

2013

## The Paradox of Counterterrorism Sunset Provisions

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### Recommended Citation

Emily Berman, *The Paradox of Counterterrorism Sunset Provisions*, 81 Fordham L. Rev. 1777 (2013).  
Available at: <https://ir.lawnet.fordham.edu/flr/vol81/iss4/6>

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## ARTICLES

### THE PARADOX OF COUNTERTERRORISM SUNSET PROVISIONS

*Emily Berman\**

*Since 9/11, legislators and commentators alike have hailed expiration dates—or “sunset provisions”—as a means to moderate the government’s tendency to curtail individual freedoms in response to security crises. Sunsets advocates explain that such provisions provide Congress with an opportunity to reevaluate counterterrorism legislation after the crisis atmosphere has passed, enabling legislators to adjust any policy whose infringement on civil liberties appears, in retrospect, unjustified by its benefits.*

*This Article demonstrates that, rather than guarding against the long-term entrenchment of overly robust security measures, sunsets have the opposite effect. The Article begins by illustrating that Congress’s high expectations for counterterrorism sunsets have not been borne out by their impact. It then explains that the failure of sunsets to prompt meaningful reevaluation of post-crisis counterterrorism measures stems from two sources. First, optimism over sunsets’ potential relies on several inaccurate assumptions about how the state of the world will change between the time a statute is enacted and its sunset date. And second, this optimism fails to account for the President’s outsized role in counterterrorism policymaking. Finally, the Article identifies sunsets’ hidden cost: paradoxically, by insisting on including sunset provisions, legislators concerned about overzealous counterterrorism legislation actually facilitate the enactment of such statutes. And as sunsets do not subsequently correct overzealous policy, they enable the long-term entrenchment of the very policymaking errors they are designed to prevent. The Article concludes that citizens and legislators concerned about the civil*

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*liberties costs of counterterrorism policy should reject claims that sunsets are an effective answer to those concerns.*

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#### INTRODUCTION

“[N]o man ever legislates at all. Accidents and calamities occur in a thousand different ways, and it is they that are the universal legislators of the world.”<sup>1</sup>

While the eyes of the world were focused on negotiations over the “fiscal cliff” and its possible impacts on tax rates, federal programs, and the

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1. See OREN GROSS & FIONNUALA NÍ AOLÁIN, LAW IN TIMES OF CRISIS: EMERGENCY POWERS IN THEORY AND PRACTICE 68 (2006) (quoting PLATO, THE LAWS 164 (Trevor J. Saunders trans., Penguin Books 1970)).

economy more broadly, another deadline came and went practically unnoticed. On December 31, 2012, the Foreign Intelligence Surveillance Act (FISA) Amendments Act of 2008<sup>2</sup> (FAA)—the statute that codified the controversial Bush Administration program allowing warrantless wiretapping of Americans' communications known as the Terrorist Surveillance Program—was scheduled to expire.<sup>3</sup> Until, that is, Congress passed an eleventh-hour five-year extension of the statute.<sup>4</sup> While Congress is notoriously gridlocked on issues ranging from the economy to the environment to entitlement reform, this statute was renewed by a bipartisan majority with little public debate and no modifications.<sup>5</sup>

The expiration date—or “sunset provision”—grew out of the circumstances surrounding the legislation's initial enactment. President George W. Bush implemented his Terrorist Surveillance Program in secret and without statutory authorization in the immediate wake of 9/11.<sup>6</sup> *The New York Times* revealed the program's existence in 2005,<sup>7</sup> and a federal judge subsequently determined that it failed to comply with existing statutes.<sup>8</sup> Congress then rushed to provide a statutory basis for the program in order to avoid a detrimental interruption in intelligence collection.<sup>9</sup>

Due to the unusual speed with which the legislation was passed and the “extraordinary powers” it gave to federal authorities, legislators worried that it might pose too great a threat to Americans' privacy.<sup>10</sup> Aware of the

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2. Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436 (codified in scattered sections of 8, 18, and 50 U.S.C.).

3. *Id.* The Terrorist Surveillance Program (TSP) was designed to intercept electronic communications to and from the United States “where there was a reasonable basis to conclude that one party to the communication was a member of Al Qaeda.” See OFFICES OF INSPECTORS GEN. OF THE DEP'T OF DEF., DEP'T OF JUSTICE, CIA, NSA, OFFICE OF THE DIR. OF NAT'L INTELLIGENCE, UNCLASSIFIED REPORT ON THE PRESIDENT'S SURVEILLANCE PROGRAM 1–6 (2009), available at <http://www.fas.org/irp/eprint/psp.pdf>.

4. Matt Sledge, *FISA Warrantless Wiretapping Program Renewed by Senate*, HUFFINGTON POST (Dec. 28, 2012, 12:06 PM), [http://www.huffingtonpost.com/2012/12/28/fisa-warrantless-wiretapping-senate\\_n2376039.html](http://www.huffingtonpost.com/2012/12/28/fisa-warrantless-wiretapping-senate_n2376039.html). The House of Representatives had already passed a five-year extension in September 2012. See Ellen Nakashima, *House Votes To Renew Contested Surveillance Law*, WASH. POST, Sept. 13, 2012, at A2.

5. See *Bill Summary & Status, 112th Cong. (2011–2012), H.R. 5949, Major Congressional Actions*, LIBR. CONGRESS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:HR05949:@@R> (last visited Feb. 15, 2013) (noting that the Senate voted in favor of the bill 73–23 without amendment).

6. See James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 15, 2005, at A1.

7. See *id.*

8. See Carol D. Leonnig & Ellen Nakashima, *Ruling Limited Spying Efforts—Move To Amend FISA Sparked by Judge's Decision*, WASH. POST, Aug. 3, 2007, at A1.

9. Eric Lichtblau, James Risen & Mark Mazzetti, *Reported Drop in Surveillance Spurred a Law*, N.Y. TIMES, Aug. 10, 2007, at A1.

10. 153 CONG. REC. 34,571 (2007) (statement of Sen. Dodd); 151 CONG. REC. E1640 (daily ed. July 27, 2005) (statement of Rep. Gary L. Ackerman). FISA limited surveillance targeting to individuals for whom a federal judge found probable cause to believe that they were agents of a foreign power. Foreign Intelligence Surveillance Act of 1978 § 105, 50 U.S.C. § 1801 (2006). The new statute initially permitted surveillance of any international communication, Protect America Act of 2007 (PAA) § 2, Pub. L. No. 110-55, 121 Stat. 552 (codified at 50 U.S.C. § 1805a (Supp. V 2011)), and when it was renewed as

conventional wisdom that government has historically tended to overreact to security crises at the expense of civil liberties,<sup>11</sup> some legislators insisted on including a sunset provision, not only in the legislation's initial enactment but also in its first renewal less than one year later, to ensure a subsequent opportunity to reevaluate the legislation.<sup>12</sup> A sunset was necessary, in the words of one lawmaker, "to make sure we have gotten both parts of this system right—effective intelligence collection and the protection of the privacy of Americans—before settling on what should be permanent law."<sup>13</sup>

The FISA Amendments Act's sunset is not unique. In fact, Congress has embedded sunset provisions in many post-9/11 expansions of government power—particularly expansions of government surveillance power.<sup>14</sup> In each case, the circumstances of the provisions' initial enactment raised concerns about their impact on civil liberties. And to address those concerns, Congress limited the temporal scope of the statute. The goal was to provide an opportunity for a sober second look at the legislation—outside the crisis atmosphere and with the benefit of additional information—to consider whether its civil liberties costs are too high. Phrased differently, Congress has used sunsets to guard against the risk that legislative reactions to terrorism will result in long-term undesirable alterations to the law.<sup>15</sup>

Congress is not alone in believing sunsets will serve this purpose. Legislators' insistence on including sunsets is consistent with the opinion among many commentators—who portray sunsets' effects as inconsistent and unpredictable in other contexts<sup>16</sup>—that sunsets are particularly likely to serve as useful error-correction mechanisms in counterterrorism legislation.<sup>17</sup> This view suggests three reasons that post-crisis counterterrorism legislation might benefit from subsequent reexamination, making sunsets particularly appropriate: First, cognitive biases triggered by terrorist attacks will cause both legislators and their constituents to overestimate the severity of the threat in the aftermath of a terrorist strike. Second, Congress will lack sufficient information at that time to make a

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the FAA, it authorized surveillance of communications so long as the target is "reasonably believed" to be located abroad. FAA § 702, 50 U.S.C. § 1881a (2006).

11. *See infra* Part III.A.

12. *See infra* Part I.B.1. Congress can, of course, amend or repeal any statute at any time. This Article refers to statutes without sunsets as "long-term" legislation.

13. 153 CONG. REC. 34,539 (2007) (statement of Sen. Rockefeller); *see also infra* note 36 and accompanying text.

14. *See infra* Part I.B.1.

15. *Id.*

16. *See infra* notes 26–31 and accompanying text.

17. This Article limits its discussion to counterterrorism surveillance legislation, for which its argument is particularly forceful because of the inherently secretive nature of surveillance. But other counterterrorism statutes—statutes that enhance domestic executive-branch powers designed to safeguard the physical security of American interests against terrorist attacks—share many of surveillance laws' relevant characteristics and are therefore susceptible to the same concerns. This Article makes no claims with respect to terrorism-related legislation that does not authorize security measures—statutes providing compensation for victims or financial assistance to airlines are examples.

fully reasoned policy decision. And finally, if the crisis itself is temporary, long-term changes in the law would be unnecessary.

Sunsets are thus employed as a mechanism to force Congress to reevaluate policies when the crisis atmosphere and, presumably, its accompanying pathologies have passed. At that time, the argument goes, legislators can reassess the legislation free from cognitive bias, armed with new information, and able to judge whether the need for particular policies has passed. Based on that reassessment, Congress can then curtail or discontinue any measures that appear, in retrospect, to have conferred excessive security powers on the executive.

This Article contends that this conventional wisdom is incorrect. While the logic behind Congress's reliance on sunsets has intuitive appeal, the argument that sunsets will remedy legislative overreaction to the terrorist threat is flawed in at least two ways. First, its assumptions about the deliberative nature of the renewal process (i.e., (a) the reconsideration of counterterrorism statutes at the end of the sunset period will occur free of cognitive bias; (b) the information required to make a fully informed policy decision, which was lacking when the statute was initially passed, becomes available and will be utilized; and (c) the crisis that spurred the legislation will ultimately be recognized as temporary) are inaccurate when it comes to counterterrorism legislation. And second, the argument fails to recognize the dominance of the President in counterterrorism policy formulation. Once these flaws are identified, it should come as no surprise that sunsets have not served their intended purpose, nor are they likely to do so in the future.

That failure—which alone would call the wisdom of using sunsets into question—leads paradoxically, to sunset provisions exacerbating, rather than mitigating, long-term overreaction to terrorist threats.<sup>18</sup> Because would-be objectors to a statute draw reassurance from a statute's purportedly temporary nature, a sunset provision lowers the cost of enactment, easing the path for controversial security measures to become law. As a result, legislators who would not have agreed to vote for a particular measure in long-term legislation can be more easily persuaded to approve that very same measure in a temporary bill. This makes it more likely that a piece of post-crisis counterterrorism legislation will represent the very overreaction that legislators include sunsets to correct. And, as this Article demonstrates, the fact that sunsets often fail to deliver on their error-correction mission results in that overreaction to remain embedded in the law. As a result, sunsets do not provide a remedy for unnecessarily extreme security policy; instead, they enable its long-term entrenchment.

The argument proceeds in three parts. After a brief discussion of the role of sunsets in U.S. law, Part I sets out Congress's reasons for incorporating

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18. See *infra* Part III.

sunsets in counterterrorism legislation, using the USA PATRIOT Act<sup>19</sup> to illustrate how those arguments factor into the initial enactment of counterterrorism statutes. It then shows that sunsets have fallen short of the goals for which they were included. Next, Part II details the flaws in the pro-sunset argument, explaining why sunsets have failed to achieve their stated goals. Finally, Part III argues that sunsets are not merely ineffective but that, paradoxically, they actually magnify the very concerns regarding legislative overreaction that they are deployed to alleviate. Part III then considers the implications of these dynamics for the use of sunsets in counterterrorism legislation going forward, concluding that citizens and legislators concerned about the civil liberties costs of counterterrorism policy should not rely on sunsets alone as an effective answer to those concerns.

### I. USE OF SUNSET PROVISIONS IN POST-9/11 COUNTERTERRORISM LEGISLATION

Counterterrorism surveillance statutes in the post-9/11 era have tended to confer on the executive extraordinary powers amidst an atmosphere of fear and uncertainty on an expedited schedule. The fear, haste, lack of reliable information, and uncertainty regarding the scope or duration of the threat that results from this atmosphere all increase the likelihood of policymaking errors—particularly the tendency to overreact to crises at the expense of civil liberties. This part details Congress's efforts to use sunsets since 9/11 to combat these potential policymaking errors. First, it briefly explains sunset provisions' longstanding role in American lawmaking beyond the counterterrorism context. It then sets out the basis for Congress's faith that sunsets can prevent indefinitely empowering the executive with overly expansive counterterrorism authorities, and it shows how sunsets' ability to offer this reassurance has rendered them crucial to the passage of multiple counterterrorism statutes. Finally, it demonstrates that congressional reexamination of these statutes has failed to reflect the benefits that sunsets are designed to capture.

#### A. *Sunset Provisions in U.S. Law*

The idea of imposing temporal limits on government action is not novel, nor is it confined to use in counterterrorism statutes. Such limits appear in at least one constitutional provision,<sup>20</sup> and Congress has employed them in a myriad of policy contexts and for a host of reasons. They have been used in statutes addressing military and financial emergencies,<sup>21</sup> to facilitate

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19. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act or PATRIOT Act) of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified in scattered sections of the U.S. Code).

20. See U.S. CONST. art. I, § 8, cl. 12 (two-year limit on military appropriations).

21. See, e.g., Second War Powers Act, Pub. L. No. 77-507, 56 Stat. 176 (1942) (subjecting specified war powers to a two-year sunset); CLINTON L. ROSSITER,

experimentation,<sup>22</sup> to control (some say manipulate) budgets and appropriations,<sup>23</sup> as a political bargaining chip,<sup>24</sup> and to improve the performance of administrative agencies by combating ossification and interest group capture.<sup>25</sup> At bottom, sunsets are an institutional design tool that forces Congress to return to policies that, for various reasons, may benefit from review. Based on its reexamination, Congress can then modify the policy, renew it, or allow it to expire. Despite sunsets' widespread use, existing scholarship on them is generally pessimistic. It has found that their ability to spark meaningful congressional evaluation of the virtues and vices of expiring legislation is unpredictable at best and is largely contingent on prevailing political circumstances.<sup>26</sup> Other scholars are more explicitly skeptical.<sup>27</sup>

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CONSTITUTIONAL DICTATORSHIP 261 (1948) (stating that most major New Deal statutes contained sunsets).

22. See, e.g., Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1827 (codified at 2 U.S.C. § 701 (2006)); Ethics in Government Act Amendments of 1982, Pub. L. No. 97-409, 96 Stat. 239 (codified at 28 U.S.C. § 7 (2006) (creating the office of Independent Counsel). The statute was ultimately allowed to lapse after Kenneth Starr's investigations into President Clinton. See Neal Katyal, *Sunsetting Judicial Opinions*, 79 NOTRE DAME L. REV. 1237, 1242 (2004).

23. See, e.g., Budget Control Act of 2011, Pub. L. No. 112-25, 125 Stat. 240 (codified at 2 U.S.C. § 900 (2006)) (raising the nation's debt ceiling); Elizabeth Garrett, *Accounting for the Federal Budget and Its Reform*, 41 HARV. J. ON LEGIS. 187, 193 (2004) (discussing pathologies of sunsets in the budget context); Rebecca M. Kysar, *Lasting Legislation*, 159 U. PA. L. REV. 1007, 1026 (2011) (discussing pathologies of sunsets in the tax context); George K. Yin, *Temporary-Effect Legislation, Political Accountability, and Fiscal Restraint*, 84 N.Y.U. L. REV. 174, 178-81 (2009) (advocating the use of sunsets in statutes that impact the federal budget).

24. See Kysar, *supra* note 23, at 1016 n.28 (the Violent Crime Control and Law Enforcement Act of 1994 included a sunset to "appease libertarian concerns").

25. See, e.g., THEODORE J. LOWI, *THE END OF LIBERALISM* 298-313 (2d ed. 1979) (recommending five to ten year sunsets on all statutes creating federal agencies).

26. E.g., Jacob E. Gersen, *Temporary Legislation*, 74 U. CHI. L. REV. 247, 276-77 & n.118 (2007) (observing that renewal debates range from nonexistent to exceedingly intense). Sunsets received brief attention in the 1970s and 1980s as being largely ineffective mechanisms to improve the efficiency of the regulatory state. See, e.g., Bruce Adams, *Sunset: A Proposal for Accountable Government*, 28 ADMIN. L. REV. 511, 519-21 (1976); Lewis Anthony Davis, *Review Procedures and Public Accountability in Sunset Legislation: An Analysis and Proposal for Reform*, 33 ADMIN. L. REV. 393, 407-08 (1981); Dan R. Price, *Sunset Legislation in the United States*, 30 BAYLOR L. REV. 401, 406-14, 418-19 (1978). Since then, sunsets had received only sporadic scholarly attention, see GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 2 (1982) (stating that courts should be given "authority to determine whether a statute is obsolete"); Adrian Vermeule, *Holmes on Emergencies*, 61 STAN. L. REV. 163, 189-94 (2008) (describing Justice Holmes's belief that judges should determine when an emergency had ended), until they became common in counterterrorism and tax provisions. See BRUCE ACKERMAN, *BEFORE THE NEXT ATTACK: PRESERVING CIVIL LIBERTIES IN AN AGE OF TERRORISM* 80-83 (2006) (advocating that emergency powers be subject to sunsets); John E. Finn, *Sunset Clauses and Democratic Deliberation: Assessing the Significance of Sunset Provisions in Antiterrorism Legislation*, 48 COLUM. J. TRANSNAT'L L. 442 (2010); Gersen, *supra*; John Ip, *Sunset Clauses and Counterterrorism Legislation*, PUB. L. (forthcoming 2013) (manuscript at 17-19) (on file with author); Katyal, *supra* note 22, at 1237 (suggesting that the Supreme Court should "prospectively declare" that some of its national security opinions will lapse as binding precedent at a time certain); Kysar, *supra* note 23; Rebecca M. Kysar, *The Sun Also Rises:*

But when it comes to counterterrorism legislation, several commentators who are highly skeptical of the value of sunsets in other contexts echo legislators in advocating for use of sunsets. These accounts argue that “appropriately designed sunset clauses . . . can play a useful role in the governance of legislatively conferred counterterrorism powers”<sup>28</sup> and that, under the right conditions, a sunset is “likely to provide far more advantages than drawbacks as a legislative response.”<sup>29</sup>

### B. *The Promise of Counterterrorism Sunset Provisions*

Crises often require Congress to quickly enact legislation that provides the government the tools necessary to address the crisis but refrains from doing long-term damage to the law in the process.<sup>30</sup> In the counterterrorism context, as was the case in the fall of 2001, this quandary often requires Congress to determine how to confer increased powers on the executive branch without infringing unnecessarily on civil liberties and constitutional rights. As one legislator put it, the goal is to provide “law enforcement tools to respond to the deadly and unconventional threats we face” but

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*The Political Economy of Sunset Provisions in the Tax Code*, 40 GA. L. REV. 335 (2006); Yin, *supra* note 23. For more on the history of sunsets and other tools affecting the temporal scope of legislation, see, for example, Gersen, *supra*, at 249–61 (discussing the history and use of sunsets in federal, state, and international law).

27. See, e.g., LAURA K. DONOHUE, *THE COST OF COUNTERTERRORISM: POWER, POLITICS, AND LIBERTY* 14, 336 (2008); Davis, *supra* note 26, at 395–96 (most modifications are cosmetic); Finn, *supra* note 26, at 497, 501–02 (noting that sunsets “offer at best only a modest contribution to advancing or improving democratic deliberation” and “are generally an ineffective safeguard for democratic and constitutional norms”); Ip, *supra* note 26 (manuscript at 17–19); Kysar, *supra* note 23, at 1051–68 (advocating a presumption against sunsets); Vern McKinley, *Sunrises Without Sunsets: Can Sunset Laws Reduce Regulation?*, 1995 REGULATION, no. 4, at 57 (“[I]n practice sunset provisions have not been very effective . . .”), available at <http://www.cato.org/sites/cato.org/files/serials/files/regulation/1995/10/v18n4-6.pdf>.

28. Ip, *supra* note 26 (manuscript at 1) (arguing for the use of sunsets accompanied by “other mechanisms of accountability”); see also ACKERMAN, *supra* note 26, at 131–32 (advocating the use of sunsets supplemented by supermajority voting requirements).

29. Gersen, *supra* note 26, at 248 (advocating a presumption for the use of sunsets in response to newly recognized, and therefore unpredictable, risks); see *id.* at 249 (“[W]ithin certain well-specified policy domains, temporary legislation should be embraced as the rule rather than eschewed even as an exception.”); Kysar, *supra* note 23, at 1009–10, 1066–67 & nn.251–54 (condemning most sunsets as “worse than ineffective,” but relaxing this critique with respect to legislation meant to be temporary or enacted in “crisis situations”—including terrorist attacks). Professor Gersen supports his conclusion with an analysis of the Terrorism Risk Insurance Act of 2002, 15 U.S.C. § 6701 (2006), which does not involve security measures and thus does not represent the type of counterterrorism legislation on which this Article focuses.

