



Legislative Bulletin.....December 14, 2005

Summary of the Bill Under Consideration Today:

Total Number of New Government Programs: at least 4

Total Cost of Discretionary Authorizations: \$615 million and such sums as necessary over five years

Effect on Revenue: \$0

Total Change in Mandatory Spending: \$0

Total New State & Local Government Mandates: Yes, as noted below; at least two

Total New Private Sector Mandates: At least two

Number of Bills Without Committee Reports: 0

Number of Reported Bills that Don't Cite Specific Clauses of Constitutional Authority: 0

H.R. 3199 — Conference Report on USA PATRIOT and Terrorism Prevention Reauthorization Act of 2005 (Sensenbrenner, R-WI)

Order of Business: The conference report for H.R. 3199 is scheduled for consideration on Wednesday, December 14, 2005, subject to a closed rule ([H. RES. 595](#)). Per the rule, the bill is not amendable.

The original USA PATRIOT Act (H.R. 3162 in the 107th Congress) passed the House by a vote of 357-66, passed the Senate by a vote of 98-1, and was signed into law on October 26, 2001, 45 days after the 9/11 terrorist attacks.

H.R. 3199 passed the House by a vote of 257-121 on July 21, 2005. The Senate passed a modified version of the bill by unanimous consent on July 29, 2005. House conferees were appointed on November 9, 2005 and the bill was reported out of conference on December 8, 2005.

Summary: This write-up is based on the Conference Report text of H.R. 3199, published on December 8, 2005. H.R. 3199 would reauthorize and modify certain provisions of the USA PATRIOT (Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism) Act and the Foreign Intelligence Surveillance Act (FISA). The original PATRIOT Act includes 16 provisions that are set to expire on December 31, 2005. This bill would permanently extend 14 of the 16 expiring provisions, and implement a new 4-year sunset for the remaining two provisions (Section 206 and 215). In addition, the bill would make several other changes to the law relating to investigations of potential terrorist activity, and provisions regarding enhanced penalties for terrorism, seaport terrorism, terrorism financing and the Secret Service. Highlights of the bill by title and section are as follows:

Section 102(a): Permanently extended provisions. Section 102(a) repeals Section 224 of the PATRIOT Act (sunset section), thus permanently extending the following provisions that were contained in the originally passed PATRIOT Act and currently set to expire on December 31, 2005:

- Section 201: Authority to intercept electronic, wire, and oral communications (wiretapping) relating to terrorism. This section permits the use of court-supervised wiretaps in cases involving various terrorism offenses (delineated in 18 U.S.C. 2516).
- Section 202: Authority to intercept electronic, wire, and oral communications relating to computer fraud and abuse offenses. This section permits the use of court-supervised wiretaps in cases involving felony computer fraud or abuse.

Note: To exercise the authority granted in Sections 201 or 202, federal officials must obtain approval by a senior Justice Department official and apply for a court order approving the use of the wiretap. The order must be “narrowly drawn, of short duration, and based upon probable cause” that it will generate evidence relating to the offenses under investigation. When the order expires, those whose communications have been intercepted must be notified. Federal officials may return to the court to obtain extensions to the order, and current law allows for an indefinite number of extensions.

- Section 203(b): Authority to share intercepted electronic, wire, and oral information. This section permits foreign intelligence information obtained by a wiretap to be shared with federal law enforcement, intelligence, protective, immigration and military personnel for official use.
- Section 203(d): General authority to share foreign intelligence information. This section permits foreign intelligence information discovered in the course of a federal criminal investigation to be shared with federal law enforcement, intelligence, protective, immigration and military personnel for official use, unless there is a legal impediment.

- Section 204: Clarification of intelligence exceptions from limitations on interception and disclosure of electronic, wire, and oral communications. Section 204 is essentially a technical amendment clarifying that prior wiretap laws (which generally prohibit wiretaps) do not bar foreign intelligence-gathering activities (such as pen registers and trap & trace devices) under the PATRIOT Act.
- Section 207: Duration of FISA surveillance of non-United States persons who are agents of a foreign power. This section extends the allowable duration of FISA surveillance and physical search orders and extensions. It extends FISA wiretap orders that target foreign powers from a maximum of 90 days to 120 days (with a possible extension to one year), and physical search orders from 45 days to 90 days.
- Section 209: Seizure of voice-mail messages pursuant to warrants. This section permits use of a search warrant to seize unopened voice mail held by a service provider.
- Section 212: Emergency disclosure of electronic surveillance. This section allows service providers in emergency situations to disclose customer communications record information and the content of stored customer communications. Prior law limited the circumstances under which service providers might disclose specific customer communications.
- Section 214: FISA pen register and trap & trace authority. This section expands FISA pen register and trap & trace order procedures so that they apply to electronic communications (email and similar internet communications) along with telephone communications as are currently applicable.
- Section 217: Interception of computer trespasser communications. This section permits federal authorities to intercept an intruder's communications within an invaded computer system. It requires consent of the systems operator, a law enforcement investigation, and a reasonable belief that the communications are relevant to the investigation.
- Section 218: Foreign Intelligence Information. This section provides that FISA surveillance or physical search applications only need to certify that foreign intelligence gathering is a "significant" purpose for seeking the order rather than "the" purpose for the order. Further, this section clarifies that a "wall" between FBI criminal and intelligence investigators is unnecessary.
- Section 220: Nationwide service of search warrants for electronic evidence. This section authorizes nationwide execution of search warrants and court orders for customer communications records. Prior to the PATRIOT Act, federal authorities could gain access to this type of customer communications through the use of a search warrant or a court order, but it could only be issued in the judicial district where the warrant or court order would be executed. Thus, federal authorities

charged that this hindered criminal investigations conducted in one district where the communications provider was located in another district.

