



## FEDERAL SURVEILLANCE OF U.S. PERSONS UNDER THE USA PATRIOT ACT

A UNIT FROM

*THE ROLE OF THE CITIZEN IN THE 21<sup>ST</sup> CENTURY*

THE 2005 ILLINOIS YOUTH SUMMIT RESOURCE GUIDE FOR  
STUDENTS AND TEACHERS

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# Unit Three: Federal Surveillance of U.S. Persons under the USA PATRIOT Act

## Overview

Passed and signed into law just six weeks after the attacks on September 11, the "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001" has been a focus of controversy since the day it was proposed. The 132-page Act includes many changes to existing law and new innovations. Among these changes are enhanced surveillance procedures and the relaxation of certain restrictions in the sharing of information among foreign and domestic intelligence and law enforcement agencies.

For example, Section 215 of the Act allows the FBI to order any person or entity to turn over "any tangible things," such as financial and library records, so long as the FBI specifies that the order is "for an authorized investigation... to protect against international terrorism or clandestine [secret] intelligence activities." The FBI does not need to show probable cause or have reasonable grounds to believe that the person whose records it seeks is engaged in criminal activity. Those served with Section 215 orders are prohibited from disclosing the fact to anyone else. This section will "sunset" (automatically end) on December 31, 2005, unless Congress acts to renew it.

This unit will provide background on the USA PATRIOT Act and some of the controversy surrounding the enhanced surveillance procedures it features. It will explore how citizens need to find a balance between their desires to be both safe and free. It will introduce the idea of public policy—what it is and how to assess its costs and benefits. It will offer a model for assessing Section 215 and help students consider whether Congress should vote to renew it.

## Focus Questions

- Should Congress renew Section 215 of the USA PATRIOT Act which permits the Federal Bureau of Investigation (FBI) to apply to a federal judge for an order requiring the production of any tangible things – including books, records, papers, documents, and other items – for an investigation of a United States person to protect against international terrorism or clandestine intelligence activities?

## Objectives

- Provide a historical and public policy context for the USA PATRIOT Act
- Introduce a working definition of public policy, supply policy analysis tools, and promote recognition of the impact of public policy and how to affect policy decisions

## Materials

3A: Reading: The PATRIOT Act: What is the Proper Balance Between National Security and Individual Rights?

3B: Strategy: Looking at Public Policy: GRADE

3C: Source: Section 215 of the USA PATRIOT Act of 2001

3D: Activity: Legislative Hearing on Section 215 of the USA PATRIOT Act

3E: Taking a Stand: Position Paper on Federal Surveillance Powers over U.S. Persons

Federal Surveillance of U.S. Persons: Selected Community, Print and Internet Resources

## 3A: The PATRIOT Act: What is the Proper Balance Between National Security and Individual Rights?

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Terrorists struck America on September 11, 2001. Hijacking four planes, they flew two of them into the World Trade Center towers in New York and another into the Pentagon in Washington. The fourth plane crashed in Pennsylvania before it reached its target in Washington. Within two hours, both of the massive 110-story twin towers had collapsed. A wing of the Pentagon was severely damaged. More than 3,000 people died in the attacks. Two days later, the White House identified the culprits as members of Al Qaeda, an Islamic fundamentalist terrorist group based in Afghanistan but with terrorist cells throughout the world. The hijackers had worked out of Al Qaeda terrorist cells operating in the United States. No one knew whether more terrorist attacks were coming.

Soon after September 11, U.S. Attorney General John Ashcroft brought before Congress a list of recommended changes in the law to combat terrorism. Some of these measures had long been opposed by members of Congress as infringing on the rights of Americans.

But September 11 had swept away all previous objections. The U.S. Senate quickly passed the USA PATRIOT ACT (Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism). Only one senator, Russell Feingold (D-Wis.), voted against it.

