109TH CONGRESS
1st Session
HOUSE OF REPRESENTATIVES
REPT. 109–174
Part 2

USA PATRIOT AND TERRORISM PREVENTION REAUTHORIZATION ACT OF 2005

JULY 18, 2005.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

---

Mr. HOEKSTRA, from the Permanent Select Committee on Intelligence, submitted the following

R E P O R T

together with

ADDITIONAL VIEWS

[To accompany H.R. 3199]

[Including cost estimate of the Congressional Budget Office]

The Committee on Permanent Select Committee on Intelligence, to whom was referred the bill (H.R. 3199) to extend and modify authorities needed to combat terrorism, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "USA PATRIOT and Terrorism Prevention Reauthorization Act of 2005".

SEC. 2. REFERENCES TO USA PATRIOT ACT.

A reference in this Act to the USA PATRIOT ACT shall be deemed a reference to the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001.

SEC. 3. REPEAL OF USA PATRIOT ACT SUNSET PROVISION.

Section 224 of the USA PATRIOT ACT is repealed.

SEC. 4. EXTENSION OF SUNSET PROVISION RELATING TO INDIVIDUAL TERRORISTS AS AGENTS OF FOREIGN POWERS.

Subsection (b) of section 6001 of the Intelligence Reform and Terrorism Prevention Act of 2004 (Public Law 108–458; 118 Stat. 3742) is amended to read as follows:

"(b) SUNSET.—(1) Except as provided in paragraph (2), the amendment made by subsection (a) shall cease to have effect on December 31, 2010.

"(2) With respect to any particular foreign intelligence investigation that began before the date on which the amendment made by subsection (a) ceases to have effect, such amendment shall continue in effect."

SEC. 5. REPEAL OF SUNSET PROVISION RELATING TO SECTION 2332B AND THE MATERIAL SUPPORT SECTIONS OF TITLE 18, UNITED STATES CODE.

Section 6603 of the Intelligence Reform and Terrorism Prevention Act of 2004 (Public Law 108–458; 118 Stat. 3762) is amended by striking subsection (g).

SEC. 6. SHARING OF ELECTRONIC, WIRE, AND ORAL INTERCEPTION INFORMATION UNDER SECTION 203(B) OF THE USA PATRIOT ACT.

Section 2517(6) of title 18, United States Code, is amended by adding at the end the following: "Within a reasonable time after a disclosure of the contents of a communication under this subsection, an attorney for the Government shall file, under seal, a notice with a judge whose order authorized or approved the interception of that communication, stating the fact that such contents were disclosed and the departments, agencies, or entities to which the disclosure was made.".

SEC. 7. DURATION OF FISA SURVEILLANCE OF NON-UNITED STATES PERSONS UNDER SECTION 207 OF THE USA PATRIOT ACT.

(a) ELECTRONIC SURVEILLANCE.—Section 105(e) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1805(e)) is amended—

(1) in paragraph (1)(B), by striking ", as defined in section 101(b)(1)(A)" and inserting "who is not a United States person"; and

(2) in subsection (2)(B), by striking "as defined in section 101(b)(1)(A)" and inserting "who is not a United States person".

(b) PHYSICAL SEARCH.—Section 304(d) of such Act (50 U.S.C. 1824(d)) is amended—

(1) in paragraph (1)(B), by striking "as defined in section 101(b)(1)(A)" and inserting "who is not a United States person"; and

(2) in paragraph (2), by striking "as defined in section 101(b)(1)(A)" and inserting "who is not a United States person".

(c) PEN REGISTERS, TRAP AND TRACE DEVICES.—Section 402(e) of such Act (50 U.S.C. 1842(e)) is amended—

(1) by striking "(e) An" and inserting "(e)(1) Except as provided in paragraph (2), an"; and

(2) by adding at the end the following new paragraph:

"(2) In the case of an application under subsection (c) where the applicant has certified that the information likely to be obtained is foreign intelligence information not concerning a United States person, an order, or an extension of an order, under this section may be for a period not to exceed one year.".

SEC. 8. ACCESS TO CERTAIN BUSINESS RECORDS UNDER SECTION 501 OF FISA UNDER SECTION 215 OF THE USA PATRIOT ACT.

(a) ESTABLISHMENT OF RELEVANCE STANDARD.—Subsection (b)(2) of section 501 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1861), is amended by striking "to obtain" and all that follows and inserting "and that the information likely to be obtained from the tangible things is reasonably expected to be (A) foreign intelligence information not concerning a United States person, or (B) relevant to an ongoing investigation to protect against international terrorism or clandestine intelligence activities.".

(b) CLARIFICATION OF JUDICIAL DISCRETION.—Subsection (c)(1) of such section is amended to read as follows:

"(c)(1) Upon an application made pursuant to this section, if the judge finds that the application meets the requirements of subsections (a) and (b), the judge shall enter an ex parte order as requested, or as modified, approving the release of records.".

(c) AUTHORITY TO DISCLOSE TO ATTORNEY.—Subsection (d) of such section is amended to read as follows:

"(d)(1) No person shall disclose to any person (other than a qualified person) that the United States has sought or obtained tangible things under this section.

"(2) An order under this section shall notify the person to whom the order is directed of the nondisclosure requirement under paragraph (1).

"(3) Any person to whom an order is directed under this section who discloses that the United States has sought to obtain tangible things under this section to a qualified person in response to the order shall inform such qualified person of the nondisclosure requirement under paragraph (1) and that such qualified person is also subject to such nondisclosure requirement.

"(4) A qualified person shall be subject to any nondisclosure requirement applicable to a person to whom an order is directed under this section in the same manner as such person.

"(5) In this subsection, the term 'qualified person' means—

"(A) any person necessary to produce the tangible things pursuant to an order under this section; or

"(B) an attorney to obtain legal advice in response to an order under this section.".

(d) JUDICIAL REVIEW.—

(1) PETITION REVIEW PANEL.—Section 103 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1803) is amended by adding at the end the following new subsection:

"(e)(1) Three judges designated under subsection (a) who reside within 20 miles of the District of Columbia, or if all of such judges are unavailable, other judges of the court established under subsection (a) as may be designated by the Presiding Judge of such court (who is designated by the Chief Justice of the United States from among the judges of the court), shall comprise a petition review panel which shall have jurisdiction to review petitions filed pursuant to section 501(f)(1).