- *Section 223: Civil liability for certain unauthorized disclosures.* This section creates a “cause of action” against the United States for official willful violations of Title III (the relevant section of the PATRIOT Act dealing with money laundering and anti-terrorist financing, among other things) or FISA; amends individual civil liability provisions of Title III for official unlawful disclosure or use; and allows disciplinary authority for agency officials over violations of Title III or FISA. Thus, a person subject to unlawful use or disclosure of information obtained by a federal wiretap may take civil action against the United States, and agency heads have the authority to discipline federal officials for willful or intentional violations of Title III or FISA provision.
- *Section 225: Immunity for compliance with FISA wiretaps.* This section establishes immunity to service providers for assistance in the execution of, or compliance with, a FISA surveillance order.

Section 102(b): Temporarily extended provisions. This section extends the sunset from December 31, 2005 to December 31, 2009 (a four-year sunset extension) for the following two PATRIOT Act provisions:

- *Section 206: Roving surveillance authority under FISA.* This section permits roving FISA surveillance orders (roving wiretaps). Orders do not need to specifically identify or name individuals when targets take actions to thwart surveillance. Thus, a roving wiretap may cover multiple locations, establishments, or neighborhoods because the target is being evasive and intentionally using multiple telephones for communication (rather than a single cell phone that could be more easily wiretapped). This provision is widely referred to as a “John Doe wiretap” since it allows for a surveillance order without authorities having to name a specific person under surveillance. Based on an amendment by Rep. Issa, it defines the “reasonable period of time” in current law to be no more than 15 days in which federal officials are required to notify a judge when the object of surveillance changes.
- *Section 215: Access to records and other items under FISA.* This section permits access to “tangible items” under FISA, including business records for hotels, motels, automobile rentals, storage facilities, library activities, internet service provider records, and other tangible items, regardless of the individual holding the item. This provision is widely referred to as the “Library” provision since libraries’ records are included in the type of “tangible items” available under a FISA order. According to the testimony of Attorney General Gonzales before a House Judiciary Committee hearing on April 6, 2005, Section 215 had never been used to obtain library or book store records. An amendment adopted in the House (from Rep. Flake), and retained in Conference, required the FBI Director (rather than his designee) to approve Section 215 orders.

Section 103: Agent of a foreign power definition extended. This section extends the sunset provision in Section 6001 of the Intelligence Reform and Terrorism Prevent Act (P.L. 108-458) by four years, to expire on December 31, 2009. Section 6001 amended the definition of an “agent of a foreign power” to include a foreign national who is preparing for or engaging in international terrorism. The modification precluded the need to show an illegal activity is being conducted on behalf of a foreign power (as long as the target is not an American). The Conference Report notes that this definition reaches “lone wolf” terrorists engaged in international terrorism.

Section 104: Crimes of terrorism outside national boundaries. This section repeals the sunset provision (set to expire on December 31, 2006) in Section 6603 of the Intelligence Reform and Terrorism Prevent Act (P.L. 108-458), thus making the provision permanent. Section 6603 defines material support for terrorists and also addresses various court concerns on the constitutionality of the prohibition of such support.

Section 105: Duration of FISA surveillance. This section amends various sections of FISA by redefining a foreign agent as someone “who is not a United States person.” To see the previous definition of a foreign agent, see: http://www4.law.cornell.edu/uscode/html/uscode50/usc_sec_50_00001801----000-.html When foreign intelligence information is not concerning a United States person, the allowable duration of an initial FISA order may be up to 120 days, and extensions are “not to exceed one year.”

Section 106: Access to business records. This section modifies Section 215 of the PATRIOT Act to establish a standard of relevance when obtaining business records under FISA. It would require “that the information likely to be obtained from 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.” It would also require a statement of facts to be included in the application that shows the tangible things sought are relevant to the investigation. It requires high-level approval (Deputy Director or the Executive Assistant Director or higher) of requests for certain categories of records such as library, bookstore, tax return, firearms sales, and medical records.

It clarifies judicial discretion by requiring a judge to enter an *ex parte* order (a notice on behalf of one party *without* notice to any other party) approving the release of records when the judge finds that an application to access records meets *all* the requirements of the section. It allows FISA orders to be challenged in court and a recipient to disclose information to a lawyer to comply with the order. It requires the Attorney General to adopt minimization procedures within 180 days of enactment (i.e. – procedures that are designed to “minimize the retention, and prohibit the dissemination of non-publicly available information concerning non-consenting U.S. persons”).

Further, the section grants authority to disclose to a “qualified person” the facts of an order to obtain records. A qualified person is defined as “any person necessary to

produce the tangible things pursuant to an order under this section,” or “an attorney to obtain legal advice with respect to an order under this section.” This section also establishes a judicial review panel to review petitions filed (challenging the legality of the order) regarding this section, and sets out procedures for the panel.

A new section added by Conference requires that the Department of Justice Inspector General conduct an audit on the use and effectiveness of Section 215, and submit an unclassified report to the House and Senate Committees on Judiciary and Intelligence.

Section 107: Report on emergency disclosures. This section amends 18 U.S.C 2702 pertaining to section 212 of the PATRIOT Act, which allows internet service providers to voluntarily disclose the contents of electronic communications in emergency situations. This section requires that the Attorney General provide a report annually to the House and Senate Committees on the Judiciary containing “the number of accounts from which the Department of Justice has received voluntary disclosures” and a summary of the basis for such disclosures.

Section 108: Roving surveillance authority. This section requires the facts to support a FISA application for roving surveillance authority to be included in the application, by striking “where the court finds” and inserting “where the court finds, based upon specific facts provided in the application.” It also requires, when electronic surveillance is directed at a facility that was not known at the time the order is issued, that a judge be notified on an ongoing basis of the surveillance and be provided the facts to support such surveillance. It requires that the order describe the “specific target” in detail when authorizing a roving wiretap for a target whose identify is not known. It also requires certain semi-annual reports to Congress on the use of this authority.

Section 109: Enhanced congressional oversight. This section requires 1) the FISA court to publish its rules and 2) reporting to the House and Senate Judiciary Committees on the use of the emergency employments of electronic surveillance, physical searches, and pen register and trap and trace devices. It also requires the DHS Secretary to submit a report describing the internal affairs operations at the U.S. Citizenship and Immigration Services (USCIS) to the same committees.

