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USA PATRIOT Improvement and Reauthorization Act of 2005: A Sketch

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Summary

Several sections of the USA PATRIOT Act and one section of the Intelligence Reform and Terrorism Prevention Act of 2004 were originally scheduled to expire on December 31, 2005; however, Congress extended their expiration date until March 10, 2006. In July 2005, both Houses approved USA PATRIOT reauthorization acts, H.R. 3199 and S. 1389, and the conference committee filed a report accompanying H.R. 3199, H.Rept. 109-333. A separate bill, the USA PATRIOT Act Additional Reauthorizing Amendments Act of 2006 (S. 2271), provides civil liberties safeguards not included in the conference report. Both H.R. 3199 and S. 2271 were signed into law (P.L. 109-177 and P.L. 109-178) by the President on March 9, 2006.

The USA PATRIOT Improvement and Reauthorization Act of 2005 (the Act) makes permanent 14 of the 16 expiring USA PATRIOT Act sections. Among other things, the Act provides for greater congressional and judicial oversight of section 215 Foreign Intelligence Surveillance Act (FISA) business records orders and section 206 FISA roving wiretaps and calls for both sections to sunset at the end of 2009. It establishes judicial review and enforcement procedures for national security letters. The Act expands law enforcement wiretap authority to cover more than 20 federal crimes. It revises federal criminal provisions relating to seaport and maritime security. The Act reinforces federal money laundering and forfeiture authority, particularly in connection with terrorist offenses. It intensifies federal regulation of foreign and domestic commerce in methamphetamine precursors.

This is an abridged version of CRS Report RL33332, *USA PATRIOT Improvement and Reauthorization Act of 2005: A Legal Analysis*, by Brian T. Yeh and Charles Doyle, without footnotes or citations to authority.

Introduction

The USA PATRIOT Improvement and Reauthorization Act of 2005, P.L. 109-177 (the Act), consists of seven titles. By its terms, the USA PATRIOT Act Additional Reauthorizing Amendments Act of 2006, P.L. 109-178 (“Additional Amendments Act”), provides civil liberties safeguards to the specified sections of the Foreign Intelligence Surveillance Act (FISA) and the national security letter (NSL) statutes *after* they have been amended by the Act. This report provides a summary of the major provisions of the Act and, where appropriate, discusses the modifications to law made by the Additional Amendments Act.

Title I: USA PATRIOT Improvement and Reauthorization Act

Changes to FISA. Title I postpones expiration of sections 206 and 215 of the USA PATRIOT Act (roving FISA wiretaps and FISA access to business records) until December 31, 2009, and makes permanent the other temporary USA PATRIOT Act amendments. Also postponed until December 31, 2009, is the expiration of the Intelligence Reform and Terrorism Prevention Act authority to use FISA orders in “lone wolf” terrorist investigations.

Section 215 of the USA PATRIOT Act amended FISA to authorize the FBI Director or his designee to apply to the FISA court to issue orders granting the government access to any tangible item, no matter who holds it, in foreign intelligence, international terrorism, and clandestine intelligence cases. Title I adds several safeguards to the use of section 215 “business records” orders under FISA (“215 order”). First, it provides that the FBI Director, Deputy Director, or the Executive Assistant Director for National Security must approve orders for the production of certain library, book store, firearm sale, medical, tax return, and educational records. A 215 order application must describe the reasonable grounds for believing that the records sought are *relevant* to an ongoing international terrorism investigation, and that such materials pertain to foreign intelligence information *not* concerning a U.S. person. The Attorney General is directed to adopt specific “minimization procedures” governing the retention and dissemination by the FBI of the tangible things obtained under a 215 order.

Title I establishes a judicial review process for recipients of 215 orders to challenge them: the FISA court judge may modify or set aside the 215 order if it does not comply with the statute or is otherwise unlawful. However, if the judge does not modify or rescind the 215 order, then the judge must immediately affirm the order and direct the recipient to comply with it. The Additional Amendments Act grants the recipient of a 215 order the express right to petition a FISA judge to modify or quash the nondisclosure requirement that accompanies such an order. Such a right was not provided by the Act. However, for one year after the date of the issuance of a 215 production order, the nondisclosure requirement remains in full effect; the recipient may not challenge the gag order until after the one-year moratorium has ended.

Although 215 orders are accompanied by nondisclosure orders, Title I expressly clarifies that a recipient of a 215 order may disclose its existence to an attorney to obtain legal advice, as well as to other persons approved by the FBI. However, upon the request of the FBI Director (or his designee), the recipient must disclose to the FBI the identity

of the person to whom the disclosure will be or was made. The Additional Amendments Act exempts explicitly from the identification disclosure requirement the name of the attorney sought to obtain legal advice with respect to the 215 order.