"(2) Not later than 60 days after the date of the enactment of the USA PATRIOT and Terrorism Prevention Reauthorization Act of 2005, the court established under subsection (a) shall develop and issue procedures for the review of petitions filed pursuant to section 501(f)(1) by the panel established under paragraph (1). Such procedures shall provide that review of a petition shall be conducted ex parte and in camera and shall also provide for the designation of an Acting Presiding Judge.".

(2) PROCEEDINGS.—Section 501 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1861) is further amended by adding at the end the following new subsection:

"(f)(1) A person receiving an order to produce any tangible thing under this section may challenge the legality of that order by filing a petition in the panel established by section 103(e)(1). The Presiding Judge shall conduct an initial review of the petition. If the Presiding Judge determines that the petition is frivolous, the Presiding Judge shall immediately deny the petition and promptly provide a written statement of the reasons for the determination for the record. If the Presiding Judge determines that the petition is not frivolous, the Presiding Judge shall immediately assign the petition to one of the judges serving on such panel. The assigned judge shall promptly consider the petition in accordance with procedures developed and issued pursuant to section 103(e)(2). The judge considering the petition may modify or set aside the order only if the judge finds that the order does not meet the requirements of this section or is otherwise unlawful. If the judge does not modify or set aside the order, the judge shall immediately affirm the order and order the recipient to comply therewith. A petition for review of a decision to affirm, modify, or set aside an order by the United States or any person receiving such order shall be to the court of review established under section 103(b), which shall have jurisdiction to consider such petitions. The court of review shall immediately provide for the record a written statement of the reasons for its decision and, on petition of the United States or any person receiving such order for writ of certiorari, the record shall be transmitted under seal to the Supreme Court, which shall have jurisdiction to review such decision.

"(2) Judicial proceedings under this subsection shall be concluded as expeditiously as possible. The judge considering a petition filed under this subsection shall provide for the record a written statement of the reasons for the decision. The record of proceedings, including petitions filed, orders granted, and statements of reasons for decision, shall be maintained under security measures established by the Chief Justice of the United States in consultation with the Attorney General and the Director of National Intelligence.

"(3) All petitions under this subsection shall be filed under seal, and the court, upon the government's request, shall review any government submission, which may include classified information, as well as the government's application and related materials, ex parte and in camera.".

SEC. 9. MODIFICATION OF SURVEILLANCE AUTHORITY UNDER THE FOREIGN INTELLIGENCE SURVEILLANCE ACT OF 1978.

Subsection (c)(2) of section 105 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1805) is amended—

(1) by striking "and" at the end of subparagraph (C);

(2) by striking the period at the end of subparagraph (D) and inserting ";and"; and

(3) by adding at the end the following new subparagraph:

"(E) that, in cases where the facility or place at which surveillance will be directed is not known at the time the order is issued, the applicant shall notifiy a judge having jurisdiction under section 103 within a reasonable period of time, as determined by the court, after surveillance begins to be directed at a new facility or place, and that such notice shall contain a statement of the facts and circumstances relied

upon by the applicant to justify the belief that the facility or place at which the electronic surveillance was directed is being used, or is about to be used, by the target of the electronic surveillance.".

PURPOSE

The purpose of H.R. 3199 is to extend and modify authorities needed to combat terrorism and espionage provided in the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism ("USA PATRIOT") Act of 2001 and the Intelligence Reform and Terrorism Prevention Act of 2004.

COMMITTEE STATEMENT AND VIEWS

A. Background and need for legislation

Immediately after the terrorist attacks of September 11, 2001, Congress and the Administration quickly determined that the legal tools available to investigators to fight terrorists and spies were inadequate. The USA PATRIOT Act of 2001 provided critical additional tools to intelligence and law enforcement officials in counterterrorism and counterespionage investigations, and implemented reforms to facilitate better information sharing between the intelligence and law enforcement communities.

The authorities of the USA PATRIOT Act have been used continuously since its enactment to enhance the federal government's capacity to gather and share intelligence. Many of the results have been clear and demonstrable. For example, the National Counterterorism Center receives and shares information on a daily basis with law enforcement agencies, and has estimated that the number of known or appropriately suspected terrorists intercepted at borders of the United States, based on FBI reporting alone, has increased due to the information sharing provisions of the USA PATRIOT Act. In another example, the Department of Justice has applied Section 214 of the Act to international terrorism and counterintelligence investigations, including a case where the subject was believed to be attempting to procure nuclear arms.

Other successes of the USA PATRIOT Act have not been as publicly apparent but are equally, if not more, significant. The Permanent Select Committee on Intelligence receives regular and detailed classified reporting with respect to the exercise of authorities under the Foreign Intelligence Surveillance Act ("FISA"), including the enhancements provided under the USA PATRIOT Act. Although it cannot be discussed in an unclassified format, this reporting clearly has established the vital role that these enhanced authorities play on a daily basis in a wide variety of critical counterintelligence and counterterrorism investigations.

In considering reauthorization of the Act, the Committee has endeavored to emphasize that many of the core enhanced authorities of the USA PATRIOT Act are fundamentally intelligence authorities intended to gather information to counter threats to national security from terrorists and spies. The Act provides enhanced but carefully tailored authorities, usually targeted against "foreign powers" and "agents of foreign powers." The PATRIOT Act also has definitively broken down the "wall" between intelligence and law

enforcement agencies to allow them to share information, free of artificial stovepipes.

What the PATRIOT Act is *not*, either in intent or practice, is a license for the government to invade the privacy of ordinary citizens or to violate civil liberties. The Department of Justice Inspector General reported earlier this year that it had received 1,943 allegations of abuse of the PATRIOT Act. *None* of those complaints were found to have even alleged misconduct by Justice Department employees relating to use of a provision in the PATRIOT Act, and only 12 warranted further investigation for civil liberties issues unrelated to the PATRIOT Act.