Section 110: Attacks against railroad carriers and mass transportation systems. This section prohibits surveillance, photographs, videotaping, diagrams, and other collection of information of mass transportation facilities with the intent to plan or assist in planning a terrorist attack (specifically defined in 18 U.S.C. 1993). Per an amendment adopted in the House by Rep. Capito (R-WV), it also modifies and expands the acts which constitute a criminal attack against a railroad carrier or mass transportation system, updates the definition of “dangerous weapons” to include box cutters and other previously unrecognized weapons, provides for prison sentences up to 20 years for violence against a mass transit vehicle, and requires a mandatory life sentence (with the possibility of the death penalty) if the attack results in the death of a person (similar to provisions within H.R. 52 introduced in the 109th Congress). The prison sentences are consistent with

current law, but this provision would apply those sentences to an expanded list of offences.

Section 111: Forfeiture. This section modifies 18 U.S.C 981 to expressly provide that any property used to commit or facilitate the commission of a federal crime of terrorism is subject to civil forfeiture provisions.

Section 112: Definition of terrorism. This section expands the definition of a federal crime of terrorism to include new predicate offenses, including “military-type training from a foreign terrorist organization” and “nuclear and weapons of mass destruction threats.”

Section 113: Modifies wiretap authority. This section expands the circumstances or potential offenses under which a high ranking Department of Justice official may authorize an application to a federal judge to obtain a wiretap. Specifically, it adds additional offenses under various sections of the PATRIOT Act that a wiretap may be requested and granted to investigate, including actions relating to: violence at international airports, biological agents and toxins, nuclear and weapons of mass destruction threats, explosive materials, possession of weapons in federal facilities, damage to government buildings and communications, assault to a flight crew member with a dangerous weapon, and certain other weapon offenses on board an aircraft.

Section 114: Delayed notice search warrants. This section amends the definition of a “period of reasonable delay” for court orders under section 213 of the PATRIOT Act (regarding disclosure of electronic surveillance and “sneak and peak” warrants) to be no more than 30 days for the initial request, and for additional periods of no more than 90 days “unless the facts justify longer.” Further, per an amendment by Rep. Flake (R-AZ), it restricts the ability of the court to delay notification of a search if the only reason for the delay is that it may delay a related trial. As the Committee Report notes, prior to granting a search warrant (whether or not it is delayed), a federal judge is required to find that there is probable cause to believe a crime has been or is about to be committed and that evidence of that crime may be found in the search.

Section 115: Judicial review of National Security Letters (NSLs). This section, per an amendment by Rep. Flake, specifies that the recipient of a national security letter may consult with an attorney, and may also challenge national security letters in court. It authorizes a judge to reject the national security letter request by the government “if compliance would be unreasonable or oppressive” to the recipient of the national security letter, and allows the recipient to challenge the non-disclosure requirement (gag order) of the national security letter request.

This section also permits a court to modify or remove the non-disclosure requirement of the national security letter request “if it finds that there is no reason to believe that disclosure may endanger the national security of the United States, interfere with a criminal, counterterrorism, or counterintelligence investigation, interfere with diplomatic relations, or endanger the life or physical safety of any person.” It modifies the non-

disclosure requirement so that recipients may tell individuals with whom they work about the national security letter request in order to comply with the national security request, and contains additional penalties for individuals who violate the non-disclosure requirements of a national security letter. It allows the government to move for judicial enforcement of non-compliance by recipients, allows the court to impose sanctions for contempt of court if a recipient fails to comply if a court order to enforce an NSL. Finally, it requires that reports on national security letters by federal agencies to Congress must also be sent to the House and Senate Judiciary Committees.

Section 116: Confidentiality of National Security Letters. This section provides for the FBI Director to prohibit disclosure of information relating to a wiretap (including its existence) to any person (that is not specifically necessarily in order to comply with the request, or an attorney to obtain legal advice or assistance) if the Director or his designee determines that sharing this information would result in danger to the national security of the United States, interference with an investigation, or danger to the life or physical safety of any person.

Section 117: Violations of nondisclosure of National Security Letters. This section provides for a prison term of five years or fine, or both, for individuals who were properly notified of an applicable nondisclosure requirement and still knowingly and willfully violated that nondisclosure order.

Section 118: Reports on National Security Provisions. This section requires the Department of Justice to report on all NSLs to the House and Senate Judiciary Committees, in addition to existing statutory requirements to report to various other House and Senate committees. It also directs the Attorney General to report to Congress annually on the total number of requests for information (i.e. - from internet service providers, or under the Right to Financial Privacy Act, the National Security Act, the Fair Credit Reporting Act, or various other statutes) made by the DoJ in the previous year.

Section 119: Audit of use of National Security Letters. This section directs the DoJ Inspector General to perform an audit of the effectiveness and use, including any improper or illegal use, of national security letters issued by the DoJ. The report is to be provided to the House and Senate Committees on the Judiciary and Intelligence within one year of enactment.

Section 120: Forfeiture provisions. This section replaces the reference to the broad definition under federal criminal code (18 U.S.C. 2331) with a different definition (18 U.S.C 2332b(g)(5), considered a more narrowly tailored, focused term) within the code regarding a federal crime of terrorism for asset forfeiture.

Section 121: Penal Provisions regarding trafficking in contraband cigarettes or smokeless tobacco. Based on an amendment by Rep. Coble, this section amends the Contraband Cigarette Trafficking Act (CCTA) by making it unlawful for any person to knowingly ship, possess, sell, distribute or purchase contraband cigarettes. The CCTA would be amended by: (1) extending its provisions to cover contraband smokeless tobacco; (2) reducing the number of cigarettes that trigger application of the CCTA from

60,000 to 10,000 cigarettes; (3) imposing reporting requirements on persons, except for tribal governments, who engage in delivery sales of more than 10,000 cigarettes or 500 single-unit cans or packages of smokeless tobacco in a single month; (4) requiring the destruction of cigarettes and smokeless tobacco seized and forfeited under the CCTA; and (5) authorizing state and local governments, and certain persons holding federal tobacco permits, to bring causes of action against violators of the CCTA.

