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SNEAK AND PEEK SEARCH WARRANTS AND THE USA PATRIOT ACT[1]

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Sneak and Peek Search Warrants Before the USA Patriot Act

A sneak and peek search warrant (also called a covert entry search warrant or a surreptitious entry search warrant) is a search warrant authorizing the law enforcement officers executing it to effect physical entry into private premises without the owner's or the occupant's permission or knowledge and to clandestinely search the premises; usually, such entry requires a stealthy breaking and entering.[2]

Although neither federal statutory law nor Rule 41 of the Federal Rules of Criminal Procedure (which governs federal search warrants) expressly authorized sneak and peek search warrants, and although the notice requirement of Rule 41 (under which officers serving a search warrant are required to deliver to the occupants, or leave on the premises, a copy of the warrant and a receipt for articles seized) seemingly prohibited sneak and peek warrants, in the 1980's "the FBI and the DEA ... embarked upon a widespread series of [court-authorized] covert entries in a variety of criminal investigations,"[3] and by the end of 1984 had persuaded federal judges and federal magistrates to issue at least 35 sneak and peek warrants.[4] There are five reported federal appellate decisions, three in the Ninth Circuit and two in the Second Circuit, involving the validity of searches undertaken pursuant to various sneak and peek warrants issued in the 1980's.[5]

The factual scenarios underlying those five appellate cases, decided between 1986 and 1993, permit us to understand the realities of search practices under sneak and peek warrants. Under those warrants the

search occurred only when the occupants were absent from the premises. The entry and the search were conducted in such a way as to keep them secret. The warrants prohibited seizures of anything except intangible evidence, i.e., information concerning what had been going on, or now was located, inside the premises. No tangible evidence was seized. The searching officers usually took photographs inside the premises searched. No copy of the warrant or receipt was left on the premises. The time for giving notice of the covert entry might be postponed by the court one or more times. The same premises might be subjected to repeated covert entries under successive warrants. At the end of the criminal investigation the premises previously searched under a sneak and peek warrant were usually searched under a conventional search warrant and tangible evidence was then seized. Generally, it was not until after the police made an arrest or returned with a conventional search warrant that the existence of any covert entries was disclosed. Sometimes this was weeks or even months after the surreptitious search or searches.

Neither the Second nor the Ninth Circuit held inadmissible the evidence obtained under the sneak and peek warrants at issue. The Second Circuit held that sneak and peek warrants did not violate the 4th Amendment,[6] that Rule 41 did not bar issuance of sneak and peek warrants,[7] and that to the extent there had been a violation of the notice requirement of Rule 41 the evidence was nonetheless admissible under the established legal principle that violations of Rule 41 ordinarily do not authorize suppression.[8] The Ninth Circuit held that the warrants violated both the 4th Amendment and the notice requirement of Rule 41, but that nonetheless the evidence obtained was, insofar as the 4th Amendment was concerned, admissible under the "good faith" exception to the exclusionary rule, and, insofar as Rule 41 was concerned, admissible because the Rule 41 violation was not fundamental.[9] Judging from pre-1993 caselaw, the approach taken by the Second Circuit as to the basic validity of sneak and peek warrants under the 4th Amendment and Rule 41 appears to have been more legally sound than that of the Ninth Circuit.[10]

The USA Patriot Act's Authorization of Sneak and Peek Warrants

Section 213 of the USA Patriot Act,[11] enacted on Oct. 26, 2001, contains the first express statutory authorization for the issuance of sneak and peek search warrants in American history. Section 213 is not restricted to terrorists or terrorism offenses; it may used in connection with any federal crime, including misdemeanors. Section 213 is one of the provisions of the USA Patriot Act excepted from the Act's sunset provisions.[12] To the extent Section 213 may conflict with Rule 41, Section 213 prevails.[13]

Section 213 amends 18 U. S. C. § 3103a, relating to warrants for the search and seizure of evidence of federal crimes, by adding the following: "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 ... 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."[14]

Under 18 U. S. C. § 3103a(b), three requirements must be met before a federal court may issue a sneak and peek search warrant for evidence of a federal crime.

