

## Chairman F. James Sensenbrenner, Jr., 2001–2007

**D**uring the chairmanship of F. James Sensenbrenner Jr., R-WI (2001–2007), the Judiciary Committee was at the forefront of congressional efforts responding to the terrorist attacks of September 11, 2001 and preventing future attacks. The Judiciary Committee achieved numerous legislative and oversight accomplishments in this area, including the USA PATRIOT Act, the Enhanced Border Security and Visa Entry Reform Act of 2002, and the REAL ID Act. The Committee also compiled an impressive, broader record with legislation updating immigration policy, combating crime, reforming laws that affect business and commerce, and modernizing the legal environment for electronic communications.

### **Counterterrorism**

Within one month of the September 11th attacks, the Judiciary Committee unanimously reported a 150-page bill, titled *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism*, which became the “USA PATRIOT Act.”<sup>1</sup> In remarks to the House on the version of the legislation reconciled by the House and Senate, Chairman Sensenbrenner succinctly highlighted the importance of this legislation:

Mr. Speaker, today we have the duty and privilege to pass this historic legislation, the USA PATRIOT Act of 2001, which was born of adversity and violent attack. This landmark legislation will provide law enforcement and intelligence agencies additional tools that are needed to address the threat of terrorism and to find and prosecute terrorist criminals.

This legislation authorizes the sharing of information between criminal investigators and those engaged in foreign intelligence-gathering. It provides for enhanced wiretap and surveillance authority. It brings the basic building blocks of a criminal investigation, pen registers and trap and trace provisions, into the 21st century to deal with e-mails and Internet communications.<sup>2</sup>

The USA PATRIOT Act was arguably the most important legislation passed that aimed at preventing another 9/11-type attack. This legislation embodied a wholesale change in policy focus after 9/11 from one of prosecution after an attack occurs to one of aggressive prevention of an attack. The tearing down of “the wall,” which had prevented law enforcement and the intelligence community from sharing information, and other USA PATRIOT authorities are credited with disrupting numerous terrorist plots and cells.

As enacted, the USA PATRIOT Act contained 14 provisions that were to sunset on December 31, 2005, to provide Congress with an opportunity to oversee the implementation

of these new law enforcement authorities. As part of its oversight responsibilities, the Judiciary Committee conducted extensive oversight hearings and in 2005 reported a bill extending the law's investigatory and prosecutorial tools to fight terrorism. Congress ultimately passed the USA PATRIOT Improvement and Reauthorization Act of 2005,<sup>3</sup> which made nearly all of these sunset provisions permanent (the others were not repealed, but rather again subject to a sunset).

The USA PATRIOT Act marked the beginning of congressional efforts to break down the barriers to facilitate information sharing between federal law enforcement officials and the intelligence community. The Homeland Security Information Sharing Act,<sup>4</sup> passed by the House on June 26, 2002, continued that effort by requiring the President to create procedures to strip out classified information so that state and local officials may receive the information without clearances. This bill also removed the barriers for state and local officials to share law enforcement and intelligence information with federal officials. The provisions of this bill were incorporated into the Homeland Security Act of 2002.

The Judiciary Committee also acted swiftly after the September 11th attacks to draft legislation to assert control over U.S. borders through reforms directed at visa issuance, inspection, and tracking. The Enhanced Border Security and Visa Entry Reform Act of 2002<sup>5</sup> required the Secretary of State to issue machine-readable, tamper-resistant visas containing biometric identifiers, and directed law enforcement and intelligence agencies to share information with the State Department and the Immigration and Naturalization Service (INS) relevant to aliens' admission and deportation. This legislation also mandated better security standards for new passports issued by Visa Waiver Program countries.

U.S. border security enhancements were also a principal component of the Judiciary Committee's contributions to the Intelligence Reform and Terrorism Prevention Act of 2004, originally titled the "9/11 Recommendations Implementation Act"<sup>7</sup> when it first passed the House. The Committee submitted legislative language on a range of important policy matters included in the measure. In particular, the Committee drafted provisions on border and immigration enforcement, visa requirements, immigration reform, other border protection and immigration matters, and provisions making changes to the federal criminal code related to terrorism prevention. Notably, this legislation authorized over five years the doubling of Border Patrol agents, tripling the number of Immigration and Customs Enforcement investigators, and tripling the number of beds used to house detained criminal and illegal immigrants.

In 2005, the Judiciary Committee led consideration and passage of additional legislation, based upon recommendations in the report of the National Commission on Terrorist Attacks Upon the United States commonly known as the "9/11 Commission." For example, the REAL ID Act<sup>8</sup> contained provisions to disrupt terrorist travel, amend asylum provisions of the Immigration and Naturalization Act, and prohibit Federal agencies from accepting state-issued identification, such as drivers' licenses, unless the documents meet minimum security requirements. Noting that "for terrorists, travel documents are as important as weapons,"

the 9/11 Commission had recommended the Federal Government set national standards for the issuance of identity documents such as drivers' licenses and birth certificates.

The Judiciary Committee played a key role in developing legislation creating the Department of Homeland Security (DHS). The Committee's principal contributions to this legislation were a comprehensive overhaul of the Immigration and Naturalization Service, designed to end its mission overload by transferring the agency's functions to the new department and bifurcating the enforcement and adjudicatory functions into separate organizations; the Safe Explosives Act, which amended the federal criminal code related to possession and use of explosive materials; changes two federal laws to allow and encourage the sharing of homeland security information among federal, state, and local entities; enhancement of cyber security provisions of the federal criminal code; and the Support Anti-terrorism by Fostering Effective Technologies Act of 2002, the "SAFETY Act,"<sup>9</sup> which authorized the Secretary of Homeland Security to designate certain anti-terrorism technologies for certain liability protections in a federal cause of action arising from a terrorist act. In addition, the Committee spearheaded the creation of the first statutorily-mandated privacy officer for a federal agency, in this instance, the Department of Homeland Security, as part of this legislation.

