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Robert M. Duncan Jr.
University of Kentucky

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SURREPTITIOUS SEARCH WARRANTS AND THE USA PATRIOT ACT: “THINKING OUTSIDE THE BOX BUT WITHIN THE CONSTITUTION,” OR A VIOLATION OF FOURTH AMENDMENT PROTECTIONS?

Robert M. Duncan Jr.*

We must not make a scarecrow of the law,
Setting it up to fear the birds of prey,
And let it keep one shape, till custom make it
Their perch and not their terror.¹

I. INTRODUCTION

Based upon current world events, William Shakespeare’s seventeenth century quote provides an appropriate message for our country. For the United States’s laws to remain effective in protecting its citizens, these laws, from time to time, must evolve to reflect the changing nature of society. As Shakespeare alludes to in his play, Measure for Measure, if laws, especially criminal laws, remain stagnant they will lose their force. As recent history suggests, if criminal laws do not change to reflect the times, evildoers can and will use those laws against the United States. The Patriot Act is an attempt by the government to change certain criminal laws to better protect its citizens.² However, the debate remains as to whether the Patriot Act, specifically Title II, § 213, which amends 18 U.S.C. § 3103a, and authorizes surreptitious search warrants, is constitutionally justified under the Fourth Amendment, and is within the mandates of Rule 41 of the Federal Rules of Criminal Procedure, or whether the Patriot Act goes too far, and is instead an unwar-

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* B.A. in English, Centre College, 2000. J.D., University of Kentucky, 2003. Law Clerk to the Honorable Henry R. Wilhoit Jr., Senior U.S. District Judge, Eastern District of Kentucky at Ashland. The opinions contained in this article do not necessarily reflect those of Judge Wilhoit. The author would like to thank Professors Allison Connelly and Sarah Wellin for their advice, criticisms, and guidance. The author would also like to thank his parents, Robert M. and Joanne Duncan, and his fiancée Valerie A. Riddler, for their love and support. Finally, this article is in memory of Lucas M. Woodward, a classmate and friend.

¹ WILLIAM SHAKESPEARE, MEASURE FOR MEASURE, Act 2, Scene 1, Line 1 (Davis Harding ed., Yale University Press 1954) (1926).

ranted governmental intrusion and invasion of privacy. This article addresses these concerns.

The United States and the lives of its citizens irrevocably changed on September 11, 2001. Al-Qaeda’s terrorist attack, using airplanes as weapons of mass destruction, caught the nation off guard. Simultaneous strikes on the World Trade Center in New York City and the Pentagon in Washington, D.C. altered our collective sense of security within our national borders.

In testimony before the Senate Committee on the Judiciary not long after the September 11 attacks, Attorney General John Ashcroft stated, “we are at war with an enemy that abuses individual rights as it abuses jet airliners: as weapons with which to kill Americans.” The terrorist operatives “enjoy the benefits of our free society even [though] they commit themselves to our destruction. They exploit our openness—not randomly or haphazardly—but by deliberate, premeditated design.” The Attorney General also remarked,

America’s defense—the defense of life and liberty—requires a new culture of prevention, nurtured by cooperation, built on coordination and rooted in our Constitutional liberties. . . . Our survival and success in this long war on terrorism demands that we continuously adapt and improve our capabilities to protect Americans from a fanatical, ruthless enemy.

In quick response to the September 11 attacks, Congress passed the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act (hereinafter “Patriot Act”) of 2001. On October 26, 2001, President George W. Bush signed the Act into law. At the signing ceremony, President Bush remarked, the country took “an essential step in defeating terrorism, while protecting the constitutional rights of all Americans.” The President further stated, “this law will give intelligence and law enforcement officials important new tools to fight a present danger. . . . It will help law enforcement to identify, to dismantle, to disrupt, and to punish

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4 Id.
5 Id.
terrorists before they strike.”

The Act received broad bipartisan support from members of the House and the Senate. However, some critics described the Act as a wish list for prosecutors and a “list of horribles” for civil liberties groups like the ACLU. Many of the ideas the Patriot Act incorporated, including making it easier to obtain wiretaps or search warrants, were proposed after the 1994 Oklahoma City bombing, but were not enacted then.

The Act’s purpose is “[t]o deter and punish terrorist acts in the United States and around the world, [and] to enhance law enforcement investigatory tools.” The Patriot Act tremendously increases the federal government’s powers in fighting foreign and domestic terrorism, as well as domestic crime in general. The Act provides for enhanced surveillance capabilities by law enforcement, including authority for federal criminal agencies, such as the FBI and CIA, to share criminal investigative information. It also expands the federal government’s surveillance capabilities under the Foreign Intelligence Surveillance Act of 1978, and enacts legislation to deter money laundering by known terrorist organizations.

One potentially major enhancement of governmental power that has not received as much attention as the examples mentioned above is found in Title II, Enhanced Surveillance Procedures, § 213. This section, titled “Delay,” authorizes the delaying of notice of a search warrant execution and provides statutory authority for the issuance of surreptitious search warrants.

Rule 41 of the Federal Rules of Criminal Procedure states that a valid search warrant must be issued by a neutral and detached

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8 Id.
9 Steven Brill, After: How America Confronted the September 12 Era 52 (2003).
10 Id. at 52-53.
14 18 U.S.C. § 3103a(b).
15 Unless otherwise specified, the author’s use of the term “government” refers to the U.S. federal government.
federal magistrate judge or state judge, and it must be based on probable cause.\textsuperscript{16} Rule 41 details the minimum basic requirements for both conventional and surreptitious search warrants. Surreptitious or covert entries must be based on valid search warrants. However, as will be discussed more fully, there are basic differences between conventional and surreptitious search warrants.\textsuperscript{17} Surreptitious search warrants, also known as “sneak-and-peak” search warrants, and “covert-entry” search warrants, allow law enforcement officers to enter a person’s property “while no one else [is] there, look around, and leave without removing anything.”\textsuperscript{18} The following serves as a brief introduction of the two kinds of search warrants.

Conventional search warrants allow officers to enter a person’s home or office, and search for and seize specific items listed in the warrant.\textsuperscript{19} The police must provide notice to a target of a search that they searched her or his premises, and the police must provide the target with a list of items taken.\textsuperscript{20} Surreptitious search warrants, however, require no immediate notice to the target that police have searched her or his home or office, as long as no items are seized.\textsuperscript{21} As will be explored later in this article, notice of the search can be delayed for many reasons.

Surreptitious search warrants are often used in conjunction with conventional search warrants. “[A]gents executing surreptitious search warrants often employ them in order to enter a residence or property when the owner or occupant is not present and observe the interior of the residence to confirm whatever suspicions the agents might have about illegal activity.”\textsuperscript{22} According to a May 21, 2003, report to members of Congress by the Department of Justice (DOJ), in the approximately eighteen months after the Patriot Act was enacted, the DOJ sought 248 times to delay having to notify the target of an investigation that a surreptitious warrant had been executed.\textsuperscript{23} It stands to reason that the use of surreptitious search warrants is often used in conjunction with conventional search warrants. “[A]gents executing surreptitious search warrants often employ them in order to enter a residence or property when the owner or occupant is not present and observe the interior of the residence to confirm whatever suspicions the agents might have about illegal activity.”

\textsuperscript{17} These differences will be more fully discussed later in the article.
\textsuperscript{18} \textit{United States v. Freitas}, 800 F.2d 1451, 1453 (9th Cir. 1986).
\textsuperscript{19} \textit{Fed. R. Crim. P.} 41(b).
\textsuperscript{20} Id. at 41(d).
\textsuperscript{21} \textit{See} 18 U.S.C. § 3103a(b).

The department portrayed its use of its new powers as judicious and
tious search warrants in conjunction with conventional search warrants could increase in the coming years, as more law enforcement personnel learn of surreptitious searches and their potential benefits.24

This article explores the history of surreptitious searches, both pre- and post-Patriot Act and discusses what the future possibly holds for surreptitious search warrants. The article also explores several questions, including: are surreptitious searches “working to protect American lives while preserving American liberties,” as Attorney General Ashcroft has said, or do they weaken essential Fourth Amendment protections?25 Is the statutory authorization for surreptitious search warrants “think[ing] outside the box but inside the Constitution,”26 as Attorney General Ashcroft has also said, or does this authorization invade upon people’s reasonable expectation of privacy in their homes, papers, and effects? Critics of the Patriot Act generally, and of surreptitious searches specifically, fear that “the government now operates with an increased reliance on suspicion, a more frequent use of confidential information and a more broadly cast policy of secrecy than before.”27 Other critics, including ACLU Executive Director Anthony Romero, have stated that the government's expanded powers are Orwellian in their scope.28

Changes in the law may be needed, given the United States’ current “war on terror.” This article will explore how surreptitious search warrants may be a useful arrow in the federal government’s quiver to fight against global and domestic terrorism. However, critics correctly assert that the use of these warrants could become problematic unless firmer guidelines are developed to provide

24 Shannon McCaffrey, Secret Spy Court Sets Record Issuing Warrants Figure Indicates U.S. Agents Using Broad New Police Powers, LEXINGTON HERALD-LEADER, May 3, 2003, at B6 (“The government sought and received approval for a record number of warrants . . . a sign that federal agents are putting to use broad new police powers handed to them after the Sept. 11 attacks.”).
25 DOJ Oversight, supra note 3.
28 Dimitra Kessenides, Mr. Liberty, JD JUNGLE, Feb./Mar. 2003, at 54, 56.
stricter notice requirements for covert entries. The article also will explore the issue of whether § 213 of the Patriot Act should be used in all domestic crimes.

