

FROM “SNEAK AND PEEK” TO “SNEAK AND STEAL”: SECTION 213 OF THE USA PATRIOT ACT

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I. INTRODUCTION

Section 213 of the USA PATRIOT Act (Patriot Act)¹ has brought to light the existence of law enforcement tools about which few people were concerned before the attacks on September 11, 2001. This provision has also been a lightning rod for criticism on Fourth Amendment grounds because it explicitly authorizes two types of delayed-notification searches: “sneak and peek” and “sneak and steal” searches.² Unfortunately, the War on Terrorism has highly politicized the debate about these law enforcement tools. What before were seen as uncontroversial criminal law tools are now seen as a threat to civil liberties because of the current context.³

Delayed-notification searches are aptly described as covert or secret searches, surreptitious searches, and most deliberately—sneak-and-peek searches.⁴ These warrants allow a law enforcement agent to “enter, look around, photograph items and leave without seizing anything and without leaving a copy of the warrant.”⁵ Agents often perform the search

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¹ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act, Pub. L. No. 107-56, 115 Stat. 272 (2001) [hereinafter USA PATRIOT Act] (codified in scattered sections of the U.S.C.).

² See Mary DeRosa, “*Sneak and Peek*” Search Warrants: A Summary, in PATRIOT DEBATES: EXPERTS DEBATE THE USA PATRIOT ACT 101, 101 (Stewart A. Baker & John Kavanaugh eds., 2005) [hereinafter PATRIOT DEBATES].

³ See Heather MacDonald, *Sneak-and-Peek in the Full Light of Day*, in PATRIOT DEBATES, *supra* note 2, at 102, 102–03 (arguing that anti-Patriot Act demagogues use rhetorical techniques to attack section 213). The intersection of national security and civil liberties not only politicizes the debate but also triggers arguments related to the Executive’s deference in matters related to national security. See Brett Shumate, *New Rules for a New War: The Applicability of the Geneva Conventions to Al-Qaeda and Taliban Detainees Captured in Afghanistan*, 18 N.Y. INT’L L. REV. 1, 68–69 (2005).

⁴ Kevin Corr, *Sneaky but Lawful: The Use of Sneak and Peek Search Warrants*, 43 U. KAN. L. REV. 1103, 1103 (1995). One of the earliest articles to address surreptitious searches is John Kent Walker, Jr., Note, *Covert Searches*, 39 STAN. L. REV. 545 (1987).

⁵ Corr, *supra* note 4. Drug investigations, specifically those involving methamphetamine labs, have been the area in which surreptitious searches have been consistently used because agents can maintain the secrecy of the investigation while gaining intelligence or confirming suspicions. *Id.* Surreptitious searches gained prevalence during the war on drugs in the 1980s. See Robert M. Duncan, *Surreptitious Search Warrants and the USA PATRIOT Act: “Thinking Outside the Box but Within the Constitution,” or a Violation of Fourth Amendment Protections?*, 7 N.Y. CITY L. REV. 1, 9–10

when the owner is absent, observe the interior, and confirm any suspicions about possible illegal activity.⁶ Agents will then seek a conventional search warrant to return to the property and seize evidence of criminal activity. In contrast with conventional search warrants, sneak-and-peek search warrants dispense with the notice and receipt requirements, at least temporarily. The dispensation of these requirements maintains the secrecy of the search and investigation.⁷

In some situations, section 213 of the Patriot Act also authorizes law enforcement agents to seize evidence during a sneak-and-peek search.⁸ This type of search has been called a sneak-and-steal search,⁹ and rarely has been discussed in the academic literature and case law. However, its use will likely increase because section 213 explicitly authorizes this type of search.¹⁰ In fact, the Department of Justice has reported that during the twenty-two month period between April 1, 2003, and January 31, 2005, federal agents used this provision 108 times to execute court-approved delayed-notification search warrants, representing 0.2% of search warrants sought by law enforcement.¹¹ Of these 108 delayed-notification searches, forty-five were sneak-and-steal searches.¹² Sneak-and-steal searches thus constituted 21% of searches pursuant to section 213 during this period. Courts should expect to see these warrants, and challenges to them, with increasing frequency.¹³

(2004) (stating that by 1984 the DEA had persuaded federal judges to issue at least thirty-five surreptitious search warrants); *see also* United States v. Pangburn, 983 F.2d 449 (2d Cir. 1993); United States v. Villegas, 899 F.2d 1324 (2d Cir. 1990); United States v. Freitas (*Freitas II*), 856 F.2d 1425 (9th Cir. 1988); United States v. Freitas (*Freitas I*), 800 F.2d 1451 (9th Cir. 1986), *modified*, 856 F.2d 1425 (9th Cir. 1988).

⁶ Paul V. Konovalov, Note, *On a Quest for Reason: A New Look at Surreptitious Search Warrants*, 48 HASTINGS L.J. 435, 443 (1997).

⁷ *Id.* at 442; *see also* 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 4.12(b), at 816 (4th ed. 2004) (noting that surreptitious entry warrants authorize agents to “enter certain premises and look around (but not take anything) during the occupant’s absence”); Corr, *supra* note 4 (noting that there is one exception to the rule that nothing is usually seized during the search).

⁸ *See* Corr, *supra* note 4, at 1114 (noting the existence of sneak-and-steal search warrants).

⁹ *Id.*

¹⁰ USA PATRIOT Act § 213, 18 U.S.C. § 3103a (Supp. III 2003).

¹¹ Press Release, U.S. Dep’t of Justice, Department of Justice Releases New Numbers on Section 213 of the Patriot Act (Apr. 4, 2005), http://www.usdoj.gov/opa/pr/2005/April/05_opa_160.htm (last visited Oct. 22, 2006).

¹² *Id.* In the eighteen-month period after the enactment of the Patriot Act, the Justice Department used this provision 248 times to delay notification. Duncan, *supra* note 5, at 4.

¹³ Duncan, *supra* note 5, at 4–5 (“It stands to reason that the use of surreptitious 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.”).

This article will explore the distinction between these two types of surreptitious searches and the criticism that has been leveled against section 213. First, however, Part II of this article will discuss the Patriot Act generally and section 213 specifically. Part II will conclude by describing two of the leading criticisms against section 213—namely, that it grants radical new authority to the government to conduct secret searches and lowers standards for surreptitious searches.

Part III will survey the historical development of delayed-notification search warrants before the passage of the Patriot Act. Part III.A will discuss the pre-Patriot Act sneak-and-peek searches in the Ninth, Second, and Fourth Circuits. Part III.B will discuss the few pre-Patriot Act sneak-and-steal searches.

Part IV of this article will argue that both criticisms of section 213 are unsustainable given the historical development of surreptitious searches. First, Part IV.A will show that section 213 did not grant radical new authority to the government but actually codified majority practice with respect to sneak-and-peek searches. Second, Part IV.B will show that section 213 did not lower the execution standards of surreptitious search warrants but created standards where none previously existed. This part will conclude that section 213 of the Patriot Act protects Fourth Amendment interests by creating statutory standards and recognizing the distinction between sneak-and-peek and sneak-and-steal searches that courts have been unable or unwilling to recognize. Not only did section 213 acknowledge the distinction between the two types of searches, but it also recognized that sneak-and-steal searches should require an additional showing of necessity to authorize seizure in connection with a surreptitious search.

Part V will explain several proposed modifications to section 213. Part V.A will discuss congressionally proposed modifications and conclude that they are modest gains for the government that do little to restrict the use of surreptitious searches. Part V.B will suggest two modifications to the requirements for a sneak-and-steal search. In addition to the requirement that the government show “reasonable necessity for the seizure,” the government should also be required to show that the seizure (1) is not intended to induce the target to illegal conduct and (2) will not disclose the search.

Finally, Part VI will conclude the discussion by summarizing the important points and recommending that the proposed modifications be accepted.

II. THE USA PATRIOT ACT

Congress enacted and President Bush signed the Patriot Act on October 26, 2001, in response to the attacks on the United States by

Islamic terrorists on September 11, 2001.¹⁴ The Patriot Act gave federal authorities “greater power to conduct surveillance within the United States for purposes of both preventing terrorism and monitoring the activity of foreign intelligence agents.”¹⁵ However, many of the Patriot Act’s numerous provisions, like section 213, are not limited to national security and terrorism investigations. Although many provisions were subject to sunset in December 2005, section 213 was not.¹⁶ Part II.A provides a broad overview of section 213’s legislative history and text. Parts II.B and II.C discuss section 213’s authorization of sneak-and-peek and sneak-and-steal searches, respectively. Part II.D outlines the main criticisms of section 213 that will guide the remainder of the article.

A. Section 213: Authority for Delaying Notice of the Execution of a Warrant

Section 213 of the Patriot Act amends 18 U.S.C. § 3103a to allow delay in the notification of search warrants.¹⁷ The Justice Department argued that “the law governing delay in immediate notice of a search warrant [was] a mix of inconsistent rules, practices, and court decisions varying widely from jurisdiction to jurisdiction across the country. This greatly hinder[ed] the investigation of many terrorism cases and other cases.”¹⁸ Prior to the Patriot Act, “there was no statutory authorization for clandestine searches of private premises in criminal investigations, although [the Foreign Intelligence Surveillance Act] permitted such searches for national security purposes.”¹⁹ The Justice Department sought to have delayed-notification search warrants analyzed under “the same circumstances that excused delayed notification of government access to e-mail to longer-term, remote, third party storage.”²⁰ Section

¹⁴ ACLU v. U.S. Dep’t of Justice, 265 F. Supp. 2d 20, 21 (D.D.C. 2003).

¹⁵ *Id.* In addition to sneak-and-peek searches, the Patriot Act granted the government expanded authority to issue national security letters. For a discussion of national security letters, as amended by the Patriot Act, see Brett A. Shumate, *Thou Shalt Not Speak: The Nondisclosure Provisions of the National Security Letter Statutes and the First Amendment Challenge*, 41 GONZ. L. REV. 151, 157–58 (2006).

¹⁶ DeRosa, *supra* note 2; Patricia Mell, *Big Brother at the Door: Balancing National Security with Privacy Under the USA PATRIOT Act*, 80 DENV. U. L. REV. 375, 399 (2002); Press Release, U.S. Dep’t of Justice, Attorney General Alberto R. Gonzales Calls on Congress to Renew Vital Provisions of the USA PATRIOT Act (Apr. 5, 2005), http://www.usdoj.gov/opa/pr/2005/April/05_ag_161.htm (last visited Oct. 22, 2006).