Under Section 224 of the USA PATRIOT Act, the authorities contained in sixteen of its provisions are scheduled to expire on December 31, 2005. Ten of those provisions concern intelligence and intelligence-related matters within the jurisdiction of the Permanent Select Committee on Intelligence:

Section 203(b). Authority to Share Electronic, Oral, and Wire Interception Information

Section 203(d). Foreign Intelligence Information

Section 204. Clarification of Intelligence Exceptions From Limitations on Interception and Disclosure of Wire, Oral, and Electronic Communications

Section 206. Roving Surveillance Authority Under FISA

Section 207. Duration of FISA Surveillance of Non-United States Persons Who Are Agents of a Foreign Power

Section 214. Pen Register and Trap and Trace Authority Under FISA

Section 215. Access to Records and Other Items Under FISA

Section 218. Foreign Intelligence Information

Section 223. Civil Liability for Certain Unauthorized Disclosures (with respect to duties imposed on intelligence agencies)

Section 225. Immunity for Compliance with FISA Wiretap

In addition, the Committee has considered renewal of Section 6001 of the Intelligence Reform and Terrorism Prevention Act of 2004, relating to individual terrorists as agents of foreign powers, which is also scheduled to expire on December 31, 2005.

The record in support of reauthorizing these provisions is clear and convincing. The expiring provisions have been the subject of intense public scrutiny and oversight, through regular reporting by the Executive Branch, review by the Department of Justice Inspector General, and regular oversight hearings and activities of the Committee. The Committee has determined that the expiring authorities have generally been demonstrated to be critical and effective authorities in counterterrorism and counterespionage investigations, or authorities necessary to ensure that investigators are fully equipped to swiftly and efficiently prevent or respond to acts of terrorism or espionage. Conversely, the oversight process has not discovered any substantial claim that the provisions of the USA PATRIOT Act had been abused.

B. Legislation

Accordingly, H.R. 3199 as reported from the Permanent Select Committee on Intelligence permanently reauthorizes the expiring provisions of the USA PATRIOT Act. As amended, the bill also reauthorizes Section 6001 of the Intelligence Reform and Terrorism

Prevention Act of 2004 through December 31, 2010. The bill also includes provisions requested by the Administration to extend to up to a year the maximum duration of certain FISA orders targeted against "agents of foreign powers" who are not U.S. persons and reforms to clarify concerns that have been raised with respect to the original authorities.

The Committee's hearings suggested that some fair concerns had been raised with respect to unintended ambiguities in the original law. Accordingly, the bill also contains sensible changes to clear up those ambiguities once and for all without compromising investigators. These provisions include four key reforms to Section 215 of the PATRIOT Act, which allows investigators to obtain permission to access to certain business records from judges:

- Establishes a relevance standard to textually clarify that Section 215 orders must be relevant to an ongoing investigation to protect against international terrorism or clandestine intelligence activities. This provision is intended to clarify the original intention of the specification requirement and is not intended to "raise" the standard for the specification required under Section 215;
- Clarifies that judges have the discretion to modify requested orders;
- Clarifies that the recipient of a Section 215 order may discuss the order with an attorney to obtain legal advice and may challenge the order;
- Provides for a panel of judges from the FISA court to review challenges to the legality of a Section 215 order.

The bill also includes a provision to require that federal judges responsible for wiretaps in criminal cases be notified (under seal) when information from those wiretaps is shared with the intelligence community.

COMMITTEE CONSIDERATION AND VOTES

On July 13, 2005, the Committee met in open session and ordered the bill H.R. 3199 favorably reported, as amended.

Ms. Harman offered and, after debate, subsequently received unanimous consent to withdraw an *en bloc* amendment to modify certain standards relating to the exercise of authorities provided by Sections 206, 214 and 215 of the USA PATRIOT Act, to modify authorities on review of motions to discover materials under the Foreign Intelligence Surveillance Act, and to provide subsequent notice in specified circumstances to the subjects of certain FISA search and surveillance who are United States persons.

Ms. Harman offered a modified version of an *en bloc* amendment to modify certain standards relating to the exercise of authorities provided by Sections 206, 214 and 215 of the USA PATRIOT Act, to modify authorities on review of motions to discover materials under the Foreign Intelligence Surveillance Act, and to provide subsequent notice in specified circumstances to the subjects of certain FISA search and surveillance who are United States persons. After debate, the amendment was not agreed to by voice vote.

Mr. Ruppersberger offered an amendment to extend certain USA PATRIOT Act sunset requirements. After debate, the amendment was not agreed to by voice vote.

Ms. Eshoo offered an amendment relating to library and bookseller records. After debate, the amendment was not agreed to by voice vote.

Mr. Boswell offered an amendment relating to notification to judges in specified circumstances under authorities provided by Section 206 of the USA PATRIOT Act (codified at Section 105 of the Foreign Intelligence Surveillance Act). After debate, the amendment was adopted by voice vote.

Mr. Hastings offered an amendment to extend the sunset provision relating to authorities regarding individual terrorists as agents of foreign powers (Section 6001 of the Intelligence Reform and Terrorism Prevention Act of 2004). After debate, the amendment was adopted by voice vote.

By voice vote, the Committee adopted a motion by the Chairman to favorably report the bill H.R. 3199 to the House, as amended, and to recommend that the bill as amended do pass.

SECTION-BY-SECTION ANALYSIS AND EXPLANATION OF AMENDMENTS

The provisions of the bill are as follows:

Section 1. Short Title.—provides that the short title of the bill is the "USA PATRIOT and Terrorism Prevention Reauthorization Act of 2005."

Section 2. References to PATRIOT Act.—Provides that, within the bill, the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism shall be referred to as the "USA PATRIOT Act".

Section 3. Repeal of USA PATRIOT Act Sunset Provision.—This section repeals section 224 of the USA PATRIOT Act that states authorities under sections 201, 202, 203(b) and (d), 204, 206, 207, 209, 212, 214, 215, 217, 218, 220, 223, and 225 of the USA PATRIOT Act (P.L. 107–296) expire on December 31, 2005.