30. See generally John Ferejohn & Pasquale Pasquino, *The Law of the Exception: A Typology of Emergency Powers*, 2 INT’L J. CONST. L. 210 (2004) (describing various models of emergency power, and noting that emergency power is “conservative” in the sense that “it is aimed at resolving the threat to the system in such a way that the legal/constitutional system is restored to its previous state”).

ensure that “we do not at the same time endanger the basic civil liberties and freedoms that we hold so dear.”<sup>31</sup>

Sunsets have been legislators’ go-to tool in efforts to strike this balance; since 9/11, Congress has extended sweeping surveillance powers to the executive branch and relied on sunsets to prompt subsequent scrutiny of those authorities. In addition, sunsets have proved indispensable in facilitating legislative compromise on contentious counterterrorism bills.

### 1. The Purpose of Counterterrorism Sunset Provisions

Legislators have articulated three characteristics of counterterrorism legislation that they hope sunsets will address—hope that is echoed in the academy even by scholars highly skeptical of sunsets’ value in other contexts.<sup>32</sup> First, there is the impact of cognitive bias. If the emotions or sense of urgency inherent in times of perceived crisis cause legislators and the public to misperceive risk, sunsets are held out as a “cure for temporary passions” that might spur Congress to overreact.<sup>33</sup> When it came to the PATRIOT Act, legislators looked to sunsets to provide the opportunity to “revisit whether [the law] strikes the proper balance between securing our safety and ensuring our freedom”<sup>34</sup> with “the benefit of greater thought, in an atmosphere more conducive to protecting our liberties than understandably was the situation immediately after a horrific, wrenching, deadly attack.”<sup>35</sup>

The same was true for legislation codifying the Terrorist Surveillance Program. The Protect America Act, a precursor to the FISA Amendments Act, was subject to a very short sunset to prevent “any errors caused” by the “expedited procedure with which it was enacted [to] persist.”<sup>36</sup> And FISA’s “lone wolf” provision—which permits electronic surveillance of noncitizens involved domestically in international terrorist activity but unaffiliated with any foreign terrorist organization<sup>37</sup>—was subject to sunset due to similar concerns that it conferred excessively “sweeping” authorities.<sup>38</sup> In addition to believing that sunsets temper the impact of cognitive bias, Congress views sunsets as aids in gathering information.

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31. 151 CONG. REC. E1584 (daily ed. July 22, 2005) (statement of Rep. Patrick J. Kennedy).

32. See Gersen, *supra* note 26, at 249; Ip, *supra* note 26 (manuscript at 1); Kysar, *supra* note 23, at 1014; see also ACKERMAN, *supra* note 26, at 131–32.

33. Gersen, *supra* note 26, at 250.

34. 151 CONG. REC. 28,811 (2005) (statement of Sen. Clinton).

35. 152 CONG. REC. 2437 (2006) (statement of Sen. Levin).

36. 153 CONG. REC. E1771 (daily ed. Aug. 4, 2007) (statement of Rep. Udall); see also 154 CONG. REC. 1008 (2008) (statement of Sen. Snowe) (“Congress wisely employed a 6-month sunset to ensure that the shortcomings of this temporary law could be explored at length and properly corrected.”).

37. Intelligence Reform and Terrorism Prevention Act (IRTPA) of 2004, 50 U.S.C. § 1801 (2006).

38. 150 CONG. REC. 25,700 (2004) (statement of Rep. Holt); see also 151 CONG. REC. 25,616 (2005) (statement of Rep. Scott) (stating that the “lone wolf” provision is one of the most “worrisome” powers).

When insufficient information is available for reasoned decision making at the time of initial enactment, legislators can use the sunset period as a trial run, allowing them to see whether policy operates as intended before making any long-term decisions.<sup>39</sup> Sunsets ensure an “opportunity to reassess whether these tools are yielding the intended results in the war on terror.”<sup>40</sup> Stated differently, they are expected to assist in providing “Congress the opportunity to regularly review [the legislation] and fine-tune it to adapt” to new information.<sup>41</sup> Many members of Congress found the sunset provision of the original PATRIOT Act nonnegotiable “because it lets them see how well [the measures] work . . . and how responsibly they have been used.”<sup>42</sup> Similarly, legislators concerned about the FISA Amendments Act insisted on a sunset so that they could come back and assess “its effectiveness against terrorism and its compromises of privacy.”<sup>43</sup>

Third, Congress sees sunsets as a useful tool to address “temporary” crises. When a crisis calls for temporary policy, the subsequent scrutiny prompted by sunsets can serve to ensure that measures that are no longer necessary do not become an enduring part of the law. Several legislators supported the PATRIOT Act’s “dramatic expansion of Federal power because our country was at war,” while insisting that “these powers should contain sunset provisions” so that “after the emergency was over the government would again return to a level consistent to a free society.”<sup>44</sup>

## 2. Sunset Provisions’ Role in Counterterrorism Lawmaking

Given the range of pitfalls that legislators rely upon sunsets to combat, it is not surprising that they have played a significant role in legislative negotiations. In fact, it seems that including a sunset was “the price of passing” several pieces of counterterrorism legislation.<sup>45</sup> The story of the

39. See Gersen, *supra* note 26, at 266–72; Ip, *supra* note 26 (manuscript at 10).

40. 152 CONG. REC. 2440 (2006) (statement of Sen. Cantwell); *see also, e.g.*, 151 CONG. REC. 25,616 (2005) (statement of Rep. Boucher) (“The most effective way for Congress to maintain oversight of the most controversial powers that the PATRIOT Act conveys is to sunset [them].”).

41. 151 CONG. REC. 16,934 (2005) (statement of Rep. Levin).

42. Karen Hosler, *Bills Would Give Ashcroft Many Anti-terrorism Tools*, BALT. SUN, Oct. 10, 2001, at 7A; *see also, e.g.*, 152 CONG. REC. 2793 (2006) (statement of Rep. Nadler); 152 CONG. REC. 2425 (2006) (statement of Sen. Kyl) (wanting to “take another look down the road to make sure we did not act too hastily”).

43. 153 CONG. REC. 34,571 (2007) (statement of Sen. Dodd) (“[W]hen making such dramatic changes to the Nation’s terrorist surveillance regime, we should err on the side of caution” and revisit them after “the new regime has been tested.”).

44. 151 CONG. REC. 25,618 (2005) (statement of Rep. Rohrabacher) (“[W]hen the war was won . . . those powers [subject to sunset] would be rescinded . . . .”); 151 CONG. REC. 17,001 (2005) (statement of Rep. Rohrabacher). *See generally* 151 CONG. REC. 16,924 (2005) (statement of Rep. Cunningham) (“God willing, there should be a day we will not need a PATRIOT Act.”); 151 CONG. REC. 16,889 (2005) (statement of Rep. Slaughter) (“The idea of these measures was always that they would be temporary.”).

45. 154 CONG. REC. 385 (2008) (statement of Rep. Lungren); *see also, e.g.*, 151 CONG. REC. 16,927 (2005) (statement of Rep. Pelosi) (noting that she only “supported the

PATRIOT Act's initial enactment provides insight into sunsets' central role in this regard.

Cleanup at Ground Zero had barely begun. The stock market had just reopened. Neither the New York City subways nor the nation's airports had resumed normal operations. In short, the country was still reeling from the events of September 11th. Yet, sharing a sense of urgency stemming from concern that the United States remained vulnerable to further attacks, both Congress and the Bush Administration were hard at work drafting new counterterrorism legislation less than a week after 9/11.

Administration officials pressed for quick congressional action and provided to Congress proposed legislation—the Anti-Terrorism Act of 2001 (ATA)—that represented a dramatic expansion of executive branch police and intelligence-collection powers.<sup>46</sup> As just one example, it authorized the Attorney General to detain alien terrorism suspects indefinitely without charge. Despite consensus on the need to move quickly, however, legislators from both sides of the aisle were sufficiently concerned about the ATA that they insisted on “fine-tuning it to minimize the infringement of civil liberties.”<sup>47</sup>

Both the House and the Senate worked nearly around the clock to develop their own bills, each producing a proposal by the first week of October. The Senate's Uniting and Strengthening America Act (USA Act)<sup>48</sup> incorporated most of the Administration's requested powers, albeit with moderate additional civil liberties protections.<sup>49</sup> It did not, however, include a sunset provision.<sup>50</sup>

The Provide Appropriate Tools Required to Intercept and Obstruct Terrorism Act (House PATRIOT Act)<sup>51</sup> was unanimously approved by all thirty-six members of the House Judiciary Committee—Democrats and

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[PATRIOT Act] because of these sunset provisions”); 154 CONG. REC. 14,231 (2008) (statement of Sen. Bond) (stating that he “agreed to a . . . sunset” on the FAA as a “bipartisan compromise”).

46. Anti-Terrorism Act of 2001, H.R. 2896, 107th Cong. (2001); see also Beryl A. Howell, *Seven Weeks: The Making of the USA PATRIOT Act*, 72 GEO. WASH. L. REV. 1145, 1154, 1161 (2004) (describing the bill).

47. *Protecting Constitutional Freedoms in the Face of Terrorism, Hearing Before the S. Comm. on the Judiciary, Subcomm. on the Constitution, Federalism, and Property Rights*, 107th Cong. 2 (2001) (statement of Sen. Feingold, Chairman, S. Subcomm. on the Constitution, Federalism, & Property Rights). See generally *Administration's Draft Anti-Terrorism Act of 2001, Hearing Before the H. Comm. on the Judiciary*, 107th Cong. 1 (2001) (statement of Rep. Sensenbrenner) (“[T]his bill should not do anything to take away the freedom of innocent citizens.”).

48. Uniting and Strengthening America Act, S. 1510, 107th Cong. (2001). After Mohammed Atta was identified as one of the 9/11 hijackers, the original name for the bill—the ATA—was scrapped because it was too similar to Atta. Howell, *supra* note 46, at 1153 n.43.

49. See Howell, *supra* note 46, at 1156–58 (describing the USA Act).

50. S. 1510.

51. H.R. 2975, 107th Cong. § 353 (2001).

Republicans alike.<sup>52</sup> This bill was more judicious than the Senate's USA Act in the powers it granted to the executive. It did not, for example, contain any expansion of the power to conduct delayed notice, or "sneak-and-peek" searches—in which the government may execute a search warrant without contemporaneously informing the property's occupant.<sup>53</sup> It also required judicial approval of some kinds of information sharing among government agencies,<sup>54</sup> and it set a higher bar for obtaining court orders to acquire certain types of evidence.<sup>55</sup>

Even with this comparatively cautious bill, members of the House Judiciary Committee feared that, due to the haste and pressure under which it was drafted, the bill provided too much power to the executive branch, posed too great a threat to civil liberties, and reflected insufficient consideration.<sup>56</sup> Consequently, they insisted that the surveillance powers in the House PATRIOT Act sunset.<sup>57</sup> Indeed, a bipartisan group of more than two-dozen cosponsors emphasized the sunset as "the keystone to the overwhelming support" for the bill in committee.<sup>58</sup>

After the Senate approved the USA Act 96–1,<sup>59</sup> members of the Administration began to pressure House leadership to bring *that* bill to a vote before the full House, rather than the bipartisan House PATRIOT Act.<sup>60</sup> Executive officials strongly preferred the USA Act for two reasons: it was more similar to the Administration's original request, and it did not contain a sunset provision.<sup>61</sup>

In late-night negotiations among congressional leaders and executive officials over which bill the House would vote on, "the sunset was a key sticking point" because the executive branch "strenuously opposed" including one.<sup>62</sup> But as House leadership knew that any bill "would likely

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52. Audrey Hudson, *McCain Stalls Anti-terror Package*, WASH. TIMES, Oct. 11, 2001, at A11.

53. House PATRIOT Act, H.R. 2975, 107th Cong. § 353 (2001).

54. *Id.*

55. *Id.* § 156.

56. See Audrey Hudson, *House To Vote on Time-Limited Anti-terrorism Bill; Feingold Says He's Worried About Threat to Civil Liberties*, WASH. TIMES, Oct. 12, 2001, at A3 (stating that Judiciary Committee members indicated that absent time-consuming hearings to consider a counterterrorism bill, they could not support the sweeping changes it included without a sunset); John Lancaster, *House Approves Terrorism Measure; Bill Grants Bulk Of Bush's Request*, WASH. POST, Oct. 25, 2001, at A1.

57. House PATRIOT Act, H.R. 2975. See generally Hudson, *supra* note 56; Lancaster, *supra* note 56.

58. Hudson, *supra* note 56.

59. Robin Toner & Neil A. Lewis, *House Passes Terrorism Bill Much Like Senate's, but with 5-Year Limit*, N.Y. TIMES, Oct. 13, 2001.

60. *Id.*

61. Hudson, *supra* note 52. See generally Jesse J. Holland, *Senator Insists on Debating Terror Bill*, CHI. TRIB., Oct. 10, 2001, at 12; John Lancaster, *Senate Passes Expansion of Electronic Surveillance: Anti-terrorism Bill Is Set for House Debate Today*, WASH. POST, Oct. 12, 2001, at A1.

62. David Boyer, *House OKs Anti-terror Bill; At Odds with Senate over Money Laundering, Wiretaps*, WASH. TIMES, Oct. 13, 2001, at A1.

fail in the House without a ‘sunset,’”<sup>63</sup> they agreed to bring the House USA Act<sup>64</sup> to the floor—a new bill containing several security measures that had been in the Senate’s USA Act but that were not included in the House PATRIOT Act—only if executive officials conceded that it would also include a sunset.<sup>65</sup>

In the end, the House passed a version of the USA Act that included a sunset, but also expanded power for sneak-and-peek searches<sup>66</sup> and omitted several of the oversight provisions that had been in the House PATRIOT Act—such as limits on the circumstances under which the Justice Department could share grand jury information with other government agencies,<sup>67</sup> extensive reporting requirements regarding the government’s acquisition of stored communications,<sup>68</sup> and the establishment of a Deputy Inspector General for Civil Rights and Civil Liberties charged with creating a plan for oversight of the Justice Department.<sup>69</sup> The House thus extended—or relaxed limitations on—multiple executive powers in return for a sunset.

Once both Houses of Congress had passed versions of the USA Act, the discrepancy between the House and Senate bills with respect to a sunset was one of the factors that slowed “[t]ense negotiations” to reconcile the bills.<sup>70</sup> Insisting on a sunset became “the key thing” that legislators in both Houses concerned about the legislation’s impact on fundamental rights clung to as a means to include “some protection.”<sup>71</sup> These legislators agreed that “[i]f there isn’t a legitimate sunset, [they would] have some real trouble supporting the bill.”<sup>72</sup> Negotiations between a small group of

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63. Jess Bravin, *Questions of Security: Congress Reaches Accord on Antiterror Bill*, WALL ST. J., Oct. 19, 2001, at A8. See generally Boyer, *supra* note 62; Hosler, *supra* note 42 (noting that the House Majority Leader “estimated that much of the House support for the measure was based” on the inclusion of a sunset provision); Howell, *supra* note 46, at 1176; William Bendix & Paul J. Quirk, *Deliberating Security and Democracy: The Patriot Act and Surveillance Policy, 2001–2008*, at 12 (March 2009) (unpublished paper presented at the Annual Meeting of the Midwest Political Science Association) (on file with author).

64. Uniting and Strengthening America Act, H.R. 2975, 107th Cong. § 213 (2001).

65. Boyer, *supra* note 62; see Bendix & Quirk, *supra* note 63.

66. H.R. 2975 § 213.

67. House PATRIOT Act, H.R. 2975, 107th Cong. (2001). Senator Leahy articulated the concerns this type of information sharing raises:

Federal criminal investigators have enormous discretion, with little statutory or constitutional guidance for how they interview people, conduct physical surveillance, recruit informants in organizations, and request access to records they consider “relevant” to an investigation. All that information would be eligible to be disseminated widely . . . if it meets the definition of “foreign intelligence” or “foreign intelligence information.”

147 CONG. REC. 20,672 (2001).

68. H.R. 2975 § 112.

69. *Id.* § 702.

70. Melanie Fonder & Noelle Straub, *Anti-terrorism Bill Stalled by House-Senate Disputes*, HILL, Oct. 17, 2001.

71. *Id.*

72. *Id.* (quoting Sen. John Corzine and noting Sens. Maria Cantwell, Carl Levin, and Paul Wellstone’s agreement with this sentiment).

House and Senate leadership, which were complicated by an anthrax attack that forced legislative staff to “work literally in phone booths and in hallways and from their homes and off laptops and cell phones,” ultimately produced the USA PATRIOT Act.<sup>73</sup> The final bill included both the executive powers from the USA Act and a four-year sunset provision.<sup>74</sup> President Bush signed the bill into law on October 26, 2001—just seven weeks after the terrorist attacks.<sup>75</sup> But congressional insistence on a sunset meant that many of its surveillance powers would expire at the end of 2005 unless reauthorized.<sup>76</sup>

At first blush, sunset provisions seem to be a valuable tool for addressing legislators’ concerns. If the risk of overreaction to security threats is real—a point on which both legislators and observers agree<sup>77</sup>—the case for including a mechanism to limit the duration of that overreaction is a compelling one, particularly if it facilitates legislative compromise during exigencies. The expectation was that as the sunset date approached, Congress would reexamine the sunset provisions in a noncrisis atmosphere and with the benefit of information regarding their implementation.<sup>78</sup> It could thus assess these policies’ continued value in the fight against terrorism as well as their costs—in terms of dollars, opportunity costs, and constriction of civil liberties—and make any adjustments that the results of those assessments indicated. This is not what happened.

### C. *The Disappointing Performance of Counterterrorism Sunset Provisions*

Measuring sunsets’ success is not a straightforward exercise. Congress’s stated goal for sunsets is that they will prompt a reexamination of statutory provisions so that legislators can engage in deliberations at a time when their view of the issues is no longer distorted by cognitive bias, when they can incorporate information about the policies’ implementation into their decision making, and when they can assess dispassionately the continued need for robust counterterrorism measures.<sup>79</sup> But the point of sunsets is not to prompt debate for debate’s sake; it is to allow Congress to identify and correct policymaking errors by eliminating or modifying provisions that, in retrospect, appear unwise, ineffective, excessively costly, or otherwise undesirable. In other words, to be successful, sunsets must lead to renewed consideration that actually results in improved policy (or a conscious determination to adhere to existing policy).

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73. PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (codified in scattered sections of the U.S. Code); 147 CONG. REC. 20,695 (2001) (statement of Sen. Leahy).

74. PATRIOT Act §§ 201–224.

75. Jonathan Krim & Robert O’Harrow Jr., *Bush Signs into Law New Enforcement Era; U.S. Gets Broad Electronic Powers*, WASH. POST, Oct. 27, 2001, at A6.

76. Lancaster, *supra* note 56.

77. *See supra* notes 32–35 and accompanying text; *infra* Part III.A.

78. *See supra* Part I.B.1.

79. *See supra* Part I.B.1.

On this metric, optimism about sunset provisions has been misplaced. Renewal debates have not been free from the influence of cognitive bias, nor has Congress viewed sunset statutes as potentially temporary. The most striking sunset failure, however, has come in the realm of information. In the end, all meaningful policy modifications have been prompted by forces exogenous to the statutes themselves, and whether or not the legislation is improved has borne little relationship to the presence of sunsets.

### 1. Cognitive Bias by the Numbers

There is no means of measuring the extent to which cognitive biases color renewal debates, but it is plain that any cognitive bias surrounding terrorist attacks does not disappear within the time span of a typical sunset provision. Public concern about terrorist attacks is not, of course, what it was in November 2001, but anxiety remains elevated even now. As of March 2012, over a third of the population remained either “very” or “somewhat” worried that they or someone in their family will become a victim of terrorism,<sup>80</sup> and 65 percent still worry a “great deal” or a “fair amount” about the possibility of future terrorist attacks.<sup>81</sup> Currently, 63 percent of Americans agree or strongly agree that the United States faces greater security threats today than it did during the Cold War.<sup>82</sup> While identifying a “correct” level of concern is impossible, these existing anxiety levels are inconsistent with the true threat posed by terrorism. If current statistics hold true, Americans are almost four times more likely to be struck by lightning than to be killed in a terrorist attack in any given year.<sup>83</sup> These public assessments of the terrorist risk indicate that cognitive bias, and the resulting inflation of the terrorist threat, remains at work when Congress considers whether to renew sunset statutes.

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80. *Terrorism in the United States*, GALLUP.COM, <http://www.gallup.com/poll/4909/terrorism-united-states.aspx> (last updated Jan. 22, 2013) (showing that the segment of the population similarly concerned in 2000 was 24 percent; today it is 36 percent).

81. *Id.*

82. Benjamin Valentino, U.S. Foreign Policy Poll, Apr. 26–May 2, 2012 (unpublished survey), available at <http://www.dartmouth.edu/~benv/files/poll%20responses%20by%20party%20ID.pdf>.

83. Nate Silver, *Crunching the Risk Numbers*, WALL ST. J. (Jan. 8, 2010, 9:37 PM), <http://online.wsj.com/article/SB10001424052748703481004574646963713065116.html> (concluding that the odds of dying in a terrorist attack for a “Westerner is about a one in three million each year”); *Lightning Safety: Medical Aspects of Lightning*, NAT’L WEATHER SERVICE, <http://www.lightningsafety.noaa.gov/medical.htm> (last visited Feb. 15, 2013). See generally John Mueller & Mark G. Stewart, *The Terrorism Delusion*, 37 INT’L SEC. 81 (2012) (arguing that the terrorist threat has been exaggerated, discussing the monetary costs of countering that perceived threat, and discussing why “anxieties about terrorism persist despite exceedingly limited evidence that much fear is justified”).