First, the court must find "reasonable cause to believe that providing immediate notification of the execution of the warrant may have an adverse result (as defined in section 2705)." 18 U. S. C. § 2705(a)(2) defines "adverse result" to be (1) endangering the life or physical safety

of an individual, (2) flight from prosecution, (3) destruction of or tampering with evidence, (4) intimidation of potential witnesses, or (5) otherwise seriously jeopardizing an investigation or unduly delaying a trial.

Second, the warrant must prohibit "the seizure of any tangible property ... except where the court finds reasonable necessity for the seizure ..." Whereas the sneak and peek warrants litigated in the Second and Ninth Circuits between 1986 and 1993 were specifically limited to intangible evidence, 18 U.S. C. § 3103a(b) authorizes sneak and peek warrants for the seizure not only of intangibles, but also of tangibles, provided the court finds "reasonable necessity" for the seizure of the tangibles. Presumably, if tangible evidence is seized under a sneak and peek warrant the seizure will be carried out clandestinely; for example, a seized physical object might be replaced with another object that appears to be the original item.

Third, the warrant must provide for the giving of notice of execution of the warrant "within a reasonable period of its execution, which period may thereafter be extended by the court for good cause shown."

It is obvious that these restrictions on issuing sneak and peek search warrants border on the meaningless, especially in light of the somber reality that search warrants are issued secretly and ex parte, that they are typically issued on the basis of recurring, generalized, boilerplate allegations, and that the judicial officials who issue them tend to be rubber stamps for law enforcement. Take, for example, the "adverse result" requirement. The statutory definition of adverse result is so all-encompassing that it is difficult to imagine many criminal investigations where at least one form of such a result is not going to be arguably applicable; furthermore, to satisfy the requirement the court need not have reasonable cause to believe that there will be an adverse result, only that there "may" be an adverse result. The second requirement, that the warrant prohibit the seizure of tangible property, is drained of significance by the gigantic exception allowing seizure of

such property "where the court finds reasonable necessity for the seizure." It will be a rare case indeed where such necessity, if alleged, will not be determined to exist by the issuing court; and it may be confidently predicted that, with the passage of time, requests for seizure of tangible evidence will become the rule rather than the exception in connection with sneak and peek warrants. The final requirement, that the warrant provide for the giving of notice within a reasonable period, involves merely a question of the wording of a sneak and peek warrant, and the provision permitting the court (acting ex parte) 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.

It is also noteworthy that 18 U. S. C. § 3103a contains no statutory exclusionary rule enforcing these three restrictions on the issuance of sneak and peek warrants. Therefore, in the event a sneak and peek warrant is issued in contravention of §3103a the evidence obtained thereby will nonetheless be admissible under the usual rule that evidence acquired in violation of statutory protections is admissible unless the statute includes an exclusionary rule. Even where the sneak and peek warrant for some reason violates the 4th Amendment the evidence nonetheless will probably be admissible under the "good faith" doctrine.

Conclusion

Section 213 of the USA Patriot Act not only specifically grants the federal judiciary power to issue sneak and peek warrants, but also, by allowing their use for every federal crime and by placing no meaningful limits on their issuance, encourages their issuance. It may be expected that as time passes the use of such warrants will become the rule rather than the exception in federal court, and that when a conventional search warrant is issued it will almost always have been preceded by a sneak and peek warrant.

Decisional law makes it extremely unlikely that the federal courts will hold that Section 213's authorization of sneak and peek warrants violates the 4th Amendment.[15]

Although Section 213 applies to federal search warrants, it is only a question of time before states begin enacting legislation authorizing state judges to issue sneak and peek warrants.

