

The Intelligence Reform and Terrorism Prevention Act: Addressing Controversies, Expanding Powers

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Brief Analysis

Today, President George W. Bush will sign the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA), which represents the most dramatic and fundamental changes to the U.S. intelligence community since 1947, when the CIA was created. While public and media attention has been focused on the establishment of a director of national intelligence and a National Counterterrorism Center, other equally important aspects of IRTPA have received far less attention. Perhaps of greatest significance, IRTPA will improve the FBI and Justice Department's ability to combat international terrorism in a variety of ways.

Expansion of the FBI's Powers

One of the most far reaching and controversial changes in IRTPA involved amending the Foreign Intelligence Surveillance Act of 1978 (FISA) to allow the FBI to obtain wiretaps and conduct secret searches on individual terrorist suspects with no connection to a foreign power. Several members of Congress have been pushing for the change in recent years, driven in part by revelations that the FBI did not obtain a FISA wiretap on accused conspirator Zacarias Mousaoui prior to the attacks because its lawyers did not believe there was sufficient information to connect him to a foreign power. FBI officials supported the change, maintaining that there is increasing danger from lone actors who may sympathize with the larger causes of formal terrorist groups and take action accordingly, even if they have little or no connection to these groups.

While this provision will certainly increase the FBI's ability to target suspected terrorists, it is unclear whether it will survive judicial review. Civil liberties groups argue that the measure violates Fourth Amendment protections against unreasonable search and seizure. Hence, the issue will likely end up in the courts, presumably once the Justice Department attempts to prosecute an individual on whom they obtained a FISA warrant using this provision. The defendant, however, will likely be in the awkward position of having to challenge the legality of the FISA warrant without knowing whether the department relied on the "lone wolf" provision in the FISA application.

Prosecuting Terrorists

IRTPA also changes the "material support" statute -- Title 18, Section 2339, of the Antiterrorism and Effective Death Penalty Act of 1996. Section 2339A makes it a crime to provide material support or resources that a donor knows will be used in connection with a terrorist act; Section 2339B prohibits "knowingly" providing material support or resources to organizations designated as "foreign terrorist organizations." As defined by the statute, "material

support and resources" include not only financial assets, but also training, communications equipment, safe houses and other facilities, as well as other physical assets. The USA PATRIOT Act amended the statute, adding "expert advice and assistance" to the list of prohibited types of support.

The material support statute has been the cornerstone of the Justice Department's efforts to prosecute suspected terrorists in recent years. According to the department, as of May 2004, more than fifty defendants in seventeen different judicial districts had been charged under the statute since September 11. These include John Walker Lindh, the so-called "American Taliban"; six Yemenis in Lackawanna, New York, who attended an al-Qaeda training camp; an Ohio truck driver who scouted various U.S. sites on al-Qaeda's behalf; a Saudi student in Idaho who served as the administrator for a website allegedly containing jihadist material; and some of the paintball players in Virginia who were charged with providing support to a Kashmiri terrorist group, among others.

IRTPA adds to the statute by making it a criminal offense to "knowingly receive" military-type training from a designated terrorist organization. In the past, even if someone confessed to knowingly attending an al-Qaeda training camp, this alone would not have been an illegal act. The new IRTPA provision is particularly significant in light of U.S. intelligence estimates that 10,000-20,000 individuals received training at al-Qaeda camps in Afghanistan from 1996 to 2001, not to mention the many individuals who attended training camps run by other terrorist organizations.

In addition, IRTPA clarifies portions of the material support statute that some federal courts have found unconstitutional. For example, in *Humanitarian Law Project, et al. v. John Ashcroft, et al.*, the plaintiffs sought to provide assistance to the Kurdistan Workers Party (PKK) and the Liberation Tigers of Tamil Eelam (LTTE), both of which had been designated as terrorist organizations by the U.S. government. In January 2004, a federal court in California agreed with the plaintiffs that the phrase "expert advice and assistance" was impermissibly vague and thus violated the First Amendment. In 1998, the plaintiffs had brought a similar suit arguing that the "training" and "personnel" terms in the material support statute were unconstitutionally vague; in a December 2003 decision, the 9th Circuit Court agreed with them. Yet another part of the statute was deemed unconstitutional by a federal judge in New York in July 2003. Ahmed Sattar and other followers of the "Blind Sheikh" Omar Abdul Rahman had been charged under the measure barring provision of communications equipment for allegedly transmitting information from the imprisoned sheikh to other members of the Egyptian al-Gamaa al-Islamiya (the Islamic Group) worldwide. In dismissing two counts of the indictment, however, the court found that the term "communications equipment" was unconstitutionally vague.

IRTPA clarifies some of the terms that courts have deemed questionable or too vague. For example, the legislation includes more detailed definitions of the terms "training," "expert advice or assistance," and "knowingly provided." It also includes a section explicitly stating that nothing in the law should be construed as abridging the First Amendment. Finally, IRTPA authorizes the secretary of state -- in consultation with the attorney general -- to grant waivers to the statute.

9-11 Commission Reform Recommendations

IRTPA will improve the FBI's ability to combat international terrorism by legislating the 9-11 Commission's recommendations regarding reform in the bureau. The commission found that while the FBI had made significant progress in improving its counterterrorism capabilities under Director Mueller, gaps remained, particularly in the bureau's field offices. In visits to these offices, the commission staff found that language and surveillance specialists were not well integrated into the FBI's intelligence program, and that analysts were sometimes underutilized.

The gaps identified by the commission raised concerns in light of the fact that, prior to September 11, the FBI had already made several attempts to reform itself in recognition of the growing threat from international terrorism and

the bureau's own systemic deficiencies in addressing that threat. These efforts were largely unsuccessful. Accordingly, the commission wanted to ensure that current reform efforts will remain on track even if Director Mueller were to leave the bureau. IRTPA takes an important step forward in this regard by legislating the commission's recommendations. IRTPA orders the FBI director to develop a "specialized and integrated national intelligence workforce" of agents, analysts, linguists, and surveillance specialists. The legislation goes on to mandate that this cadre be recruited, trained, and rewarded in such a way that the FBI develops an institutional culture steeped in intelligence. IRTPA also creates a Directorate of Intelligence at the FBI, granting the current Office of Intelligence additional powers to promote reform efforts within the bureau.

Conclusion

Although the passage of IRTPA will certainly improve the FBI, Justice Department, and intelligence community's ability to counter the international terrorist threat, it is only the first step in a long process. How the FBI and Justice Department use their new powers, and the way in which the bureau carries out its reform efforts, are perhaps even more important than the presence of these provisions in IRTPA. Both the executive branch and Congress must recognize that more changes will likely be needed in the future, not only to address continuing problems, but also to respond to the evolving terrorist threat.

Michael Jacobson, a Soref fellow at The Washington Institute, served as counsel on both the congressional and independent commissions investigating the September 11 attacks. ❖

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