Section 4. Repeal of Sunset of Individual Terrorists as Agents of Foreign Powers.—This section repeals section 6001(b) of the Intelligence Reform and Terrorism Prevention Act, (IRTPA) which applied the USA PATRIOT Act sunset to the new definition for "Agent of a Foreign Power" under section 6001. Section 6001 provides that "Agent of a Foreign Power," for any person other than a United States person, includes a person who "engages in international terrorism or activities in preparation thereof". The new definition reaches "lone wolf" terrorists engaged in international terrorism.

Section 5. Repeal of Sunset Provision Relating to Section 2332B and the Material Support Sections of Title 18, United States Code.—This section repeals section 6603(g) of the IRTPA, which would have sunset section 6603. The sunset would allow a criminal offense, and not a law enforcement tool, to expire. Furthermore, this sunset effectively makes the underlying provision unconstitutional. Section 6603 of the IRTPA addressed the prohibition against providing material support to terrorists and amended the law to address court concerns on the constitutionality of the material support prohibition.

Section 6. Sharing of Electronic, Wire, and Oral Interception Information.—This section responds to concerns that additional judicial oversight was needed for the sharing of criminal wiretap information to the intelligence community. Section 6 of the Act amends

section 2517(6) of title 18, which was added by section 203(b) of the USA PATRIOT Act, by requiring that an attorney for the government shall file, under seal, a notice with a judge whose order authorized or approved the interception of that communication, stating the fact that such contents were disclosed and the departments, agencies, or entities to which the disclosure was made.

The Committee emphasizes that such notices shall be made under seal, as well as its intention that the provision should be implemented to insure the protection of the notices as well as intelligence sources and methods.

Section 7. Duration of FISA of Non-United States Persons.—This section would (1) Further extend the maximum duration of orders for electronic surveillance and physical search targeted against all agents of foreign powers who are not U.S. persons. Initial orders authorizing searches and electronic surveillance would be for periods of *up to* 120 days and renewal orders would extend for periods of up to one year; and (2) extend the maximum duration of both initial and renewal orders for pen register/trap and trace surveillance, in cases where the Government certified that the information likely to be obtained is foreign intelligence information not concerning a U.S. person, for a period of one year.

Section 8. Access to Certain Business Records Under Section 501 of FISA.—This section would amend section 215 of the USA PATRIOT Act to (1) to clarify that the information likely to be obtained is reasonably expected to: be (A) foreign intelligence information not concerning a U.S. person or (B) relevant to an ongoing investigation to protect against international terrorism or clandestine intelligence activities; (2) clarify that a FISA 215 order may be challenged; (3) clarify that a recipient of a 215 order may consult with a lawyer and the appropriate people necessary to comply with the order; (4) clarify that the order will only be issued "if the judge finds that the requirements have been met;" and (5) to set up a judicial review process that authorizes the judge to set aside or affirm a 215 order that has been challenged.

The committee adopted two amendments. An amendment by Mr. Boswell provides that, within a reasonable period of time after surveillance begins, the applicant shall notify a judge whenever surveillance begins to be directed at a new facility or place under authorities provided by Section 206 of the USA PATRIOT Act (as codified in Section 105 of the Foreign Intelligence Surveillance Act). An amendment by Mr. Hastings provides that Section 6001 of the Intelligence Reform and Terrorism Prevention Act of 2004 shall expire on December 31, 2010.

OVERSIGHT FINDINGS AND RECOMMENDATIONS

With respect to clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee held 2 hearings on reauthorization of the USA PATRIOT Act, receiving testimony from Deputy Attorney General James Comey as well as outside experts and citizens' groups.

GENERAL PERFORMANCE GOALS AND OBJECTIVES

In accordance with Clause (3)(c) of House rule XIII, the Committee's performance goals and objectives are reflected in the descriptive portions of this report.

CONSTITUTIONAL AUTHORITY STATEMENT

The intelligence and intelligence-related activities of the United States government are carried out to support the national security interests of the United States.

Article 1, section 8 of the Constitution of the United States provides, in pertinent part, that "Congress shall have power * * * to pay the debts and provide for the common defense and general welfare of the United States; * * *"; and "to make all laws which shall be necessary and proper for carrying into execution * * * all other powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

UNFUNDED MANDATE STATEMENT

Section 423 of the Congressional Budget and Impoundment Control Act (as amended by Section 101(a)(2) of the Unfunded Mandates Reform Act, P.L. 104–4) requires a statement of whether the provisions of the reported bill include unfunded mandates. In compliance with this requirement, the Committee has received a letter from the Congressional Budget Office included herein.

BUDGET AUTHORITY AND CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

With respect to the requirements of clause 3(c)(2) of rule XIII of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974 and with respect to requirements of 3(c)(3) of rule XIII of the House of Representatives and section 402 of the Congressional Budget Act of 1974, the Committee has received the following cost estimate for H.R. 3199 from the Director of the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, July 18, 2005.

Hon. PETER HOEKSTRA,
Chairman, Permanent Select Committee on Intelligence,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 3199, the USA PATRIOT and Terrorism Prevention Reauthorization Act of 2005.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Jason Wheelock.

Sincerely,

DOUGLAS HOLTZ-EAKIN, *Director.*

Enclosure.

H.R. 3199—USA PATRIOT and Terrorism Prevention Reauthorization Act of 2005

CBO estimates that implementing H.R. 3199 would have no significant cost to the federal government. Enacting the bill could affect direct spending and revenues, but CBO estimates that any such effects would not be significant.

The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001 (Public Law 107–56), as well as the Intelligence Reform and Terrorism Prevention Act of 2004 (Public Law 108–458), expanded the powers of federal law enforcement and intelligence agencies to investigate and prosecute terrorist acts. H.R. 3199 would permanently authorize certain provisions of these acts, many of which will otherwise expire on December 31, 2005. In addition, the bill would make several other changes to the laws relating to investigations of potential terrorist activity.

Because those prosecuted and convicted under H.R. 3199 could be subject to civil and criminal fines, the federal government might collect additional fines if the legislation is enacted. Collections of civil fines are recorded in the budget as revenues. Criminal fines are recorded as revenues, then deposited in the Crime Victims Fund and later spent. CBO expects that any additional revenues and direct spending would not be significant because of the relatively small number of cases affected.