II. BACKGROUND

To better analyze surreptitious search warrants, the following review of conventional search warrants and electronic surveillance law has been included.

A. Brief Discussion of Conventional Search Warrants Under Rule 41 of the Federal Rules of Criminal Procedure

The Fourth Amendment of the U.S. Constitution protects “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” 30 The Amendment further provides, “no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the . . . things to be seized.” 31 The Fourth Amendment does not specifically mention a notice requirement.

The Supreme Court in Katz v. United States interpreted the Fourth Amendment to apply to any government search or seizure that violates a person’s reasonable expectation of privacy in her or his person. 32 Building upon the foundation developed by the Fourth Amendment and existing common law, Rule 41 of the Federal Rules of Criminal Procedure, titled, “Search and Seizure,” first enacted in 1944, codified and amended federal criminal law and practice. 33 Section 3103 of Title 18 of the U.S. Code gives statutory authority to Rule 41.

Rule 41, more specifically subsection (d), lists specific steps that law enforcement personnel must generally follow to obtain and execute a conventional search warrant. 34 The rule is interpreted and reinforced by Supreme Court decisions. 35 As required

29 This section is intended to provide a general background on search and seizure requirements. The author does not intend this section to be considered in any way a comprehensive analysis of searches and seizures under the Fourth Amendment. The section is included as a refresher on basic search and seizure principles and to provide a starting point for a discussion of the differences between conventional and surreptitious searches.
30 U.S. Const. amend. IV.
31 Id.
34 Id.
35 See, e.g., Fed. R. Crim. P. 41 advisory committee’s notes.
by the Constitution, the issuance of a search warrant must be based on probable cause. To prove probable cause to obtain a warrant, law enforcement personnel must present a neutral and detached magistrate or judge with an “affidavit or other information” detailing the law enforcement officer’s belief that probable cause exists. If the magistrate or judge agrees that probable cause exists for a search, she or he will sign and issue a search warrant. In accordance with Fourth Amendment mandates, “[t]he warrant must identify the . . . property to be searched, [and] identify any . . . property to be seized . . . .” Law enforcement officers must execute the warrant within ten days of its issuance.

When the officer executes the search warrant, she or he must note the exact date and time of the execution. Generally, officers also must announce their presence before entering the premises to execute the search warrant. Additionally, “an officer present during the execution of the warrant must prepare and verify an inventory of any property seized.” Officers are restricted to searching in the areas listed on the warrant, and must look only in places where the items they are looking for could possibly be concealed.

There is no express provision providing for notice in Rule 41. However, Rule 41 implicitly provides notice to the target of the search that a search has taken place. This is accomplished by requiring the officer executing the warrant to “give a copy of the warrant and a receipt for the property taken to the person from whom, or from whose premises, the property was taken,” or “leave a copy of the warrant and receipt at the place where the officer took the property.” As will be discussed in depth later in this article, this notice provision signifies one of the main divergences between surreptitious and conventional search warrants.

There are numerous exceptions to the Rule 41 requirements, one of which is that law enforcement officers may enter the premises without announcing their entrance if there is a threat of imme-

37 Id. at 41(e)(3)(D).
38 Id. at 41(e)(2).
39 Id. at 41(e)(2)(A).
40 Id. at 41(f)(1).
41 See Richards v. Wisconsin, 520 U.S. 385 (1997) (holding there is no blanket exception for no-knock search warrants). The decision to allow searches without knocking and announcing must be done on a case-by-case basis. Id. at 394.
diate destruction of evidence. Other possible exigent circumstances, which include danger to officers, hot pursuit, or people requiring assistance, may also justify entry without announcement or even entry without a search warrant. Additionally, illegal contraband in plain view of the officers may be seized even if such items are not specifically listed on the search warrant. For example, if an officer enters a house with a search warrant for a person’s financial records and papers, and sees a marijuana plant sitting in the open, the officer may legally seize the plant. Prior to the Patriot Act, common law surreptitious searches were born at least partly out of the myriad of exceptions to the Rule 41 search and seizure requirements.

B. Title III Surveillance

Surreptitious search warrants also borrow heavily from the procedures of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, both in the form of the warrant applications and substance of the search and surveillance procedures. Title III regulates “more sophisticated forms of police surveillance, such as wiretapping and electronic surveillance.” Author Paul Konovalov noted that Title III was Congress’s attempt to regulate police investigatory techniques after the Supreme Court’s decision in *Katz*, which “rejected for the first time the idea that there must be a physical trespass to trigger the protection of the Fourth Amendment.”

The Supreme Court in *Dalia v. United States* held that the “Fourth Amendment does not prohibit per se a covert entry performed for the purpose of installing otherwise legal electronic bugging equipment.” The *Dalia* Court further stated, “this Court has

46 These examples are meant only to give a sample of the possible exceptions to the Rule 41 requirements.
47 See *Harris v. United States*, 390 U.S. 234, 236 (1968) (holding that officers who lawfully entered a premises had a right to seize an object in plain view); see also *Texas v. Brown*, 460 U.S. 730, 738-739 (1983) (stating that the theory of the “plain view” exception is “better understood . . . not as an independent ‘exception’ to the Warrant Clause, but simply as an extension of whatever the prior justification for an officer’s ‘access to an object’ may be”).
48 The author recognizes this brief discussion fails to address numerous search warrant exceptions and nuances, however, in the interest of maintaining the focus of the article, these issues purposely are not included.
51 Id.
never held that a federal officer may without warrant . . . [break] into a man’s office or home, . . . and relate at the man’s subsequent criminal trial what was seen or heard.”53 The Court concluded that covert entries are constitutional if they are made with a warrant, and it found “no basis for a constitutional rule proscribing all covert entries.”54 The Court’s decision in Dalia, that covert entries are not per se prohibited, has been relied on in subsequent cases authorizing surreptitious search warrants.55

Under Title III, federal officials “may authorize an application to a federal judge for an order allowing wiretapping or electronic eavesdropping to discover evidence of specific federal crimes.”56 Before an order is granted, the judge must determine whether the applicants have tried to use normal investigative procedures.57 Additionally, Title III requires that the electronic surveillance “warrant not allow the period of interception to be ‘longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days.’”58 The target of the wiretap or intercept must be given notice “within a reasonable time but not later than ninety days after . . . the termination of the period of an order or extensions thereof.”59 As is discussed later, courts should apply the ninety-day notice requirement by analogy to the surreptitious search warrant context.

C. Development of Surreptitious Searches, Pre-Patriot Act60

Surreptitious search warrants are a relatively recent development in the legal community, dating back only to the early ’80s.61 During this time, “the FBI and the DEA . . . embarked upon a widespread series of [court-authorized] covert entries in a variety of criminal investigations,” and by 1984, had persuaded federal judges and federal magistrates to issue at least 35 surreptitious

53 Id. at 247 (emphasis added). It is important to recognize the premise that all surreptitious searches and covert entries must be supported by a valid search warrant, even if that warrant does not provide for notice of the search.
54 Id.
55 See United States v. Villegas, 899 F.2d 1324 (2d Cir. 1990); United States v. Simons, 206 F.3d 392, 397 (4th Cir. 2000).
56 Konovalov, supra note 22, at 465.
58 United States v. Villegas, 899 F.2d at 1337 (quotating 18 U.S.C. § 2518(5)).
60 Except where noted, the basic definitions and generalities about surreptitious search warrants apply to both pre- and post-Patriot Act.
search warrants. A surreptitious search, also known as a sneak-and-peak search, or a covert-entry search, “is generally understood as a search of property without the consent or knowledge of the owners or occupants of the property.” These warrants “allow agents to conduct searches secretly (whether physically or virtually), to observe or copy evidence, and to depart the location searched, generally without taking any tangible evidence or leaving notice of their presence.” Officers executing a surreptitious search warrant usually take photographs inside the premises searched.

As briefly discussed earlier, both conventional and surreptitious searches must be supported by a valid warrant, meaning a warrant that is issued by a neutral and detached magistrate or judge upon a showing of probable cause, and that lists and limits the scope of the search. However, surreptitious search warrants exhibit at least one key difference. Surreptitious search warrants “do not contemplate a seizure of [tangible] evidence.”

The basic purposes of surreptitious search warrants are secrecy and stealth. FBI Supervisory Special Agent Kevin Corr noted in an article that surreptitious search warrants enable officers to maintain secrecy during an investigation, while allowing non-consensual, court-authorized entry and searches. Corr further stated that in a search that does not disturb the premises, an occupant may not even realize that law enforcement agents have entered until it is too late to curtail the criminal activity. Until recently, drug investigations were the most common instances in which this covert-entry technique had been employed.