The next day, the House of Representatives passed the bill 357-66. The final bill was 342 pages long and changed more than 15 existing laws. Most of the Justice Department's recommendations were incorporated into it, but several provisions will expire in 2005.

On October 26, President George W. Bush signed the Patriot Act into law. He praised the "new tools to fight the present danger . . . a threat like no other our Nation has ever faced." He also asserted that the Patriot Act "upholds and respects the civil liberties guaranteed by our Constitution."

The Patriot Act defines "domestic terrorism" as activities within the United States that . . . involve acts dangerous to human life that . . . appear to be intended--

- (i) to intimidate or coerce a civilian population;
- (ii) to influence the policy of a government by intimidation or coercion; or
- (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping. . .

### **The Patriot Act and Privacy**

Some of the most controversial parts of the Patriot Act surround issues of privacy and government surveillance. The Fourth Amendment to the U.S. Constitution protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . ." It requires law-enforcement officers to obtain warrants before making most searches. To get a warrant, officers must make sworn statements before a judge "particularly describing the place to be searched, and the persons or things to be seized." The judge may only issue a search warrant if officers show "probable cause" that the person is engaged in criminal activity. Federal law requires that officers report to the court on the results of the search.

Surveillance such as wiretaps and physical searches requires officers to prove "probable cause" of criminality. Even before the Patriot Act, there were exceptions under federal law.

One was for so-called "pen-trap" orders. To obtain from a telephone company the numbers dialed to and from a particular telephone, officers must get a pen-trap order from a judge. They do not

need to show probable cause, but must certify that the information is needed for an ongoing criminal investigation. The reason for the lesser standard is that these records are far less intrusive than wiretaps and physical searches.

Another major exception was for matters before the Federal Intelligence Surveillance Court. Congress created the court in 1978 following scandals revealing that U.S. intelligence agencies had spied on hundreds of thousands of American citizens, most notably the Reverend Martin Luther King Jr.

The court was a compromise between those who wanted to leave U.S. intelligence agencies free from any restrictions and those who wanted intelligence agencies to apply for search warrants like other law-enforcement agencies. Congress required U.S. intelligence agencies (the FBI and National Security Agency) to apply for warrants for wiretaps and other surveillance on foreign governments and suspected foreign agents. But because the agencies are not investigating domestic crime, they do not have to meet the probable cause standard. They only have to certify that the purpose of the investigation is to track a foreign government or agent. They do not have to report to the court on the results of the surveillance. The court meets in secret with only government representatives present and has never denied an intelligence agency's application for a search warrant.

The Patriot Act expands all these exceptions to the probable-cause requirement. Section 215 of the act permits the FBI to go before the Foreign Intelligence Surveillance Court for an order to search for "any tangible things" connected to a terrorism suspect. The order would be granted as long as the FBI certifies that the search is "to protect against international terrorism or clandestine intelligence activities [spying]." But the FBI would not need to meet the stronger standard of probable cause.

The Patriot Act now authorizes this court to issue search orders directed at any U.S. citizen who the FBI believes may be involved in terrorist activities. Such activities may, in part, even involve First Amendment protected acts such as participating in non-violent public protests.

In Section 215, "any tangible things" may include almost any kind of property--such as books, documents, and computers. The FBI may also monitor or seize personal records held by public libraries, bookstores, medical offices, Internet providers, churches, political groups, universities, and other businesses and institutions.

The Patriot Act prohibits third parties served with Section 215 orders such as Internet providers and public librarians to inform anyone that the FBI has conducted a search of their records.

Section 216 of the Patriot Act extends pen-trap orders to include e-mail and web browsing. The FBI can ask Internet service providers to turn over a log of the web sites a person visits and the addresses of e-mail coming to and from the person's computer.