Section 122: Prohibition of Narco-Terrorism. Based on an amendment by Rep. Hyde (R-IL), this section establishes a new criminal offense of narco-terrorism, which prohibits any person from manufacturing, distributing or possessing with intent to distribute a controlled substance, flunitrazepam (commonly referred to as a “date-rape” drug), or listed chemical, or attempting or conspiring to do so, knowing or intending that such activity, directly or indirectly, aids, or provides support, resources or anything of value to: (a) a foreign terrorist organization; or (b) any person or group involved in the planning, preparation for, or carrying out of a terrorist offense.

The penalty for such an offense is a mandatory minimum prison sentence of two times the applicable mandatory minimum penalty under current criminal code for this offense (the 20-year mandatory minimum contained in the House bill was stripped in conference). The provision states Congress’ intent to establish broad extra-territorial jurisdiction to enforce this new criminal offense, and provides that the government must have knowledge that a person or organization has engaged or engages in terrorist activity. The provision also modifies the terms “anything of pecuniary value,” “terrorist offense,” and “terrorist organization.”

Section 123: Interfering with the operation of an aircraft. This section amends 18 U.S.C. 32, which prohibits the destruction of aircraft or aircraft facilities, to address the increasing number of reports to the Federal Aviation Administration of the intentional aiming of lasers into airplane cockpits. The amendment makes it illegal to interfere with or disable a pilot or air navigation facility operator “with the intent to endanger the safety of any person or with reckless disregard for human safety.”

Section 124: Sense of Congress relating to lawful political activity. This section states the sense of Congress that “government should not investigate an American citizen solely on the basis of the citizen’s membership in a non-violent political organization or the fact that the citizen was engaging in other lawful political activity.”

Section 125: Removal of civil liability barriers discouraging the donation of fire equipment. This section establishes immunity from civil liability (other than gross negligence or intentional misconduct) for anyone other than a fire equipment manufacturer who donates fire equipment to volunteer fire companies. It states that this law preempts the laws of any state “to the extent that such laws are inconsistent with this section” except state laws that provide for additional protection from liability.

Section 126: Report on data-mining activities. Based on an amendment by Rep. Berman (D-CA), this section directs the Attorney General report to Congress (within one

year of enactment) on any DoJ initiative that uses or develops “pattern-based data-mining technology,” and stipulates specific content the report must include.

Section 127: Sense of Congress. This section is a sense of the Congress that the victims of terrorist attacks should have access to the forfeited assets of terrorists.

Section 128: PATRIOT Sec. 214; Authority to disclose additional information in connection with FISA search orders. This section requires: 1) an *ex parte* order for a pen register or tap or trace device for foreign intelligence purposes to direct the provider, upon the applicant’s request, to disclose specific information to the federal officer using the device; and 2) the Attorney General to inform the House and Senate Judiciary committees regarding uses of such devices.

TITLE II: Terrorism Death Penalty Enhancement.

This title is based in part on an amendment on an amendment by Rep. Carter (R-TX), which is similar to H.R. 3060 introduced in the House, though its provisions were substantially reduced in Conference.

- Provides for the death penalty for certain air piracy crimes for offenses “committed before the enactment of the Violent Crime Control and Law Enforcement Act of 1994.” According to the Conference Report, this would include a “small, but important category of defendants, including those responsible for the December 1984 hijacking of Kuwait Airways flight 221” and the murder of two USAID employees, among other crimes.
- Consolidates various procedures within Title 21 governing federal death penalty prosecutions, some of which were duplicative and required that trial courts provide two separate sets of jury instructions in certain death penalty prosecutions.
- Provides that a defendant charged with a crime punishable by death is entitled to be appointed free legal counsel and other services if the defendant becomes financially unable to obtain adequate representation or investigative services. Stipulates that the maximum hourly rate of pay for attorneys would be \$125 per hour, and the total fees and expenses paid cannot exceed \$7,500 per case (with some exceptions).

TITLE III: Reducing Crime and Terrorism at America’s Seaports.

This title is based on an amendment by Rep. Schiff (D-CA), which is nearly identical to H.R. 2651 introduced in the House.

- Expands the current list of federal crimes constituting “entry into the United States by false pretenses” to include “any real property, vessel, or aircraft of the U.S. or secure area of any airport or seaport.” It increases from 5 to 10 years the maximum prison sentence for offenders of this law if the act constitutes “an attempt to commit a felony.”
- Provides for criminal sanctions for an operator of a vessel that a) knowingly disobeys an order by a federal law enforcement officer to heave (move a ship in a specified direction) that vessel, b) resists or prevents a federal officer from boarding a vessel (that is duly authorized by federal law); or c) intentionally