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63 Konovalov, supra note 22, at 442-443.
64 ACLU v. United States Dep’t of Justice, 265 F. Supp. 2d 20, 24 (D. D.C. 2003). As background information in this Freedom of Information Act case, the U.S. District Court for the District of Columbia discussed changes in the law due to the Patriot Act, including a discussion of surreptitious search warrants.
65 Wilkes, supra note 62.
66 Konovalov, supra note 22, at 444.; see also, Fed. R. Crim. P. 41 (b)(1), (d)(1), (e)(2).
67 Id. at 443. It has been argued that taking pictures constitutes a seizure of evidence; courts have interpreted the no seizure of evidence provision to mean no seizure of physical evidence. As discussed in Freitas I, taking photographs is considered seizure of intangible evidence, which is permitted.
68 Corr, supra note 61, at 1103.
69 Id.
70 Id.
Surreptitious searches hold an obvious allure for law enforcement officials. Before the Patriot Act amendments to Rule 41, which granted express statutory authority for surreptitious search warrants, courts sought to develop guidelines for these warrants' issuance and use, “[b]ecause the sneak and peak technique is literally sneaky.”71 These limitations reflected courts’ concerns that covert entry warrants are inherently unfair and violate Fourth Amendment constitutional protections. Common law rules regarding surreptitious search warrants “developed piecemeal, case by case and circuit by circuit.”72 The U.S. District Court for the District of Columbia noted, “[b]efore the enactment of the Patriot Act, a court’s ability to approve a sneak-and-peak warrant . . . was not entirely settled.”73 As author Konovalov observed before the Patriot Act was enacted, “[b]ecause the text of the Fourth Amendment reveals little about the constitutionality of surreptitious search warrants, courts have focused on applying the Unreasonable Search and Seizure Clause [of the Fourth Amendment] to the surreptitious search context in an attempt to devise standards for the execution of surreptitious warrants and post-search notice.”74

The same principal issue faces courts today as it did before the Patriot Act: How much notice must be given to the target of a surreptitious search to constitute reasonable notice? Two circuits, the Ninth Circuit Court of Appeals and the Second Circuit Court of Appeals addressed this question, pre-Patriot Act. Both circuits relied on different analyses and reached different conclusions regarding the notice requirement. Then in 2000, the Fourth Circuit ruled on a similar case involving a quasi-surreptitious search warrant, applying the rule of the Second Circuit.75

When cases involving surreptitious search warrants arise, it appears likely that the courts will turn to the existing case law of the Ninth, Second, and Fourth Circuits for guidance in interpreting surreptitious search questions in the Patriot Act context. Therefore, before examining the changes the Patriot Act wrought in the area of surreptitious searches and covert-entry warrants, it is appropriate to fully examine the decisions of the seminal cases on the subject in those three circuits.

71 Id.
72 Id. at 1104.
73 ACLU v. United States Dep’t of Justice, 265 F. Supp. 2d at 24.
74 Konovalov, supra note 22, at 443-444.
III. The Approaches of the Ninth, Second, and Fourth Circuit Courts of Appeals

A. U.S. Court of Appeals for the Ninth Circuit

(1) United States v. Freitas

United States v. Freitas76 (hereinafter “Freitas I”) is the first reported case involving the use of a surreptitious search warrant.77 Defendants Raymond Freitas and Johnny McClellan were charged with manufacturing methamphetamine and conspiracy to manufacture methamphetamine.78 The police investigation that ultimately led to the charges against them began in late July 1984.79 An anonymous informant called the DEA and notified the agency that Freitas was running a methamphetamine laboratory in the basement of his home in Clearlake, California.80 After approximately five months of dialogue with the anonymous informant and the DEA’s surveillance and investigation of Freitas, DEA Special Agent Stephen Wood applied to a magistrate for eight search warrants on December 12, 1984.81 The next day, DEA Special Agent Laura Hayes applied for an additional search warrant—the so-called “surreptitious entry” warrant— for the defendant’s Clearlake, California house.82 “Under the terms of the warrant, the agents were permitted to enter the home while no one else was there, look around, and leave without removing anything.”83 Special Agent Hayes justified her request to the magistrate for the surreptitious search warrant because she believed, “the defendants were in the middle of what would be an ongoing drug operation and that a surreptitious entry would help the DEA ‘determine the status of the suspected clandestine methamphetamine laboratory.’”84 The magistrate who granted the search warrant used a conventional warrant form, written to comply with Rule 41, but deleted the description of the property to be seized, and “the requirement that copies of the warrant and an inventory of the property taken . . . be left at the residence.”85 Therefore, the warrant did not contain a

76 800 F.2d 1451 (9th Cir. 1986).
77 Konovalov, supra note 22, at 444.
78 Freitas, 800 F.2d at 1453.
79 Id.
80 Id.
81 Id. at 1452-53.
82 Id. at 1453.
83 Id.
84 Id.
85 Id.
notice requirement. On December 13, DEA agents executed a conventional search warrant based on evidence gathered under the surreptitious search warrant. On December 17, a day after the eight initial conventional search warrants had expired, the government applied for an extension (until December 26, 1984). The magistrate issued the extension, and on December 20, agents seized various evidence and arrested the defendants at the Clearlake house.

The U.S. District Court for the Northern District of California held a suppression hearing to determine, in part, “whether the surreptitious entry (and the information gleaned from that entry) impermissibly tainted the December 17 [conventional] warrant.” Although the court stated that surreptitious search warrants are neither valid nor invalid under Rule 41 or the Fourth Amendment, the court held that “the agents’ reliance on the surreptitious entry warrant was objectively unreasonable within the meaning” of the United States v. Leon good-faith exception to the exclusionary rule.

The Ninth Circuit scrutinized the district court’s decision. It agreed with the district court’s finding that there was a search as defined by Rule 41, and that the search’s purpose “was ‘to seize’ intangible, not tangible, property.” The intangible property “to be seized” the court refers to is the “information regarding the status of the suspected clandestine methamphetamine laboratory.” The court also agreed with the district court that “the search was authorized by a warrant supported by what the district court concluded was probable cause.”

The court next turned to the question of “whether a warrant lacking both a description of the property to be seized and a notice
requirement conforms to Rule 41.95 The court stated that the critical question pertained to when notice should be given to the defendants.96 The court noted, “although Freitas did not receive notice contemporaneous with the search, he and other defendants did receive notice within seven days of the search.”97 However, the court declined to hold, under the facts of this case, that the warrant conformed to the procedures of obtaining and executing a search warrant under Rule 41(d).98 The court stated, “the adjustments to Rule 41 necessary to regulate surreptitious entries can be better accomplished by the rule makers and Congress than by the case-by-case work of courts . . . .”99

The court next examined the district court’s decision under the Fourth Amendment. In beginning its analysis, the Court of Appeals noted that failing to comply with Rule 41(d) did not automatically require the suppression of evidence.100 If the court determined that officers executing the warrant did not deliberately violate a portion of Rule 41(d), and the search did not violate the Fourth Amendment, the search could be justified.101

The court stated that the absence of a specific notice requirement in the warrant was particularly troubling. “While it is clear that the Fourth Amendment does not prohibit all surreptitious entries, it is also clear that the absence of any notice requirement in the warrant casts strong doubt on its constitutional adequacy.”102 The court further stated, “surreptitious searches and seizures of intangibles strike at the very heart of the interests protected by the Fourth Amendment,” and therefore, “surreptitious entries [should] be closely circumscribed.”103 The court, however, did not strictly prohibit surreptitious searches. It held that the warrant in this case was “constitutionally defective in failing to provide explicitly for notice within a reasonable, but short, time subsequent to the surreptitious entry.”104 The court stated that the time for notice “should not exceed seven days except upon a strong showing of necessity.”105

The court further held, “the district court erred in holding

95 Id.
96 Id.
97 Id.
98 Id. at 1456.
99 Id. at 1455.
100 Id. at 1456.
101 Id.
102 Id.
103 Id.
104 Id.
105 Id. (emphasis added).
that on the basis of the actual and assumed facts the agents were not entitled to assert that their reliance on the warrant was objectively reasonable."\textsuperscript{106} The Court of Appeals remanded the case back to the district court to hold another suppression hearing consistent with the ruling that the DEA agents’ actions in executing the search warrant were done in good faith. On remand, the district court held that the surreptitious entry was illegally authorized.\textsuperscript{107} The district court also had no difficulty concluding that the surreptitious search of the Clearlake house violated the Fourth Amendment.\textsuperscript{108}

(2) Subsequent Ninth Circuit Cases After Freitas I

The Ninth Circuit has continued to adhere to the rule of Freitas I in surreptitious search warrant cases. In \textit{United States v. Freitas II} (hereinafter “Freitas II”), the Court of Appeals heard the government’s second appeal of the results of the suppression hearing from the district court.\textsuperscript{109} According to Konovalov, the court “concluded from its independent review of the factual record that there was a sufficient basis to believe that the agents’ behavior was objectively reasonable in executing the surreptitious search warrant.”\textsuperscript{110} The court held that the \textit{Leon} “‘good faith’ exception to the exclusionary rule applied, and that the evidence from the searches was admissible.”\textsuperscript{111}

In \textit{United States v. Johns} (hereinafter “Johns I”), the government appealed the ruling of the U.S. District Court for the Eastern District of California.\textsuperscript{112} The district court held that the “sneak-and-peak” warrant authorizing agents to enter a storage unit and examine its contents, then leave without disturbing the contents or notifying the unit’s owner, violated both the Fourth Amendment and the notice requirement of Rule 41(d).\textsuperscript{113} The Court of Appeals stated that the warrant in the present case was indistinguishable from the warrant in Freitas I, and the district court incorrectly concluded that “the warrant in question did not violate either the Fourth Amendment or Rule 41(d).”\textsuperscript{114} Author Konovalov noted,

\begin{flushright}
\textsuperscript{106} \textit{Id.} at 1457.