## 2. Counterterrorism Provisions As Temporary Provisions?

There is also some question with respect to whether post-9/11 counterterrorism legislation was designed as a temporary response to a temporary crisis. It is true that the immediate post-9/11 period was repeatedly referred to as an “emergency,”<sup>84</sup> and at least some legislators viewed elements of the PATRIOT Act as experimental policies whose continued need should be reassessed at the end of the sunset period.<sup>85</sup> But by the time the first sunset date approached, many legislators had ceased to view these powers (or never had viewed them) as anything other than long-term necessities. The initial renewal in 2005 of the PATRIOT Act produced two new statutes—the USA PATRIOT Act Improvement and Reauthorization Act of 2005<sup>86</sup> and the USA PATRIOT Act Additional Reauthorizing Amendments Act of 2006.<sup>87</sup> These bills eliminated the sunset on fourteen of the PATRIOT Act’s sixteen expiring provisions, making them a lasting part of the law.<sup>88</sup> The two PATRIOT Act provisions remaining subject to sunset<sup>89</sup> have since been renewed, unchanged, on multiple occasions and are currently scheduled to sunset on June 15, 2015.<sup>90</sup> The lone wolf provision of FISA, which was put on the PATRIOT Act’s sunset schedule when it was enacted, has been similarly extended despite the fact that, as of 2009, it had never been relied upon in an investigation.<sup>91</sup>

Some post-9/11 additions to executive surveillance powers seem plainly designed to result in long-term legislation. As an initial matter, it is difficult to characterize the PATRIOT Act powers that were not limited to counterterrorism investigations or that law enforcement agencies had been asking for since long before 9/11 as temporary responses to a counterterrorism emergency.<sup>92</sup>

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84. *E.g.*, 147 CONG. REC. 22,242 (2001) (statement of Rep. Cummings) (arguing for enforcement of hate crime laws in “this time of national emergency”); 147 CONG. REC. 19,626 (2001) (statement of Rep. McKeon) (discussing the 9/11 attacks “and the resulting national emergency”); 147 CONG. REC. 18,027 (2001) (statement of Sen. Helms) (arguing to enhance the president’s power “in this time of national emergency”); Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11, 2 PUB. PAPERS 1140, 1143 (Sept. 20, 2001) (pledging that the U.S. will “come together . . . during this emergency”).

85. *See supra* note 44 and accompanying text.

86. Pub. L. No. 109-177, 120 Stat. 192 (2006).

87. Pub. L. No. 109-178, 120 Stat. 278 (2006).

88. USA PATRIOT Act Improvement and Reauthorization Act of 2005 § 102(a).

89. Sections 206 (roving wiretaps) and 215 (“business records” orders) of the PATRIOT Act remain subject to sunset. *Id.* § 102(b).

90. PATRIOT Sunsets Extension Act of 2011, Pub. L. No. 112-14, 125 Stat. 216 (codified in scattered sections of 50 U.S.C.).

91. USA PATRIOT Act Improvement and Reauthorization Act of 2005 § 103; Letter from the U.S. Dep’t of Justice to Hon. Patrick J. Leahy, Chairman, Comm. on the Judiciary 5 (Sept. 14, 2009), *available at* [http://www.wired.com/images\\_blogs/threatlevel/2009/09/leahyletter.pdf](http://www.wired.com/images_blogs/threatlevel/2009/09/leahyletter.pdf).

92. *See* Kim Lane Scheppele, *Law in a Time of Emergency: States of Exception and the Temptations of 9/11*, 6 U. PA. J. CONST. L. 1, 3 (2004) (asserting that the PATRIOT Act was

Similarly, at least portions of the post-9/11 amendments to FISA were plainly seen as “modernization” of a statute that had been rendered partially obsolete by the technological advances of recent decades, not as temporary legislation to address a finite crisis.<sup>93</sup> The FISA Amendments Act thus represents the codification of a fundamental shift in the executive’s authority to acquire international communications—first implemented through the President’s extrastatutory Terrorist Surveillance Program<sup>94</sup>—rather than a temporary surveillance power granted for the duration of a finite terrorist threat.<sup>95</sup>

If legislators either never expected or had ceased to expect counterterrorism measures to become obsolete prior to their sunset, sunsets’ role as a means to allow temporary legislation to expire was never in play. It is therefore no surprise that none of the counterterrorism powers extended to the executive branch since 9/11 have been permitted to lapse. This might mean that Congress thought carefully and determined that it got it right with these statutes the first time around. But as Part II explains, other forces at work in the counterterrorism policymaking environment are more likely the causes of this entrenchment.

### 3. Obstacles to the Flow of Information

The most dramatic divergence between sunsets’ ideals and their reality has come in their information-related effects. The expectation is that, while a sunset statute is in force, legislators will learn “how well [the measures] work and how responsibly [they’ve] been used,”<sup>96</sup> and adjust the policies accordingly. To be sure, some counterterrorism renewal debates have generated an extensive congressional record, and Congress has heard

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not an emergency measure); Kam Wong, *The USA PATRIOT Act I: Some Unanswered Questions*, 34 J. SOC. L. 1, 192 (2006) (many of the provisions the executive branch requested were “just off the shelf items from the 1996 anti-terrorism legislation”).

93. E.g., Press Release, White House, Fact Sheet on FISA Modernization (Aug. 3, 2007), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2007/09/20070919-1.html>.

94. The TSP first was codified as the Protect America Act of 2007 (PAA), which sunset after six months. Pub. L. No. 110-55, 121 Stat. 552. It was then renewed as the FISA Amendments Act of 2008 (FAA), Pub. L. No. 110-261, 122 Stat. 2436 (codified in scattered sections of 8, 18, and 50 U.S.C.). Like the TSP, both the PAA and the FAA provided the authority to engage in “intelligence activities directed at persons overseas” without establishing probable cause that the target was an agent of a foreign power. See *Modernization of the Foreign Intelligence Surveillance Act, Hearing Before the S. Select Comm. on Intelligence*, 110th Cong. 29 (2007) (testimony of Kenneth L. Wainstein, Asst. Att’y Gen.); see also PAA § 2 (exempting from FISA’s limitations all communications “directed at” targets outside the United States).

95. See William C. Banks, *Programmatic Surveillance and FISA: Of Needles in Haystacks*, 88 TEX. L. REV. 1633, 1641–49 (2010) (describing the evolution of the TSP into first the PAA and then the FAA); Paul M. Schwartz, *Warrantless Wiretapping, FISA Reform, and the Lessons of Public Liberty: A Comment on Holmes’s Jorde Lecture*, 97 CALIF. L. REV. 407, 415 (2009) (“Like the PAA in 2007, the FAA in 2008 appears to authorize the TSP.”).

96. See Hosler, *supra* note 42.

from an array of witnesses hailing from law enforcement, intelligence, academia, think tanks, advocacy organizations, and the private sector.<sup>97</sup> But a close inspection of these debates indicates that Congress has largely continued to rely upon incomplete—and sometimes misleading—information. Moreover, any information indicating a potential need for error correction has been addressed through purely cosmetic modifications.<sup>98</sup>

When it comes to Congress's lack of information, there is plenty of blame to go around; much of it can be laid at Congress's own feet for failing to request information that would allow it to evaluate policy effectiveness or executive abuse or waste. Congress's (unclassified) routine information gathering has been limited to requests for aggregate numbers—how many times a particular tool has been employed, whether courts rejected or modified any proposed surveillance orders, etc.—whose implications are difficult to discern.<sup>99</sup> One commentator has labeled this kind of information-sharing “privacy theater,” a ritual that perpetuates the “‘myth’ that counting surveillance activity indicates that someone somewhere is drawing lessons from these statistics and that the surveillance system, in turn, will be reformed if needed.”<sup>100</sup>

Congress's dearth of knowledge became clear as the PATRIOT Act's first renewal approached in December 2005. Concerns about the FBI's use of National Security Letters (NSLs)—which permit investigators, without judicial review, to obtain certain types of records, such as credit reports from financial institutions and subscriber information from communications

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97. *E.g.*, *USA PATRIOT Act: A Review for the Purpose of Reauthorization, Hearings Before the H. Comm. on the Judiciary*, 109th Cong. (2005); *USA PATRIOT Act, Hearings Before the S. Select Comm. on Intelligence*, 109th Cong. (2005) (testimony of Heather MacDonald, Senior Fellow, Manhattan Institute for Policy Research; Att'y Gen. Alberto Gonzales; David Kris, former Asst. Att'y Gen., National Security Division); *Implementation of the USA PATRIOT Act: Crime, Terrorism and the Age of Technology, Hearings Before the H. Comm. on the Judiciary, Subcomm. on Crime, Terrorism, & Homeland Security*, 109th Cong. (2005) (testimony of James Dempsey, Exec. Dir., Center for Democracy and Technology; Peter Swire, Prof. of Law, Ohio State University); *Implementation of the USA Patriot Act: Sections of the Act that Address the Foreign Intelligence Surveillance Act (FISA), Hearings Before the H. Comm. on the Judiciary, Subcomm. on Crime, Terrorism, & Homeland Security*, 109th Cong. (2005) (testimony of James Baker, Counsel, Intelligence Policy, Office of Intelligence Policy and Review, Department of Justice); *Implementation of the USA Patriot Act: Effect of Sections 203(B) and (D) on Information Sharing, Hearings Before the H. Comm. on the Judiciary, Subcomm. on Crime, Terrorism, & Homeland Security*, 109th Cong. (2005) (testimony of Maureen Baginski, Exec. Asst. Dir., Office of Intelligence, FBI; Timothy Edgar, National Security Policy Counsel, ACLU; Barry Sabin, Chief, Counterterrorism Section, Criminal Division, Department of Justice).

98. Some might argue that the same can be said for any congressional debate. But the promise of sunsets was, in part, that they would lead to more informed policy.

99. *See, e.g.*, 50 U.S.C. § 1861 (2006); USA Patriot Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, § 109.

100. Paul M. Schwartz, *Reviving Telecommunications Surveillance Law*, 75 U. CHI. L. REV. 287, 311 (2008).

providers<sup>101</sup>—only registered on Congress’s radar after the *Washington Post* published a story about them in November 2005. According to the report, the FBI was issuing tens of thousands of NSLs yearly—a sharp increase from pre-9/11 numbers—and retaining all resulting records, even those pertaining only to innocent people.<sup>102</sup> Only at this point—long after Congress had completed its hearings on the PATRIOT Act renewal and with the sunset date less than two months away—did legislators recognize the need to probe more deeply into the executive branch’s use of its NSL authorities. In other words, the initial PATRIOT Act reauthorization bills were passed without Congress ever knowing the true scope of the FBI’s activities. It was not innate congressional curiosity but successful investigative journalism that prompted more aggressive inquiries.<sup>103</sup>

Congress’s information deficit has continued to plague PATRIOT Act renewals. During the Act’s most recent renewal, a pair of Democratic senators raised objections to the use of the business-records provision of the PATRIOT Act, which authorizes the FBI to seek an order from a judge to obtain “any tangible thing” that is “relevant” to an investigation into terrorism or espionage.<sup>104</sup> Justice Department officials argued that Congress needed to reauthorize this provision, in part, because an “important sensitive collection program” relies on it for its authority.<sup>105</sup> But lawmakers briefed on the program complained that critical information about how the government uses that authority remains unknown to most members of Congress and to the American people.<sup>106</sup> Moreover, these lawmakers alleged that “most Americans would be stunned to learn” how the government interprets this authority and that “there is now a significant gap between what most Americans *think* the law allows and what the government *secretly claims* the law allows.”<sup>107</sup> One senator predicted that

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101. 12 U.S.C. § 3414 (2006); 15 U.S.C. §§ 1681u, 1681v (2006); 18 U.S.C. § 2709 (2006); 50 U.S.C. § 436 (2006).

102. Barton Gellman, *The FBI’s Secret Scrutiny*, WASH. POST, Nov. 6, 2005, at A1.

103. A requirement that the executive report the total number of requests made pursuant to NSL authority exempts one of the most ubiquitous varieties of NSLs—requests for subscriber information (the name, address, length of service, and local and long distance toll billing records of a subscriber), USA PATRIOT Act Improvement and Reauthorization Act of 2005 § 118(c)(1)(A), Pub. L. No. 109-177, 120 Stat. 192 (2006), skewing the numbers of NSLs downward significantly. And a congressionally mandated Inspector General report into the use of NSLs produced highly valuable information. *Id.* §§ 106A, 119; *see infra* notes 124–27 and accompanying text. But it was a one-time audit, only covering NSL use up to 2007.

104. USA PATRIOT Act Improvement and Reauthorization Act of 2005 § 106; Letter from Sens. Ron Wyden & Mark Udall to Att’y Gen. Eric Holder (Mar. 15, 2012), *available at* <https://www.documentcloud.org/documents/325953-85512347-senators-ron-wyden-mark-udall-letter-to.html>.

105. *USA Patriot Act, Hearing Before the H. Comm. on the Judiciary, Subcomm. on the Constitution, Civil Rights, and Civil Liberties*, 111th Cong. 8 (2009) (statement of Todd M. Hinnen, Deputy Asst. Att’y Gen., National Security Division, Department of Justice).

106. Letter from Sens. Ron Wyden & Mark Udall, *supra* note 104; *see also Reauthorizing the USA PATRIOT Act: Ensuring Liberty and Security, Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 80 (2009) (statement of Sen. Feingold).

107. Letter from Sens. Wyden & Udall, *supra* note 104.

when the American people find out how their government has secretly interpreted the PATRIOT Act, they are going to be stunned and they are going to be angry. They are going to ask Senators: Did you know what this law actually permits? Why didn't you know before you voted on it?<sup>108</sup>

Even when new information has motivated legislators to modify an expiring statute, they have accepted cosmetic means of addressing their concerns. For example, after failing to convince fellow legislators to approve some additional civil liberties protections in the 2005 renewal of the PATRIOT Act—such as adding a requirement that the government provide reasons why it believes that certain items it seeks are connected to terrorism—a bipartisan block of forty-six senators filibustered the proposed renewal bill.<sup>109</sup> Further negotiations generated a compromise deal whose resulting modifications then-Senate Judiciary Committee Chair Arlen Specter described as “cosmetic.”<sup>110</sup> It provided, for example, that NSLs could be used to acquire library records only if that library provides “electronic communication service[s].”<sup>111</sup> But this language merely restated preexisting law; NSLs were already limited to service providers.<sup>112</sup> More broadly, the deal included several new reporting requirements that took the “privacy theater” form of demands for aggregate numbers.<sup>113</sup> As Senator Specter pointed out, “sometimes cosmetics will make a beauty out of a beast and provide enough cover for senators to change their vote.”<sup>114</sup> But enacting political cover for legislators does not necessarily result in more well-considered policy—sunsets’ purported aim.

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108. 157 CONG. REC. S3372, S3386 (daily ed. May 26, 2011) (statement of Sen. Wyden).

109. Charles Babington, *4 GOP Senators Hold Firm Against Patriot Act Renewal*, WASH. POST, Dec. 21, 2005, at A4; see also Eric Lichtblau, *Extension of Patriot Act Faces Threat of Filibuster*, N.Y. TIMES, Nov. 18, 2005, at A26.

110. *Feingold Appears Alone in Patriot Act Filibuster*, ST. LOUIS POST-DISPATCH, Feb. 16, 2006, at A7.

111. USA PATRIOT Act Additional Reauthorizing Amendments Act of 2006 § 5, 18 U.S.C. § 2709(f) (2006). Electronic communications service is defined as “any service which provides to users thereof the ability to send or receive wire or electronic communications.” 18 U.S.C. § 2510(15) (2006).

112. 18 U.S.C. § 2709(a). Other adjustments to the NSL provision revised authority relating to judicial review, confidentiality, and nondisclosure of NSLs and clarified that individuals who receive FISA orders can challenge nondisclosure requirements. USA PATRIOT Act Additional Reauthorizing Amendments Act of 2006 § 3, 50 U.S.C. § 1861(f)(2)(A)(i) (2006).

113. USA PATRIOT Act Improvement and Reauthorization Act of 2005 § 106A, Pub. L. No. 109-177, 120 Stat. 192 (2006) (business-records orders); § 107(a) (voluntary disclosures by private actors of the contents of electronic communications); § 108 (roving wiretaps); § 109 (physical searches & use of trap-and-trace devices and pen registers); § 114 (delayed-notice searches); § 118 (NSLs regarding U.S. persons); § 126 (data-mining practices). See generally FAA § 702(1)(2), 50 U.S.C. § 1881a(1)(2) (dissemination of U.S. persons’ identities acquired through FAA surveillance); Letter from Ronald Weich, Asst. Att’y Gen., to Sen. Harry Reid, Senate Majority Leader (Apr. 29, 2011), available at <http://www.fas.org/irp/agency/doj/fisa/2010rept.pdf>.

114. *Feingold Appears Alone in Patriot Act Filibuster*, supra note 110.

The executive has also served as an obstacle to useful exploitation of information. Sometimes, it has simply been reluctant or unwilling to share information. In 2003, for example, lawmakers characterized Attorney General John Ashcroft as “guarded or unresponsive” to Congress’s questions about PATRIOT Act powers.<sup>115</sup> Similarly, when considering the codification of the Terrorist Surveillance Program, the Senate Judiciary Committee was forced, after making “no fewer than nine formal requests,” to subpoena the information and documents it wanted.<sup>116</sup> In the end, nearly three-quarters of the members of the Senate voted on the legislation without having been briefed on the program it was enacted to replace.<sup>117</sup>

At other times, the executive has been seemingly incapable of answering Congress’s questions. In fact, despite legislators’ worries that the FISA Amendments Act’s powers would inadvertently trench on Americans’ privacy, neither Congress nor the executive branch has kept track of how the surveillance program has impacted U.S. persons’ communications.<sup>118</sup> Congress *was* informed that, on at least one occasion, the FISA Court—the secret court that evaluates government applications for FISA surveillance orders<sup>119</sup>—found that some collection carried out under the FISA Amendments Act violated the Fourth Amendment.<sup>120</sup> Yet it was not until 2012 that legislators sought data regarding the privacy impact of the statute. In response to these inquiries, the executive informed Congress that it was neither reasonably possible to supply even an estimate of how many Americans’ communications have been intercepted under the statute<sup>121</sup> nor feasible to conduct a study to determine this number.<sup>122</sup> Despite the absence of this information, the Act was renewed with no alterations for five more years.<sup>123</sup>

Congress’s experience with NSLs illustrates another potential executive branch failing—it has, at times, provided inaccurate information. After the *Washington Post* story in 2005 raised questions regarding the FBI’s use of NSLs, Congress instructed the Inspector General of the Justice Department

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115. Emily Pierce, *Ashcroft Rapped Over Oversight*, ROLL CALL, June 9, 2003, at 1. See generally Dan Eggen, *Ashcroft Assailed On Policy Review; Lawmakers Say Oversight Is Blocked*, WASH. POST, Aug 21, 2002, at A2 (stating that months went by with no response from Attorney General Ashcroft to a list of PATRIOT Act–related questions).

116. Michael A. Fletcher, *Senators Subpoena the White House*, WASH. POST, June 28, 2007, at A1.

117. Schwartz, *supra* note 95, at 425. This executive noncooperation tended to diminish (but not disappear) as sunsets approached. See *infra* Part II.B.

118. See FAA Sunsets Extension Act of 2012, S. REP. NO. 112-174, at 8, 10 (2012).

119. 50 U.S.C. § 1803 (2006).

120. See Letter from Kathleen Turner, Dir. of Legal Affairs, ODNI, to Sen. Ron Wyden, Member, Senate Select Comm. on Intelligence (July 20, 2012), available at <http://www.fas.org/irp/news/2012/07/dni072012.pdf>.

121. *Id.*

122. Letter from I. Charles McCullough, III, Inspector Gen. of the Intelligence Cmty., to Sens. Ron Wyden and Mark Udall (June 15, 2012), available at <http://www.wyden.senate.gov/download/response-letter-from-ic-inspector-general>.

123. See *supra* notes 4–5 and accompanying text.

to conduct an audit evaluating NSLs' use and effectiveness.<sup>124</sup> The results of this audit, released in 2007 and 2008, revealed significant, systemic abuse.<sup>125</sup> The FBI had not only circumvented statutory requirements and obtained information beyond the scope of its authorities, but it had also provided inaccurate information to Congress.<sup>126</sup> As a result, "Capitol Hill was peppered" with Justice Department efforts to correct statements it had provided during the 2005 reauthorization process that "need[ed] clarification," because "the reports provided to Congress . . . did not accurately reflect the FBI's use of NSLs."<sup>127</sup>

Groups outside the government have, at times, also been counterproductive when it comes to generating information for renewal debates. Traditional watchdog groups are unable to acquire basic information regarding counterterrorism policy implementation because it is classified. So rather than pinpointing specific problematic practices, these groups have drawn Congress's attention to civil liberties concerns based only on statutory language. Congress requested an audit of business-records orders, for example, in response to concerns voiced by the American Library Association (ALA),<sup>128</sup> which opposed allowing the government to access library records with these orders. The ALA waged a campaign successful enough for the underlying provision to become known as "the library provision," even though it can be used to acquire "any tangible thing."<sup>129</sup> But as of the first PATRIOT Act renewal, congressional

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124. USA PATRIOT Improvement and Reauthorization Act of 2005 §§ 106A, 110, Pub. L. 109-177, 120 Stat. 192.

125. OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, A REVIEW OF THE FEDERAL BUREAU OF INVESTIGATION'S USE OF NATIONAL SECURITY LETTERS 124 (2007) [hereinafter 2007 NSL REPORT], available at <https://www.fas.org/irp/agency/doj/oig/natsec.pdf>; OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, A REVIEW OF THE FBI'S USE OF NATIONAL SECURITY LETTERS: ASSESSMENT OF CORRECTIVE ACTIONS AND EXAMINATION OF NSL USAGE IN 2006, at 8-12 (2008) [hereinafter 2008 NSL REPORT], available at <http://www.justice.gov/oig/special/s0803b/final.pdf>. See generally OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, A REVIEW OF THE FEDERAL BUREAU OF INVESTIGATION'S USE OF EXIGENT LETTERS AND OTHER INFORMAL REQUESTS FOR TELEPHONE RECORDS 64-78 (2010) [hereinafter EXIGENT LETTER REPORT], available at <http://www.justice.gov/oig/special/s1001r.pdf> (describing shortcuts used to acquire phone records).

