# Questions and Answers about the USA PATRIOT Act

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Aug 23, 2004

Q: What is the USA PATRIOT Act?

A: The USA PATRIOT Act is an act of Congress that was enacted on October 26, 2001. USA PATRIOT is an acronym, so it is properly spelled in all capital letters. It stands for "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism." The USA PATRIOT Act, which was passed 98-1 in the Senate and 357-66 in the House of Representatives, amended a number of existing statutes and enacted new provisions covering a wide range of topics. Although much attention has been focused on the amendments to surveillance and immigration laws, the USA PATRIOT Act also provides for, among other things, financial assistance to victims of terrorist attacks, increased benefits for public safety workers, a condemnation of discrimination against Arab and Muslim Americans, consumer protection from fraud by requiring disclosure in solicitations for charitable contributions after a terrorist attack, increased staffing and overtime pay for Northern border enforcement employees, funding for training, and resources to study critical infrastructure.

Q: Did the USA PATRIOT Act create the secret foreign intelligence court?

A: No. The Foreign Intelligence Surveillance Act of 1978 ("FISA") created the Foreign Intelligence Surveillance Court to provide judicial oversight of government surveillance in foreign intelligence matters. The 1978 Act came as a response to wiretapping abuses during Watergate. Before 1978, foreign intelligence surveillance had no such judicial oversight. Foreign intelligence information is defined in FISA as information that relates to a foreign power or agent of a foreign power involved in an attack, potential attack or "other grave hostile acts," sabotage, international terrorism, or clandestine intelligence activities by an intelligence service or network. Because matters before the FISA court relate to national security, they are not open to the public. FISA was an effort to balance the need for judicial oversight with the need to keep foreign intelligence information confidential.

Similar to the standard used in a criminal case, FISA requires that before the court will authorize a wiretap, the government must provide a detailed affidavit establishing probable cause to believe that the target is an agent of a foreign power and that the facilities to be monitored are being used by an agent of a foreign power. As in a criminal case, a physical search of premises in a foreign intelligence case requires a search warrant issued by the court based on a detailed showing of probable

cause. As in criminal cases, less intrusive searches, such as requests for business records maintained by a third party, require less oversight.

The USA PATRIOT Act amended FISA to allow its provisions to be used in cases where foreign intelligence is a "significant purpose" of the investigation rather than "the purpose" of the investigation. In November 2002, the FISA Court of Review upheld this provision of the USA PATRIOT Act, finding that information derived from FISA investigations may be used in criminal cases because criminal prosecutions are but one way to protect the national security from international terrorism. The FISA Court of Review's opinion suggested that the Department of Justice had been overly cautious in the past by erecting a wall between foreign intelligence and criminal information.

Q: Does the USA PATRIOT Act eliminate judicial oversight of federal law enforcement activities?

A: No. In criminal cases and foreign intelligence cases, federal agents still must obtain a wiretap order from a court based on a detailed affidavit setting forth probable cause before they can install a wiretap. Agents still must obtain a search warrant from a court based on a showing of probable cause before they can search a residence.

Agents still must obtain court orders before installing a pen register or trap and trace device on a telephone to obtain outgoing and incoming telephone numbers. Courts retain the power to suppress evidence obtained in violation of the Fourth Amendment to the Constitution. Where government surveillance intrudes on expectations of privacy, the USA PATRIOT Act preserves judicial oversight as part of our system of checks and balances.

Q: Does the USA PATRIOT Act erode the probable cause standard?

A: No. As was true before the USA PATRIOT Act was enacted, the probable cause standard in a criminal case is probable cause to believe that a crime has been committed and that the person is using the facilities sought to be monitored or searched in connection with the crime; in a foreign intelligence case, probable cause that the target is an agent of a foreign power and that the facilities sought to be monitored or searched are being used by an agent of a foreign power. In both types of investigations, probable cause must be established to obtain a wiretap order or search warrant. As was true even before the USA PATRIOT Act, lesser intrusions, such as requests for records from third parties, require a lower standard.

Q: Does the USA PATRIOT Act permit "sneak and peek" searches, in which the person whose property is searched is never notified?

