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Dust-Up

The Patriot Act: Looking back to 2001

Jena Baker McNeill says the Patriot Act was long overdue before the 9/11 attacks. Julian Sanchez says we need an analysis of the trade-offs that come with increased surveillance powers.

4:40 PM CDT, October 23, 2009



Today's topic: In hindsight, did Congress and the president react too hastily in 2001 by passing the Patriot Act just weeks after the 9/11 attacks? Did the revisions in 2005 adequately address concerns that the act went too far or didn't go far enough? Jena Baker McNeill and Julian Sanchez finish their debate on the Patriot Act, key provisions of which Congress is considering reauthorizing.

Point: Jena Baker McNeill

Let's stop rehashing the birth of the Patriot Act and start talking about preventing terrorist attacks in 2010 and beyond.

We all agree that Congress and the president are obligated to protect Americans against attacks by foreign enemies. After the 9/11 attacks, this duty was crystal clear. What was also clear is that suppressing terrorism could not be achieved by military means alone.

The 9/11 hijackers started a war, but they didn't plan their attacks aboard a military vessel, use traditional weapons or bring an army with them. Their weapons were the everyday luxuries in our society -- our cellphone networks, our hotels, our restaurants and our planes.

I would argue that we did not enact the Patriot Act too quickly after Sept. 11, 2001; in fact, the law's provisions were long overdue. As the 9/11 Commission stated, "The 9/11 attacks were a shock, but they should not have come as a surprise."

There were several warnings: the 1993 "Black Hawk Down" incident, in which Al Qaeda operatives helped Somalis bring down U.S. helicopters, the 1995 Riyadh car bombing, the 1996 Khobar Towers attacks and the bombings of U.S. embassies in Kenya and Tanzania. Don't forget the bombing of the U.S. warship Cole in 2000 and the first World Trade Center attack in 1993. These were acts of terrorism; still, our law enforcement practices were left relatively unchanged.

Sure, we could have kept the same legal practices and probably foiled some post-9/11 plots. But evidence suggests that we probably wouldn't have stopped all of them without the Patriot Act. A world without the Patriot Act would have extended the "period of darkness," described by former Deputy Atty. Gen. James B. Comey, that comes with a lack of information sharing between law enforcement agencies. This refers to the time spent obtaining new warrants whenever a terrorist tosses a cellphone and when investigators are effectively prohibited from tracking suspects.

It surely is no coincidence that we haven't had a terrorist attack on U.S. soil since 2001. Remember back to the time immediately after the 9/11 attacks: The consensus was not if another strike would occur, but when. The thought that more than eight attack-free years and counting would ensue would have seemed almost unthinkable then. All it takes is one attack to kill thousands of innocent citizens and shake America's confidence to the core -- and the Patriot Act has helped us ensure that no plot has come to fruition.

To go back to the question posed to us today, the option in 2001 of doing nothing was a non-starter and would have put us at risk.

This is not to say the Patriot Act is perfect. Sure, we can ponder whether the law should have included more provisions or fewer and whatever else different members of Congress would have preferred. We can debate whether the 2005 changes were needed or not. But this does not make the Patriot Act bad legislation. Investigators have proved that the act can be successfully implemented in a way that respects civil liberties. The 26-plus foiled plots speak for themselves.

I would argue that there are more important questions to be asking ourselves about counter-terrorism heading in 2010. For example, how can we make the U.S. Department of Homeland Security more dynamic, integrated and seamless? What about starting a Homeland Security initiative to integrate the anti-terrorism efforts of state and local governments, the private sector, our allies around the world and Washington?

The Patriot Act has made us better fighters. If we ask the right questions, we can improve even more.

Jena Baker McNeill is a homeland security analyst at the Heritage Foundation.

Counterpoint: Julian Sanchez

Let's be honest: None of us were in much mood for cool deliberation in the weeks immediately following 9/11. Under the best of circumstances, it would have been a feat to get everything right in a 300-page bill that makes dramatic changes to dozens of complex national security statutes. In the panicked aftermath of a horrific terror attack, it would have been nothing short of miraculous. So you'll have to forgive me, Jena, if I'm more interested in looking back to see where a better balance could have been struck in light of what we now know.

Let's clear some brush first. You keep invoking the national security equivalent of Lisa Simpson's **tiger-repellent rock**: Some doubt the rock's magic powers, but I sure don't see any tigers around! If we actually pay attention to the institutional sources of pre-9/11 intelligence failure, we find that an array of internal structural problems and simple blunders, not some paucity of investigative tools, deserve the lion's share of the blame. Inadequate information sharing and coordination, which could have been substantially remedied even without legislative change, were indeed part of the problem -- but I'm mystified by how often you come back to this aspect of the law, which is largely irrelevant to the actual reform proposals on the table. Meanwhile, the successful investigations since 9/11 -- only a few of which actually involved "plots" for attacks in the U.S. -- appear to have depended a lot more on good human intelligence and informants in the community than broad new surveillance powers.

If we were really engaged in a "fundamental debate" over whether to "squash" Patriot Act authority wholesale, then perhaps an analysis at the magic-rock level would be adequate. But there are many more specific questions: How narrowly should the target description in a **roving wiretap** application be drawn to avoid issuing broad "John Doe" warrants? What kind of evidentiary showing is appropriate when investigators use national security letters -- issued by the tens of thousands each year -- to gather financial records or track Internet activity? Does the creation of vast databases of

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personal information about mostly innocent Americans for the purposes of "pattern analysis" yield an intelligence benefit that justifies the risk to privacy involved? What procedures might avoid the already-evident problem of "mission creep," where extraordinary tools for counter-terrorism efforts end up primarily being used for ordinary criminal cases? What rules should govern the handling of information about innocents?

For the most part, you've chosen to gloss over these important questions. You do offer your take on one particular reform, though it's not among those still under consideration: Sen. Russell D. Feingold's proposed requirement that national security letters be used to identify terror suspects only when they are the "least intrusive means" to do so. You worry that this is too "subjective" a standard, and that hapless investigators uncertain about how to apply it will be too cautious. But you must know that this is not how it works. The attorney general develops specific guidelines that give content to the more abstract requirements of the statute. Agents are not required to make complex legal determinations on their own, and there is no reason in principle to expect this to be a more serious problem than fleshing out the meaning of "probable cause," or any number of other standards that apply to government search and seizure.

And this brings us to the real bone of contention. The ultimate investigative "flexibility" is a total lack of standards that the Founding Fathers despised. We don't allow this, not only because it is inconsistent with American values but because before we imposed some restraints on intelligence surveillance in the 1970s, we know that domestic spying authority was systematically abused, on a massive scale, for political purposes unrelated to national security. The response of Congress was to impose the very restraints whose dilution you now applaud. The risk that history will repeat itself is transparently real, even if you don't deem the new abuses that have managed to slip through the veil of secrecy sufficiently "dramatic" yet.

What we need is an analysis of the trade-offs. We are so used to talking about the balance of "liberty versus security" that it's easy to forget they're not always in conflict. Some restraints on government power leave us much more free without seriously impeding legitimate investigations.

Julian Sanchez is a research fellow at the Cato Institute.

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