

# WebMemo



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## Patriot Act: A Chance to Commit to National Security

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On September 22–23, the House and Senate Judiciary Committees held hearings to examine reauthorization of key provisions of the Patriot Act, which helps law enforcement fight terrorism through more flexible surveillance and investigation methods and easier information sharing. Key provisions of the act will expire on December 31 if Congress does not reauthorize them.

The three foiled terrorist plots announced this past week are evidence that America's counterterrorism tools are working. And the Patriot Act is a key element in this framework. Not only does it help fight terrorism by aiding authorities in their effort to stop the flow of information and resources between terrorist groups, but it does so in a way that is consistent with the U.S. Constitution. This tool should be supported and maintained by Congress.

**Three Key Provisions.** The Patriot Act, enacted shortly after the attacks on 9/11, was intended to help law enforcement share information as well as to provide more extensive methods by which to track down terrorists at the earliest stages of terrorist plot formation. The act makes it easier for authorities to conduct surveillance on terrorists, with key provisions that account for modern technologies (such as cell phones). While there are multiple provisions that make up the Patriot Act, there are three provisions set to expire this year:

1. *Section 206: Roving Surveillance Authority.* This provision allows law enforcement, after approval from the court created by the Foreign Intelligence Surveillance Act (FISA), to conduct continuous

surveillance of national security suspects across modes of communications. It is meant to stop terrorists who often switch telecommunications devices (like cell phones) to evade authorities.

While roving surveillance has been available to authorities in criminal investigations prior to 2001, Section 206 would allow authorities to perform such an act in national security investigations. This gives law enforcement flexibility, but it does so with built-in procedural safeguards, such as a requirement that the requesting authority demonstrate probable cause for the surveillance.

It further requires continuous monitoring by the FISA court and extensive oversight by Congress. This section, used approximately 140 times since 2001, is a gigantic step forward in terms of helping law enforcement fight terrorism in a modern, technological world.

2. *Section 215: Business Record Orders under FISA.* This provision allows law enforcement, with approval from the FISA court, to require disclosure of documents and other records from businesses and other institutions (third parties) without a suspect's knowledge.

This paper, in its entirety, can be found at:  
[www.heritage.org/Research/HomelandSecurity/wm2648.cfm](http://www.heritage.org/Research/HomelandSecurity/wm2648.cfm)

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It is essentially a way for prosecutors to obtain evidence in national security investigations in a fashion similar to that of a grand jury subpoena. The difference is that Section 215 actually requires more procedural safeguards than a grand jury subpoena, including a requirement that the requesting authority show relevance and obtain court approval (the grand jury standard being a simple showing of relevance).

It further protects civil liberties by requiring additional approval for document requests that might have the slightest relation to freedom of speech and expression, such as library records. It has been used approximately 250 times since 9/11.

3. *Section 6001 of the Intelligence Reform and Terrorism Prevention Act: The Lone Wolf Provision.* This provision allows law enforcement to track non-U.S. citizens acting alone to commit acts of terrorism that are not connected to an organized terrorist group or other foreign power. While the FBI has confirmed that this section has never actually been used, it needs to be available if the situation arises where a lone individual may seek to do harm to the United States.

**A Success Story.** The U.S. has not experienced a terrorist attack on its own soil since 9/11, despite repeated attempts. In fact, an examination of publicly available information demonstrates that at least 26 terrorist plots have been foiled since 9/11.

The 2002 Lackawanna Six plot, where individuals involved in the drug trade went overseas to obtain terrorist training, was foiled partly because law enforcement was able to pursue the investigation as a single case, a luxury afforded to them only because of changes made under the Patriot Act. Under a pre-Patriot Act standard, law enforcement would have been required to pursue the drug investigation separately from the terrorism plot, unable to share information and evidence acquired.

Attorney General John Ashcroft has credited the Patriot Act as a major factor in the arrest of 310 terrorism suspects. And just this week, the success of the Patriot Act was recognized by President Barack Obama when he expressed his support for its reauthorization.

While the FBI has not indicated whether this week's foiled plots were the result of the Patriot Act's provisions, a spokesman stated that he could not discuss the tools used to investigate the case because these authorities were before the FISA court.<sup>1</sup>

**Time to Institutionalize Our Counterterrorism Tools.** Despite repeated attempts to demonstrate abuse, little evidence has ever been proffered to demonstrate any Patriot Act misuse. In fact, at times the Patriot Act offers significantly more protections than available under common criminal investigations. And more often than not, it simply modernizes already-available tools that prosecutors have used routinely in criminal investigations well before 2001. These provisions are subject to routine oversight by both the FISA court and Congress. The act has been narrowed and refined continuously, contributing to the fact that no single provision of the Patriot Act has ever been found unconstitutional.

Congress should resist initiatives that would repeal or erode key provisions of the Patriot Act and should fully institutionalize these tools into the broader counterterrorism framework. As former White House Homeland Security Advisor Ken Weinstein, phrased it, "There is no reason to return to the days when it was easier for prosecutors to secure records in a simple assault prosecution than for national security investigators to obtain records that may help prevent the next 9/11."<sup>2</sup>

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1. David Kris, "Reauthorizing the USA PATRIOT Act: Ensuring Liberty and Security," testimony before the Committee on the Judiciary, U.S. Senate, September 23, 2009.
  2. Kenneth Wainstein, testimony before the Committee on the Judiciary, U.S. Senate, September 23, 2009, at <http://judiciary.senate.gov/pdf/09-09-23%20Wainstein%20Testimony.pdf> (October 9, 2009).