\textsuperscript{108} \textit{Id.} at 1571.

\textsuperscript{109} \textit{United States v. Freitas (Freitas II)}, 856 F.2d 1425 (9th Cir. 1988).

\textsuperscript{110} Konovalov, supra note 22, at 447-48.

\textsuperscript{111} \textit{Id.} at 448.

\textsuperscript{112} 851 F.2d 1131 (9th Cir. 1988).

\textsuperscript{113} \textit{Id.}

\textsuperscript{114} \textit{Id.} at 1135.
\end{flushright}
“[s]pecifically, the court observed that the warrant in Johns failed to provide for any post-search notice, and thus was presumptively violative of the Fourth Amendment absent a showing that the officers who executed the warrant acted in good faith in relying on the warrant.”115 The court remanded the case for further hearings to determine if Leon applied.

On remand, the district court held that the warrant was relied on in good faith.116 This brought another appeal to the Court of Appeals, this time by the defendant. In United States v. Johns II (hereinafter “Johns II”), the court, consistent with its holding in Freitas I, held that a “warrant not providing for notice of a search is inconsistent with Rule 41(d).”117 The court then explained, “the failure to give notice in Johns II was a ‘nonfundamental’ violation of Rule 41 that did not require automatic suppression of the evidence (as would a ‘fundamental’ or constitutional violation) because the agents had acted in ‘good faith’ in relying on the warrant.”118 Finally, the court noted that after its holding in this case, the Freitas I rule of a seven-day notice requirement would be binding, and law enforcement would not be able to, in good faith, claim ignorance of the notice standard.119

(3) Rule of the Ninth Circuit

Based on the analysis of the Ninth Circuit case law, it appears that the Court of Appeals approves of surreptitious searches in limited situations, even though before the Patriot Act, surreptitious searches had no specific statutory authority. The Ninth Circuit cases indicate that in compliance with Rule 41(d), notice must be given within a reasonable period of time after the search. The Freitas I decision defines reasonable notice as being up to seven days after the execution of a surreptitious warrant.120

B. U.S. Court of Appeals for the Second Circuit

(1) United States v. Villegas

In United States v. Villegas, eleven defendants appealed their convictions for cocaine manufacturing and possession and conspir-
acy to manufacture and distribute cocaine.\textsuperscript{121} The defendants raised several arguments in their appeal, chief of which was that “their [Fourth Amendment] rights were violated by the delay in receiving notice of the May 13 [surreptitious] search.”\textsuperscript{122} Therefore, they argued, the search was not valid, and thus all evidence seized pursuant to that warrant should be suppressed.

The surreptitious search warrant was granted based on the investigation of a suspected cocaine manufacturing operation, described as being on “a 377-acre dairy farm on Johnnycake Road in Herkimer County.”\textsuperscript{123} Defendant Villegas purchased the farm in 1986.\textsuperscript{124} The DEA began its investigation based on an April 1987 tip by a confidential informant about the “cocaine factory.”\textsuperscript{125} The DEA agents performed additional investigation to ensure the veracity of the confidential informant’s statements, and after determining that the information was reliable, applied for a surreptitious warrant on May 12, 1987, to search the Johnnycake farm premises.\textsuperscript{126}

The affidavit accompanying the application for the search warrant contained information that the confidential informant had provided to the agents, as well as “that covert physical surveillance of the premises was difficult by reason of the farm’s remote location, . . . that there was no informant who could infiltrate the operation, and that numerous coconspirators remained to be identified.”\textsuperscript{127} The agents’ affidavit stated that they “did not wish to seize the evidence believed to be on the premises.”\textsuperscript{128} Instead, they wanted authorization to search “in order to ‘take photographs but not physically to seize any tangible items of evidence at this time.’”\textsuperscript{129} Additionally, the agents requested permission to postpone giving Villegas notice of the search for seven days, or for even a longer period.\textsuperscript{130}

The district judge granted the warrant request on May 12, 1987, and the DEA agents executed it on May 13 by entering the Johnnycake residence that night.\textsuperscript{131} They did not seize anything.

\textsuperscript{121} United States v. Villegas, 899 F.2d 1324, 1332 (2d Cir. 1990).
\textsuperscript{122} Id.
\textsuperscript{123} Id.
\textsuperscript{124} Id. at 1329.
\textsuperscript{125} Id.
\textsuperscript{126} Id. at 1330.
\textsuperscript{127} Id.
\textsuperscript{128} Id.
\textsuperscript{129} Id.
\textsuperscript{130} Id.
\textsuperscript{131} Id.
but they took photographs of various parts of the house and garage, and their contents. 132 The agents did not leave a copy of the warrant or provide any other type of notice, “and thereafter they repeatedly sought extensions, eight in all, to allow them to continue the investigation without alerting the targets.” 133 The extensions, each supported by a new affidavit detailing the progress of the investigation and the need for an extension, “were granted, authorizing delay of service of notice through July 15.” 134

Based upon the surreptitious warrant issued on May 12, and executed May 13, agents obtained a conventional search warrant on July 14. 135 The warrant was executed the same day, resulting in the arrests of the eleven defendants and the seizure of evidence related to the possession, making, and distribution of cocaine. 136 The defendants were subsequently convicted and received sentences ranging from ten to twenty-five years in prison. 137

The Second Circuit Court of Appeals rejected Villegas’ claim “that the May 12 warrant was unlawful under both [Rule 41] and the Fourth Amendment . . . because it authorized a search without a seizure of tangible property and authorized a covert-entry without contemporaneous notice.” 138 The court dealt with the defendant’s Rule 41 challenge first.

The court stated, “[g]iven the Fourth Amendment’s warrant requirements, and assuming no statutory authority prohibition, the courts must be deemed to have inherent power to issue a warrant when the requirements of that Amendment are met.” 139 The court then discussed the Supreme Court’s decision in United States v. New York Telephone Company, a case dealing with a warrant application for pen registers, giving agents the capability to track the numbers dialed in the phone’s keypad. 140 In New York Telephone Company, the Supreme Court held, “Rule 41 is not limited to tangible items but is sufficiently flexible to include within its scope electronic intrusions authorized upon a finding of probable cause.” 141 The Second Circuit held that based on the Supreme Court’s holding in New York Telephone Company, and other cases, including Freitas I, the

132 Id. at 1331.
133 Id.
134 Id.
135 Id.
136 Id.
137 Id. at 1329.
138 Id.
139 Id.
141 Id. at 169.
seizure of intangible items, including pictures, by the DEA was lawful.

The court next addressed Villegas’ claim that “the July 14 warrant should have been suppressed because the May 13 search was initiated by means of covert entry . . . or because notice of entry and search was not given to him until after his arrest on July 14.”  

The court began its analysis by stating, “we believe that certain safeguards are required where the entry is to be covert and only intangible evidence is to be seized.”  

The court felt strongly that “there must be some safeguard to minimize the possibility the officers will exceed the bounds of propriety without detection.” Ultimately, the court concluded that the requisite safeguards were imposed in this case.

The court discussed how certain types of searches or surveillances depend on covert entry or “premature absence of disclosure.”  

Citing Katz and Dalia, the court stated, “neither Rule 41 nor the Fourth Amendment prohibits covert entry.” The court continued by conducting an analysis of the various procedural safeguards afforded targets of search warrants under the rules governing conventional search warrants (primarily Rule 41), and Title III governing electronic surveillance. Based on this analysis, the Second Circuit developed two limitations on the issuance of warrants for covert-entry searches for intangibles.

The Second Circuit, borrowing from Title III, said, “[f]irst, the court should not allow the officers to dispense with advance or contemporaneous notice of the search unless they have made a showing of reasonable necessity for the delay.” The court continued that although the standard for surreptitious searches would not be as rigorous as that imposed by Title III, “the officers must at least satisfy the issuing authority that there is good reason for delay.”