126. 2007 NSL REPORT, *supra* note 125; 2008 NSL REPORT, *supra* note 125. See generally EXIGENT LETTER REPORT, *supra* note 125, at 64-78.

127. Letter from Richard A. Hertling, Acting Asst. Att'y Gen., to Sen. Arlen Specter, Ranking Minority Member, Senate Comm. on the Judiciary (Mar. 9, 2007), available at [http://media.washingtonpost.com/wp-srv/nation/pdf/doj\\_specterletter\\_030907.pdf](http://media.washingtonpost.com/wp-srv/nation/pdf/doj_specterletter_030907.pdf). See generally Dan Eggen & John Solomon, *FBI Audit Prompts Calls for Reform; Some Lawmakers Suggest Limits on Patriot Act*, WASH. POST, Mar. 10, 2007, at A1.

128. See OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, A REVIEW OF THE FEDERAL BUREAU OF INVESTIGATION'S USE OF SECTION 215 ORDERS FOR BUSINESS RECORDS 63-64 (2007) [hereinafter 2007 SECTION 215 REPORT], available at <http://www.justice.gov/oig/special/s0703a/final.pdf>; OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, A REVIEW OF THE FBI'S USE OF SECTION 215 ORDERS FOR BUSINESS RECORDS IN 2006, at 85 (2008) [hereinafter 2008 SECTION 215 REPORT], available at <http://www.justice.gov/oig/special/s0803a/final.pdf>.

129. *E.g.*, Dan Eggen, *Library Challenges FBI Request; Patriot Act Prohibits Details of Lawsuit from Being Released*, WASH. POST, Aug. 26, 2005, at A11.

inquiry revealed that this power had never been invoked to acquire library records.<sup>130</sup> Instead, Congress discovered, libraries had voluntarily provided records to the government.<sup>131</sup> Addressing the ALA's true concerns would therefore require attention to voluntary information-sharing rules, an issue that garnered no attention in the reauthorization debates. In other words, while sunsets were meant to prompt disclosure of information that would help Congress focus its legislative resources where they were most needed, they may have resulted in information that did the opposite.

These examples illustrate the pitfalls that have interfered with sunsets' ability to deliver their supposed information benefits. Since the initial reauthorizations of the PATRIOT Act and the enactment of the FISA Amendments Act in 2005 and 2008 respectively, renewal debates have settled into a pattern. Each time a deadline approaches, a handful of legislators raise the question of adding civil liberties protections—sometimes delaying renewal—that would require a short-term renewal to allow additional negotiations or force legislative hearings.<sup>132</sup> But ultimately, the expiring authorities are renewed, unchanged and with little, if any, additional information.

#### 4. Irrelevance of Sunsets to Statutory Modifications

Some might protest that sunsets cannot be portrayed as having failed entirely, because there have, in fact, been some meaningful modifications to statutes like the PATRIOT Act. Upon closer examination, however, it is clear that all noncosmetic changes to these statutes have been prompted from sources outside of Congress. For example, modifications of the rules governing the gag orders imposed on recipients of NSLs and business-records orders, as well as both the definition of material support and the

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130. See BRIAN T. YEH & CHARLES DOYLE, CONG. RESEARCH SERV., RL 33332, USA PATRIOT IMPROVEMENT AND REAUTHORIZATION ACT OF 2005: A LEGAL ANALYSIS 4 n.18 (2006), available at <http://www.fas.org/sgp/crs/intel/RL33332.pdf> (providing that as of the 2005–06 reauthorization, the business-records-orders provision had never been used to access library records); Bendix & Quirk, *supra* note 63, at 32–33 (describing the highly effective lobbying by the American Libraries Association that prompted extensive debate over business-records orders). This is likely due, at least in part, to the overuse of NSLs, which meant that the FBI secured information without a court order that it should have pursued via business-records orders.

131. 151 CONG. REC. 25,616 (2005) (statement of Rep. Scott).

132. See, e.g., Carl Hulse, *Democrats Put Off Some Difficult Issues Until 2010*, N.Y. TIMES, Dec. 16, 2009, at A33 (stating that renewal was included in a bill extending several expiring statutes); Paul Kane & Felicia Sonmez, *Congress Extends PATRIOT Act Provisions*, WASH. POST, May 27, 2011, at A4; Press Release, Sen. Ron Wyden, Wyden Places Hold on FISA Amendments Act Extension (June 11, 2012), available at <http://www.wyden.senate.gov/news/press-releases/wyden-places-hold-on-fisa-amendments-act-extension>; Felicia Sonmez, *Senate Passes Short-term Extension of PATRIOT Act Provisions*, WASH. POST (Feb. 15, 2011), <http://voices.washingtonpost.com/44/2011/02/senate-to-vote-tuesday-on-shor.html> (enacting ninety-day extension passed to allow additional debate and hearings, which relied on Administration witnesses for information regarding the value of the provisions at issue); see also *supra* notes 4–5 (noting the renewal of the FAA after votes defeated several amendments meant to enhance civil liberties).

scienter requirement necessary for material-support convictions, were compelled by judicial determinations that aspects of these provisions were unconstitutional.<sup>133</sup>

Moreover, the presence of sunsets and the scrutiny of counterterrorism measures do not seem to be very closely correlated. The NSL provision is perhaps the most obvious example—it has been among the most controversial and most frequently debated, but it has never been subject to a sunset.<sup>134</sup> Nor has the PATRIOT Act provision authorizing sneak-and-peek searches. Yet it garnered significant attention during the 2005 reauthorization debates when Congress learned that less than one-in-five delayed-notice searches were related to terrorism investigations. Between the enactment of the PATRIOT Act and its first sunset date, 155 of these “sneak-and-peek orders”—which FBI Director Robert Mueller described as “an invaluable tool to fight terrorism”—had been issued; eighteen of them had been used in terrorism cases.<sup>135</sup> Leaving aside the cosmetic nature of the modification resulting from this scrutiny—the addition of a renewable thirty-day limit on the searches’ secrecy<sup>136</sup>—it was the result of information garnered about a provision that was not expiring. And in 2011, the House of Representatives held hearings to discuss the permanent provisions of the PATRIOT Act.<sup>137</sup> If long-term counterterrorism provisions are just as likely to be scrutinized as those subject to sunset, it is hard to attribute that scrutiny to the sunsets themselves.

In sum, the passage of time does not seem to have resulted in legislative action free from bias, enlightened by information about policy implementation, and aimed at determining whether any excessive grant of power to the executive had outlived its usefulness. The result is that changes to sunseting counterterrorism legislation have been based on

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133. USA PATRIOT Act Improvement and Reauthorization Act of 2005 § 115, 18 U.S.C. § 1992 (2006); see *Humanitarian Law Project v. Mukasey*, 552 F.3d 916 (9th Cir. 2009) (describing a series of decisions by the Ninth Circuit holding that the statutory definition of “material support” was unconstitutionally vague, prompting Congress to amend); *Doe v. Gonzales*, 386 F. Supp. 2d 66, 82 (D. Conn. 2005) (holding portions of the NSL gag-order provision unconstitutional), *dismissed as moot by Doe II v. Gonzales*, 449 F.3d 415, 420 (2d Cir. 2006) (holding that the government’s concession that newly enacted statutory procedures barred further litigation of plaintiffs’ claims rendered the appeal moot).

134. PATRIOT Act § 505, Pub. L. No. 107-56, 115 Stat. 272 (2001) (modifying NSLs but not imposing a sunset on the authority); see also Julian Sanchez, *Leashing the Surveillance State: How To Reform Patriot Act Surveillance Authorities*, CATO POL’Y ANALYSIS, no. 675 (May 16, 2011), <http://www.cato.org/sites/cato.org/files/pubs/pdf/PA675.pdf>.

135. *USA PATRIOT Act: A Review for the Purpose of Reauthorization, Hearing Before the H. Comm. on the Judiciary*, 109th Cong. 36 (2005) (statement of Att’y Gen. Alberto Gonzales); *Oversight of the USA PATRIOT Act, Hearings Before the S. Comm. on the Judiciary*, 109th Cong. (2005) (statement of Robert Mueller III, Dir., FBI).

136. USA PATRIOT Act Improvement and Reauthorization Act of 2005 § 114(a)(1), 18 U.S.C. § 3103a. The original provision required the government to give notice of such a search “within a reasonable period.” PATRIOT Act § 213(b)(3), Pub. L. 107-56, 115 Stat. 272.

137. See *Permanent Provisions of the Patriot Act, Hearing Before the H. Comm. on the Judiciary, Subcomm. on Crime, Terrorism, and Homeland Security*, 112th Cong. (2011).

incomplete or inaccurate information, largely symbolic, or difficult to attribute to the presence of the sunset. In other words, hard-won sunset provisions have exhibited scant added policy-correction value. The next part seeks to explain why the expectations for, and the reality of, sunsets diverge so markedly.

## II. EXPLAINING COUNTERTERRORISM SUNSET PROVISIONS' FAILURE

The observed effects of sunset provisions are not inexplicable. It is true that the argument for using sunsets in counterterrorism legislation makes intuitive sense. It is also true that each of the factors that this argument relies upon—cognitive bias, information deficits, and the possible need for temporary measures—will be present when Congress considers post-crisis counterterrorism legislation. But in presupposing that sunsets will generate renewal processes that result in policy correction, sunsets' advocates assume that cognitive biases will subside, that Congress will gather—and use—new information, and that the need for these measures is actually viewed as finite. But it appears that these assumptions are flawed. Moreover, they fail entirely to take into account the unique role the President plays in the formulation of counterterrorism policy. As a result, counterterrorism legislation will be more resistant to modification or expiration than statutes subject to sunsets in other policy areas where initial, temporary legislation might be plagued by similar distorting factors.

### A. Cognitive Bias

The first characteristic of the post-crisis counterterrorism policymaking environment put forward to support the use of sunsets is the influence of cognitive bias. Cognitive bias is a pattern of deviation in judgment that occurs in particular situations, leading to perceptual distortion or inaccurate judgment.<sup>138</sup> In the post-crisis counterterrorism context, several forms of cognitive bias will lead individuals—legislators and constituents alike—to overestimate the risk posed by terrorism.<sup>139</sup> People, for example, “consider risks to be significant if they can easily think of instances in which those risks came to fruition.”<sup>140</sup> This phenomenon is triggered by particularly

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138. See generally Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics & Biases*, 185 SCIENCE 1124 (1974) (describing several forms of bias).

139. See Gersen, *supra* note 26, at 268–71 (noting various cognitive biases that sunsets might help neutralize); Ip, *supra* note 26 (manuscript at 11–12) (same); cf. Oren Gross, *Security vs. Liberty: On Emotion and Cognition*, in THE LONG DECADE: HOW 9/11 HAS CHANGED THE LAW (forthcoming) (manuscript at 3–21), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1952344](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1952344) (discussing forms of cognitive bias that can affect security-related policy decisions); Cass R. Sunstein, *Terrorism and Probability Neglect*, 26 J. RISK & UNCERTAINTY 121, 133 (2003) (same). But see ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY & THE COURTS* 59–86 (2007) (questioning the impact of cognitive bias).

140. This phenomenon is referred to as the “availability heuristic.” CASS R. SUNSTEIN, *LAWS OF FEAR: BEYOND THE PRECAUTIONARY PRINCIPLE* 5 (2005); Sunstein, *supra* note 139, at 121 (discussing availability heuristic’s relevance to counterterrorism policymaking); see Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L.

salient and well-publicized risks, as well as risks that have recently produced actual harm, risks that conjure vivid images, and newly recognized or uncertain risks.<sup>141</sup> These types of cognitively “available” risks are most likely to inspire legislation that reflects an overestimate of the likelihood of future harm.<sup>142</sup>

A second source of risk overestimation is individuals’ tendency to focus on the most catastrophic possible outcome of a particular risk—on how bad the outcome *could* be, rather than on how likely that outcome is to come about.<sup>143</sup> The effect of this form of bias is magnified when it comes to risks that produce strong emotional responses.<sup>144</sup> Frightening but unlikely events thus stoke demand for governmental action.

Finally, people would rather incur a *certain* loss than make a gamble *likely* to cost less than that certain loss but presenting a small probability of major loss.<sup>145</sup> This results in individuals seeking “regulation, as a form of insurance, to prevent harms that are grave but that are highly unlikely to occur.”<sup>146</sup> So “even if the likelihood of an attack is extremely low, people will be willing to pay a great deal to avoid it.”<sup>147</sup> Sunsets’ proponents identify sunsets as a means of mitigating legislative missteps that result

REV. 683, 706 (1999) (estimating risk on the basis of how easily examples can be brought to mind); Roger G. Noll & James E. Krier, *Some Implications of Cognitive Psychology for Risk Regulation*, 19 J. LEGAL STUD. 747, 754–55, 758 (1990) (same); Tversky & Kahneman, *supra* note 138, at 1127 (same). See generally Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, 5 COGNITIVE PSYCHOL. 207 (1973).

141. See Gersen, *supra* note 26, at 269–70; Ip, *supra* note 26 (manuscript at 10–11); see also Sunstein, *supra* note 140, at 5–6, 36–39, 42–43 (“[M]any people are quite concerned about risks that appear newer, such as the risks associated with genetically modified foods, recently introduced chemicals, and terrorism.”); Jacob E. Gersen & Anne Joseph O’Connell, *Deadlines in Administrative Law*, 156 U. PA. L. REV. 923, 974 (2008) (“[T]here is a general tendency to favor new, high-profile risks for regulation over older, more familiar risks.”); Kuran & Sunstein, *supra* note 140, at 707 (people “grossly overestimate risks to which the media pay a great deal of attention”); Jessica Stern & Jonathan B. Wiener, *Precaution Against Terrorism*, 9 J. RISK RES. 393, 413 (2006) (arguing that once a rare and catastrophic event has occurred, “people tend to overstate the risk of another catastrophic event”).

142. See, e.g., Kuran & Sunstein, *supra* note 140, at 691–703 (providing examples).

143. This phenomenon is known as “probability neglect.” Sunstein, *supra* note 139, at 126.

144. See Cass R. Sunstein, *Probability Neglect: Emotions, Worst Cases, and Law*, 112 YALE L.J. 61, 70–87 (2002) (describing the effect of probability neglect and providing evidence of its impact); Sunstein, *supra* note 139, at 127–30 (describing a regulation whose stringency can be attributed to “probability neglect when emotions are running high”); see also George F. Loewenstein et al., *Risk as Feelings*, 127 PSYCHOL. BULL. 267, 271–74 (2001) (discussing effects of emotion on risk assessment); Eric Posner, *Fear and the Regulatory Model of Counterterrorism*, 25 HARV. J.L. & PUB. POL’Y 681, 684 (2002) (noting that a fearful person “typically misperceives, or acts as though he misperceives, the magnitude” of a risk).

145. This tendency is labeled “prospect theory.” Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICA 263, 279–81 (1979); Kuran & Sunstein, *supra* note 140, at 707–08; Sunstein, *supra* note 139, at 123.

146. Noll & Krier, *supra* note 140, at 758 (“[L]arge catastrophic outcomes with low probabilities will be overvalued.”); Sunstein, *supra* note 139, at 123.

147. Sunstein, *supra* note 139, at 124.

from cognitive biases by delaying long-term policy commitments, ostensibly until any overreactions resulting from cognitive bias have dissipated.<sup>148</sup>

The cognitive biases likely to lead to overreaction will be hard at work when it comes to terrorism. Terrorist attacks are also subject to widespread publicity, conjure vivid images of damage and destruction, and are subject to great uncertainty with respect to when, where, and how an attack will occur.<sup>149</sup> As such, they will be easily cognitively available. It is also beyond cavil that terrorism can produce catastrophic harm. This constant possibility of catastrophic “worst-case scenarios” means that cognitive bias will cause individuals to disregard the fact that the chances of incurring major harms are negligible. Terrorism’s strong emotional component—as a phenomenon it “is unusual in that it possesses all of the characteristics that psychologists have shown to be conducive to disproportionate dread”—will exacerbate these effects.<sup>150</sup> The presence of all of these features predicts that the cognitive bias will impact the policymaking environment in a terrorism emergency.

Sunsets’ advocates assume that cognitive biases will dissipate within the sunset period, so that forcing reconsideration of legislation will counteract their effects. A typical counterterrorism sunset period is around four years. Yet over a decade later, distorting effects of cognitive bias persist.<sup>151</sup> One answer could be to extend the length of sunsets, allowing more time for the effects of biases to pass. Perhaps if the United States was free from any terrorist attacks for, say, thirty years, the cognitive and emotional impact of the initial threat would dissipate entirely. But if the point of a sunset is to prevent unnecessarily draconian statutes from becoming entrenched in the law, a thirty-year sunset is no remedy.

The continuing cognitive impact of terrorism exceeds that of other policy areas because terrorism, as a risk, has several characteristics likely to promote cognitive bias over the long-term that are not present elsewhere. As an initial matter, terrorism will remain subject to more uncertainty than most risks that government addresses. Researchers can develop vaccines

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148. There are also cognitive biases that can lead to *underregulation* in certain circumstances. See Kysar, *supra* note 23, at 1049 (discussing several). Each of these biases, however, will be significantly undermined by a terrorist attack that creates an atmosphere where existing regulations seem to have proved inadequate.

149. See Jonathan H. Marks, *9/11 + 3/11 + 7/7 = ?*, 37 COLUM. HUM. RTS. L. REV. 559, 567 (2006) (“[T]he availability heuristic suggests that we may be inclined to exaggerate the probability of further terrorist attacks.”); W. Kip Viscusi & Richard J. Zeckhauser, *Sacrificing Civil Liberties To Reduce Terrorism Risks*, 26 J. RISK & UNCERTAINTY 99, 100 (2003) (arguing that publicity of the 9/11 attacks “produced the kind of risk that people are likely to severely misestimate in the future”).

150. Stern & Wiener, *supra* note 141, at 414; see SUNSTEIN, *supra* note 140, at 81 (describing how people will pay more for flight insurance covering losses resulting from “terrorism” than flight insurance covering all causes of loss); Gross, *supra* note 139 (manuscript at 14) (noting that “alarmist narratives of worst-case scenario[s]” can undermine efforts for a restrained response to terrorism).

151. See *supra* notes 80–83 and accompanying text (providing statistics of Americans who worry about terrorist attacks).

for a deadly virus; an outbreak of mad cow disease can be traced to its source; and precautions taken against an ongoing crime spree become unnecessary once the perpetrator is arrested.<sup>152</sup> But additional time will bring only limited additional clarity to threats posed by terrorism.

This is particularly true of ideology-driven terrorism in which the identification and incapacitation of individuals does not eliminate the risk.<sup>153</sup> In 2001, America's counterterrorism efforts were trained on Al Qaeda in the Afghanistan-Pakistan border region, the Taliban, and Osama Bin Laden. Today, Al Qaeda is "a shadow of what it once was,"<sup>154</sup> the Taliban have been removed from power in Afghanistan, and Osama Bin Laden is dead. Current counterterrorism policy must address, for example, threats emanating from Al Qaeda in the Arabian Peninsula, Al Qaeda in the Islamic Maghreb, Al Shabaab in Somalia, and possibly from within the United States itself. It is impossible to identify the nature of the threat that will present itself tomorrow.<sup>155</sup> Continued uncertainty is likely to trigger continued overreaction.

Another feature of terrorism contributing to long-term cognitive bias is the emotional element—and fear in particular—that compounds overestimation of easily accessible and potentially catastrophic risks. This emotion is a permanent feature of the terrorist threat—terrorism is *designed* to instill fear—to a degree unparalleled by other contemporary risks.<sup>156</sup> Additional information about a threat usually helps abate fear of that threat.

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152. See Sunstein, *supra* note 139, at 124 (using the D.C. sniper case as an example).

153. E.g., BRUCE HOFFMAN, *INSIDE TERRORISM* 252 (2006) (a pattern has emerged whereby "radical cells learn from each attack and refine their operations, making preventive measures and police investigations more difficult" (internal quotation marks omitted)); Press Release, Office of the Dir. of Nat'l Intelligence, Declassified Key Judgments of the National Intelligence Estimate "Trends in Global Terrorism: Implications for the U.S." (Apr. 2006), available at [http://www.dni.gov/files/documents/Newsroom/Press%20Releases/2006%20Press%20Releases/Declassified\\_NIE\\_Key\\_Judgments.pdf](http://www.dni.gov/files/documents/Newsroom/Press%20Releases/2006%20Press%20Releases/Declassified_NIE_Key_Judgments.pdf) ("[T]he global jihadist movement . . . is spreading and adapting to counterterrorism efforts.").

154. John O. Brennan, Asst. to the President for Homeland Sec. & Counterterrorism, *The Efficacy & Ethics of U.S. Counterterrorism Strategy*, Speech at the Woodrow Wilson Int'l Ctr. for Scholars (Apr. 30, 2012), available at <http://www.wilsoncenter.org/event/the-efficacy-and-ethics-us-counterterrorism-strategy>.

155. See *The al Qaeda-Inspired Terrorist Threat: An Appreciation of the Current Situation, Testimony Before the Canadian S. Special Comm. on Anti-terrorism* 1 (Dec. 6, 2010) (statement of Brian Michael Jenkins, RAND Corp.), available at [http://www.rand.org/content/dam/rand/pubs/testimonies/2010/RAND\\_CT353.pdf](http://www.rand.org/content/dam/rand/pubs/testimonies/2010/RAND_CT353.pdf) (stating that analysts remain "remarkably divided in their assessments of where we are in the global campaign against al Qaeda-inspired terrorism," "[i]ntelligence is imperfect," and "[t]here is much uncertainty"); see also HOFFMAN, *supra* note 153, at 257–95 (speculating on the nature of future terrorist threats); Bruce Hoffman, *The Changing Face of Al Qaeda and the Global War on Terrorism*, 27 *STUD. IN CONFLICT & TERRORISM* 549, 552 (2004) (describing the evolution of Al Qaeda); Stern & Wiener, *supra* note 141, at 394 (noting that the sources of terrorism are "highly uncertain" and "difficult to assess"). See generally RICHARD A. POSNER, *CATASTROPHE: RISK & RESPONSE* 171–75 (2004) (finding that it is impossible to quantify the risk posed by terrorism).