¹⁷ USA PATRIOT Act § 213, 18 U.S.C. § 3103a (Supp. III 2003).

¹⁸ Beryl A. Howell, *Seven Weeks: The Making of the USA PATRIOT Act*, 72 GEO. WASH. L. REV. 1145, 1184 (2004) (quoting Attorney General Ashcroft’s Draft Anti-Terrorism Package (Anti-Terrorism Act of 2001) Section-by-Section Analysis § 352) (internal quotation marks omitted).

¹⁹ DeRosa, *supra* note 2.

²⁰ CHARLES DOYLE, CONGRESSIONAL RESEARCH SERVICE, THE USA PATRIOT ACT: A LEGAL ANALYSIS 65 (2002).

213, therefore, “resolves this problem by establishing a statutory, uniform standard for all such circumstances.”²¹

The first sentence of section 213 recognizes both sneak-and-peek and sneak-and-steal searches by stating that notice may be delayed for any warrant “to search for and seize any property.”²² These warrants are not limited to terrorism cases; delayed-notification searches are allowed for any federal investigation.²³ Section 213 states:

DELAY.—With respect to the issuance of any warrant or court order under this section, or any other rule of law, to *search for and seize any property* or material that constitutes evidence of a criminal offense in violation of the laws of the United States, *any notice required, or that may be required, to be given may be delayed if—*

- (1) 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 section 2705);
- (2) the warrant prohibits the *seizure of any tangible property*, any wire or electronic communication (as defined in section 2510), or, except as expressly provided in chapter 121, any stored wire or electronic information, except where the court finds *reasonable necessity for the seizure*; and
- (3) 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.²⁴

B. Section 213: Sneak-and-Peek Searches

Section 213 specifically recognizes sneak-and-peek searches by authorizing the delay of the notice of a search. In a sneak-and-peek search, agents may “secretly enter, either physically or virtually; conduct a search, observe, take measurements, conduct examinations, smell, take pictures, copy documents, download or transmit computer files, and the like; and depart without taking any tangible evidence or leaving notice of their presence.”²⁵ In addition to finding probable cause for the search,²⁶ a court must find “reasonable cause to believe” that immediate notification will have an adverse result.²⁷ As set forth in 18 U.S.C. § 2705, an adverse result includes the endangering of the life or physical safety of an individual, flight from prosecution, destruction of or

²¹ Attorney General Ashcroft’s Draft Anti-Terrorism Package (Anti-Terrorism Act of 2001) Section-by-Section Analysis, § 352, <http://leahy.senate.gov/press/200109/092001.html>.

²² USA PATRIOT Act § 213.

²³ DeRosa, *supra* note 2.

²⁴ USA PATRIOT Act § 213 (emphasis added).

²⁵ DOYLE, *supra* note 20, at 62–63.

²⁶ Howell, *supra* note 18, at 1185.

²⁷ USA PATRIOT Act § 213(1).

tampering with evidence, intimidation of potential witnesses, or otherwise seriously jeopardizing an investigation or unduly delaying a trial.²⁸ A judge must also prohibit the seizure of tangible property to permit a sneak-and-peek search.²⁹

Both sneak-and-peek and sneak-and-steal searches under section 213 are closely related to the issuance and execution of conventional search warrants under Rule 41 of the Federal Rules of Criminal Procedure.³⁰ Excluding the notice requirement, Rule 41 remains applicable to these searches. A federal law enforcement agent may obtain a search warrant by appearing before a magistrate or judge and making a showing of probable cause that the search will reveal evidence of a crime, contraband, fruits of a crime, property designed for or intended to be used for committing a crime, or a person to be arrested or unlawfully restrained.³¹ The officer must identify the “person or property to be searched” and “any person or property to be seized.”³² The magistrate or judge must issue the warrant if there is probable cause for the search.³³ Under conventional search warrants, the officer must then execute the warrant within ten days, during the daytime, unless the judge authorizes execution during the nighttime.³⁴ After executing the warrant, the officer must take an inventory of any property seized. He must then give a copy of the warrant and a receipt for the seized property to the person from whom the property was taken or leave a copy of the warrant and receipt at the place where the property was taken.³⁵ The executing officer must then promptly return the warrant and a copy of the inventory to the magistrate or judge.³⁶

Section 213’s modification of Rule 41’s notice requirement is the heart of a surreptitious search. For a sneak-and-peek search, notice must be provided “within a reasonable period of [the search’s] execution.”³⁷ One proposal that would have required a seven-day period for delayed notice within section 213 was opposed by the Department of Justice and ultimately rejected by the Senate.³⁸ The Justice Department recognized, however, that the courts typically only authorize delay for

²⁸ 18 U.S.C. § 2705(a)(2)(A)–(E) (2000); *see also* DeRosa, *supra* note 2; Howell, *supra* note 18.

²⁹ USA PATRIOT Act § 213(2).

³⁰ FED. R. CRIM. P. 41.

³¹ *Id.* at 41(b)–(c).

³² *Id.* at 41(e)(2).

³³ *Id.* at 41(d).

³⁴ *Id.* at 41(e)(2)(B).

³⁵ *Id.* at 41(f)(3).

³⁶ *Id.* at 41(f)(4); *see also* Konovalov, *supra* note 6, at 441–42.

³⁷ USA PATRIOT Act § 213(3), 18 U.S.C. § 3103a (Supp. III 2003).

³⁸ Howell, *supra* note 18, at 1188.

seven days.³⁹ Additionally, section 213 authorizes court-approved extensions “for good cause shown.”⁴⁰

C. Section 213: Sneak-and-Steal Searches

In contrast to section 213’s authorization of sneak-and-peek searches, section 213’s authorization of sneak-and-steal searches is relatively novel.⁴¹ As Representative C.L. “Butch” Otter has argued, the Patriot Act and prior law part ways in that “officers may seize tangible property using a covert warrant under the Patriot Act without leaving an inventory of the property taken.”⁴² Indeed, none of the leading Second or Ninth Circuit cases addressed seizure in conjunction with a sneak-and-peek search warrant.⁴³ At least one federal court has recognized that section 213 authorizes sneak-and-steal searches by stating that “these new warrants may also authorize the seizure of tangible property.”⁴⁴

To clarify, a sneak-and-peek search warrant can only be issued if the judge prohibits the seizure of tangible property during the search.⁴⁵ A judge can convert a sneak-and-peek search into a sneak-and-steal search that authorizes the seizure of tangible property during the search only upon an additional showing of “reasonable necessity for the seizure.”⁴⁶ This requirement for an additional showing of necessity is a higher burden than that which law enforcement must meet for seizures under a conventional search warrant.⁴⁷ Finally, the same post-search notice requirement for sneak-and-peek searches is also applicable to sneak-and-steal searches;⁴⁸ however, when agents perform a sneak-and-steal search they can delay notice twice. “First, the provision allows law

³⁹ *Id.* at 1188–89; *see also* United States v. Pangburn, 983 F.2d 449 (2d Cir. 1993); United States v. Villegas, 899 F.2d 1324 (2d Cir. 1990); United States v. Freitas (*Freitas II*), 856 F.2d 1425 (9th Cir. 1988); United States v. Freitas (*Freitas I*), 800 F.2d 1451 (9th Cir. 1986), *modified*, 856 F.2d 1425 (9th Cir. 1988).

⁴⁰ USA PATRIOT Act § 213(3).

⁴¹ *See* James B. Perrine, *The USA PATRIOT Act: Big Brother or Business as Usual?*, 19 NOTRE DAME J.L. ETHICS & PUB. POL’Y 163, 171 (2005) (noting that the “reasonable necessity standard for seizure of property under a delayed notification warrant is a feature of section 213 not readily evident from a review of case law”).

⁴² C.L. “Butch” Otter & Elizabeth Barker Brandt, *Preserving the Foundation of Liberty*, 19 NOTRE DAME J.L. ETHICS & PUB. POL’Y 261, 272 (2005).

⁴³ *Pangburn*, 983 F.2d 449; *Villegas*, 899 F.2d 1324; *Freitas II*, 856 F.2d 1425; *Freitas I*, 800 F.2d 1451.

⁴⁴ *ACLU v. U.S. Dep’t of Justice*, 265 F. Supp. 2d 20, 24 (D.C. Cir. 2003).

⁴⁵ USA PATRIOT Act § 213(2).

⁴⁶ *Id.* During the congressional debate regarding section 213, the Bush Administration sought the authority to conduct sneak-and-steal searches without an additional showing of necessity, but Congress rejected this proposal. Howell, *supra* note 18, at 1188.

⁴⁷ Perrine, *supra* note 41, at 172.

⁴⁸ USA PATRIOT Act § 213.

enforcement to delay notifying the person whose property was searched that a warrant has been executed; and second, should law enforcement seize some of that person's property, the government may delay providing an inventory and notice of what was actually taken."⁴⁹

D. Criticisms of Section 213

Critics of the Patriot Act make two principal arguments in opposition to section 213.⁵⁰ Both criticisms relate to the extent to which section 213 allegedly expanded governmental authority to conduct surreptitious searches and lowered the execution standards of surreptitious search warrants.

First, critics argue that section 213 grants the government a "radical new power"⁵¹ and "expand[s] government powers."⁵² The American Civil Liberties Union ("ACLU") has argued that "[n]ow, the government can secretly enter your home while you're away . . . rifle

⁴⁹ Nathan H. Seltzer, *When History Matters Not: The Fourth Amendment in the Age of the Secret Search*, 40 CRIM. L. BULL. 105, 113 (2004).

