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Politics

The Patriot Act: Key Controversies

by Larry Abramson and Maria Godoy

THE PATRIOT ACT[Complete Coverage](#)

Feb. 14, 2006 -- The USA Patriot Act seems headed for long-term renewal. Key senators have reached a deal with the White House that allays the civil liberties concerns of some critics of the law.

Passed in the weeks after the Sept. 11 attacks, the law expanded the government's powers in anti-terrorism investigations. Controversial surveillance provisions were set to expire at the end of last year; attempts to re-authorize them long-term were filibustered last December. The compromise reached last week, which has the support of both House Speaker Dennis Hastert and Senate Minority Leader Harry Reid, makes three major changes to the law:

- 1** - Recipients of court-approved subpoenas for information in terrorism investigations now have the right to challenge a requirement that they refrain from telling anyone. However, recipients must wait a year before challenging the gag order.
- 2** - The second change concerns recipients of a so-called National Security Letter, which is an administrative subpoena issued by the FBI demanding records. Recipients will no longer be required to tell the FBI the name of any attorney consulted about the letter.
- 3** - Most libraries -- those that act in traditional roles, such as lending books and providing Internet access -- will not be subject to National Security Letters demanding information about suspected terrorists. However, libraries that act as an Internet Service Provider will still be subject to National Security Letters.

Below, NPR examines the act's most controversial provisions:

Information Sharing

Sec. 203(b) and (d): Allows information from criminal probes to be shared with intelligence agencies and other parts of the government. **Expires Dec. 31.**

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Supporters say the provisions have greatly enhanced information sharing within the FBI, and with the intelligence community at large.

Con:

Critics warn that unrestricted sharing could lead to the development of massive databases about citizens who are not the targets of criminal investigations.

Roving Wiretaps

Sec. 206: Allows one wiretap authorization to cover multiple devices, eliminating the need for separate court authorizations for a suspect's cell phone, PC and Blackberry, for example. **Expires Dec. 31.**

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The government says roving wiretaps are needed to deal with technologically sophisticated terrorists.

Con:

Critics say the language of the act could lead to privacy violations of anyone who comes into casual contact with a suspect.

Access to Records

Sec. 215: Allows easier access to business records in foreign intelligence investigations. **Expires Dec. 31.**

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The provision allows investigators to obtain books, records, papers, documents and other items sought "in connection with" a terror investigation.

Con:

Critics attack the breadth of the provision, saying the law could be used to demand the reading records of library or bookstore patrons.

Foreign Intelligence Wiretaps and Searches

Sec. 218: Lowers the bar for launching foreign intelligence wiretaps and searches. **Expires Dec. 31.**

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Pro:

Allows investigators to get a foreign intelligence wiretap or search order, even if they end up bringing criminal charges instead.

Con:

Because foreign intelligence probes are conducted in secret, with little oversight, critics say abuses could be difficult to uncover.

"Sneak & Peek" Warrants

Sec. 213: Allows "sneak and peek" search warrants, which let authorities search a home or business without immediately notifying the target of a probe. **Does not expire.**

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Pro:

Supporters say this provision has already allowed investigators to search the houses of drug dealers and other criminals without providing notice that might have jeopardized an investigation.

Con:

Critics say the provision allows the use of "sneak and peek" warrants for even minor crimes, not just terror and espionage cases.

Material Support

Sec. 805: Expands the existing ban on giving "material support" to terrorists to include "expert advice or assistance." **Does not expire.**

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Pro:

Supporters say it helps cut off the support networks that make terrorism possible.

Con:

Critics say the provision could lead to guilt by association.

The 'Lone Wolf' Provision

Section 6001 of the Intelligence Reform and Terrorism Prevention Act of 2004 allows intelligence investigations of lone terrorists not connected to a foreign nation or organization.

While not part of the Patriot Act, this provision also sunsets on Dec. 31 and is under review. Civil liberties groups say the provision could sweep in protesters and those suspected of involvement in domestic terrorism. Language passed by the Senate Intelligence Committee would make this section permanent.

Information Sharing

Sections 203(b) and 203(d) of the Patriot Act are at the heart of the effort to break down the "wall" that used to separate criminal and intelligence investigations. The Justice Department has frequently blamed the wall for the failure to find and detain Sept. 11 hijackers Nawaf al-Hazmi and Khalid al-Midhar prior to the attacks. CIA agents had information that both men were in the United States and were suspected terrorists, but the FBI says it did not receive that information until August 2001.

U.S. officials also blame the wall for the failure to fully investigate Zacarias Moussaoui, who has since pleaded guilty in connection with the Sept. 11 plot. The government says that existing procedures made investigators afraid of sharing information between the intelligence and criminal sides of the probe. Supporters say these provisions have greatly enhanced information sharing within the FBI, and with the intelligence community at large.

Civil libertarians say the failure to share information was largely a result of incompetence and misunderstanding of the law. They say investigators were always allowed to share grand jury information, which is specifically authorized by this section. They warn that the scope of the Patriot Act language is far too broad and encourages unlimited sharing of information, regardless of the need.

