

An hourglass-shaped graphic with a globe in the top bulb and a smaller globe in the bottom bulb. The hourglass is light blue and has a dark blue top cap. The globe in the top bulb is dark blue, while the globe in the bottom bulb is light blue. The text is centered within the hourglass shape.

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*Analysis of S. 1709, 108th Congress: the Security and
Freedom Ensured Act of 2003 (SAFE Act)*

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Analysis of S. 1709, 108th Congress: the Security and Freedom Ensured Act of 2003 (SAFE Act)

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Summary

This report is a section by section explanation of the effects of S. 1709, the SAFE Act, on current law. The SAFE Act was introduced in the 108th Congress “to amend the USA PATRIOT ACT to place reasonable limitations on the use of surveillance and the issuance of search warrants.”

Section 1. Short Title. Section 1 of the bill contains the short title, the “Security and Freedom Ensured Act of 2003” or “SAFE Act.”

Section 2. Limitation on Roving Wiretaps under the Foreign Intelligence Surveillance Act of 1978.

A. Proposed Amendment of 50 U.S.C. §1805(c)(1). Section 1805(c)(1) lists the information required to be specified in an order approving an electronic surveillance. Subparagraphs (A) and (B) of this section state that an order for an electronic surveillance would need to specify, amongst other things: (A) the identity, *if known*, or a description of the target; and, (B) the nature and location of each of the facilities or places at which the electronic surveillance will be directed, *if known*. Therefore, the statute allows for orders to be issued without requiring the government to specifically identify the target *or* the place of the electronic surveillance.

Section 2 of the SAFE Act proposes to amend 50 U.S.C. § 1805(c)(1) in two ways by requiring an order for electronic surveillance [hereinafter referred to as ‘order’] to identify either the target of the order or the place. The SAFE Act proposes to amend § 1805(c) by adding language that would require that, if the identity of the target is not known, the order provide a description of the target *and* the nature and location of the facilities and places at which the electronic surveillance will be directed. Furthermore, in cases where the facilities or places of surveillance are not known, it would require the order to identify the target. In effect, the SAFE Act would only allow electronic

surveillances in instances where either the identity of the target or the location of the surveillance is known and would no longer allow an electronic surveillance where neither the target nor the place of the surveillance is known.

B. Proposed Amendment of 50 U.S.C. § 1805(c)(2). Title 50 U.S.C. § 1805(c)(2) currently places no restrictions on when the surveillance of a place may be conducted, thus allowing an order for the electronic surveillance of a location to be conducted at any time and without a specific target identified or present at the location. Section 2 of the SAFE Act proposes to amend this section by adding an additional requirement that: “(B) in cases where the facility or place at which the surveillance will be directed is not known at the time the order is issued, that the surveillance be conducted only when the presence of the target at a particular facility or place is ascertained by the person conducting the surveillance.” The SAFE Act would only allow for the electronic surveillance of a location when the target of the surveillance is present and not at “any time.”

Section 3. Limitation on Authority to Delay Notice of Search Warrants.

A. Proposed Amendment of 18 U.S.C. § 3103a(b)(1). Title 18, U.S.C. §3103a(b)(1) addresses the circumstances under which notice of the execution of a search warrant may be delayed. It states that notice of a search warrant may be delayed if “the court finds reasonable cause to believe that providing immediate notification of the execution of the warrant *may* have an adverse result (as defined in section 2705).” (emphasis added). In turn, § 2705 defines adverse result as being : (1) endangering the life or physical safety of an individual; (2) flight from prosecution; (3) destruction or tampering with evidence; (4) intimidation of potential witnesses; or, a “catch-all” provision, (5) otherwise seriously jeopardizing an investigation or unduly delaying a trial. Therefore, under current law, the government can delay giving notice of a search warrant if it can show that there is a possibility that any of the above-mentioned results would occur.

