 844(d). Most of these offenses condemn attempts and conspiracies to commit them, and accomplices and coconspirators incur comparable liability in any event.²⁶

Section 306 establishes a new federal offense which prohibits transporting explosives, biological agents, chemical weapons, radioactive or nuclear material knowing it is intended for use to commit a federal crime of terrorism — aboard a vessel in the United States, in waters subject to U.S. jurisdiction, on the high seas, or aboard a vessel of the United States. The crime is punishable by imprisonment for any term of years or for life and may be punishable by death if death results from commission of the offense, *id.*

²⁴ 18 U.S.C. 175, 229, 831; 42 U.S.C. 2272.

²⁵ Each crime designated in 18 U.S.C. 2332b(g)(5)(B) carries its own penalty.

²⁶ 18 U.S.C. 2; *United States v. Pinkerton*, 328 U.S. 640, 647-48 (1946).

Transporting Terrorists. While it is a crime to harbor a terrorist, 18 U.S.C. 2339, or to provide material support, including transportation, for the commission of a terrorist offense or for the benefit of a foreign designated terrorist organization, 18 U.S.C. 2339A, 2339B, such offenses are only punishable by imprisonment for not more than 15 years. The same perceived defect may appear to some in the penalties for aiding and abetting commission of the various federal crimes of terrorism and in the penalties available for committing many of them.²⁷

Section 306 creates a new federal offense, 18 U.S.C. 2284, punishable by imprisonment for any term of years or for life for transporting an individual knowing he intends to commit, or is fleeing from the commission of, a federal crime of terrorism. Unlike the new 18 U.S.C. 2282A(c), created in section 305, neither of the section 306 offenses have an explicit exception for official activities. Of course, even though facially the new section 2284 forbids transportation terrorists for purposes of extradition or prisoner transfer, it would never likely to be read or applied to prevent or punish such activity.

Interference With Maritime Navigation. Chapter 111 of title 18 outlaws causing damage to a vessel or to maritime facilities;²⁸ other statutes supply parallel coverage under some circumstances;²⁹ hoaxes relating to violations of chapter 111 are punishable by imprisonment for not more than five years (not more than 20 years if serious injury results and if death results, by imprisonment for any term of years or for life or by death), 18 U.S.C. 1038.

Section 307 establishes a new chapter 111A in title 18 relating to the destruction of, or interference with, vessels or maritime facilities which among others things: makes violence — committed, attempted or conspired — against vessels or their facilities punishable by imprisonment for not more than 30 years (by imprisonment for any term of years or for life if the offense involves a vessel carrying high level radioactive waste or spent nuclear fuel; if death results, by imprisonment for any term of years or by death). It makes related hoaxes punishable by a civil fine of not more than \$5,000 or imprisonment for not more than five years, proposed 18 U.S.C. 2292. It establishes U.S. jurisdiction over these offenses when they are committed overseas if the offender, victim, or vessel is an American, 18 U.S.C. 2290.

²⁷ For example, destruction of aircraft or violence at international airports in violation of 18 U.S.C. 32 and 73 respectively are punishable by imprisonment for not more than 20 years, less a death results; and same penalties apply to computer fraud and abuse violations considered federal crimes of terrorism, 18 U.S.C. 1030(a)(5), (c)(4). Aiding and abetting carries the same penalties as the underlying offense, 18 U.S.C. 2.

²⁸ E.g., 18 U.S.C. 2280 (violence against maritime navigation), 2275 (burning or bombing vessels).

²⁹ E.g., 18 U.S.C. 1363 (damage or destruction of property in U.S. special maritime and territorial jurisdiction), 81 (arson in the U.S. special maritime and territorial jurisdiction), 844(i) (burning or bombing property used in interstate or foreign commerce).

Theft From Maritime Commerce.

Theft From Interstate Commerce. Federal law prohibits theft from shipments traveling in interstate or foreign commerce; violations are punishable by imprisonment for not more than 10 years (not more than one year if the value of the property stolen is \$1000 or less), 18 U.S.C. 659.

