

# **USA PATRIOT ACT REAUTHORIZATION: HOW DOES IT AFFECT YOU?**

**LWVSD Unit Presentation, September, 2005**

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## **What's Changed Since 9/11/2001?**

**The Transportation Security Administration (TSA) replaced privatized security at airports and has developed a watch list of passengers**

**Secret searches**

**More secret monitoring of emails and phone conversations**

**Police monitoring crowds, demonstrations, religious services, parades, and border crossings more**

**Perception that the FBI could monitor your reading materials**

**Much tighter monitoring of foreign students and immigrants**

**More searches of bags carried into government buildings**

**More "gag orders" which require third parties to not inform anyone about searches**

**The formation of the U.S. Department of Homeland Security and much increased sharing of information between criminal investigators and intelligence investigators**

**Etc.**

## **Are We Officially At War Against Terrorists?**

**Can we be at war against something other than a country or group of countries?**

## **What's Happened to the USA PATRIOT Act?**

**The USA PATRIOT Act was passed by Congress in 2001 six weeks after the terrorist attacks of Sept. 11<sup>th</sup>. Although the act passed in both the House and Senate by wide margins, members on both sides of the aisle expressed reservations about its impact on our fundamental freedoms and civil liberties. As a result, Congress also included "sunset clauses" on 16 provisions. These provisions will expire on Dec. 31, 2005**

**if Congress does not act to renew them. Most of them relate to foreign intelligence and law enforcement authority, permitting easier access to the surveillance, monitoring and investigation of Americans with fewer checks on abuse.**

**Many of the laws, regulations, and procedures used in criminal investigations can now be used in FISA intelligence investigations and vice-versa. Information is now shared between the two divisions so they can work together to identify potential terrorists.**

**In May, 2003, the Justice Department reported to Congress on its use of expanded powers to fight terrorism. At the time, they were reviewing 4,500 intelligence files in terrorist cases to determine whether criminal charges should be made. They said fewer than 10 visits had been made to mosques as part of their investigations. They had contacted about 50 libraries, often at the invitation of librarians who were suspicious of activity. (We've also heard that no investigations have included library use.) The number of emergency investigations after 9/11 more than doubled compared to before 9/11. 248 gag orders had been extended up to 90 days. Fewer than 50 "material witnesses" were being held in terrorism investigations as of January, 2003; they are held for 90 days or less. Most of them have been kept secret. The USA PATRIOT Act allows judges to issue a warrant for someone in another district; this speeds up the process.**

**In August, 2004, the LWVSD Board signed onto a resolution to the San Diego City Council directing the City Manager to require the San Diego Police Department and the City of San Diego Library System to report quarterly to the City Council regarding the number and nature of requests for searches; the number of search warrants that have been executed in San Diego; the extent of electronic surveillance carried out; the number of times education records have been obtained and**

**books purchased from bookstores; and the extent to which federal authorities are monitoring political meetings, religious gatherings, etc. To date this resolution has not been docketed. Regular reports are made to Congress regarding the use of the USA PATRIOT Act.**

**In July, 2005, the LWVC issued a statement summarizing its positions on the USA PATRIOT Act which basically said it supports the sunseting of all 16 clauses because a “democratic society depends upon the informed and active participation of its citizens at all levels of government” and “governmental bodies must protect the citizen’s right to know by giving adequate notice of proposed actions, holding open meetings and making public records accessible....The League of Women Voters of California strongly believes that we can neither protect our democracy nor defeat terrorism by curtailing the freedoms guaranteed by the Constitution.”**

**An article in the *San Diego Union Tribune* on July 30, 2005 reported that U.S. District Judge Audrey Collins found that Congress failed to remedy all the problems in the USA PATRIOT Act and that she found it too vague to be understood by an average person and therefore it is unconstitutional.**

### **Consequences**

**People who are suspicious are often arrested for immigration violations and deported. All people who are arrested by the FBI for either a criminal or FISA investigation have their constitutional rights including the services of an attorney. There is some discussion that the USA PATRIOT Act is now becoming an anti-immigration act.**

## **Some Definitions**

- 1) **NSL – National Security Letter** – is used to obtain financial records, credit reports, third party communication billing (including pawnshops, car dealers, casinos, and the post office), and transactional records – it does not require judicial review.
- 2) **Tangible Items** – business records, materials read at the library or purchased at a book store, educational records, medical records, membership lists, tax reports, travel records, genetic information, refugee service organizations records, firearm records – usually obtained from third parties. When the FBI monitors a library or cyber café computer, they see all the emails in it.
- 3) **Sneak and Peak** – Section 215 – sunset clause - These investigations include special powers to secretly search a home or office without ever notifying the owner providing “probable cause” that it contains information about the activities of an agent of a foreign power. Federal agents obtain a special warrant from the secret court established by FISA. Prior to the USA PATRIOT Act, the government had to certify that the
- 4) primary purpose of the search was for foreign intelligence. Now the agents may obtain these warrants as long as they certify that a significant purpose of the search is foreign intelligence.
- 5) **Wiretaps** intercept calls to and from a particular telephone number and capture the content of the conversation. Federal criminal wiretaps require a judicial order based on probable cause that the communications to be intercepted will reveal activity relevant to one of a list of federal crimes called wiretap