⁵⁰ Critics of section 213, of course, make many other arguments. They argue that section 213 allows the government to unilaterally conduct secret searches without ever providing notice to the target of the search. MacDonald, *supra* note 3, at 103–04. The ACLU suggests that the government can unilaterally conduct secret searches because "you may never know what the government has done." *Id.* at 103. This argument ignores the text of section 213: a judge can only issue a section 213 warrant if he finds "reasonable cause" to delay notice of the search. USA PATRIOT Act § 213. Moreover, section 213 explicitly requires the government to give the target of the search notice "within a reasonable time." *Id.*

Moreover, critics decry the fact that section 213 is not limited to terrorism cases. James X. Dempsey, *Sneak-and-Peek in the Full Light of Day: Reply to MacDonald*, in PATRIOT DEBATES, *supra* note 2, at 105, 106. James X. Dempsey argues that section 213 should be limited to terrorism cases because before the Patriot Act the government had the authority to conduct secret searches in international terrorism investigations through the Foreign Intelligence Surveillance Act. *Id.* Citizens should be afraid, he argues, because this authority is "available for all federal offenses," allowing federal investigators to enter one's home while asleep to investigate "student loan cases." *Id.* The Otter Amendment, which was passed overwhelmingly by the House, would bar funding to be used to support section 213 because Representative Otter has argued that section 213 "eliminates the time limits for notification under prior federal law, makes judicial review of the necessity of delayed notification perfunctory and so loosens the standard for delayed notification as to render it meaningless." Otter & Brandt, *supra* note 42, at 271; *see also* Howell, *supra* note 18, at 1185 (citing 149 CONG. REC. H7289-93 (daily ed. July 22, 2003) (amendment offered by Rep. Otter)). Otter has also objected to the fact that section 213 may be used in nonterrorism-related cases. Otter & Brandt, *supra* note 42. Both Mr. Dempsey and Representative Otter ignore the fact that pre-Patriot Act uses of surreptitious searches were not limited to terrorism cases, but took place primarily in drug cases. Limiting section 213 to terrorism cases would restrict investigative authority to limits that were unknown before the Patriot Act.

⁵¹ Heather MacDonald, *Sneak-and-Peek in the Full Light of Day: Response to Dempsey*, in PATRIOT DEBATES, *supra* note 2, at 110, 110.

⁵² Dempsey, *supra* note 50, at 105.

through your personal belongings . . . download computer files . . . and seize any items at will. . . . And, because of the Patriot Act, you may never know what the government has done.”⁵³ Richard Leone, president of the Century Foundation, argues that the Patriot Act “allows the government to conduct secret searches without notification” and that the Act is “arguably the most far-reaching and invasive legislation passed since the Espionage Act of 1917 and the Sedition Act of 1918.”⁵⁴

Second, critics argue that “[t]he Patriot Act’s ‘sneak and peek’ provision is about *lowering standards* for sneak and peek warrants, not imposing uniformity.”⁵⁵ Even though prior case law had required a seven-day post-search notice, section 213 “overturn[ed] the seven-day rule and instead allow[ed] notice of search warrants to be delayed for an *indefinite* ‘reasonable time.’”⁵⁶ Moreover, Representative Otter argues that, in authorizing sneak-and-steal warrants, the Patriot Act breaks from prior case law to allow officers to seize tangible property using a covert warrant.⁵⁷ He believes that the nonthreatening nature of section 213 makes it “more dangerous to the cause of preserving liberty” because it “has the potential to become the insidious mechanism of steady but discernable erosion in the foundation of our freedoms.”⁵⁸ Likewise, the ACLU argues that section 213 “expands the government’s ability to execute criminal search warrants (which need not involve terrorism) and seize property without telling the target for weeks or months.”⁵⁹ Due to this lowering of standards, the critics contend, the government has the authority to conduct secret searches essentially without restraint.

The remainder of this article will examine whether these criticisms are valid by exploring the historical development of delayed-notification search warrants. After surveying this history in Part III, Part IV will argue that both of these criticisms are unsupported given the historical development of such search warrants.

⁵³ MacDonald, *supra* note 3, at 103.

⁵⁴ *Id.*

⁵⁵ ACLU, Myths and Realities about the Patriot Act, <http://action.aclu.org/reformthepatriotact/facts.html> (last visited Oct. 22, 2006).

⁵⁶ *Id.*

⁵⁷ Otter & Brandt, *supra* note 42.

⁵⁸ *Id.* at 273–74.

⁵⁹ ACLU, *The Sun Also Sets: Understanding the PATRIOT Act “Sunsets,”* <http://action.aclu.org/reformthepatriotact/sunsets.html> (last visited Oct. 22, 2006).

III. HISTORICAL DEVELOPMENT OF DELAYED-NOTIFICATION SEARCH WARRANTS

A. Pre-Patriot Act Sneak-and-Peek Searches

Only three federal circuits have addressed delayed-notification search warrants: the Ninth Circuit,⁶⁰ the Second Circuit,⁶¹ and the Fourth Circuit.⁶² Their approaches to the issue are discussed below.

1. The Ninth Circuit: *United States v. Freitas*

United States v. Freitas (Freitas I) was the first circuit court case to address the issue and remains the seminal case in the area of delayed-notification search warrants.⁶³ In 1984 an anonymous informant contacted the Drug Enforcement Agency (“DEA”) and revealed that Freitas was running a methamphetamine lab in his home in California.⁶⁴ The DEA applied for a surreptitious entry warrant for Freitas’s home because the agents sought to determine the status of the methamphetamine lab.⁶⁵ The magistrate issued the warrant using a conventional warrant form but struck two items: (1) “the description of the property to be seized” and (2) “the requirement that copies of the warrant and an inventory of the property taken were to be left at the residence.”⁶⁶ The warrant authorized the agents “to enter the home while no one else was there, look around, and leave without removing anything.”⁶⁷ The warrant, thus, had no notice requirement.⁶⁸ The agents later applied for an extension of the original warrant, after which the agents seized various evidence at Freitas’s home.⁶⁹

Considering whether the surreptitious entry impermissibly tainted the later warrant, the district court “found that surreptitious entry warrants are neither valid under Rule 41 . . . nor constitutionally permissible.”⁷⁰ The court then “held that the lack of notice violated both

⁶⁰ *United States v. Freitas (Freitas II)*, 856 F.2d 1425 (9th Cir. 1988); *United States v. Freitas (Freitas I)*, 800 F.2d 1451 (9th Cir. 1986), *modified*, 856 F.2d 1425 (9th Cir. 1988).

⁶¹ *United States v. Pangburn*, 983 F.2d 449 (2d Cir. 1993); *United States v. Villegas*, 899 F.2d 1324 (2d Cir. 1990).

⁶² *United States v. Simons*, 206 F.3d 392 (4th Cir. 2000).

⁶³ *Corr*, *supra* note 4, at 1104–05.

⁶⁴ *Freitas I*, 800 F.2d at 1452.

⁶⁵ *Id.* at 1453.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 1453, 1456.

⁶⁹ *Id.* at 1453.

⁷⁰ *Id.* at 1454.

Rule 41 and the Fourth Amendment.”⁷¹ The Ninth Circuit reversed and held that the district court’s holding conflicted with the Supreme Court’s opinion in *United States v. New York Telephone Co.*⁷² In that case, the Court construed Rule 41’s definition of property as not being limited to tangible items and held that “seizures of intangibles were not precluded by the definition of property appearing in Rule 41(b).”⁷³ The surreptitious search in *Freitas I* was a search of intangible, not tangible property; “[t]he intangible property to be ‘seized’ was information regarding the ‘status of the suspected clandestine methamphetamine laboratory.’”⁷⁴ Even though the agents did not comply with Rule 41,⁷⁵ their noncompliance did not render the evidence inadmissible unless the agents intentionally and deliberately disregarded Rule 41 or the search violated the Fourth Amendment.⁷⁶

Even though the Ninth Circuit agreed with the district court that the warrant failed to comply with Rule 41 or the Fourth Amendment, the court upheld the search under the good-faith exception to the exclusionary rule established in *United States v. Leon*.⁷⁷ Analogizing to *Massachusetts v. Sheppard*,⁷⁸ the court found that the agents’ reliance on the warrant was objectively reasonable.⁷⁹ The court then remanded the case to the district court to make findings of fact critical to the agents’ invocation of the good-faith exception.⁸⁰ In sum, the Ninth Circuit in *Freitas I* held that the warrant violated both Rule 41 and the Fourth Amendment but reversed the district court’s conclusion that the agents did not satisfy the good-faith exception to the exclusionary rule in *Leon*.

⁷¹ *Id.*

⁷² *Id.* at 1455.

⁷³ *Id.* (citing *United States v. New York Tel. Co.*, 434 U.S. 159, 170 (1977)) (internal quotation marks omitted).

⁷⁴ *Id.*

⁷⁵ *Id.* at 1455–56.

⁷⁶ *Id.* at 1456.

⁷⁷ 468 U.S. 897 (1984).

⁷⁸ 468 U.S. 981 (1984).

⁷⁹ *Freitas I*, 800 F.2d at 1457.

⁸⁰ *Id.* Judge Poole’s dissent in *Freitas I* is strikingly aggressive in its defense of the Fourth Amendment and in its disdain for surreptitious searches. The dissent accused the majority of “distort[ing] history, confound[ing] precedent, and shun[ning] the clear intent of the Fourth Amendment to the Constitution.” *Id.* at 1458 (Poole, J., dissenting). Judge Poole viewed surreptitious searches as dangerous, offensive, and violative of the letter and spirit of the Constitution, and as ignoring the precise requirements of Rule 41. *Id.* According to the dissent, the majority gave law enforcement “carte blanche authority” to “make stealthy entry at night into the private residence of a citizen.” *Id.* Rejecting any notion of good faith, the dissent believed that “it constituted free-roaming, unsupervised license to cast entirely aside all vestige of the right to privacy which under our Constitution over the decades has been held the due of us all.” *Id.* Thus, surreptitious searches “constitute[] a dangerous and radical threat to civil rights and to the security of all our homes and persons.” *Id.*

In *United States v. Freitas (Freitas II)*, the Ninth Circuit held that there was a sufficient basis to conclude that the agents acted reasonably in reliance on the warrant.⁸¹ Rule 41 did not require suppression because the agents had not acted intentionally or deliberately with subjective bad faith, but instead had acted in good faith by consulting with an assistant U.S. attorney and magistrate.⁸² The court noted that a violation is fundamental only where it is *clearly* unconstitutional under Fourth Amendment standards.⁸³ It also reiterated its holding in *Freitas I* that the surreptitious nature of the search did not violate the Fourth Amendment—the warrant was constitutionally defective only because it failed to provide for post-search notice within seven days.⁸⁴ “The constitutional infirmity did not emanate from the surreptitious nature of the entry or even from the fact that the warrant failed to provide for contemporaneous notice. Rather, it was based on a distinction between post-search notice and no notice.”⁸⁵

⁸¹ 856 F.2d 1425 (9th Cir. 1988).

⁸² *Id.* at 1432.

⁸³ *Id.* at 1432–33.

