CRS Report for Congress

Section by Section Analysis of the

USA PATRIOT Act

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Summary
The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act, P. L. 107-56, is part of the Congressional response to September 11. It is the merger of two similar bills. S.1510 passed the Senate on October 11, 147 Cong.Rec. S10604, and H.R.2975 passed the House on October 12 after substituting the language of H.R.3108 for its text, 147 Cong.Rec. H6775. Having informally resolved their differences, the House enacted the measure in final form on October 24, 147 Cong.Rec. H7282, and the Senate on October 25, 147 Cong.Rec. S11059.
The Act consists of ten titles which, among other things:
• give federal law enforcement and intelligence officers greater authority (at least temporarily) to gather and share evidence particularly with respect to wire and electronic communications;
• amend federal money laundering laws, particularly those involving overseas financial activities;
• create new federal crimes, increase the penalties for existing federal crimes, and adjust existing federal criminal procedure, particularly with respect to acts of terrorism;
• modify immigration law, increasing the ability of federal authorities to prevent foreign terrorists from entering the U.S., to detain foreign terrorist suspects, to deport foreign terrorists, and to mitigate the adverse immigration consequences for the foreign victims of September 11; and
• authorize appropriations to enhance the capacity of immigration, law enforcement, and intelligence agencies to more effectively respond to the threats of terrorism. Several proposals, offered while the Act was under consideration, were not among the provisions ultimately enacted, e.g., revision of the McDade-Murtha Amendment (relating to the application of professional conduct standards to federal prosecutors), measures to combat illegal Internet gambling, and are thus beyond the scope of this report.

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Title VIII – Strengthening the Criminal Laws Against Terrorism

Pre-existing federal law criminalized, among other things, wrecking trains, 18 U.S.C. 1992; damaging commercial motor vehicles or their facilities,18 U.S.C. 33, or threatening to do so, 18 U.S.C. 35; destroying vessels within the navigable waters of the United States, 18 U.S.C. 2273; destruction of vehicles or other property used in activities affecting interstate or foreign commerce by fire or explosives, 18 U.S.C. 844(i); possession of a biological agent or toxin as a weapon or a threat, attempt, or conspiracy to do so, 18 U.S.C. 175; use of a weapon of mass destruction affecting interstate or foreign commerce or a threat, attempt, or conspiracy to do so, 18 U.S.C. 2332a; commission of
Section 801. Federal Crimes of Violence.

A federal crime of violence while armed with a firearm, or of federal felony while in possession an explosive, 18 U.S.C. 924(c), 844(h); and conspiracy to commit a federal crime, 18 U.S.C. 371. Section 801 fills in some of the gaps in these proscriptions. It makes terrorist attacks and other acts of violence against mass transportation systems federal crimes, punishable by imprisonment for any term of years or life if the conveyance is occupied at the time of the offense, and imprisonment for not more than twenty years in other cases. Under its provisions, it is a crime to willfully

-wreck, derail, burn, or disable mass transit;

-place a biological agent or destructive device on mass transit recklessly or with the intent to endanger;

-burn or place a biological agent or destructive device in or near a mass transit facility knowing a conveyance is likely to be disabled;

-impair a mass transit signal system;

-interfere with a mass transit dispatcher, operator, or maintenance personnel in the performance of their duties recklessly or with the intent to endanger;

-act with the intent to kill or seriously injure someone on mass transit property;

-convey a false alarm concerning violations of the section;

-attempt to violate the section;

-threaten or conspire to violate the section when the violation involves interstate travel, communication, or transportation of materials or that involves a carrier engaged in or affecting interstate or foreign commerce, 18 U.S.C. 1993.

Section 802. Definition of Domestic Terrorism.

Section 802 adjusts the definition of international terrorism in 18 U.S.C. 2331 and borrows from it to define domestic terrorism. Section 2331 has for some time defined international terrorism as those criminal acts of violence, committed primarily overseas or internationally, that appear to be intended to intimidate or coerce a civilian population, or to influence a governmental policy by intimidation or coercion, or to affect the conduct of a government by assassination or kidnapping, 18 U.S.C. 2331(1). Section 802 simply modifies this last element to include acts that appear to be intended to affect the conduct of a government by mass destruction, assassination or kidnapping. It defines domestic terrorism as those criminal acts dangerous to human life, committed primarily within the United States, that appear to be intended to intimidate or coerce a civilian population, or to influence a governmental policy by intimidation or coercion, or to affect the conduct of a government by mass destruction, assassination or kidnapping, 18 U.S.C. 2331(5).

Section 803. Harboring Terrorists Prohibited.

