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USA PATRIOT Act Reauthorization Proposals and Related Matters in Brief

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Summary

Several sections of the USA PATRIOT Act, P.L. 107-56, that expand federal law enforcement or foreign intelligence information gathering powers, are scheduled to sunset on December 31, 2005. Legislation has been introduced in both the House and the Senate to make these expiring provisions or some of them permanent, e.g., H.R. 3199 (Representative Sensenbrenner), S. 1266 (Senator Roberts), S. 1389 (Senator Specter). Other proposals would enlarge the list of expiring USA PATRIOT Acts sections, rendering temporary various, now permanent sections, e.g., H.R. 1526 (Representative Otter), S. 737 (Senator Craig). Many of the proposals modify expiring sections before reauthorizing them, or reauthorize related temporary provisions enacted in other legislation, or amend or make temporary certain of the USA PATRIOT Act's permanent sections, or create or modify other related provisions dealing with law enforcement and foreign intelligence information gathering authority. This is a short background discussion of some of these proposals and brief summary of their content.

Related CRS Reports include CRS Report RL32186, *USA PATRIOT Act Sunset: Provisions That Expire on December 31, 2005*; CRS Report RS21441, *Libraries and the USA PATRIOT Act*; CRS Report RL32907, *Security and Freedom Ensured Act (SAFE Act) (H.R. 1526) and Security and Freedom Enhancement Act (SAFE Act)(S. 737): Section by Section Analysis*; CRS Report RL30465, *Foreign Intelligence Surveillance Act: An Overview of the Statutory Framework and Recent Judicial Decisions*; CRS Report RL32880, *Administrative Subpoenas and National Security Letters in Criminal and Foreign Intelligence Investigations: Background and Proposed Adjustments*.

A lion's share of the proposals relate to two statutes governing information collection, the Electronic Communications Privacy Act (ECPA)(18 U.S.C. 2510-2522, 2701-2712, 3121-3127) and the Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. 1801-1862. ECPA has three sets of general prohibitions accompanied by law enforcement exceptions that operate under judicial supervision. They involve: (1) the interception of wire, oral or electronic communications (wiretapping), 18 U.S.C. 2510-2522; (2) access to the content of stored electronic communications and to

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communications transaction records, 18 U.S.C. 2701-2712; and (3) the use of trap and trace devices and pen registers (essentially in and out secret caller id devices), 18 U.S.C. 3121-3127. FISA is concerned with gathering information about foreign powers and their agents including international terrorists; it has four parts devoted to: (1) electronic surveillance (wiretapping), 50 U.S.C. 1801-1811; (2) physical searches, 1821-1829; (3) pen registers and trap and trace devices (pen registers), 50 U.S.C. 1841-1846; and (4) production of tangible items (access to business records), 50 U.S.C. 1861-1862.

The USA PATRIOT Act sections scheduled to expire 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 sharing foreign intelligence information (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 Intelligence Reform and Terrorism Prevention Act of 2004, P.L. 108-458, has two sunset provisions. Section 6001 of the act which sunsets on December 31, 2005 defines agents of a foreign power, 50 U.S.C. 1801(b)(1)(C), so as to permit FISA orders targeting so-called "lone wolf" terrorists without requiring any showing that they are members of a terrorist group or agents of such a group or of any other foreign power. Section 6603 expands and clarifies the laws that proscribe material assistance to foreign terrorists or foreign terrorist organizations, 18 U.S.C. 2339A, 2339B; it expires on December 31, 2006.

Permanent USA PATRIOT Act sections for which some have proposed expiration on December 31, 2005 include sections 213 (delayed notification of surreptitious execution of a search (sneak and peek) warrant); 216 (ECPA pen register/trap & trace orders for electronic communications (e.g., Internet use)); 219 (nation-wide service of terrorism case search warrants); and 505 (expansion of national security letter authority).

Several statutes permit intelligence authorities to issue national security letters (NSLs) requesting information relating to national security investigations from the business records of third party communications providers, 18 U.S.C. 2709; financial institutions, 12 U.S.C. 3414; consumer credit bureaus, 15 U.S.C. 1681u, 1681v; and the like, 50 U.S.C. 436. A lower federal court decision now on appeal held that the practices associated with the exercise of NSL authority under 18 U.S.C. 2709 violated the Fourth and First Amendments because of a want of judicial supervision and the facially permanent, all consuming nature of the gag orders that come with an NSL, *Doe v. Ashcroft*, 334 F.Supp.2d 471 (S.D.N.Y. 2004).

