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THE USA PATRIOT ACT: TWO YEARS LATER QUESTIONS AND ANSWERS FOR CONCERNED COMMUNITIES

The USA PATRIOT (Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism) Act was passed by Congress in October 2001, almost immediately after the terrorist attacks of September 11th. The stated purpose of the Act is to enable law enforcement officials to track down and punish those responsible for the attacks and to protect against any similar attacks.

Many advocates believe that some portions of the law go too far in sacrificing important civil rights and liberties in the name of national security, but others focus on the portions of the law that provide important tools for law enforcement. Many commentators argue that the administration has evaded legitimate requests from Congress and the public about how controversial provisions in the Act can be or are being used, making it difficult to evaluate these laws.

Much of the commentary on the USA PATRIOT Act is confusing or even inaccurate, and the subject is often politicized. This "Question & Answer" fact sheet is designed to help communities think and talk about this important set of laws in ways that make sense.

What is the USA PATRIOT Act?

The USA PATRIOT Act is a bill that Congress passed as federal law in October 2001, almost immediately after the terrorist attacks of September 11th. The actual text of the USA PATRIOT Act contains 134 provisions addressing subjects as diverse as surveillance procedures; money laundering; border protection; providing for victims of terrorism, public safety officers and their families; information sharing for infrastructure protection; criminal laws; and intelligence gathering and sharing.

The real question appears to be not whether the entire Act is good or bad, but how the provisions that are most controversial affect our nation. Perhaps more important is the lack of information about how these provisions are being used. The Department of Justice has evaded or only partially answered questions from Congress concerning its use of these powers. Currently, several lawsuits are underway concerning information about certain provisions or their constitutionality.

Why is the USA PATRIOT Act controversial?

Most of the Act is *not* controversial, and some portions are welcomed as good public policy. For example, the Act includes provisions that update criminal, immigration and banking law to reflect changes in technology. A handful of provisions, however, have received national attention from critics and defenders alike. Some of these provisions expand the government's power to spy on ordinary people or search their homes without their knowledge. Advocates for civil liberties assert that use of these techniques without adequate judicial oversight contravenes the Constitution, which guarantees that searches and seizures are unlawful unless an impartial judge determines law enforcement had a good reason to suspect that there was evidence of a crime to be found.

Other provisions subject non-citizens to exclusion, detention or deportation with questionable procedures, some for behavior that would be protected by the Constitution if they were citizens. Other provisions remove important checks and balances between

the branches of the government, such as reducing or eliminating the power of the courts to ensure the administration is respecting constitutional rights. Some provisions are seen as fostering a “chilling effect” on people’s willingness to criticize the government or freely associate with others. Advocates concerned about this effect argue it will not affect just people with something to hide, but also innocent persons who seek simply to be left alone. Some provisions authorize new powers for the intelligence arm of the FBI, which always operates without public disclosure of its actions. Other provisions, while described by their proponents as essential to fight terrorism, are being used to investigate crimes unrelated to terrorism. Advocates are concerned that law enforcement “took advantage” of the nation’s fear of terrorism to more easily persuade lawmakers to expand their power in ways that are unrelated.

Some supporters of the USA PATRIOT Act say every provision has been essential to stopping additional terrorist attacks since 9/11, while downplaying the actual effect of its changes on the law.

One source of controversy is the lack of information about how the new laws are being used. The USA PATRIOT Act greatly expands the powers of the Department of Justice while reducing the oversight role of the courts. Since the Department of Justice has resisted responding to requests for information from both Congress and the public about how it is using these powers, advocates have little information with which to settle the controversies. Some portions of the USA PATRIOT Act bar persons affected by them from telling anyone.

What provisions are people concerned about?

Most of the controversial provisions made changes to areas of the law that were already hotly debated, or took practices used in one area of the law and expanded them to others. The following provisions are just a few of those that have received a great deal of attention.

Section 213: Sneak and Peek Searches – A “sneak and peek” search warrant authorizes officers in run-of-the-mill criminal cases to secretly enter a home or office (either physically or electronically), conduct a search, observe, take measurements, conduct examinations, smell, take pictures, copy documents, download or transmit computer files, and the like; and then depart without leaving notice of their presence. Before the USA PATRIOT Act, these warrants were only allowed in certain narrow circumstances, and notification delays were limited. The USA PATRIOT Act so broadly expanded the use of “sneak and peek” search warrants, that advocates are concerned that what used to be the exception – delayed notification of a search – can easily become commonplace.