It is a federal crime to harbor aliens, 8 U.S.C. 1324, or those engaged in espionage, 18 U.S.C. 792, or to commit misprision of a felony (which may take the form of harboring the felon), 18 U.S.C. 4, or to act as an accessory after the fact to a federal crime (including by harboring the offender), 18 U.S.C. 3. The Justice Department asked that a terrorist harboring offense be added to the espionage section, and that it be given extraterritorial effect and venue flexibility. Section 803 instead establishes a separate offense which punishes harboring terrorists by imprisonment for not more than ten years and/or a fine of not more than $250,000, 18 U.S.C. 2339. The predicate offense list consists of:

- destruction of aircraft or their facilities, 18 U.S.C. 32;
- biological weapons offenses, 18 U.S.C. 175;
- chemical weapons offenses, 18 U.S.C. 229;
- nuclear weapons offenses, 18 U.S.C. 831;
- bombing federal buildings, 18 U.S.C. 844(f);
- destruction of an energy facility, 18 U.S.C. 1366;
- violence committed against maritime navigational facilities, 18 U.S.C. 2280;
- offenses involving weapons of mass destruction, 18 U.S.C. 2232a;
- international terrorism, 18 U.S.C. 2232b;
- sabotage of a nuclear facility, 42 U.S.C. 2284;

It permits prosecution either at the place the harboring occurred or where the underlying act of terrorism committed
by the sheltered terrorist might be prosecuted. In order to enjoy the full benefits of section 803, the prosecution may have to establish a nexus between the act of terrorism and the site of concealment, U.S.Const. Art.III, §2, cl.3; Amend. IV; United States v. Cabrales, 524 U.S. 1 (1998). On the other hand, if the acts of terrorism occur in the United States or over which the United States has jurisdiction, the crime of harboring the terrorist even overseas can be prosecuted in the United States in all likelihood without amending existing law, cf., United States v. Felix-Gutierrez, 940 F.2d 1200, 1205 (9th Cir. 1991)(“crime of accessory after the fact gives rise to extraterritorial jurisdiction to the same extent as the underlying offense”).

Section 804. Crimes Committed Abroad at U.S. Facilities Abroad, Jurisdiction.
Crime is usually outlawed, prosecuted and punished where it is committed. In the case of the United States, this a matter of practical and diplomatic preference rather than constitutional necessity. Consequently, a surprising number of federal criminal laws have extraterritorial application. In some instances, the statute proscribing the misconduct expressly permits the exercise of extraterritorial jurisdiction, e.g., 18 U.S.C. 2332a (relating to use of weapons of mass destruction by an American overseas). In others, such as those banning assassination of Members of Congress, 18 U.S.C. 351, or the attempted murder of federal law enforcement officers, 18 U.S.C. 1114, the court will assume Congress intended the prohibitions to have extraterritorial reach.10 Section 804 touches upon extraterritoriality only to a limited extent and in somewhat unusual manner. The special maritime and territorial jurisdiction of the United States represent two variations of the extraterritorial jurisdiction. Congress has made most common law crimes – murder, sexual abuse, kidnaping, assault, robbery, theft and the like – federal crimes when committed within the special maritime and territorial jurisdiction of the United States. The special maritime jurisdiction of the United States extends to the vessels of the United States. Historically, the territorial jurisdiction of the United States was thought to reach those areas over which Congress enjoyed state-like legislative jurisdiction. (United Stats v. Layton, 855 F.2d 1388 (9th Cir. 1981); United States v. Benitez, 741 F.2d 1312 (11th Cir. 1984) United States v. Bowman, 260 U.S. 94 (1922); Ford v. United States, 273 U.S. 593 (1927) For some time, those territories were located exclusively within the confines of the United States, but over the years came to include at least temporarily, Hawaii, the Philippines, and other American overseas territories and possessions. Recently, the lower federal courts have become divided over the question of whether laws enacted to apply within federal enclaves within the United States and American territories overseas might also apply to areas overseas over which the United States has proprietary control, compare, United States v. Gatlin, 216 F.3d 207 (2d Cir. 2000); United States v. Laden, 92 F.Supp.2d 189 (S.D.N.Y. 2000); with, United States v. Corey, 232 F.3d 1166 (9th Cir. 2000); United States v. Erdos, 474 F.2d 157 (4th Cir. 1973). The section resolves the conflict by declaring within the territorial jurisdiction of the United States includes those overseas areas used by American governmental entities for their activities or residences for their personnel, at least to the extent that crimes are committed by or against an American. It is intended as a residual provision and therefore does not apply where it would conflict with a treaty obligation or where the offender is covered by the Military Extraterritorial Jurisdiction Act (18 U.S.C. 3261).