A: No. Section 213 of the USA PATRIOT Act codified only *delayed* notification of search warrants; notice is still required. Generally, when government agents execute a search warrant, they must provide a copy of the warrant to the person whose premises are searched at the time the warrant is executed. Courts previously allowed for a delay of the notification where necessary to avoid compromising an ongoing investigation, finding that such delay complied with the Fourth Amendment, *see*, *e.g.*, *United States v. Villegas*, 899 F.2d 1324, 1331 (2d Cir. 1990), but because the procedures were not contained in statute or court rule, they were applied differently around the country. The USA PATRIOT Act provides uniformity by specifying the circumstances under which delay is permissible. When a judge finds, based on facts articulated in a sworn affidavit, reasonable grounds to delay notice, such as risk of flight or destruction of evidence, a judge may allow for a specific period of delay that he or she finds to be reasonable. Upon expiration of that time, notice must be given. During the search, evidence may not be seized unless the court finds that seizure is necessary.

Q: What are "roving" wiretaps?

A: Roving wiretaps allow a wiretap order to be specific to a person, regardless of which telephone he is using, rather than specific to a particular telephone. Section 206 of the USA PATRIOT Act extended to foreign intelligence investigations roving wiretaps, which existed in criminal cases before the USA PATRIOT Act was enacted. In this day of cellular telephones, such a provision is a necessary update in the law to keep up with technology. When the original wiretap statute was passed in 1968, most people had only one telephone. In the 21st century, many people have more than one telephone including a cellular telephone. Sophisticated targets change their cellular telephones frequently in an effort to thwart investigators. The roving wiretap order still requires that a federal law enforcement agent swear in a detailed affidavit to facts establishing probable cause, and still requires a court to make a finding of probable cause before issuing the order. The roving order has the additional requirement of a judge's approval to monitor more than one telephone. But now, each time a target changes his cellular telephone, instead of going through the application process, which can take days or weeks, government agents can use the same wiretap order to monitor the target's calls.

Q: Does the USA PATRIOT Act allow the government to spy on my e-mail?

A: No. Sections 214 and 216 of the USA PATRIOT Act relate to pen registers and trap and trace devices, which are investigative tools used to obtain information about the source and destination – but not the content – of telephone calls and e-mail messages. These tools have been available to law enforcement for years with respect to telephone calls. The USA PATRIOT Act simply makes it clear that the same rules may be applied to e-mail that previously applied to telephones. When the statute pertaining to telephones was enacted in 1986, lawmakers did not contemplate the dramatic expansion in computer communication that would exist fifteen years later. Although judges had applied the telephone rules to e-mail before the USA PATRIOT Act was enacted, the PATRIOT Act clarified that pen register and trap and trace provisions apply to e-mail as well as telephone facilities, and made these rules uniform across the country. These provisions permit a judge to enter an order allowing the government to obtain addressing and routing information, that is, the addresses of e-mail messages sent and received or the telephone numbers of the telephone calls made and received. The order does not permit the interception of content, including the subject line of an e-mail message. Before a court will enter the order, a government attorney must certify that the information is relevant to an ongoing criminal investigation, or, in a foreign intelligence case, that the information

is relevant to an investigation to protect against international terrorism or clandestine intelligence activities or to obtain foreign intelligence information not concerning U.S. persons (defined as citizens and permanent resident aliens). Any investigation of a U.S. person may not be based solely on activities protected by the First Amendment. Therefore, in either criminal or foreign intelligence cases, fishing expeditions of people's e-mail messages based on their political activity is not permitted. These provisions update existing law to keep up with changing technology.

Under law that has not been changed by USA PATRIOT Act, the government must obtain a search warrant to see the content of unopened e-mail communications that are less than six months old. The content of older, opened e-mail messages, or of messages previously opened and stored on a mail server, can be obtained with a grand jury subpoena, a court order, or a search warrant, all of which require notice to the subscriber, although such notice may be delayed, if the court approves, upon a proper showing of need by the government. All of these provisions allowing access to the content of e-mail existed before the enactment of the USA PATRIOT Act.

Q: Is the government using the authority of the USA PATRIOT Act to compile watch lists based on the books ordinary citizens check out of the library?

A: No. Section 215 permits the government to obtain "tangible things" from third parties in foreign intelligence investigations. Although the USA PATRIOT Act does not mention libraries, this section could be applied to library records as business records. Under previous law, government agents had the ability to access business records, including library records, with a grand jury subpoena in criminal cases. Section 215 now allows such requests in foreign intelligence cases. An important protection provides that Section 215 may not be used against U.S. persons (citizens or permanent resident aliens) solely based on activities protected by the First Amendment. In practice, these requests are made only as to specific individuals who are already the target of an investigation. This provision includes a safeguard that provides that government agents must seek a court order for the records, based on a certification from a high-ranking FBI official (Assistant Special Agent in Charge or higher) that the records sought are for "an authorized investigation to obtain foreign intelligence information not concerning a U.S. person or to protect against international terrorism or clandestine intelligence activities." An additional safeguard requires the Department of Justice to report its use of this provision to Congress every six months.