Nearly two decades ago a prescient federal judge, in a dissenting opinion, warned that sneak and peek search warrants "constitute ... a dangerous and radical threat to civil rights and to the security of all our homes and persons."[16] Echoing this sentiment, a law review note published three years later emphasized that sneak and peek search warrants "bestow on law enforcement agents unlimited license to rifle through a person's private residence without the owner's knowledge or consent. There is no check on agents' actions to ensure they comply"17 with protections for individual rights, and "the risk of abuse and the subsequent intrusion into privacy is ... severe."[18]

Section 213 of the USA Patriot Act ushers in a new regime in America, a regime where the police learn at the police academy how to clandestinely burglarize the residences and offices of Americans and where the potential for police abuse is limitless. From now on Americans will be forced to live in "Orwellian fear that government agents may intrude at any time."[19]

FOOTNOTES

1. This article focuses on covert entries and surreptitious searches and seizures pursuant to sneak and peek search warrants issued by federal courts prior to, or under the authority of, the USA Patriot Act.

There is insufficient space in this article for a comprehensive examination of court-authorized covert entries to install and maintain

hidden listening devices under the Federal Electronic Surveillance Act, 18 U. S. C. § 2510 et seq.; see Dalia v. United States, 441 U. S. 238 (1979); see also McNamara, The Problem of Surreptitious Entry to Effectuate Electronic Eavesdrops: How Do You Proceed After the Court Says "Yes"?, 15 Am. Crim. L. Rev. 1 (1977); Note, Covert Entry in Electronic Surveillance: The Fourth Amendment Requirements, 47 Fordham L. Rev. 203 (1978); Comment, The Problem of Surreptitious Entry to Implement a Title III Intercept Order: An Argument in Favor of Express Judicial Authorization, 70 J. Crim. L. & Criminology 510 (1979).

There is also insufficient space in this article to examine court-authorized covert entries to conduct surreptitious electronic visual surveillance for purposes of criminal investigation prior to the USA Patriot Act, except to the extent the caselaw allowing such entries and surveillance throws light on the issue of the validity of sneak and peek search warrants; see, e.g., United States v. Koyomejian, 970 F. 2d 536 (9th Cir. 1992); United States v. Mesa-Rincon, 911 F. 2d 1433 (10th Cir. 1990); United States v. Biasucci, 786 F. 2d 504 (2d Cir. 1986); United States v. Torres, 751 F. 2d 875 (7th Cir. 1984); see also Hodges, Electronic Visual Surveillance and the Fourth Amendment: The Arrival of Big Brother?, 3 Hastings Const. L. Q. 261 (1976); Note, Electronic Visual Surveillance and the Right of Privacy: When Is Electronic Observation Reasonable?, 35 Wash. & Lee L. Rev. 1043 (1978).

Covert entries to gather domestic national security information are also beyond the scope of this article; see United States v. United States District Court, 407 U. S. 297 (1972).

Finally, covert entries to gather foreign intelligence information, whether court-authorized under the Foreign Intelligence Surveillance Act, 50 U. S. C. § 1801 et seq., or without judicial authorization but pursuant to the inherent powers of the President, are also outside the scope of this article; see United States v. Koyomejian, 970 F. 2d 536 (9th Cir. 1992); see also Brown and Cinquegrana, Warrantless Physical

Searches for Foreign Intelligence Purposes: Executive Order 12,333 and the Fourth Amendment, 35 Cath. U. L. Rev. 97 (1985); Note, Executive Order No. 12,333: An Assessment of the Validity of Warrantless National Security Searches, 1983 Duke L. J. 611.

2. See generally Corr, Sneaky But Lawful: The Use of Sneak and Peek Search Warrants, 43 U. Kan. L. Rev. 1103 (1995); Note, On a Quest for a Reason: A New Look at Surreptitious Search Warrants, 48 Hastings L. J. 435 (1997); Note, Freitas After Villegas: Are "Sneak and Peek" Search Warrants Clandestine Fishing Expeditions?, 26 San Diego L. Rev. 933 (1989); Note, Covert Searches, 39 Stan. L. Rev. 545 (1987); Corr, Court-Sanctioned Stealth Searches and Seizures, 22 Search and Seizure L. Rep. 1 (Nov. 1995); Failure to Give Notice of Covert Entry Won't Ordinarily Lead to Suppression, 52 Crim. L. Rep. 1417 (Feb. 17, 1993); "Sneak and Peek" Warrant Upheld Against Fourth Amendment Challenge, 47 Crim. L. Rep. 2046 (Apr. 18, 1990).

