DUST-UP

Have any Patriot Act horror stories come true?

Julian Sanchez says the government has collected far more information than needed. Jena Baker McNeill says some of the proposed changes would remove the most effective portions of the Patriot Act.

October 23, 2009

E-mail Print Share Text Size

Today's topic: Where are the demonstrated examples of abuses of liberties because of the Patriot Act? Are there any provisions of the law that civil libertarians would find acceptable? Julian Sanchez and Jena Baker McNeill continue their debate on the Patriot Act, portions of which Congress is considering reauthorizing

Point: Julian Sanchez

Spoiler alert: Yes, there have been a number of well-documented abuses of power under the Patriot Act, as well as subsequent surveillance legislation. I'll detail some of them in a moment, and the ACLU has a more thorough report. As that report should make abundantly clear, it's really only a handful of the Patriot Act's dozens of provisions that civil libertarians have serious problems with, and our concern in most cases is to improve them, not eliminate them. But there are three more general points I think it's important to clarify before we delve into specifics.

First, intelligence surveillance demands especially robust safeguards precisely because it's so inherently secretive and therefore lacks many of the checks that exist in criminal investigations. Ordinary wiretaps, for instance, are always eventually disclosed to their targets and typically meant to be used as evidence in a trial, in which defense attorneys have powerful incentives to scrutinize the record closely for misbehavior. Intelligence taps are covert: Targets may never learn they've been spied on, and criminal prosecution may not be the goal. Both National Security Letters (NSLs) and so-called Section 215 orders for business records and other "tangible things" come with gag orders that remain in place long after the investigation is complete. The banks and telecommunications providers served with these orders have little incentive to expend time, money and energy challenging demands for information in court, and the few that have done so are prohibited from talking about why they believe the requests are illegitimate. Congressional oversight can help -- the Church Committee in the 1970s uncovered a stunning array of abuses stretching back decades -- but, absent some major scandal, tends to be limited in scope.

It also doesn't help that among the already documented abuses is the intelligence community's failure to fully and accurately inform Congress about their use of those powers. When legislators do become aware of problems, their ability to mobilize support for reform is hampered by their own inability to go public with their concerns. Sen. Russ Feingold (D-Wis.) has repeatedly said that he believes those Section 215 orders are being misused, but citizens have no real way to evaluate the claim.

Second, "abuse" typically connotes a violation of the law, or at least the internal rules governing surveillance. But there's good reason to be concerned about some of these powers even when they're

The Latest | NEWS AS IT HAPPENS

TUNISIA: Government cracks down on press freedoms, opposition before elections - Babylon & Beyond *10/23/2009, 6:24 a.m.*

Voices – Soupy Sales, 1926 - 2009 - The Daily Mirror *10/23/2009, 6:13 a.m.*

California?s Great America to add swing ride, re-theme kids area for 2010 - Los Angeles Times Travel | Daily Deal Blog *10/23/2009, 5:55 a.m.*

Art review: Brad Eberhard at Thomas Solomon Gallery - Culture Monster *10/23/2009, 5:00 a.m.*

Hula Dance Craze Sweeps New York - The Daily Mirror *10/23/2009, 4:00 a.m.*

MOST VIEWED | MOST E-MAILED

1. Soupy Sales dies at 83; slapstick comic had hit TV show in 1960s
2. Dodgers' owner Frank McCourt fires wife Jamie
3. H1N1 vaccine a tough sell to pregnant women
4. Pau Gasol might miss Lakers' opener
5. Swine flu surges in California, but vaccine remains scarce

used precisely as intended. In recent hearings, Justice Department officials made quite clear that they vacuum up reams of telephone, Internet and bank records in the preliminary phases of investigations to "close down leads" and spot suspicious patterns. This is another way of saying that the vast majority of people surveilled are innocent -- not when this authority is misused, but by design. The FBI issues tens of thousands of National Security Letters each year, and the majority seek information about U.S. citizens. That information isn't discarded; it goes into a massive FBI database containing literally billions of records. Simple math suggests there just aren't that many terrorists out there.