The Judiciary Committee considered, and Congress passed, the Continuity in Representation Act<sup>10</sup> to require states to hold special elections for the House within 49 days of an announcement by the Speaker that House vacancies exceed 100 Members. Credible reports on 9/11 that the fourth hijacked airline, which crashed in Pennsylvania after passengers heroically stormed the cockpit, was headed for the U.S. Capitol while Congress was in session, prompted congressional action on this legislation. The law was intended to allow the House to quickly reconstitute its full membership by direct election in the event of extraordinary circumstances, such as a terrorist attack on Congress that results in the death of many Members. This legislation, introduced by Chairman Sensenbrenner, was overwhelmingly supported by House Members because it allowed for a quick reconstitution of the House while maintaining the House's two-hundred-plus year identity as "the People's House" comprised only of Members elected by the people.

In September of 2006, towards the end of the 109th Congress, the Judiciary Committee reported two key pieces of legislation to aid government officials in the War on Terror: the Military Commissions Act and the Electronic Surveillance Modernization Act. The Military Commissions Act<sup>11</sup> authorizes military tribunals for violations of the law of war by alien enemy combatants. These tribunals responded to the need for establishing in law procedures to provide full and fair trials for foreign individuals suspected of terrorism, while not harming national security by publicly sharing sensitive intelligence information as would occur in a criminal trial. This act was reported favorably by the Committee (and the House Armed Services Committee) and was the result of complex negotiations among the House, Senate and the White House. It became law on October 17, 2006.

The Electronic Surveillance Modernization Act<sup>12</sup> was another landmark anti-terrorism bill reported by the Committee. This legislation responded to a consensus that the

“Foreign Intelligence Surveillance Act of 1978” (FISA) governing surveillance of suspected foreign enemies was outdated and insufficient to handle the modern-day terrorist threat. Specifically, this bill reformed FISA by providing enhanced oversight of and accountability from the executive branch. This bill also clarified the scope and applicability of FISA warrants. As terrorists constantly change their tactics and methods of communication, the Committee’s responsibility, during this post 9/11 era, was to ensure that the President and those under his charge have the tools necessary to thwart another attack on U.S. soil. The Military Commissions Act and the Electronic Surveillance Modernization Act provide these tools and allow the government to intercept credible threats to our national security before they materialize, thus creating proactive initiatives to strengthen America’s national security.

### **Immigration**

In addition to the changes to immigration laws already mentioned, the Judiciary Committee considered several immigration legislative initiatives including:

- Child Status Protection Act, which allowed a child to remain eligible for immediate relative status so long as an immigrant visa petition was filed for the child before turning 21;<sup>13</sup>
- Family Sponsor Immigration Act, which authorized the substitution of another eligible family sponsor in the event of the death of the original sponsor-petitioner;<sup>14</sup>
- permitting work authorization for non-immigrant spouses of intracompany transferees;<sup>15</sup>
- permitting work authorization for non-immigrant spouses of treaty traders or treaty investors;<sup>16</sup>
- extending the special immigrant religious worker program to 2008;<sup>17</sup>
- authorizing handwritten and electronic signatures on attestation forms;<sup>18</sup>
- enhancing naturalization and other immigration benefits for military personnel and families;<sup>19</sup>
- allowing employers nationwide to participate in the basic pilot program to verify the employment eligibility of new employees.<sup>20</sup>
- providing increased numbers of H-1B visas for foreign students who have graduated U.S. universities with graduate degrees in professional fields and instituting a dedicated fee applying to H-1B and L visa petitions to fund anti-fraud and enforcement efforts.<sup>21</sup>

### **Crime and Department of Justice Authorizations**

The Judiciary Committee considered a number of major anti-crime bills that were enacted into law during Mr. Sensenbrenner’s chairmanship. Among the most significant legislative accomplishments dealt with violent crimes against women and children, and ensuring effective use of DNA technology within the criminal justice system.

Enacted in 2003, the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today known as the “PROTECT Act”<sup>22</sup> was landmark child protection legislation that took a comprehensive approach to protecting children from sexual predators, including attacking illicit markets that encourage the exploitation and abduction of children, establishing penalties to reflect the seriousness of crimes against children, providing harsher penalties for repeat offenders, and enhancing law enforcement to prevent, investigate, and prosecute crimes against children. The law also supports the recovery of abducted children. Additionally, in response to an increasing trend of lenient sentences for sex offenders and child sex predators, the PROTECT Act restricted judicial discretion when imposing sentences on defendants convicted of those crimes. Finally, the PROTECT Act included new child pornography provisions in response to the Supreme Court’s decision striking down an earlier law addressing of child pornography.

The Judiciary Committee reported legislation that reauthorized the Violence Against Women Act<sup>23</sup> and expanded and improved grant programs under this law. Among its provisions, the new law addressed domestic violence, dating violence, sexual assault, stalking, young victims, immigrant victims of violence, international marriage brokers, and housing for victims of domestic violence.

The Judiciary Committee also reported major legislation to enhance the rights of victims of crimes and to improve DNA testing and analysis in conjunction with criminal investigations and prosecutions. The Justice for All Act expanded crime victims’ rights related to protection and notice, among other rights; addressed the backlog in testing DNA evidence from rape cases; expanded the criminal laboratory infrastructure to improve the processing of DNA evidence; expanded DNA databases to include convicted felons and other sex offenders; improved DNA and other forensic programs; amended the federal criminal code to establish procedures for post-conviction DNA testing; and authorized grants to States to improve the quality of legal representation in capital cases involving indigent accused.