Federal law enforcement officials enjoy authority to issue administrative subpoenas in certain controlled substance, child sexual abuse, and fraud investigations, although their authority there generally includes provisions for judicial supervision and in some instances more narrowly confined gag orders, see e.g., 21 U.S.C. 886, 18 U.S.C. 3486.

Federal law enforcement and national security officials may also request postal authorities to maintain mail covers under which they record the information contained on the outside of the letters or other mail sent or received by the particular targets of an investigation, 39 C.F.R. §233.3.

H.R. 3199, the USA PATRIOT and Terrorism Prevention Reauthorization Act of 2005, as introduced by Representative Sensenbrenner, with the amendments in the bill as reported by the House Judiciary Committee, according to the press, *Panel Approves Patriot Act Rauthorization Without Making All Provisions Permanent*, CQ.com, would:

- make permanent all the temporary USA PATRIOT Act sections (except sections 206 and 215), as well as the temporary lone wolf FISA section, due to expire on December 31, 2005, and the material assistance amendments which expire a year later;
- postpone for 10 years (rather than permanently) the expiration of sections 206 (roving FISA wiretaps) and 215 (FISA tangible items);
- require law enforcement officials to report their sharing of wiretap-unearthed national security information to the issuing court;
- permit the use of long tenured FISA wiretap and search orders targeting alien agents of a foreign power (not just members of international terrorist groups and officials or employees of foreign powers);
- recast the business record/tangible item provisions of section 215 to (1) make explicit its relevancy standard and court authority to grant or modify conforming applications, (2) permit recipient disclosure to his attorney, and (3) provide a mechanism for judicial challenges within the FISA court;
- permit recipient challenges of FISA section 215 (tangible item) orders;
- expand the criminal prohibitions relating to attacks on mass transit; and
- require Justice Department Inspector General review of material witness authority use.

S. 1266, as reported by the Senate Select Committee on Intelligence, S.Rept. 109-85, would:

- make permanent FISA USA PATRIOT Act sections expiring on December 31, 2005 (i.e., USA PATRIOT Act sections 203 (information sharing), 204 (technical), 206 (pen register), 207 (tenure), 214 (pen register), 215 (tangible items), 218 (the wall), 225 (helper immunity)), and postpone sunset for the FISA lone wolf section until December 31, 2009;
- change the definition of “contents” for FISA surveillance purposes so that contents would no longer include the existence of, or the identity of parties to, a communication;
- permit the use of FISA authority solely for the purpose of protecting national security by criminal prosecution;
- recast the FISA tangible item order provisions of section 215 to:
 - make the relevancy standard explicit,
 - permit recipient disclosure to his attorney and others permitted by the FBI,
 - instruct the Attorney General to issue minimal standards for retention and dissemination of the results,
 - establish a judicial review procedure for the order (unreasonable or oppressive orders may be set aside or modified) or for the order’s gag feature (remains in place if the FBI certifies disclosure endangers national security), and
 - increase the coverage of required reports to Congress to include statistical information on the number of times use involves library, book store, firearm sale, medical, or tax records;
- codify and modify mail cover provisions in national security cases so that (1) covers would be ordered at the discretion of the Attorney General rather than the Postal Service, (2) covers might be ordered to gather foreign intelligence information and investigations to protect against international terrorists and spies, (3) covers on foreign powers might run for a year (rather than 120 days) without extension, (4) minimization standards are issued by the Attorney General, and (5) every six months full reports would be made to the Congressional Intelligence Committees and statistical reports to the Congressional Judiciary Committees;
- create a procedure for administrative subpoenas for records in national security cases to be issued by senior officials in the Justice Department (U.S. Attorney and above) and FBI (field office heads and above) with (1) recalcitrance punishable as contempt, (2) gag order violations punishable by imprisonment for up to a year (up to five years in obstruction cases), (3) gag order exceptions for the recipient’s attorney and anyone else approved by the Justice Department, (4) gag orders to determinate length at Justice Department discretion, (5) judicial review of the subpoena (unreasonable or oppressive subpoenas may be set aside or modified) or of the subpoena’s gag feature (remains in place if the Justice Department or FBI certifies disclosure endangers national security), (6) civil liability immunity for recipients, and (7) reports to

Congressional committees including statistical information on use involving library, book store, firearm sales, medical, or tax records;

- insist that reports to Congress include information on the criminal cases in which FISA acquired information is authorized for use at trial;
- extend the tenure of FISA pen register orders and require recipients to provide authorities with related customer billing information;
- treat accomplices and coconspirators of foreign agents as though they were agents for FISA purposes in terrorism cases;
- require that the FISA court be given an explanation of the applicant's claim of relevance in the case of FISA pen register and access to tangible item orders; and
- direct the Attorney General to report to the Congressional Intelligence Committees every six months on the number of times business records have been voluntarily supplied to the FBI in instances where FISA tangible item orders might have been used.

