Name: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

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**National Security Day 6: Freedom vs. Security**

Determine whether you agree or disagree:

*Sometimes personal rights must be given up in order to protect people from those who could be a danger to all of us.*

*It's better to be safe than sorry when it comes to fighting terrorism.*

*The government should have the right to investigate to the fullest extent any suspicious person and their activities.*

*Civil Liberties have been granted in the Constitution's Bill of Rights and should be preserved, no matter what.*

**PATRIOT ACT Background**  
  
Following the 9/11 attacks on America, Congress overwhelmingly passed the USA PATRIOT Act (Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism) as a means for protecting the country from future attacks by providing law enforcement officials with new tools to fight terrorism. Among them are the power to track Internet communications, wiretap phone and computer communications, obtain search warrants for e-mail and voicemail communications, and the ability to access personal records and information without any proof that an individual has committed a crime. These new powers have led to controversy because many feel the USA PATRIOT Act violates the basic civil liberties established by the U.S. Constitution, particularly those related to privacy and First and Fourth Amendment rights. As a result, many local and state governments have passed resolutions against the Act, and the ACLU has taken legal action against various provisions of the law. What has emerged is a debate and a power struggle between the right to personal civil liberties and the need for national security.

**PATRIOT ACT CONTINUES TO SPARK DEBATE**

September 17, 2003

**Almost two years after the introduction of the USA Patriot Act, President Bush is asking lawmakers to expand the powers provided under the anti-terrorism legislation.**

The president’s request is the latest spark in the controversy over the USA Patriot Act – the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act – which Congress signed into law one month after the terrorist attacks on Sept. 11, 2001.

In a speech delivered the day before the two-year anniversary of Sept. 11, President Bush called on Congress to "untie the hands of our law enforcement officials so they can fight and win the war against terror."

The expanded powers would allow officials to bypass a judge or grand jury in order to obtain subpoenas in time-sensitive terrorism investigations. It would also deny bail to terrorism suspects and open up the federal death penalty for terror-related crimes that result in death.

Currently, the act allows officials to track an individual’s communications on the Internet, install telephone and computer wiretaps, obtain search warrants for voice-mail and e-mail messages, access personal information, such as medical, financial and educational histories, and access library records without proof of a crime.

**Growing Criticism**

Supporters and critics of the law are constantly at odds over what liberties Americans should have to sacrifice in exchange for their safety.

The Patriot Act's most outspoken critic, the American Civil Liberties Union, or ACLU, an 80- year-old civil rights watchdog organization, called the act a “surveillance monster” and argued that there were “virtually no rules" governing the new powers.

The act slowly eliminates judicial oversight and upsets checks and balances, ACLU Executive Director Anthony Romero told Newsweek magazine.

"Of course we want to be safe, but the government of the United States under the leadership of George Bush and John Ashcroft has perpetrated a cruel hoax on the American people," New York Civil Liberties Union Executive Director Donna Lieberman said. "It has taken advantage of this unspeakable tragedy to launch a broadside against our fundamental rights."

Another complaint from civil liberties groups is that the law is increasingly being used against criminals, who are not terrorists.

A man in North Carolina accused of running a methamphetamine lab was charged with breaking a new state law that bars the manufacturing of chemical weapons. If he is convicted he could get 12 years to life, a crime that had previously only resulted in a six-month sentence, the Associated Press reported.

**Defending the Patriot Act**

In an effort to rally support for the Patriot Act, Attorney General John Ashcroft recently finished a 16-city tour, traveling across the United States to speak to law enforcement officials in defense of the act.

Ashcroft pointed to the triumphs the government has made under the act since Sept. 11, 2001. Among them, federal prosecutors have brought more than 250 criminal charges under the law, resulting in more than 130 convictions or guilty pleas.

"We have used tools provided in the Patriot Act to fulfill our first responsibility -- that of protecting the American people," Ashcroft said. "We've used these tools to provide the security that ensures liberty."

Former Assistant Attorney General Viet Dinh said the act's success is obvious because nothing has happened in the last two years, an achievement for law enforcement officials, the Department of Justice and Ashcroft.

Lawmakers, hoping to avoid the heated debates that surrounded the passage of the original Patriot Act, are expected to quietly attach additions to the Patriot Act to spending bills, which are usually easier to pass in Congress.

Sheryl Silverman, Online NewsHour EXTRA

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### Question 1: FISA: Was the NSA program consistent with the Foreign Intelligence Surveillance Act (FISA)?