156. See Stern & Wiener, *supra* note 141, at 414 ("Terrorism . . . is unusual in that it possesses all of the characteristics that psychologists have shown to be conducive to disproportionate dread.").

But terrorism requires a “great deal of information” to counteract its emotional effects.<sup>157</sup> So long as the possibility of terrorism remains, it will evoke emotions. In fact, as terrorist groups continue to seek nuclear technology, fear of terrorism may *rise*.

Another explanation for terrorism’s continuing cognitive impact is more mercenary. A fearful public has specific beneficiaries. The media, for example, benefit from extensive coverage of terrorist incidents, which incentivizes such coverage and, in turn, increases in the public both the “availability” of terrorism<sup>158</sup> and the anxiety associated with the threat.<sup>159</sup> Executive officials also stand to gain from a sense of on-going threat;<sup>160</sup> when urging Congress to renew counterterrorism legislation, these officials emphasize the “continued threats to our Nation.”<sup>161</sup> And elected officials can boost their approval numbers. Studies during the 2004 presidential campaign, for example, showed that when people—liberal or conservative—were primed with images from 9/11, their approval of George W. Bush rose significantly.<sup>162</sup>

Not only will cognitive biases caused by the crisis persist, but cognitive effects may result from the very act of reconsidering counterterrorism legislation. When people are reminded about the 9/11 attacks, surveillance powers like those contained in the PATRIOT Act garner higher public support than they do at other times.<sup>163</sup> And several post-9/11 studies show that after reminders of death—of which images and discussion of 9/11 or

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157. Sunstein, *supra* note 139, at 127, 132; cf. Jeffrey J. Rachlinski & Cynthia R. Farina, *Cognitive Psychology and Optimal Government Design*, 87 CORNELL L. REV. 549, 606 (2001) (attributing policymaking errors to an inability to process information effectively).

158. See, e.g., Dominic Rohner & Bruno S. Frey, *Blood and Ink! The Common-Interest-Game Between Terrorists and the Media*, 133 PUB. CHOICE 129, 130 (2007) (noting that the media benefit from terrorism by increased sales and viewership); see also SUNSTEIN, *supra* note 140, at 102–03.

159. See, e.g., Michelle Slone, *Responses to Media Coverage of Terrorism*, 44 J. CONFLICT RESOL. 508, 515 (2000).

160. See *infra* Part II.C.

161. See, e.g., SUNSTEIN, *supra* note 140, at 104 (noting the Bush Administration’s frequent references to 9/11 “as a way of emphasizing the reality of seemingly distant threats and the need to incur significant costs to counteract them”); Letter from J.M. McConnell, Dir. of Nat’l Intelligence, to Sen. Harry Reid (Feb. 5, 2008), *available at* <http://www.justice.gov/archive/ll/docs/letter-ag-to-reid020508.pdf> (stating that “in the face of the continued threats to our Nation from terrorists and other foreign intelligence targets, it is vital that Congress not allow” the executive’s surveillance authorities to expire).

162. Mark J. Landau et al., *Deliver Us From Evil: The Effects of Mortality Salience and Reminders of 9/11 on Support for President George W. Bush*, 30 PERSONALITY AND SOC. PSYCHOL. BULL. 1136, 1142, 1144–48 (2004) (describing President Bush’s use of images of 9/11 in 2004 election campaign ads to establish his effectiveness in combating terrorism and noting that his “popularity [was] increased when thoughts of death or terrorism are especially salient”); see Florette Cohen et al., *American Roulette: The Effect of Reminders of Death on Support for George W. Bush in the 2004 Presidential Election*, 5 ANALYSES SOC. ISSUES & PUB. POL’Y 177, 185 (2005) (attributing Bush’s “victory in the 2004 presidential election” to “the appeal of his leadership style . . . to an electorate that was continually reminded of the trauma of the 9/11 terrorist attacks”).

163. See Yaeli Bloch-Elkon, *Preventing Terrorism After the 9/11 Attacks*, 71 PUB. OPINION Q. 142, 160 (2007).

future attacks are of course examples—people will exhibit more nationalistic tendencies, disapproval of people different from themselves, and increased aggression toward those who do not share their cultural worldview, making counterterrorism measures whose burdens fall on segments of the population seen as “other” more palatable.<sup>164</sup>

A possible example of a continued tendency to overstate the threat comes in the context of so-called “homegrown” Islamic terrorism. A chorus of voices in late 2010 and early 2011 stressed the significant and growing threat posed by radicalized American Muslims.<sup>165</sup> The result was a series of congressional hearings, proposed legislation, White House strategy development, and widespread alarm expressed in the media.<sup>166</sup> While the threat from this front is a real one, recent studies indicate that the scale of homegrown terrorism “does not appear to have corroborated the warnings issued by government officials” in early 2011.<sup>167</sup> In fact, instead of the “surge” predicted by government officials, the numbers of Muslim Americans involved in terrorist-related activities dropped in 2011.<sup>168</sup> But public dialogue has failed to devote attention to this revised threat

164. See, e.g., SUNSTEIN, *supra* note 140, at 209; Cohen et al., *supra* note 162, at 178; Landau et al., *supra* note 162, at 1139. See generally Tom Pyszczynski et al., *Mortality Salience, Martyrdom, and Military Might: The Great Satan Versus the Axis of Evil*, 32 PERSONALITY & SOC. PSYCHOL. BULL. 525 (2006) (noting that mortality salience made conservatives more likely to support the use of political violence as well as the PATRIOT Act itself).

165. See, e.g., PETER BERGEN & BRUCE HOFFMAN, BIPARTISAN POL’Y CTR., ASSESSING THE TERRORIST THREAT: A REPORT OF THE BIPARTISAN POLICY CENTER’S NATIONAL SECURITY PREPAREDNESS GROUP 1, 31 (2010) (concluding that the “increasingly prominent role” that U.S. citizens and residents have played in terrorist plots indicates a “domestic terrorism problem”); Lucy Madison, *Attorney General Eric Holder: Threat of Homegrown Terrorism “Keeps Me Up at Night,”* CBSNEWS (Dec. 21, 2010, 10:46 AM), [http://www.cbsnews.com/8301-503544\\_162-20026288-503544.html](http://www.cbsnews.com/8301-503544_162-20026288-503544.html); Dina Temple-Raston, *Homegrown Terrorists Pose Biggest Threat, Report Says*, NPR (Sept. 10, 2010, 7:01 AM), <http://www.npr.org/templates/story/story.php?storyId=129760267>; Jordy Yager, *Napolitano Warns of Threat from Homegrown Radicalization, Terrorism*, HILL (Feb. 9 2011, 7:00 PM), <http://thehill.com/homenews/house/143127-napolitano-warns-lawmakers-of-threat-from-homegrown-radicalization-domestic-terrorism>.

166. See, e.g., Prevention of Violent Radicalization and Homegrown Terrorism Act, H.R. 1955, 110th Cong. (2007); *The Evolving Nature of Terrorism: Nine Years After the 9/11 Attacks, Hearing Before the H. Comm. on Homeland Sec.*, 111th Cong. (2010); WHITE HOUSE, EMPOWERING LOCAL PARTNERS TO PREVENT VIOLENT EXTREMISM IN THE UNITED STATES (2011), available at [http://www.whitehouse.gov/sites/default/files/empowering\\_local\\_partners.pdf](http://www.whitehouse.gov/sites/default/files/empowering_local_partners.pdf).

167. CHARLES KURZMAN, MUSLIM-AMERICAN TERRORISM IN THE DECADE SINCE 9/11, at 1 (2012). See generally *id.* at 7 (noting that repeated warnings about the threat of homegrown terrorism from government officials creates “a sense of heightened tension that is out of proportion to the actual number of terrorist attacks”); Risa A. Brooks, *Muslim “Homegrown” Terrorism in the United States: How Serious is the Threat?*, 36 INT’L SEC. 7, 10 (2011) (concluding that Muslim Americans are not “increasingly motivated or capable of engaging in terrorist attacks”).

168. KURZMAN, *supra* note 167, at 8. In addition, the domestic perpetrators who do exist might be less dangerous than expected. Individuals who have studied specific instances of domestic terrorism in detail have described the would-be terrorists as “incompetent, ineffective, unintelligent, idiotic, ignorant, inadequate, unorganized, . . . amateurish, dopey, . . . moronic, irrational, [or] foolish.” Mueller & Stewart, *supra* note 83, at 88.

assessment. Instilling and sustaining fear makes for compelling headlines. Walking back sensational claims and diffusing alarm is more difficult and less profitable.

This persistence of at least some cognitive bias in the counterterrorism policymaking environment might provide a partial explanation for sunsets' failure to ensure reconsideration of a policy after "temporary passions" have abated. While they will almost certainly fade to some degree, the dispassionate deliberative capacity of both lawmakers and citizens will remain partially compromised, prompting them to place disproportionate value on counterterrorism efforts perceived to ward off terrorist attacks.

### B. Information Deficits

Those who advocate for the use of sunset provisions in counterterrorism legislation place great weight on their potential informational benefits.<sup>169</sup> They point out that, when lack of information limits Congress's ability to evaluate an issue fully, sunset clauses "can improve the body of information on which decision-making is grounded."<sup>170</sup>

There are two types of potential information deficits for sunsets to address. First, it is possible that there simply is no information either about a risk's characteristics or about the viability of a particular measure to mitigate that risk. In 2001, for example, there was scant basis for Congress to predict whether any security benefits that the PATRIOT Act provided would be worth their costs. But once a given counterterrorism power has been used for a time, "[b]etter information becomes available,"<sup>171</sup> and policymaking undertaken when more information is available "increases the probability of selecting optimal policy."<sup>172</sup> On this view, sunsets should afford Congress the ability to reassess policy after it has had the opportunity to collect sufficient information for effective evaluation.

Second, it may be that information exists but that Congress lacks access to that information and therefore cannot incorporate it into the policymaking process. In this circumstance, there is a different way in which sunsets might help. When a sunset approaches, the executive branch must convince Congress to renew the authority that was created by the sunset provision. This provides Congress with leverage that allows its members to demand information from the executive.<sup>173</sup> The legislature can then use that information to inform its renewal decisions.

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169. See, e.g., Gersen, *supra* note 26, at 266–78; Ip, *supra* note 26 (manuscript at 10, 16–17); *supra* notes 39–43 and accompanying text; cf. Elizabeth Garrett, *Harnessing Politics: The Dynamics of Offset Requirements in the Tax Legislative Process*, 65 U. CHI. L. REV. 501, 562–63 (1998) (noting that sunsets can institutionalize legislative evaluation of information regarding tax expenditures); Yair Listokin, *Learning Through Policy Variation*, 118 YALE L.J. 480, 534 (2008) (arguing that sunsets are a means of incorporating learning into the legislative process).

170. Ip, *supra* note 26 (manuscript at 10).

171. *Id.* (manuscript at 10, 16).

172. Gersen, *supra* note 26, at 267.

173. *Id.* at 276–78, 282; Ip, *supra* note 26 (manuscript at 17).

But the value of sunsets in erasing information deficits rests on assumptions both that Congress will gain access to information allowing for better legislative decisions and that it will in fact put that information to use.<sup>174</sup> Neither of these assumptions has proved true in reauthorization debates, undermining sunsets' ability to deliver the information benefits envisioned for them.<sup>175</sup>

Secrecy is at the root of this problem, which has three manifestations. First, the mere fact that the work of counterterrorism itself is conducted largely in secret and often involves classified information that is illegal—and frequently damaging to national security—to disseminate or disclose places Congress and the public at the informational mercy of the executive.<sup>176</sup> Information about policies—their costs, how they are implemented, whether they are effective, and even their content—must come from the same entity implementing those policies and requesting their renewal. If Congress does not receive (or cannot share) information regarding policies subject to sunset, any debates over reauthorization will suffer from the same information deficits that, in part, inspired the use of sunsets in the first place. Second, the dearth of public information means that, as a sunset approaches, Congress cannot rely (as it is wont to do) on interested parties outside the government to expose wasteful, ineffective, or abusively implemented aspects of the expiring policies. Its traditional oversight role is thus rendered more challenging. And finally, Congress itself is less aggressive than it could be in seeking out the information it requires.

### 1. Clandestine Nature of Counterterrorism Activities

The executive's information monopoly means that at times Congress simply does not know about certain executive activity, and therefore does not know that there is information it should ask for.<sup>177</sup> As one former senator noted, executive officials “answer your questions, but you have to ask the right questions.”<sup>178</sup> At other times the executive is merely slow to respond to information requests. Recall the Attorney General's reluctance to share information in the early days of the PATRIOT Act or divulge facts

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174. See Gersen, *supra* note 26, at 275–77. See generally *id.* (recognizing that the information-based justification for sunsets' use is undermined if “temporary statutes are always extended with little deliberation”).

175. See *supra* Part I.C.

176. The impact of this secrecy is compounded by the fact that significant amounts of information that is classified need not be. See, e.g., ELIZABETH GOITEIN & DAVID M. SHAPIRO, BRENNAN CTR., REDUCING OVERCLASSIFICATION THROUGH ACCOUNTABILITY 5 (2011), available at [http://www.brennancenter.org/sites/default/files/legacy/Justice/LNS/Brennan\\_Overclassification\\_Final.pdf](http://www.brennancenter.org/sites/default/files/legacy/Justice/LNS/Brennan_Overclassification_Final.pdf) (noting longstanding, bipartisan agreement that as much as 50 percent of classified information is improperly classified).

177. See JACK L. GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION (2007) (describing this phenomenon during the Bush Administration).

178. Dana Priest, *Congressional Oversight of Intelligence Criticized*, WASH. POST, Apr. 27, 2004, at A1.

about the Terrorist Surveillance Program.<sup>179</sup> As sunsets approach, this reluctance sometimes gives way—some legislators believed that once Congress began to use the PATRIOT Act’s sunset to “[hold] the Administration’s feet to the fire”<sup>180</sup> about how it was “being implemented,”<sup>181</sup> they “got real answers.”<sup>182</sup> Others remained unsatisfied, pointing out that some of the provisions that Congress converted into lasting legislation were “untested,” and Congress could not evaluate “how helpful they are because the President has not provided information.”<sup>183</sup>

Another byproduct of the executive information monopoly is that Congress lacks the means to verify the information it does get. Instead, Congress must rely on communications from executive officials. Information regarding the number of NSLs issued is the most concrete example. The Justice Department inadvertently misreported the numbers, but as Congress had no independent means of verifying those reports, it was unaware of the error until the Inspector General released his report years later.<sup>184</sup> But this handicap is even more glaring with respect to evaluating the effectiveness—as opposed to frequency of usage—of counterterrorism powers. The conclusions set forth in the few Inspector General reports about the efficacy of counterterrorism powers seem to have rested largely on the claims of intelligence officials, describing NSLs, for example, as “indispensable investigative tools.”<sup>185</sup> And the most a joint Inspector General’s report about the value of the Terrorist Surveillance Program could say was that many senior intelligence officials “believe that the [program] filled a gap in intelligence collection.”<sup>186</sup> Lacking a system to measure counterterrorism policy’s effectiveness, Congress has had nothing but the executive branch’s assurances regarding both how particular programs were being implemented and what value those programs had.

Frequent instances in which information is disclosed to only a limited group of legislators also pose particular challenges. The executive is

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179. See *supra* notes 115–17 and accompanying text. See generally Stephen J. Schulhofer, *Secrecy and Democracy: Who Controls Information in the National Security State?* 14–16 (N.Y.U. Sch. of Law, Pub. Law & Legal Theory, Working Paper No. 10-53, 2010) (discussing instances of executive withholding information).

180. 151 CONG. REC. 16,934 (2005) (statement of Rep. Levin).

181. *Id.*

182. 151 CONG. REC. 25,616 (statement of Rep. Scott); see also 154 CONG. REC. 1270 (2008) (statement of Sen. Cardin).

183. 151 CONG. REC. 16,903 (statement of Rep. Thompson); see also 155 CONG. REC. 22,086 (2009) (statement of Sen. Feingold) (stating that during the PATRIOT Act reauthorization debate in 2005, much “implementation information remained classified”); 151 CONG. REC. 16,931 (statement of Rep. DeLauro) (“We are failing to consider some of the most ineffective and overreaching provisions of the PATRIOT Act.”); 151 CONG. REC. 16,927 (statement of Rep. Pelosi) (“[W]e have not seen that oversight.”).

184. See *supra* notes 124–27 and accompanying text.

185. 2007 NSL REPORT, *supra* note 125, at xlv; see also 2008 SECTION 215 REPORT, *supra* note 128, at 55–58. See generally 2007 SECTION 215 REPORT, *supra* note 128.

186. OFFICES OF INSPECTORS GEN. OF THE DEP’T OF DEF., DEP’T OF JUSTICE, CIA, NSA, OFFICE OF THE DIR. OF NAT’L INTELLIGENCE, UNCLASSIFIED REPORT ON THE PRESIDENT’S SURVEILLANCE PROGRAM 37–38 (2009), available at <http://www.fas.org/irp/eprint/psp.pdf>.

statutorily obligated to keep Congress “fully and currently informed” of the intelligence activities of the United States.<sup>187</sup> With respect to certain secret government activity, only the “chairmen and ranking minority members of the congressional intelligence committees, the Speaker and minority leader of the House of Representatives, the majority and minority leaders of the Senate, and such other member or members of the congressional leadership as may be included by the President”<sup>188</sup>—known as the Gang of Eight—are included in briefings. Sometimes these members may neither bring staff with them to the briefings nor consult staff about what they learn. In a handwritten letter to Vice President Richard Cheney, Senator Rockefeller, a member of the Senate’s intelligence committee, complained about a briefing at which he was informed about the Terrorist Surveillance Program, stating that, as neither a “technician nor an attorney,” his “inability to consult staff or counsel” left him “unable to fully evaluate, much less endorse these activities [discussed at the briefing].”<sup>189</sup>

Even if all members of Congress are fully informed, the usefulness of that information in considering whether to reauthorize policies carried out in secret is significantly impaired by the fact that the public will be unable to play a meaningful role. This was a problem with respect to the debates over codifying the Terrorist Surveillance Program, in which “critical legal and factual information remained unknown to the public.”<sup>190</sup> The secret interpretation of the business-records provision presents a similar issue.<sup>191</sup> It hardly needs to be stated that, if the government’s interpretation of a provision differs significantly from the public’s understanding of it, an informed public debate about whether the law should be renewed is rendered impossible. Absent knowledge of what the government is doing in its name, the public has no means of determining whether to support renewal of existing legislation, press for policy changes, or advocate allowing the legislation to expire. And without public pressure acting as an exogenous mechanism pressing Congress to incorporate lessons learned into the renewal legislation, Congress is likely to defer to the executive in this area.<sup>192</sup> The value of any information is sharply reduced when it cannot be employed in an open, public debate over the desirability of the policy.

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187. 50 U.S.C. § 413b(b)(1) (2006).

188. *Id.* § 413b(c)(2). There is a credible argument that only briefings regarding covert actions, and not intelligence programs, should be limited to the Gang of Eight. *Compare id.* (no mention of limited briefings), with 50 U.S.C. § 413a (authorization of limited briefings).

189. Letter from Sen. John D. Rockefeller IV to Vice President Dick Cheney (July 17, 2003), available at <http://www.fas.org/irp/news/2005/12/rock121905.pdf>; see also Kathleen Clark, *Congress’s Right to Counsel in Intelligence Oversight*, 2011 U. ILL. L. REV. 915, 932–36 (critiquing Gang of Eight briefings as a means of inoculating the executive from backlash without providing Congress a meaningful oversight opportunity).

190. 155 CONG. REC. 22,086 (2009) (statement of Sen. Feingold).

191. See *supra* notes 105–08 and accompanying text.

192. See *infra* Part II.D.

## 2. Impact on Congressional Oversight

Government officials, outside task forces, and scholars consistently criticize congressional oversight of national security policy as ineffective.<sup>193</sup> Sunsets might enhance oversight in certain ways (such as providing leverage for demanding information), but secrecy undermines the efficacy of one of Congress's most efficient oversight models—known as “fire alarm” oversight.

In fire-alarm oversight, Congress relies on nongovernmental parties to identify problematic policies and ensure that legislators are informed about all sides of an issue.<sup>194</sup> This eliminates the need for Congress itself to spend the time and resources necessary to identify, gather, or analyze crucial information. Instead, interested parties will bring to Congress's attention matters of concern regarding ongoing government action (or inaction). This may be true when it comes to things such as adverse health effects caused by a drug treatment approved by the FDA, or an industrial plant's pollution of waterways in violation of the Clean Water Act. The same cannot be said for counterterrorism policy, because interested parties lack access to the information that might “set off” a fire alarm.<sup>195</sup> They can therefore neither provide that information to Congress nor identify specific concerns about how a sunset provision has been implemented.