The SAFE Act proposes to amend § 3103a(b)(1) by striking ‘may have an adverse result (as defined in section 2705)’ and inserting in its place ‘will (A) endanger the life or physical safety of an individual; (B) result in flight from prosecution; or (C) result in the destruction of, or tampering with, the evidence sought under the warrant’. The effect of the amendment is two-fold. First, by changing ‘may’ to ‘will’, the government would no longer be able to show just a possibility of the listed negative results, but it would be required to show that any one of these results is inevitable.¹ Second, the proposed amendment would narrow the list of negative results that would be considered when determining if a delay in notice is needed by deleting two of the results, (1) intimidation of potential witnesses, and, the “catch-all” provision (2) otherwise seriously jeopardize an investigation or unduly delay a trial. This proposed amendment addresses the criticisms of the USA PATRIOT ACT on its departure from the Fourth Amendment standards for searches and seizures. The Fourth Amendment provides protection from

¹ This interpretation is based on the common meaning of the words ‘may’ and ‘will’. ‘May’ is defined as indicating “a possibility or probability”, while ‘will’ is used “to express inevitability.” MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 767, 1433 (11th ed. 2003).

warrantless searches and seizures subject to very specific exceptions more commonly known as “exigent circumstances².” The USA PATRIOT ACT has been criticized for its deviation from those very narrowly tailored exceptions by creating exceptions not currently considered exigent circumstances under the Fourth Amendment³. This amendment is meant to bring the USA PATRIOT ACT back into parallel with the exigent circumstances exceptions of the Fourth Amendment.

B. Proposed Amendment of 18 U.S.C. § 3103a(b)(2). Title 18 U.S.C. § 3103a(b)(2) discusses the timetable for providing notice of the execution of a search warrant. The current law allows for notification to take place “within a reasonable period of its execution” and allows for extensions by a court for good cause shown. Accordingly, there are no specific time limits for notification and instead it is left for the courts to determine how long a “reasonable period” of time is. Additionally, current law does not put a cap on the length of the extensions granted by the courts in effect allowing for an indefinite extension.

The amendment proposed by Section 3 of the SAFE Act seeks to strike the language ‘within a reasonable period’ and instead set a more specific timetable for the notifications and the granting of extensions. It would require that notification be given no later than 7 days after the execution of the warrant and it would allow for extensions of that period of time by no more than 7 days at a time. Furthermore, the amendment would change the standard for determining the need of an extension from ‘good cause shown’ which allows for a more subjective interpretation, to a more objective and specific standard. It would require that it be proven that notice of the execution of the warrant will (1) endanger the life or physical safety of an individual; (2) result in flight from prosecution; or (3) result in the destruction of, or tampering with, the evidence sought under the warrant. Once again, note the use of the word ‘will’ in the amendment which creates a higher standard than the one in the current law. Also, while the current law does not state who is allowed to request the extensions on the notifications, the proposed amendment would require that the request be made by the Attorney General, the Deputy Attorney General, or an Associate Attorney General.

C. Addition of new subsection to 18 U.S.C. § 3103a. In addition, Section 3 of the SAFE Act proposes to add one more subsection to § 3103a, subsection (c). The proposed subsection (c) would impose a new requirement on the Attorney General for reports to Congress on the requests made for delays of notice and extensions of delays of notice. It would require a report to be submitted every 6 months stating how many requests for delay of notice with respect to warrants have been granted, denied, or are pending; and, for each request for delayed notice that was granted, the number of requests for extensions of the delay of notice, categorized as granted, denied, or pending. The proposed amendments would give Congress the ability to monitor the notification process.

² See *Terry v. Ohio*, 392 U.S. 1 (1968)(holding that a warrantless search was allowed when the police officer believed that there was a threat to the life or physical safety of a person); *United States v. Santana*, 427 U.S. 38 (1976)(warrantless search allowed to prevent felon from fleeing); *Schmerber v. California*, 384 U.S. 757 (1966)(warrantless search is allowed when there is a danger of destruction of property).

³ 149 CONG. REC. S12377 (daily ed. Oct. 2, 2003)(statement of Sen. Craig).

D. Sunset Provision. Finally, Section 3 of the SAFE Act proposes to add the proposed amendments of 18 U.S.C. § 3103a to the sunset provision of the USA PATRIOT ACT. It would therefore make the current law expire on December 31, 2005. However, it would allow the current law to remain in effect and be applicable to those investigations which predate the implementation of the proposed amendment.