**Yes**

* **FISA authorized the president to conduct wartime electronic surveillance without warrants.** [The U.S. Department of Justice has argued in its 1/19/06 article "Legal Authorities Supporting the Activities of the National Security Agency Described by the President"](http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/nsa/dojnsa11906wp.pdf) that, "The President’s exercise of his constitutional authority to conduct warrantless wartime electronic surveillance of the enemy, as confirmed and supplemented by statute in the AUMF (Authorization for Use of Military Force), is fully consistent with the requirements of the Foreign Intelligence Surveillance Act (“FISA”)... The United States makes full use of the authorities available under FISA to gather foreign intelligence information, including authorities to intercept communications, conduct physical searches, and install and use pen registers and trap and trace devices. While FISA establishes certain procedures that must be followed for these authorities to be used..., FISA also expressly contemplates that a later legislative enactment could authorize electronic surveillance outside the procedures set forth in FISA itself. The AUMF constitutes precisely such an enactment. To the extent there is any ambiguity on this point, the canon of constitutional avoidance requires that such ambiguity be resolved in favor of the President’s authority to conduct the communications intelligence activities he has described. Finally, if FISA could not be read to allow the President to authorize the NSA activities during the current congressionally authorized armed conflict with al Qaeda, FISA would be unconstitutional as applied in this narrow context."
* **FISA made room for the 2001 Authorization of the Use of Military Force to authorize warrantless wiretapping:** [Justice Department Report in Support of the Program 1/27/06](http://www.usdoj.gov/opa/documents/nsa_myth_v_reality.pdf#search=%22The%20NSA%20Program%20to%20Detect%20and%20Prevent%20Terrorist%20Attacks%20-%20Myth%20v.%20Reality%22) - "Myth: The NSA program violates the Foreign Intelligence Surveillance Act (FISA). Reality: The NSA activities described by the President are consistent with FISA. FISA expressly envisions a need for the President to conduct electronic surveillance outside of its provisions when a later statute authorizes that surveillance. The AUMF is such a statute [Sept 13, 2001 Congressional Authorization for the Use of Military Force]." (see arguments that support the claim that "the AUMF is such a statute" in the next section).
* **PATRIOT Act Amendments to FISA lowered boundaries to warrantless wiretapping:** \*\*[Grayson A. Hoffman claims in "Litigating Terrorism: The New FISA Regime, the Wall, and the Fourth Amendment", American Criminal Law Review article (2003),](http://www.questia.com/PM.qst?a=o&se=gglsc&d=5008125290&er=deny) that PATRIOT act amendments to FISA set new standard that required that foreign intelligence gathering be "a significant purpose" of the surveillance, as opposed to "the purpose." This helped offer greater flexibility and justification to the NSA's wiretapping domestically, and of US citizens, as long as the "significant purpose" of that is to collect foreign intelligence.[[3]](http://www.questia.com/PM.qst?a=o&se=gglsc&d=5008125290&er=deny) \*\*[The Department of Justice](http://www.questia.com/PM.qst?a=o&se=gglsc&d=5008125290&er=deny) insisted that the FISA amendments were intended to break down the "wall," thereby permitting federal prosecutors to use FISA surveillance to gather evidence for criminal prosecutions aimed at protecting national security.

**No**

* **FISA makes illegal all warrantless wiretapping without a court order under the Foreign Intelligence Surveillance Act (FISA) Law**

[**Article 50 United States Code, section 1809**](http://caselaw.lp.findlaw.com/casecode/uscodes/50/chapters/36/subchapters/i/sections/section_1809.html)**:**

* + "(a)Prohibited activities - a person is guilty of an offense if he intentionally
    - (1) engages in electronic surveillance under color of law except as authorized by statute; or
    - (2) discloses or uses information obtained under color of law by electronic surveillance, knowing or having reason to know that the information was obtained through electronic surveillance not authorized by statute.
  + (b) Defense: It is a defense to a prosecution under subsection (a) of this section that the defendant was a law enforcement or investigative officer engaged in the course of his official duties and the electronic surveillance was authorized by and conducted pursuant to a search warrant or court order of a court of competent authorization is outlawed by the text of FISA."
* **The breadth of the NSA program was too wide, extending beyond the boundaries of "just cause":** \*\*["Surveillance Net Yields Few Suspects", The Washington Post 2/5/06](http://www.washingtonpost.com/wp-dyn/content/article/2006/02/04/AR2006020401373.html) - "fewer than 10 U.S. citizens or residents a year, according to an authoritative account, have aroused enough suspicion during warrantless eavesdropping to justify interception of their (purely) domestic calls, as well. That step still requires [under FISA] a warrant from a federal judge, for which the government must supply evidence of probable cause...The minimum legal definition of probable cause, said a government official who has studied the program closely, is that evidence used to support eavesdropping ought to turn out to be 'right for one out of every two guys at least.' Those who devised the surveillance plan, the official said, 'knew they could never meet that standard -- that's why they didn't go through [the FISA court].'"
  + [According to *USA Today*](http://www.usatoday.com/news/washington/2006-05-10-nsa_x.htm) - Several sources allege that thousands, possibly millions of innocent civilians have been subject to surveillance. In addition J. Scott Marcus, internet pioneer and former FCC advisor, concluded that the "spy rooms" used by AT&T, are "in far more locations than would be required to intercept the majority of international traffic", and that the surveillance methods used are insufficient to adequately determine what originates from outside the US.[[4]](http://www.eff.org/legal/cases/att/marcus-decl-redact.pdf) This all suggests that a substantial proportion of the surveillance cases were not based on a "reasonable" degree of certainty of an international communication, which was a requirement under FISA for such surveillance.