Almost as troubling, the veil of secrecy can trigger false alarms—issues about which interested parties do raise concerns may not direct Congress toward the best use of its oversight resources. The time spent on appeasing fears in 2005 regarding the use of business-records orders to collect

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193. *E.g.*, THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 420 (2004), available at <http://govinfo.library.unt.edu/911/report/911Report.pdf>; see also, *e.g.*, *id.* at 419 (finding widespread dissatisfaction with congressional oversight among both members and their staff); AMY B. ZEGART, EYES ON SPIES 31 (2011) (stating intelligence community officials and their legislative overseers both believe “that oversight was consistently ineffective and getting more so”); Vicki Divoll, *The “Full Access Doctrine”: Congress’s Constitutional Entitlement to National Security Information from the Executive*, 34 HARV. J.L. & PUB. POL’Y 493, 539–41 (2011) (arguing for intelligence oversight reform because “[f]orty years of tweaking the [existing] statutes has not worked”); Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255, 1297–1305 (1988); Loch K. Johnson, *Ostriches, Cheerleaders, Skeptics, and Guardians: Role Selection by Congressional Intelligence Overseers*, 28 SAIS REV. INT’L AFF. 93, 104–06 (2008) (calling on members of Congress to exercise more vigilant intelligence oversight).

194. See Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 167–68 (1984) (contrasting fire-alarm oversight with more time-consuming and expensive “police-patrol” oversight).

195. See AMY B. ZEGART, *FLAWED BY DESIGN: THE EVOLUTION OF THE CIA, JCS, AND NSC* 26–28 (1999) (“[I]t is difficult for interest groups to serve as low-cost information providers.”); Samuel J. Rascoff, *Domesticating Intelligence*, 83 S. CAL. L. REV. 575, 597 n.81 (2010) (noting that fire-alarm oversight “typically depends on a public that is positioned to observe official actors and to call attention to their potential abuses”); see also Schulhofer, *supra* note 179, at 21–30 (describing challenges to congressional oversight stemming from secrecy).

information about Americans' reading habits may have been better spent elsewhere, given that the power had not been used for that purpose.

### 3. Congressional Efforts to Acquire Information

The inherent secrecy surrounding counterterrorism efforts is not the only force contributing to persistent information deficits in policymaking. Congress has not maximized the potential of the leverage that sunsets provide to secure the release of helpful information. Without public access to the relevant information, there is neither the stick of public disapproval prompting Congress to engage in aggressive oversight nor the carrot of claiming credit for repairing flawed policy.<sup>196</sup>

Congress's demand that the Justice Department prepare more searching reviews of the use of business-records orders and NSLs once those provisions had come under attack, and the Senate Judiciary Committee's persistence in seeking information regarding the Terrorist Surveillance Program, indicate that it is in legislators' power to secure helpful information. But only NSLs and business-records orders were subject to such audits—and even those only for the years 2002 to 2006.<sup>197</sup> So while the information the audits provided was available for the 2009 reauthorization debates, that information was incomplete—failing to cover 2007 and 2008 or to provide information regarding anything other than those two tools—and provided for no comparable information for future reauthorizations. Rather than secure these more probing examinations of effectiveness or signs of abuse or waste, Congress's information requests and reporting requirements are limited to more opaque or symbolic forms.<sup>198</sup> This approach threatens to consume significant executive branch time and resources—the price tag for one recent biannual report required by the PATRIOT Act came in at \$647,179 for the six-month reporting period<sup>199</sup>—to generate reports that fall short of facilitating searching assessments of the nation's counterterrorism machinery.

So whether it is because Congress does not actively seek enough—or the correct—information, because the executive fails to supply that information, or because the necessarily secret nature of counterterrorism

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196. See, e.g., ZEGART, *supra* note 193, at 63–64 (congressional motives discourage intelligence oversight); Heidi Kitrosser, *Congressional Oversight of National Security Activities: Improving Information Funnels*, 29 CARDOZO L. REV. 1049, 1060 (2008) (concluding that congresspersons may acquiesce in, or even facilitate, executive noncompliance with statutory directives to share information); Rascoff, *supra* note 195, at 597 (stating that congressional intelligence committee members are “poorly incentivized to question intelligence practices” of questionable legality); Schulhofer, *supra* note 179, at 24 (noting lack of political rewards resulting from intelligence community oversight); Schwartz, *supra* note 95, at 428 (describing reports to Congress as “a myth of oversight”).

197. USA PATRIOT Act Improvement and Reauthorization Act of 2005 § 119(a), Pub. L. No. 109-177, 120 Stat. 192 (2006).

198. See *supra* note 113 and accompanying text.

199. OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, REPORT TO CONGRESS ON THE IMPLEMENTATION OF § 1001 OF THE USA PATRIOT ACT 18 (2012), available at <http://www.justice.gov/oig/special/s0908.pdf>.

policy renders meaningful debate impossible, renewal debates about counterterrorism statutes have not reflected the benefits sunsets might provide in less clandestine contexts. Instead, the fact that the work of counterterrorism goes on largely behind closed doors means that sunsets' purported information-generating benefits have proved largely illusory.

This inevitable persistent information deficit is the feature that most starkly differentiates counterterrorism policy from other policymaking areas. To be sure, information deficits also plague long-term policymaking and the ability to craft risk regulation for newly discovered risks in the nonterrorism context. But to the extent that sunsets rely on the ability to eliminate congressional information deficits during the sunset period, that faith is misplaced. The heart of the sunset mechanism is the idea that additional congressional deliberation will improve policy. But if sunsets are meant to allow Congress to reform policy based on the benefit of new information, the assumption that Congress will have and use new information is integral to the very concept of sunsets. When Congress is perpetually underinformed because it is not in charge of the relevant information, and interested parties outside the government cannot fill this gap, legislators cannot expect sunsets to succeed.

### C. *The Myth of Temporary Legislation*

The third way in which sunsets are hailed as valuable is as a tool to address “temporary” crises.<sup>200</sup> If the period requiring a particular measure is finite, a statute that returns by default to the status quo at the end of that period avoids the need for Congress to repeal the measure.<sup>201</sup> In other words, sunsets can be a “symmetric response to policy problems that are themselves perceived to be temporary.”<sup>202</sup> The assumption that temporary legislation will be permitted to expire when it is no longer necessary—and that this point will be evident—underlies this argument.

Throughout American history, this is in fact the way that the U.S. government has responded to emergencies. In contrast to many nations,<sup>203</sup> the U.S. Constitution does not establish a regime of emergency powers to activate in the event of a crisis.<sup>204</sup> Instead, emergency powers at the American executive's disposal frequently result from legislative delegations of power triggered by some form of perceived need. These delegations often purport to provide “emergency power” on a temporary basis and

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200. See, e.g., Kysar, *supra* note 23, at 1060, 1067 n.253 (stating that one of the “acceptable uses of temporary legislation is when lawmakers originally intend the legislation to be temporary”).

201. Cf. Ip, *supra* note 26 (manuscript at 9–10) (describing this position to advocate for use of sunset provisions in counterterrorism legislation).

202. Gersen, *supra* note 26, at 273.

203. See, e.g., Ferejohn & Pasquino, *supra* note 30, at 213; Samuel Issacharoff, *Political Safeguards in Democracies at War*, 29 OXFORD J. LEGAL STUD. 189, 201 (2009).

204. The Suspension Clause, which permits Congress to suspend the “the Writ of Habeas Corpus . . . when in Cases of Rebellion or Invasion the public Safety may require it,” is an exception. U.S. CONST. art. I, § 9, cl. 2.

expire either of their own force or when one of the political branches declares the emergency at an end.<sup>205</sup>

As an initial matter, sunsets can only serve this purpose if the need for the legislation at issue truly is conceived of as finite. It is far from clear that this is the case with respect to the post-9/11 counterterrorism surveillance statutes.<sup>206</sup> To the extent that legislators never meant to allow any of these measures to expire, it means that at least one of the claimed purposes of sunsets was doomed to fail from the start. But even crisis legislation that is truly intended to be temporary tends to “normalize” and become part of the legal fabric.

### 1. Temporary Powers and Normalization

Numerous scholars have documented the phenomenon of temporary emergency powers normalizing over time, gradually becoming part of the accepted body of law.<sup>207</sup> This is a phenomenon that has occurred across the globe and at all levels of government.<sup>208</sup> And it represents a formidable force pressing against reconsideration of counterterrorism measures enacted in the wake of an attack.

Circumstances like the United States’ struggle against terrorism, where emergency and normalcy become difficult to distinguish from one another, render this normalization trend even more powerful.<sup>209</sup> As commentators and officials from all three branches of government have noted, the “war on

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205. *E.g.*, International Emergency Economic Powers Act, Pub. L. No. 95-223, 91 Stat. 1625 (1977) (authorizing the President to block financial transactions and freeze assets after declaring the existence of an “unusual and extraordinary threat” that originates “outside the United States”).

206. *See supra* Part I.C.2.

207. *See, e.g.*, David Cole, *No Reason To Believe: Radical Skepticism, Emergency Power, and Constitutional Constraint*, 75 U. CHI. L. REV. 1329, 1354 (2008) (reviewing ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY & THE COURTS* (2007)); Ferejohn & Pasquino, *supra* note 30, at 219, 234 (noting that legislated emergency powers can become “embedded in the normal legal system”).

208. *See, e.g.*, DONOHUE, *supra* note 27, at 14–16 (United Kingdom); GROSS & NI AOLÁIN, *supra* note 1, 171–244 (providing examples of the spread and routinization of emergency powers); Oren Gross, *What “Emergency” Regime?*, 13 CONSTELLATIONS 74, 75 (2006) (Israel); Anil Kalhan et al., *Colonial Continuities: Human Rights, Terrorism, and Security Law in India*, 20 COLUM. J. ASIAN L. 93, 125–41 (2006) (India); Chris Mooney, *A Short History of Sunsets*, LEGAL AFF., Jan.–Feb. 2004, at 67–68 (state agencies). *See generally* HUMAN RIGHTS WATCH, *CONVICTED BEFORE TRIAL: INDEFINITE DETENTION UNDER MALAYSIA’S EMERGENCY ORDINANCE* (2006), available at <http://www.hrw.org/reports/2006/malaysia0806/malaysia0806web.pdf> (Malaysia).

209. *See* MARY L. DUDZIAK, *WAR TIME: AN IDEA, ITS HISTORY, ITS CONSEQUENCES* 4–5 (2012) (arguing that wartime has become normal time in America); Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011, 1022, 1085, 1089–90 (2003) (arguing that “the exception[—the state of emergency and the concomitant emergency regime—]has merged with the rule”); *see also* Continuation of the National Emergency With Respect to Certain Terrorist Attacks, 76 Fed. Reg. 56,633 (Sept. 9, 2011) (reauthorizing of the state of emergency declared in 2001 for the tenth time).

terror” has no ascertainable end.<sup>210</sup> Including a sunset provision to prevent normalization of legislation presumes the existence of a finite crisis that demands extraordinary measures adopted for its duration—a deadly virus might need to be quarantined, but it will pass; mad cow disease will be eradicated; floodwaters will recede. It is the ascertainable onset of the crisis that prompts the invocation of emergency measures, and the ascertainable end that allows emergency measures to be discontinued. If an emergency will not end but at best will recede incrementally, it is difficult to determine when the threat has faded sufficiently to discontinue measures enacted to address it.<sup>211</sup> To do so, legislators must make the subjective determination that the threat has faded to the point that these tools no longer serve to reduce risk.<sup>212</sup>

Another factor contributing to the normalization process is that the security measures adopted to thwart terrorists tend to migrate into nonterrorism law enforcement operations.<sup>213</sup> Measures justified in 2001 as “constructive, valuable tools to be used in the fight against terrorism”<sup>214</sup> are now used to investigate “drug traffickers, white-collar criminals, blackmailers, child pornographers, money launderers, spies and even corrupt foreign leaders.”<sup>215</sup> Delayed-notice search warrants are one such power—at the time of the initial PATRIOT Act reauthorization debates, just 18 of 155 such warrants were issued in terrorism cases.<sup>216</sup> This trend has only become more dramatic over time. From October 2007 to September 2010, 4,217 sneak-and-peek warrants were issued, but less than 1 percent of

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210. *E.g.*, *Boumediene v. Bush*, 553 U.S. 723, 785 (2008) (recognizing that the fight against terrorism “may last a generation or more”); 151 CONG. REC. 16,924 (2005) (statement of Rep. Wilson) (“The war against foreign terrorists and spies will not end.”); John Yoo, *War, Responsibility, and the Age of Terrorism*, 57 STAN. L. REV. 793, 816 (2004) (arguing that the unending nature of the U.S. struggle against terrorism creates a perpetual state of emergency); Address Before a Joint Session of the Congress on the State of the Union, 1 PUB. PAPERS 81, 82 (Jan. 20, 2004) (noting that the hope that the danger is behind us “is understandable, comforting—and false”).

211. In a somewhat analogous example from American history, a federal rent control statute for the District of Columbia was enacted with a two-year sunset in the wake of World War I as an “emergency” measure to address the influx of would-be tenants into Washington and the accompanying rise in demand for housing. Act of October 22, 1919, ch. 80, tit. II, 41 Stat. 298. Twice it was renewed, and it only ceased to have effect when a federal court held the law invalid because the emergency on which it relied had ended. Vermeule, *supra* note 26, at 167–68.

212. *See* DONOHUE, *supra* note 27, at 14.

213. *See* DAVID COLE, *ENEMY ALIENS* 88–179 (2003) (describing multiple examples of this phenomenon from American history); Laura Donohue, *The Perilous Dialogue*, 97 CALIF. L. REV. 357, 373–77 (2009) (describing the spread of measures initially aimed at terrorist violence in Northern Ireland first to the rest of Great Britain and then to all areas of criminal law); Eric A. Posner & Adrian Vermeule, *Accommodating Emergencies*, 56 STAN. L. REV. 605, 621 (2003) (describing the theory that terrorism powers bleed over into regular policing).

214. *See Administration’s Draft Anti-Terrorism Act of 2001: Hearing Before the H. Comm. on the Judiciary*, 107th Cong. 19 (2001) (statement of Att’y Gen. John Ashcroft).

215. Eric Lichtblau, *U.S. Uses Terror Law To Pursue Crimes from Drugs to Swindling*, N.Y. TIMES, Sept. 28, 2003, at A1; *see* Gross, *supra* note 208, at 80–82.

216. *See supra* note 135.

them related to terrorism.<sup>217</sup> Once an investigative tool has been used successfully against, for example, a major drug distribution organization, Congress will find it difficult to repeal the power—regardless of whether less intrusive tools might have led to the same result.

## 2. Bureaucratic Entrenchment

Features inherent in bureaucracies—and in national security bureaucracies in particular—are also major contributors to the normalization tendency. Any change in the way a bureaucracy operates represents not just a change of text in the statute books; it also often entails substantial institutional transformation. Any time an agency's powers or priorities change, that shift necessitates concrete actions. In response to post-9/11 counterterrorism statutes, agencies drafted and distributed new handbooks, guidelines, and manuals reflecting the modifications. Government officials were trained in how to implement the new policies. New personnel were hired, new equipment was installed, new databases were created, new paperwork designed, new procedures devised. Once these changes have been made, and once employees have become accustomed to the new rules and expectations, it is no small task to unscramble the egg.<sup>218</sup>

The agency's substantive work adjusts as well. Once the FBI had the authority to collect subscriber information from Internet Service Providers (ISPs) without a judicial order, its agents came to rely heavily on this tool.<sup>219</sup> This creates a path dependence in which investigative strategies rely upon the ability to use this tool—indeed, this power has been described as “the building blocks of most [national security] investigations.”<sup>220</sup> If the power never had been granted in the first place, perhaps the Bureau would have found a different way to achieve its goals—after all, investigators blame the 9/11 “failures” on lack of communication and leadership, not the

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217. See REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS ON APPLICATIONS FOR DELAYED-NOTICE SEARCH WARRANTS AND EXTENSIONS (2011), available at [http://www.aclu.org/files/assets/aousc\\_patriot\\_act\\_section\\_213\\_sneak\\_and\\_peek\\_report.pdf](http://www.aclu.org/files/assets/aousc_patriot_act_section_213_sneak_and_peek_report.pdf); REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS ON APPLICATIONS FOR DELAYED-NOTICE SEARCH WARRANTS AND EXTENSIONS (2010), available at <https://www.fas.org/irp/agency/doj/fisa/2009rept.pdf>; REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS ON APPLICATIONS FOR DELAYED-NOTICE SEARCH WARRANTS AND EXTENSIONS (2009), available at <http://big.assets.huffingtonpost.com/SneakAndPeakReport.pdf>.

218. See, e.g., Listokin, *supra* note 169, at 524 (“The greater the sunk costs described here, the stronger the power of policy inertia.”).

219. See 2007 NSL REPORT, *supra* note 125, at 45–65.

220. *The Permanent Provisions of the Patriot Act, Hearing Before H. Comm. on the Judiciary, Subcomm. on Crime, Terrorism, & Homeland Security*, 112th Cong. 7 (2011) (statement of Todd Hinnen, Acting Asst. Att’y Gen. for National Security).

absence of necessary intelligence-collection powers.<sup>221</sup> But long-standing reliance on a particular tool raises the value of that tool in the user's eyes.

Add to these procedural and strategic considerations the fact that additional powers are accompanied by additional funding and prestige, and officials will resist efforts to repeal the powers. The intelligence community has become a leviathan, accustomed to operating with fewer limitations, bigger budgets, and more clout than ever before<sup>222</sup>—a position it is predictably loath to cede. In the counterterrorism context, this means that military, intelligence, and law enforcement agencies will lobby against efforts to roll back powers they have been granted.<sup>223</sup> As “beneficiaries of an extant regulatory program,” these organizations “will lobby harder” than those who advocate modifications.<sup>224</sup>

These considerations can apply with some force to any bureaucracy, but they are exacerbated here in at least two ways. First, in most regulatory contexts, there are strong, established interests opposed to agency assertions of power. For example, industry will resist EPA efforts to impose more stringent environmental regulations. In the counterterrorism context, however, the executive and the established interests all favor maximizing the executive's “regulatory” power. Conferring additional powers on the executive branch benefits the agencies themselves. And, again, the entity pressing for continued powers is the only entity with full access to the information about the costs and benefits of those powers. But private contractors that supply these agencies with hardware, software, and personnel also profit, as do the telecommunications companies and ISPs who charge for every wiretap.<sup>225</sup> And second, the same pressure that Congress faces to maximize the nation's security and to avoid criticism for not having taken sufficient preventive measures<sup>226</sup> provides the executive strong incentives to continually assert and consolidate power in this area.<sup>227</sup>

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221. THE 9/11 COMMISSION REPORT, *supra* note 193, at 269–76, 424–27; COMM'N ON THE INTELLIGENCE CAPABILITIES OF THE U.S. REGARDING WEAPONS OF MASS DESTRUCTION, REPORT TO THE PRESIDENT OF THE UNITED STATES 281–82 (2005), *available at*.

222. *See, e.g.*, Dana Priest & William M. Arkin, *National Security, Inc.*, WASH. POST, July 20, 2010, at A1 (stating that “there is a Top Secret America created since 9/11 that is hidden from public view, lacking in thorough oversight and so unwieldy that its effectiveness is impossible to determine”).

223. *See* DONOHUE, *supra* note 27, at 15.

224. *See* Kysar, *supra* note 23, at 1047–48; Rachlinski & Farina, *supra* note 157, at 603–05 (attributing the “stickiness” of some policies to cognitive effects such as loss aversion and the endowment effect).

225. *See* Dan Eggen, *Wiretaps Are Cut Over Unpaid Bills*, WASH. POST, Jan. 11, 2008, at A15 (reporting that telecommunications companies have “repeatedly cut off FBI access to wiretaps of alleged terrorists” due to unpaid bills).

226. *See infra* notes 265–66 and accompanying text.

227. *See, e.g.*, Philip Mudd, Former Deputy Dir., FBI, Nat'l Sec. Branch, Brennan Center for Justice Panel Discussion on Intelligence Collection and Law Enforcement: New Roles, New Challenges (Mar. 18, 2011) (transcript on file with author) (describing executive officials' recognition that failure to act preventatively will result in congressional investigations and finger-pointing).

*D. The Role of the President in Counterterrorism Policymaking*

One crucial element of any discussion of counterterrorism powers goes unaddressed in the accounts of legislators and commentators who favor sunsets: the President dominates the formulation of national security and foreign affairs policy in ways that he does not in any other policy area. This domination arises from many sources, including the drastic expansion of presidential power in the post-war era, which is most highly pronounced in the national security context;<sup>228</sup> the advantage that accompanies the President's position as first mover in responding to crises; the ability to act quickly and secretly; the President's role as the "sole organ" of U.S. foreign affairs;<sup>229</sup> the executive's information monopoly; substantive expertise in military and security matters; and a norm of executive primacy that fosters expectations that the President will take the lead in national security.<sup>230</sup>

The President also has at his disposal the bully pulpit, and executive officials have not shied away from using it to press for desired counterterrorism powers. In the rush to enact the original PATRIOT Act in 2001, then-Attorney General John Ashcroft asserted that individuals who "scare peace-loving people with phantoms of lost liberty" would "only aid terrorists."<sup>231</sup> These sorts of warnings of potential catastrophe were not limited to the immediate post-9/11 timeframe. When Congress was debating the FISA Amendments Act in 2007, President Bush admonished legislators that each "day that Congress puts off reforms increases the danger to our nation."<sup>232</sup> And in urging renewal of that Act, President Obama's Attorney General Eric Holder recently joined with the Director of National Intelligence in telling Congress that the expiring authorities "continue[] to produce significant intelligence that is vital to protect the nation."<sup>233</sup>

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228. Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1816–21 (1996) (summarizing accretion of power in the presidency).

229. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936).

230. See DONOHUE, *supra* note 27, at 262 (arguing that congressional reticence to engage in aggressive oversight might stem from a belief that surveillance is an exclusively executive power); ZEGART, *supra* note 195, at 28–36 (noting that "presidents play a larger role" in shaping national security agencies); William P. Marshall, *Eleven Reasons Why Presidential Power Inevitably Expands and Why It Matters*, 88 B.U. L. REV. 505, 507–19 (2008) (enumerating reasons for the continuous expansion of presidential power); see also POSNER & VERMEULE, *supra* note 139, at 47 (arguing that Congress defers to executive policy preferences because it recognizes its institutional disadvantages in responding to emergencies).