Section 308 increases the penalty from not more than 10 years imprisonment to not more than 15 years imprisonment (and from not more than one year to not more than five years if the value of the stolen property is \$1000 or less). It makes it clear that theft from trailers, cargo containers, freight stations, and warehouses are covered, and that the theft of goods awaiting transshipment is also covered, proposed 18 U.S.C. 659.

Interstate or Foreign Transportation of Stolen Vessels. Interstate or foreign transportation of a stolen vehicle or aircraft is punishable by imprisonment for not more than 10 years, 18 U.S.C. 2312; receipt of a stolen vehicle or aircraft that has been transported in interstate or foreign commerce carries the same penalty, 18 U.S.C. 2313.

Section 308 expands the coverage of federal law to cover the interstate or foreign transportation of a stolen vessel and receipt of stolen vessel that has been transported in interstate or overseas, proposed 18 U.S.C. 2311. It increases the penalties for violations of sections 2312 and 2313 from imprisonment for not more than 10 years to not more than 15 years. The United States Sentencing Commission is to review the sentencing guidelines application to violations of 18 U.S.C. 659 and 2311. The Attorney General is to see that cargo theft information is included in the Uniform Crime Reports and to report annually to Congress on law enforcement activities relating to theft from interstate or foreign shipments in violations of 18 U.S.C. 659.

Penalties for Noncompliance With Manifest Requirements. Violations of vessel or aircraft arrival, reporting entry and clearance requirements, imposed for customs purposes, are punishable by imprisonment for not more than one year and a fine of not more than \$2,000 (not more than five years imprisonment and fine of not more than \$10,000 if there is contraband aboard), 19 U.S.C. 1436. Offenders may also be subject to a civil penalty of not more than \$5,000 (not more than \$10,000 for a subsequent offense), *id.* The fines for false or inadequate shipping manifests are not more than \$1,000, 19 U.S.C. 1584.

Section 309 makes the sanctions more compatible; it increases the fine under section 1584 to not more than \$10,000; the civil penalty under section 1436 to not more than \$10,000 (not more \$25,000 for subsequent offenses); and the criminal fine under section 1436 to not more than \$10,000).

Stowaways. Stowing away on a vessel or an aircraft is a federal crime; offenders are subject to imprisonment for not more than one year, 18 U.S.C. 2199.

Section 310 increases the penalty for stowing away from imprisonment for not more than one year to not more than five years (not more than 20 years if the offense

is committed with the intent to inflict serious injury upon another or if serious injury to another results; or if death results, by death or imprisonment for any term of years or for life, proposed 18 U.S.C. 2199.

Port Security Bribery. Bribery of a federal official is punishable by imprisonment for not more than 15 years, 18 U.S.C. 201; many federal crimes of terrorism carry maximum penalties of imprisonment for not more than 20 years or more.³⁰ Those who aid and abet or conspire for the commission of such crimes are subject to sanctions.³¹

Section 311 makes it a federal crime to bribe any individual (private or public) with respect to various activities within any secure or restricted area or seaport — with the intent to commit international or domestic terrorism (as defined in 18 U.S.C. 2331). Offenders face imprisonment for not more than 20 years, proposed 18 U.S.C. 226.

Smuggling Goods Into the United States. As a general rule, smuggling is punishable by imprisonment for not more than five years, 18 U.S.C. 545.

Section 312 increases the penalty for smuggling to imprisonment for not more than 20 years, proposed 18 U.S.C. 545.

Smuggling Goods From the United States. The penalty for smuggling goods into a foreign country by the owners, operators, or crew of a U.S. vessel is imprisonment for not more than five years, 18 U.S.C. 546. The same penalty applies to smuggling goods into the United States (although the symmetry would disappear when section 312 makes smuggling into the U.S. a 20 year felony). Other penalties apply for smuggling or unlawfully exporting specific goods or materials out of the U.S. or into other countries.³²

Section 313 creates a new federal crime which outlaws smuggling goods out of the United States; offenders face imprisonment for not more than 10 years, proposed 18 U.S.C. 554.