predicates. Foreign intelligence wiretaps require no such finding. Instead, wiretaps may be authorized based on the finding of the secret FISA court that there is probable cause that the target of surveillance is a “foreign power” or “agent of a foreign power”. FISA created an exception to the Fourth Amendment’s requirement for probable cause when the purpose of a wiretap (or search) was to gather foreign intelligence. Since the search was not conducted for the purpose of gathering evidence to put someone on trial, the standards could be loosened. This illustrates how dangerous it is to create exceptions to fundamental rights because the USA PATRIOT Act expanded this once narrow exception so that it could now be applied to cover wiretaps (and searches) for regular domestic criminal cases. The law changed to allow the tap when a “significant” purpose was to gather foreign intelligence rather than its being the “primary” purpose.

- 6) **Roving Wiretaps** (Section 206, sunset clause) The Government can issue “John Doe” wiretaps that fail to specify a target or telephone number and need not check that the conversations they are intercepting actually involve a target of the investigation. These single wiretap orders, which can follow the target as he/she uses different telephones and devices to communicate, had been allowed in criminal investigations, but not in foreign intelligence investigations. The safeguard in criminal investigations had been that the target or the phone had to be specified. Intelligence surveillance need not specify either. Section 207, also subject to sunset, increases the time that foreign intelligence wiretaps may be used without judicial oversight from 90 days to 6 months for the initial order. Renewals for the surveillance may continue for a year before requiring judicial approval.

- 7) **Pen Register/Trap and Trace Devices** have been available for some time to monitor a particular telephone number, tracking the telephone numbers dialed and the telephone numbers of incoming calls but not the content of the call; this type of surveillance did not and does not require “probable cause” or court approval. Section 214, subject to sunset, broadens pen/trap authority for foreign intelligence surveillance. Section 216 is permanent and broadens pen/trap authority for criminal investigations by permitting the seizure of Internet routing information (e.g. website links, addressing information) without protections against the unwarranted seizure of possible content. Investigators do not need to show that the device has, is, or will be used by a foreign agent or by a lone wolf. However, it cannot be used against a U.S. citizen.
- 8) **FISA – Foreign Intelligence Surveillance Act, 1978** – “concerned with gathering information about foreign powers and their agents including international terrorists through: a) electronic surveillance/wiretapping, b) physical searches, c) pen registers/trap and trace devices, and d) searching for tangible items. (Doyle) A FISA investigation of a foreign agent or government does not need to provide probable cause; this concept has been added to criminal investigations through the USA PATRIOT Act.
- 9) **Gag order** – a third party cannot tell anyone that there is an investigation going on – until he is told to do so.
- 10) **Delayed notice** – the person who is being investigated does not know it until he is told about it by the FBI. In S1389, the amount of time is being reduced to 7 days but if the investigation would endanger life or physical safety, cause flight, cause loss of evidence, or cause witness tampering, they it is not revealed to the accused person.

## **Current Bills in Congress**

Several bills have been introduced in Congress with various proposals to deal with the sunsetted clauses and the controversial issues. They are discussed in closed hearings, which the League opposes. (Reference: American Library Association)

- 1) **The SAFE Act of 2005 (S737)** is an acronym for Security and Freedom Enhancement Act but has not been acted on yet. It basically would not repeal any provision nor take away any government or law enforcement power conferred by the USA PATRIOT Act. Rather the SAFE Act would help to add some judicial, Congressional and public oversight to its powers. It was written by a consortium of organizations who are concerned about loss of constitutional liberties; some of the SAFE Act's provisions are in S1389.
  
- 2) **S 1389 – The USA PATRIOT Improvement and Reauthorization Act of 2005** – passed on 7/29/05 on unanimous consent (no debate, no amendments, no roll call vote)
  - “Postpones until 12/31/09 Sec. 215 (sneak and peak) and 206 (roving wire taps) and the adds the ability to investigate a “lone wolf” which is a person who acts as a terrorist without being paid by a foreign government.
  - Makes permanent all of the other sunsetted sections
  - Provides notice to the issuing court when law enforcement, wiretap-generated national security information is shared
  - Requires in the case of FISA roving wiretaps that either identity of the target or the nature and location of the targeted facilities be specified; that if the nature and location are not known, surveillance be limited to times when the target is present; that new notice and identifying information be supplied to the issuing court

when the execution of a FISA surveillance becomes roving; and expands the content of reports to Congress