The SAFE Acts, H.R. 1526, introduced by Representative Otter, and S. 737, introduced by Senator Craig, would:

- require in the case of FISA roving wiretaps that either identity of the target or the nature and location of the targeted facilities be specified, that if the nature and location are not known surveillance be limited to times when the target is present;
- limit the grounds for use of the delayed notification of the execution of sneak and peek warrants to exigent circumstances (dropping the catch-all trial delay and investigation jeopardy grounds); confine the period of delay to seven days (with the possibility of 21 day extensions); and require reports to Congress on use of the authority;
- demand that FISA tangible item orders only be issued upon a judicial finding of specific and articulable facts supporting a finding that items pertain to a foreign power or its agent;
- amend the definition of "domestic terrorism" (18 U.S.C. 2331) to match that of "federal crimes of terrorism" (18 U.S.C. 2332b(g)(5));
- (H.R. 1526 only) preclude addressing a communications NSL (18 U.S.C. 2709) to a library or book store;
- (H.R. 1526 only) add to the list of USA PATRIOT Act sections expiring on December 31, 2005, sections 213 (delayed notification of sneak and peek warrants), 216 (expansion of law enforcement pen register to Internet use), 219 (nation wide service of terrorism search warrants), and 505 (expanding the reach of NSLs);
- (S. 737 only) establish specific procedures for FISA tangible item orders that would: (1) hold such orders to the standards applicable to grand jury subpoenas in espionage or terrorism cases, (2) put a 180 time limit (with extension possible) on gag orders and permit disclosure to the recipient's attorney, (3) limit gag orders to exigent circumstance and national security risk situations, (4) expressly authorize judicial challenges of the order or any accompanying gag order, (5) make applicable official

use provisions comparable to those that apply in FISA wiretap and search cases, and (6) insist on full reporting to Judiciary Committee;

- (S. 737 only) amend the NSL statutes to require procedures comparable to those the bill imposes upon FISA tangible item orders (summarized above);

- (S. 737 only) require a state of specific and articulable facts to support the relevancy certification in a law enforcement pen register/trap and trace application; and

- (S. 737 only) provide for notification of parties whose communications have been subject to an executed law enforcement pen register/trap and trace order with 90 days after expiration of the order (unless extended for good cause).

Senator Specter introduced the USA PATRIOT Act Improvement and Reauthorization Act of 2005, S. 1389, which would:

- postpone until December 31, 2009, the lone wolf FISA definition and sections 215 (FISA tangible item orders) and 206 (FISA roving wiretaps) of the USA PATRIOT ACT;

- make permanent all of the other temporary USA PATRIOT Act sections and the temporary material assistance section of the 2004 intelligence reform legislation;

- provide notice to the issuing court when law enforcement, wiretap-generated national security information is shared;

- require in the case of FISA roving wiretaps that either identity of the target or the nature and location of the targeted facilities be specified, that if the nature and location are not known surveillance be limited to times when the target is present, that new notice and identifying information be supplied to the issuing court when the execution of a FISA surveillance becomes roving, and reports to Congress be expanded;

- extend the tenure of FISA wiretap, search and pen register/trap and trace orders when the foreign agent target is not a U.S. person;

- increase the reporting requirements relating to emergency communications service provider disclosures, the use of delayed notice warrants, FISA pen register orders, FISA tangible item orders;

- require FISA court finding of relevancy for pen register orders, but authorize orders that instruct assisting service providers to supply related customer transaction information;

- recast the section 215 tangible order provisions to (1) require a FISA court finding of relevancy; permit recipient disclosure to attorneys and court challenges; require a particularized description of the tangible items sought; authorize use to acquire library, book store, firearm or medical records only on FBI Director approval; and

- adjust the national security letter provisions of 18 U.S.C. 2709 to permit recipient disclosures to their attorneys and limited court challenges and to authorize judicial enforcement against recalcitrant recipients.