So-called sneak-and-peek warrants that were sold as a vital tool for terrorism investigations are now overwhelmingly used in ordinary criminal investigations -- contrary to what the public was told, certainly, but in accordance with the letter of the law. If we look back to those abuses uncovered by the Church Committee, we find some cases in which surveillance of journalists, activists and even Supreme Court justices was initiated for manifestly unlawful political purposes. But just as often, information gathered in the course of an initially legitimate national security investigation was later used for an illegitimate political end.

Finally, it's important to be clear on just what sort of abuse we should be worried about. It is not primarily that investigators will decide to start spying on average Americans -- though we have learned that some National Security Agency operators find it hilarious to pass around recordings of U.S. soldiers' pillow talk. It's that all this information, even if acquired for legitimate purposes, gives the people who hold it enormous political power. A reporter, activist or senator who crossed J. Edgar Hoover might find his career ruined by an embarrassing leak to the press.

All that said, what do we know about actual abuses so far? We know two successive inspector general reports found endemic misuse of NSLs, including requests for information the FBI wasn't entitled to obtain and "exigent letters" sent when no real emergency existed. We know that in at least one case, NSLs were used to obtain records after a judge rejected an attempt to obtain them via court order, citing 1st Amendment concerns. We know expanded National Security Agency wiretap powers approved last year have led to substantial "overcollection" of Americans' purely domestic communications -- including Bill Clinton's e-mails. Many of these can be put down to sloppiness or ineptitude, though they're no less troubling.

But history teaches that if there are more deliberate abuses, we probably won't know about them for decades to come. I don't know about you, but I'd rather not wait to find out.

Julian Sanchez is a research fellow at the Cato Institute.

Counterpoint: Jena Baker McNeill

Julian, I agree that it really is only a handful of Patriot Act provisions that civil libertarians find objectionable.

Unfortunately, they're the provisions that truly matter. A Patriot Act that lacks or dilutes these key provisions is as useful as a plastic sword in a gunfight.

When you look at who in Congress is seeking to add "procedural safeguards" to the law, you begin to see that efforts to amend the Patriot Act are less about remedying "abuses" and more about squashing it all together. In fact, Feingold, who has advocated these "procedural safeguards," was the only senator to vote against the Patriot Act in 2001, and he remains one of its most outspoken critics.

It's one thing, and perfectly legitimate, to advocate "safeguards." But add too many, and you've assembled a range of bureaucratic hoops -- a great way to effectively kill a policy. And this is exactly what will happen if Congress adds even more hurdles to the ones that already serve as a check on law enforcement.

Take, for example, the "least intrusive means" standard advocated by Feingold as a "safeguard" under the business records provision. It sounds OK, but it is actually an entirely subjective legal standard. Parsing this legal jargon might excite constitutional law students, but ask a federal investigator to define it. Try and find out how it would affect his or her ability to act decisively on sensitive intelligence information.

In essence, if it ain't broke, don't fix it. Yes, we could place further restrictions on the act, but doing so would be a step backward. It would inhibit the flexibility law enforcement officials need to stop modern terrorism.

The disagreement between civil libertarians and the national security crowd really comes down to a

more fundamental disagreement over whether the government should be allowed to do these activities in the first place. But this isn't about "abuse," which implies going outside the lines drawn by the law. Using the law precisely as it is intended is following the law.

Civil libertarians often allude to a whole host of abuses that could result from the Patriot Act. It has long been their cause celebre that law enforcement will use personal information for nefarious purposes if given the opportunity. In this instance, this same argument for more restrictions on law enforcement investigations is, essentially, an old argument repackaged for the Patriot Act.

The act, however, has not resulted in dramatic claims of abuse. Even the widely criticized business records provision has been used only 250 times since 2001. Barring the Supreme Court's decision over the law's "material support" provision, no part of the Patriot Act has been found unconstitutional.

Nor do the Patriot Act's provisions come without strings attached. Because of the Patriot Act, the Foreign Intelligence Surveillance Act application required to get roving surveillance authority is more substantial than a common warrant. And the act is full of congressional oversight mechanisms, reporting requirements and other standards as a means to make sure law enforcement is not stepping over its bounds.

If investigators are sloppy, by all means, use the legal powers already in place as a remedy. There are adequate safeguards on the books to stop this, and they should be used. But the Patriot Act is not an example of abuse; it is an example of success. The lack of terrorist attacks since 9/11 and the absence of actual abuses stand as mute but powerful witnesses to the law's effectiveness.

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