Section 805. Support of Terrorism.
Sections 2339A and 2339B of title 18 of the United States Code ban providing material support to individuals and to organizations that commit various crimes of terrorism. Section 804 amends the sections in several ways, some at the behest of the Justice Department. Section 2339B (support of a terrorist organization) joins section 2339A (support of a terrorist) as a money laundering predicate offense, 18 U.S.C. 1956(c)(7)(D) The predicate offense list of 18 U.S.C. 2339A (support to terrorists) grows to include:

! chemical weapons offenses, 18 U.S.C. 229;
! terrorist attacks on mass transportation, 18 U.S.C. 1993 ;
! sabotage of a nuclear facility, 42 U.S.C. 2284; and
! sabotage of interstate pipelines, 49 U.S.C. 60123(b).

Section 805 also adds expert advice or assistance of the types of assistance that may not be provided under section 2339A. Prosecutions grounded on providing material assistance in the form of expert advice may encounter the same First Amendment vagueness problems some courts have found in assistance which takes the form of “training” and “personnel,” Humanitarian Law Project v. Reno, 205 F.3d 1130, 1137-136 (9th Cir. 2000). Finally, the section declares that a prosecution for violation of section 2339A (support of terrorists) may be brought where the support is provided or where the predicate act of terrorism occurs. The full benefit of this amendment may have to await

Section 806. Assets of Foreign Terrorist Organizations.
Modern forfeiture law strips criminals of the proceeds and instruments of crime. Terrorism, however, neither produces profits of drug dealing nor requires the specialized equipment of the rum runner or the counterfeiter. Consequently, most forfeiture statutes do not reach the crimes of terrorism. Nevertheless terrorism, particularly international terrorism, requires financing; cash is the essential instrumentality of terrorism. The USA PATRIOT Act attacks terrorism at its most vulnerable spot, its need for financial support. The Act’s invigorating of the International Economic Emergency Powers Act asset forfeiture and its money laundering measures are calculated to encumber and prevent terrorism by drying up its sources of financial support. Section 806 supplies another tool for that effort. It subjects to civil forfeiture property wherever located: (1) which belongs to an individual or entity planning or engaging in domestic or international terrorism against the United States (as defined in 18 U.S.C. 2331) or which affords the individual a source of influence over a terrorist organization; (2) which is acquired or maintained for use in furtherance of acts of domestic or international terrorism committed against Americans; or (3) which is derived from or is useful for the commission of acts of domestic or international terrorism committed against the Americans, 18 U.S.C. 981(a)(1)(G). The section is something of a rarity in that it creates a forfeiture of estate (confiscation based solely on the property’s relation to an offender rather than to the offense; discussed earlier with respect to section 106), traditionally thought to be at odds with the concept of civil in rem forfeiture and with the bans on corruption of the blood, U.S.Const. Art.III, §3, cl.2; Amend.V; United States v. Grande, 620 F.2d 1026 (4th Cir. 1980).

Section 807. Technical Clarification Relating to Provision of Material Support to Terrorism.
The Trade Sanctions Reform and Export Enhancement Act of 2000, Title IX of Public Law 106-387, 114 Stat. 1549A-69, limits the power of the President to unilaterally impose export restrictions on agricultural and medical products, subject to certain exceptions. Section 807 builds on the pronouncement of section 221(b)(2) to confirm that the trade sanctions bill should not be construed to limit or otherwise amend the prohibitions on providing material support to terrorist or terrorist organizations found in 18 U.S.C. 2339A and 2339B.

Section 808. Definition of Federal Crime of Terrorism.
Paragraph 2332b(g)(5)(b) lists a number of violent federal crimes within its definition of “federal crime[s] of terrorism” for purposes of the section’s prohibition on acts of terrorism transcending national boundaries. Section 808 amends the definition for consistency with its use in various other sections of the USA PATRIOT Act. The Section drops a number of less serious crimes from the definition, such as simple assault (18 U.S.C. 351(e)), bomb scares (18 U.S.C. 844(e)), and malicious mischief (18 U.S.C. 1361), after reaffirming that the omitted offenses remain within the investigative jurisdiction of the Department of Justice. It places several more serious crimes within the definition, crimes like biological weapons offenses (18 U.S.C. 175b), cybercrime (18 U.S.C. 1030), terrorists attacks on mass transit (18 U.S.C. 1993), and various violent crimes committed aboard aircraft within U.S. jurisdiction (49 U.S.C. 46504, 46505(b)(3),(c), 46505).