Q: Why does the USA PATRIOT Act permit one part of the government to share intelligence information with other parts of the government?

A: Section 203 permits the sharing of foreign intelligence or grand jury information to federal law enforcement, intelligence, national security, national defense, protective or immigration personnel "to assist the official receiving that information in the performance of his official duties." This provision is an effort to let the right hand know what the left hand knows. For example, if federal law enforcement authorities learn through a grand jury proceeding or foreign intelligence surveillance that a group is planning to blow up Joe Louis Arena during a Red Wings game, this provision permits them to tell criminal investigators, who can then act on that information in an attempt to prevent the attack. Under previous law, disclosure was prohibited.

Q: Does the USA PATRIOT Act permit the FBI to conduct surveillance of religious services, internet chat rooms, political demonstrations and other public meetings?

A: No. The USA PATRIOT Act does not address these types of investigations. After 9/11, the Attorney General Guidelines for investigating terrorism cases were amended to permit the FBI to "visit any place and attend any event that is open to the

public on the same terms and conditions as members of the public generally." With respect to Internet sites, agents are permitted to "conduct online search activity and to access online sites and forums on the same terms and conditions as members of the public generally." The rationale for the guideline is that law enforcement agents should be permitted to go anywhere that is open to the public because in such places there is no expectation of privacy, which is where the Fourth Amendment draws the line for reasonable searches.

The guidelines provide for safeguards against abuse of the information obtained. For example, the guidelines provide that agents may not maintain files on individuals "solely for the purpose of monitoring activities protected by the First Amendment or the lawful exercise of other rights secured by the Constitution or laws of the United States. Rather, all such law enforcement activities must have a valid law enforcement purpose." The guidelines further provide, "No information obtained from such visits shall be retained unless it relates to potential criminal or terrorist activities."

Q: Does the USA PATRIOT Act define domestic terrorism so broadly as to chill constitutionally protected speech?

A: No. Section 802 amended 18 U.S.C. § 2331 to define domestic terrorism as offenses that (1) involve acts dangerous to human life that violate the laws of the United States or any state; and (2) are intended to coerce or intimidate a civilian population, influence government policy by intimidation or coercion or affect the conduct of government by mass destruction, assassination, or kidnaping. This definition is virtually identical to the definition of international terrorism that existed before the USA PATRIOT Act under 18 U.S.C. § 2331, except that domestic terrorism applies to acts that occur primarily within the territorial jurisdiction of the United States. Prohibiting "acts dangerous to human life" does not violate the Constitution. Speaking at a political rally or participating in an anti-war demonstration would not amount to domestic terrorism under this definition.

Q: Why were 762 immigrants arrested after 9/11 if they weren't charged with crimes of terrorism?

A: Most of the 762 were illegal aliens who had overstayed their visas. A visa gives a visitor permission to stay in the United States for a set period of time. Upon expiration of that time, the alien must leave the United States. If he fails to do so, he

may be arrested and deported. Before 9/11, the Immigration and Naturalization Service ("INS") failed to arrest many aliens who had overstayed their visas. Some of the 9/11 hijackers were visa overstays. The INS has now been dismantled and replaced by the Bureau of Immigration and Customs Enforcement under the Department of Homeland Security. The 762 aliens were not arrested under the USA PATRIOT Act, which was not enacted until about six weeks after 9/11.

Q: Does the USA PATRIOT Act permit the indefinite detention of non-citizens based on mere suspicion that they are involved in terrorism?

A: No. Section 412 of the USA PATRIOT Act requires the Attorney General to certify on "reasonable grounds to believe" that an alien is engaging in acts of terrorism or endangers the national security of the United States before an alien may be detained under this section. Moreover, it does not permit indefinite detention. An alien may be held for only seven days before the Attorney General must either start deportation proceedings (because the alien has no legal right to be in the United States) or file criminal charges. Otherwise, the alien must be released. In situations in which the alien is deportable, but is not likely to be deported within the reasonably foreseeable future, the alien may be detained for additional periods of up to six

months only if the release of the alien would threaten the national security of the United States or the safety of the community or another person. If the alien is determined not to be deportable, detention shall terminate. An important safeguard in Section 412 provides for habeas corpus review by courts on the merits of any detention. To date, Section 412 of the USA PATRIOT Act has not yet been used.

Q: Does the USA PATRIOT Act authorize detention of people as enemy combatants?