- Extends the length of time that a FISA wiretap, search and pen register/trap and trace order can take when the foreign agent target is not a U.S. citizen
- Recasts the section 215 tangible order provisions to (1) require a FISA court finding of relevancy; permit recipient disclosure to attorneys and court challenges; require a particularized description of the tangible items sought; authorize use to acquire library, book store, firearm or medical records only on FBI Director approval
- Adjusts the national security letter provisions to permit recipient disclosures to their attorneys and certain court challenges.(Doyle)

3) **HR 3139** – passed in the House in mid July, 2005

- Reauthorizes the sunset clauses and extends the sunset for Sec. 215 and Sec. 206 to 12/31/2015
- Sec. 215 – “requires the Director of the FBI to personally approve any request for records from a library. Disclosure of receipt of a Sec. 215 order to any person necessary to produce the tangible things pursuant to an order under this section or an attorney to obtain legal advice. The recipient may challenge the Sec. 215 order in special petition review panel of the FISA court only to determine legality of the order.
- Sec. 505 – Recipient of a national security letter to challenge the request in a U.S. District Court – the court may set aside the NSL if it is unreasonable or oppressive.
- Gag order – may be challenged in U.S. District Court; not automatic unless it would harm national security, interfere with diplomatic relations, harm an investigation or endanger life or physical safety. Must be recertified after a year has lapsed.”

**S1389 and HR3139 were introduced and passed right after the London bombings and will now be reconciled by a Congressional committee.**

**Bill of Rights U.S. Constitution – Selected Amendments:**

**Amendment I – Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.**

**Amendment IV – The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.**

**Amendment V – No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.**

**Amendment VI – In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against**

**him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defense.**

## **DISCUSSION**

**Consider this range of viewpoints about the values we should uphold when considering the balance between civil liberties and homeland security. (LWVUS)**

**View 1 – People must be able to speak and worship as they wish, without fear that the government will strike back.**

*According to this view*, freedom of speech and freedom of religion are two of the essential liberties that inspired the founding of our country. Many in America are now afraid that our government will target them and discriminate against them if they say the “wrong” things or if they are of the “wrong” faith. Longstanding religious and community organizations have been targeted as “extremist” organizations. Innocent people find themselves not being allowed to board airplanes. If our fears of terrorism cause us to give up our basic rights, then the terrorists will have taken away part of America’s identity.

**View 2 – In the war on terror, we have to make sacrifices if we want to maintain our safety and defeat our enemies.**

*According to this view*, one reason why the war on terror is so difficult is that it isn’t always clear who our enemies are. Some of them could be living among us. In order to fight terrorism effectively, our government will have to watch people carefully, and act quickly to apprehend them. The new powers given to law enforcement have aided in the arrest of terrorists in Portland, Oregon, and outside Buffalo, New York. In some cases, innocent citizens will be singled out (perhaps because of their religion or race), or have their civil liberties taken away, but that is a price we have to pay.

**View 3 – Our government should not intrude into the private lives of law-abiding citizens.**

*According to this view*, law-abiding Americans should be treated with openness and respect by our government. We should not allow law enforcement officials to secretly monitor our medical

records, examine our school transcripts, or find out what kinds of books we borrow from the library. Under the USA PATRIOT Act, the government has expanded rights to search our private records, and it is illegal for people holding those records, such as doctors, teachers, or librarians, to let us know when the government has requested them. These are our private affairs, and our government has no right to gather this information without our permission. If we allow government to operate secretly, the potential for abuse is simply too high.

**View 4 – The majority of the people must be protected from those at the extremes.**

*According to this view*, the vast majority of the residents in any community – and throughout the world, in fact – are decent, law-abiding people. But there are always individuals who act in a way that undermines the quality of life for everyone else. Left unchecked, these instigators may even provoke violence, such as when neo-Nazi groups convince their followers to commit hate crimes. When we allow those voices at the extremes to dominate public dialogue and threaten public safety, we take civil liberties too far.

**View 5 – Our government works best when we preserve the checks and balances within it.**

*According to this view*, it is critical that we maintain the separation of powers established in our constitution. In our government, the three branches (executive, legislative and judicial) share power, and each branch is able to monitor (and, when necessary, challenge) the actions of the other two. This is what our system of “checks and balances” is about. Since 9/11, we have given more authority to law enforcement, and weakened the oversight powers of judges. It is now much easier, for example, for law enforcement officers to conduct secret searches of our homes. This kind of dangerous precedent interferes with the Constitutional principle that has safeguarded our rights for two hundred years.

**View 6 – We trust our public officials and law enforcement professionals to do the right thing.**

*According to this view*, trust in government is directly connected to public safety. Citizens and law enforcement need to be able to work together to make our communities secure. In order to keep us safe, police and other law enforcement officials put their lives on the line on a regular basis. The nature of anti-terrorist work requires that much of it be kept secret; if we want law enforcement professionals to be effective at tracking down terrorists, we need to give them some freedom to maneuver. They entered this profession because they had a strong sense of right and wrong and by serving us they have earned our trust and respect.

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