Section 215: Access to Business Records – Before the USA PATRIOT Act became law, the intelligence arm of the FBI could obtain a secret court order for four specific kinds of business records. The FBI’s intelligence agents were not required to allege any illegal activity, but were required to show the court specific facts giving reason to believe the person under investigation was “an agent of a foreign power”. Section 215 of the USA PATRIOT Act expanded this authority to include not just certain records, but any “tangible thing”, while weakening the necessary connection to terrorism and the oversight function of the court. The law now allows the FBI to obtain a court order for “any tangible things” held by anyone by simply stating the investigation is related to terrorism. The government need not identify a specific suspect or allege any illegal activity, and the court can only reject the request if it is not submitted in the proper form. The government does not need to allege any specific facts, the court cannot independently inquire into the underlying facts, and the person targeted cannot challenge the order. The person from whom records have been seized is not allowed to tell anyone, and the target of the investigation may never know their private information was seized.

Section 411: Detention and Deportation of Immigrants for Unknowing Association with Terrorists – Section 411 of the USA PATRIOT Act broadens the kinds of relationships to other individuals and

groups that can make an immigrant eligible for detention or deportation. The immigrant bears the burden of proving a negative, however – that he did not know the individuals or organizations that he associated with had taken certain actions or espoused certain views.

Section 412: Detention of Immigrants and Other Non-Citizens – Section 412 of the USA PATRIOT Act permits indefinite detention of immigrants and other non-citizens as long as the Attorney General certifies that he has “reasonable grounds to believe” that the person is a terrorist and/or is endangering national security. The individual may or may not be charged with any crime. Such certification can only be challenged in a limited *habeas corpus* proceeding appealable only to the U.S. Court of Appeals for the District of Columbia Circuit. If the person is determined to be deportable (for reasons that may have nothing to do with terrorism), but no country is willing to accept him, he can be detained indefinitely so long as the Attorney General continues the certification.

Section 505: National Security Letters – A national security letter is an order from the Attorney General or his staff that requires someone to give records to the government. Before the USA PATRIOT Act, the letter had to be directed at the records of a specific person and had to state facts supporting a belief that the person was the agent of a foreign power. Section 505 of the USA PATRIOT Act removes these requirements – a national security letter now can be used to obtain anyone’s records, even if they are not suspected of spying or terrorism, with no requirement that a judge approve its use.

Section 802: Domestic Terrorism and Free Speech – The USA PATRIOT Act created a new definition of “domestic terrorism” that encompasses activities that involve any criminal acts dangerous to human life, and that appear to be intended to intimidate or coerce a civilian population, to influence government policy by intimidation or coercion, or to affect government conduct by mass destruction, assassination, or kidnapping. Advocates are concerned that this definition could be used to prosecute as terrorists people who take part in protests or demonstrations that “appear to be intended to intimidate or coerce a civilian population [or] to influence government policy by intimidation or coercion” and who commit minor crimes that could result in someone’s death, even accidentally.

Section 805: Material Support for Terrorism -- This section prohibits providing material support or resources to organizations designated by the U.S. government as “foreign terrorist organizations”, including “expert advice or assistance.” However, the law does not distinguish between “expert advice or assistance” furthering terrorist or unlawful acts and other types of assistance, such as medical aid given to people living in places where a foreign terrorist organization is the *de facto* government, advice on how to bring about social change through non-violent means, or advice on how to comply with international human rights standards. Critics say the law is unconstitutional because it violates our First Amendment rights to freedom of speech and association.

It seems like many of the government’s anti-terrorism policies are directed against immigrants and foreign visitors. Isn’t the USA PATRIOT Act responsible for these policies as well?

