

# Learning the lessons of the Patriot Act

Next week, the USA Patriot Act will turn 8 years old. Passed just six weeks after 9/11, on Oct. 26, 2001, the legislation revamped dozens of laws governing search and surveillance powers. In many cases, those powers were substantially broadened by the act.

Later this year, three controversial provisions of the Patriot Act will expire unless Congress moves to reauthorize them. In mid-September, President Barack Obama's Justice Department called for the renewal of those provisions in their current form. Soon afterward, Sens. Russ Feingold, D-Wis., and Patrick Leahy, D-Vt., set out competing legislative plans for amending those same authorities.

Whatever transpires, Congress will be forced to act on the matter before Dec. 31. In the meantime, what lessons has America learned from its Patriot Act experience?

## **The value of sunset clauses**

In the weeks after 9/11, the federal government scrambled to formulate a response to September's massive terror attacks. On the legislative front, the Justice Department quickly drafted the 300-page USA Patriot Act, and submitted it to Congress for approval.

The legislation was a grab bag of provisions, including appropriations for the families of terror victims, and changes to the ways that banks reported large deposits. Still other aspects of the bill expanded search and seizure authorities used by police and intelligence agencies. These provisions would eventually come to define the Patriot Act in the eyes of much of the public.

The act's rapid compilation meant that many previously existing legislative proposals were included in the draft bill. Fragments of bills that had been considered by Congress before — and had been rejected — were integrated into the language of the Patriot Act. In large part, this old material was composed of police powers that had been pursued by the Clinton administration in the aftermath of Oklahoma City bombing.

During the mid-1990s, Republicans in the House formed a key part of the congressional opposition to these sought-after authorities. Less than a decade later, however, the Republican leadership reversed course and re-introduced many of

these same provisions in Patriot Act packaging. While civil libertarians were unable to extract problem provisions from the fast-moving Patriot Act bill prior to a vote, they were able to add a "sunset" expiration date to ensure that Congress would be forced to revisit them at a later time. This proved to be a fortuitous move.

### **Sunset-driven reform of search powers**

Among the powers contained in the initial Patriot Act were broadly written search authorities that gave great deference to police agencies, with limited judicial oversight. These authorities included the power to compel the seizure of business records or other tangible things under a new category of FISA court order. Under Section 215 of the Act, FISA judges were all but mandated to provide orders for tangible things upon a government agent's request. The "shall issue" language of the Patriot Act directed judges to issue such orders with only minimal review.

The tight constraints that the Act placed upon judges — in addition to the Act's total ban on the disclosure of Section 215 orders — spurred litigation by the ACLU. However, before the ACLU's court challenge resolved itself, the Patriot Act reached its sunset date.

Faced with broad, grass-roots opposition to certain post-9/11 powers, Congress chose to quietly amend some Patriot provisions during their renewal. Section 215, for instance, was altered to allow judges to reject applications for these FISA orders. Those served with Section 215 orders were also allowed to contact an attorney to dispute such demands. These legislative changes were substantive enough that the ACLU eventually dropped its litigation. Without the sunset clause, the original, overbroad Section 215 provision might still be on the books.

Whatever becomes of the Patriot Act's current sunset renewal debate, there is an institutional lesson to be taken from this experience. In the future, sunset triggers like those found in the Patriot Act should be added to other contentious pieces of legislation that come before Congress. Without them, representatives often have little incentive to review and correct their more controversial work.

### **Lack of oversight encourages abuse**

Our national experience with the Patriot Act provides us with another lesson — one that affirms the suspicions of those who distrust the aggregation of unchecked governmental power.

The original Patriot Act expanded the use of National Security Letters, or NSLs. NSLs are essentially subpoenas for documents issued directly by FBI agents,

without any court oversight. Prior to the Patriot Act, the use of NSLs was quite limited. After the Act's passage, NSLs could be issued for all manner of business, Internet, telephone and credit records, without a judge ever reviewing the relevance of the orders. In 2006 alone, the FBI issued over 49,000 National Security Letters.

Like Section 215 orders, Patriot Act NSLs came with a perpetual gag order that prevented recipients from challenging them in court. This gag language was so broad that District Court Judge Victor Marrero held the Patriot Act's NSL provision to be unconstitutional in 2004.

### **Inspector General's report reveals NSL problems**

Last year, the Inspector General of the Justice Department released a report on the use of NSLs by government agents during the 2006 calendar year. According to the report, the FBI issued several "blanket" NSLs that sought information on more than 3,600 telephone numbers. These NSLs were issued even though agents never demonstrated to their supervisors that the information sought was relevant to any authorized investigation. The IG's report also stated that the NSLs in question were issued in direct violation of federal law.

The IG was unable to quantify the full extent of such problems, because it determined "that a significant number of NSL-related violations [were] not being identified or reported by the FBI." Such episodes illustrate the problems that occur when secretive processes receive little external oversight.

On a positive note, sunset review of the Patriot Act forced Congress to modify the NSL provision in 2006. The revised provision now allows for court challenges, and for NSL disclosure to attorneys. Congress also mandated the kind of internal data collection that resulted in the 2008 IG's report. As that report illustrates, tighter oversight of the NSL mechanism is needed, and should be considered by Congress during the current reauthorization debate.

### **Legislative haste breeds grass-roots opposition**

The six-week rush to pass the original Patriot Act holds yet another lesson that Americans should note. Undue haste on the part of Congress often reads as if legislators are trying to hide something — and on some occasions, they are. The procedural history of the Patriot Act, for instance, was riddled with irregularities. Drafts of bills were switched at odd hours. Late in the process, key committee members did not have access to relevant language. As Rep. Ron Paul, R-Texas, noted at the time, most of those who ultimately voted for the Act had not even seen the final bill.

Rapid action on the part of the government can cause deep public unease — especially when the impact of that action will be broad-based. Legislation that feels like a rush-job almost guarantees that political resistance will be swift, mobilized and vocal. Much of the grass-roots opposition that crystallized around the Patriot Act can be traced to its hurried method of passage.

### **Health-care debate has parallels**

America saw a similar dynamic play out over the course of this past summer, as Congress attempted to quickly pass a 1,000 page version of health-care reform legislation. While emanating from a different end of the political spectrum, the opposition seen in town hall forums was rooted in an unease similar to that which erupted around the Patriot Act. In each case, the hasty legislative tactics used to push the bills helped stoke a grass-roots conflagration.

Like the Republicans in 2001, today's Democratic leadership hopes to use the stressors of the present to forward its legislative agenda. "Never let a serious crisis go to waste," White House chief of staff Rahm Emmanuel has said. While a crisis may provide a ready-made political opportunity to pass legislation, it rarely creates an environment for productive lawmaking. Legislators interested in formulating sound public policy of all kinds should take this key lesson away from the Patriot Act experience.

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