Title I extends the maximum duration of FISA electronic surveillance and physical search orders against any agent of a foreign power who is not a U.S. person (e.g., a lone wolf terrorist). Initial orders authorizing such searches may be for a period of up to 120 days, with renewal orders permitted to extend the period for up to one year. In addition, Title I extends the tenure for both initial and extension orders authorizing installation and use of FISA pen registers, and trap and trace surveillance devices, from a period of 90 days to one year, in cases where the government has certified that the information likely to be obtained is foreign intelligence information not concerning a U.S. person.

Congressional oversight of the use of FISA authority is enhanced by Title I, by requiring the Attorney General to report to both Houses' Judiciary and Intelligence Committees concerning FISA order disclosures, electronic surveillance orders, and physical searches. In addition, the Inspector General is instructed to perform a comprehensive audit of the effectiveness and use of the FBI's FISA authority, for submission to the Judiciary and Intelligence Committees for calendar years 2002-2006.

National Security Letters. 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 types of customer business records, including subscriber and transactional information related to Internet and telephone usage, credit reports, and financial records. Title I authorizes judicial enforcement of an NSL request for these types of records, as well as provides a recipient of an NSL the right to challenge the legality of the request in U.S. district court. The court may quash or modify an NSL request if compliance would be unreasonable, oppressive, or otherwise unlawful. Title I also permits an NSL recipient to petition the court to modify or quash a nondisclosure requirement that may accompany the NSL; however, unlike a 215 order issued under FISA, the NSL recipient need *not* wait for one year prior to challenging the gag order. Another difference from a section 215 order is that the nondisclosure order does *not* automatically attach to the NSL. The nondisclosure requirement attaches only if the investigative agency has certified that disclosure may endanger any individual or the national security of the United States, interfere with diplomatic relations, or interfere with a criminal or intelligence investigation. Title I punishes a person who was notified of an NSL nondisclosure requirement but nevertheless knowingly and willfully violates that directive, with imprisonment of not more than one year, or not more than five years if committed with the intent to obstruct an investigation or judicial proceeding.

NSL recipients are permitted under the Act to disclose that the FBI has sought or obtained access to the information sought through the NSL, to any person whose assistance is needed to comply with it or to an attorney to obtain legal advice concerning the NSL. However, as in the case for 215 FISA orders, the Act provides that upon the request of the government agency authorized to issue the NSL, the recipient must disclose to the FBI or the government agency the identity of the person to whom the disclosure will be or was made. The Additional Amendments Act expressly exempts the identity of attorneys from the disclosure requirement established by the Act. The Additional Amendments Act also clarifies that libraries, the services of which include offering

patrons access to the Internet, are not subject to NSLs, unless they are functioning as electronic communication service providers.

Title I requires that any reports to a congressional committee regarding NSL shall also be provided to the Judiciary Committees. The Inspector General is also directed to conduct an audit of the effectiveness and use of NSL, for submission to the Judiciary and Intelligence Committees for calendar years 2003-2006.

Other Terrorism-Related Matters. Title I makes permanent the material support of terrorism amendments in the Intelligence Reform and Terrorism Prevention Act, 18 U.S.C. 2339B. Title I also authorizes confiscation of property within U.S. jurisdiction constituting proceeds from, or used to facilitate, offenses that involve trafficking in nuclear, chemical, biological, or radiological weapons technology or materials.

Federal law generally requires the government to obtain a court order authorizing the interception of wire, oral, or electronic communications in the investigation of certain crimes specifically enumerated by statute (“predicate offenses”). Title I expands the list of predicate offenses to include some 20 federal crimes that might be committed for terrorist purposes, such as those involving weapons of mass destruction, arson, and aggravated identity theft.

Title I also creates a new criminal offense called “narco-terrorism,” which outlaws drug trafficking for the benefit of a foreign terrorist organization or of a person who has or is engaged in terrorism under a wide range of jurisdictional circumstances; violations are punishable by imprisonment for 20 years to life. In addition, the definition of “federal crimes of terrorism” is expanded by adding narco-terrorism and foreign military training.

Law Enforcement Amendments. A delayed notice search warrant, or “sneak and peek” warrant, is one that authorizes law enforcement officers to secretly enter a home or business, either physically or virtually, conduct a search, and depart without taking any tangible evidence or leaving contemporaneous notice of their search; the target is to be notified of the execution of such a search warrant a “reasonable period of time” afterwards. Title I enhances procedural protections and oversight concerning these search warrants by permitting notification delays of no more than 30 days, with 90-day extensions as the facts justify; removing undue trial delay as a ground for delayed notification; and requiring annual reports to Congress concerning the use of the authority.

Title I merges two existing federal offenses concerning train wrecking and attacks on mass transportation systems into a new single offense intended to provide uniform offense elements and penalties for attacks on all transportation systems on land, on water, or through the air. Federal law concerning destruction of aircraft is also amended to include interfering with or disabling the operator of an aircraft or aircraft facility with reckless disregard for human safety or with the intent to endanger.