The Judiciary Committee reported three bills that were enacted into law to protect the rights of the unborn. The Unborn Victims of Violence Act,<sup>25</sup> also called Laci and Conner’s Law, made it a separate offense to cause the death or injury of a child *in utero* in the commission of certain federal violent crimes. Until enactment, a violent boyfriend, for instance, could injure or kill a child *in utero* without facing the full weight of the law.

The Partial-Birth Abortion Ban Act of 2003<sup>26</sup> amended the federal criminal code to prohibit anyone from performing a partial-birth abortion, except when necessary to save the life of the mother. Partial-birth abortion is defined as a procedure in which an intact living fetus is partially delivered until some part of the fetus is outside of the body of the mother before the fetus is killed and the delivery completed. The Born-Alive Infants Protection Act of 2002<sup>27</sup> stated that references in law and regulation to “person,” “human being,” “child,” and “individual” include every infant born alive at any stage of development. This law was enacted to counter disturbing reports of infants born after unsuccessful abortion attempts being discarded after birth.

The Judiciary Committee also considered three measures, which became law, to clarify federal policy on three criminal justice matters. The Anabolic Steroid Control Act of 2004<sup>28</sup> dealt with regulation of anabolic steroids under the Controlled Substances Act,<sup>29</sup> and directed the U.S. Sentencing Commission to review Federal Sentencing Guidelines related to offenses involving such steroids. A second measure reauthorized the ban on undetectable firearms for an additional 10 years. A third measure, the Prison Rape Elimination Act of 2003,<sup>30</sup> directed certain studies of prison rape for the purpose of reducing its incidence.

Three measures dealing with newer forms of criminal activity were considered by the Judiciary Committee and became law. The Identity Theft Penalty Enhancement Act,<sup>31</sup> among its provisions, amended the federal criminal code to establish penalties for aggravated identify theft. The CAN-SPAM Act of 2003<sup>32</sup> amended the federal criminal code to define and penalize crimes involving the transmission of certain unsolicited commercial electronic mail. The Video Voyeurism Prevention Act of 2004<sup>33</sup> amended the federal criminal code to prohibit various forms of recording of an individual's private body areas when the individual has an expectation of privacy.

Authorization is an important oversight tool that allows Congress and Committees of jurisdiction to create, amend, extend, and set priorities for programs within executive agencies. Despite the law's requirement for regular congressional authorization of the Justice Department, the last DOJ authorization had been enacted in 1979. This failure to properly authorize the Justice Department ended in 2002 when the Judiciary Committee successfully led the authorization effort. In the 109th Congress, the Committee again developed legislation to give direction to the Department of Justice and the important programs it administers.

These two Department of Justice authorization bills contained many important reforms and increased oversight of the Department. Enacted in 2002, the 21st Century Department of Justice Appropriations Authorization Act<sup>34</sup> combined a number of changes to the Justice Department and other agencies and programs within the jurisdiction of the Judiciary Committee. Among its provisions, this law reauthorized the Patent and Trademark Office; changed patent reexamination procedures established a commission to study modernization of antitrust laws; clarified the jurisdiction of federal district courts in civil actions involving minimal diversity of state residency between adverse parties, the Multiparty, Multiforum Trial Jurisdiction Act of 2002; reformed various juvenile justice laws; established greater oversight over the Federal Bureau of Investigation; authorized the entry of additional foreign medical graduates to work in medically underserved areas; and reauthorized a program to allow foreign medical graduates who had completed their residencies on J visas to practice medicine without first leaving the U.S. by agreeing to practice in medically-underserved areas.

The Violence Against Women Act and the Department of Justice Reauthorization Act of 2005,<sup>35</sup> was a comprehensive package negotiated between the House and Senate to reauthorize vital programs within the Department of Justice to combat all crimes as well as programs within the Office of Violence Against Women, specifically targeting crimes of domestic violence, dating violence, sexual assault, and stalking.

This legislation also made important changes to laws governing the collection of DNA samples. Current law had allowed federal authorities to collect DNA samples from individuals upon indictment. This legislation expanded that authority to permit the Attorney General to collect DNA at arrest or detention of non-citizens. This legislation also authorized states to seek funding to reduce the backlog in crime scene evidence, to reduce the backlog in DNA samples of offenders convicted of qualifying state offenses, or to enhance the state's DNA laboratory capabilities.

In addition to the numerous oversight tools provided in the Act, there were a number of important reforms of grant programs and offices within the Department. This legislation also made some very important modifications to the criminal code such as extending the statute of limitations for human trafficking offenses and applying increased criminal penalties to prison guards who sexually abuse those in their custody.

Building upon the PROTECT Act enacted in 2003, the Judiciary Committee, under the leadership of Chairman Sensenbrenner, was instrumental in the enactment of the Adam Walsh Child Protection and Safety Act of 2006.<sup>36</sup> In 2006, the U.S. had over 569,000 registered sex offenders, more than 100,000 of them “missing,” their whereabouts unknown to the public and law enforcement. The 2006 legislation required national registration obligations by the states, regular updates, frequent in-person verification, and up to ten years in prison for those failing to register properly. Under this legislation, the U.S. Marshals also assisted states in finding “missing” sex offenders.