If a delay is granted by the court, the “court should nonetheless require the officers to give the appropriate person notice of

142 Villegas, 899 F.2d at 1336.
143 Id.
144 Id.
145 Id.
146 Id.
148 See id. at 1337.
149 Id.
150 Id.
151 Id.
the search within a reasonable time after the covert entry.” 152 Reasonable delay is based on “the circumstances of each individual case.” 153 Relying on Freitas I, the court further stated that the issuing court should not authorize a notice delay longer than seven days. 154 However, the court disagreed with Freitas I to the extent that it decided to allow subsequent “good cause” delays after the initial seven-day delay expired. 155 The Second Circuit in Villegas held that the applicant requesting the delay could not rely solely on the grounds for the first delay, but must make a new showing of the need for further delay. 156 The court said, “If these limitations on the withholding of notice are followed . . . we believe the interests of both the individual and the government will be adequately served.” 157

(2) United States v. Pangburn

The Second Circuit decided United States v. Pangburn 158 three years after its Villegas decision. The case stems from three search warrants issued in California to California Bureau of Narcotics agents working in conjunction with DEA agents from Rochester, New York. 159 Two of the warrants were covert-entry warrants for the search of a locker owned by Frank J. Salcido for evidence of a large methamphetamine operation. 160 The third was a conventional warrant supported by evidence and information garnered under the two surreptitious searches. 161 The two covert-entry warrants did not authorize the seizure of any tangible items of evidence, nor did the agents leave notice of their searches. 162 Execution of the third warrant led to the seizure of materials used to make methamphetamine, as well as several firearms: “[t]he items seized, along with other evidence, formed the basis for a 78 count superceding indictment in the Western District of New York charging Salcido and seven co-defendants with various crimes relating to methamphetamine precursor trafficking.” 163

152 Id.
153 Id.
154 Id.
155 Id.
156 Id.
157 Id. at 1337-1338.
158 983 F.2d 449 (2d Cir. 1993).
159 Id. at 450.
160 Id. at 450-51.
161 Id. at 451-52.
162 Id. at 450, 451.
163 Id. at 452.
In a suppression hearing before a federal magistrate, Salcido challenged the validity of the search warrants.\textsuperscript{164} The magistrate judge ordered the evidence suppressed, and the district court accepted the magistrate’s recommendation.\textsuperscript{165} The government appealed to the Second Circuit.

The \textit{Pangburn} case modifies the \textit{Villegas} rule, holding that the seven-day notice requirement "is grounded in [Rule] 41 and is not compelled by the Constitution."\textsuperscript{166} Importantly, the court also stated, "[n]o provision specifically requiring notice of the execution of a search warrant is included in the Fourth Amendment."\textsuperscript{167} The court said it would not suppress evidence gained under a warrant without proper notice, unless there is a showing of intentional disregard of the notice requirement by the officers or a showing of prejudice to the defendant.\textsuperscript{168} As Konovalov states, "[t]hus the \textit{Pangburn} court not only rejected the \textit{Freitas} \textit{[I]} reasoning that notice is a constitutional requirement, but it also suggested that a warrant lacking a notice provision is presumptively valid absent a showing of intentional disregard for the notice requirement or prejudice to the owner or resident of the searched property."\textsuperscript{169}

\textbf{(3) Rule of the Second Circuit}

Since \textit{Pangburn} is the last reported case from the Circuit, it appears that its holding is still valid. The court in \textit{Pangburn} departed from established surreptitious search warrant case precedent and indicated that notice was not required by the Fourth Amendment.\textsuperscript{170} The court also held that notice was not required unless the agents executing the warrant intentionally disregarded the notice requirement, or there is a showing of prejudice to the defendant.\textsuperscript{171} In doing so, the court shifted sharply from \textit{Villegas}, and seemingly gave law enforcement greater latitude to use the evidence obtained from surreptitious search warrants.

\textbf{C. U.S. Court of Appeals for the Fourth Circuit}

\textbf{(1) United States v. Simons}

The most recently reported circuit court decision substantively
dealing with surreptitious searches is *United States v. Simons*.172 In *Simons*, the court held that a search team’s failure to leave a copy of the search warrant behind after searching the defendant’s computer did not render the search unreasonable under the Fourth Amendment, even though the search violated Rule 41.173

The case arose from Simons’ appeal of the district court’s ruling on his motion to suppress the evidence of pornographic pictures seized from the hard drive of his computer.174 Simons, an electronic engineer with a division of the CIA, signed an agreement consenting to random “electronic audits” of his computer to ensure that he was using it strictly for “official business.”175 During one of these audits, Simons’ supervisors were alerted to the pornographic images, including child pornography, found on Simons’ computer.176 Based on this evidence, Simons’ supervisors contacted the FBI.177 The FBI, in conjunction with the U.S. Attorney’s Office, worked together in preparing an application for a search warrant for Simons’ office and computer.178 The affidavit “also expressed a ‘need’ to conduct the search in secret.”179 The warrant was issued and executed on August 6, 1998.180 However, “the warrant mentioned neither permission for, nor prohibition of, secret execution.”181 The search team seized several computer files from Simon’s office by copying them, but did not leave an inventory list or a copy of the warrant with Simons personally, or at his office.182 In fact, he did not learn of the search until approximately 45 days later.183

In September, FBI agents applied for, and were granted a second search warrant based on evidence seized pursuant to the August “surreptitious” search warrant.184 The second search was executed in Simons’s presence.185 Simons was indicted for possession of child pornography, and he moved to suppress the evidence

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172 206 F.3d 392 (4th Cir. 2000).
173 *Id.* at 403.
174 *Id.*
175 *Id.* at 395.
176 *Id.* at 396.
177 *Id.*
178 *Id.*
179 *Id.* at 396-97.
180 *Id.*
181 *Id.*
182 *Id.*
183 *Id.*
184 *Id.*
185 *Id.* at 397.
gained from the two search warrants. The district court denied his motion, and he was subsequently convicted.

Simons appealed his conviction alleging violations of his Fourth Amendment rights. The Court of Appeals upheld the constitutionality of the earlier warrantless searches of Simons’ office, stating that he had no reasonable expectation of privacy in his computer because of the office policy of random computer audits. The court then focused on the August 1998 search warrant.

Simons’ principal argument was that the August 1998 search warrant violated the Fourth Amendment and Rule 41(d) because the search team did not leave a copy of the warrant or a receipt of the property taken. The court did not specifically classify the August 1998 warrant as a surreptitious warrant. The court noted, “there are two categories of Rule 41 violations: those involving constitutional violations, and all others.” The court continued that “[n]on-constitutional violations of Rule 41 warrant suppression only when the defendant is prejudiced by the violation, or when the defendant proves “intentional and deliberate disregard of a provision in the Rule” by the government.

The court concluded that the failure to give Simons notice “did not render the search unreasonable under the Fourth Amendment.” The court also cited Dalia, noting that the Fourth Amendment does not “proscribe covert entries, which necessarily involve a delay in notice.” The Fourth Circuit finally cited Pangburn, holding that because the warrant was issued by a neutral and detached magistrate, and was based on probable cause, “we perceive no basis for concluding that the 45-day delay in notice rendered the search unconstitutional.” However, as in the Second Circuit in Pangburn, the court then turned its analysis to whether there was a willful or deliberate violation of Rule 41 by the

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186 Id.
187 Id.
188 Id.
189 This is an obvious oversimplification of the Court’s reasoning and analysis. However, for the sake of brevity, and since it does not deal directly with the topic of the article, further discussion of these issues is omitted.
190 Id., 206 F.3d at 397.
191 Id. at 402.
192 Id. at 403 (citing United States v. Chaar, 137 F.3d 359, 362 (6th Cir. 1998)).
193 Id. (citing United States v. Smith, 914 F.2d 565, 568 (4th Cir. 1990)).
194 Id. (internal quotation marks omitted).
195 Id.
196 Id. (quoting Dalia v. United States, 441 U.S. 238, 247-48 (1979)).
197 Id. (citing United States v. Pangburn, 983 F.2d 449, 453-55 (2d Cir. 1993)).
agents. Ultimately, the court remanded the case to the U.S. District Court for the Eastern District of Virginia for determination of this question.

On remand, the district court in United States v. Simons held there was no evidence that the defendant was prejudiced by the Rule 41(d) violation. In its decision, the court did not refer to the warrant in the surreptitious warrant context. Instead, the court analyzed the warrant in terms of a conventional search warrant. It stated, “the violation occurred after-the-fact: the search was proper up and until the Government agents exited Defendant’s office without providing some sort of notice.”

(2) Rule of the Fourth Circuit

Although the case does not explicitly state this, it appears that the Fourth Circuit applied the Pangburn rule to the Simons case. The Simons case was not a traditional surreptitious search case. However, the court’s treatment of the facts, and the references to the government affidavits and documents referring to the August 1998 search as “surreptitious” or “covert” seem to indicate that the court felt that the search was at least quasi-surreptitious. As such, the court applied parts of conventional Rule 41 analysis to judge the sufficiency of the warrant itself (i.e., the neutral and detached magistrate standard, supported by probable cause, etc.), while applying Pangburn’s logic to the lack of notice provided to Simons (i.e., no specific notice requirement found in the Fourth Amendment, and if no intentional disregard of Rule 41 or prejudice to defendant, no suppression of evidence).

