



## HOW THE USA-PATRIOT ACT EXPANDS LAW ENFORCEMENT "SNEAK AND PEEK" WARRANTS

The final version of the anti-terrorism legislation, the Uniting and Strengthening America By Providing Appropriate Tools Required To Intercept and Obstruct Terrorism (H.R. 3162, the "USA PATRIOT Act") would allow law enforcement agencies to delay giving notice when they conduct a search. This means that the government could enter a house, apartment or office with a search warrant when the occupant was away, search through her property and take photographs, and in some cases seize physical property and electronic communications, and not tell her until later. This provision would mark a sea change in the way search warrants are executed in the United States.

The Fourth Amendment protection against unreasonable searches and seizures requires the government to both obtain a warrant and to give notice to the person whose property will be searched before conducting the search. The notice requirement enables the person whose property is to be searched to assert her Fourth Amendment rights. For example, a person with notice might be able to point out irregularities in the warrant, such as the fact that the police are at the wrong address, or that because the warrant is limited to a search for a stolen car, the police have no authority to be looking in dresser drawers. The Supreme Court recently affirmed that notice is a key Fourth Amendment protection. However, it has not ruled on the constitutionality of sneak and peek searches.

The major rationale for requiring a warrant before conducting a search is to ensure that a neutral and detached third person - usually a magistrate - will review a warrant prior to issuance. The invasion of privacy must be held to a minimum. In a covert search warrant, there are often no limitations on what can or will be searched. Any protections afforded by a warrant are meaningless when the searching officer has complete and unsupervised discretion as to what, when and where to search and the individual owner is not provided notice so cannot assert and protect her rights.

The government already has the authority, in limited situations, to delay notification, for searches of some forms of electronic communications that are in the custody of a third party. It must show the judge that if the person to be searched is given notice, one of the five things will happen - (1) an individual's physical safety will be endangered, (2) someone will flee prosecution, (3) evidence will be tampered with, (4) potential witnesses will be intimidated or, (5) an investigation would be jeopardized or a trial unduly delayed.

Section 213 would take an extremely limited authority and expand it so that it would be available in any kind of search (physical or electronic) and in any kind of criminal case. The standard that law enforcement must show - that an investigation will be jeopardized - is a very low one. Law enforcement agents will seek to delay notification whenever it is to their advantage to do so. Over time, the delayed notice "exception" would become the rule and would deal another serious blow to the privacy protections afforded by the Fourth Amendment.

Even though this provision is one of the most far-reaching of all of the search provisions in the bill,

unlike many of those provisions, it does sunset is a permanent change in the law.

For more information, see the joint letter on Sneak and Peek Warrants by ACLU, the Free Congress Foundation and others at <http://www.aclu.org/congress/1101901a.html>.

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