Section 4 of the Unfunded Mandates Reform Act (UMRA) excludes from the application of that act any legislative provisions that are necessary for national security. CBO has determined that the provisions of this bill are either excluded from UMRA because they are necessary for the national security or they contain no intergovernmental or private-sector mandates.

On July 18, 2005, CBO transmitted a cost estimate for H.R. 3199 as ordered reported by the House Committee on the Judiciary on July 13, 2005. The two versions of H.R. 3199 are similar and the cost estimates are identical.

The CBO staff contact for this estimate is Jason Wheelock.

This estimate was approved by Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

SECTION 224 OF THE USA PATRIOT ACT

[SEC. 224. SUNSET.

[(a) IN GENERAL.—Except as provided in subsection (b), this title and the amendments made by this title (other than sections 203(a), 203(c), 205, 208, 210, 211, 213, 216, 219, 221, and 222, and the amendments made by those sections) shall cease to have effect on December 31, 2005.

[(b) EXCEPTION.—With respect to any particular foreign intelligence investigation that began before the date on which the provi-

sions referred to in subsection (a) cease to have effect, or with respect to any particular offense or potential offense that began or occurred before the date on which such provisions cease to have effect, such provisions shall continue in effect.]

INTELLIGENCE REFORM AND TERRORISM PREVENTION ACT OF 2004

* * * * * * *

TITLE VI—TERRORISM PREVENTION

Subtitle A—Individual Terrorists as Agents of Foreign Powers

SEC. 6001. INDIVIDUAL TERRORISTS AS AGENTS OF FOREIGN POWERS.

(a) * * *

[(b) SUNSET.—The amendment made by subsection (a) shall be subject to the sunset provision in section 224 of Public Law 107–56 (115 Stat. 295), including the exception provided in subsection (b) of such section 224.]

(b) SUNSET.—(1) Except as provided in paragraph (2), the amendment made by subsection (a) shall cease to have effect on December 31, 2010.

(2) With respect to any particular foreign intelligence investigation that began before the date on which the amendment made by subsection (a) ceases to have effect, such amendment shall continue in effect.

* * * * * * *

Subtitle E—Criminal History Background Checks

* * * * * * *

SEC. 6603. ADDITIONS TO OFFENSE OF PROVIDING MATERIAL SUPPORT TO TERRORISM.

(a) * * *

* * * * * * *

[(g) SUNSET PROVISION.—

[(1) IN GENERAL.—Except as provided in paragraph (2), this section and the amendments made by this section shall cease to be effective on December 31, 2006.

[(2) EXCEPTION.—This section and the amendments made by this section shall continue in effect with respect to any particular offense that—

[(A) is prohibited by this section or amendments made by this section; and

[(B) began or occurred before December 31, 2006.]

* * * * * * *

SECTION 2517 OF TITLE 18, UNITED STATES CODE

§ 2517. Authorization for disclosure and use of intercepted wire, oral, or electronic communications

(1) * * *

* * * * * * *

(6) Any investigative or law enforcement officer, or attorney for the Government, who by any means authorized by this chapter, has obtained knowledge of the contents of any wire, oral, or electronic communication, or evidence derived therefrom, may disclose such contents to any other Federal law enforcement, intelligence, protective, immigration, national defense, or national security official to the extent that such contents include foreign intelligence or counterintelligence (as defined in section 3 of the National Security Act of 1947 (50 U.S.C. 401a)), or foreign intelligence information (as defined in subsection (19) of section 2510 of this title), to assist the official who is to receive that information in the performance of his official duties. Any Federal official who receives information pursuant to this provision may use that information only as necessary in the conduct of that person's official duties subject to any limitations on the unauthorized disclosure of such information. *Within a reasonable time after a disclosure of the contents of a communication under this subsection, an attorney for the Government shall file, under seal, a notice with a judge whose order authorized or approved the interception of that communication, stating the fact that such contents were disclosed and the departments, agencies, or entities to which the disclosure was made.*

* * * * * * *

FOREIGN INTELLIGENCE SURVEILLANCE ACT OF 1978

* * * * * * *

TITLE I—ELECTRONIC SURVEILLANCE WITHIN THE UNITED STATES FOR FOREIGN INTELLIGENCE PURPOSES

* * * * * * *

DESIGNATION OF JUDGES

SEC. 103. (a) * * *

* * * * * * *

(e)(1) Three judges designated under subsection (a) who reside within 20 miles of the District of Columbia, or if all of such judges are unavailable, other judges of the court established under subsection (a) as may be designated by the Presiding Judge of such court (who is designated by the Chief Justice of the United States from among the judges of the court), shall comprise a petition review panel which shall have jurisdiction to review petitions filed pursuant to section 501(f)(1).

(2) Not later than 60 days after the date of the enactment of the USA PATRIOT and Terrorism Prevention Reauthorization Act of 2005, the court established under subsection (a) shall develop and issue procedures for the review of petitions filed pursuant to section 501(f)(1) by the panel established under paragraph (1). Such proce-

dures shall provide that review of a petition shall be conducted ex parte and in camera and shall also provide for the designation of an Acting Presiding Judge.

* * * * * * *

ISSUANCE OF AN ORDER

SEC. 105. (a) * * *

* * * * * * *

(c) An order approving an electronic surveillance under this section shall—

(1) * * *

(2) direct—

(A) * * *

* * * * * * *

(C) that such carrier, landlord, custodian, or other person maintain under security procedures approved by the Attorney General and the Director of National Intelligence any records concerning the surveillance or the aid furnished that such person wishes to retain; **[**and**]**

(D) that the applicant compensate, at the prevailing rate, such carrier, landlord, custodian, or other person for furnishing such aid**[**.**]***; and*

(E) that, in cases where the facility or place at which surveillance will be directed is not known at the time the order is issued, the applicant shall notify a judge having jurisdiction under section 103 within a reasonable period of time, as determined by the court, after surveillance begins to be directed at a new facility or place, and that such notice shall contain a statement of the facts and circumstances relied upon by the applicant to justify the belief that the facility or place at which the electronic surveillance was directed is being used, or is about to be used, by the target of the electronic surveillance.