Federal law proscribes laundering the proceeds of various federal crimes (predicate offenses), 18 U.S.C. 1956, 1957. The proceeds involved in financial transactions in violation of the money laundering statutes are generally subject to confiscation, 18 U.S.C. 981(a)(1)(A). Section 313 adds the new overseas smuggling crime, 18 U.S.C. 554, to the money laundering predicate offense list, proposed 18 U.S.C. 1956(c)(7)(D).

³⁰ E.g., 18 U.S.C. 32 (destruction of aircraft, 20 years), 81 (arson, 25 years), 2332a (weapons of mass destruction, life imprisonment).

³¹ 18 U.S.C. 2; *United States v. Pinkerton*, 340 U.S. 640 (1946).

³² E.g., 31 U.S.C. 5332 (bulk cash), 21 U.S.C. 953 (controlled substances), 18 U.S.C. 553 (stolen motor vehicles).

Federal law calls for the confiscation of goods smuggled into the United States and of the conveyances used to smuggle them in, 19 U.S.C. 1595a. Section 313 calls for the confiscation of goods smuggled out of the U.S. and of any property used to facilitate the smuggling, proposed 19 U.S.C. 1595a(d).

It is a federal crime to remove property from the custody of the Customs Service. Offenders are punishable by imprisonment for not more than two years, 18 U.S.C. 549. Section 313 increases the penalty to imprisonment for not more than 10 years, proposed 18 U.S.C. 549.

Terrorism Financing

Emergency Economic Powers Act Penalties. Violations of the Emergency Economic Powers Act which outlaws violations of presidential orders issued under the act including but not limited to those that bar financial dealings with designated terrorists and terrorist groups are punishable by a civil penalty of not more than \$10,000 and by imprisonment for not more than 10 years, 50 U.S.C. 1705.

Section 402 increases the maximum term of imprisonment to 20 years and changes the maximum civil penalty to \$50,000, proposed 50 U.S.C. 1705.

Terrorist Money Laundering. The federal Racketeer Influenced and Corrupt Organizations (RICO) law imposes severe penalties (up to 20 years imprisonment) for acquiring or operating an enterprise through the commission of a pattern of other crimes (predicate offenses), 18 U.S.C. 1661-1965. In addition, the crimes designated RICO predicate offenses are as such money laundering predicate offenses, 18 U.S.C. 1956(c)(7)(A). Property associated with either a RICO or money laundering violation is subject to confiscation, but RICO forfeiture requires conviction of the property owner, 18 U.S.C. 1963, money laundering forfeiture does not, 18 U.S.C. 1956, 981.

Section 403 adds 18 U.S.C. 1960 (money transmitters) and 8 U.S.C. 1324a (employing aliens) to the RICO predicate offense list and consequently in the case of 8 U.S.C. 1324a to the money laundering predicate offense list (18 U.S.C. 1960 is already there). It also makes 18 U.S.C. 2339C (terrorist financing) and 42 U.S.C. 408 (misuse of a social security number) money laundering predicate offenses. In doing so it duplicates the presence of 18 U.S.C. 2339C on the money laundering list, since as a federal criminal of terrorism it is a RICO predicate offense and thus is already a money laundering predicate offense, 18 U.S.C. 2332b(g)(5)(B), 1961(1), 1956(c)(7)(A).

The proceeds from federal forfeitures are generally available proportionately to the arresting and prosecuting agencies, see e.g., 18 U.S.C. 981(e).