This legislation ensured additional resources are devoted to protecting children from violent criminals. Those exploiting children on the Internet were also targeted by this child protection legislation which was hailed by the Center for Missing and Exploited Children as the “most important child protection legislation in the last 25 years.” Tough penalties for those seeking to profit from the exploitation of children were also included.

### **Voting Rights Act Reauthorization**

The Voting Rights Act of 1965 (VRA) was one of the most significant pieces of legislation passed by Congress during the 20th century. Through its permanent and temporary provisions, the VRA helped to end nearly a century of discrimination against minorities in the electoral process in certain areas of the country. The VRA successfully worked to increase racial and language minority participation in the political process, resulting in increased minority registration and turnout rates and a larger number of minority officials elected to local, state, and federal offices. Prior to their reauthorization in 2006, the temporary provisions of the VRA had been reauthorized on four separate occasions, in 1970, 1975, 1982, and 1992, each time with broad bipartisan support. The Voting Rights Act Reauthorization and Amendments Act of 2006,<sup>37</sup> was introduced by Chairman Sensenbrenner. This legislation reauthorized the temporary provisions for an additional 25 years and made necessary changes to certain provisions to ensure that the VRA remained effective in the future. Both Houses of Congress passed the VRA reauthorization legislation with broad bipartisan support, it was signed into law by President Bush on July 27, 2006.

As Chairman Sensenbrenner stated after the Committee reported the VRA reauthorization by a 33 to 1 vote:

The Committee record shows that while the VRA has been successful, our work is not yet complete. Discrimination in the electoral process continues to exist and threatens to undermine the progress that has been made over the last forty years. By extending the VRA for an additional 25 years, H.R. 9 ensures that the voting rights of all Americans regardless of race or color will be protected.

The temporary provisions of the VRA that were reauthorized for an additional 25 years included: section 4, which set forth the coverage formula and bailout process; section 5, the preclearance provision that required section 4 covered jurisdictions to obtain the Department of Justice's or the D.C. District Court for the District of Columbia's prior approval of all voting changes before the changes could be enforced; section 8, the federal observer provision that authorized the Department of Justice to assign election observers to section 4 covered jurisdictions' polling locations; and section 203, the bilingual election assistance provision that required certain state and local jurisdictions to make election materials available in a covered language. Sixteen states were covered in whole or in part by section 4's coverage formula, including: Alabama, Alaska, Arizona, California, Florida, Georgia, Louisiana, Michigan, Mississippi, New Hampshire, New York, North Carolina, South Carolina, South Dakota, Texas, and Virginia. Thirty-one states were covered in whole or in part under the formula set forth under section 203.

In addition to reauthorizing the temporary provisions, the Voting Rights Act Reauthorization and Amendments Act of 2006 updated the VRA to reflect current election practices and coverage determinations and terminated section 6 of the VRA, the federal examiner provision, and its related provisions. Federal examiners were included in the original VRA to ensure that eligible citizens were able to register to vote. Testimony received by the Subcommittee on the Constitution revealed that federal examiners had not been used in the last 20 years and were no longer critical to protecting minority voters. This measure also amended section 203 to reflect the change in data collection methods made by the U.S. Census Bureau which is responsible for making coverage determinations under section 203 and formerly relied on the long form census questionnaire to make its previous determinations. The Voting Rights Act Reauthorization and Amendments Act of 2006 reflected the new collection tool used by the Census Bureau, the American Community Survey, to make these coverage determinations and specified that coverage determinations be made every five years based on a rolling five-year average. To ensure that section 203's assistance was effective, it authorized GAO to conduct a study on the effectiveness of the bilingual assistance provided by covered jurisdictions to language minority citizens.

The legislation addressed two Supreme Court decisions, *Reno v. Bossier Parish (Bossier II)* and *Georgia v. Ashcroft*, which had significantly weakened the ability of section 5 to prevent discriminatory voting changes from being enforced and adversely affected the ability of minority voters to participate in the political process. The Voting



Rights Act Reauthorization and Amendments Act of 2006 also made clear that a voting change made by a covered jurisdiction that is motivated by a discriminatory purpose could not be precleared under section 5 and made clear that section 5 was intended to protect the ability of minority citizens to elect their preferred candidates of choice.

### **Commerce, Consumers, and Employment**

The Judiciary Committee responded to developments in the private and public sectors by considering legislation concerning the relationships between businesses and consumers, businesses and investors, and the federal government and its employees.

The Committee succeeded in the enactment into law of the Class Action Fairness Act of 2005<sup>38</sup> after related bills reported from the Committee and passed by the House in earlier Congresses had not become law. The new law allowed more interstate class-action lawsuits to be heard in federal courts, and made additional procedural changes to the federal judicial code with regard to proposed settlements of class-action lawsuits. This law responded to egregious examples of forum-shopping of class action cases to certain state courts notorious for awarding enormous verdicts with national implications. In addition, many class action settlements frequently had garnered millions of dollars in fees for the attorneys while the class members received coupons or only a few dollars.

Congress also passed the “Protection of Lawful Commerce in Arms Act,”<sup>39</sup> a version of which the Judiciary Committee had reported. The law prohibits certain civil liability lawsuits against firearms manufacturers and others involved in commerce, and prohibits sales of firearms to individuals, other than those holding a firearms license, unless the transferee is provided with secure gun storage or a safety device.

The Judiciary Committee also succeeded in the enactment into law of the most significant overhaul of the Bankruptcy Code in 16 years, The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.<sup>40</sup> This law made procedural and substantive changes to the federal bankruptcy law to eliminate bankruptcy cases that are fraudulent or opportunistic, to establish the principal that debtors who can do so should repay their debts, and to provide additional reorganizational relief in bankruptcy for farmers and fishermen, among other measures.