* * * * * * *

(e)(1) An order issued under this section may approve an electronic surveillance for the period necessary to achieve its purpose, or for ninety days, whichever is less, except that (A) an order under this section shall approve an electronic surveillance targeted against a foreign power, as defined in section 101(a), (1), (2), or (3), for the period specified in the application or for one year, whichever is less, and (B) an order under this Act for a surveillance targeted against an agent of a foreign power**[**, as defined in section 101(b)(1)(A)**]** *who is not a United States person* may be for the period specified in the application or for 120 days, whichever is less.

(2) Extensions of an order issued under this title may be granted on the same basis as an original order upon an application for an extension and new findings made in the same manner as required for an original order, except that (A) an extension of an order under this Act for a surveillance targeted against a foreign power, a defined in section 101(a) (5) or (6), or against a foreign power as defined in section 101(a)(4) that is not a United States person, may be for a period not to exceed one year if the judge finds probable cause to believe that no communication of any individual United

States person will be acquired during the period, and (B) an extension of an order under this Act for a surveillance targeted against an agent of a foreign power [as defined in section 101(b)(1)(A)] *who is not a United States person* may be for a period not to exceed 1 year.

* * * * * * *

TITLE III—PHYSICAL SEARCHES WITHIN THE UNITED STATES FOR FOREIGN INTELLIGENCE PURPOSES

* * * * * * *

ISSUANCE OF AN ORDER

SEC. 304. (a) * * *

* * * * * * *

(d)(1) An order issued under this section may approve a physical search for the period necessary to achieve its purpose, or for 90 days, whichever is less, except that (A) an order under this section shall approve a physical search targeted against a foreign power, as defined in paragraph (1), (2), or (3) of section 101(a), for the period specified in the application or for one year, whichever is less, and (B) an order under this section for a physical search targeted against an agent of a foreign power [as defined in section 101(b)(1)(A)] *who is not a United States person* may be for the period specified in the application or for 120 days, whichever is less.

(2) Extensions of an order issued under this title may be granted on the same basis as the original order upon an application for an extension and new findings made in the same manner as required for the original order, except that an extension of an order under this Act for a physical search targeted against a foreign power, as defined in section 101(a) (5) or (6), or against a foreign power, as defined in section 101(a)(4), that is not a United States person, or against an agent of a foreign power [as defined in section 101(b)(1)(A)] *who is not a United States person*, may be for a period not to exceed one year if the judge finds probable cause to believe that no property of any individual United States person will be acquired during the period.

* * * * * * *

TITLE IV—PEN REGISTERS AND TRAP AND TRACE DEVICES FOR FOREIGN INTELLIGENCE PURPOSES

* * * * * * *

PEN REGISTERS AND TRAP AND TRACE DEVICES FOR FOREIGN INTELLIGENCE AND INTERNATIONAL TERRORISM INVESTIGATIONS

SEC. 402. (a) * * *

* * * * * * *

[(e) An] *(e)(1) Except as provided in paragraph (2), an* order issued under this section shall authorize the installation and use of a pen register or trap and trace device for a period not to exceed

90 days. Extensions of such an order may be granted, but only upon an application for an order under this section and upon the judicial finding required by subsection (d). The period of extension shall be for a period not to exceed 90 days.

(2) In the case of an application under subsection (c) where the applicant has certified that the information likely to be obtained is foreign intelligence information not concerning a United States person, an order, or an extension of an order, under this section may be for a period not to exceed one year.

* * * * * * *

TITLE V—ACCESS TO CERTAIN BUSINESS RECORDS FOR FOREIGN INTELLIGENCE PURPOSES

SEC. 501. ACCESS TO CERTAIN BUSINESS RECORDS FOR FOREIGN INTELLIGENCE AND INTERNATIONAL TERRORISM INVESTIGATIONS.

(a) * * *

(b) Each application under this section—

(1) * * *

(2) shall specify that the records concerned are sought for an authorized investigation conducted in accordance with subsection (a)(2) **[**to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities.**]** *and that the information likely to be obtained from the tangible things is reasonably expected to be (A) foreign intelligence information not concerning a United States person, or (B) relevant to an ongoing investigation to protect against international terrorism or clandestine intelligence activities.*

[(c)(1) Upon an application made pursuant to this section, the judge shall enter an ex parte order as requested, or as modified, approving the release of records if the judge finds that the application meets the requirements of this section.**]**

(c)(1) Upon an application made pursuant to this section, if the judge finds that the application meets the requirements of subsections (a) and (b), the judge shall enter an ex parte order as requested, or as modified, approving the release of records.

* * * * * * *

[(d) No person shall disclose to any other person (other than those persons necessary to produce the tangible things under this section) that the Federal Bureau of Investigation has sought or obtained tangible things under this section.**]**

(d)(1) No person shall disclose to any person (other than a qualified person) that the United States has sought or obtained tangible things under this section.

(2) An order under this section shall notify the person to whom the order is directed of the nondisclosure requirement under paragraph (1).

(3) Any person to whom an order is directed under this section who discloses that the United States has sought to obtain tangible things under this section to a qualified person in response to the order shall inform such qualified person of the nondisclosure requirement under paragraph (1) and that such qualified person is also subject to such nondisclosure requirement.

(4) A qualified person shall be subject to any nondisclosure requirement applicable to a person to whom an order is directed under this section in the same manner as such person.

(5) In this subsection, the term "qualified person" means—

(A) any person necessary to produce the tangible things pursuant to an order under this section; or

(B) an attorney to obtain legal advice in response to an order under this section.