231. *Ashcroft: Critics of New Terror Measures Undermine Effort*, CNN.COM (Dec. 6, 2001), [http://articles.cnn.com/2001-12-06/us/inv.ashcroft.hearing\\_1\\_military-tribunals-terrorism-probe-attorney-general-john-ashcroft?\\_s=PM:US](http://articles.cnn.com/2001-12-06/us/inv.ashcroft.hearing_1_military-tribunals-terrorism-probe-attorney-general-john-ashcroft?_s=PM:US).

232. Jim Rutenberg, *Wielding the Threat of Terrorism, Bush Outmaneuvers the Democrats*, N.Y. TIMES, Aug. 7, 2007, at A14 (reporting that Senate Democrats convinced President Bush to delete that sentence from the public radio address on July 28, 2007). See generally Tim Starks, *Bush Signs FISA Rewrite into Law*, CONG. Q. WKLY., July 14, 2008 (reporting that President Bush had "chastised" Congress for not sending him a bill to sign).

233. Letter from James R. Clapper, Dir. of Nat'l Intelligence, and Att'y Gen. Eric Holder to Reps. John Boehner and Nancy Pelosi, Speaker and Minority Leader of the House of Representatives, and Sens. Harry Reid and Mitch McConnell, Majority and Minority

The practical impact of Presidential dominance is a marked legislative deference to executive branch requests, not only initially but when it comes time for renewal as well. With respect to post-9/11 counterterrorism statutes, the executive branch internally developed preferences, described the capabilities it wanted Congress to approve, and drafted desired legislation.<sup>234</sup> Congress tinkered around the edges, but the substance of the legislation has reflected these executive preferences.<sup>235</sup> Indeed, in the face of the public statements executive officials are willing to make, a legislator will be hard-pressed to refuse to give the President the powers he claims to need to keep America safe.

Statutes in many policy areas are heavily influenced—if not dictated—by well-organized interests that will benefit from the legislation.<sup>236</sup> In the counterterrorism realm, the well-organized interest behind the legislation—the statutes’ “beneficiary”—is the executive branch itself and, in particular, the intelligence community. Some observers assert that the congressional intelligence oversight committees, rather than acting as a check on executive powers, have “degenerated into a mutual admiration society for secret agencies.”<sup>237</sup> The legislature thus plays a much smaller role in monitoring, shaping, and constraining the implementation of counterterrorism policy than it plays in other areas of domestic risk regulation. Instead, both Congress and the public expect Congress to defer to the executive branch’s stated counterterrorism needs.

This, some might argue, is how democracy should work. If Congress feels pressure to defer to the executive on security questions, it is because its members perceive a constituent preference for them to do so. There are, however, at least two reasons to question this argument. First, even if the initial post-crisis legislation appropriately reflects the citizenry’s preference,

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Leaders of the Senate (Feb. 8, 2012), *available at* [http://intelligence.senate.gov/pdfs112th/dni\\_ag\\_letter.pdf](http://intelligence.senate.gov/pdfs112th/dni_ag_letter.pdf).

234. *See, e.g.*, Howell, *supra* note 46, at 1153–55 (describing the Bush Administration’s proposed draft Anti-Terrorism Act of 2001); Letter from J.M. McConnell, Dir. of Nat’l Intelligence, to Sens. John D. Rockefeller & Christopher S. Bond, Chairman and Ranking Member of the Senate Select Comm. on Intelligence (Apr. 12, 2007), *available at* <http://www.justice.gov/archive/ll/docs/letter-ref-fisa-modernization.pdf> (submitting draft legislation to amend FISA). *But see* Howell, *supra* note 46, at 1178–1205 (describing compromises included in the original USA PATRIOT Act).

235. Eric A. Posner & Adrian Vermeule, *Crisis Governance in the Administrative State: 9/11 and the Financial Meltdown of 2008*, 76 U. CHI. L. REV. 1613, 1650 (2009) (“[A]lthough legislators do push back against executive demands, in the end they accede to the core of the executive’s proposals . . .”).

236. *See, e.g.*, William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1518–20 (1987) (synthesizing in simplified form the transactional analysis of legislation originating in Mancur Olson’s seminal 1965 book, *The Logic of Collective Action*).

237. *See* Loch K. Johnson, “*The Contemporary Presidency*”: *Presidents, Lawmakers, and Spies: Intelligence Accountability in the U.S.*, 34 PRESIDENTIAL STUD. Q. 828, 833 (2004) (internal quotation marks omitted); Koh, *supra* note 193, at 1273–74 & n.79 (explaining that “some scholars have described situations in which a government bureau and its congressional review committee are in bed with each other” (internal quotation marks omitted)).

when it comes time for renewal, circumstances are different. It is impossible to know what sort of legislative preferences voters would express if they were able to assess fully the government's implementation of counterterrorism legislation. Second, the majority's demand for continuation of the security measures may result from the fact that the majority itself bears fewer costs for the measures' implementation than certain segments of the population.<sup>238</sup> If Congress's renewal decisions reflect this tyranny of the majority, perhaps it is not a result that should be hailed as an effective instance of democracy in action.

This array of forces exerting pressure to extend sunseting counterterrorism surveillance statutes have meant that they have been consistently and repeatedly reauthorized, and that sunsets have been unable to force the reasoned, informed reconsideration for which they were envisioned. None of this is to say that all emergency measures last forever.<sup>239</sup> But outright repeals tend to be rare, difficult to bring about, and frequently the result of external forces rather than sunsets.

### III. THE DYNAMICS OF COUNTERTERRORISM SUNSET PROVISIONS

Civil libertarian legislators who champion sunsets as a means to protect civil liberties in the face of the emphasis on security acknowledge that "adding sunsets . . . only gets us so far."<sup>240</sup> Whatever else it might do, "a sunset is no substitute for substantive improvement."<sup>241</sup> So unless there is a meaningful possibility of substantive changes when appropriate, sunsets add little civil-libertarian value. If, as the preceding discussion indicates, expiring counterterrorism legislation is overwhelmingly likely to be renewed regardless of its actual impact, the question becomes whether sunsets have costs that outweigh the small chance of benefits they

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238. See COLE, *supra* note 213, at 17–21; SUNSTEIN, *supra* note 140, at 204–08 (noting the risk of imposing excessive restrictions on civil liberties "when an identifiable subgroup faces the burden"); JEREMY WALDRON, TORTURE, TERROR, AND TRADE-OFFS 33–39 (2010); Cole, *supra* note 207, at 1349 (stating that during emergencies, U.S. government officials often infringe on the liberties of the most vulnerable, "while reassuring the majority that their own rights are not being undermined"); Stephen Holmes, *In Case of Emergency: Misunderstanding Tradeoffs in the War on Terror*, 97 CALIF. L. REV. 301, 316 (2009) (giving examples of policies that disproportionately burden certain groups).

239. See DONOHUE, *supra* note 27, at 270 (noting some opposition to presidential policy); Cole, *supra* note 207, at 1353 (pointing out that it is not impossible to regain liberties once sacrificed in the name of emergency, but that "the road back is very often a long, slow, and grueling one"); Adrian Vermeule, *Emergency Lawmaking After 9/11 & 7/7*, 75 U. CHI. L. REV. 1155, 1171–75 (2008) (discussing bipartisan resistance to some of the President's emergency-power requests after 9/11); cf. Posner & Vermeule, *supra* note 213, at 611 (acknowledging the possibility of a "weak," and therefore not absolute, ratchet effect).

240. 151 CONG. REC. 28,226 (2005) (statement of Sen. Feingold); see also Letter from Caroline Fredrickson, Dir., Wash. Legislative Office, ACLU, to Congress, Re: Vote NO on the Conference Report on the USA PATRIOT Improvement and Reauthorization Act of 2005, H.R. 3199 (Dec. 7, 2005) [hereinafter ACLU Letter], available at <http://www.aclu.org/national-security/aclu-letter-congress-urging-no-vote-usa-patriot-improvement-and-reauthorization-ac> ("[S]ome in Congress [were] content to receive tardy and generic reports from the administration about these powers, despite the public outcry.").

241. 151 CONG. REC. 28,460 (statement of Sen. Leahy).

represent. Exploration of the impact of sunsets on the legislative process itself is necessary to assess these costs.

As Part III.A explains, commentators agree that if post-crisis counterterrorism legislation is passed, its effect will be to increase the executive's security powers. Congress's concern that this increase will prove too great drives the inclination to limit temporally any such legislation. This is where sunsets' paradox arises.

Part III.B demonstrates that, in creating a temporal limit on legislation, sunsets lower the barriers to enactment. This means that counterterrorism legislation is more likely to be enacted if it includes a sunset. But because the temporal limitation will not lead to the subsequent correction of policymaking errors,<sup>242</sup> the overall impact of counterterrorism sunsets is to enable long-term congressional overreaction. Part III.B then explains why, despite their effects, legislators would still agree to vote for sunsets in counterterrorism legislation. In fact, there are compelling reasons—some sincere and some strategic—that legislators may nonetheless want to include sunsets in counterterrorism bills.

Finally, Part III.C argues that sunsets' costs might be addressed in one of two ways. Each requires both legislators and voters to recognize that sunsets alone will not, in fact, guarantee the legislative reassessment for which they are designed. Consequently, civil libertarian legislators, their constituents, and like-minded interest groups should demand that Congress either eschew the use of sunsets in this context altogether or seek means to augment dramatically sunsets' effectiveness.

#### A. *The Security Emphasis*

In the wake of terrorist attacks, government tends to blame the inadequacies of existing law for the failure to prevent the attacks, justifying action to address perceived gaps.<sup>243</sup> This process yields predictable effects: because it is compensating for perceived shortcomings in security policy, counterterrorism legislation will have a "security emphasis," meaning that it will seek to augment the government's capacity to provide security.<sup>244</sup> At the same time, the perceived value of civil liberties relative to security measures will decline.<sup>245</sup>

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242. See *supra* Part II.

243. See Howell, *supra* note 46, at 1148; Vermeule, *supra* note 239, at 1175, 1188 (noting lawmakers consistently agree in the wake of a terrorist attack that the status quo is unacceptable). See generally Omnibus Diplomatic Security & Anti-Terrorism Act of 1986, Pub. L. No. 99-399, 100 Stat. 853 (codified as amended in scattered sections of the U.S. Code) (response to hijacking of the *Achille Lauro*); Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 18 U.S.C.) (response to Oklahoma City bombing).

244. See, e.g., Posner & Vermeule, *supra* note 213, at 631 (stating that post-crisis changes in law will always augment security).

245. See RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY 9, 31–41 (2006); SUNSTEIN, *supra* note 140, at 206 (arguing that cognitive bias and social influences lead to legislation that "unduly sacrifices liberty in the

This security emphasis will be exacerbated by the fact that, unlike the benefits of increased security—which will be widely shared—many burdens imposed by counterterrorism legislation will fall disproportionately on disfavored, powerless, or voiceless groups.<sup>246</sup> The majority’s legislative preferences will not take the full costs into account—neither short costs nor potential long-term costs of the deterioration of the relationship between law enforcement and minority communities. Recall that people primed to think about their own death exhibit more nationalistic tendencies, disapproval of those who do not share their religious and political beliefs, and increased aggression toward those who do not share their cultural worldview.<sup>247</sup> Using a volunteer army, borrowing rather than taxing, and detention and surveillance practices focused on ethnic and religious minorities all ensure that most Americans sacrifice very little liberty due to the “war on terror.”<sup>248</sup> On the other hand, when the Transportation Safety Administration announced plans to require full-body scanners in airports—a counterterrorism measure that threatened the privacy of a broader swath of the population—opposition was more robust.<sup>249</sup> In short, the majority will support more costly security measures if it does not expect to pay all of those costs itself.

The conventional wisdom holds that, in times of national security crisis, this security emphasis causes the U.S. Government to *overreact* to threats and infringe unnecessarily—and perhaps unconstitutionally—on civil liberties.<sup>250</sup> On this view, the Sedition Act of 1798, President Lincoln’s suspension of habeas corpus, the internment of Japanese-Americans, and FBI infiltration of peaceful political dissidents during the Vietnam era all

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name of security”); Robert M. Chesney, *Civil Liberties and the Terrorism Prevention Paradigm: The Guilt by Association Critique*, 101 MICH. L. REV. 1408, 1413 & n.16 (2003) (describing “conventional wisdom” that “during times of crisis the balance between liberty and security shifts in favor of the latter”); Gross, *supra* note 139 (manuscript at 24–25) (contending that processes “seeking to balance the interests of liberty and security” will suffer from systemic flaws that “are going to be tilted in one direction—towards more security—rather than the other—more liberty”).

246. *See supra* note 238 and accompanying text.

247. *See supra* note 164 and accompanying text.

248. *See* Ronald Dworkin, *The Threat to Patriotism*, N.Y. REV. BOOKS (Feb. 28, 2002), <http://www.nybooks.com/articles/archives/2002/feb/28/the-threat-to-patriotism/>; *cf.* Issacharoff, *supra* note 203, at 198, 206 (noting that decisions to engage in asymmetric warfare against nonstate actors, particularly ones with a racial or ethnic component, are less susceptible to democratic political checks than decisions to engage in traditional interstate warfare).

249. *See* Nate Silver, *The Full-Body Backlash*, N.Y. TIMES FIVETHIRTYEIGHT (Nov. 15, 2010, 7:32 PM), <http://fivethirtyeight.blogs.nytimes.com/2010/11/15/the-full-body-backlash/>.

250. *E.g.*, MICHAEL IGNATIEFF, THE LESSER EVIL: POLITICAL ETHICS IN AN AGE OF TERROR 58–61 (2004); GEOFFREY R. STONE, PERILOUS TIMES 530–31 (2004); Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1029–30 (2004); Gersen, *supra* note 26, at 269–70 (predicting congressional overreaction to risks that are new, subject to uncertainty, or vulnerable to cognitive bias); Gross, *supra* note 139 (manuscript at 24–25); Ip, *supra* note 26 (manuscript at 9–14) (same). *But see* Mark Tushnet, *Defending Korematsu? Reflections on Civil Liberties in Wartime*, 2003 WIS. L. REV. 273 (2003) (critiquing and refining the overreaction thesis).

represent examples where, in response to a “unique challenge,” “the [country] went too far in sacrificing civil liberties.”<sup>251</sup> Many members of Congress subscribe to this theory as well;<sup>252</sup> indeed, it is one of their primary motivations for the use of sunsets.<sup>253</sup>

This position is not, however, universally shared. Professors Eric Posner and Adrian Vermeule dispute the “overreaction thesis.”<sup>254</sup> In an argument that has been hotly contested,<sup>255</sup> they argue that it is impossible to determine whether additional security measures enacted in the wake of a crisis are overreactions to the threat, or simply rational responses to shortcomings in the pre-crisis status quo.<sup>256</sup> Further, they claim that excessive concerns about liberty are equally likely to impact the content of post-crisis legislation as excessive concerns about security.<sup>257</sup>

This Article, however, need not come down on one side of this debate or the other. It is irrelevant whether a new statute represents a correction to overly libertarian constraints, or an overreaction to the threat. What is important here is the consensus with respect to the *existence* of the security emphasis—no one disputes that post-crisis counterterrorism legislation will always move, if at all, in the same direction: toward additional security. The question there is not whether the law will move in the direction of additional security, but instead, how far it will move in that direction.

#### B. *The Costs of Counterterrorism Sunset Provisions*

Though it is impossible to specify the exact impact that a sunset will have on the substance of any given piece of legislation, arguments in favor of sunsets have failed to recognize the costs that sunsets impose on counterterrorism legislation. According to legislative theorists, sunsets lower the cost of legislation. Including a sunset reduces the stakes of passing that measure, because the law is perceived—either accurately or

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251. *E.g.*, STONE, *supra* note 250, at 12–14 & n.\* (asserting that these “central lessons” about historical curtailment of Americans’ First Amendment rights “apply across the board” to civil liberties).

252. *See supra* notes 33–35 and accompanying text.

253. *See supra* Part I.B.1.

254. POSNER & VERMEULE, *supra* note 139, at 59–86.

255. *See, e.g.*, Cole, *supra* note 207, at 1346–47 (stating that history indicates that the citizenry is much more likely to mobilize in favor of increased security than in favor of increased civil liberties); Gross, *supra* note 139 (manuscript at 7–16) (disputing Posner & Vermeule’s claim that excessive concern over civil liberties is just as likely as excessive concern over security); Marks, *supra* note 149, at 583 (noting that Posner & Vermeule’s “argument does not take adequate account of the magnitude and direction of individual cognitive and emotive responses” to terrorism).

256. POSNER & VERMEULE, *supra* note 139, at 51–66 (arguing that it is impossible to predict whether fear will prompt good or bad policymaking).

257. *Id.* at 59–86 (arguing that “libertarian panics” resulting in inadequate security measures are just as likely as “security panics” that result in excessive security measures); Posner & Vermeule, *supra* note 213, at 627 (contending that individual behavior during emergencies is just as likely to overvalue civil liberties as it is to undervalue civil liberties); Adrian Vermeule, *Libertarian Panics*, 36 RUTGERS L.J. 871, 872–79 (2005) (also arguing that libertarian panics are just as likely as security panics).

inaccurately—as temporary.<sup>258</sup> Just as mechanisms that relieve Congress of the need to reach a clearly defined bargain, such as broad delegations of power or vague language, sunsets relieve legislators of the need to agree on specific long-term policy.<sup>259</sup> Compromises are therefore easier to reach for legislation with a sunset than for long-term legislation.

Lowering the barriers to post-crisis counterterrorism legislation in this way could have several possible effects. One possibility is that legislators with concerns over the scope of security powers, assured that any problematic powers will be revisited and curtailed, might agree to vote in favor of a more expansive set of security measures than they otherwise would have approved.<sup>260</sup> The resulting legislation would therefore include more or stronger security measures than legislation without a sunset would have contained. A second possibility is that, by making it easier to legislate, sunsets allow Congress to enact a bill when, if required to agree on long-term legislation, it would not have legislated at all. In either of these circumstances, sunsets increase the magnitude of the security emphasis in counterterrorism legislation, increase the likelihood that new security measures will be enacted, and thus increase the risk that a counterterrorism statute will represent an overreaction to the terrorist threat.

The negotiations over the PATRIOT Act strongly suggest that including sunsets magnified that legislation's security emphasis. Recall that the House Judiciary Committee's original bill failed to include several powers the executive requested, and that the White House was able to convince House leadership to bring to the floor a bill more akin to its preferences only after conceding that the bill would include a sunset.<sup>261</sup> Phrased differently, the House agreed to vote on a bill substantively more to the Administration's liking on the condition that it would be temporary legislation.

Bargains over the PATRIOT Act sunsets also took place on a more granular level. An example is the provision allowing Justice Department officials to share grand jury information with intelligence agencies. The House Judiciary Committee's bill required *ex ante* judicial review of

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258. See POSNER & VERMEULE, *supra* note 139, at 84 (“[K]nowledge that a given law contains a sunset proviso lowers the stakes of enacting it . . .”); William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523, 529–32 (1992) (arguing that hold-outs are more likely to compromise on their preferences for temporary legislation than for long-term legislation).

259. Each of these tactics makes it easier to reach legislative agreement. See, e.g., John F. Manning, *What Divides Textualists From Purposivists?*, 106 COLUM. L. REV. 70, 91–111 (2006) (describing textualists' objections to reliance on legislative history to determine the terms of a legislative bargain, in part because it undermines the power conferred on political minorities by the Constitution's intentionally onerous bicameralism and presentment requirements).

260. See Finn, *supra* note 26, at 502 (arguing that, at worst, sunsets make the adoption of counterterrorism legislation more likely); Gersen, *supra* note 26, at 261; Kysar, *supra* note 23, at 1020 (noting an instance where including sunsets permitted Congress to enact “deeper tax cuts than would have been possible” in long-term legislation). *But see* Ip, *supra* note 26 (manuscript at 25) (disagreeing).

261. See *supra* note 65 and accompanying text.

disseminations of information gleaned from a grand jury within the executive branch.<sup>262</sup> By contrast, the Senate's USA Act required no judicial involvement at all.<sup>263</sup> The final bill included *ex post* judicial review of information sharing, on the condition that the power would not sunset.<sup>264</sup> So the House was able to bargain away the sunset on that particular provision for more judicial involvement.

If this is sunsets' effect, they not only fail to mitigate concerns of excessive grants of power to the executive, but they actually exacerbate them. Why then, would legislators agree to approve additional security measures in exchange for sunsets? There are at least two possibilities. Legislators that insist on including sunsets for the sake of civil liberties may be sincere, or they may be strategic.<sup>265</sup> Sincere legislators are simply mistaken (or overly optimistic) with respect to what sunsets actually will accomplish. They may be unaware of the ways in which the counterterrorism policymaking environment works against sunsets' effectiveness. Or they may mistakenly believe that exploiting the leverage over the executive that a sunset provides will result in effective oversight despite the pressures to extend sunsetting counterterrorism legislation. Or they may not realize sunsets' potential impact on the substance of the underlying legislation and therefore view them as, in essence, "better than nothing." Or they may believe that the minimal benefits that sunsets can provide exceed their costs.

The possibility of strategic legislators, on the other hand, exposes a third possible effect of using sunsets and therefore lowering the cost of enacting counterterrorism legislation. It is possible that legislators who argue for including sunsets in a bill would have voted for it even if the sunsets were *not* included. In other words, the sunsets may have no impact on the content of the legislation at all. But including a sunset enables legislators to describe a controversial bill as temporary. This description promotes the perception that the policy choices under consideration will be scrutinized and revised in calmer times. As a result, Congress need not accept full responsibility for the policies it enacts.