Congress tightened filing, disclosure, and other controls on public companies with the Sarbanes-Oxley Act of 2002, following a series of financial scandals involving major corporations and accounting firms. The Judiciary Committee contributed two important titles amending the federal criminal code to this legislation, the White-Collar Crime Penalty Enhancement Act of 2002 and the Corporate Fraud Accountability Act of 2002,<sup>41</sup> which provided a stiffer of sentences for “white-collar” crimes.

The Judiciary Committee reported two trade agreement bills that were enacted into law, the United States-Chile Free Trade Agreement Implementation Act<sup>42</sup> and the United States-Singapore Free Trade Agreement Implementation Act.<sup>43</sup> The provisions within the jurisdiction of the Committee allowed nonimmigrant treaty trader or treaty investor nationals of these countries, and their spouses and children, to enter or work in the United

States. The provisions within the jurisdiction of the Committee reserved a number of temporary visas for Chilean and Singaporean professionals.

While Chairman of the Committee on Science (1997–2001), Mr. Sensenbrenner found a disturbing pattern of intolerance, discrimination, and retaliation at the Environmental Protection Agency, and ordered a congressional investigation of these civil rights violations. In response to a year-long investigation, and as the Chairman of the Committee on the Judiciary, Mr. Sensenbrenner introduced the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002,<sup>44</sup> known as the “No FEAR Act.” Hailed by *Time* columnist Jack White as “the first new civil rights law of the 21st century,” this law required federal agencies to be accountable for violations of discrimination and whistleblower protection laws, and provided federal employees throughout the federal government with additional on-the-job protection from illegal discrimination, retaliation, and other mistreatment by deterring and punishing government misconduct toward them. Chairman Sensenbrenner was recognized by the National Association for the Advancement of Colored People and the No FEAR Coalition for leading the crusade for enactment of this historic civil rights legislation.

### **Intellectual Property**

The Committee continued to pursue a theme of updating traditional forms of protection for intellectual property in the 21st Century. At the same time, Chairman Sensenbrenner emphasized that this priority must be squared with the legitimate interests of individuals, small businesses, and others wishing to invoke fair-use access to intellectual property.

The Committee enacted at least five prominent copyright bills from 2001 through 2007. The Technology, Education, and Copyright Harmonization (TEACH) Act of 2002<sup>45</sup> clarified the rules governing the use of copyrighted works in a digital environment by educational entities. The classic example of its application was a scenario in which a student is enrolled in an online course that was being taught in a facility where the student was not physically present. The preexisting rules that applied to a brick-and-mortar world were more than 20 years old and were in obvious need of an update.

The Satellite Home Viewer Extension and Reauthorization Act (SHVERA) of 2004<sup>46</sup> extended the distant-signal compulsory license that allows satellite systems to operate for an additional five years. The related cable license was reauthorized five years earlier in perpetuity.

Legislation concerning digital sound recordings and their application to “small” webcasters<sup>47</sup> temporarily suspended royalties due from noncommercial and small commercial webcasters to the affected copyright holders. Authored by Chairman Sensenbrenner, this legislation also authorized a third-party organization, called “SoundExchange,” to negotiate a global settlement agreement with small webcasters on behalf of copyright owners and performers. Without the bill, many of the affected webcasters could not have continued their operations.

The Copyright Royalty and Distribution Reform Act of 2004<sup>48</sup> replaced the existing administrative construct within the U.S. Copyright Office that determines copyright royalty

rates and the distribution of related royalties under various compulsory licenses. The legislation made these proceedings fairer to small participants, more predictable, and less expensive.

Enacted in the 109th Congress, the Family Entertainment and Copyright Act of 2005<sup>49</sup> was comprised of separate bills reported by the Committee and nearly enacted in the previous term. The primary components of the bill included an authorization for a film preservation program; new federal penalties for those who “camcord” movie releases in public theaters as well as other penalties for copyright piracy; and protection for developers of digital “filtering” technology that allows consumers to view copyrighted movies in edited formats chosen by the viewer.

The major patent bills considered by the Committee from 2001 through 2007 were the Cooperative Research and Technology Enhancement (CREATE) Act of 2003,<sup>50</sup> and multiple attempts to authorize a new patent fee schedule while eliminating the incentive for Congress to divert the corresponding fee revenue to programs unaffiliated with the U.S. Patent and Trademark Office.<sup>51</sup>

The CREATE Act extends to collaborative researchers who work in multiple organizations the same “safe harbor” that patent law previously provided *only* to inventive collaborators who are employed in a single organization. The practical effect of this change is to prohibit the use of “secret prior art” to defeat an otherwise valid patent or patent application. The CREATE Act acknowledges that research collaborations among multiple groups is a growing trend, especially within the university and biotechnology communities.

Committee efforts to report legislation that creates a new fee schedule and addresses the matter of fee “diversion” were necessitated by the growing importance of the Patent and Trademark Office (PTO) to the American economy. The agency is burdened by a growing influx of new patent applications annually in addition to a backlog of pending applications. Bills introduced in the 108th and 109th Congresses that revise the fee schedule would generate a 15% revenue increase for the agency’s use. In addition, a refund mechanism was included in both bills requiring the PTO Director to remit unspent revenue in a given fiscal year back to the inventors who filed applications (or paid maintenance and other fees). This last feature would eliminate the theoretical incentive of congressional appropriators to divert a portion of PTO revenues to non-agency programs. More than \$700 million has been diverted through the years in this way.