3. Note, Covert Searches, 39 Stan. L. Rev. 545, 546 (1987).

4. Id. at 546-47.

5. United States v. Pangburn, 983 F. 2d 449 (2d Cir. 1993) (warrant's violation of notice requirement of Rule 41 did not require suppression); United States v. Villegas, 899 F. 2d 1324 (2d Cir. 1990) (warrant did not violate 4th Amendment or Rule 41); United States v. Freitas, 856 F. 2d 1425 (9th Cir. 1988) (warrant violated 4th Amendment and Rule 41); United States v. Johns, 851 F. 2d 1131 (9th Cir. 1988) (same); United States v. Freitas, 800 F. 2d 1451 (9th Cir. 1986) (same).

It also appears from federal caselaw that on at least two occasions, the first in 1980, the second in 1990, state court judges issued sneak and peek warrants, despite the absence of state statutory authorization for such warrants. United States v. Sitton, 968 F. 2d 947 (9th Cir. 1992) (referring to sneak and peek search warrant issued by California judge to sheriff's deputies in 1990); United States v. Inadi, 748 F. 2d 812 (3d Cir. 1985) (referring to sneak and peek search warrant issued by state magistrate in New Jersey to state police officers in 1980). See also People v. Teicher, 52 N. Y. 2d 638, 422 N. E. 2d 506, 439 N. Y. S. 2d 846 (1981) (state court authorized police to secrete video camera in

dentist's office).
6. United States v. Villegas, 899 F. 2d 1324 (2d Cir. 1990) (relying on Dalia v. United States, 441 U. S. 238 (1979)).
7. United States v. Villegas, 899 F. 2d 1324 (2d Cir. 1990) (relying on United States v. New York Telephone Co., 434 U. S. 159 (1977); United States v. Biasucci, 786 F. 2d 504 (2d Cir. 1986); United States v. Torres, 751 F. 2d 875 (7th Cir. 1984); United States v. Taborda, 635 F. 2d 131 (2d Cir. 1980)).
8. United States v. Pangburn, 983 F. 2d 449 (2d Cir. 1993) (warrant's violation of notice requirement of Rule 41 did not require suppression of evidence). See also United States v. Freitas, 800 F. 2d 1451 (9th Cir. 1986) (failure to comply with Rule 41 does not automatically require suppression of evidence); United States v. Vasser, 648 F. 2d 507 (9th Cir. 1980) (violation of Rule 41 does not lead to suppression unless the violation is fundamental); United States v. Radlick, 581 F. 2d 225 (9th Cir. 1978) (a violation of Rule 41 requires suppression of evidence only where agents would not have carried out the search had they been required to follow Rule 41 and where the violation was intentional and deliberate); United States v. Burke, 517 F. 2d 377 (2d Cir. 1975) (a violation of Rule 41 alone should not lead to exclusion of evidence unless the search would not have occurred or would not have been so abrasive if Rule 41 had been followed, or unless there was an intentional and deliberate disregard of Rule 41).
9. See, e.g., United States v. Freitas, 856 F. 2d 1425 (9th Cir. 1988).
10. See, e.g., Dalia v. United States, 441 U. S. 238 (1979) (4th Amendment does not per se bar court-authorized covert entries); United States v. New York Telephone Co., 434 U. S. 159 (1977) (although Rule 41 defines seizable property to include tangible objects, it does not exhaustively enumerate all the items which may be seized pursuant to Rule 41; Rule 41 is sufficiently broad to include seizures of intangible items; the notice requirement of Rule 41 is not so inflexible as to require invariably that notice be given to the person searched prior to commencement of the search); United States v. Donovan, 429 U. S. 413 (1977) (federal statute providing that persons subjected to court-authorized electronic surveillance are to be given notice of the

