

Oversight is crucial

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Here we go again, jerking the steering wheel to the left after we oversteered to the right (in an effort to correct a left bias), vainly seeking a reasonable, middle road between the pull of public safety and that of individual rights. The events of 9/11 led Congress to enact the USA Patriot Act, granting enormous new powers to law enforcement agencies. Now, we are once more trying to correct the overcorrection with little hope of striking the right balance. (Just wait for the next terrorist attack to witness additional overreactions.)

We need a whole new approach. Instead of presuming that new security measures are either justified or in grievous violation of our rights, we should note that their merit or fault often depends on how carefully subjected their use is to oversight and how transparent it is to the press and public. Such scrutiny may not be satisfactory unless there is also a civilian review board.

Take, for example, one of the most controversial clauses of the Patriot Act, § 215, which allows the government to demand that private parties turn over extensive records. (These parties could include libraries or hospitals.) Many critics argue that this section should not be extended; others want it to be greatly limited. However, it is not difficult to imagine a situation in which such a search fully meets the constitutional demand that it be "reasonable." Just think, say, that the Federal Bureau of Investigation has information that a terrorist known only by an alias has been treated in hospital X for condition Y. Most would agree that under these circumstances it would be reasonable to search all of the records of the given hospital for individuals with that condition. Instead of banning such searches, it would be best to have a supervisor mechanism to ensure that the use is legitimate and that the FBI is not fishing because an unreliable source mentioned that some foreigner was treated somewhere for something.

The same holds true for the gag rule, also included in § 215, which prohibits disclosing to those whose documents have been searched that they are under investigation. It is very easy to imagine many conditions under which such a gag is justified for a considerable amount of time—just as it is to envision others in which it would be used merely to avoid public scrutiny. Then there is the equally controversial § 213 of the Patriot Act, known as the Sneak and Peek provision. It allows the government to search someone's home and to delay informing the person that his or her home has been searched. Scores of scenarios come to mind in which such a delay would be essential for any successful investigation. The true issue is not the delay in notification per se, but whether or not it is properly used. All of these matters should be handled by having in place the proper scrutiny, not by limiting the government's power to conduct such searches in the first place.

To some extent the needed accountability is already built into the government. For instance, the inspector general of the Department of Justice issued two highly critical reports of the FBI in 2003. Furthermore, congressional committees have oversight power. And they correctly demanded more specific information about the usage of various powers provided by certain sections of the Patriot Act in an effort to render these sections both legitimate and more effective. However, the record shows that on their own, these committees cannot provide anything close to the needed countervailing force to government agencies hell-bent on following their own course in the name of

national security.

The press, the next line of defense, has been doing a sound job of regularly reporting about a variety of abuses and about programs with absurd designs, leading the government to send many ideas back to the drawing board and to greatly reform aspects of the no fly lists, the tracking of foreign students and airport scanning methods, among others.

Create a civilian review board

Many citizens find these layers of oversight of value but still insufficient. To further strengthen the oversight of the Patriot Act and to reassure the public that the FBI is not running amok again, we need a civilian review board. It would be composed of the kind of people who served on the 9/11 Commission: bipartisan, highly respected by the public, able to work together, not in the running for public office and patriotic. They would need the proper level of security clearance to review detailed records to ensure that nobody is pulling the wool over their eyes. The board would issue regular reports about its findings without revealing specifics about sources and methods. Such oversight would allow one and all to determine whether new security measures have been employed legitimately. Such reports should lead to internal reforms in government agencies, as they will have to expect future rounds of similar audits. And they would serve as a reliable basis for revisions to contentious sections of the Patriot Act.

Two matters, though, do not require additional data. First, the extraordinary powers that the Patriot Act grants the government to fight terrorism are used to go after all kinds of other criminals. Congress should at least limit the scope of crimes to which the Patriot Act can be applied, say to terrorism and pedophilia. Second, we must talk with the five states that announced that they will refuse to help in the war against terrorism if it takes place under the auspices of the Patriot Act. Hopefully, they can buy into the better scrutinized and revised act. If not, homeland security funds should be denied to them, and other pressures exerted to bring them back in line.

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