⁸⁴ *Id.* at 1433. Shortly after *Freitas II*, the Ninth Circuit used the same reasoning in *United States v. Johns*, 948 F.2d 599 (9th Cir. 1991). In *Johns*, the FBI obtained a sneak-and-peek search warrant to gain surreptitious entry into a storage unit that allegedly contained a methamphetamine lab. The warrant made no provision for notification, and the officers intended to notify the owners only after an arrest had been made or when they decided to curtail their surveillance; in effect, the agents intended to put off notice indefinitely. Relying on *Freitas II*, the court held that the failure to give notice of the search was not a fundamental violation of Rule 41. *Id.* at 607. However, because the violation prejudiced the defendant, the evidence should have been suppressed but was not because the search fell within the good-faith exception to the exclusionary rule. *Id.* Even though the surreptitious search violated the Fourth Amendment because of the agents’ failure to provide notice within a reasonable time, the good-faith exception did not require suppression of the evidence because the agents’ objectively believed that the search was justifiable. *Id.* at 605 n.4. The court also reiterated that “warrants issued after *Freitas I* should *not* issue without a provision for seven-day notice absent a strong showing of necessity.” *Id.* at 606. From now on, any warrant issued without a seven-day notice without a strong showing of necessity “will render inapplicable the good faith exception.” *Id.*

⁸⁵ *Freitas II*, 856 F.2d at 1433 (citations omitted). Consequently, five conclusions can be made from examining the Ninth Circuit cases. First, surreptitious searches are unconstitutional when they do not provide for notice within a reasonable time after the search. Second, a reasonable time after the search must not exceed seven days. Third, the good-faith exception to the exclusionary rule allows the admissibility of evidence gained from a surreptitious search where post-search notice is provided within seven days after the search. Fourth, strict compliance with Rule 41 is not required—the real fight is in the Fourth Amendment analysis because evidence is only suppressed under Rule 41 where there is a fundamental violation, and there will only be a fundamental violation where there is a violation of the Fourth Amendment. Fifth, a search for intangibles is permissible under the Fourth Amendment and Rule 41.

2. The Second Circuit: *United States v. Villegas* and *United States v. Pangburn*

The Second Circuit's approach differs from the Ninth Circuit's because the Second Circuit roots the post-search notice requirement in Rule 41 and not the Fourth Amendment.⁸⁶ In *United States v. Villegas*, the DEA applied for a warrant to search a farm in New York where the agents believed the occupants were running a cocaine factory.⁸⁷ The affidavit stated that covert physical surveillance of the farm was difficult and that other investigatory techniques were insufficient.⁸⁸ The agents did not seek to seize the evidence on the premises but sought to conduct a search to photograph evidence without providing notice of the search for seven days.⁸⁹ The agents executed the warrant at night, took photographs, and seized nothing.⁹⁰ The judge granted extensions so the agents could continue their investigation without providing notice.⁹¹ The agents then obtained another warrant to seize the evidence.⁹²

On appeal, the defendant argued that the surreptitious search and delay in receiving notice violated Rule 41 and the Fourth Amendment.⁹³ First, the court rejected the defendant's Rule 41 argument because "courts must be deemed to have inherent power to issue a warrant when the requirements of [the Fourth] Amendment are met."⁹⁴ Second, the court rejected the defendant's particularity argument because *New York Telephone* made clear that the Fourth Amendment authorized the search and seizure of intangible property.⁹⁵ The court found that the warrant met the particularity requirement because the agents particularly described the place and items to be searched at the farmhouse.⁹⁶

The court next turned to the defendant's argument that the warrant was unconstitutional because of the covert entry and because notice of the entry was not given until after his arrest.⁹⁷ The court began its analysis by citing *Dalia v. United States*⁹⁸ and *Katz v. United States*⁹⁹

⁸⁶ Compare *United States v. Pangburn*, 983 F.2d 449 (2d Cir. 1993) with *United States v. Freitas (Freitas I)*, 800 F.2d 1451 (9th Cir. 1986), modified, 856 F.2d 1425 (9th Cir. 1988).

⁸⁷ 899 F.2d 1324, 1330 (2d Cir. 1990).

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 1331.

⁹³ *Id.* at 1332, 1334.

⁹⁴ *Id.* at 1334.

⁹⁵ *Id.* at 1334–35.

⁹⁶ *Id.* at 1335–36.

⁹⁷ *Id.* at 1336.

⁹⁸ 441 U.S. 238 (1979).

and noting that “[c]ertain types of searches or surveillances depend for their success on the absence of premature disclosure” and that where “nondisclosure of the authorized search is essential to its success, neither Rule 41 nor the Fourth Amendment prohibits covert entry.”¹⁰⁰ Because the *Dalia* Court “described the contention that covert entries are unconstitutional for their lack of notice as frivolous,” the court concluded that a covert entry without contemporary notice did not violate the Fourth Amendment.¹⁰¹

The court next turned to the safeguards required by the Fourth Amendment. Comparing covert searches to conventional searches and Title III¹⁰² wiretaps, the court found surreptitious searches to be the least intrusive because there is no physical seizure of property. A surreptitious search only deprives the owner of privacy, whereas a conventional search deprives the owner of both his privacy and his property. Surreptitious searches are also less intrusive than wiretaps because they have a short duration, focus specifically on items sought in the warrant, and produce information from a specific moment in time, while wiretaps are ongoing and indiscriminate.¹⁰³

The Second Circuit also required two safeguards. First, the officers must make “a showing of reasonable necessity for the delay.”¹⁰⁴ Second, the officers must give the owner notice of the search within a reasonable time after the covert entry.¹⁰⁵ Citing *Freitas I*, the court noted that what constitutes a reasonable time will vary on the circumstances of each case and agreed with *Freitas I* that it should not exceed seven days.¹⁰⁶ Officers may seek extensions; however, they cannot be granted solely on

⁹⁹ 389 U.S. 346 (1967).

¹⁰⁰ *Villegas*, 899 F.2d at 1336. *Dalia* held that “[t]he Fourth Amendment does not prohibit *per se* a covert entry performed for the purpose of installing otherwise legal electronic bugging equipment.” *Id.* (quoting *Dalia*, 441 U.S. at 248). *Katz* held that “when covert entry and nondisclosure are appropriate, Rule 41 does not require that the owner of the property be given advance or contemporary notice of the entry.” *Id.* (citing *Katz*, 389 U.S. at 355 n.16 (1967)); *cf.* Saad Gul, *The Bells of Hell: An Assessment of the Sinking of ANR General Belgrano in the Context of the Falkands Conflict*, 18 N.Y. INT’L L. REV. 81, 114 (2005) (noting that international and U.S. law require that the actions must be judged in light of information contemporaneously available, and not with the benefit of hindsight).

¹⁰¹ *Villegas*, 899 F.2d at 1336 (citing *Dalia*, 441 U.S. at 247) (internal quotation marks omitted).

¹⁰² Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510–2520 (2000 & Supp. III 2003).

¹⁰³ *Villegas*, 899 F.2d at 1336–37.

¹⁰⁴ *Id.* at 1337.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

the same basis as the first delay. Instead, the officers must make a fresh showing of the need for further delay.¹⁰⁷

The Second Circuit further distinguished itself from the Ninth Circuit in *United States v. Pangburn*.¹⁰⁸ In *Pangburn*, DEA agents in New York and state law-enforcement agents in California were investigating a joint federal-state trafficking operation of chemicals used in the manufacture of methamphetamines. The California state agents obtained a surreptitious search warrant for a storage locker in California and sought to photograph any items located within the locker without providing notice or seizing the items.¹⁰⁹ The agents later obtained a second surreptitious search warrant and a conventional search warrant to seize the contraband found in the locker.¹¹⁰

The Second Circuit began its analysis by reviewing the Fourth Amendment, Rule 41, and the Supreme Court's holdings in *Katz* and *New York Telephone*.¹¹¹ The court next turned to the Ninth Circuit's holding in *Freitas I* and stated that "[d]espite the absence of notice requirements in the Constitution and in Rule 41, it stands to reason that notice [of] a surreptitious search must be given at some point after the covert entry."¹¹² The court noted that in *Villegas* it had followed *Freitas I* in requiring notice within a reasonable time not longer than seven days after the covert entry. Therefore, the court rejected the government's argument that the required notice was "merely a preferred procedure."¹¹³

The *Pangburn* court distinguished itself from the *Freitas I* court by noting that while the Ninth Circuit had held that the warrant was constitutionally defective for its failure to include a notice requirement, the *Villegas* court had made no such determination but had concluded that covert searches were less intrusive than conventional searches.¹¹⁴ The court then noted that because "[t]he Fourth Amendment does not deal with notice of any kind," the court "preferred to root [the] notice requirement in the provisions of Rule 41 rather than in the somewhat amorphous Fourth Amendment 'interests' concept developed by the *Freitas I* court."¹¹⁵ Unlike the Fourth Amendment, Rule 41 actually discusses notice. Turning to the issue of whether Rule 41 should require

¹⁰⁷ *Id.* at 1338; *see also* *United States v. Ludwig*, 902 F. Supp. 121 (W.D. Tex. 1995) (applying *Villegas* to a surreptitious search and finding that the agents acted in good-faith reliance on the warrant).

¹⁰⁸ 983 F.2d 449 (2d Cir. 1993).

¹⁰⁹ *Id.* at 450.

¹¹⁰ *Id.* at 451.

¹¹¹ *Id.* at 453.

¹¹² *Id.* (emphasis omitted).

¹¹³ *Id.* at 454.

¹¹⁴ *Id.* at 454–55.

¹¹⁵ *Id.* at 455.

the application of the exclusionary rule, the *Pangburn* court found there was no basis for suppression because there was no prejudice to the defendant, and the agents did not intentionally or deliberately disregard the notice requirement.¹¹⁶ Thus, the conventional search warrant was properly issued on the basis of information gained through the surreptitious entries.¹¹⁷

3. The Fourth Circuit: *United States v. Simons*

The Fourth Circuit adopted the approach taken by the Second Circuit in 2000. In *United States v. Simons*, a CIA employee was internally investigated for downloading child pornography on his office computer.¹¹⁸ The first search of Simons's computer took place when a supervisor, at his workstation, examined the computer.¹¹⁹ A second search took place when the supervisor physically entered Simons's office to remove the hard drive and replace it with a copy.¹²⁰ A third search took place when the Federal Bureau of Investigation (FBI) applied for a surreptitious search warrant to search Simons's office and computer.¹²¹ The judge issued the warrant but denied the surreptitious nature of the search—the agents were required to leave a copy of the warrant and a receipt for any property taken.¹²² The agents executed the search warrant at night and copied the contents of the computer and other evidence but removed nothing from the office. The agents failed to leave a copy of the warrant or a receipt, and Simons did not learn of the search until forty-five days later.¹²³ The agents subsequently obtained another search warrant and seized evidence from Simons's office.¹²⁴

Among other arguments, Simons argued that the third search violated the Fourth Amendment and Rule 41 because the agents did not leave a copy of the warrant or a receipt for the property taken.¹²⁵ The

¹¹⁶ *Id.*

¹¹⁷ The Second Circuit's analysis differs from the Ninth Circuit's reasoning in several ways. First, the Second Circuit roots its notice requirement in Rule 41, while the Ninth Circuit roots its notice requirement in the Fourth Amendment. In the Second Circuit, notice is not a constitutional requirement, as the Ninth Circuit had concluded in *Freitas I. Konovalov*, *supra* note 6, at 457. Second, officers must make a showing of reasonable necessity for the delay. And third, post-search notice must only be received at some point after the covert entry, not necessarily within seven days.