surveillance after it is completed satisfies 4th Amendment); Katz v. United States, 389 U. S. 347 (1967) (a conventional search warrant ordinarily serves to notify the suspect of an intended search; however, officers need not announce their purpose before conducting an otherwise authorized search if such an announcement would provoke the escape of the suspect or the destruction of critical evidence; Rule 41 requires officers to serve upon the person searched a copy of the warrant and a receipt for material obtained, but it does not invariably require that this be done before the search takes place); Osborn v. United States, 385 U. S. 323 (1966) (upholding validity of court-authorized use of hidden recording device against suspect who was not notified of the electronic surveillance until after his conversations were recorded); United States v. Koyomejian, 970 F. 2d 536 (9th Cir. 1992) (Rule 41 authorized a federal court to issue warrants for silent video surveillance); United States v. Mesa-Rincon, 911 F. 2d 1433 (10th Cir. 1990) (Rule 41 empowered federal court to issue order authorizing Secret Service to surreptitiously enter private building to install and maintain video surveillance equipment); United States v. Biasucci, 786 F. 2d 504 (2d Cir. 1986) (Rule 41 empowered federal court to issue order authorizing FBI to enter business office and install hidden video camera); United States v. Torres, 751 F. 2d 875 (7th Cir. 1984) (federal court had inherent power as well as authority under Rule 41 to issue an order authorizing television surveillance of the interior of an apartment being used by terrorists as a safe house to make bombs); United States v. Taborda, 635 F. 2d 131 (2d Cir. 1980) (search warrant required for viewing of private area through telescope); Michigan Bell Telephone Co. v. United States, 565 F. 2d 385 (6th Cir. 1977) (the Rule 41 definition of “property” as tangible objects is not all inclusive; Rule 41 authorizes search warrants for intangible objects).

11. USA Patriot Act, Pub. L. No. 107-56, tit. 2, § 213, 115 Stat. 272, 285-86 (amending 18 U. S. C. § 3103a).

12. USA Patriot Act, Pub. L. No. 107-56, tit. 2, § 224(a), 115 Stat. 272, 295.

13. As amended on Apr. 29, 2002, effective Dec. 1, 2002, Rule 41(a)(1) provides: “This rule does not modify any statute regulating search and

seizure, or the issuance of a search warrant in special circumstances."
14. 18 U. S. C. § 3103a(b).
15. See, e.g., Dalia v. United States, 441 U. S. 238 (1979) (4th Amendment does not per se bar court-authorized covert entries); United States v. Donovan, 429 U. S. 413 (1977) (federal statute providing that persons subjected to court-authorized electronic surveillance are to be given notice of the surveillance after it is completed satisfies 4th Amendment); Katz v. United States, 389 U. S. 347 (1967) (a conventional search warrant ordinarily serves to notify the suspect of an intended search; however, officers need not announce their purpose before conducting an otherwise authorized search if such an announcement would provoke the escape of the suspect or the destruction of critical evidence; Rule 41 requires officers to serve upon the person searched a copy of the warrant and a receipt for material obtained, but it does not invariably require that this be done before the search takes place); Osborn v. United States, 385 U. S. 323 (1966) (upholding validity of court-authorized use of hidden recording device against suspect who was not notified of the electronic surveillance until after his conversations were recorded); United States v. Pangburn, 983 F. 2d 449 (2d Cir. 1993) (sneak and peek warrant's violation of notice requirement of Rule 41 did not require suppression); United States v. Koyomejian, 970 F. 2d 536 (9th Cir. 1992) (Rule 41 authorized a federal court to issue warrants for silent video surveillance); United States v. Mesa-Rincon, 911 F. 2d 1433 (10th Cir. 1990) (Rule 41 empowered federal court to issue order authorizing Secret Service to surreptitiously enter private building to install and maintain video surveillance equipment); United States v. Villegas, 899 F. 2d 1324 (2d Cir. 1990) (sneak and peek warrant did not violate 4th Amendment or Rule 41); United States v. Biasucci, 786 F. 2d 504 (2d Cir. 1986) (Rule 41 empowered federal court to issue order authorizing FBI to enter business office and install hidden video camera); United States v. Torres, 751 F. 2d 875 (7th Cir. 1984) (federal court had inherent power as well as authority under Rule 41 to issue an order authorizing television surveillance of the interior of an apartment being used by terrorists as a safe house to make bombs); United States v. Taborda, 635