Finally, a major trademark bill was enacted during Chairman Sensenbrenner’s tenure. As its name implies, the Madrid Protocol Implementation Act<sup>52</sup> implements the terms of the Madrid Protocol trademark treaty. Ratification of the Protocol by the Senate and passage of the legislation to codify its obligations in our national law were important developments for trademark filers, especially individuals and small businesses. Under the law, trademark owners can file for protection in every country that is a member of the Protocol by filing in the United States for a nominal fee. The PTO is charged with the administrative duties of registering the marks internationally.

The Small Webcaster Settlement Act of 2002,<sup>53</sup> reported from the Judiciary Committee, wrote into law the settlement between small webcasters and copyright holders over rates and payment terms. The settlement ended a dispute between the webcasters, who held licenses allowing them to use copyrighted works, and the copyright holders.

The Judiciary Committee reported the Family Entertainment and Copyright Act of 2005,<sup>54</sup> which was enacted into law. The law contained the Family Movie Act of 2005, which allowed home users of audio and video recordings to use certain forms of technology to pass over portions of a recording. The Artists' Rights and Theft Prevention Act of 2005, also contained in the law, prohibited piracy of audiovisual works and establishes penalties for piracy.

### **Judicial Ethics**

The Committee devoted substantial resources to enhancing judicial ethics, investigating instances of judicial misconduct, and conducting related oversight of the federal judiciary. This is especially important given the enormous power of life-tenured U.S. district and circuit judges as well as Supreme Court justices. The Committee rewrote portions of the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 (1980 Act)<sup>55</sup> in the 107th Congress.<sup>56</sup> The Committee was concerned with the regularity with which certain complaints filed under the statute<sup>57</sup> had been dismissed by the federal judiciary.

Chief Justice Rehnquist announced the creation of a judicial committee, headed by Justice Stephen Breyer, to review the 1980 Act and the federal recusal<sup>58</sup> statute. The Breyer Committee's report, released in September of 2006, found that four judicial oversight matters investigated by the House Judiciary Committee were handled improperly by the courts. Chairman Sensenbrenner authored the Judicial Transparency and Ethics Enhancement Act of 2006,<sup>59</sup> which the Committee reported favorably in September of 2006. The bill creates an Inspector General (IG) for the federal judiciary whose duties include investigating instances of "possible misconduct in office of judges and proceedings under [the 1980 Act], that may require oversight or other action within the judicial branch or by Congress." Other functions include conducting audits and preventing and detecting waste, fraud, and abuse.

### **Telecommunications**

Since 1957, the Committee on the Judiciary has played a central role in promoting competition in the telecom industry. In the late 1950s, the Committee held oversight hearings to examine the monopoly power that AT&T wielded because of its control of the local exchange and the Department of Justice's efforts to limit that power through antitrust enforcement.<sup>60</sup>

During the tenure of Chairman Sensenbrenner, the Committee reinvigorated its historic role in national telecommunications policy by conducting a number of hearings and reporting legislation to promote competition and consumer choice in this industry. The Judiciary Committee was intimately involved in the major telecom legislative debate in the 107th Congress. On May 22, 2001, the Committee conducted a legislative hearing examining the "American Broadband Competition Act of 2001," and the "Broadband Competition and

Incentives Act of 2001.” On June 5, 2001, the Committee conducted a legislative hearing on the “Internet Freedom and Broadband Deployment Act of 2001.” Because many Committee Members felt that the legislation did not contain the safeguards necessary to preserve competition in the broadband industry, the Committee adversely reported it.<sup>61</sup>

On March 23, 2003, the Committee reported a resolution to establish a Task Force on Antitrust to facilitate consideration of antitrust-related issues. Throughout his tenure, Chairman Sensenbrenner wrote several detailed letters to the Department of Justice and Federal Trade Commission urging a more assertive and proactive role in defending the application of the antitrust laws in the telecommunications marketplace.

On March 16, 2006, the Committee adopted a resolution establishing a Task Force on Telecom and Antitrust to assist the Committee in examining how the wave of proposed mergers in the telecom industry would affect competition and, most importantly, consumers.

Concerned about government entities seeking to tax Internet access that would threaten the Internet’s benefits to the public, the Judiciary Committee twice reported legislation called the Internet Tax Nondiscrimination Act that became law. The legislation enacted into law in 2001 extended the moratorium on multiple or discriminatory state or local taxes on electronic commerce through November 1, 2003.<sup>62</sup> The legislation enacted in 2004 extended this ban until November 1, 2007, and clarified aspects of the operation of the moratorium.<sup>63</sup>

In order to ensure that American consumers are provided a strong remedy for market abuse by broadband service providers, Chairman Sensenbrenner authored the “Internet Freedom and Nondiscrimination Act of 2006.” The legislation reasserted an antitrust remedy for anticompetitive conduct in which the broadband network provider: (1) fails to provide network services on reasonable and nondiscriminatory terms; (2) refuses to interconnect with the facilities of other network providers on a reasonable and nondiscriminatory basis; (3) blocks, impairs or discriminates against a user’s ability to receive or offer lawful content; (4) prohibits a user from attaching a device to the network that does not damage or degrade the network; or (5) fails to disclose to users, in plain terms, the conditions of the broadband service. On May 25, 2006, the Committee favorably reported the bill H.R. 5417, but no House action was taken on this legislation.

On June 16, 2006, Chairman Sensenbrenner testified before the Senate Committee on the Judiciary at a hearing titled “Reconsidering Our Communications Laws: Ensuring Competition and Innovation.” In his remarks, Chairman Sensenbrenner stated:

Some antitrust critics contend that fidelity to the free market is somehow inconsistent with a commitment to antitrust. However, as a strong conservative who adheres to the primacy of free markets, I believe that the antitrust laws preserve the integrity of the free market upon which economic vitality depends. The communications industry is no exception to this rule. The principled application of the antitrust laws in the communications market has facilitated competition, reduced prices, encouraged the deployment of new technologies, and enhanced consumer choice for millions of Americans.

