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USA PATRIOT Act Reauthorization in Brief

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Summary

Both Houses have approved proposals to reauthorize USA PATRIOT Act sections scheduled to expire at the end of the year. The House passed H.R. 3199 on July 21, 2005, 151 *Cong. Rec.* H6307; the Senate, S. 1389 on July 29, 2005 (although the Senate substituted its language for that of H.R. 3199 and then passed H.R. 3199; for convenience the Senate version of H.R. 3199 is referred to as S. 1389 here). This is a sketch of those bills and how they differ. Their common provisions deal mostly with expanded federal authority under the Foreign Intelligence Surveillance Act (FISA) and the Electronic Communications Privacy Act (ECPA). The bills make permanent all but two of the temporary USA PATRIOT Act sections. They postpone the expiration of the two, dealing with FISA roving wiretaps and the so-call library or business records authority. In these two, the national security letter statutes, and some of the other USA PATRIOT Act provisions make sometimes parallel and sometimes individualistic adjustments. H.R. 3199 contains a number of features not found in S. 1389 including a first responder grant program, new capital offenses and adjusted capital punishment procedures, sections that in large measure replicate the seaport crimes portions of S. 378 (as reported), a substantial expansion in federal forfeiture authority in terrorism and money laundering cases, and expansion of federal wiretapping authority to embrace investigations into twenty crimes for which the authority did not previously exist. A more detailed version of this report is available as CRS Report RL33027, *USA PATRIOT Act: Background and Comparison of House- and Senate-approved Reauthorization and Related Legislative Action*.

Both House and Senate bills make the following expiring sections of the USA PATRIOT Act permanent without amendment: *Sec. 201* (ECPA wiretapping in certain terrorism investigations), *Sec. 202* (ECPA wiretapping in computer fraud and abuse investigations), *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. 209* (seizure of stored voice mail by warrant rather than ECPA order), *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)(H.R. 3199, §102; S. 1389, §9(a)).

Both bills also make permanent section 6603 of the Intelligence Reform and Terrorism Prevention Act, which otherwise expires on December 31, 2006, and which temporarily clarifies and expands federal proscriptions on providing material support to terrorists, e.g., 18 U.S.C. 2339A, 2339B (H.R. 3199, §104; S. 1389, §9(c)). They both postpone – until December 31, 2009 in the Senate bill and until December 31, 2015 in the House bill – the expiration of section 6001 of the Intelligence Reform and Terrorism Prevention Act, which expires on December 31, 2005, and which makes FISA orders available in the investigation of foreign international terrorists without knowing whether they are agents or members of a particular group of international terrorists, (H.R. 3199, §103; S. 1389, §9(b)).

Both bills make section 207 permanent but amend it in essentially the same manner (H.R. 3199, §§102, 106; S. 1389, §§9(a), 3). Section 207 temporarily elongates the permissible life-time of FISA surveillance and physical search orders (and extensions) directed at the officers and employees of foreign powers, 50 U.S.C. 1805(e), 1824(d). The bills make the change permanently applicable to any agent of a foreign power who is not a “U.S. person,” and elongates the permissible lifetime of FISA pen register/trap and trace orders and extensions when the effort is likely to produce foreign intelligence information other than that which concerns a “U.S. person,” proposed 50 U.S.C. 1842(e).

As for individualized treatment, the bills both make permanent temporary section 203(b) of the USA PATRIOT Act which allows federal law enforcement officials to share with certain other federal officials foreign intelligence information obtained during a court authorized wiretap, 18 U.S.C. 2517(6) (H.R. 3199, §102; S. 1389, §9(a)), but the House bill alone insists that the authorizing court be informed of the disclosure, H.R. 3199, §105. The two bills each (1) make permanent section 212 which permits communications service providers to voluntarily provide authorities with the contents of stored communications or communication transaction information (without a warrant or customer consent) in emergency cases, 18 U.S.C. 2702(b)(8), (c)(4), (H.R. 3199, §102; S. 1389, §9(a)), and (2) 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, §108); S. 1389, §4(a)). But the Senate bill alone removes the requirement that the danger be immediate from the emergency communications record disclosure provisions of 18 U.S.C. 2702(c)(4) (S. 1389, §4(b)). They both make permanent section 214 which temporarily expressly expands FISA pen register/trap and trace authority to electronic communications and enlarges the range of permissible targets, (H.R. 3199, §102; S. 1389, §9(a)), but S. 1389 (§6) alone modifies its provisions by authorizing FISA pen register/trap and trace orders that direct service providers to supply 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).

The bills take different approaches in their amendments relating to four other USA PATRIOT Act sections: *Sec. 206* (assistance in conducting roving FISA wiretaps), *Sec. 213* (delayed notification of sneak and peek), *Sec. 215* (FISA tangible items access orders), and *Sec. 505* (national security letters (NSLs)).

Section 206 of the USA PATRIOT Act, a temporary section whose expiration date both bills postpone, allows FISA courts to include within a FISA surveillance order a general direction for third party assistance, rather than a direction addressed to a particular communications provider or the like, when the target’s actions may preclude specific identification, 50 U.S.C. 1805(c)(2)(B). The two bills differ thus:

S. 1389	H.R. 3199
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. 2(b)).
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 213 of the USA PATRIOT Act is not a temporary section. It allows federal courts to permit delayed notice of the execution of a search warrant for a reasonable period time when contemporaneous notice might have adverse consequences such as the flight of a suspect, the loss of evidence, physical injury, jeopardy to an investigation or delay of a trial, 18 U.S.C. 3103a(b). The bills amends the law in similar if distinct ways:

S. 1389	H.R. 3199
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).

S. 1389	H.R. 3199
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.

The bills postpone with considerable modification the section 215 FISA tangible item orders providing government access to business records in certain national security cases (the so-called library section):

S. 1389	H.R. 3199
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)).
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 by 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 by 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 and confidentiality orders in the FISA court; <i>the Presiding Judge may dismiss frivolous petitions and assign 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)).

S. 1389	H.R. 3199
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.

National security letter statutes authorize federal officials, generally the Federal Bureau of Investigation (FBI) to request communications providers, financial institutions and credit bureaus to provide certain customer transaction information under strict confidentiality requirements in national security cases, 12 U.S.C. 3414, 15 U.S.C. 1681u, 1681v, 18 U.S.C. 2709, 50 U.S.C. 436. The lack of judicial involvement and the practices surrounding use of the communications NSL have been found to violate the Fourth and First Amendments to the Constitution, *Doe v. Ashcroft*, 334 F.Supp.2d 471 (S.D.N.Y. 2004). The bills address those concerns as follows:

S. 1389	H.R. 3199
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).
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).

S. 1389	H.R. 3199
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).

While S. 3189 calls for a number of additional rules and reports in order to enhance accountability in the use of FISA authority which have no counterpart in the House bill, there are far more unique provisions in H.R. 3199. They include provisions dealing with capital offenses and adjusted capital punishment procedures, sections that in large measure replicate the seaport crimes portions of S. 378 (as reported), a substantial expansion in federal forfeiture authority in terrorism and money laundering cases, and expansion of federal wiretapping authority to embrace investigations into twenty crimes for which the authority did not previously exist.