IV. Section 213 of the Patriot Act, Amending 18 U.S.C. § 3103a: Authority for Delaying Notice of the Execution of a Warrant

A. Effect of § 213 Amendments on Rule 41

Patriot Act § 213, codified at 18 U.S.C. § 3103a(b), “contains the first express statutory authorization for the issuance of sneak and peak search warrants in American history.” Section 213 is only a small portion of the immense Patriot Act, and, until recently, has seemingly escaped much media scrutiny. Critics of § 213 contend that § 213 will cause the use of surreptitious search war-

198 Id. at 403.
200 Id. at 706.
201 Wilkes, supra note 62.
rants to become the rule rather than the exception in federal court. However, the benefit to law enforcement by the specific authorization of surreptitious searches is unquestioned. As will be discussed below, if properly limited, surreptitious search warrants can be a useful crime-prevention tool.

(1) Congressional Amendment of Rule 41

Section 3103 of Title 18 of the U.S. Code provides statutory authorization for the issuance of federal criminal search warrants. In its text, § 3103 refers users to Rule 41 of the Federal Rules of Criminal Procedure. Thus, Rule 41, as authorized by Congress, controls the issuance of federal criminal search warrants. In April 2002, approximately six months after the Patriot Act became law, Congress amended Rule 41. It added the following language under Rule 41(a) “Scope and Definitions: This rule does not modify any statute regulating search or seizure, or the issuance and execution of a search warrant in special circumstances.” This amendment, which became effective in December 2002, means § 213, and its authorization of surreptitious search warrants, prevails if it conflicts with Rule 41.

(2) Congressional Amendment of 18 U.S.C. § 3103a

Section 3103a of Title 18 of the U.S. Code supplements Rule 41, and authorizes additional grounds for issuing federal criminal search warrants. As stated above, if there is any conflict between Rule 41 and § 3103a (as amended by § 213), § 3103a prevails. Congress originally enacted § 3103a in 1968 and did not amend it until 2001 with § 213 of the Patriot Act.

Section 213 substantially amends § 3103a by adding a “Delay” provision after the statute’s statement of purpose. The “Delay”
provision in subsection (b) permits the delay of notice if certain extenuating circumstances or conditions exist.

The statute lists three instances in which it is proper for law enforcement to delay notice of a search. First, delay may be valid if “the court finds reasonable cause to believe that providing immediate notification of the execution of the warrant may have an adverse result [as defined in 18 U.S.C. § 2705].”205 “Adverse result” is defined as “endangering the life or physical safety of an individual, flight from prosecution, destruction or tampering with evidence, intimidation of potential witness, or otherwise seriously jeopardizing an investigation or unduly delaying a trial.”206

Next, the amended § 3103a(b)(2)207 states that federal judges may delay notice if “the warrant prohibits seizure of any tangible property, any wire or electronic communication, . . . any stored wire or electronic information, except where the court finds reasonable necessity for the seizure.”208 Finally, subsection (b)(3) of § 3101a authorizes delay if “the warrant provides for the giving of such notice within a reasonable period of its execution, which period may thereafter be extended by the court for good cause shown.”209

(3) What Do the Changes Mean?

The changes to § 3103a give specific statutory authority for surreptitious search warrants. The drafters of § 213 clearly modeled the statute after the existing surreptitious search warrant case law, particularly Villegas. The “reasonable cause” requirement for delaying notice of the search tracks the “good reason” language of Villegas (i.e., that the government must provide a good reason

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205 Id.
208 USA Patriot Act § 213, 115 Stat. at 286.
209 Id.; 18 U.S.C. § 3103a(b)(3).
for delayed notice of warrants). However, the statute provides no definition of “reasonable cause,” or “good cause” to guide judges who issue search warrants.

Presumably, courts will turn to the Second Circuit’s decision in Villegas when confronted with the issue of “reasonable cause” for delay of notice. As previously discussed, the Villegas court held that the facts of that case provided “ample ground for the initial delay.” The court’s additional seven-day extensions of the original delay based on law enforcement agents’ affidavits updating the progress of the case, and explaining the need for additional delays, showed good cause for the further delay. As these affidavits provided a substantial basis for the court to conclude that the further delay of notice would lead to evidence of wrongdoing, the court granted the authorization.

Section 3103a(b)(2) specifically prohibits the seizure of any tangible physical property. This provision is consistent with both Freitas I and the Villegas. It is likely that future courts will turn to these cases for guidance. However, the “reasonable necessity” provision dealing with the seizure of evidence leaves open the question of what constitutes “reasonable necessity.” One might assume that the “reasonable necessity” of the seizure of evidence would involve situations in which law enforcement personnel find and seize a bomb, or discover evidence of chemical or biological weapons while executing a covert-entry search warrant. In a sense, the seizure would be akin to a plain view seizure. The seizure of these items would almost certainly be justified.

However, it remains an open question whether officers may seize an item of evidence based on “reasonable necessity,” and subsequently replace the item with a dummy or a copy. For example, could law enforcement officers seize a live bomb and replace it with an identical dummy bomb, so as not to alert the targets about the surreptitious search? There is no specific prohibition in § 3103a(b)(2). The only guidance is the court’s definition of “reasonable necessity for the seizure.”

Finally, § 3103a(b)(3) provides that notice of a surreptitious search must be given within a “reasonable period” after execution. Again, the drafters of the statute provide no guidance for the
meaning of “reasonable period.” It is safe to assume that courts will apply the existing case law on surreptitious searches, as well as apply other reasonable notice provisions by analogy.

Since the Supreme Court has not spoken definitively on the issue, courts are free to apply any one of several competing standards. Based on the § 213 drafters’ use of Villegas language in the amendments, a good place to begin the analysis is with the Second Circuit’s decision. The Second Circuit held that “what constitutes reasonable time will depend on the circumstances in each case.”

The Villegas court agreed with the Freitas I decision in that “the issuing court should not authorize a notice delay of longer than seven days.” However, the Second Circuit in Villegas departed from the Ninth Circuit’s analysis, and held “[f]or good cause, the issuing court may thereafter extend the period of delay. Such extensions should not be granted solely on the basis of grounds presented for the first delay; rather the applicant should be required to make a fresh showing of the need for further delay.”

Extensions of delaying notice of covert warrants have been delayed by up to two months and still found valid by courts. Courts could also conceivably apply Title III Electronic Surveillance statutes by analogy to “reasonable period” analysis. Section 2518(8)(d) of Title 18 of the U.S. Code, covering procedures for intercepting wire, oral, or electronic communications, provides for a notice delay “within a reasonable time but not later than ninety days after filing” for an application for surveillance. It appears that this question will be one of the key issues in the first round of Patriot Act surreptitious search warrant litigation.

V. Analysis of and Suggestions for Improving § 3103a(b) Amendments

A. Constitutionality of Surreptitious Search Warrants

Federal court decisions leave little doubt that surreptitious searches and covert entries are constitutionally permitted. The Supreme Court’s decision in Dalia that “[t]he Fourth Amendment does not prohibit per se a covert entry performed [pursuant to a valid search warrant],” enforced this premise. Subsequent deci-

\[\text{\footnotesize References:}\]
\[214 \text{ Id.}\]
\[215 \text{ Id.}\]
\[216 \text{ Id.}\]
\[217 \text{ See generally, id.}\]
\[219 \text{ Dalia v. United States, 441 U.S. 238, 248 (1979).}\]
sions by the Second, Fourth, and Ninth Circuits further entrenched this principle. However, questions of the constitutionality of the notice provisions persist.

Based on the existing case law, it appears that the delayed notice provisions found in the § 213 Amendments to § 3103a are constitutional. There is no explicit notice provision in the Fourth Amendment. Professor Wayne LaFave noted that by the early 1800s, “American courts began speaking of the necessity of giving notice in the execution of a search warrant.”220 He continued, “[t]his became the generally accepted common law rule in this country, subject to only limited exceptions,” such as destruction of evidence or danger to persons.221 As previously noted, federal courts followed in 1944 with the adoption of the Federal Rules of Criminal Procedure.