¹¹⁸ 206 F.3d 392, 395 (4th Cir. 2000).

¹¹⁹ *Id.* at 396.

¹²⁰ *Id.* at 396–97.

¹²¹ *Id.*

¹²² *Id.* at 397.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* at 402.

court noted that the agents clearly violated Rule 41 by failing to provide notice but held that

the failure of the team executing the warrant to leave either a copy of the warrant or a receipt for the items taken did not render the search unreasonable under the Fourth Amendment [because it] does not mention notice, and the Supreme Court has stated that the Constitution does not categorically proscribe covert entries, which necessarily involve a delay in notice.¹²⁶

The court approvingly cited *Pangburn* and cited *Freitas I* only to contrast the Ninth Circuit's approach.¹²⁷ The Fourth Circuit thus aligned itself with the Second Circuit's approach in holding that surreptitious searches do not violate the Fourth Amendment.¹²⁸

B. Pre-Patriot Act Sneak-and-Steal Searches

Unlike the frequent discussion of sneak-and-peek searches in prior case law, sneak-and-steal searches have had a much more limited treatment. In fact, only three federal cases have discussed them.¹²⁹ Unfortunately, courts were issuing sneak-and-steal warrants without recognizing the distinction between the searches authorized under such warrants and those authorized under sneak-and-peek warrants. The few cases involving sneak-and-steal searches before the Patriot Act did nothing to account for the greater intrusion entailed by sneak-and-steal searches. These courts simply approved the seizure in connection with the surreptitious search without recognizing the distinction between sneak-and-peek searches and sneak-and-steal searches. The historical development of sneak-and-steal searches is discussed to show that section 213 did not lower standards for surreptitious searches but actually created standards where none previously existed for sneak-and-steal searches. Moreover, section 213 recognizes the critical distinction between sneak-and-peek and sneak-and-steal searches and actually *raises* the required standards.

¹²⁶ *Id.* at 403 (citing *Dalia v. United States*, 441 U.S. 238, 247–48 (1979)).

¹²⁷ *Id.*

¹²⁸ *Duncan*, *supra* note 5, at 24.

¹²⁹ *See, e.g.*, *United States v. Miranda*, 425 F.3d 953 (11th Cir. 2005); *United States v. Heal*, 972 F.2d 1345, 1992 WL 203884, at **1 (9th Cir. 1992) (unpublished table decision); *United States v. Rollack*, 90 F. Supp. 2d 263 (S.D.N.Y. 1999). Of course, there may in fact be additional cases in which courts authorized searches but the agents failed to provide notice. *See, e.g.*, *DeArmon v. Burgess*, 388 F.3d 609, 611 (8th Cir. 2004) (“According to appellants, the officers broke entry doors and locks on interior doors, damaged drywall and furniture, and seized a firearm, doorknobs and locks, photographs, personal papers, and jewelry. Also, according to appellants, the officers did not provide them with a copy of the search warrant and an itemized receipt for the seized property . . .”). However, the three cases discussed here are the only cases that involve a surreptitious, or sneak-and-peek, search in which the court also authorized seizure in the warrant.

1. *United States v. Heal*

The first case to address a sneak-and-steal search without recognizing the greater Fourth Amendment interests was *United States v. Heal*, an unpublished opinion from the Ninth Circuit in 1992.¹³⁰ In *Heal*, the DEA obtained a surreptitious search warrant to enter a home where the agents believed the owner was engaged in methamphetamine manufacturing.¹³¹ The warrant “permitted the agents to *seize* ‘controlled substances’ but not [drug] grow[ing] equipment.”¹³² The agents executed the warrant, but Heal’s girlfriend thwarted the covert entry. The agents secured the home and obtained a conventional search warrant later in the day that allowed them to seize the marijuana-growing equipment.¹³³

On appeal, Heal argued that the conventional search “warrant was illegal because it was based on the fruits of the poisonous first search warrant.”¹³⁴ In a short opinion, the Ninth Circuit cited *Freitas I* and noted that “[a] surreptitious entry warrant may be valid if it adequately describes the property to be seized and if it includes a notice requirement.”¹³⁵ Because the surreptitious search warrant listed the items to be seized and Heal was given notice within seven days of the entry, the surreptitious search warrant was valid.¹³⁶ The court never addressed the warrant’s unique authorization of seizure in connection with the surreptitious search.

Heal is the first case to depart from previous surreptitious search cases.¹³⁷ Unlike *Freitas I* and *Pangburn*, which “authorized only a covert entry and search,” *Heal* authorized “a covert taking of property.”¹³⁸ The warrant authorized the agents to seize controlled substances found during the search.¹³⁹ One possible explanation for the court’s authorization of a sneak-and-steal warrant is that “takings of contraband, and only contraband, may always be conducted during a covert entry search as long as the officers specifically ask for such limited seizure authority.”¹⁴⁰ The court noted that “[b]ecause he could not lawfully possess it, a judicially authorized law enforcement ‘taking’ of it

¹³⁰ 1992 WL 203884, at **1.

¹³¹ *Id.*

¹³² *Id.* (emphasis added).

¹³³ *Id.*

¹³⁴ *Id.* (internal quotation marks omitted).

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ Corr, *supra* note 4, at 1113.

¹³⁸ *Id.* at 1114.

¹³⁹ *Heal*, 1992 WL 203884, at **1.

¹⁴⁰ Corr, *supra* note 4, at 1114.

does not offend any legitimate property interest.”¹⁴¹ However, the most likely explanation for the case is that it was based on a misreading of *Freitas I*—the Ninth Circuit had never before stated that a “surreptitious entry warrant may be valid if it adequately describes the property to be seized and if it includes a notice requirement.”¹⁴² *Freitas I* involved the seizure of intangible property, unlike the seizure of tangible property in *Heal*.¹⁴³

2. *United States v. Rollack*

The Southern District of New York addressed the next case involving a sneak-and-steal search, which concerned the search of a prisoner’s mail.¹⁴⁴ In *United States v. Rollack*, U.S. Bureau of Alcohol, Tobacco, and Firearms (“ATF”) agents obtained a warrant to search *and seize* the defendant’s mail because they believed he was using the mail to direct illegal gang activities.¹⁴⁵ The agents requested and were granted the authority to delay notice to avoid compromising the investigation.¹⁴⁶ “During the course of these intercepts, federal agents reviewed all of Rollack’s incoming and outgoing mail and *copied or seized* six letters pursuant to the two warrants.”¹⁴⁷ Here, the agents were not only authorized to execute a sneak-and-peek search, but also to seize the evidence. Although the defendant made many arguments to suppress the

¹⁴¹ *Id.*

¹⁴² *Heal*, 1992 WL 203884, at **1 (citing *United States v. Freitas (Freitas I)*, 800 F.2d 1451, 1456 (9th Cir. 1986), *modified*, 856 F.2d 1425 (9th Cir. 1988)).

¹⁴³ See discussion *supra* notes 67–90 and accompanying text.

¹⁴⁴ *United States v. Rollack*, 90 F. Supp. 2d 263 (S.D.N.Y. 1999). A case that preceded *Rollack* was *United States v. Heatley*, in which the FBI obtained a sneak-and-peek warrant that authorized them “to examine and copy [the prisoner’s] non-legal mail, both incoming and outgoing . . . and either to seize the contents or to return them to their original location—a ‘sneak and peek’ warrant.” 41 F. Supp. 2d 284, 285 (S.D.N.Y. 1999). The case is unclear as to whether the agents were authorized to conduct a sneak-and-peek warrant to copy the mail and return the originals or whether the agents were authorized to sneak-and-steal the mail—in effect, not just to copy the mail but to seize it and prevent it from reaching its final destination. It appears that the agents conducted the search as if it was a sneak-and-peek warrant by merely copying the contents, even though they may have been authorized to seize the letters altogether. The seizure in the case thus seems to have been only that of intangible property through the copying of the letters, rather than the seizure of tangible property. Indeed, the court stated that “the only things that could be seized were statements contained in that correspondence,” indicating that the warrant involved was actually one of the sneak-and-peek variety and the seizure being only of intangible property. *Id.* at 291. Either way, the case seems to be an odd one in that the defendant did not challenge the constitutionality of the warrant but argued that the warrant was simply overbroad and that the extension of the delay was improper. *Id.* at 285.

¹⁴⁵ *Rollack*, 90 F. Supp. 2d at 267.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 268 (emphasis added).

evidence, including an argument that Rule 41 was violated,¹⁴⁸ he did not challenge the authorization of the seizure in connection with the sneak-and-peek search. Like in *Heal*, the court in *Rollack* failed to recognize the distinction between sneak-and-peek and sneak-and-steal searches.

3. *United States v. Miranda*

In *United States v. Miranda*, a case involving perhaps the most brazen example of a sneak-and-steal search, DEA agents used a delayed-notification warrant to remove three pounds of methamphetamine from a residence “to make it appear that a burglary had been committed.”¹⁴⁹ The agents staged the burglary because they “hoped to precipitate activity within the Cuevas conspiracy that would provide additional evidence of criminal conduct.”¹⁵⁰ On appeal, the court did not address the legality of the search because the government appealed the judgment of acquittal.¹⁵¹ Because the search took place in August 2002, section 213 of the Patriot Act should have governed the issuance of the sneak-and-peek search warrant. Although seizure is permitted by the sneak-and-steal provision of section 213, the agents would have had to show reasonable necessity for the seizure. It is arguable whether a court would have found that staging a burglary would satisfy this burden.¹⁵² Regardless, the agents in *Miranda* made no additional showing for the seizure beyond that required for the sneak-and-peek search. Even though this case arose after the Patriot Act, it provides further evidence that courts have failed to recognize the distinction between sneak-and-peek and sneak-and-steal searches.