F. 2d 131 (2d Cir. 1980) (search warrant required for viewing of private area through telescope); Michigan Bell Telephone Co. v. United States, 565 F. 2d 385 (6th Cir. 1977) (the Rule 41 definition of "property" as tangible objects is not all inclusive; Rule 41 authorizes search warrants for intangible objects).
16. United States v. Freitas, 800 F. 2d 1451, 1458 (9th Cir. 1986) (Poole, J., dissenting).
17. Note, Freitas After Villegas: Are "Sneak and Peek" Search Warrants Clandestine Fishing Expeditions?, 26 San Diego L. Rev. 933, 946 (1989).
18. Id. at 947.
19. Note, Covert Searches, 39 Stan. L. Rev. 545, 557 (1987).

STATUTORY AND CASELAW UPDATE

Through April 18, 2008

STATUTORY LAW UPDATE

1. The sneak and peak search warrant provisions of 18 U.S.C. § 3103a were amended in several respects by Pub. L. 109-177, Title I, § 114, 120 Stat. 210 (Mar. 9, 2006).

2. As a result of the amendments enacted by Pub. L. 109-177 in 2006, 18 U.S.C. § 3103a now provides:

United States Code
Title 18. Crimes and Criminal Procedure
Part II. Criminal Procedure
Chapter 205. Searches and Seizures
Section § 3103a. Additional grounds for issuing warrant

(a) In general.–In addition to the grounds for issuing a warrant in section 3103 of this title, a warrant may be issued to search for and

seize any property that constitutes evidence of a criminal offense in violation of the laws of the United States.

(b) 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, except if the adverse results consist only of unduly delaying a trial);

(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 not to exceed 30 days after the date of its execution, or on a later date certain if the facts of the case justify a longer period of delay.

(c) Extensions of delay.–Any period of delay authorized by this section may be extended by the court for good cause shown, subject to the condition 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, unless the facts of the case justify a longer period of delay.

(d) Reports.–

(1) Report by judge.–Not later than 30 days after the expiration of a warrant authorizing delayed notice (including any extension thereof) entered under this section, or the denial of such warrant (or request for extension), the issuing or denying judge shall report to the Administrative Office of the United States Courts–

(A) the fact that a warrant was applied for;

(B) the fact that the warrant or any extension thereof was granted as applied for, was modified, or was denied;

(C) the period of delay in the giving of notice authorized by the warrant, and the number and duration of any extensions; and

(D) the offense specified in the warrant or application.

(2) Report by Administrative Office of the United States Courts.–Beginning with the fiscal year ending September 30, 2007, the Director of the Administrative Office of the United States Courts shall transmit to Congress annually a full and complete report summarizing the data required to be filed with the Administrative Office by paragraph (1), including the number of applications for warrants and extensions of warrants authorizing delayed notice, and the number of such warrants and extensions granted or denied during the preceding fiscal year.

(3) Regulations.–The Director of the Administrative Office of the United States Courts, in consultation with the Attorney General, is authorized to issue binding regulations dealing with the content and form of the reports required to be filed under paragraph (1).

See also Brett A. Shumate, From "Sneak and Peek" to "Sneak and Steal": Section 213 of the USA Patriot Act, 19 Regent U. L. Rev. 203 (2006); Nathan H. Seltzer, Still Sneaking & Peeking, 42 Crim. Law Bull. 289 (2006); Beryl A. Howell, Surveillance Powers in the USA

Patriot Act: How Scary Are They?, 76 Pa. B.A. Q. 12 (Jan. 2005); Timothy Edgar, We Can Be Both Safe and Free: How the Patriot Act Threatens Civil Liberties, 76 Pa. B.A. Q. 21 (2005); James B. Perrine, The USA Patriot Act: Big Brother or Business as Usual?, 19 Notre Dame J.L. Ethics & Pub. Pol'y 163 (2005); Beryl A. Howell, Seven Weeks: The Making of the USA Patriot Act, 72 Geo. Wash. L. Rev. 1145 (2004); Nathan H. Seltzer, When History Matters Not: The Fourth Amendment in the Age of the Secret Search, 40 Crim. Law Bull. 105 (2004); Robert M. Duncan Jr., 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 (2004).