As previously discussed, the language of Rule 41 does specifically include a notice provision.222 Author Konovalov asserted, “while notice may be considered as a factor contributing to the reasonableness of a particular search, notice is not constitutionally required.”223 The recent decision of Simons seems to buttress this argument. The Fourth Circuit writing in Simons, and quoting the Supreme Court’s Dalia decision, stated, “[t]he Fourth Amendment does not mention notice, and the Supreme Court has stated the Constitution does not categorically proscribe covert entries, which necessarily involve a delay in notice.”224

The Supreme Court decision in Wilson v. Arkansas,225 further clouds the area. The Court held that the “knock and announce” notice principle forms part of the reasonableness inquiry under the Fourth Amendment.226 However, as Professor Wayne LaFave noted, “Wilson does not even say that any violation of . . . [a] notice rule is . . . unreasonable under the Fourth Amendment.”227 He noted that the “rule is itself not an inflexible rule requiring announcement [or notice] under all circumstances.”228

Professor LaFave’s concession explains the Supreme Court’s

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221 Id.
223 Konovalov, supra note 22, at 461.
226 Id. at 929.
227 LaFave, supra note 220, at 600-01.
228 Id.
treatment of Title III electronic surveillance cases. LaFave continues:

It is not entirely clear whether Title III is somewhat vulnerable on [the basis of delaying or failing to provide notice contemporaneously with electronic surveillance.] However, the lower courts have consistently rejected constitutional challenges to the legislation on such grounds. . . . It appears that the Supreme Court finds these arguments compelling.229

This area of Fourth Amendment jurisprudence remains murky. Even though the framers of the Bill of Rights did not specifically include a notice provision in the Fourth Amendment, it appears that some type of notice is generally required for the execution of a criminal search warrant.230 In compliance with this principle, Rule 41 implicitly, and § 3103a explicitly, provide for some form of notice to be given to the target of a search. The questions remain when exactly notice must be given, and how long the government may delay giving notice.

Until the Supreme Court directly rules on whether the Fourth Amendment requires a specific type of notice provision, or a definitive standard of exactly when notice must be given, or how long notice can be delayed, the implied notice provisions in Rule 41 and the statutorily mandated provisions in § 3103a are presumably constitutional. Thus, it is left to the interpretation and discretion of the lower courts to determine what constitutes notice and what procedures provide reasonable notice.

B. Criticisms of § 213 Amendments to § 3103a231

When asked by an interviewer about the worst aspects of the Justice Department’s response to the September 11th attacks, ACLU chairman Anthony Romero responded:

229 WAYNE LAFAVE & JEROld H. ISRAEL, CRIMINAL PROCEDURE, § 4.2(c), at 264 (3d ed. 2000).

230 See ACLU v. United States Dep’t of Justice, 265 F. Supp. 2d 20, 24, n.5 (D.D.C. 2003) (suggesting that “when law enforcement agents seize property pursuant to a warrant, due process requires them to take reasonable steps to give notice that the property has been taken so the owner can pursue available remedies for its return.”) (internal quotation marks omitted).

231 This section attempts to state potential criticisms of § 213 amendments to § 3103a. The author mixes his personal criticisms with the criticisms of legal commentators who have spoken on the subject. Surprisingly, there is not a great deal of criticism specifically about § 213. This may be because other sections of the Patriot Act, like the Act’s amendments to FISA, have overshadowed § 213’s potential impact. Because there are only a few specific criticism of § 213, general criticisms of the Patriot Act, as well as hypotheses about what critics could potentially say about § 213’s amendments have been applied.
[T]he new authority [Attorney General Ashcroft] has sought and secured grants him secret powers, like sneak-and-peak searches. These are the things that really cut at the heart of a government of the people, by the people, and for the people. The more he tries to hide and say, “Trust us, we’re the government,” the more we need to be worried.232

Romero’s quote encapsulates the feelings of some Americans who fear the Justice Department and Attorney General Ashcroft’s Patriot Act legislation expand the government’s powers too greatly. One concern is that § 213 is not subject to repeal by the Act’s sunset provision, unlike other provisions of the act.233 Some commentators fear that unlike other amendments in the Act that are allowed to expire after their usefulness lapses, § 213 and its amendments to § 3103a will remain, and will be expanded beyond the scope of its intended use.234

However, probably the area of greatest concern to critics of § 213 is the vague language of the amendment to § 3103a itself. Particularly troubling is the Act’s failure to state a specific definition of what constitutes reasonable notice. It could be argued that the “within a reasonable period of execution” language of the amendment and § 3103a(b)(3) is too broad and amorphous to be of any practical use. Therefore, without a specific date when lack of notice becomes unreasonable, courts are likely to misuse the “for good cause shown” extension for delaying notice, and expand or extend the amount of time law enforcement officials have until they must notify the targets of their search. Critics from the Georgia Defender organization assert, “the provision permitting the court to extend the period (one or more times) ‘for good cause shown,’ a standard easily met, makes it likely that such extensions will become routine and pro forma.”235

Additionally, there probably will be much criticism of the “adverse result” requirement of § 213 and § 3103a(b)(1). Critics could argue 18 U.S.C. § 2705(a)(2)’s definition of “adverse result,” including the phrase, “or otherwise seriously jeopardizing an investigation or unduly delaying a trial,” is vague and overbroad. A plausible argument could be made that this language is intentionally designed to give law enforcement officials as much flexibility as possible. The few critics who have spoken on this subject fear “re-

232 Kessenides, supra note 28, at 57.
233 Wilkes, supra note 62.
235 Wilkes, supra note 62.
strictions on issuing sneak and peak search warrants border on the meaningless,” and that the search warrants will be “issued on the basis of recurring . . . allegations, and that the judicial officials who issue them tend to be rubber stamps for law enforcement.”236 Recent statements by DOJ officials that the Justice Department has never been turned down by a court when requesting to delay notification buttress the claims of judicial rubber stamps.237

C. Suggestions for Improvement238

It is undisputed by proponents and critics of the § 213 amendments to § 3103a that these changes are a major enhancement of federal law enforcement capabilities. The changes allow federal officials greater ability to fight the War on Terror, as well as to fight crime in general. The amendments to § 3103a serve a noble purpose. However, § 213 is not without flaws. The § 213 amendments are vaguely worded and purposefully do not provide any bright line standards. This undoubtedly was done to give the government the greatest amount of flexibility in tailoring the application of the amended law to the largest number of factual situations. There may be utility for the government using § 213 and its amendments to § 3103a as currently worded and any bright line standard could weaken the government’s ability to effectively combat terrorism. However, adding some definitive guidelines to § 213 would strengthen its acceptance in the legal community as a legitimate tool, while not significantly weakening its practical usefulness by federal law enforcement in fighting certain types of crimes.

First, agents should follow enhanced procedural requirements when applying for a surreptitious search warrant, as compared to a conventional search warrant. The changes could be easily adapted from 18 U.S.C. § 2518, dealing with electronic surveillance warrants. Section 2518(1)(c) is particularly applicable to the surreptitious search context and could easily be adapted to fit surreptitious search warrants. Section 2518(1)(c) requires agents’ warrant applications to include, “a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to

236 Id.
238 This section identifies ways in which the Act’s amendments could be improved to make them more acceptable to the public at large, and possibly more widely recognized as a legitimate law enforcement tool within the legal community. However, even without the proposed changes, the author feels § 213 amendments are warranted and will be proven to be beneficial.
be too dangerous.”239 This change in requirements is appropriate because surreptitious search warrants, like electronic surveillances, are considered by some critics to be highly intrusive.240 These are extraordinary measures and should be treated accordingly. If adopted, the proposed change would help judges ensure that federal agents have exhausted every other means of traditional information gathering, or investigative techniques, before they issue a surreptitious search warrant.

Second, there should be a limit on how long officials could delay notice to the target of a surreptitious search. This change would be in the spirit of fairness, openness, and disclosure as embodied in the Fourth Amendment. Even critics of the § 3103a amendments recognize the usefulness of surreptitious search warrants and their value as investigatory tools.241 However, this change could potentially influence those who argue that § 213 is inherently unfair.

There is currently a pending bipartisan effort to reform the Patriot Act generally, and § 213 specifically.242 According to the National Law Journal, “[a] number of bills designed to rein in parts of the act have been introduced in both chambers [of Congress] in the past year.”243 The broadest of those bills is the so-called Safe Act (Security and Freedom Ensured Act) of 2004.244 Under the Safe Act, the current delayed notice provision for surreptitious search warrants would be altered. Specifically, “[t]he Safe Act would impose a seven-day, renewable time limit” for delaying notice from sneak-and-peak search warrants.245 This seven-day, renewable time limit is similar to the approaches of the Ninth Circuit in Freitas I and the Second Circuit in Villegas. However, the seven-day limit, even though it is renewable, is too restrictive.

The best compromise would be to adopt a notice standard much like 18 U.S.C. § 2518(8)(d) governing electronic surveil-

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240 See generally, Konovalov, supra note 22 (arguing convincingly that surreptitious searches are less intrusive than a regular search).
241 See Dean Schabner, Conservative Backlash: Provisions of “Patriot II” Draft Worry Those on Right, ABC News, at http://more.abcnews.go.com/section/us/2020/conservatives_patriot03012.html (Mar. 12, 2003) (“There’s no question the government has to have the tools to protect us from terror attacks and to prosecute those who harm us” (quoting American Conservative Union Executive Director Stephen Thayer)).
243 Id.
244 Id.
245 Id.
lance, which provides that notice must be given “[w]ithin a reason-
able time but not later than ninety days” after the filing of a request for
electronic surveillance or a wiretap.246 Similarly to § 3103a(b)(3), § 2518(8)(d) extensions for delay are based on a
showing of good cause by the government. If the § 2518(8)(d)
standard was adopted in the surreptitious search context, it would
protect the government’s need to conduct covert surveillance of
especially dangerous, or non-traditional criminal entities, while
protecting an individual’s constitutional right to privacy. The
ninety-day time frame seemingly would allow enough time for fed-
eral law enforcement to conduct a thorough investigation.