In the cases discussed in this section, the government made no additional showing that seizure was necessary, as the Patriot Act requires. The courts’ failure to recognize the distinction and to require an additional showing of necessity for the seizure is a major failing of these sneak-and-steal cases.

IV. REBUTTING THE CRITICISMS OF SECTION 213

Given the historical development of both sneak-and-peek and sneak-and-steal searches, both criticisms of section 213 are unsustainable. Part IV.A will first rebut the claim that section 213 grants radical new authority to the government. Part IV.B will then

¹⁴⁸ *Id.* at 271.

¹⁴⁹ 425 F.3d 953, 956 (11th Cir. 2005).

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 953.

¹⁵² See discussion *infra* Part V.B for an argument that section 213 should be modified to prohibit the agents’ conduct in *Miranda*.

rebut the claim that section 213 lowers standards for surreptitious searches.

A. Sneak-and-Peek in Section 213: Codifying Majority Practice

Section 213 does not grant radical new authority to the government. It is not, as one critic has put it, “a novel idea dreamed up by the Bush Administration and the Ashcroft Justice Department.”¹⁵³ Far from creating radical new power, section 213 actually codifies majority practice regarding surreptitious searches and provides uniform statutory standards. “[F]or over a decade before passage of the USA PATRIOT Act, courts had sanctioned the use of sneak-and-peek warrants, and their use was, if not frequent, fairly routine.”¹⁵⁴ Surreptitious searches were routinely used in drug cases throughout the 1980s and ‘90s.¹⁵⁵ The argument by some that “[s]ection 213 of the PATRIOT Act greatly expands what already was constitutionally questionable authority for delayed notification of the execution of search warrants” is simply not true with respect to sneak-and-peek searches.¹⁵⁶ Rather, Congress’s entry into the field of surreptitious searches was an answer to the call for it to provide guidance in this area.¹⁵⁷

In substance, section 213 has been “[c]haracterized as a codification of the Second Circuit decision”¹⁵⁸ and favors the Second Circuit’s approach more than the Ninth Circuit’s in several ways. First, like the Second Circuit’s requirement that officers make a showing of “reasonable necessity for the delay,”¹⁵⁹ section 213 authorizes a sneak-and-peek

¹⁵³ Howell, *supra* note 18; see also Beryl A. Howell, *Surveillance Powers in the USA PATRIOT Act: How Scary are They?*, 76 PENN. B. ASS’N Q. 12, 19 (2005).

¹⁵⁴ Howell, *supra* note 153.

¹⁵⁵ See, e.g., *United States v. Pangburn*, 983 F.2d 449 (2d Cir. 1993); *United States v. Villegas*, 899 F.2d 1324 (2d Cir. 1990); *United States v. Freitas (Freitas II)*, 856 F.2d 1425 (9th Cir. 1988); *United States v. Freitas (Freitas I)*, 800 F.2d 1451 (9th Cir. 1986), *modified*, 856 F.2d 1425 (9th Cir. 1988); see also MacDonald, *supra* note 3, at 103 (noting that “[f]or decades, federal courts have allowed investigators to delay notice of a search in drug cases, organized crime, and child pornography, for the same reasons as in section 213”).

¹⁵⁶ Otter & Brandt, *supra* note 42, at 267. However, this same argument may be true with respect to sneak-and-steal searches. See *infra* Part IV.B.

¹⁵⁷ Howell, *supra* note 153 (“From a civil liberties perspective, rather than allow the continued expansion of exclusionary rule exceptions, it is preferable to provide courts with clear guidelines for use of the sneak and peek procedure—and that is what the USA PATRIOT Act provided.”); Perrine, *supra* note 41, at 172 (arguing that “Congress’s involvement in this area is preferable to a case-by-case modification of Rule 41 across the different circuits”).

¹⁵⁸ DOYLE, *supra* note 20, at 65 (citing 147 CONG. REC. H7197 (daily ed. Oct. 23, 2001)).

¹⁵⁹ *Villegas*, 899 F.2d at 1337.

search where there is “reasonable cause” for the delay.¹⁶⁰ Second, like the Second Circuit’s requirement that the officers provide notice within a reasonable time,¹⁶¹ section 213 also requires notice within a reasonable time.¹⁶² Third, like the Second Circuit’s recognition that officers may seek extensions for delaying notice,¹⁶³ section 213 also authorizes extensions for “good cause shown.”¹⁶⁴ Therefore, section 213 did not create radical new authority, but simply codified the majority practice regarding sneak-and-peek searches.

B. Sneak-and-Steal in Section 213: Creating Standards Where None Previously Existed

Section 213 does not lower standards for the issuance of surreptitious searches but actually creates standards where none previously existed.¹⁶⁵ Where courts failed to recognize the distinction between sneak-and-peek and sneak-and-steal searches,¹⁶⁶ section 213 not only recognizes the distinction but also requires an additional showing to authorize a sneak-and-steal search.¹⁶⁷ In this respect, section 213 actually *raises* standards for surreptitious searches.

For a sneak-and-peek search, section 213 requires the government to show that there is “*reasonable cause* to believe that providing immediate notification of the execution of the warrant may have an *adverse result*.”¹⁶⁸ A sneak-and-peek search warrant would likely be issued in the case where the FBI is investigating a chemical engineering student who has communicated with extremists in Yemen about a local

¹⁶⁰ USA PATRIOT Act § 213(1), 18 U.S.C. § 3103a (Supp. III 2003).

¹⁶¹ *Villegas*, 899 F.2d at 1337.

¹⁶² USA PATRIOT Act § 213(3).

¹⁶³ *Villegas*, 899 F.2d at 1338.

¹⁶⁴ USA PATRIOT Act § 213(3).

¹⁶⁵ For an argument that the sneak-and-steal provision is blatantly unconstitutional, see Seltzer, *supra* note 49, at 141.

Perhaps the greatest leap the sneak and peek provision takes is authorizing the actual seizure of tangible property without notice. This is the most blatant violation of Fourth Amendment principles. It strains credulity to imagine a situation where the government has such a significant interest in secretly seizing an individual’s property without notice that it could be deemed “reasonable” under the Fourth Amendment. If the government takes an individual’s property, nothing less than immediate notice would be constitutional.

Id. (citation omitted).

¹⁶⁶ See, e.g., *United States v. Miranda*, 425 F.3d 953 (11th Cir. 2005); *United States v. Heal*, 972 F.2d 1345, 1992 WL 203884, at **1 (9th Cir. 1992) (unpublished table decision); *United States v. Rollack*, 90 F. Supp. 2d 263 (S.D.N.Y. 1999).

¹⁶⁷ USA PATRIOT Act § 213.

¹⁶⁸ *Id.* (emphasis added).

chemical plant on the basis of a tip from the student's coworker.¹⁶⁹ Under such a warrant, the FBI could examine the contents of the student's computer to search for evidence that the student was involved in a plot to blow up the chemical plant. Reasonable cause exists to believe that if the FBI provides notification, the student will alert his fellow cell members, thereby resulting in the destruction of evidence of a potential plot to blow up the chemical plant. Notification could also put the FBI's informant, the student's coworker, at risk.

In contrast, for a sneak-and-steal search, the government must also show that there is "reasonable necessity for the seizure."¹⁷⁰ In the previous example, section 213 would probably authorize the FBI to surreptitiously enter the student's home and seize chemical evidence related to the plot to blow up the chemical plant. The FBI would also be required to prove that there is probable cause for the search and that there is reasonable cause to believe that notification would lead to an adverse result. But because the FBI requested the authority to seize items during the search, the FBI would also be required to show that there was reasonable necessity for the seizure. Here, that standard would likely be met if the FBI intended to test the chemicals to determine if they were capable of blowing up the chemical plant.

On the other hand, a sneak-and-steal warrant would not permit the FBI to seize items when there is no reasonable necessity for the seizure. For example, in the previous hypothetical, the FBI would probably not be permitted to seize contraband (a bag of marijuana) in plain view because the FBI is investigating the student for a possible terrorist attack, and the seizure of contraband is not related to the terrorism investigation because it is evidence of ordinary criminal wrongdoing. The seizure of items unrelated to the investigation is not of "reasonable necessity" because it has no connection to the terrorism investigation. In contrast, the seizure of the chemicals is of "reasonable necessity" because it is closely related to, and indeed furthers, the terrorism investigation.

When applied to previous sneak-and-steal cases, section 213 provides for much more consistent results. For example, in *Heal*, the agents were permitted "to seize 'controlled substances' but not grow[ing] equipment";¹⁷¹ thus, the agents would have been required to show that there was reasonable necessity for the seizure. Although the judge failed to require it in *Heal*, this standard would be met for the seizure of the controlled substances if the agents intended to test the legality of the substances and then obtain a conventional search warrant. Likewise, reasonable necessity probably existed for the seizure of the prisoner's

¹⁶⁹ This hypothetical is taken from MacDonald, *supra* note 3, at 102.

¹⁷⁰ USA PATRIOT Act § 213(2).

¹⁷¹ *Heal*, 1992 WL 203884, at **1.

mail in *Rollack* because the agents believed the prisoner was using the mail to direct illegal gang activities.¹⁷² The agents hoped to learn of the prisoner's contact with the gang without disturbing the secrecy of the investigation.

However, the seizure in *Miranda*, in which the DEA used a surreptitious search to stage a burglary by removing several pounds of drugs,¹⁷³ would probably not be permitted under section 213 because no reasonable necessity existed for the seizure. Unlike in *Rollack* and *Heal*, in which the agents sought to maintain the secrecy of the search, the agents in *Miranda* did not seek to maintain the secrecy of the search because they removed a large quantity of drugs. Instead, the agents in *Miranda* used the cover of the surreptitious search to deceive the targets of the search rather than to further the investigation. Although the seizure may assist the investigation, the "reasonable necessity" language in section 213 should not be read to allow agents to stage a burglary.¹⁷⁴ Thus, section 213 should eliminate cases such as *Miranda* that highlighted the confusion in sneak-and-steal cases.

By recognizing the distinction between sneak-and-peek and sneak-and-steal searches and by requiring an additional showing of necessity to authorize seizure, section 213 actually raises standards for the issuance of sneak-and-steal search warrants. In the past, courts recognized their authority to authorize a surreptitious search but failed to distinguish a sneak-and-peek search from a sneak-and-steal search. By authorizing both searches without requiring an additional showing, courts ignored important Fourth Amendment interests that the Patriot Act now recognizes and protects. Once understood in this historical context, section 213 emerges as a restraint on the issuance of surreptitious searches.