### Question 2: Patriot Act: Is the NSA program legal under the Patriot Act?

**Yes**

* **The NSA program was legal under Title II of the USA PATRIOT Act entitled Enhanced Surveillance Procedures.**
  + **The administration argued as early as 2004:** [According to Tech Law Journal's article "Bush Proposes to Extend and Expand PATRIOT Act"](http://www.techlawjournal.com/topstories/2004/20040419.asp) - In particular, the title allows government agencies to gather "foreign intelligence information" from both U.S. and non-U.S. citizens, which is defined in section 203. The sections of Title II amend the Foreign Intelligence Surveillance Act of 1978 and its provisions in 18 U.S.C., dealing with "Crimes and Criminal Procedure". It also amends the Electronic Communications Privacy Act of 1986. Generally, the Title expands federal agencies' powers in intercepting, sharing, and using private telecommunications, especially electronic communications. It also updates the rules that govern computer crime investigations. Finally, it sets out procedures and limitations for individuals who feel their rights have been violated to seek redress, including against the United States government.
  + [According to Wikipedia's NSA Surveillance article](http://en.wikipedia.org/wiki/USA_PATRIOT_Act%2C_Title_II#Overview), some argue that section 218 changed FISA to the "[significant] purpose of the surveillance is to obtain foreign intelligence information" (change in []). The change in definition was meant to remove a legal "wall" between criminal investigations and surveillance for the purposes of gathering foreign intelligence, which hampered investigations when criminal and foreign surveillance overlapped.

**No**

* **Some sources claim, that in order for Title II to be used in defense of the program**, the program would have needed to be applied the domestic law enforcement provisions of the [PATRIOT Act](http://www.epic.org/privacy/terrorism/hr3162.html) for authorization of any of the NSA program activities. In order for the program's compliance to be established with the Patriot Act, all wiretapping orders granted under section 215 would have to be disclosed to the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate. Every six months, the Attorney General would also have to provide a report to the Committees on the Judiciary of the House of Representatives and the Senate, which details the total number of applications made for orders approving requests for the production of tangible things and the total number of such orders either granted, modified, or denied. This process was never followed by the Bush administration, which undermines its claim that the NSA program is protected by the PATRIOT Act.[[5]](http://en.wikipedia.org/wiki/USA_PATRIOT_Act%2C_Title_II#Overview)