CASELAW UPDATE

United States v. Espinoza, 2005 WL 3542519 (E.D. Wash. 2005) (the express requirements of 18 U.S.C. § 3103a require the issuing court to find, when issuing a delayed notice search warrant, "reasonable cause to believe that providing immediate notification of the execution of the warrant may have an adverse result," 18 U.S.C. § 3103a(b)(1), and in order to allow seizure of tangible property, to find "reasonable necessity for the seizure," § 3103a(b)(2); § 3103a(b)(3) requires the warrant itself to "provide[ ] for the giving of such notice within a reasonable period of its execution;" here, the issuing court did not include such findings on the search warrant nor in any contemporaneously issued sealed order; the government argues the issuing court need not put such findings explicitly on the warrant; perhaps not, but absent the insertion on the warrant itself or in a contemporaneously issued sealed order of the statutorily required findings by the magistrate, arguments over the meaning of conflicting language in the search warrant will persist with the unnecessary development of strained precedent as courts speculate on the magistrate's thought process and decision; while this court agrees § 3103a(b) does not explicitly require the issuing court to insert the statutory findings on the warrant itself, based on the policies and purposes of the 4th Amendment warrant requirement, this court finds a

bright-line rule requiring an issuing court to expressly make such findings is necessary, either by explicitly adopting and incorporating the affidavit's conclusions for the necessity for a § 3103a(b) warrant in a written order accompanying the warrant or on the warrant itself; here, because the issuing court did not make such findings in either an order or on the warrant, this court must guess at what was actually intended, an unacceptable course when it involves the rights guaranteed under the 4th Amendment; in order to ensure 4th Amendment privileges are protected and infringements on such are able to be closely scrutinized, this court finds the 4th Amendment requires the issuing court to specify in writing that it made the determinations required by § 3103a(b); here, rather than set a date, following a reasonable period, for notice, the warrant actually required leaving a copy of the warrant at the site; accordingly, not only does the warrant not contain findings required by § 3103a(b), but the warrant actually called for immediate notice; therefore, on its face, the warrant failed to comply with § 3103a(b)(3) and must be treated as a standard warrant issued under 18 U.S.C. § 3102 and Rule 41, Fed. R. Crim. Proc.; the government then argues, even if the warrant failed to comply with § 3103a, the evidence should not be suppressed because the search falls within the good faith exception to the exclusionary rule enunciated in United States v. Leon, 468 U.S. 897 (1984); this court finds the Leon good faith exception inapplicable; accordingly, it is hereby ordered that the government's motion to reconsider suppression of evidence is denied)

United States v. Mikos, 2003 WL 22462560 (N.D. Ill. 2003) (the government applied for, and was issued, a "sneak and peek" warrant pursuant to 18 U.S.C. § 3103a to search defendant's storage locker located at Acorn Self Storage in Chicago; defendant requests that the evidence seized from the storage locker be suppressed, which this court denies; this court denies the suppression even though the sneak and peek warrant did not authorize officers to seize any property found during the search and law enforcement officers arguably violated this provision by (1) taking weapons out of duffel bag found within the locker and testing the weapons for operability, and (2) taking these weapons out into the

street and photographing them; this court, however, refuses to find the firearms were “seized” because the movement of the weapons outside for photographing and testing in no way altered the weapons’ accessability insofar as the defendant was concerned because they were in storage; thus, these movements did not constitute a meaningful interference with defendant’s possessory interests in the weapons; in addition, this court believes the weapons would have been discovered independently of their being (1) removed from the duffel bag or (2) taken into the street, and the evidence need not be suppressed under the independent source doctrine)

American Civil Liberties Union v. U.S. Dept. of Justice, 265 F.Supp.2d 20 (D.D.C. 2003) (ACLU made a Freedom of Information Act request to Department of Justice, seeking disclosure of statistics regarding use of new information gathering authority conferred by Patriot Act, including its authority for federal law enforcement officers to use sneak and peek search warrants; the information was withheld and the ACLU sued to compel disclosure of the withheld information; the DOJ moved for summary judgment; the court held that statistical information sought could be withheld on national security grounds)