V. AMENDMENTS TO SECTION 213

Facing a deadline to renew several Patriot Act provisions subject to sunset at the end of 2005, congressional negotiators reached a tentative agreement on several provisions in November 2005, including section 213.¹⁷⁵ The Patriot Act compromise, signed into law on March 9, 2006, imposes several additional limitations on delayed-notification search warrants authorized by section 213. Pro-government commentators have

¹⁷² *United States v. Rollack*, 90 F. Supp. 2d 263, 267 (S.D.N.Y. 1999).

¹⁷³ *United States v. Miranda*, 425 F.3d 953, 955 (11th Cir. 2005).

¹⁷⁴ For a discussion of a proposed modification that would eliminate cases like *Miranda*, see *infra* Part V.B.

¹⁷⁵ Jonathan Weisman, *Congress Arrives at Deal on Patriot Act*, WASH. POST, Nov. 17, 2005, at A1. Even though section 213 was amended, it was not subject to sunset. See *supra* note 16 and accompanying text.

concluded the compromise is a “win for the Administration,”¹⁷⁶ while the ACLU has argued the compromise “take[s] us from bad to worse.”¹⁷⁷ Part V.A discusses the amendments to section 213 and argues that they do little to change the statutory scheme with respect to both sneak-and-peek and sneak-and-steal searches. In fact, these amendments may increase law enforcement’s discretion in conducting surreptitious searches. Part V.B argues that two new modifications should be adopted for the issuance of sneak-and-steal search warrants.

A. The Amendments

First, the compromise provides more specificity with regard to the time within which agents must provide post-search notice. Section 114(a)(1) of the USA PATRIOT Improvement and Reauthorization Act of 2005 amends Patriot Act section 213(b)(3), which required notice within a reasonable time, to now require notice “within a reasonable time not to exceed 30 days.”¹⁷⁸ However, the new provision allows a period beyond thirty days “if the facts of the case justify a longer period of delay.”¹⁷⁹ This change makes thirty days the rule within which notice must be given but recognizes that, in certain cases, notice may not be reasonable in that time. Although this requirement may be considered an improvement because it provides more specificity and identifies the outer limits of a “reasonable time,” it does not restrict law enforcement in practice because most courts have already concluded that a reasonable time should not exceed seven days.¹⁸⁰ In fact, this requirement may actually provide more flexibility to the government by allowing more time to provide post-search notice than currently exists.

Second, the compromise provides more specificity with regard to extending the time for post-search notice. Section 213 of the Patriot Act allowed extensions of time for post-search notice when there was “good cause shown.”¹⁸¹ The compromise continues to allow extensions for “good cause shown” but only “upon an updated showing of the need for further delay and that each additional delay should be limited to periods of 90

¹⁷⁶ Posting of Orin Kerr to The Volokh Conspiracy, <http://volokh.com/posts/1132196140.shtml> (Nov. 16, 2005, 20:55 EST).

¹⁷⁷ Press Release, ACLU, ACLU Says White House Usurps Patriot Act Reauthorization Process, Negotiators Neglect Privacy and Civil Liberties Concerns but Add Poison Pills (Nov. 16, 2005), <http://www.aclu.org/safefree/general/21664prs20051116.html>.

¹⁷⁸ USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, § 114(a)(1), 120 Stat. 191, 210 (2006).

¹⁷⁹ *Id.*

¹⁸⁰ *See, e.g.*, United States v. Pangburn, 983 F.2d 449 (2d Cir. 1993); United States v. Villegas, 899 F.2d 1324 (2d Cir. 1990); United States v. Freitas (*Freitas II*), 856 F.2d 1425 (9th Cir. 1988); United States v. Freitas (*Freitas I*), 800 F.2d 1451 (9th Cir. 1986), *modified*, 856 F.2d 1425 (9th Cir. 1988).

¹⁸¹ USA PATRIOT Act § 213(3), 18 U.S.C. § 3103a (Supp. III 2003).

days or less, unless the facts of the case justify a longer period of delay.¹⁸² This requirement also benefits the government. Under former section 213, post-search notice was to be given within a reasonable time, which courts interpreted as seven days.¹⁸³ The compromise extends a reasonable time to a maximum of thirty days. None of the pre-Patriot Act cases determined what a reasonable extension would be. However, one would assume that seven days would have been the outer boundary for an extension because courts concluded that a reasonable time for post-search notice meant seven days. The compromise, however, provides an outer limit of ninety days rather than seven.¹⁸⁴

Third, the compromise imposes notification and reporting requirements on judges who authorize delayed-notification search warrants. Although section 213 lacked any reporting requirement when originally passed, the compromise now requires a judge to report to the Administrative Office of the U.S. Courts within thirty days after the expiration of a delayed-notification warrant (1) the fact that a warrant was applied for; (2) the fact that the warrant or extension was granted, modified, or denied; (3) the period of delay in giving the notice permitted by the warrant and the number and duration of any extensions; and (4) the offense specified in the warrant.¹⁸⁵ The Administrative Office of the U.S. Courts must then provide a report to Congress summarizing the data provided by federal judges.¹⁸⁶

Considering these amendments as a whole, they appear to benefit the government because there are no serious modifications that will jeopardize the government's use of sneak-and-peek search warrants. These amendments will not likely change the current process by which delayed-notification search warrants are issued pursuant to section 213. Defining what constitutes a reasonable time is a modest improvement because it gives courts less discretion; however, this modification will be limited in its effectiveness because most courts construed a reasonable time to mean only seven days.¹⁸⁷ In fact, the modification will likely have

¹⁸² USA PATRIOT Reauthorization and Improvement Act § 114(a)(2). This is similar to the extension period of ninety days permitted in 18 U.S.C. § 2705(a)(4) (2000). However, section 2705 also authorizes the first delay period to be ninety days. *Id.* § 2705(a)(1). Therefore, the extension period matches the original authorized period. However, the compromise extends the extension period to ninety days even though a reasonable time to delay notice has been construed to be seven days.

¹⁸³ See *Pangburn*, 983 F.2d at 449–50; *Freitas I*, 800 F.2d at 1456.

¹⁸⁴ USA PATRIOT Reauthorization and Improvement Act § 114(a)(2) (stating that “extensions should only be granted upon an updated showing of the need for further delay and that each additional delay should be limited to periods of 90 days or less”).

¹⁸⁵ *Id.* § 114(c).

¹⁸⁶ *Id.*

¹⁸⁷ See *Pangburn*, 983 F.2d at 449–50; *United States v. Villegas*, 899 F.2d 1324, 1337 (2d Cir. 1990); *Freitas I*, 800 F.2d at 1456.

the unintended effect of granting more discretion to law enforcement because it extends the time within which post-search notice must be given. The same is true of the requirements for extending post-search notice. Moreover, the requirements of judicial notice and annual reporting may help Congress do a better job at oversight but are unlikely to present an additional burden or limitation on the government.¹⁸⁸ In sum, the amendments should be seen as modestly increasing the government's discretion to conduct surreptitious searches while providing for greater specificity and oversight.

B. Modification of the Requirement that There be "Reasonable Necessity for the Seizure"

Despite Congress's efforts at reform, sneak-and-steal searches under section 213 require further modification. Currently, section 213 authorizes sneak-and-steal searches where, in addition to finding reasonable cause to delay notice of the search,¹⁸⁹ a court finds "reasonable necessity for the seizure."¹⁹⁰ Two new requirements are needed. Congress should also require the government to prove that the seizure (1) is not intended to induce the target to illegal conduct and (2) will not disclose the search.

The first requirement—that the seizure is not intended to induce the target to illegal conduct—is necessary to further define when there is "reasonable necessity" for a seizure.¹⁹¹ A seizure that would only aid an investigation by inducing the target to further illegal conduct would not be permitted by "reasonable necessity" under this limitation. For example, in *Miranda*, agents did not provide notice of the search and staged a burglary to induce the targets in a conspiracy to commit further unlawful acts from which they could gather additional evidence.¹⁹² Under

¹⁸⁸ Cf. Posting of Orin Kerr to The Volokh Conspiracy, *supra* note 176 ("It'll be interesting to see if the reporting requirement makes some judges less willing to issue delayed notice warrants; I would imagine that some judges would rather not have to file the reports.").

¹⁸⁹ USA PATRIOT Act § 213(1), 18 U.S.C. § 3103a (Supp. III 2003).

¹⁹⁰ *Id.* § 213(2). The "reasonable necessity" standard is not one that has been frequently used in criminal law, thereby making it an amorphous concept that courts have yet to define. See Perrine, *supra* note 41, at 171 (noting that the "reasonable necessity standard for seizure of property under a delayed notification warrant is a feature of section 213 not readily evident from a review of case law"); see also Duncan, *supra* note 5, at 27 ("However, the 'reasonable necessity' provision dealing with the seizure of evidence leaves open the question of what constitutes 'reasonable necessity.'").

¹⁹¹ Without this limitation it is unclear whether "reasonable necessity means a seizure necessary to the investigation that is also reasonable in a Fourth Amendment sense, *i.e.*, in the presence of exigent circumstances, or whether it means a seizure which a reasonable judge might find necessary for the investigation." DOYLE, *supra* note 20.

¹⁹² See *United States v. Miranda*, 425 F.3d 953, 956 ("They did not leave a copy of the search warrant because they wanted to make it appear that a burglary had been

those facts, no “reasonable necessity” supports the seizure because the staging of the burglary is not intended to gather evidence of past or continuing illegal acts but only to induce the target to commit further illegal acts. A seizure should only be permitted if it will gather evidence of past, continuing, or future unlawful behavior. Where the government conducts the seizure to determine the status of future unlawful behavior, for example, by seizing potentially explosive chemicals to determine if the target plans to execute a bombing plot,¹⁹³ there would also be reasonable necessity for the seizure. Therefore, the “reasonable necessity” test would require the government to show that the seizure is not intended to induce the target to illegal conduct; the seizure must be intended to gather evidence of past, continuing, or future crimes.