A: No. Enemy combatant status, which essentially permits detention of enemy soldiers during hostilities, as opposed to detention under the criminal justice system, pre-dates 9/11, and was approved by the Hague and Geneva Conventions. Enemy combatant status was used to detain a U.S. citizen who attempted sabotage during World War II. Nothing in the USA PATRIOT Act addresses enemy combatants.

Q: Does the USA PATRIOT Act permit closing immigration hearings to the public?

A: No. The procedures to close immigration hearings in cases involving foreign intelligence and national security information are not part of the USA PATRIOT Act. Since 9/11, some immigration hearings have been closed to the public where

necessary to protect the national security. In the Sixth Circuit Court of Appeals, which includes federal cases in Michigan, Judge Damon Keith wrote that closing immigration hearings is appropriate, on a case-by-case basis, for that portion of the hearing that could compromise the national security. (The Third Circuit Court of Appeals, in a case the U.S. Supreme Court declined to review, held that blanket closure of immigration hearings, rather than case-by-case, is permissible where disclosure could affect the national security.) Disclosing information to the court without disclosing it to the public is necessary in some situations where the information could compromise intelligence sources, at best tipping off other suspects, at worst endangering the lives of cooperating sources around the world.

Q: Is the USA PATRIOT Act unconstitutional?

A: No provision of the USA PATRIOT Act has been held unconstitutional by any court in the country.

Q: Does the USA PATRIOT Act discriminate against Arab and Muslim Americans?

A: No. To the contrary, the USA PATRIOT Act protects Arab and Muslim Americans. Section 1001 directs the Department of Justice's Office of Inspector

General to process and investigate complaints alleging abuses of civil rights by Department of Justice employees. Section 102 of the USA PATRIOT Act specifically condemns acts of violence or discrimination against all Americans, including Arab Americans and Muslim Americans and Americans from South Asia. It directs that their civil rights and civil liberties be protected and that every effort be taken to preserve their safety. Toward that end, our office has successfully prosecuted cases involving hate crimes and false accusations against Arab American victims since 9/11. In one case, a defendant was convicted after telephoning and threatening to kill a victim simply because of the victim's Arabic name. In another case, a defendant was convicted of perjury after he falsely testified before a grand jury that local individuals were members of a terrorist cell planning an attack.

In addition, U.S. Attorney Jeffrey G. Collins has formed and co-chairs a group called BRIDGES, which stands for Building Respect in Diverse Groups to Enhance Sensitivity. BRIDGES includes leaders from the local Arab American community and law enforcement. The group meets monthly to promote mutual understanding and cooperation.

Q: What are some of the reasons critics oppose the USA PATRIOT Act?

A: First, the USA PATRIOT Act appears to have become a short-hand label for all aspects of the war on terrorism. Critics have incorrectly attributed to the USA PATRIOT Act a number of anti-terrorism initiatives that have nothing to do with the Act. For example, the USA PATRIOT Act does not address such issues as enemy combatants, military tribunals, closed immigration hearings, or monitoring of attorney-client communications. A number of newspapers nationally and within the Eastern District of Michigan recently reported on claims of civil rights abuses by government employees, but incorrectly attributed the abuses to the USA PATRIOT Act. In fact, the report was required by one of the USA PATRIOT Act's many safeguards. Section 1001 directs the Department of Justice's Office of Inspector General ("OIG") to process and investigate complaints alleging abuses of civil rights by Department of Justice employees. The USA PATRIOT Act is not the basis of the complaints cited in the OIG report; it is the mechanism for investigating the complaints.

Second, it seems that many critics are unaware of the investigative tools that were available to law enforcement before the USA PATRIOT Act was enacted. Instead, they incorrectly assume that these tools were created by the USA PATRIOT Act. For example, roving wiretaps were permissible in criminal cases before the USA

PATRIOT Act was enacted. The USA PATRIOT Act simply extended this tool to foreign intelligence cases. Similarly, investigators were able to obtain library records with a grand jury subpoena in criminal cases long before the USA PATRIOT Act was enacted. The USA PATRIOT Act simply extended this ability to foreign intelligence cases, and added some protections, such as requiring a court order, prohibiting the investigation of a U.S. person based solely on activities protected by the First Amendment, and requiring the government to report the use of this provision to Congress. As another example, the foreign intelligence surveillance court was not, as is sometimes assumed, created by the USA PATRIOT Act; it has existed since 1978. Moreover, the court was created to prevent government wiretap abuses by creating judicial oversight in foreign intelligence cases.

These inaccuracies and false assumptions perpetuate the myth that the USA PATRIOT Act violates constitutional rights. Instead, it provides tools to assist law enforcement in combating terrorism, while preserving the constitutional rights that make America worth protecting.