Section 403 amends the money laundering statutes to provide a clear statement of the relative investigating jurisdiction of various federal agencies, 18 U.S.C. 1956(e), 1957(e)

Forfeiture for Foreign Crimes. The property of individuals and entities that prepare for or commit acts of international terrorism against the United States or

against Americans is subject to federal confiscation, 18 U.S.C. 981(a)(1)(G). Criminal forfeiture is confiscation that occurs upon conviction for a crime for which forfeiture is a consequence, e.g., 18 U.S.C. 1963 (RICO). Civil forfeiture is confiscation accomplished through a civil proceeding conducted against the “offending” property based on its relation to a crime for which forfeiture is a consequence, e.g., 18 U.S.C. 981. A convicted defendant may be required to surrender substitute assets if the property subject to criminal forfeiture is located overseas or otherwise beyond the reach of the court, 18 U.S.C. 853(p). Civil forfeiture ordinarily requires court jurisdiction over the property, but when forfeitable property is held overseas in a financial institution that has a correspondent account in this country the federal government may institute and maintain civil forfeiture proceedings against the funds in the interbank account here, 18 U.S.C. 9871(k).

Article III, section 2 of the Constitution declares in part that, “no attainder of treason shall work corruption of blood, or forfeiture of estate except during the life of the person attainted,” U.S.Const. Art.III, §3, cl.2. Forfeiture of estate is the confiscation of property simply because it is the property of the defendant, without any other connection to the crime for which gives rise to the forfeiture. The constitutional provision applies only in cases of treason, but due process would seem likely to carry the ban to forfeiture of estate incurred as a result of other crimes, particularly lesser crimes.³³ The assumption must be hypothetical because with a single Civil War exception until very recently federal law only called for the forfeiture of property that had some nexus to the confiscation-triggering crime beyond mere ownership by the defendant.³⁴ Subparagraph 981(a)(1)(G) calls for the confiscation the property of individuals and entities that engage in acts of terrorism against the United States or Americans, 18 U.S.C. 981(a)(1)(G)(i), and under separate clauses any property derived from or used to facilitate such misconduct, 18 U.S.C. 981(a)(1)(G)(ii),(iii). As yet, there no reported cases involving 18 U.S.C. 981(a)(1)(G)(i).

Section 404 authorizes the federal government to confiscate under civil forfeiture procedures all property of any individual or entity planning or committing an act of international terrorism against a foreign nation or international organization without any further required connection of the property to the terrorist activity other than ownership. The section contemplates forfeiture of property located both here and abroad; for with respect to property located outside of the United States, it requires an act in furtherance of the terrorism to “have occurred within the

³³ *United States v. Grande*, 620 F.2d 1026,1038 (4th Cir. 1980)(“We would agree. . . that if §1963 revives forfeiture of estate as that concept was expressed in the Constitution it is almost certainly invalid because of the irrationality of a ruling that forfeiture of estate cannot be imposed for treason but can be imposed for a pattern of lesser crimes”).

³⁴ Under the Confiscation Act all the property of Confederate army and naval officers was forfeited, 12 Stat. 589 (1862), but owing to the constitutional reservations of President Lincoln, the forfeiture statute was followed by another declaring that confiscation would only apply during the life time of a member of the Confederate armed forces, 12 Stat. 627 (1862). The Supreme Court read the two together and as a matter statutory construction held that a life estate in the property of the former Confederate naval officer at issue was all that was subject to confiscation, *Bigelow v. Forest*, 76 U.S. 339, 350 (1869).

jurisdiction of the United States,” proposed 18 U.S.C. 981(a)(1)(G) (iv). It is unclear whether the jurisdiction referred to is the subject matter jurisdiction or territorial jurisdiction of the United States or either or both. The due process shadow of Article III, section 3, clause 2 may limit the reach of the proposal to property with some nexus other than ownership to the terrorist act.

Application of the Money Laundering Statute to Dependent Transactions. Money laundering constitutes engaging in financial transactions with the proceeds of predicate offenses either generally, 18 U.S.C. 1957, or for laundering or other statutorily condemned purposes, 18 U.S.C. 1956. The proceeds involved in such transactions are subject to confiscation, 18 U.S.C. 981(a)(1)(A).