Additionally, it may be unreasonable under the Fourth Amendment if the government conducts a sneak-and-steal search that is intended to induce the target to illegal conduct. If the government is able to seize evidence and stage burglaries to induce the target to further unlawful behavior, as in *Miranda*, the target of the sneak-and-steal search has been subjected to unreasonable government behavior because the agents are inducing the target to commit further illegal acts by fraud.¹⁹⁴

The government’s conduct is even more unreasonable when a sneak-and-steal search, such as the one in *Miranda*,¹⁹⁵ alerts the target that a search has taken place without providing notice. Hence, the second requirement—that the seizure will not disclose the search—is required. This requirement is closely related to the first because a search that is intended to induce the target to illegal conduct will likely alert the target that a search has taken place. After the agents have completed the sneak-and-steal, they must make reasonable and good-faith efforts to maintain the secrecy of the search and investigation. This requirement

committed. By staging a burglary, the agents hoped to precipitate activity within the Cuevas conspiracy that would provide additional evidence of criminal conduct.”). One author has suggested that “reasonable necessity” would involve a situation where law enforcement agents execute a sneak-and-peek search and find a bomb or evidence of chemical or biological weapons. Duncan, *supra* note 5, at 27–28. The author suggests that the agents could seize the live bomb and possibly replace it with a dummy bomb “so as not to alert the targets about the surreptitious search.” *Id.* Even though a court may uphold the seizure because it was made in good faith and in plain view, section 213 does not authorize this seizure. There may be “reasonable necessity for the seizure” at the moment the agents discover the bomb; however, section 213 requires that a court find there to be “reasonable necessity for the seizure” before the search takes place. USA PATRIOT Act § 213(2).

¹⁹³ See *supra* text accompanying note 169.

¹⁹⁴ See *Jacobson v. United States*, 503 U.S. 540, 548 (1992) (“In their zeal to enforce the law, however, Government agents may not originate a criminal design, implant in an innocent person’s mind the disposition to commit a criminal act, and then induce commission of the crime so that the Government may prosecute.”).

¹⁹⁵ *Miranda*, 425 F.3d at 956.

would invalidate sneak-and-steal searches that are intentionally used to reveal the search or conducted with unreasonable care. Moreover, allowing seizures that would compromise the secrecy of the investigation under the cover of a surreptitious search would eliminate the purpose of a delayed-notification search warrant.¹⁹⁶ Although the target does not have specific notice that the government has invaded his privacy, he is alerted that someone, probably the government, has done so.

Government conduct is unreasonable when a sneak-and-steal search reveals that someone has been inside the target's home without disclosing the government's lawful intrusion because the target may justifiably feel that they have been burglarized and take steps to gather information and even contact the police regarding a suspected theft. For example, in *Mayfield v. Gonzales*, the FBI executed several sneak-and-peek searches while the Mayfield family was away from their home.¹⁹⁷ The searches were done "so incompetently that the FBI left traces of their searches behind, causing the Mayfield family to be frightened and believe that they had been burglarized."¹⁹⁸ Moreover, in *Miranda*, agents "did not leave a copy of the search warrant because they wanted to make it appear that a burglary had been committed [and] . . . hoped to precipitate activity within the Cuevas conspiracy that would provide additional evidence of criminal conduct."¹⁹⁹ Ninth Circuit Judge Kozinski, in his dissenting opinion in *United States v. Nates*, elaborated on the unreasonableness of the government's behavior when a secret search reveals that a search has taken place without identifying the government's intrusion:

¹⁹⁶ Andrew C. McCarthy, *Spinning the PATRIOT Act: Sneaking a Peek at "Judge" Napolitano's Latest Debacle*, NAT'L REV. ONLINE, Apr. 7, 2005, <http://www.nationalreview.com/mccarthy/mccarthy200504070805.asp> ("If important items that a subject is likely to miss—like his checkbook—are removed, then the aim of the sneak-and-peek technique is destroyed.")

¹⁹⁷ No. Civ. 04-1427-AA, 2005 WL 1801679, at *3 (D. Or. July 28, 2005).

¹⁹⁸ *Id.* (internal quotation marks omitted).

¹⁹⁹ *Miranda*, 425 F.3d at 956. I do not share the view of Fox News Senior Judicial Correspondent Judge Andrew Napolitano that the FBI will make a practice of breaking into homes to stage burglaries:

Sneak and peek allows FBI agents to invade your home . . . to break into your house and make it look like a burglary. To steal your checkbook, to plant a chip in your computer. . . . You could come back in the middle of this and think they are burglars and you could call the local police who don't know that they are FBI agents.

McCarthy, *supra* note 196 (quoting Napolitano). In Napolitano's opinion, the FBI is intentionally staging burglaries in the homes of the innocent among us. In my opinion, however, cases like *Mayfield* and *Miranda* are few and far between. These additional requirements are necessary, though, to ensure that when agents conduct a sneak-and-steal search they do not inadvertently cause such fears in the target of the search. This is done by maintaining the secrecy of the search and not inducing the target to illegal conduct. A surreptitious search should remain just that.

This means that when something is lost, stolen, mislaid or broken, the [target] will be completely mystified as to what happened. He will have no idea where to inquire as to its whereabouts or demand compensation. He may spend countless hours looking for the item in places he might have left it, harassing people who might have taken it, never suspecting that a government agent used a passkey to go through his luggage. Being subject to a secret search and then never being told about it is something I think most people would find especially offensive, and this then bears on the reasonableness of the procedure employed by the government.²⁰⁰

In sum, two requirements should be added to section 213 to ensure its compliance with the Fourth Amendment's requirement that searches be reasonable. First, the government should be required to prove that the seizure is not intended to induce the target to illegal conduct. This requirement would only permit a seizure intended to gather evidence of past, continuing, or future crimes. Second, the government must prove that the seizure will not disclose the search. Intentionally alerting the target that someone has entered the premises and taken property, without notification that the government has lawfully done so, can produce unreasonable and justifiable fear in the target. For the protection of both the target and the investigation, a surreptitious search should remain just that—surreptitious.

VI. CONCLUSION

When understood in its historical context, section 213 neither grants radical new powers to the government nor lowers standards for the issuance of surreptitious searches. With respect to sneak-and-peek searches, section 213 codifies the majority practice that began in the

²⁰⁰ 831 F.2d 860, 867 (9th Cir. 1987) (Kozinski, J., dissenting). Although *Nates* did not involve a sneak-and-peek search, it did involve a surreptitious search of luggage at an airport. *Id.* at 861. Judge Kozinski believed that the search of the luggage at the airport may have violated the Fourth Amendment's reasonableness requirement. *Id.* at 864; *see id.* at 865 (noting "our collective discomfort with surreptitious governmental intrusions into our privacy"). Even though *Nates* was decided after *United States v. Freitas (Freitas I)*, 800 F.2d 1451 (9th Cir. 1986), Judge Kozinski did not cite to it despite the fact that *Freitas I* may have allayed some of his concerns (or raised even more) regarding the surreptitious nature of the search. According to Judge Kozinski:

A secret search is, perhaps, the hardest to justify in light of our shared notions of individual privacy and personal autonomy. Clandestine searches are, by and large, foreign to our way of thinking because of their inherent intrusiveness, the heightened risk of abuse they pose, and because they are inconsistent with principles of openness and fair play we normally expect of our public officials. The notion that, while an individual is temporarily separated from his property, law enforcement officers are rummaging through it at will, is difficult to square with contemporary notions of what is reasonable governmental conduct.

Nates, 831 F.2d at 865 (Kozinski, J., dissenting).

1980s. Surreptitious search warrants developed without congressional guidance for over fifteen years.²⁰¹ Before the Patriot Act was passed, two lines of cases developed with respect to sneak-and-peek search warrants. One line of cases, developed in the Ninth Circuit, held that surreptitious searches violated the Fourth Amendment when agents did not provide notice within a reasonable time after the search—within seven days.²⁰² The other line of cases, which began in the Second Circuit and was followed in the Fourth Circuit, held that notice was required by Rule 41 and not the Fourth Amendment.²⁰³ Section 213 codified the Second Circuit’s approach to surreptitious searches; it did not create a radical new authority to conduct these searches.

In the area of sneak-and-steal searches, however, courts had not developed a framework within which to analyze these unique searches. Courts frequently did not recognize a distinction between the two types of surreptitious searches, even though a surreptitious search in which a seizure occurs implicates greater Fourth Amendment interests than one without a seizure. By recognizing the important distinction between sneak-and-peek and sneak-and-steal searches, section 213 not only created new standards, but also raised those that were currently being practiced. For sneak-and-peek searches, beyond the required showing of probable cause, a court must find that there is reasonable cause to believe that immediate notification will have an adverse result.²⁰⁴ Beyond that, to authorize a sneak-and-steal search, a court must make an additional finding of reasonable necessity for the seizure.²⁰⁵ Section 213 therefore reaches an appropriate balance between Fourth Amendment protection and the necessities of criminal investigations.

However, section 213 could benefit from further modification, especially in the area of sneak-and-steal searches. Congress’s recently proposed modifications to section 213 are not substantial revisions that will affect the government’s authority to conduct surreptitious searches. Section 213 requires two additional modifications to comply with the Fourth Amendment’s requirement that searches be reasonable. In addition to proving “reasonable necessity for the seizure,”²⁰⁶ the government should also prove that the seizure (1) is not intended to induce the target to illegal conduct and (2) will not disclose the search.

²⁰¹ The first circuit court to address surreptitious searches was *Freitas I* in 1986, and the Patriot Act was passed in 2001.

²⁰² *United States v. Freitas (Freitas I)*, 800 F.2d 1451 (9th Cir. 1986), *modified*, 856 F.2d 1425 (9th Cir. 1988).

²⁰³ *United States v. Pangburn*, 983 F.2d 449 (2d Cir. 1993); *United States v. Villegas*, 899 F.2d 1324 (2d Cir. 1990).

²⁰⁴ USA PATRIOT Act § 213, 18 U.S.C. § 3103a (Supp. III 2003).

²⁰⁵ *Id.* § 213(2).

²⁰⁶ *Id.*

These modifications should be adopted because a constitutional challenge to the sneak-and-steal provision of section 213 is sure to come.²⁰⁷ When that time comes, the more constitutional protections that are in place, the greater the likelihood that section 213 will survive judicial scrutiny.

²⁰⁷ See Seltzer, *supra* note 49, at 141 (arguing that the sneak-and-steal provision of section 213 is blatantly unconstitutional and should be stricken from the Patriot Act).

No court has yet confronted this level of governmental intrusion. Both the Second and Ninth Circuits strongly emphasized in reaching their decisions that only a seizure of intangible property occurred. The Second Circuit even opined that a surreptitious search with only a seizure of intangible property is the least intrusive of searches because the individual is not deprived of his property. Is this where the Second and Ninth Circuits would draw the line?

Id.