- provides false information to a federal law enforcement officer during a boarding regarding the vessel's "destination, origin, ownership, registration, nationality, cargo, or crew."
- Makes it a criminal offense to place a device or dangerous substance in U.S. waters that is likely to destroy or damage a vessel or its cargo, or damage or alter any maritime navigation equipment which endangers the safe navigation of a ship, and it increases penalties for smugglers who misrepresent illicit cargo. Provides for a life imprisonment or, if a death results, the death penalty for violators of this provision.
 - Establishes a new criminal offense for intentionally damaging or tampering with any maritime navigational aid maintained by the Coast Guard or under its authority, if such an act endangers the safe navigation of a ship.
 - Establishes a new criminal offense for knowingly placing any device in waters that is likely to damage a vessel or its cargo, or interfere with a vessel's safe navigation. It provides for a fine and/or life imprisonment and, if death results, the death sentence.
 - Establishes a new criminal offense for knowingly transporting aboard any vessel (within the U.S. or on waters subject to U.S. jurisdiction) an explosive or incendiary device, biological agent, chemical weapon, or radioactive or nuclear material, knowing the item is intended to be used to commit a criminal offense. Provides for a fine or life imprisonment, or both; if death results, it provides for the death penalty.
 - Establishes a new criminal offense for knowingly: 1) setting fire to, damaging, destroying, disabling, or wrecking a vessel or its parts, a maritime facility or any apparatus used to store, load or unload cargo and passengers; 2) performing an act of violence against or incapacitating any individual on a vessel, or at or near a facility; or 3) communicating false information that endangers the safety of a vessel. Provides for a fine and/or imprisonment for up to 20 years, or the death penalty if death results from the offense.
 - Provides for lesser penalties for a threat of the above offenses, and also makes the offender liable for all costs incurred as a result of the action or threat.
 - Expands the scope current criminal offenses for theft of vessels or cargo to include additional transportation facilities and instruments (i.e. - trailers, cargo containers, warehouses). Provides for increased fines and penalties for offenses.
 - Provides the maximum penalty for a stowaway on a vessel or aircraft. If the offense is committed with the intent to cause serious bodily injury (or such occurs because of the offense), it provides for a fine and up to 20 years imprisonment. If death results, the offense is punishable by death.
 - Establishes a new criminal offense for knowingly (and with the intent to commit terrorism) bribing a public official to affect port security, or receiving a bribe affecting the same. Provides for up to 15 years imprisonment for an offense.
 - Increases the penalty for illegally smuggling goods from up to five years to up to 20 years imprisonment.
 - Creates a new criminal offense for illegally smuggling goods from the U.S., and provides for up to 10 years imprisonment.

TITLE IV: Combating Terrorism Financing.

- Increases the penalties for activities constituting terrorism financing from \$11,000 to \$50,000 per unlawful transaction and criminal sentences from 10 to 20 years.
- Provides for additional terrorism-financing offenses (such as the use of Hawalas) as predicate offenses to money laundering statutes. Hawalas are alternative (and illegal) remittance or banking systems that tend to exist outside of traditional financing streams and rely more on interpersonal communications than on tangible financial instruments. To learn more, visit this website: <http://www.interpol.int/Public/FinancialCrime/MoneyLaundering/hawala/>.
- Adds provisions to seize assets of persons committing terrorist acts against foreign countries or international organizations, and clarifies the law regarding transactions involving criminal proceeds and provides for technical corrections.

TITLE V: Miscellaneous Provisions.

- Provides for waiving the residency requirements for U.S. Attorneys and Assistant U.S. Attorneys when such attorney is assigned additional responsibilities, such as participation by U.S. attorneys in legal activities in Iraq.
- Adds the Secretary of Homeland Security in the Presidential line of succession (after Secretary of veterans Affairs).
- Modifies various other provisions, including the presidential appointment of the ATF Director, qualifications of U.S. Marshals, DoJ intelligence matters, and Attorney General review of habeas procedures.

TITLE VI: Secret Service.

- Authorizes the Secret Service to prosecute individuals who breach established security perimeters or engage in disruptive conduct at events at National Special Security Events (NSSE), and increases statutory penalties from six months to one year for violations.
- Provides for up to 10 years imprisonment for individuals who evade security procedures and are in possession of dangerous or deadly weapons;
- Establishes a new criminal offense for knowingly possessing or using false identification that could be used to gain unauthorized access to any restricted area of an NSSE;
- Clarifies that certain other Secret Service personnel may provide assistance and information to the National Center for Missing and Exploited Children. The Child Abduction Prevention Act (signed into law on April 30, 2003_ provided that Secret Service “officers and agents” could provide such information, and this provision would expand that unintentionally restrictive definition;

TITLE VII: Combat Methamphetamine Epidemic Act of 2005

Subtitle A: Domestic Regulation of Precursor Chemicals

- **Reclassification of Chemicals:** Classifies ephedrine, pseudoephedrine, or phenylpropanolamine as Scheduled Listed Chemicals, and provides that products containing these chemicals may be distributed as a nonprescription drug. Under current law, these chemicals are classified as “List One Drugs” and this status is

not removed by the Act. The Act provides that these chemicals are also to be listed as Schedule V chemicals, which are chemicals subject to more strenuous regulation, including a requirement that they be sold by prescription only. However, the bill provides that these chemicals, although classified as Schedule V, will not be required to be obtained by prescription only, and states will have to option to offer the products over the counter, under specific regulations. According to the Committee, several states have already, at the state level, made this switch in the chemical classifications.

Pseudoephedrine is a common decongestant, and phenylpropanolamine is an appetite suppressant, both of which (and derivatives of) are used by some to make methamphetamines, commonly called meth. Pseudoephedrine is typically sold in stores over-the-counter in the form of cold and sinus medication.

- **Product Sales Regulations:** Defines the term “regulated sellers” as retail distributors and pharmacies and requires these sellers to keep a written or electronic log of purchases, identifying the products by name, the quantity sold, the names and addresses of purchasers, and the dates and times of the sales. Purchasers of these products are required to show identification and must sign the logbook. The bill also prohibits the sellers from selling the products in nonliquid form (including gel caps) at the retail level unless the product is packaged in “blister packs” containing not more than two dosage units. In short, these products, if in pill form, must be in blister packs in order to be sold over the counter.
- **Monthly Sale Limit:** Prohibits selling to a customer more than 9.0 grams of ephedrine base, pseudoephedrine base, or phenylpropanolamine base in these products during a 30-day period. Additionally, the measure instructs regulated sellers to ensure that customers do not have direct access to these products before the sale is made. In short, these products are referred to as “behind-the-counter” placement products and are to be stored in a locked cabinet located in an area of the facility not directly available to customers.
- **Regulated Sellers New Program:** Requires regulated sellers to submit to the Attorney General a self-certification, which will permit them to sell scheduled listed chemical products at retail. Additionally their staff is required to have been trained regarding policies for selling these products. The bill directs the Attorney General to establish a program managing this program, using a new DOJ Internet website.
- **Repeal of Blister Pack Exemption:** Repeals the federal blister pack exemption. Under current law, an individual may purchase an unlimited amount of a cold or sinus medicine containing pseudoephedrine or similar substance if it is packaged in blister packs. According to the Committee, it was assumed that individuals manufacturing meth would be deterred if the chemicals were sold in blister packs, which are more difficult to maneuver. However, this was not the case and these individuals have continued to purchase the products packaged in blister packs. With the repeal of the blister pack exemption, all pseudoephedrine sold in this form is now subject to the same regulations as all other products of this nature, including monthly limits and storage restrictions, etc.

