

# WebMemo



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## Letting PATRIOT Act Provisions Expire Would Be Irresponsible

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Last night, the House of Representatives voted not to suspend the rules and pass three key counterterrorism amendments to the Foreign Intelligence Surveillance Act (FISA). The amendments—two found in the PATRIOT Act and one in the Intelligence Reform and Terrorism Prevention Act of 2004—are set to expire at the end of February. The vote in the House was 277–148, with 26 Republicans voting against the extension.

With at least 36 known plots foiled since 9/11, the United States continues to face a serious threat of terrorism. As such, national security investigators continue to need these authorities to track down terror leads and dismantle plots before the public is in any danger. These three amendments—which have been extensively modified over the years by Congress and now include significant new safeguards, including substantial court oversight—are vital to this success. Congress should not let the sunset provisions expire and should instead seek permanent authorization.

**Three Important Provisions.** The PATRIOT Act, and subsequently its sunset provisions, contains a critical set of tools within America's counterterrorism framework. In fact, the law, enacted shortly after 9/11, was meant to provide more extensive methods for and coordination between law enforcement and intelligence personnel to track down terrorists at the earliest stages of terror plot formation. These capabilities had been provided to law enforcement for decades in criminal investigations but had not been available for terrorism investigations.

Much of the PATRIOT Act has been permanently enacted. However, three of the act's key provisions contain a sunset clause and must be reauthorized periodically. These include “roving” surveillance, the business record orders (called the “library provision” by opponents of the act), and the “lone wolf” provision.

*1. Section 206 of the PATRIOT Act: Roving Surveillance Authority.* Roving wiretaps have routinely been used by domestic law enforcement in standard criminal cases since the mid-1980s. Roving wiretaps allow investigators, working within the law, to track a target as he moves from cell phone to cell phone.

However, national security agents did not have this garden-variety investigative tool until the passage of the PATRIOT Act in 2001. Section 206 authorizes the government to conduct “roving” surveillance of a foreign power or agent thereof. This provision allows law enforcement, after approval from the court created by 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.

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Since its passage, Section 206 has been subjected to substantial and appropriate oversight by Congress and now includes robust safeguards. As a threshold matter, the government must prove that there is “probable cause” to believe that the target is a foreign power or an agent of a foreign power.

It further requires continuous monitoring by the FISA court and substantial reporting requirements to that court by the government. This section is a gigantic step forward in terms of helping law enforcement fight terrorism in a modern, technological world.

As former Homeland Security Advisor Kenneth Wainstein said in his 2009 testimony to the Senate Judiciary Committee regarding this provision, “These safeguards and the operational need to surveil terrorists and spies as they rotate their phones and other communications devices make a very strong case for reauthorizing ... Section 206.” As of September 2009, the FBI had used this tool approximately 140 times.

**2. Section 215 of the PATRIOT Act: Business Record Orders Under FISA.** Domestic prosecutors routinely rely on business records and other concrete evidence to prove up a wide variety of criminal charges from simple theft to homicide. Law enforcement, working with local prosecutors, acquires this evidence through the course of the investigation, oftentimes through the use of a subpoena. However, national security agents did not have the same authority to acquire similar evidence prior to the passage of Section 215. They had to obtain a court order and were limited to those records held by a business that was a “common carrier, public accommodation facility, physical storage facility or vehicle rental facility.”

Section 215 eliminated those arbitrary and self-limiting provisions but requires that the records sought are relevant to an authorized investigation. However, unlike a standard prosecutor-issued subpoena, or even a grand jury subpoena, Section 215 orders require FISA court approval. There is substantial congressional oversight and reporting requirements built into Section 215.

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. Third-party recipients of 215 orders can appeal the order to the FISA court.

Section 215 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.

As Wainstein testified, “There is no reason to return to the days when it is 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.”

**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.

**Worthy of Reauthorization.** In February 2010, Congress passed a one-year extension of the PATRIOT Act’s three sunset provisions. These provisions are set to sunset again on February 28, 2011, if Congress does not reauthorize them. Last night’s vote was an attempt to do just that. However, the motion to suspend the rules and pass the bill, which requires a two-thirds vote to proceed, failed by a vote margin of 277–148.

Yesterday’s vote was troublesome, mostly because it is unclear why the act, which has enjoyed bipartisan support, was not reauthorized. Little evidence has ever been proffered to demonstrate any PATRIOT Act misuse. In fact, at times the PATRIOT Act offers significantly more protections than are available under common criminal investigations. And more often than not, it simply modernizes already-available tools that prosecutors have routinely used 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.

The necessity for tools like the PATRIOT Act in combating acts of terrorism, coupled with the act's numerous safeguards meant to ensure protection of civil liberties, makes reauthorization an obvious choice. Congress should not let the sunset provisions expire.

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