* * * * * * *

(f)(1) A person receiving an order to produce any tangible thing under this section may challenge the legality of that order by filing a petition in the panel established by section 103(e)(1). The Presiding Judge shall conduct an initial review of the petition. If the Presiding Judge determines that the petition is frivolous, the Presiding Judge shall immediately deny the petition and promptly provide a written statement of the reasons for the determination for the record. If the Presiding Judge determines that the petition is not frivolous, the Presiding Judge shall immediately assign the petition to one of the judges serving on such panel. The assigned judge shall promptly consider the petition in accordance with procedures developed and issued pursuant to section 103(e)(2). The judge considering the petition may modify or set aside the order only if the judge finds that the order does not meet the requirements of this section or is otherwise unlawful. If the judge does not modify or set aside the order, the judge shall immediately affirm the order and order the recipient to comply therewith. A petition for review of a decision to affirm, modify, or set aside an order by the United States or any person receiving such order shall be to the court of review established under section 103(b), which shall have jurisdiction to consider such petitions. The court of review shall immediately provide for the record a written statement of the reasons for its decision and, on petition of the United States or any person receiving such order for writ of certiorari, the record shall be transmitted under seal to the Supreme Court, which shall have jurisdiction to review such decision.

(2) Judicial proceedings under this subsection shall be concluded as expeditiously as possible. The judge considering a petition filed under this subsection shall provide for the record a written statement of the reasons for the decision. The record of proceedings, including petitions filed, orders granted, and statements of reasons for decision, shall be maintained under security measures established by the Chief Justice of the United States in consultation with the Attorney General and the Director of National Intelligence.

(3) All petitions under this subsection shall be filed under seal, and the court, upon the government's request, shall review any government submission, which may include classified information, as well as the government's application and related materials, ex parte and in camera.

* * * * * * *

ADDITIONAL VIEWS

Preliminary note

We commend Chairman Hoekstra for taking the unprecedented step of allowing a member of the press to attend the mark-up of H.R. 3199 and for making the transcript of the session available to the public. This action demonstrates that the Committee can have candid debate about intelligence policy in an unclassified setting. Unfortunately, the public was not permitted to attend this mark-up because it occurred in the Committee's secure facility. We hope that future mark-ups will take place in a venue accessible to all—so that the American people can have confidence in our work.

Introduction

The U.S. government needs effective tools to combat terrorism. The terrorist threat is real—and if we are going to demand that the FBI uncover terror cells here in the U.S., we need to give them the tools to do that.

The last time Congress considered the PATRIOT Act, it was also in the shadow of terrorism. It was just 45 days after 9/11; we were bracing for more terror; the invasion of Afghanistan had begun; and Capitol Hill was hit with anthrax attacks. Given these intense pressures, Congress did a fairly decent job with the PATRIOT Act, which modernized a number of legal authorities and gave the FBI new tools to track terrorists here at home. But we can do better.

Improving the PATRIOT Act

The mark-up of H.R. 3199 was our Committee's opportunity to improve the PATRIOT Act. As Deputy Attorney General Jim Comey told our Committee when he briefed us, any expansion of government power must be carefully justified and tailored so that it does not facilitate abuse or unwarranted intrusions into our privacy.

Improving the PATRIOT Act is not a partisan issue. The SAFE Act, which makes improvements to PATRIOT Act authorities, is bipartisan legislation that had 71 cosponsors in the last Congress. The Sanders Amendment to the Science, State, Justice, Commerce FY 2006 Appropriations bill—which prohibited spending funds to obtain library or bookstore documentary records under Seciton 215 of the Act, but properly excluded internet records—passed 238–187, with a large number of Republican votes, including one House Permanent Select Committee on Intelligence (HPSCI) majority Member.

H.R. 3199 is a good start. For example, it would allow the recipients of Section 215 orders to consult with an attorney and challenge the order before a federal judge. The bill also excludes some expansive provisions that our counterparts in the Senate adopted,

including administrative subpoenas, mail covers, and a broader definition of foreign intelligence.

Our package of common-sense amendments (described below), were shared with the Majority and were developed with input from a range of Members and outside groups. The Ranking Member also personally shared our proposals with Attorney General Gonzales and FBI Director Mueller. Our staffs have discussed them on a bipartisan basis.

The Committee received letters from the American Civil Liberties Union, as well as the Patriots to Restore Checks and Balances, a coalition led by former Rep. Bob Barr. Those letters, which are part of the official record of the mark-up, indicate support for efforts to improve the PATRIOT Act, along the lines of our amendments.

Of the five Democratic amendments offered at the mark-up, two passed on a voice vote by the Committee. Representative Boswell offered an amendment to impose a "return" requirement on roving "John Doe" wiretaps under Section 206. Representative Hastings offered an amendment to sunset the "Lone Wolf" provision in 2010.

The Committee rejected three other amendments that we believe were meritorious. Representative Harman's *en bloc* amendment would have made several critical changes to Sections 206, 214 and 215. Representative Ruppersberger offered an amendment to sunset all 10 expiring provisions under the Committee's jurisdiction in 2009. Representative Eshoo offered an amendment to prevent Section 215 orders from being used to obtain library or bookstore documentary records. All three of these amendments failed on voice vote.

We are committed to offering these amendments on the floor, and we urge the Rules Committee to allow their consideration by the full House.

Our proposals are moderate. And they would not compromise that ability to catch terrorists or spies. They will merely adjust the authorities of the PATRIOT Act to preserve our liberties.

As Benjamin Franklin said more than 200 years ago: "Those who would sacrifice liberty to purchase a bit of security deserve neither liberty nor security."

Detailed discussion of amendments

Five amendments were offered by Committee Democrats.

Representative Harman offered an *en bloc* amendment related to several sections of the PATRIOT Act.

With respect to Sections 214 and 215, the Harman amendment would require government Foreign Intelligence Surveillance Act (FISA) applications for tangible items as well as pen register and trap and trace orders to assert there are "specific and articulable facts" giving reason to believe that the records sought relate to a foreign power or an agent of a foreign power, and to include an explanation that supports the assertion such facts exist.

These provisions would retain the ability of the government to seek court approval to obtain items and information under Sections 214 and 215. But, they would also align this sweeping power with the traditional FISA standard by requiring individualized suspicion. Nothing in the amendment would hamper the government's

ability to go after suspected terrorists or their associates, such as 9–11 hijacker Mohammad Atta or his roommate.