Section 405 amends 18 U.S.C. 1956 so as to outlaw each of any “dependent transactions” related to a money laundering transaction forbidden by the section, proposed 18 U.S.C. 1956(j)(1). “Dependent transactions” are those that complement, complete, or would not have occurred but for the otherwise proscribed laundering financial transaction, proposed 18 U.S.C. 1956(j)(2).

Sundry Technical and Substantive Amendments.

Bulk Cash Smuggling. It is a federal crime to transport or transfer more than \$10,000 in cash out of the United States concealed in any conveyance, merchandise, container, luggage or on one’s person, 31 U.S.C. 5332. Subsection 406(a) amends section 5332 to outlaw transporting or transfer of more than \$10,000 in cash concealed in “any mail,” proposed 31 U.S.C. 5332.

Civil Forfeiture Pre-trial Freezes and Restraining Orders. Federal law permits pre-trial restraining orders to freeze property sought in criminal forfeiture cases, 21 U.S.C. 853(e), and pre-trial restraining orders or the appointment of receivers or conservators in civil forfeiture cases, 18 U.S.C. 981(j). In money laundering cases, it also permits restraining orders and the appointment of receivers under somewhat different procedures with respect to the property of foreign financial institutions with interbank accounts in this country, which is subject to a collection or forfeiture proceeding, 18 U.S.C. 1956(b). Section 406(a) removes the requirement that the property be that of a foreign financial institution, proposed 18 U.S.C. 1956(b)(3),(4).

Codification of Section 316 of the USA PATRIOT Act. Section 316 of the USA PATRIOT Act allows property owners to challenge the government’s assertion of terrorism related forfeitures, 115 Stat. 309 (2001). Section 406 of H.R. 3199 codifies section 316 as 18 U.S.C. 987.

Conspiracy Penalties. It is a federal crime to destroy or attempt to destroy commercial motor vehicles or their facilities, 18 U.S.C. 33. Offenders face imprisonment for not more than 20 years, *id.* It is also a federal crime to cause or to attempt to cause more than \$100,000 worth of damage to an energy facility, 18 U.S.C. 1366. Again, offenders face imprisonment for not more than 20 years, *id.* In both cases as in the case of any federal felony, conspiracy to commit such offenses is punishable under the general federal conspiracy statute by imprisonment for not more than five years, 18 U.S.C. 371.

Subsection 406(c) amends both 18 U.S.C. 33 and 18 U.S.C. 1366 so that conspiracy to violate their provisions carries the same penalty as the underlying offense, proposed 18 U.S.C. 33(a), 1366(a).

Technical Amendments. Section 407 corrects a purely technical, typographical omission in 2332b(g)(5)(B). Section 408 completes a technically incomplete cross reference in 31 U.S.C. 5318(n)(4)(A). Section 409 corrects purely technical, typographical errors in section 6604 of the Intelligence Reform and Terrorism Prevention Act of 2004.

Laundering the Proceeds Foreign Terrorist Training. Federal law prohibits laundering the proceeds of various predicate offenses, 18 U.S.C. 1956; in addition to other criminal penalties, property associated with such laundering is subject to confiscation, 18 U.S.C. 981(a)(1)(A). Receipt of military training from a foreign terrorist organization is also a federal crime, 18 U.S.C. 2339D. Section 112 of H.R. 3199 makes 18 U.S.C. 2339 a federal crime of terrorism under 18 U.S.C. 2332b(g)(5)(B). Federal crimes of terrorism are RICO predicate offenses by definition, 18 U.S.C. 1961(1)(G). RICO predicate offenses are by definition money laundering predicate offenses, 18 U.S.C. 1956(c)(7)(A). Section 410 confirms the status of 18 U.S.C. 2339D as a money laundering predicate offense, 18 U.S.C. 1956(c)(7)(D).

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