- **Mail Order Reporting:** Outlines specific reporting requirements (similar to those for regulated sellers) for those selling these products through a mail order distributor or as a mobile retail vendor. Additionally, these sellers are also prohibited from selling a customer more than 7.5 grams of ephedrine base, pseudoephedrine base, or phenylpropanolamine base in these products during a 30-day period.
- **Federal Per-Transaction Sales Limit:** Changes from 9 grams to 3.6 grams, the federal per-transaction sales limit for pseudoephedrine and phenylpropanolamine products.
- **Production Quotas:** Includes in the Attorney General’s current authority to establish annual production quotas for each basic class of controlled substance in schedules I and II that is manufactured, the authority to set production quotas for pseudoephedrine, ephedrine, and phenylpropanolamine. However, manufacturers would be permitted to apply for increases in their production quotas. In addition, existing penalties for illegal production of other drugs are expanded to include these chemicals.
- **Importation Restrictions:** The Attorney General’s authority to set importation quotas for substances is also extended to include pseudoephedrine, ephedrine, and phenylpropanolamine. Additionally, the bill provides strengthened regulation of imports and export transactions of these chemicals and extends current penalties for illegal exports and imports to include the new regulations. Among other things, the measure extends current importation reporting requirements by requiring post-import and export transactions.

According to the Committee, domestic production of these chemicals is relatively low, and most of the U.S. supply is imported. Under current law, importers and exporters of these chemicals are required to either notify the Department of Justice (DOJ) 15 days before the transaction takes place, or must be a “regular importer or exporter” selling these chemicals to a regular customer. In the case that a transaction fails to take place, exporters and importers typically attempt to find an immediate buyer, which, according to the Committee, sometimes leads to the sale of chemicals to companies that may not adhere to the legal boundaries of selling these chemicals. This provision is designed to address this issue by allowing importers and exporters to file a last-minute, second notice with DOJ in the case of a failed transaction.

- **Coordination with the USTR:** Directs the Attorney General, in implementing this subtitle, to work with the United States Trade Representative to ensure implementation complies with all applicable international treaties and obligations of the U.S.

Subtitle B: International Regulation of Precursor Chemicals

- **Foreign Chain of Distribution:** Extends reporting requirements placed upon individuals importing these chemicals. Specifically, individuals are required to include all information known to the importer on the chain of distribution of the chemicals from the manufacturer to the importer. In addition, the Attorney General is given permission to prohibit the importation of these chemicals if the

foreign-chain distributor, manufacturer, or others are in violation of certain requirements.

- **Additional Reporting Requirements:** Authorizes for this provision \$2 million over two years (\$1 million each year for FY06 and FY07). The legislation adds to the President's current annual report on international narcotics control strategy a separate section containing, among other things, the identification of the five countries that exported the largest amount of pseudoephedrine, ephedrine, and phenylpropanolamine (including the salts, optical isomers, or salts of optical isomers of such chemicals, and also including any products or substances containing such chemicals) during the preceding calendar year, and an economic analysis of the total worldwide production of these chemicals as compared to the legitimate demand for such chemicals worldwide.
- **Smuggling Methamphetamines from Mexico:** Authorizes \$8 million over two years (\$4 million each year for FY06 and FY07), for the Secretary to implement this section. The measure requires the Secretary of State to "take such actions as are necessary" to prevent the smuggling of methamphetamine into the U.S. from Mexico. Specifically, the Secretary is directed to:
 - "improve bilateral efforts at the United States-Mexico border to prevent the smuggling of methamphetamine into the United States from Mexico;
 - "seek to work with Mexican law enforcement authorities to improve the ability of such authorities to combat the production and trafficking of methamphetamine, including by providing equipment and technical assistance, as appropriate; and
 - "encourage the Government of Mexico to take immediate action to reduce the diversion of pseudoephedrine by drug trafficking organizations for the production and trafficking of methamphetamine."

Subtitle C: Enhanced Criminal Penalties for Methamphetamine Production and Trafficking

- **Smuggling Meth Using Facilitated Entry Programs:** Increases, by not more than 15 consecutive years in prison, the current penalty for an individual bringing drugs into the U.S through a facilitated entry point, if that offense involves methamphetamine. Under current law, the U.S. maintains certain entry points at our borders (known as facilitated entry points), which are designed to increase efficiency for those entering the country under approved circumstances. For example, the current FAST system allows pre-approved commercial truck traffic to cross the border in an express lane (similar to the EZ Pass system for many tolls across the nation), while only subjected to cargo searches on a sporadic basis. This provisions provides that if an individual smuggles meth or the chemicals associated with the manufacturing of meth through a facilitated entry point, their penalty is to be increased by not more than 15 consecutive years in prison. In addition, the measure provides that anyone whose term of imprisonment is increased under this section is to be permanently and irrevocably barred from being eligible for use of any facilitated entry points.
- **Manufacturing Meth on Federal Property:** Clarifies current law by adding the phrase "or manufacturing" to the statue outlining penalties for those cultivating a

controlled substance (such as meth) on federal property. This provision is designed to address the issue of individuals manufacturing meth on federal property, such as national parks.