Critics say that investigators should have to explain why information is being shared, and that only information related to terrorism or espionage should be released. They warn that unrestricted sharing could lead to the development of massive databases about innocent citizens.

[« Back to top](#)

Roving Wiretaps

The Justice Department has long complained about restrictions that required separate court authorizations for each device used by the target of an investigation, whether it's a computer terminal, a cell phone or a Blackberry. This provision of the Patriot Act specifically allows "roving wiretaps" against

suspected spies and terrorists. The government says it has long had this type of flexibility in criminal cases, and that such authority is needed in dealing with technologically sophisticated terrorists.

Surveillance experts point out, however, that criminal wiretaps must "ascertain" whether the person under investigation is going to be using the device before the tap takes place. Civil liberties groups say the language of the Patriot Act could lead to privacy violations of anyone who comes into casual contact with the suspect. They want Congress to require investigators to specify just which device is going to be tapped, or that the suspect be clearly identified, in order to protect the innocent from unwarranted snooping.

[« Back to top](#)

Access to Records

Probably the most hotly debated provision of the law, Section 215 has come to be known as the "libraries provision," even though it never mentions libraries or bookstores. Civil liberties groups attack the breadth of this section -- which allows investigators to obtain "any tangible thing (including books, records, papers, documents and other items)," as long as the records are sought "in connection with" a terror investigation.

Library groups said the law could be used to demand the reading records of patrons. But the government points out that the First Amendment activities of Americans are specifically protected by the law. The Justice Department has released previously classified statistics to show the law has never been used against libraries or bookstores. But the act's critics argue that there's no protection against future abuse.

Civil liberties groups have proposed numerous amendments: special protections for libraries and bookstores; a requirement that investigators explain the reason the records are sought; and an end to the "gag rule" that prohibits people who receive a 215 order from talking about it with anyone. The Justice Department has agreed that recipients can consult with an attorney and is open to an amendment that specifies this right. But the government says the controversy over this provision is an overreaction, and that this section merely expands longstanding access to certain business records.

[« Back to top](#)

Foreign Intelligence Wiretaps and Searches

Criminal investigators have a high bar to reach when asking for permission to wiretap or search a suspect's home. The bar is lower in counterterrorism or counterintelligence probes, where investigators must only prove the suspect is an "agent of a foreign power." Previously, investigators had to show that the "primary purpose" of the order was to gather foreign intelligence; the Patriot Act lowered that requirement to a "significant purpose." The government said this change takes away another brick in "the wall" separating criminal and intelligence probes: It allows investigators to get a foreign intelligence wiretap or search order, even though they might end up bringing criminal charges.

Civil liberties groups insist that "the wall" rose up through misunderstandings, and that there was no hard barrier against launching a criminal probe against someone being investigated as a spy or terrorist. They point to a 2002 ruling by the Foreign Intelligence Court of Review that buttresses this point.

But critics say the Patriot Act creates a new risk in Section 218 -- that investigators will too easily use spying and terrorism as an excuse for launching foreign intelligence wiretaps and searches. They point to the fact that the number of intelligence wiretaps now exceeds the number of criminal taps. Since these probes are conducted in secret, with little oversight, abuses could be difficult to uncover. Civil liberties groups say one antidote would be to require that the Justice Department release more information about foreign intelligence investigations.

[« Back to top](#)

"Sneak & Peek" Warrants

This section allows for "delayed notice" of search warrants, which means the FBI can search a home or business without immediately notifying the target of the investigation. The Justice Department says this provision has already allowed investigators to search the houses of drug dealers and other criminals without providing notice that might have jeopardized an investigation. Investigators still have to explain why they want to delay notice, and must eventually tell the target about the search.

Critics say that investigators already had the power to conduct secret searches in counterterrorism and counterespionage probes. The Patriot Act, they say, authorized the use of this technique for any crime, no matter how minor. They say that "sneak and peek" searches should be narrowly limited to cases in which an investigation would be seriously jeopardized by immediate notice. Legislation to cut off funding for such searches passed the House in 2003. However, this provision does not face a sunset as other controversial provisions do, so it may be harder for opponents to amend it.

[« Back to top](#)

Material Support

The antiterrorism law passed in 1996, in the aftermath of the Oklahoma City bombing, outlawed providing "material support" to foreign terrorist organizations, and expanded the definition of support to include "personnel" and "training." Section 805 of the Patriot Act extended that ban to "expert advice or assistance."

The Justice Department has said this expansion is critical to cutting off the networks of support that make terrorism possible. But many legal scholars -- and even some judges -- contend the provision is vague. They say it will lead to guilt by association and might criminalize unwitting contact with a terrorist group.

Opponents also argue that it stifles free speech, by raising fears that any charitable contribution could somehow be linked to a terrorist group by the Justice Department, and then construed as "material support." Courts have differed on the constitutionality of these efforts to cut off the "lifeblood" of terrorism. Some have ruled they are unconstitutionally vague, others have upheld these laws. In response, Congress tried to tighten the definitions in the 2004 Intelligence Reform and Terror Prevention Act. But the language in that law is also being challenged in court.

[« Back to top](#)[Full List of Patriot Act Provisions Expiring on Dec. 31, 2005](#)

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