### Question 3: Civil liberties: Does the NSA program comply with civil liberties under the constitution?

#### Yes

* **The program is narrowly focused on international phone calls:**
* [Justice Department Defense 1/27/06](http://www.usdoj.gov/opa/documents/nsa_myth_v_reality.pdf#search=%22The%20NSA%20Program%20to%20Detect%20and%20Prevent%20Terrorist%20Attacks%20-%20Myth%20v.%20Reality%22) - "The NSA program is narrowly focused, aimed only at international calls and targeted at al Qaeda and related groups. Safeguards are in place to protect the civil liberties of ordinary Americans"...
  + ..."The program only applies to communications where one party is located outside of the United States.
  + The NSA terrorist surveillance program described by the President is only focused on members of Al Qaeda and affiliated groups. Communications are only intercepted if there is a reasonable basis to believe that one party to the communication is a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda.
  + The program is designed to target a key tactic of al Qaeda: infiltrating foreign agents into the United States and controlling their movements through electronic communications, just as it did leading up to the September 11 attacks.
  + The NSA activities are reviewed and reauthorized approximately every 45 days. In addition, the General Counsel and Inspector General of the NSA monitor the program to ensure that it is operating properly and that civil liberties are protected, and the intelligence agents involved receive extensive training."
* [Justice Department](http://www.usdoj.gov/opa/documents/nsa_myth_v_reality.pdf#search=%22The%20NSA%20Program%20to%20Detect%20and%20Prevent%20Terrorist%20Attacks%20-%20Myth%20v.%20Reality%22) - "Myth: The NSA activities violate the Fourth Amendment. Reality: The NSA program is consistent with the Constitution’s protections of civil liberties, including the protections of the Fourth Amendment...
* **The Supreme Court has long held that the Fourth Amendment allows warrantless searches where 'special needs, beyond the normal need for law enforcement' exist**. Foreign intelligence collection, especially in a time of war when catastrophic attacks have already been launched inside the United States, falls within the special needs context.
  + As the Foreign Intelligence Surveillance Court of Review has observed, the nature of the 'emergency' posed by al Qaeda 'takes the matter out of the realm of ordinary crime control.'
* **The program easily meets the Court’s reasonableness test for whether a warrant is required.** The NSA activities described by the President are narrow in scope and aim, and the government has an overwhelming interest in detecting and preventing further catastrophic attacks on American soil."
  + The judge asserts that the Fourth Amendment, in all cases, “requires prior warrants for any reasonable search, based upon prior-existing probable cause.” Yet, there are many situations where our courts have found that a prior warrant is not required, so long as a search is “reasonable.” The Keith case, 1972 electronic-surveillance decision, makes clear that, though the 4th requires a warrant for purely domestic security cases, it does not always require a prior warrant for government searches. Rather, the need for warrants depends on a "reasonable" balancing of the government’s needs, such as protecting us from attack and other constitutional interests.[[6]](http://article.nationalreview.com/?q=OWVlOGNiZmIyMmZkYTg2OGFiYzM3ZGU4Nzc0MjFjNzQ=)
  + In a post-FISA case, judge Falvey ruled that: “When, therefore, the President has, as his primary purpose, the accumulation of foreign intelligence information, his exercise of Article II power to conduct foreign affairs is not constitutionally hamstrung by the need to obtain prior judicial approval before engaging in wiretapping.”
* **Judge Taylor misused the precedent of the "Youngstown Sheet and Tube Case" (seizure of U.S. steel mills in the face of a union strike) and overlooked many of its and subsequent rulings**
  + [National Review article titled "Amateur Hour? A judge’s first-year failing-grade opinion" written by Brian Cunningham 8/27/06](http://article.nationalreview.com/?q=OWVlOGNiZmIyMmZkYTg2OGFiYzM3ZGU4Nzc0MjFjNzQ=) Cunningham makes the following claims:
  + The Youngstown case disavowed the application of the opinion beyond that case’s primarily domestic context, making its application to the NSA program suspect because of the programs foreign intelligence related dealings.
  + That other US courts long after Youngstown emphasized their limitations to primarily domestic cases and that other legal authorities more appropriately govern primarily foreign-affairs/foreign-intelligence-collection cases, such as the TSP.
  + A number of Supreme Court and other decisions, most famously including Curtiss-Wright Export, which has been cited many times since Youngstown, made clear the president’s constitutional primacy in foreign-affairs/foreign-intelligence collection, upon which neither Congress nor the courts may intrude.

#### No

* **The NSA program's failure to procure judicial orders violated the fourth (right to privacy) and first amendments (freedom of speech):** [On August 17th, U.S. District Court Judge Anna Diggs Taylor ruled](http://www.nytimes.com/2006/08/17/washington/17cnd-nsa.html?ex=1313467200&en=9c107bcba3ed54d1&ei=5088&), "the President of the United States, a creature of the same Constitution which gave us these Amendments, has indisputably violated the Fourth in failing to procure judicial orders as required by FISA, and accordingly has violated the First Amendment Rights of these plaintiffs as well."
  + [According to CNN.com 8/17/06](http://www.cnn.com/2006/POLITICS/08/17/domesticspying.lawsuit/index.html), the plaintiffs maintained that the NSA's surveillance impeded "the ability of the plaintiffs to talk with sources, locate witnesses, conduct scholarship and engage in advocacy" and that this was a violation of their right to privacy.
* **The NSA program's abuses of civil liberties extend well beyond the "special needs" category of the law:** The Bush Administration made the legal claim to "special needs" to justify the NSA program: \*\*["NSA Eavesdropping and the Fourth Amendment", Jurist Law Journal 3/8/06, Williams Banks of Syracuse University College of Law](http://jurist.law.pitt.edu/forumy/2006/03/nsa-eavesdropping-and-fourth-amendment.php) - The author maintained that the Bush administration argues that the NSA program may be fitted within a line of Fourth Amendment cases excepting from the warrant and probable cause requirements situations where the government has “special needs” that are above and beyond ordinary law enforcement. While the “special needs” category has sustained drunk-driving checkpoints and drug testing in schools, programs that are relatively non-intrusive and standardized, “special needs” has never been extended to both highly intrusive and discretionary warrantless wiretapping. As the FISA Court of Review recognized in upholding FISA, the FISA system for obtaining judicial approval based on individualized suspicion is both workable and lawful.

“Is Warrantless Wiretapping in Some Cases Justified to Protect National Security?”

|  |  |
| --- | --- |
| **Program is good for Americans** | **Program is bad for Americans** |
| Your opinion: Is warrantless wiretapping justified? | |

|  |
| --- |
| Do you believe that people (individuals and society in general) must be willing to forfeit some privacy and freedom in order to maintain a safe society? Explain. |