

# WebMemo



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## After bin Laden: Support the PATRIOT Act

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Osama bin Laden's death was undoubtedly a major victory for the United States and civilized society. The War on Terrorism, however, is not over—al-Qaeda and other terrorist groups will continue to stage plots against the United States, as they have done at least 39 times since 9/11. Successful counterterrorism policies, capable of stopping these threats before they materialize, require tools that empower counterterrorism and law enforcement investigators to track down leads, including in local communities.

Those tools include two provisions of the PATRIOT Act and one in the Intelligence Reform and Terrorism Prevention Act of 2004, which provide national security investigators with more extensive means to prevent acts of terrorism. Congress and the Administration should ensure that these tools are made a permanent piece of the nation's counterterrorism policy.

**Expiring Provisions in National Security Law.** Enacted shortly after 9/11, provisions of the PATRIOT Act modernize intelligence and legal authorities, ensuring that terrorism investigators have the same tools as those available in criminal investigations. While much discussion surrounding the Act has centered on questions of civil liberties, no provision has been found unconstitutional, and in most cases its provisions have more procedural safeguards in place than similar criminal investigative tools. Nevertheless, Congress has not yet elected to make the entirety of the act permanent, and three key provisions are set to expire on May 27. These are:

**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 judicial approval from the court created by the Foreign Intelligence Surveillance Act (FISA), to conduct continuous surveillance of national security suspects across modes of communication. It was enacted to allow proper authorities to monitor suspected terrorists in real time as they communicate. Like common criminals, terrorists also switch telecommunications devices (like cell phones) to evade authorities.

Since its passage, Section 206 has been subjected to substantial and appropriate oversight by Congress and now includes robust safeguards. The

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government must prove 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 a wide variety of criminal charges from simple theft to homicide. Law enforcement, working with local prosecutors, acquires this evidence throughout the course of an investigation, often 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, dangerously narrow and self-limiting provisions but required that the records sought are relevant to an authorized investigation. However, unlike a standard prosecutor-issued subpoena, or even a grand jury subpoena, an order issued under Section 215 requires FISA court approval. In other words, Congress inserted a federal judge between investigators and potential suspects. Furthermore, the law requires substantial congressional oversight.

This provision allows law enforcement, with approval from the FISA court, to require disclosure

of documents and other records from businesses and other institutions without a suspect’s knowledge. Third-party recipients of Section 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. As we have seen in recent months, the incidence of “lone wolf” attacks is on the rise, and thus this is no time to disarm our counterterrorism professionals of this invaluable tool.

**An Effective Counterterrorism Tool.** At least 39 terrorist plots have been thwarted since 9/11. The PATRIOT Act has proved essential in halting a number of these attacks. For example, when Najibullah Zazi sought to employ a triacetone triperoxide (TATP) bomb to blow up the New York subway system, counterterrorism investigators were able to use “roving” surveillance to track Zazi and stop him before the public was in danger. A standard provision in counternarcotics operations, “roving” surveillance allows investigators to receive one authorization allowing them to link wiretaps to an individual rather than having to obtain separate authorizations for each telephone number used. Thus, investigators were able to pursue Zazi through multiple means of communication—including disposable cell phones, email, and text messages—streamlining the investigation and helping bring counterterrorism capabilities in line with 21st-century technology.

**Due for Renewal.** In February, Congress passed a 90-day extension of the expiring PATRIOT Act provisions with strong bipartisan support. Yet, the “roving” surveillance, business records, and “lone wolf” provisions are now set to expire on May 27. In order to strengthen counterterrorism capabilities and help ensure that terrorists are stopped long before the public is put in danger, Congress and the Administration should:

- **Support the PATRIOT Act.** It is time that Congress take steps to ensure that law enforcement and intelligence authorities continue to have the right tools to stop terrorism. This means seeking permanent authorization of all three provisions discussed above. Institutionalizing these tools within the counterterrorism framework is vital to thwarting future terrorist attacks and ensuring the continued security of the nation.
- **Strengthen information-sharing capabilities.** Information sharing should not mean simply having state and local law enforcement send information up to the federal government; rather, state and local law enforcement should be made

true partners. Likewise, the U.S. should increase information sharing with its allies and improve communication between the Departments of State, Justice, and Homeland Security and intelligence agencies.

- **Create a lawful detention framework for the incapacitation and lawful interrogation of terrorists.** Congress should insist on a lawful, durable detention framework, written into law, which deals not only with detainees in Guantanamo, but also future captures outside Afghanistan.

Without the necessary tools, law enforcement and intelligence may not have the right leads to track down terrorists and stop a potential attack in time. Congress should step up and ensure that U.S. intelligence and law enforcement have the authority needed to help thwart the next terrorist attack.

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