The Harman amendment would also prohibit Section 215 from being used for the production of library circulation records, library patron lists, book sales records, or book customer lists. This mirrors the limitation included in an amendment offered by Representative Sanders to the Science, State Justice, Commerce FY 2006 Appropriations. That amendment passed the full House 238–187 on June 15, 2005.

With respect to Section 206, the amendment would modify the expansive authority for "John Doe" roving wiretaps in three ways. First, it would require the description of a target to be "sufficiently specific" for the court to find probable cause to believe the target is a foreign power or an agent of a foreign power—something Department of Justice officials say they already do. Second, it would also limit the time of surveillance to the period reasonable to assume the target is near the phone or computer to be tapped. Third, it would require the government to notify the FISA Court within a reasonable period of time *after* surveillance begins at a new facility or place, and to provide an explanation of the facts and circumstances surrounding the decision to target a particular facility or place. This requirement would allow the FISA Court to better assess whether "John Doe" roving wiretaps authorized under Section 206 were carried out properly.

Finally, the Harman amendment would modify FISA in additional ways to protect due process rights of FISA targets. It would require the court to disclose to criminal defendants or other aggrieved persons, and/or their counsels, under procedures and standards established in the Classified Information Procedures Act (CIPA) (18 U.S.C. App. 3), information and materials gathered pursuant to FISA orders. These procedures are used commonly in national security cases where individuals are prosecuted on the basis of secret evidence.

It would also ensure that U.S. citizen FISA targets who are determined not to be an agent of a foreign power are notified they were the target of FISA searches, surveillance, or pen registers and traps and traces. Such notification would only occur after the Attorney General determines that disclosure would not compromise an ongoing investigation. This would help ensure that individuals—such as Brandon Mayfield who was wrongly jailed in connection with the Madrid bombings and later exonerated—are notified of surveillance and secret searches of their homes.

The Harman *en bloc* amendment was not agreed to.

Representative Ruppersberger offered an amendment to extend to December 31, 2009 the sunsets for intelligence-related sections of the PATRIOT Act and Section 6001 of the Intelligence Reform and Terrorism Prevention Act (P.L. 108–458) (the so-called "Lone Wolf" provision). This provision would have allowed law enforcement to continue to conduct investigations using these authorities. But, it would also force Congress and the Executive Branch to reevaluate in four years whether they are truly effective in fighting terrorism and their impact on civil liberties and privacy.

The Ruppersberger amendment was not agreed to.

An amendment offered by Representative Eshoo would have exempted library circulation records, library patron lists, book sales records, or book customer lists from the list of tangible things authorized to be obtained under Section 215 of the PATRIOT Act. This mirrors the limitation included in an amendment offered by Representative Sanders to the Science, State, Justice, Commerce FY 2006 Appropriations bill which passed the House 238–187 on June 15, 2005.

During Committee hearings, Department of Justice officials stated that it has not sought library or bookstore documentary records, and the Committee has received no testimony indicating that this power under Section 215 is necessary to stop terrorism. These records may always be obtained by law enforcement through other methods, such as warrants or subpoenas.

The Eshoo amendment was not agreed to.

Representative Boswell offered an amendment to Section 206 of the PATRIOT Act. Section 206, which has been the center of much debate, gives the government broad authority to conduct court-approved roving wiretaps under FISA when neither the identify *nor* the location of the target is known.

The Boswell amendment would require the government to notify the FISA Court within a reasonable period of time *after* surveillance begins at a new facility or place, and to provide an explanation of the facts and circumstances surrounding the decision to target a particular facility or place. This requirement would allow the FISA Court to better assess whether "John Doe" roving wiretaps authorized under Section 206 were carried out properly. Such enhanced transparency is essential for ensuring proper judicial oversight of this significant authority.

The Boswell amendment was agreed to by voice vote.

An amendment offered by Representative Alcee Hastings would extend until 2010 the sunset of Section 6001 of the Intelligence Reform and Terrorism Prevention Act (P.L. 108–458), the so-called "Lone Wolf" provision. The Lone Wolf provision, which sunsets in December 2005, broke from the tradition of FISA by abandoning the requirement that a non-U.S. person, suspected terrorist target have a nexus to a foreign power. Although only seven months have passed since the Lone Wolf provision became law, H.R. 3199 would have made it permanent. This short period is inadequate for the government and public to assess the effectiveness and impact of this significant expansion of government authorities.

The Hastings amendment would allow the government to retain the authority to target Lone Wolf terrorists and ensure investigations initiated before the sunset date are allowed to continue. Moreover, it would ensure this significant expansion of power is subject to a meaningful trial period before it is made permanent.

The Hastings amendment was agreed to by voice vote.

Motion to report the bill favorably

The motion to report favorably H.R. 3199, as amended, to the House of Representatives was adopted by voice vote. Representatives Hastings, Eshoo, Holt and Tierney asked that the record reflect that they voted "no" on the motion.

JANE HARMAN.
SILVESTRE REYES.
LEONARD L. BOSWELL.
BUD CRAMER.
ANNA G. ESHOO.
C.A. DUTCH RUPPERSBERGER.

ADDITIONAL VIEWS

I accept the Minority's Additional Views, above, but find that the last paragraph of the introduction in some respects seems to omit procedural faults in the 2001 consideration and action on the so-called Patriot Act. A fuller account would record: that the Judiciary Committee of the House considered and passed by a large majority—if not unanimously—a version that most members believed acceptably struck a balance between the need to arm intelligence and law enforcement authorities with proper tools and the maintenance of constitutional civil rights. Those provisions where disagreement existed were "sunsetted."

In the dark of night during October 2001, the Majority Party's Rules Committee affected a Rule, passage of which struck the Judiciary Committee's product and substituted the final version now before Congress. That final version, in the view of a number of Members, and in the view of scores of local communities, experts and others—intruded needlessly upon civil liberties as it departed from the Judiciary Committee's work.

Numerous reasonable recommendations for correcting such excesses have been suggested. They would continue to provide needed tools to officials as they confront terrorist activities, while upholding the Constitution's hard fought and hard won rights for individuals. Congress has the chance during this review of the law to correct the problems contained in the earlier legislation through questionable procedural conduct.

JOHN F. TIERNEY.

○