Another area of concern is Section 213 of the Patriot Act. It authorizes so-called "sneak- and-peek" searches for all federal criminal investigations. When applying for a search warrant, officers may show that there is "reasonable cause to believe that providing immediate notification . . . may have an adverse result." If the judge approves, then the FBI can delay notifying a citizen about the search for a "reasonable period." Thus, the FBI may search a citizen's home or business in secret. The FBI says these searches may be necessary to prevent the destruction of evidence or to keep from jeopardizing an ongoing secret investigation.

## **The Debate Over the Patriot Act**

According to the Bill of Rights Defense Committee, three states (Alaska, Hawaii, and Vermont) and 149 cities, towns and counties have passed resolutions protesting provisions of the Patriot Act. In response to criticism of the act, Congress may be having some second thoughts. The House of

Representatives voted 309-118 to repeal "sneak- and-peek" searches. In the Senate, Senators Lisa Murkowski (R-Alaska) and Ron Wyden (D-Ore.) have introduced the Rights of Individuals Act. This is a comprehensive bill, addressing a number of issues related to the Patriot Act. One part of the Murkowski-Wyden bill would limit "sneak and peek" searches. Those whose homes or offices had been searched under "sneak and peek" would have to be notified within seven calendar days.

Attorney General Ashcroft and other Americans defend the Patriot Act. "We are at war," Ashcroft says, "and we have to do things differently than we did before." He points out that the only purpose of the Patriot Act is "to prevent terrorists from unleashing more death and destruction." Ashcroft also argues that the courts and Congress still safeguard the constitutional rights of Americans.

Public opinion has consistently supported the Patriot Act. An August 2003 Gallup Poll asked whether the Patriot Act goes too far, is about right, or doesn't go far enough in restricting people's civil liberties. Only 21 percent responded that it goes too far. Fifty-five percent said it is about right, and 19 percent answered that it does not go far enough.

In June 2003, the attorney general called for another law to further strengthen the powers of law enforcement to fight terrorists. Called "Patriot Act II" by critics, the proposed new law would, among other things, enable the government to ask a court to revoke the citizenship of any American who provides "material support" to terrorists.

The courts are just beginning to review the constitutionality of the Patriot Act. In the first major legal challenge to the Patriot Act, the American Civil Liberties Union (ACLU) filed a lawsuit in July 2003 against Section 215 searches. The suit argues that these searches violate the Fourth Amendment's protection against unreasonable searches and seizures as well as First Amendment freedoms of speech and association.

In a report called "Unpatriotic Acts," the ACLU warned that American freedom was endangered by the Patriot Act: "Section 215 is likely to chill lawful dissent. If people think that their conversations, their emails, and their reading habits are being monitored, people will feel less comfortable saying what they think--especially if they disagree with government policies."

In a *Washington Post* opinion piece, Heather MacDonald, a writer at the Manhattan Institute, defended the Patriot Act. She countered the ACLU by stressing that Section 215 requires a court order. She said there was no reason for anyone to feel "afraid to read books" or "terrified into silence." "Were that ever the case, it would be thanks to the misinformation spread by advocates and politicians, not because of any real threat posed by" the Patriot Act.

It will be quite some time before cases like the ACLU lawsuit will reach the U.S. Supreme Court. The basic question that the court will have to answer is: What is the proper balance between national security and protecting individual rights?

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From: Constitutional Rights Foundation, *Bill of Rights in Action*, Fall 2003, Volume 19, Number 4, [http://www.crf-usa.org/terror/patriot\\_act.htm](http://www.crf-usa.org/terror/patriot_act.htm).

### 3B: Strategy: Looking at Public Policy: G R A D E

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“Public Policy is a plan of action, adopted by government, to solve a problem or reach a goal.”

In a democracy, you have a say on government policies and proposed policies. It’s important that you take a critical look at them. Use the following GRADE test to analyze Section 215 of the USA PATRIOT Act.