As the Senate Judiciary Committee asserts its role in this body's consideration of communication legislation, I urge its Members to ensure that the antitrust laws and the agencies that enforce them are provided a clear, continuing, and unambiguous role in promoting and defending the pro-competitive goals for which they were established.

During Chairman Sensenbrenner's tenure, the Committee conducted rigorous oversight of competitive features of the Multichannel Video Programming Distribution Marketplace. On December 4, 2001, the Committee on the Judiciary conducted an oversight hearing on "Direct Broadcast Satellite and Competition in the Multichannel Video Distribution Market," which examined the potential acquisition of DirecTV by EchoStar, leaving consumers with potentially only one choice in the satellite-TV market instead of two. This merger did not occur. On May 8, 2003, the Committee held another hearing on "Direct Broadcast Satellite Service Competition in the Multichannel Video Programming Distribution Marketplace." This hearing examined the proposed acquisition of a controlling interest in DirecTV by NewsCorp.

### **Antitrust**

Chairman Sensenbrenner's commitment to reasserting the Committee's antitrust jurisdiction was not limited to telecom-related issues. During his term, the Committee led consideration and passage of what several analysts termed the most significant amendments to the antitrust law since the Hart Scott Rodino Antitrust Improvement Act of 1976.

Chairman Sensenbrenner authored the National Cooperative Standards Development (SDOs) Act of 2004,<sup>64</sup> which was signed into law by President Bush on June 22, 2004. The legislation amended the National Cooperative Research Act (NCRA) to extend that Act's limited antitrust protections to specified activities of standard development organizations relating to the development of voluntary consensus standards. These amendments preserved and promoted the ability of SDOs to issue standards by: (1) codifying the "rule of reason" for antitrust scrutiny of their activities; (2) eliminating the threat of treble damages for specified standards development activity if SDO's disclose the scope and nature of this activity to the Department of Justice and Federal Trade Commission; and (3) providing for the recovery of attorney fees to substantially prevailing parties. As enacted, this legislation also contained important provisions that deter antitrust violations and anticompetitive misconduct while strengthening antitrust enforcement efforts.

Chairman Sensenbrenner authored legislation enacted during the 107th Congress that established a blue-ribbon commission charged with reporting on issues and problems related to the modernization of the antitrust laws. The Antitrust Modernization Commission<sup>65</sup> is primarily focused on three areas: (1) the role of intellectual property law in antitrust law; (2) how antitrust enforcement should change in the global economy; and (3) the role of state attorneys general in enforcing antitrust laws.

## **Animal Enterprise Terrorism**

On November 13, 2006, the House passed the Animal Enterprise Terrorism Act.<sup>66</sup> The Senate had passed this legislation on September 29, 2006 by unanimous consent.

This legislation strengthened the current law to allow the federal government to prosecute animal rights activists who engage in harassment and intimidation against individuals and organizations or businesses involved with an animal enterprise.

The legislation makes it a crime to intentionally place a person in reasonable fear of death, or serious bodily injury to that person or their family through conduct involving threats, acts of vandalism, property damage, trespass, harassment, or intimidation.

This bill also makes clear that its provisions are not intended to criminalize non-violent, non-harassing, non-intimidating activities designed to change public policy or private conduct, such as the lawful organization of or participation in consumer boycotts, investigative reporting, lawful whistleblowing, corporate policy campaigns that encourage citizens to communicate their view to the business community, and lawful protest activities.

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<sup>1</sup> 107–56; 115 Stat. 271. USA PATRIOT Act is the Acronym for the short title of the law, the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001.

<sup>2</sup> Rep. F. James Sensenbrenner, Jr. remarks in the House, Congressional Record, daily edition, vol. 147, October 23, 2001, p. H7196.

<sup>3</sup> P.L. 109–177; 120 Stat. 191.

<sup>4</sup> P.L. 107–296, 116 Stat. 2135.

<sup>5</sup> P.L. 107–173; 116 Stat. 543. Congress subsequently passed legislation extending to 2005 from 2004 the implementation deadline for machine-readable, tamper-resistant entry and exit documents. (P.L. 108–299; 118 Stat. 110).

<sup>6</sup> P.L. 107–173; 116 Stat. 543. Congress subsequently passed legislation extending to 2005 from 2004 the implementation deadline form for machine-readable, tamper-resistant entry and exit documents. (P.L. 108–299; 118 Stat. 110).

<sup>7</sup> The 9/11 recommendations refer to the report of the popularly named 9/11 Commission: National Commission on Terrorist Attacks Upon the United States, *The 9/11 Report: Final Report of the National Commission on Terrorist Attacks Upon the United States* (Washington: GPO, July 22, 2004); available on line at <http://www.gpoaccess.gov/911/index.html>, [visited May 10, 2006.]

<sup>8</sup> P.L. 109–13; 119 Stat. 231, 302; included as Division B, Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief 2005.

<sup>9</sup> Homeland Security Act of 2002; P.L. 107–296; 116 Stat. 2135.

<sup>10</sup> P.L. 109–55; 119 Stat. 565, 588; included as Title III, Legislative Branch Appropriations Act, 2006.

<sup>11</sup> P.L. 109–366; 120 Stat. 2600.

<sup>12</sup> House Rept. 109–680 Part 1 and 2.