Strategic legislators have good reason to pursue this path. The electoral risks of refusing executive requests for counterterrorism powers are significant. If an attack occurs, no legislator wants to be perceived as the one who denied the executive a power it claimed to need. At the same time, if the legislation passes and an attack follows, Congress can defer blame to the executive, whose policies it merely approved.

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262. See Howell, *supra* note 46, at 1182–83.

263. United and Strengthening America Act, S. 1510, 107th Cong. § 203 (2001).

264. PATRIOT Act § 203, Pub. L. 107-56, 115 Stat. 272 (2001) (codified in scattered sections of 18 U.S.C.). See generally 147 CONG. REC. 20,671 (2001) (statement of Sen. Leahy).

265. Executive branch officials also might resist sunsets for either sincere or strategic reasons (or both). They likely are sincere in their desire to provide some certainty to executive-branch agencies. For the purposes of legislative negotiation, it also behooves the President to resist sunsets when legislators want them.

Meanwhile, legislators can derive scant electoral rewards from associating themselves with particular counterterrorism policy, especially in contrast to legislation containing earmarks that provide congressional pork to their districts. Since counterterrorism legislation provides small upside value and enormous downside risk, legislators are best served, electorally, by ensuring that any catastrophe cannot be laid at their feet through voting in (what is perceived as) a “pro-security” direction.<sup>266</sup> This tendency is compounded by the fact that a large number of counterterrorism measures disproportionately impact segments of society—minorities or noncitizens—whose electoral clout is insufficient to press for more moderate policy.<sup>267</sup>

At the same time, there are limits to the infringement on civil liberties that Americans will support in the name of security, though exactly where those limits lie is difficult to discern.<sup>268</sup> Knowing that constituents value both security and civil liberties, a legislator can use sunsets as a means to “position-take” with respect to civil liberties, publicly championing civil-liberties-protecting positions without having to commit to any particular substantive policy.<sup>269</sup> Confident in the notion that the sunset allows her to

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266. See JACK GOLDSMITH, *POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11*, at 91–92 (2012) (asserting that members of Congress “tend not to like responsibility for national security decisions”); IGNATIEFF, *supra* note 250, at 58 (noting that the “political costs of underreaction are always going to be higher than the costs of overreaction”); ZEGART, *supra* note 195, at 35–36 (“What member would be willing to risk the charge that his oversight efforts ended up weakening U.S. defense capabilities or jeopardizing American national security interests?”). See generally DONOHUE, *supra* note 27, at 12 (noting that in both the United States and Britain, legislators lacking full information about the nature and scope of the threat, will “err on the side of caution”); R. Kent Weaver, *The Politics of Blame Avoidance*, 6 J. PUB. POL’Y 371, 372 (1986) (positing that legislators are most interested in minimizing blame for bad policy outcomes).

267. See *supra* notes 246–48 and accompanying text.

268. See Heidi Kitrosser, *National Security and the Article II Shell Game*, 26 CONST. COMMENT. 483, 495–96 (2010) (noting that survey respondents’ replies “produce mixed results depending on what is emphasized within the question” (internal quotation marks omitted)). Prior to the first PATRIOT Act reauthorization, Americans were unfamiliar with the content of the statute and a plurality believed that the Act was “about right” in its restrictions of civil liberties to fight terrorism. Lydia Saad, *Americans Generally Comfortable with Patriot Act*, GALLUP (Mar. 2, 2004), <http://www.gallup.com/poll/10858/americans-generally-comfortable-patriot-act.aspx> (finding that 43 percent thought it was “about right,” 26 percent believed it went “too far,” and 21 percent thought it did not go “far enough”). In the wake of the initial PATRIOT Act reauthorization debates, familiarity with the statute had increased significantly, and 81 percent of individuals polled supported making at least minor changes to the statute. *Civil Liberties*, GALLUP (Jan. 6–8, 2006), <http://www.gallup.com/poll/5263/Civil-Liberties.aspx> (finding that 50 percent favored minor changes, 24 percent favored major changes, and 7 percent wanted to eliminate the statute completely). Nearly three-fourths of the population opposed sneak-and-peek searches of Americans’ homes; a majority also opposed requiring certain businesses—hospitals, libraries, bookstores—to provide records to terrorism investigators. Saad, *supra* (finding that 71 percent of Americans opposed sneak-and-peek searches, and 51 percent opposed business records orders providing access to some sensitive records).

269. See DAVID R. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* 13, 39, 49–77 (2d ed. 2004) (arguing that legislators are primarily reelection seekers and use three activities to that end—“advertising,” “credit-claiming,” and “position-taking”—rather than pursuing particular policy outcomes). See generally *id.* at 114 n.68 (positing that the electoral process does not guarantee that legislators will be faithful agents of their constituents, “but only that

both defer to presidential security policy and assure her constituents that the bill preserves the opportunity for subsequent debate and revision, a legislator can reap the electoral benefits of both helping to protect the nation from terrorists and assuring protection of civil liberties. The same “yes” vote can be depicted as both pro–civil liberties and pro–security. Indeed, on this view, the more (and perhaps the shorter) sunset provisions in counterterrorism legislation the better, as each renewal vote can be exploited for these benefits.

This may seem a cynical depiction of Congress’s stated concern for civil liberties. But many congressional efforts at overseeing national security policy in the past half century display the same characteristics. Congress has enacted an assortment of statutes over the past forty years purportedly imposing restraints on executive national-security power, including the use of military force, covert actions, foreign-intelligence collection, and detainee treatment.<sup>270</sup>

But like sunsets, these measures have tended to impose procedural requirements rather than substantive limits, and as a rule they lack teeth.<sup>271</sup> Recent military activities in Libya illustrate the point. The War Powers Resolution (WPR) limits the president’s authority to deploy U.S. military into “hostilities” beyond 60 days without congressional approval. But the Obama Administration argued that, because “U.S. operations do not

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politicians will make it *appear*” as if they are); Posner & Vermeule, *supra* note 235, at 1643 (“Discussion on the legislative floor, if it even occurs, is carefully orchestrated posturing for public consumption, while the real work goes on behind closed doors . . .”).

270. Intelligence Oversight Act of 1980 Title V, Pub. L. No. 96-450, 94 Stat. 1975 (codified as amended at 50 U.S.C. § 413 (2006)) (requiring intelligence agencies to inform Congress about covert activities); Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended at 50 U.S.C. §§ 1801–85c (2006)); Hughes-Ryan Amendment § 32, Pub. L. No. 93-559, 88 Stat. 1804 (1974) (codified in scattered sections of 22 U.S.C.) (requiring a presidential finding of a national security necessity for covert operations); War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 55 (1973) (codified at 50 U.S.C. § 1541–1548 (2006)) (requiring congressional notification when troops are introduced into hostilities and limiting unilateral executive deployment to sixty days); *see also, e.g.*, Detainee Treatment Act of 2005 (DTA) § 1403, 42 U.S.C. § 2000dd (2006) (limiting the Defense Department’s interrogation methods); International Emergency Economic Powers Act, Pub. L. No. 95-223, 91 Stat. 162 (1977) (codified at 50 U.S.C. § 1701–1707 (2006)) (providing for congressional oversight of emergency economic powers); Foreign Military Sales Act, Pub. L. No. 90-629, 82 Stat. 1320 (1968) (codified as amended in scattered sections of 22 U.S.C.) (requiring congressional approval of certain arms sales).

271. *See, e.g.*, L. BRITT SNYDER, CTR. FOR THE STUDY OF INTELLIGENCE, SHARING SECRETS WITH LAWMAKERS: CONGRESS AS A USER OF INTELLIGENCE (1997), available at <https://www.cia.gov/library/center-for-the-study-of-intelligence/kent-csi/vol41no5/pdf/v41i5a02p.pdf> (detailing the evolution of congressional relations with the intelligence community from 1947 to 1994); ZEGART, *supra* note 193, at 20–32 (recounting the history of sporadic oversight efforts); Johnson, *supra* note 236, at 829–35 (noting that, since 1975, intelligence oversight “has been largely a story of discontinuous motivation and ad hoc responses to scandals”); Koh, *supra* note 192, at 1297–1301 (describing the shortcomings of congressional efforts to constrain executive action and increase congressional participation in foreign affairs policymaking); Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1385, 1412–18 (1989) (pointing out that both the executive and Congress have disregarded reporting and oversight requirements in multiple statutes).

involve” ground troops, “sustained fighting[,] or active exchanges of fire with hostile forces,” they do not qualify as “hostilities” and thus fall outside the WPR’s ambit.<sup>272</sup> If oversight of such visible and consequential national security activity as the use of U.S. military force abroad does not inspire stringent congressional engagement, it is not likely that secret counterterrorism measures will do so. In short, if the sunsets in post-9/11 counterterrorism statutes are more symbolic than substantial as a national security oversight tool, they are by no means unique.<sup>273</sup>

There is some evidence that one can marshal to support a theory that members of Congress are driven, at least in part, by these strategic concerns. Consider in this light Congress’s penchant for demanding information unlikely to contribute to meaningful reconsideration of counterterrorism policy, such as the number of times a particular tool has been used. If it truly wanted to take advantage of the opportunity sunsets provide to rethink hastily drafted legislation, surely Congress could demand information assessing the effectiveness and efficiency of counterterrorism measures, rather than simply whether and how often they were being used.

Compare, for example, the annual report about use of the federal domestic wiretapping law with the one about use of the FISA Amendments Act. The former breaks down the numbers in a multitude of ways, identifying the purposes for which surveillance was used; whether it resulted in any arrests, trials, or convictions; the frequency and nature of nonincriminating communications; and the cost of the surveillance in manpower and resources.<sup>274</sup> These numbers permit inferences regarding the scope, nature, and effectiveness of the surveillance employed. By contrast, the Attorney General’s FISA Amendments Act reports provide no comparable information.<sup>275</sup> As students of intelligence oversight have noted time and again, Congress knows what it wants to know.<sup>276</sup>

Additionally, both in the PATRIOT Act’s original enactment and in its reauthorization, Congress failed to impose sunsets on many of the PATRIOT Act’s most intrusive powers, as well as those that had arguably been abused.<sup>277</sup> This failure is consistent with the argument that legislators were more concerned with being able to point to the sunsets’ existence,

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272. Charlie Savage & Mark Landler, *White House Defends Continuing U.S. Role in Libya*, N.Y. TIMES, June 16, 2011, at A16.

273. This is not to say that Congress *could* not impose real restraints. See Koh, *supra* note 192, at 1326–35 (giving examples of real restraints); see also David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 733 (2008) (demonstrating a history of congressional authority over the exercise of war powers); Louis Fisher, *A Constitutional Structure for Foreign Affairs*, 19 GA. ST. U. L. REV. 1059, 1076–82 (2003).

274. 18 U.S.C. § 2519 (2006).

275. FISA Amendments Act of 2008 § 702(l), 50 U.S.C. § 1881a (2006) (requiring reports regarding, for example, the number of applications during the reporting period).

276. See Johnson, *supra* note 236, at 833; Kitrosser, *supra* note 267, at 484 (quoting several former intelligence officials to this effect).

277. See STEPHEN J. SCHULHOFER, RETHINKING THE PATRIOT ACT: KEEPING AMERICA SAFE & FREE 79 (2005); Bendix & Quirk, *supra* note 63, at 44–54.

rather than actually relying on their effectiveness. At least one organization—one with strategic goals of its own, to be sure—described the 2005 PATRIOT reauthorization statutes as “designed to facilitate a talking point that civil liberties will be protected, when in fact, they are sacrificed.”<sup>278</sup> Civil libertarian legislators echoed this assessment.<sup>279</sup>

Moreover, legislators publicly point to their insistence on sunsets as a way to tout their civil libertarian bona fides—explicitly pointing to the civil liberties protection of a sunset in the statute and “position-taking” regarding the need for such measures.<sup>280</sup> Senate Judiciary Committee Chairman Patrick Leahy’s website, for example, declares that the Senator “has strongly supported the inclusion of sunsets on authorities authorized by the USA PATRIOT Act to provide more accountability and oversight.”<sup>281</sup> And in 2005 Senator Ron Wyden announced his intention to oppose renewal of the PATRIOT Act “because it does not include sunsets for controversial powers.”<sup>282</sup> If sunsets’ value is merely symbolic, then their value benefits legislators’ electoral prospects, but not their individual constituents or the nation as a whole.

### C. Beyond Counterterrorism Sunset Provisions?

If sunsets were costless, there would be no objection to including them despite their limited usefulness. But rather than being costless, they render legislation already prone to excessive emphasis on security likely to move even further in that direction. In addition, they obfuscate the true contents of the legislative bargain that a counterterrorism statute represents. While promising temporary action followed by careful oversight, they in fact simply deliver long-term law. This deception, whether intentional or inadvertent, undermines the already attenuated democratic pedigree of secret executive counterterrorism programs. The nominal benefits that sunsets do generate cannot outweigh these substantial costs.<sup>283</sup>

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278. ACLU Letter, *supra* note 240.

279. *See, e.g.*, 151 CONG. REC. 16,991 (2005) (statement of Rep. Paul) (arguing that the PATRIOT Act reauthorization bills failed to cure the Act’s defects and lamenting that much of the reauthorization discussion was focused on the length of the sunsets).

280. If the constituencies of legislators most adamant about including sunsets exhibit heterogeneity with respect to national security policy preferences, that would provide additional support for this theory.

281. *National Security*, PATRICK LEAHY, [http://www.leahy.senate.gov/issues\\_and\\_legislation/issues/issue/?id=c1620637-cf46-4298-a667-5eb724c7ef46&p=ae62594e-4cdd-4988-a093-6095e848506a](http://www.leahy.senate.gov/issues_and_legislation/issues/issue/?id=c1620637-cf46-4298-a667-5eb724c7ef46&p=ae62594e-4cdd-4988-a093-6095e848506a) (last visited Feb. 15, 2013).

282. Press Release, Sen. Ron Wyden, Wyden to Oppose PATRIOT Act Renewal (Dec. 5, 2005), available at <http://wyden.senate.gov/newsroom/press/release/?id=2AEAC483-F0AD-41C7-B9AF-B771CD5ECE34>.

283. Nominal benefits of sunsets include the fact that they provide a focus around which political pressure for change can be mobilized, likely deter executive branch wrongdoing by officials who know they will have to seek congressional renewal of their powers, and reverse the legislative default rules so that renewal of the legislation—rather than its repeal—must overcome congressional vetogates and the filibuster.

If sunsets are not merely ineffective but counterproductive, the question then becomes what to do. An indictment of sunsets does nothing to alleviate concerns about conferring excessive security power on the executive in the wake of a terrorist attack. The best option is for civil-libertarian legislators, voters, and interest groups to insist that Congress eschew the use of sunsets in counterterrorism legislation altogether. First and foremost, legislators could then use their bargaining power to press for substantive civil-liberties-enhancing changes to the legislation, rather than for a sunset. Abandoning sunsets may thus result in counterterrorism legislation less likely to overemphasize security.

Second, eliminating sunsets will make the content of counterterrorism legislation more transparent, allowing an honest appraisal of the true terms of the bargain that the legislation represents. Existing counterterrorism legislation ascribes to sunsets a benefit—future reassessment of the statute—that they do not confer. A candid assessment of the law must include acknowledgment that the powers it enacts will be in place for the long term. It is impossible for either legislators or their constituents to evaluate the true merits of legislation in the absence of this clarity. Debate can then take place over the actual content of the bill.

Some may argue that requiring a long-term bargain at the outset will lead to more draconian legislation. After all, this argument goes, if a sunset lowers the barriers to compromise, it does so for all legislators, not just the ones who are wary of certain provisions in the bill. And if the President and hawkish legislators see the initial enactment as their only opportunity to increase government counterterrorism powers, what is to stop them from exploiting the crisis atmosphere to confer on the executive at least as much power as is contained in the version of the statute with sunset provisions—but this time explicitly for the long-term?

To be sure, it is impossible to predict with certainty what bargains might be struck. But this argument overlooks the legislative dynamics at work. If legislators concerned about particular executive powers insist on imposing sunsets, it means that the sunsets are providing some value for those legislators. Those who favor sunsets and those who do not tend to oppose one another regarding the substantive content of the bill as well. It is unlikely that a bargain between these two interests would be more favorable to one side on *both* counts—both sunset and substance. If the PATRIOT Act negotiations are any indication, removing sunsets will *reduce*, not increase, the security emphasis.

Nor does forcing Congress to make a long-term bargain eliminate the possibility of future adjustments to the legislation. Congress can (of course) change any law at any time.<sup>284</sup> There are many forces that generate

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284. By reversing the default rules so that legislation will expire with congressional inaction, sunsets also reverse the dynamics of both the filibuster and the presidential veto. When a bill approaches a sunset date, to allow the bill to expire, opponents in the Senate need only muster forty votes. To repeal long-term legislation, on the other hand, opponents of the measure in question will need not only sixty-one votes to overcome the filibuster in

congressional interest in reforming counterterrorism policies. Investigative journalism, investigations by inspectors general, and litigation challenging executive policies all have resulted in refinements to counterterrorism law. Notably, recall that neither NSLs nor sneak-and-peek searches were subject to sunsets, yet they both came under serious congressional scrutiny. And if these provisions garnered attention only because the PATRIOT Act sunset placed counterterrorism as a whole on the legislative agenda, consider that Congress must repeatedly pass both authorization and appropriations bills for intelligence community activities. If some legislative leverage is useful in seeking information, or creating an *ex ante* deterrent to executive misdeeds, Congress can use those bills for that purpose. In short, external forces create political will to act. Whether that political will, once generated, will result in changes does not depend upon whether the provision at issue is subject to a sunset. Thus civil libertarians do not lose anything by eliminating sunset provisions.

An additional benefit of eliminating sunsets is it will help demarcate the line between two conceptually distinct but often conflated elements of the debate over the civil liberties impact of executive counterterrorism power. The first element is whether the substantive authority contained in the legislation confers too much power on the executive. The second, and much more vexing, element of this debate is the question of how to secure proper oversight of policy implementation. In its use of sunsets, Congress has blurred the line between these two issues, pointing to sunsets as a remedy for questionable policy substance. Divorcing these two considerations will renew focus on determining what powers should be conferred upon the executive to facilitate its efforts to keep Americans safe *and* how to supervise their use.

An alternative response to sunsets' effects would be to not eliminate their use altogether, but instead to augment their effectiveness by using them in combination with additional means of enhancing their utility. Professor John Ip advocates, for example, pairing sunsets with reporting requirements and other accountability measures.<sup>285</sup> And Professor Bruce Ackerman has suggested that renewal of statutory security powers should require the approval of ever-increasing supermajorities.<sup>286</sup> Arguably, each of these suggestions has the benefit of raising the cost of renewing expiring legislation. Maintaining status quo would no longer be the path of least resistance, but instead reflect an affirmative legislative decision.

These “sunsets plus” suggestions recognize sunsets' shortcomings as standalone measures. And they certainly would be an improvement over

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the Senate, but a sufficient supermajority in both houses to override a presidential veto. But these considerations have little practical impact. To date, the filibuster has come into play just once, and was overcome by cosmetic concessions. *See supra* notes 110–15 and accompanying text.

285. *See supra* note 28 and accompanying text.

286. *See* ACKERMAN, *supra* note 26, at 80–83 (advocating a “supermajoritarian escalator” that would require emergency powers to be approved by a larger and larger supermajority at each renewal).

the use of sunsets alone. But they, too, are susceptible to the forces that undermine sunsets' effectiveness. If current congressional efforts to obtain information are insufficient, adding additional reporting requirements to counterterrorism statutes is unlikely to have a discernible impact. The information will still be classified and only narrowly disseminated. The executive will retain the same ability to delay, to disclose selectively, and to present information in ways that support its policy preferences. And Congress will still be subject to the incentives that have plagued congressional oversight of national security since the enterprise began. Without strong congressional will to extract this information—will that has been largely absent to date—supplemental accountability mechanisms cannot save sunsets.

And while escalating supermajority requirements may lead to more frequent termination of emergency powers, the point of a sunset is not to discontinue powers. The point is to improve the statute over time, to enable Congress to incorporate lessons learned through experience with the policy, and to eliminate inefficacious or excessively costly measures. Requiring a supermajority provides no guarantee that Congress will scrutinize counterterrorism policy in this way. Moreover, serious questions remain as to whether Congress could impose supermajority requirements on future legislatures without a constitutional amendment.<sup>287</sup>

A final weakness of proposed efforts to boost sunsets' effectiveness is that Congress is always free to dispense with them down the road but leave in place the executive powers they were meant to check. There is nothing stopping Congress from similarly repealing—or sunseting—any supermajority or reporting requirement it attaches to a counterterrorism sunset. Consequently, any effort to “fix” sunsets' appears unlikely to remedy their shortcomings.

#### CONCLUSION

Congress has consistently turned to sunsets to alleviate concerns about legislative overreaction to the threat of terrorism. But sunsets do not help combat overreaction. Instead, forces at work in the counterterrorism policymaking environment undermine sunsets' aim of ensuring that counterterrorism measures will be subject to meaningful scrutiny in a noncrisis atmosphere. But the impact of sunsets does not end there. They also facilitate the passage of legislation with a magnified emphasis on security by lowering the costs of legislating. Sunsets thus impose costs—making it easier to enact legislation that overreacts to the threat of terrorism—without providing sufficient benefits.

Sunsets' failure to fulfill their promise presents a daunting challenge for which this Article has no satisfying answer. The risk of overreaction that

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287. See generally Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665 (2002) (describing and disagreeing with arguments that entrenchment is constitutionally impermissible).

sunsets are designed to mitigate remains real. Yet sunsets as currently employed are not the means through which to address this risk. Indeed, no democratic electorate should accept without further examination congressional assurances of civil liberties' protections on the basis of sunsets. Sunsets must either be coupled with robust mechanisms that increase the costs of counterterrorism legislation or, even better, abandoned altogether.