<p><b>Goal</b></p>	<p>What is the policy and what is its goal? If you don’t know what it’s supposed to do, you can’t measure its success or failure. Policies are designed to address problems. What problem or problems is this policy supposed to address?</p>
<p><b>Rivals</b></p>	<p>Who supports this policy? Who opposes it? Knowing the rivals can help you understand who the policy might affect and whether the policy favors special interest. Also, rivals are terrific sources for information. Be sure to check their facts though.</p>
<p><b>Advantages</b></p>	<p>What are the policy’s benefits? What is good about the policy? Will it achieve (or has it achieved) its goal? Will it achieve the goal efficiently? Is it inexpensive? Does it protect people from harm? Does it ensure people’s liberties?</p>
<p><b>Disadvantages</b></p>	<p>What are the policy’s costs? What is bad about the policy? Is it inefficient? Is it expensive? Does it cause harm? Does it intrude on people’s liberties? Are there any potential consequences that may cause damage?</p>
<p><b>Evaluate the alternatives</b></p>	<p>One alternative is to do nothing. Most serious problems have various policy proposals. Evaluate them. Look at their goals, advantages, and disadvantages.</p>

Adapted from: *The Challenge of Information*, © 1998, Constitutional Rights Foundation (Los Angeles)

3C: Source: Section 215, USA PATRIOT Act of 2001 (Public Law 107-56—OCT. 26, 2001)

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**SEC. 215. ACCESS TO RECORDS AND OTHER ITEMS UNDER THE FOREIGN INTELLIGENCE SURVEILLANCE ACT.**

Title V of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1861 et seq.) is amended by striking sections 501 through 503 and inserting the following:

**“SEC. 501. ACCESS TO CERTAIN BUSINESS RECORDS FOR FOREIGN INTELLIGENCE AND INTERNATIONAL TERRORISM INVESTIGATIONS.**

“(a)(1) The Director of the Federal Bureau of Investigation or a designee of the Director (whose rank shall be no lower than Assistant Special Agent in Charge) may make an application for an order requiring the production of any tangible things (including books, records, papers, documents, and other items) for an investigation to protect against international terrorism or clandestine intelligence activities, provided that such investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution.

“(2) An investigation conducted under this section shall—

“(A) be conducted under guidelines approved by the Attorney General under Executive Order 12333 (or a successor order); and

“(B) not be conducted of a United States person solely upon the basis of activities protected by the first amendment to the Constitution of the United States.

“(b) Each application under this section—

“(1) shall be made to—

“(A) a judge of the court established by section 103(a); or

“(B) a United States Magistrate Judge under chapter 43 of title 28, United States Code, who is publicly designated by the Chief Justice of the United States to have the power to hear applications and grant orders for the production of tangible things under this section on behalf of a judge of that court; and

“(2) shall specify that the records concerned are sought for an authorized investigation conducted in accordance with subsection (a)(2) to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities.

“(c)(1) Upon an application made pursuant to this section, the judge shall enter an ex parte order as requested, or as modified, approving the release of records if the judge finds that the application meets the requirements of this section.

“(2) An order under this subsection shall not disclose that it is issued for purposes of an investigation described in subsection (a).

“(d) No person shall disclose to any other person (other than those persons necessary to produce the tangible things under this section) that the Federal Bureau of Investigation has sought or obtained tangible things under this section.

“(e) A person who, in good faith, produces tangible things under an order pursuant to this section shall not be liable to any other person for such production. Such production shall not be deemed to constitute a waiver of any privilege in any other proceeding or context.

**“SEC. 502. CONGRESSIONAL OVERSIGHT.**

“(a) On a semiannual basis, the Attorney General shall fully inform the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate concerning all requests for the production of tangible things under section 402.

“(b) On a semiannual basis, the Attorney General shall provide to the Committees on the Judiciary of the House of Representatives and the Senate a report setting forth with respect to the preceding 6-month period—

“(1) the total number of applications made for orders approving requests for the production of tangible things under section 402; and

“(2) the total number of such orders either granted, modified, or denied.”.