Some sections of the USA PATRIOT Act change immigration law, but most of the powers granted under the new law can be used against citizens as well, including most of those described above. Advocates are concerned that these powers will be used against persons who speak out against the government, or who are mistakenly caught up in an investigation. They also warn that laws that affect our treasured values of free speech and association are pernicious and impact everyone equally. There is also a great deal of concern that the expansion of executive power found in the USA PATRIOT Act permits the use of these powers outside of terrorism investigations, and sets the stage for further expansion of additional powers. We already know, for example, that “sneak and peek” searches have repeatedly been used by the FBI in criminal cases entirely unrelated to terrorism.

In addition to concerns about citizens, advocates fear that the government will use these powers to unfairly and ineffectively target entire minority groups, whether citizen or not, especially those of Arab descent, persons from South Asia, or Muslims. Profiling on the basis of race, ethnicity, religion and national origin is not only wrong, but counterproductive – it wastes resources and alienates entire communities. The government has already shown its willingness to single out populations based on race, ethnicity, religion or national origin through practices such as special registration and the detention of asylum seekers.

Our nation's history shows that often practices that were first directed against a small minority were later used to target more groups as well. Episodes like the internment of both citizens and immigrants of Japanese ancestry during World War II, and the targeting of people who "sympathized" with Communism bear this out. Many of the most egregious policies directed against Arab Americans and Muslims use laws and procedures that were developed to be applied far beyond these groups, including immigrants from other groups, and citizens. As part of the Patriot II "wish list" described below, the Bush administration proposed the Attorney General be allowed to strip citizenship from even the native born.

Many people refer to the USA PATRIOT Act when they talk about a whole host of policies the federal government has put in place over the past two years, including some directed against immigrants and foreign visitors that aren't part of the USA PATRIOT Act. Using "Patriot Act" to describe everything can make it harder for people to talk about specific issues. If we talk about specific issues, we can make good decisions about national security *and* civil liberties.

Controversial anti-terrorism policies directed against immigrants and foreign visitors that stem from sources other than the USA PATRIOT Act include increased and selective immigration law enforcement; secret hearings, detentions, and deportations; a push for the use of state and local police to enforce *civil* immigration law; and discriminatory and badly-implemented registration programs. Some practices, like detention without charges, indefinite detention and police profiling on the basis of race, ethnicity, national origin, and religion, stem from a combination of USA PATRIOT Act law, existing law, or policies that are not supported by existing law. You can contact NAPALC for additional information on these topics.

I trust our government to do what is right, and I want to support the fight against terrorism. Shouldn't I support the USA PATRIOT Act?

Most major criminal laws are reevaluated and improved after they have been in effect for a while. Urging Congress to seriously revisit the parts of the USA PATRIOT Act that are most problematic contributes to good policymaking.

The Founders of this country chose to construct a government based on checks and balances, meaning no one branch of the government can exercise power alone. They also provided strong protection for individual rights and liberties, not simply to guard against the tyranny of the corruptible, but against the mistakes of the well-meaning. They recognized that certain basic rights, like the right to a fair trial and equal treatment under the law, belong to everyone. Questioning our laws and how they are used doesn't undermine our system of government – it is the bedrock of a representative democracy. Many people feel that challenging the portions of the USA PATRIOT Act that don't respect these check and balances is therefore consistent with these values.

Many advocates will also add that the controversial portions of the USA PATRIOT Act come with costs that should now be reevaluated by lawmakers. Measures that infringe upon civil liberties divide our nation and weaken public trust in government at a time when we need to be united. Abusing the rights of immigrants and foreigners damages our relations with international partners. Some provisions

give law enforcement expanded authority to spend resources collecting information that has no relevance to crime or terrorism, opening the way for wasteful and harmful “fishing expeditions”.

How should the USA PATRIOT Act be changed? Won't that keep law enforcement from getting valuable information?

Many civil liberties advocates propose changes to the USA PATRIOT Act that do not prevent law enforcement from getting valuable information. For example, regarding provisions that allow the use of surveillance techniques for criminal investigations, advocates are asking that an impartial judge first determine there is a reasonable connection to terrorism. Once this connection is established, valuable information can be obtained. If the surveillance technique has no reasonable connection to terrorism, the value of the information is questionable.