<sup>13</sup> P.L. 107–208; 116 Stat. 927.

<sup>14</sup> P.L. 107–150; 116 Stat. 74.

<sup>15</sup> P.L. 107–125; 115 Stat. 2403.

<sup>16</sup> P.L. 107–124; 115 Stat. 2402.

<sup>17</sup> P.L. 108–99; 117 Stat. 1176.

<sup>18</sup> P.L. 108–390; 118 Stat. 2242.

<sup>19</sup> P.L. 108–136; 117 Stat. 1391; included as Title XVII, National Defense Authorization Act for Fiscal Year 2004.

<sup>20</sup> P.L. 108–156; 117 Stat. 1944.

<sup>21</sup> P.L. 108–477; 118 Stat. 3903 included as Title IV of Division J of the Consolidated Appropriations Act of 2005.

- <sup>22</sup> P.L. 108–21; 117 Stat. 649. PROTECT Act is the acronym for the short title of the law, the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003.
- <sup>23</sup> P.L. 109–162; 119 Stat. 2959; included as Titles I–IX, Violence Against Women and Department of Justice Reauthorization Act of 2005.
- <sup>24</sup> P.L. 108–405; 118 Stat. 2259.
- <sup>25</sup> P.L. 108–212; 118 Stat. 567.
- <sup>26</sup> P.L. 108–105; 117 Stat. 1201.
- <sup>27</sup> P.L. 107–207; 116 Stat. 926.
- <sup>28</sup> P.L. 108–358; 118 Stat. 1661.
- <sup>29</sup> P.L. 108–174; 117 Stat. 2481.
- <sup>30</sup> P.L. 108–79; 117 Stat. 971.
- <sup>31</sup> P.L. 108–275; 118 Stat. 831.
- <sup>32</sup> P.L. 108–187; 117 Stat. 2699. CAN-SPAM Act is the acronym for the short title of the law: the Controlling the Assault of Non-Solicited Pornography and Marketing Act.
- <sup>33</sup> P.L. 108–495; 118 Stat. 3999.
- <sup>34</sup> P.L. 107–273; 116 Stat. 1757.
- <sup>35</sup> P.L. 109–162; 119 Stat. 2959, 3084.
- <sup>36</sup> P.L. 109–248; 120 Stat. 587.
- <sup>37</sup> P.L. 109–246; 118 Stat. 682.
- <sup>38</sup> P.L. 109–2; 119 Stat. 3.
- <sup>39</sup> P.L. 109–92; 119 Stat. 2095.
- <sup>40</sup> P.L. 109–8; 119 Stat. 23.
- <sup>41</sup> P.L. 107–204; 116 Stat. 745.
- <sup>42</sup> P.L. 108–77; 117 Stat. 909.
- <sup>43</sup> P.L. 108–78; 117 Stat. 947.
- <sup>44</sup> P.L. 107–174; 116 Stat. 566.
- <sup>45</sup> P.L. 107–273; 116 Stat. 1758.
- <sup>46</sup> P.L. 108–447; 118 Stat. 2809.
- <sup>47</sup> P.L. 107–321; 118 Stat. 1214.
- <sup>48</sup> P.L.108–419; 118 Stat. 2341.
- <sup>49</sup> P.L. 109–9; 119 Stat. 819.
- <sup>50</sup> P.L. 108–453; 118 Stat. 3596.
- <sup>51</sup> H.R. 1561, 108th Congress 1st Session (2003); H.R. 2791, 109th Congress, 1st Session (2005).
- <sup>52</sup> P.L. 107–273; 118 Stat. 819.
- <sup>53</sup> P.L. 107–321; 116 Stat. 2779.
- <sup>54</sup> P.L. 109–9; 119 Stat. 217.
- <sup>55</sup> 28 U.S.C. §351 et seq. The 1980 Act allows individuals to file complaints against federal judges for alleged misconduct. The construct is premised on self-regulation in deference to judicial independence; i.e. the judges, through judicial councils and special Committees, evaluate one another.
- <sup>56</sup> H.R. 3892, 107th Cong., 1st Sess. (2001). The text of the bill was later included I sections 11041–11044 of H.R. 2215 (H.Rept. 107–685), which became P.L. 107–273; 118 Stat. 819.
- <sup>57</sup> Chairman Sensenbrenner and Representative Howard Coble jointly filed misconduct complaints against Norma Holloway Johnson, Chief Judge of the U.S. district court for the District of Columbia, in 2000; and Richard D. Cudahy, circuit judge of the Seventh Circuit Court of Appeals in 2002. The resulting Holloway Johnson investigation led to administrative changes governing case assignment in the U.S. district for the District of Columbia, while the Cudahy complaint was dismissed.
- <sup>58</sup> 28 U.S.C. §455.
- <sup>59</sup> H.R. 5219, 109th Cong., 2nd Sess. (2006).
- <sup>60</sup> See The Consent Decree Program of the Department of Justice; Hearings Before the Subcommittee on Antitrust of the House Committee on the Judiciary, 85th Cong. (1957 and 1958); Report of the Antitrust Subcommittee on the Consent Decree Program of the Department of Justice, 86th Cong. (1959).
- <sup>61</sup> H. Rep. No. 107–83, Part 2.
- <sup>62</sup> P.L. 107–75; 115 Stat. 703.



<sup>63</sup> P.L. 108-435; 118 Stat. 2615.

<sup>64</sup> P.L. No. 108-237; 118 Stat. 661.

<sup>65</sup> P L. No. 107-273, §§ 11051-60, 116 Stat. 1856.

<sup>66</sup> H.R. 4239, 109th Congress, 2nd Session.