**SEC. 224. SUNSET.**

(a) IN GENERAL.—Except as provided in subsection (b), this title and the amendments made by this title (other than sections 203(a), 203(c), 205, 208, 210, 211, 213, 216, 219, 221, and 222, and the amendments made by those sections) shall cease to have effect on December 31, 2005.

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Source: [www.lifeandliberty.gov](http://www.lifeandliberty.gov)

### 3D: Activity: Legislative Hearing on Federal Surveillance of U.S. Persons

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Legislative hearings are held by committees of the United States Congress and other legislative bodies to gather information upon which to base recommendations regarding subjects regulated by law or for which laws are being considered. These hearings are a basic function of legislative branches of government. This simulated legislative hearing involves a panel of legislators and fictional groups of citizens – representing a variety of interests – who have come to testify about the New General Guidelines for Federal Investigations.

Section 215 of the USA PATRIOT Act of 2001 states:

(a)(1) The Director of the Federal Bureau of Investigation or a designee of the Director (whose rank shall be no lower than Assistant Special Agent in Charge) may make an application for an order requiring the production of any tangible things (including books, records, papers, documents, and other items) for an investigation to protect against international terrorism or clandestine intelligence activities, provided that such investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution.

This power will “sunset,” or automatically end, on December 31, 2005, unless Congress acts to extend this provision.

This simulated legislative hearing will focus students on whether to renew this surveillance power of the federal government as it appears under Section 215 of the USA PATRIOT Act.

#### Preparations

- Assign the following roles (divide the class into groups of 4 to 6):

**Congressional Oversight Committee.** This Committee is interested in whether Congress should renew Section 215 of the USA PATRIOT Act. Six legislators is a practical number for a committee but this number may be varied to meet class requirements. One legislator is designated as chairperson.

**Center for Civil Liberties.** This group sued the FBI for illegal activities in the past and is very concerned about abuses of surveillance powers by federal agents. They oppose renewing this section of the Act. One person should be prepared to testify.

**Coalition for American Security.** This national membership organization favors law enforcement and is opposed to foreign aid. Their slogan is “Promoting American values by Protecting American interests.” They favor renewing this section of the Act. One person should be prepared to testify.

**The National Association for Librarians.** This umbrella organization represents professional librarians at public and private libraries across the country. Under Section 215, they must turn over lending records to the federal government. They oppose renewing this section of the Act. One person should be prepared to testify.

**Safety After September 11.** This group favors creative intelligence gathering and more aggressive law enforcement investigations in order to prevent future catastrophic attacks on U.S. soil. They favor renewing this Section of the Act. One person should be prepared to testify.

**Recorder.** A person or persons selected to keep a record of proceedings and present a review of recommendations.

- Explain the purpose of the legislative hearing and the procedures to be followed [see below]. Prepare a handout of the student instructions to a legislative hearing if needed.
- Allow time for participants to prepare for the legislative hearing in accordance with their assigned roles.
- Arrange to use the hearing or committee room of a local legislative body. Alternatively, set up a table for six legislators, a desk for the recorder, and a desk for the witness in the front of the classroom. Ask for a gavel and prepare nameplates with the students' names and their roles.
- Conduct the legislative hearing using the outlined procedures.

### **Student Instructions for a Legislative Hearing**

1. Prior to the hearing, all students should assess Section 215 of the USA PATRIOT Act using Handout 3B, "GRADE."
2. Prior to the hearing, student legislators may contact local legislators or other outside resource people to understand their proper role as well as to understand current laws on the topic.
3. Prior to the hearing, student witnesses may contact local groups or local chapters of national organizations that would have an interest in this topic. You should obtain any background information that will help you in presenting that group's position on the topic, including a proposed bill that contains their views.
4. Student witnesses may wish to discuss similarities in positions with other student witnesses. You might wish to explore the possibilities of supporting a common bill proposal.
5. The committee chairperson calls the legislative hearing to order, announces the purpose of the hearing, and announces the order in which the witnesses will testify.
6. Each witness is called and permitted a set amount of time to present an opening statement, followed by questions from members of the committee.
7. The chairperson is the first to question the witness, followed by each of the other members of the committee. However, a committee member may interrupt to ask a question or make a comment at any time during the proceedings.
8. The following are suggested time limits: two to five minutes for a witness' opening statement; and five to ten minutes for questions from the chairperson and other committee members.
9. After the witnesses have been heard, the legislators on the committee review the testimony, discuss the problem, and make recommendations on what their next step(s) will be.