- **“Kingpin” Penalties:** Lowers the penalty threshold amounts of the chemicals associated with manufacturing meth (making it easier for individuals to be apprehended for manufacturing meth) and increases mandatory penalties (from \$10 million to \$5 million), for manufacturing, distributing, dispensation, importing, and exporting methamphetamines. This provision is designed to allow for more frequent penalizing of meth “kingpins,” which, under current law, provides for life imprisonment on a leader of a drug trafficking organization convicted of trafficking in very large quantities of a drug and receiving very large profits from that activity.
- **Child-Protection Criminal Enhancement:** Increases by not more than 20 consecutive years in prison (and subject to a fine, or both), the current penalty for an individual manufacturing, distributing, possessing, or intending to do any of these activities on premises in which an individual under the age of 18 years is present or resides. This penalty is to be given in addition to any other sentence imposed.
- **Reports to Congress:** Requires the Attorney General to submit semiannual reports to Congress describing investigations of alleged violations of the Controlled Substances Act involving meth and measures being taken to give priority in the allocation of resources to certain violations.

Subtitle D: Enhanced Environmental Regulation of Methamphetamine By-products

- **Meth By-Products Report:** Directs the Secretary of Transportation to submit to Congress a biennial report providing information on whether the Secretary has designated as hazardous materials all by-products of the methamphetamine-production process that are known by the Secretary to pose an unreasonable risk to health and safety or property when transported in commerce in a particular amount and form.
- **Meth Production Report:** Directs the EPA to submit to Congress a report outlining information collected by the EPA from law enforcement agencies, states, and other relevant stakeholders identifying the byproducts of the meth production process and whether the EPA considers each of the byproducts to be a hazardous waste.
- **Cleanup Costs:** Makes two “technical corrections” in order to clarify current law, which is designed to require that all costs associated with the environmental clean up of hazardous-material and solid waste by-products of meth production, are imposed upon and paid by the individuals involved in the meth production and trafficking.

According to the Committee, a decision by the Eighth Circuit Court of Appeals in *United States v. Lachowski* undermined the ability of the Federal government to seek cleanup costs from methamphetamine traffickers who are convicted only of methamphetamine possession –even when the methamphetamine lab in question was on the defendant’s own property.”

Subtitle E: Additional Programs and Activities

- **DOJ Drug Courts Program:** Amends the DOJ drug court program, clarifying that grants made under this program are to be made only if the drug court meets certain requirements' including mandatory periodic testing. Under current law, the Attorney General may make grants to states, state courts, local courts, units of local government, and Indian tribal governments, acting directly or through agreements with other public or private entities, for adult drug courts, juvenile drug courts, family drug courts, and tribal drug courts.
- **DOJ Drug Court Funding:** Authorizes \$70 million in FY06 for the DOJ Drug Court. In previous years, the program has received the following funding levels:
 - \$50,000,000 for fiscal year 2002;
 - \$54,000,000 for fiscal year 2003;
 - \$58,000,000 for fiscal year 2004; and
 - \$60,000,000 for fiscal year 2005.
- **Feasibility Study on Drug Courts:** Directs the Attorney General (AG) to conduct a feasibility study on the desirability of a *new* drug court program for Federal offenders who are addicted to controlled substances.

NOTE: Some conservatives may be concerned that this study will likely result in a new federal program, which may be duplicative of the current drug court program.

- **Multiple Meth Hot Spot Grant Programs:** Authorizes \$495 million over five years (\$99 million each year over the FY06-FY2010 period) for the creation of a new federal programs to address the manufacture, sale and use of methamphetamine drugs and to improve the ability of state and local government institutions to carry out these programs. Specifically, the bill authorizes the AG to make the following types of grants:
 - Grants to states to address the manufacture, sale, and use of methamphetamine to enhance public safety; and
 - Grants for programs, projects, and other activities to do the following:
 - Investigate, arrest and prosecute individuals violating laws related to the use, manufacture, or sale of meth;
 - Reimburse the Drug Enforcement Administration for expenses related to the clean up of meth labs; and
 - Procure equipment, technology, or support systems, or pay for resources, if the applicant for the grant demonstrates to the satisfaction of the AG that expenditures for these purposes would result in the reduction in the use, sale, and manufacture of meth.

In H.R. 2862, the Science, State, Justice, Commerce, and Related Agencies Appropriations Act of 2006, the House appropriated \$60 million for policing initiatives to combat meth production and trafficking in drug hot spots. The House-passed versions of the Commerce, Justice, State Appropriations Acts of 2005 and 2004 also appropriated \$60 million each year for this purpose. This money was appropriated for the hot spot program, which was never authorized by

Congress. This provision provides authorization for this hot spot program, as well as many others, at \$99 million annually.

NOTE: Some conservatives may be concerned that this program, which has received extensive funding (at least \$180 million over three years) without congressional authorization, will now be authorized at \$495 million over five years (\$99 million annually).

- **Multiple New Drug-Endangered Children Grant Programs:** Authorizes \$40 million over two years (\$20 million for each of fiscal years 2006 and 2007) for the AG to make grants to states to carry out programs to provide comprehensive services to aid children who are living in a home in which meth or other controlled substances are unlawfully manufactured, distributed, dispensed, or used. The AG is to ensure that the services carried out with these grants include the following:
- Coordination among law enforcement agencies, prosecutors, child protective services, social services, health care services, other services providing assistance regarding the problems of children living in a meth home; and
 - Transition of children from toxic or drug endangering environments to appropriate residential environments.

NOTE: Some conservatives may be concerned that this provision authorizes \$40 million over two years for the creation of multiple new programs.

- **New Pregnant and Parenting Women Meth Offenders Grants:** Authorizes such sums as necessary for the AG to award competitive, three-year grants to address the use of meth among pregnant and parenting women offenders to promote public safety, public health, family permanence and well being. The grants awarded under this provision are to be used to facilitate or enhance and collaboration between the criminal justice, child welfare, and state substance abuse systems in order to carry out programs to address the use of meth drugs by pregnant and parenting women offenders. Entities receiving a grant under this program are permitted to reapply for only one additional three-year funding cycle.

NOTE: Some conservatives may be concerned that this provision authorizes such sums as necessary for the creation of multiple new programs.