Section 4. Privacy Protections for Library, Bookseller, and other Personal Records Under Foreign Intelligence Surveillance Act of 1978.

A. Proposed Amendment of Section 501(b)(2) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. § 1861(b)(2)). Title 50 U.S.C. § 1861 addresses the requirements for seeking the production of ‘tangible things’⁴ [hereinafter referred to as ‘records’] for foreign intelligence and international terrorism investigations. Subsection (b)(2) requires the government to specify that the records sought are for an authorized investigation to obtain foreign intelligence information not concerning a United States person, or to protect against international terrorism or clandestine intelligence activities. It allows the government to put in a request for the production of records from *any* person so long as it states that it is for an authorized investigation. It does not restrict the production by ownership of the records, but rather only by the reason for the requested production. The proposed amendment would add a requirement that the records sought belong to a person who is believed to be a foreign power or an agent of a foreign power. It would no longer make it possible for the government to seek records concerning any person but only those for whom it provides specific and articulable facts to believe that they are a foreign power or an agent of a foreign power.

B. Proposed Amendment of Section 501(c)(1) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. § 1861(c)(1)). Title 50 U.S.C. § 1861(c)(1) requires that a judge find that the application for the production of records meets the requirements under § 1861(a) and (b). Section 4 of the SAFE Act seeks to amend § 1861(c)(1) by adding an additional finding that the judge reviewing the application must make prior to granting the application. The amendment would require the judge to not only find that the application meets the requirements of the section, but also to make an independent finding that “there are specific and articulable facts giving reason to believe that the person to whom the records pertain is a foreign power or an agent of a foreign power.” It would require that the application is sought based on the subject of the records and not solely on their relevance.

C. Proposed Amendments of Section 502(a) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. § 1862(a)). Title 50 U.S.C. § 1862 (a) states that the Attorney General is required to fully inform the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate concerning all requests for the production of documents under 50 U.S.C. § 1861. The proposed amendment would add the Committee on the Judiciary of the House

⁴ ‘Tangible things’ includes books, records, papers, documents and other items. 50 U.S.C. § 1861(a)(1).

of Representatives to the list of Committees to which the Attorney General must provide reports.

Section 5. Privacy Protections for Computer Users at Libraries Under National Security Authority.

A. Proposed Amendment of 18 U.S.C. § 2709. Section 5 of the SAFE Act proposes to amend 18 U.S.C. 2709(a). Subsection (a) of § 2709 addresses the type of information that a wire and electronic communications service provider must provide upon request of the Director of the Federal Bureau of Investigation. The SAFE Act proposes to add an exception to this section which would exclude libraries from being considered wire or electronic communication service providers. The proposed amendment would narrow the definition of a wire and electronic communication service provider for purposes of 18 U.S.C. § 2709.

B. Addition of New Subsection to 18 U.S.C. § 2709. Section 5 of the SAFE Act seeks to add a new subsection, subsection (f), to 18 U.S.C. § 2709. This subsection would provide the definition of ‘library’ for purposes of 18 U.S.C. § 2709. ‘Library’ would include a public library, a public elementary or secondary school library, an academic library, a research library (a library that makes publicly available library services and materials suitable for scholarly research and not otherwise available to the public, and that is not an integral part of an institution of higher education), or, a private library or other special library, but only if the State in which such private or special library is located determines that the library should be considered a library for purposes of this section. The proposed amendment would also require that these ‘libraries’ provide services of access to the Internet, books, journals, magazines, newspapers, or other similar forms of communication in print or digitally to patrons for their use, review, examination, or circulation.

Section 6. Extension of Patriot Sunset Provision. Section 6 of the SAFE Act proposes to sunset several sections of the USA PATRIOT ACT which previously did not sunset, on December 31, 2005. The proposed amendment would sunset section 213 (amending the provision addressing delaying notice of the execution of a search warrant), section 216 (amending the provisions addressing the requirements for pen registers and trap and trace devices), section 219 (amending Rule 41 of the Federal Rules of Criminal Procedure), and, section 505 (amending the provision dealing with counterintelligence access to telephone toll and transactional records).