Section 809. No Statute of Limitations for Certain Terrorism Offenses.
Prosecution for murder may be initiated at any time; there is no statute of limitations, 18 U.S.C. 3281. With a few exceptions, there is a five year statute of limitations on the prosecution of other federal crimes. Among the relevant exceptions before the USA PATRIOT Act was enacted, were an eight year statute of limitations for several terrorist offenses, 18 U.S.C. 3286.11 and a ten year statute of limitations for arson in federal enclaves and explosives offenses involving federal property, property used in an activity affecting interstate commerce, and use of an explosive during the commission of a federal offense, 18 U.S.C. 3295. The Administration recommended the elimination of a statute of limitations in terrorism cases. Section 809 takes a less dramatic approach. It eliminates the statute of limitations for any federal crime of terrorism (as defined by 18 U.S.C. 2332b(g)(5)(B), with the amendments of §808) that risks or results in a death or serious bodily injury, 18 U.S.C. 3286. In the absence of such a risk or result, all other terrorism offenses become subject to the eight year statute of limitations unless already covered by the ten year statute for explosives and arson offenses, 18 U.S.C. 3286 (§809).
Section 810. Penalties for Terrorism Offenses.
The Justice Department suggested an alternative term of imprisonment up to life imprisonment for anyone convicted of an offense designated a terrorist crime. It described the proposal as analogous to standard fine provisions of 18 U.S.C. 3571(b),(c), which in 1984 established a basic fine of $250,000 for any individual who committed a federal felony, notwithstanding the lower maximum fine described in the statute that outlawed the offense. The proposal, however, failed to identify the critical elements that would trigger the alternative. Both practical and constitutional challenges might be thought to attend this failure to distinguish between those convicted of some “garden variety” crime of terrorism and the more serious offender meriting the alternative, supplementary penalty. Section 810 instead opts to simply increase the maximum penalties for various crimes of terrorism, particularly those which involve the taking of a human life and are not already capital offenses. It increases the maximum terms of imprisonment: 18 U.S.C. 32 (destruction of aircraft or aircraft facilities), 37 (violence at international airports), 112 (assaults on foreign dignitaries), 351 (crimes of violence against Members of Congress), 1116 (killing foreign dignitaries), 1203 (hostage taking), 1361 (destruction of federal property), 1751 (crimes of violence against the President), 2280 (violence against maritime navigation), 2281 (violence on maritime platforms), 2332 (terrorist violence against Americans overseas), 2332a (use of weapons of mass destruction), 2332b (acts of terrorism transcending national boundaries), 2340A (torture); 49 U.S.C. 46502 (air piracy), 46504 (interference with a flight crew), 46505 (carrying a weapon aboard an aircraft), and 46506 (assault, theft, robbery, sexual abuse, murder, manslaughter or attempted murder or manslaughter in the special aircraft jurisdiction of the United States).

! for life-threatening arson or arson of a dwelling committed within a federal enclave, from 20 years to any term of years or life, 18 U.S.C. 81;
! for causing more than $100,000 in damage to, or significantly impairing the operation of an energy facility, from 10 to 20 years (or any term of years or life, if death results), 18 U.S.C. 1366;
! for providing material support to a terrorist or a terrorist organization, from 10 to 15 years (or any term of years or life, if death results), 18 U.S.C. 2339A, 2339B;
! for destruction of national defense materials, from 10 to 20 years (or any term of years or life, if death results), 18 U.S.C. 2155;
! for sabotage of a nuclear facility, from 10 to 20 years (or any term of years or life, if death results), 42 U.S.C. 2284;
! for carrying a weapon or explosive aboard an aircraft within U.S. special aircraft jurisdiction, from 15 to 20 years (or any term of years or life, if death results), 49 U.S.C. 46505; and
! for sabotage of interstate gas pipeline facilities, from 15 to 20 years (or any term of years or life, if death results), 49 U.S.C. 60123.