Generally, civil liberties advocates say sensible reform should seek to *restore the federal judiciary* to its proper role in reviewing the determinations of the Attorney General and his subordinates. *Comprehensive public disclosure* will allow policymakers and the public to accurately assess how the new powers are being used. Absent comprehensive public disclosure and the restoration of judicial review, enhanced surveillance powers granted under the USA PATRIOT Act should be *limited to investigations involving international terrorism*. Finally, USA PATRIOT Act powers implicating civil liberties should be subject to “*sunset*” provisions, either existing or imposed. This means that as of the date of the sunset, the applicable portion of the law must be reviewed and reaffirmed by lawmakers, or it expires.

Why should I be concerned about the USA PATRIOT Act? I haven't done anything wrong.

Investigations where impartial judges look for a basis for reasonable suspicion or probable cause are less likely to implicate innocent people. Investigations conducted under laws that relegate the role of judges to merely providing a rubber stamp, or that do not require any showing of facts tending to connect the subject of the investigation to criminal activity, are more likely to sweep up innocent people. It is also a lesson from this nation's history that civil liberties surrendered in time of emergency are slow to be restored, and the same freedoms surrendered by a minority, such as non-citizens, have often later been taken from the population at large.

People across the nation are speaking out against the USA PATRIOT Act because they think some of its powers run counter to the democratic principles on which our nation was founded, and that is something worth standing up for. In an unprecedented grassroots movement, resolutions against the USA PATRIOT Act have been passed by governments in 229 communities in 35 states across the nation, including three state-wide resolutions. These communities represent approximately 29.4 million people who oppose sections of the USA PATRIOT Act. (1)

I heard the USA PATRIOT Act is supposed to expire. Is this true?

Some parts of the USA PATRIOT Act are subject to a “sunset provision” (Sec. 224) which revokes them in 2005 unless Congress affirmatively says otherwise. However, some of the most controversial powers, such as “sneak and peek,” are not subject to the sunset. Legislation is already planned to repeal the sunset provisions and allow the entire USA PATRIOT Act to continue without additional authorization from Congress.

(1) The numbers are current as of December 31, 2003.

What is the second USA PATRIOT Act that I have heard about?

Even with the broad powers granted by the USA PATRIOT Act, proponents who believe it does not go far enough are pushing for more power. For example, in February of 2003, a list of additional powers sought by the Department of Justice was leaked to the public. Titled the *Domestic Security Enhancement Act of 2003*, but widely referred to as "Patriot II," the list expanded on many of the controversial aspects of the first USA PATRIOT Act. The list was not a bill in Congress, but a "wish list" drafted by the Department of Justice.

Due in part to the resulting public outcry, it is unlikely Patriot II will be introduced in Congress as one large bill. However, President Bush recently promoted several specific elements of the Patriot II "wish list" and these elements have been introduced in the 108th Congress as separate proposed pieces of legislation. Other bills that are similar to USA PATRIOT Act provisions have also been introduced.

What can I do to help fix the USA PATRIOT Act?

Call or write your U.S. Senators and U.S. Representative and tell them that you are concerned that Congress went too far in some parts of the USA PATRIOT Act. Urge them to support legislative efforts that put checks and balances back in place, ensuring both Congressional oversight and judicial review. Ask them to stop attempts to expand USA PATRIOT-like powers further until we know how the current laws are working.

To identify the federal elected officials for your district, you can call the U.S. Capitol Switchboard toll-free at (800) 962-3524 and ask for a particular legislator or committee, or tell them your postal ZIP code and they will tell you your members' names and contact information. To find out if people in your community are working on community initiatives against the USA PATRIOT Act or to get started on a new initiative, check out the Bill of Rights Defense Committee's website at <http://www.bordc.org>. For current information about legislation to fix the USA PATRIOT Act, see <http://www.cdt.org/security/usapatriot/fix.shtml>.

Where can I get more information?

Below are listed a few of the many organizations that can give you more information on the USA PATRIOT Act.

American Civil Liberties Union (www.aclu.org)
Bill of Rights Defense Committee (<http://www.bordc.org>)
Center for Constitutional Rights (www.ccr-ny.org)
Center for Democracy and Technology (www.cdt.org)
Electronic Privacy Information Center (www.epic.org)
Human Rights First (www.humanrightsfirst.org)
National Asian Pacific American Legal Consortium (www.napalc.org)