The standard of “good cause shown” for the extension of de-
laying notice should be strengthened as well. A mere showing of
good cause is not enough. This relatively weak standard gives
credence to critics’ claims that judges are merely rubber stamps for
federal officials. Instead, the law should require federal agents to
present a specific factual basis or show a real need for the
extension.

This was the holding of the Second Circuit in Villegas.247 The
Court of Appeals there required that agents could not rely solely
on the grounds for the first delay, “rather the applicant should be
required to make a fresh showing of the need for further delay.”248
“If these limitations on the withholding of notice are followed . . .
we believe the interests of both the individual and the government
will be adequately served.”249 For example, if a federal agent re-
quests a delay just for more time to observe a target, that would not
be enough. However, if the agent presented the judicial official
with an update on the progress of the investigation, and specific
evidence supporting a legitimate belief that more criminal activity
was going to happen in a relatively short time, that might be
enough to warrant a delay.

Further, the government should limit the number of times an
agent may request an extension. A limit of four, or even two,
ninety-day extensions, totaling either a year or six months, would
be beneficial. These limits would allow the government ample time
to conduct its surreptitious search and continue surveillance of the
target without alerting her or him to the surveillance. Additionally,
these limits would force the government to execute surreptitious

247 United States v. Villegas, 899 F.2d 1324, 1337 (2d Cir. 1990).
248 Id.
249 Id. at 1337-38.
search warrants only when absolutely necessary, because the target would have to be notified within a concrete time period, either a year or six months, of the surreptitious search. The notice could be made either by the government agency executing the surreptitious search warrant or by the court that authorized the warrant. This would further ensure that surreptitious search warrants would only be used in the middle of, or at the end of, an on-going investigation. If not, agents using surreptitious search warrants at the beginning of an investigation would risk “blowing their cover” and risk the investigation’s secrecy if the target was notified by the court of the surreptitious search before agents completed the investigation.

Even with the proposed changes, critics could still argue that the “good cause shown” standard is relatively weak. However, as was the case in the Villegas decision, at least the changes would delineate specific procedures for courts to follow in granting extensions.

Finally, § 213 and § 3103a should be amended to specifically limit surreptitious search warrants to certain types of crimes. The Patriot Act in its general statement of purpose reads, “An Act to deter and punish terrorist acts in the United States and around the world, to enhance law enforcement investigatory tools, and for other purposes.”\(^{250}\) The § 213 amendments do not limit surreptitious searches in any way. Instead, they are applicable to any type of crime.\(^{251}\) Congress needs to limit the overly broad scope of the § 213 amendments to § 3103a to ensure that they are not misused.

Surreptitious search warrants should be limited to specific crimes, involving well-planned, well organized, and in-depth criminal behavior. This would include offenses such as terrorism, as well as racketeering, and gang-related activity. Surreptitious search warrants should only be used against certain types of criminals, such as terrorists and major drug dealers. Additional examples could also include members of well organized criminal entities or criminal syndicates.\(^{252}\) This change would help justify the use of surreptitious searches to the public, and to make individuals feel more secure in that the government is not overstepping its boundaries.


\(^{251}\) See Eric Lichtblau, U.S. Uses Terror Law to Pursue Crimes from Drugs to Swindling, N.Y. TIMES, Sept. 28, 2003, at A1 (stating the government “has begun using the law with increasing frequency in many criminal investigations that have little or no connection to terrorism.”).

\(^{252}\) The author lists these examples only as references. The statute could be tailored more expansively to include more crimes, or narrowly to only apply to terrorism. The example of drug dealers and terrorists will be used throughout.
Although not unconstitutional, this breadth of applicability of surreptitious searches is arguably not within the spirit of the Fourth Amendment. Certainly, we live in a different world than when the Founding Fathers drafted the Bill of Rights. There is little possibility that they could have conceived the level of technological enhancement that the United States has attained over the past 200-plus years. Similarly, there is little chance they could have imagined terrorists, instead of conventional armies, attacking the United States, let alone terrorists potentially using weapons of mass destruction. There is also little way they could have envisioned the drug epidemic that plagues our nation.

The Constitution and the Bill of Rights provide a framework within which our nation’s laws grow. Therefore, it can be argued that it is appropriate and constitutionally justified to update our laws to use surreptitious search warrants to combat terrorism both at home and abroad. The government is also justified in using surreptitious search warrants to combat major drug dealers.253 As noted by the Freitas and Villegas courts, the use of surreptitious search warrants stems from the federal government fighting “big-time” drug dealers.

However, the government’s use of surreptitious search warrants outside of extraordinary circumstances, such as fighting the war on terrorism or the war on drugs, arguably violates the spirit of the Fourth Amendment. The Fourth Amendment affords people “[t]he right to be secure in their persons, houses, papers, and effects.”254 To allow the government to use surreptitious search warrants against average citizens, even if they are engaged in criminal activity, gives credence to one critic’s contention that the use of surreptitious search warrants is Orwellian in its scope.255

The sanctity of one’s home is a fundamental freedom, ingrained in the American consciousness since the country’s founding. To allow the government to invade a person’s home while he or she is not there, even if that person is a criminal, and look around, leaving no notice of the search, seems inherently unfair. Surreptitious search warrants used against individuals, even suspected criminals, with no ties to terrorism, gangs, major drug activity, or well organized criminal organizations, gives one the feeling

253 Major drug dealers, traffickers, or producers could be defined by existing statutes relating to quantity of drugs produced/sold/possessed or could be written to specifically apply to the proposed changes to the § 213 amendments.

254 U.S. CONST. amend. IV.

255 Kessenides, supra note 28, at 56.
that the government is marshalling all its resources against one
person, resembling "J. Edgar Hoover's 'black bag jobs.'" To al-
low the government to run roughshod over this right, without
good reason, is contrary to the principles upon which our country
was founded. However, in certain circumstances, the government is
well within its rights to execute surreptitious search warrants.

By limiting the scope of the government's use of surreptitious
search warrants to those situations when the government can prove
to a neutral judicial officer that it has credible and specific evi-
dence that the target of a potential surreptitious search is engaged
in terrorist activity against the United States, or is engaged in a
major drug producing, selling, or trafficking operation, or is in-
volved in well organized criminal activity, makes the § 213 amend-
ments to § 3103a more fair and palatable. This proposed change
would still allow federal officials to level the playing field against
those, like terrorists and major drug producers/traffickers, and
others, who "exploit" our country's "openness" and "free society
even [though] they commit themselves to our destruction," while
easing the fears of citizens and ensuring that the government does
not overstep its boundaries.

VI. CONCLUSION

For the United States to continue to grow and prosper, the
country's criminal laws must be changed and adapted with the
times, lest they lose their force. Section 213 of the Patriot Act, au-
thorizing surreptitious search warrants for federal crimes, is one of
the government's post-September 11 attempts at updating the ex-
isting laws to better protect its citizens. The § 213 amendments to
18 U.S.C. § 3103a are a welcome and needed change. However, the
amendments to § 3103a need clarifying, particularly in the context
of what constitutes reasonable notice under § 3103a. Further, Con-
gress needs to limit the situations and the types of crimes that the
government can use surreptitious search warrants. These changes
to the § 3103a amendments would help satisfy critics who assert the
amendments go too far and violate fundamental fairness. While
limiting the applicability of surreptitious search warrants, the pro-
posed changes would not dramatically limit the government's abil-
ity to achieve its stated objective of fighting terrorism.

256 Nat Hentoff, The FBI's Magic Lantern: Ashcroft Can Be in Your Computer, VILLAGE
php.
257 DOJ Oversight, supra note 3.
With the proposed changes, the benefits of the § 213 amendments to § 3103a outweigh the risk of harm to civil liberties associated with the amendments. The Act’s § 213 amendments give the government another arrow in its quiver to shoot down “the birds of prey” that intend to harm the United States, and seek to make our country’s criminal laws “[t]heir perch, and not their terror.”

“There is a significant civil-liberties price to be paid as we adopt various national-security initiatives,” stated former U.S. Attorney Mary Jo White in an interview. Even though the § 3103a amendments are needed to bring “this nation’s surveillance laws into the twenty-first century,” and are justified given the current War on Terror, the amendments are not perfect. By fine-tuning the § 3103a amendments and adding more procedural safeguards, including stricter notice requirements, and limiting the amendments’ applicability to specific crimes and criminals, we can lessen the civil liberties price that must be paid to live in our current world. A balance can be struck between the government’s legitimate interest in protecting its citizens, and citizens’ reasonable expectations of privacy in their homes.

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258 SHAKESPEARE, supra note 1.
260 Reject Attempt to Repeal Patriot Act Sunset Clauses, supra note 234.