RSC Staff Contact for Title VII: Joelle Cannon; joelle.cannon@mail.house.gov, 202-226-9717

Possible Conservative Concerns: During debate of the USA PATRIOT Act in 2001 and in the subsequent years after passage, some conservatives have expressed concerns that the powers granted to federal authorities under the PATRIOT Act were unnecessarily broad and could infringe upon citizens' constitutional rights under the First, Fourth, Fifth and Sixth Amendments. Frequently mentioned areas of concern are sections 206 (roving wiretap), 213 (sneak and peak), and 215 (access to records) of the PATRIOT Act.

In addition, during the House debate on passage of H.R. 3199, some conservatives had reservations with permanently extending the majority of PATRIOT Act provisions (discussed in Section 102(a) above) and preferred a shorter temporary extension of PATRIOT Act sections 206 and 215 (discussed in Section 102(b) above). The conference report preserves the permanent extensions, but reduces the 10-year sunset extension of sections 206 and 215 (per the House bill; the Senate passed a four year extension) to four years, now set to expire on December 31, 2009.

Additional Information: As noted above, all three of the most controversial PATRIOT Act sections have been amended in the bill in an attempt to ameliorate some of the stated concerns, though Section 213 was not substantially altered.

Section 206 has been modified to: a) increase reporting requirements on wiretap order to a judge; b) reduce the allowable duration of a FISA surveillance order; c) require the specific facts that substantiate a roving surveillance order to be included within the order; and d) require that the order be updated and the judge notified in a reasonable time period when surveillance changes that the order covers.

Section 213 has been modified to reduce to the period of reasonable delay of notification for surveillance court orders be no more than 30 days for the initial request, and for additional periods of no more than 90 days (see Section 114 above).

Section 215 has been modified to: a) establish a relevance standard to clarify that orders must be relevant to an ongoing investigation to protect against international terrorism or clandestine intelligence activities; b) clarify that judges have the discretion to modify requested orders; c) clarify that the recipient of a Section 215 order may discuss the order with an attorney to obtain legal advice and may challenge the order; and d) provide for a judicial review panel to review challenges to the legality of a Section 215 order. Under current law, the Department of Justice is required to inform Congress each time Section 215 is used.

Administration Policy: A Statement of Administration Policy (SAP) was not available at press time for the Conference Report. However, the SAP on the House passed H.R. 3199 stated: “The Administration strongly supports House passage of H.R. 3199. As the President has stated, the Administration is committed to the full reauthorization of the provisions of the USA PATRIOT Act that are set to expire at the end of this year. The USA PATRIOT Act has increased our ability to share intelligence information, updated the law to adapt to changes in technology, and provided federal law enforcement agencies critical tools to investigate terrorists and spies that have been used for years to investigate organized crime and drug dealers. The Act is a key component of our efforts to combat terrorism and protect the American.”

To read the entire SAP on the House passed H.R. 3199, click here:
<http://www.whitehouse.gov/omb/legislative/sap/109-1/hr3199sap-h.pdf>

Committee Action: H.R. 3199 was introduced on July 11, 2005, and referred to the Committee on the Judiciary and the Permanent Select Committee on Intelligence (for consideration of those provisions that fall within their respective jurisdictions) on July 11th. The bill was marked-up by both committees on July 13th. The bill was reported out by the full Judiciary Committee by a vote of 23-14 and by the full Intelligence Committee by voice vote on July 13th (H. Rept. [109-174](#)). The House passed H.R. 3199 by a vote of 257-171 on July 21, 2005.

Cost to Taxpayers: No CBO cost estimate is available for the Conference Report. CBO provided an estimate on the original House consider H.R. 3199 (prior to amendments and passage), stating 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.”

Title VII of this Act authorizes \$615 million over five years.

Does the Bill Expand the Size and Scope of the Federal Government?: Yes, as noted in Sections 13, 14 and 15 above. However, the bill also narrows the scope of federal government authority in several areas. It permanently extends already existing provisions of the PATRIOT Act, clarifies federal authority, sets new restrictions and reporting requirements, and expands the rights of individuals involved in or who are the objects of federal terrorism investigations. Further, Title VII of this Act creates at least four new federal programs, with significant potential for additional new federal programs.

Does the Bill Contain Any New State-Government, Local-Government, or Private-Sector Mandates?: According to CBO, “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.” However, not all provisions within the bill are regarding national security, as noted above. It is not clear, though unlikely, whether Titles II – VI include unfunded mandates.

Regarding Title VII, according to a CBO score for H.R. 3889 (which contains several provisions identical to Title VII), the Act “would impose an intergovernmental mandate, as defined in UMRA, by preempting state laws that place less-burdensome requirements than those established in this bill on pharmaceutical dispensers for selling and storing over-the-counter drugs containing pseudoephedrine, ephedrine, or phenylpropanolamine. In addition, the bill would impose an intergovernmental mandate on publicly owned pharmacies by requiring compliance with those sale and storage requirements.”

Regarding, private-sector mandates (regarding H.R. 3889), CBO states, “ [The Act] would impose private-sector mandates, as defined in UMRA, on retail businesses and persons involved in the sale and distribution of certain medications containing ephedrine, pseudoephedrine, or phenylpropanolamine. . . . The bill would impose private-sector mandates on retail businesses and persons involved in the sale and distribution of certain

medications by restricting access to ephedrine, pseudoephedrine, and phenylpropanolamine products and imposing limits on the amount of such products that can be sold per customer.”

Constitutional Authority: The Permanent Select Committee on Intelligence, in [House Report 109-174 - Part 2](#), cites constitutional authority in Article 1, Section 8, Clause 1 (to provide for the common defense) and Clause 18 (to make laws to execute the foregoing powers). The House Judiciary Committee, in [House Report 109-174 - Part 1](#), cites constitutional authority in Article 1, but fails to cite a specific Section or Clause.

House Rule XIII, Section 3(d)(1), requires that all committee reports contain “a statement citing the *specific* powers granted to Congress in the Constitution to enact the law proposed by the bill or joint resolution.” *[emphasis added]*

RSC Staff Contact:

Titles I-VI: Derek V. Baker; derek.baker@mail.house.gov; 202-226-8585

Title VII: Joelle Cannon; joelle.cannon@mail.house.gov, 202-226-9717