Section 811. Penalties for Terrorist Conspiracies.
It is a separate federal offense punishable by imprisonment for not more than five years to conspire to commit any federal felony, 18 U.S.C. 371. Coconspirators are likewise subject to punishment for the underlying offense and for any other crimes committed in furtherance of the conspiracy. Nevertheless, some federal criminal statutes impose the same penalties for both the crimes they proscribe and for conspiracy to commit. Again, section 811, opts for a less sweeping approach than the Administration had proposed. It establishes equivalent sanctions for conspiracy and the underlying offense in cases of: ! arson committed within a federal enclave, 18 U.S.C. 81; ! killing committed while armed with a firearm in a federal building, 18 U.S.C. 930(c); ! destruction of communications facilities, 18 U.S.C. 1362;
! destruction of property within a federal enclave, 18 U.S.C. 1363;
! causing a train wreck, 18 U.S.C. 1922;
! providing material support to a terrorist, 18 U.S.C. 2339A;
! torture committed overseas under color of law, 18 U.S.C. 2340A;
! sabotage of a nuclear facility, 42 U.S.C. 2284;
! interfering with a flight crew within U.S. special aircraft jurisdiction, 49 U.S.C. 46504;
! carrying a weapon or explosive abroad an aircraft with U.S. special aircraft jurisdiction, 49 U.S.C. 46505; and
Section 812. Post-Release Supervision of Terrorists.
When federal courts impose a sentence of a year or more upon a convicted defendant, they must also impose a term of supervised release, 18 U.S.C. 3583; U.S.S.G. §5D1.1. Supervised release is not unlike parole, except that it is ordinarily imposed in addition to rather than in lieu of a term, or portion of a term, of imprisonment. The term may be no longer than 5 years for most crimes and violations of the conditions of release may result in imprisonment for up to an additional 5 years, 18 U.S.C. 3583(e). There were proposals to create a maximum supervisory term of life for those convicted of acts of terrorism (subject to the calibrations of the Sentencing Commission). Section 812 amends section 3583 to provide for a supervisory release term of life or any term of years following conviction for a federal crime of terrorism as defined in 18 U.S.C. 2332b which resulted in death or involved a foreseeable risk of death or serious bodily injury, 18 U.S.C. 3583(j).

Section 813. Terrorism as Racketeering Activity.
Section 813 accepts the Administration’s recommendation that all federal crimes of terrorism be included on the predicate offense list for RICO (racketeer influenced and corrupt organizations) which proscribes acquiring or operating, through the patterned commission of any of a series of predicate offenses, an enterprise whose activities affect interstate or foreign commerce, 18 U.S.C. 1961.

Section 814. Cyberterrorism Deterrence and Prevention.
Computer fraud and abuse is a federal crime when it involves a federally protected computer, i.e., a federal computer, a computer used by financial institutions, or a computer used in interstate or foreign commerce, 18 U.S.C. 1030. Section 814 increases the penalty for intentionally damaging a protected computer from imprisonment for not more than 5 years to imprisonment for not more than 10 years. It also raises the penalty for either intentionally or recklessly damaging a protected computer after having previously been convicted of computer abuse from imprisonment for not more than 10 years to imprisonment for not more than 20 years. In order to trigger criminal or civil liability for causing damage to a federally protected computer, the damage must fall into one of several categories. It must involve losses of $5000 or more, or adversely affect certain medical data, or cause a physical injury, or threaten public health or safety. Section 814 supplies a fifth category – damage affecting a computer system used by or for the government for the administration of justice, national defense, or national security. Section 814 supplies an explicit definition for the kinds of losses that may be considered in order to determine whether the $5000 threshold has been met. They consist of any reasonable cost including but not limited to those incurred to take corrective action, make damage assessments, and effect recuperation, as well as the consequential costs of interrupted service.

Section 815. Obtaining Records: Additional Defense to Civil Actions Relating to Preserving Records in Response to Government Requests.
Section 2707(e) of title 18 of the United States Code affords communications service providers with a good faith defense to civil or criminal liability for their cooperation in response to a warrant, subpoena or court order. Section 2703(f) requires them to return over records and other evidence at government request. Section 815 extends the good faith defense of section 2707(e) to cover civil and criminal liability for service provider cooperation with a request under section 2703(f).

Section 816. Development and Support of Cybersecurity Forensic Capabilities.
Section 816 authorizes annual appropriations of $50 million to establish regional computer forensic laboratories. Section 817. Expansion of the Biological Weapons Statute.
Prior to enactment of the USA PATRIOT Act, federal law proscribed the use of biological agents or toxins as weapons, 18 U.S.C. 175. Section 817 supplements existing law with two federal crimes. First, it outlaws possession of a type or quantity of biological agents or toxins that cannot be justified for peaceful purposes, 18 U.S.C. 175(b). Second, consistent with federal prohibitions on the possession of firearms, 18 U.S.C. 922(g), and explosives, 18 U.S.C. 842(i), it makes it a federal offense for certain individuals – convicted felons, illegal aliens, and fugitives and the like – to possess biological toxins or agents, 18 U.S.C. 175b. Both offenses are punishable by imprisonment for not more than ten years and/or a fine of not more than $250,000.