### **Follow Up Questions**

- In what ways is testifying before a committee an effective way for Congress to get information? In what ways is it limited?
- What was the most compelling thing you learned about the General Guidelines from your preparation? From another participant?
- Do you agree with the committee's recommendation? Why or why not?
- What would help you to understand this issue more clearly?

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Adapted from: "Legislative Hearings," *Law-Related Education in Juvenile Justice Settings*. 1993, 1999, 2003: Youth for Justice.

## 3E: Taking a Stand: Federal Surveillance of U.S. Persons

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### Policy

Should Congress renew Section 215 of the USA PATRIOT Act which permits the Federal Bureau of Investigation (FBI) to apply to a federal judge for an order requiring the production of any tangible things – including books, records, papers, documents, and other items – for an investigation of a United States person to protect against international terrorism or clandestine intelligence activities?

### Steps for writing your Position Paper

1. Choose a position **for**, **against**, or as an **alternative** to the policy above.
2. Then team up with classmates who take the same position and as a group, write a persuasive paper arguing the benefits associated with your position on this policy.
3. In your essay, be sure to call on the most **convincing arguments** and **specific evidence and examples** from:
  - the curriculum
  - discussion and other classroom activities
  - the Summit survey results
  - your service project experience
  - people in your community
  - any other sources available to you
4. Include in your paper the most convincing arguments from the **opposing side**. List what you think are the best arguments your policy rivals would make. Acknowledge these points, and do your best to refute the importance of these details.

### Specifications for Your Paper

**Length.** Your paper should be between 300 and 500 words.

**Format.** Each paper must have the name of the school in the heading and the policy being addressed in the title. No student names will appear on the position papers.

**Deadline.** All position papers must be received by the Constitutional Rights Foundation Chicago (CRFC) by **April 18, 2005**. Turn in your completed paper to your teacher before that date.

**Assessment.** For a suggested scoring guide to use with position papers, see Handout 6C, "Tool: Final Position Paper Scoring Guide."

***Select copies of your position papers will be distributed to policymakers and to students from other schools at the Summit.***

### Sharing Your Views on Section 215 of the USA PATRIOT Act

Congress will decide this term whether to renew this and other Sections of the USA PATRIOT Act. You can contribute your views on this policy by writing to your Representative in Congress and/or to U.S. Senators Durbin and Obama. Their contact information is listed in the Supplemental Resources section at the back of this curriculum.

# Federal Surveillance of U.S. Persons under the USA PATRIOT Act: Selected Community, Print, and Internet Resources

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## Resources

American Civil Liberties Union of Illinois  
180 North Michigan Avenue #2300  
Chicago, Illinois 60601-1287  
312/201-9740  
<http://www.aclu-il.org/>

Federal Bureau of Investigation  
219 South Dearborn Street, Suite 905  
Chicago, Illinois 60604  
312/431-1333  
<http://chicago.fbi.gov/>

Office of the U.S. Attorney, Northern District of Illinois  
219 South Dearborn Street, 4th floor  
Chicago, IL 60604  
312/353-5300  
<http://www.usdoj.gov/usao/iln/>  
U.S. Department of Justice  
[www.usdoj.gov](http://www.usdoj.gov)

Preserving Life and Liberty  
[Official USA PATRIOT Act web site]  
U.S. Department of Justice  
<http://www.lifeandliberty.gov/>

## Documents

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