Title II: Terrorist Death Penalty Enhancement Act of 2005

Title II makes several adjustments in federal death penalty law. The first provides for the application of federal capital punishment procedures in air piracy cases arising before 1994. The second eliminates a redundant procedural mechanism in federal capital drug cases, such that the same death penalty procedures generally applicable in federal

capital cases now apply to federal capital drug cases. The third transfers provisions of law governing the appointment of counsel in capital indigent defendant cases, from title 21 of the U.S. Code to title 18. Finally, this title authorizes a term of post-incarceration supervision for any term of years or for life in the case of federal crimes of terrorism, regardless of whether the offense involved any risk of serious injury.

Title III: Reducing Crime and Terrorism at America's Seaports Act of 2005

Title III creates more severe criminal penalties concerning criminal and terrorist activities committed at U.S. seaports or aboard vessels. It (a) amends the prohibition against entering airport secured areas to include seaport secured areas, (b) outlaws obstructing law enforcement maritime inspections, (c) prohibits placing in U.S. waters a dangerous device or substance likely to destroy or damage ships or interfere with maritime commerce, (d) condemns violence against certain aids to maritime navigation, (e) prohibits maritime transportation of weapons of mass destruction for use in a federal crime of terrorism, and (f) proscribes maritime transportation of terrorists.

Title III also (a) outlaws damaging a vessel or maritime facilities if the offense is committed in waters subject to U.S. jurisdiction or against a U.S. vessel, the offender or victim is a U.S. national, or a U.S. national is aboard the victimized vessel (however, prosecution is barred in the case of certain labor disputes); (b) increases the maximum penalties for theft from interstate or foreign shipments (from one to three years for property worth less than \$1,000 and from 10 to 15 years otherwise); (c) adds vessels to the interstate transportation, receipt, and sale of stolen conveyances prohibitions; (d) increases the maximum penalty for stowing away; (e) prohibits bribery relating to port security; (f) increases the maximum term of imprisonment for smuggling goods into the United States from five years to 20 years, and for removing goods from customs custody from two years to 10 years; and (g) proscribes smuggling goods out of the U.S. (this offense is also added to the money laundering predicate list and the goods are subject to confiscation).

Title IV: Combating Terrorism Financing Act of 2005

Title IV strengthens penalties for money laundering, particularly related to financing terrorism, and makes changes to forfeiture authority. Among other things, it increases the maximum penalties for violation of the International Emergency Economic Powers Act (IEEPA) from 10 to 20 years imprisonment and from a civil penalty of \$10,000 to one of \$50,000. It adds illegal money transmissions to the racketeering (RICO) predicate offense list and adds two criminal acts, financing terrorism and receipt of foreign military training, to the money laundering predicate offense list. Title IV also (a) authorizes the confiscation of U.S. property related to certain acts of international terrorism against a foreign government or international organization; (b) expands federal money laundering prohibitions to encompass related "dependent transactions"; (c) clarifies the rights of property owners in international terrorism confiscation cases; (d) subjects conspiracies to damage commercial motor vehicles or energy facilities to the same penalties as apply to the completed offenses; and (e) makes the criminal drug forfeiture procedures generally applicable to the forfeitures ordered following conviction.

Title V: Miscellaneous Provisions

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

Title VI: Secret Service Authorization and Technical Modification Act of 2005

Title VI provides for a rolling no-trespass zone with regard to anyone under Service protection with violations punishable by imprisonment for up to six months (up to 10 years if the violation involves a serious injury or possession of a dangerous weapon). It expands prohibitions against fraud in connection with U.S. identification documents to include documents issued by the sponsoring entity of a presidentially designated "special event of national significance." It transfers and revises the organic Act for the United States Secret Service Uniformed Division and confirms the Secret Service as a distinct entity within the Department of Homeland Security.

Title VII: Combat Methamphetamine Epidemic Act of 2005

Title VII contains subtitles concerning regulation of domestic and international commerce in three methamphetamine (meth) precursor chemicals: ephedrine, pseudoephedrine, and phenylpropanolamine (EPP); increased penalties for methamphetamine offenses; expanded meth lab clean up measures; and grant programs to address problems associated with meth abuse. More specifically, it sets a daily 3.6 gram limit for over-the-counter sales of EPP products, requires that such products be available only "behind the counter," requires purchasers of products containing more than 60 mg of pseudoephedrine to present a photo ID and sign a log book, and limits mail orders of EPP products to 7.5 grams a month. Title VII also enhances penalties for the manufacture of controlled substances on federal property and making or trafficking in meth where children are present or live, and makes it easier to prosecute drug kingpins trafficking in meth. Title VII also provides that offenders convicted of unlawful possession with intent to distribute meth may be ordered to pay restitution and to reimburse governmental entities for cleanup costs associated with meth labs on the defendant's property.

Finally, Title VII authorizes the Attorney General to award grants (a) to address the use of meth by pregnant and parenting women offenders, (b) to provide state services to drug endangered children, (c) to combat meth trafficking and abuse, and (d) for drug courts whose programs include mandatory testing and sanctions. The Attorney General is also directed to study the feasibility of federal drug courts.