PRESERVING THE FOUNDATION OF LIBERTY

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> *The sacred rights of mankind are not to be rummaged for, among old parchments, or musty records. They are written, as with a sun beam, in the whole volume of human nature, by the hand of the divinity itself; and can never be erased or obscured by mortal power.*[1]

Foundations are supposed to be steadfast. The very idea of a foundation is to provide a pinion between the fixed and the transient, the permanent and the temporary. The foundation is the unalterable base upon which to build. So it is with our Constitution and Bill of Rights. They are the rock upon which we have built our modern re-public, while protecting the individual from the government itself. For more than two centuries, they have provided the firm foundation of lib-erty and opportunity from which America and its people have taken wing, enjoying success and weathering failure, celebrating triumph and mourning tragedy.[2]

After the terrorist attacks of September 11, 2001, forgetting our past and fearing our future, Congress began turning that foundation on its head, acting as if physical security requires the sacrifice of individ-ual rights to government imperatives. While paying lip service to our heritage of limited government and individual liberty, we began acting as if individual rights are conditional, derived not from God nor inher-ent in the human condition, but subject to the collective expression of our fears. Worst of all, we convinced ourselves we were doing nothing of the kind, or that the manifest benefit of a safer society was worth risking the loss of individual liberties.

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1. Alexander Hamilton, *The Farmer Refuted* (Feb. 23, 1775), *in* 1 THE PAPERS OF ALEXANDER HAMILTON 81, 122 (H. Syrett ed., 1961) (emphasis in original).

2. The debate about the role to be played by the intent of the framers in consti-tutional interpretation has been significant in recent years. Some legal scholars have argued that the framers' intentions place limits on the scope of constitutional interpre-tation. *See, e.g.*, ROBERT BORK, ORIGINAL INTENT: OUR LAST BEST HOPE (1990). Oth-ers have suggested a less-restrictive interpretive approach to the framers' intentions, arguing that the Constitution is a living document that must respond to the needs of the times. *See, e.g.*, Paul Finkelman, *The Constitutional Intentions of the Framers: The Limits of Historical Analysis*, 50 U. PITT. L. REV. 349 (1989). The co-authors of this essay approach the Constitution from opposite sides of this interpretive divide. Re-gardless of whether the framers' intentions are viewed as the primary interpretive mechanism or as a foundational interpretive mechanism, the importance of those inten-tions to our modern understanding of the document is profound.

Congress passed the USA PATRIOT Act[3] just weeks after the September 11 attacks, while the dead from the World Trade Center towers in Manhattan, the Pentagon in Washington, and from Flight 93 in Pennsylvania were still being buried.[4] An anthrax threat, assumed by many at the time to be another terrorist attack, had forced members of Congress out of their offices.[5] Few, if any, lawmakers were truly aware of the new and expanded law enforcement authority within the PATRIOT Act. They only knew that they had to do something to quiet the public's fears, and their own.[6]

This was not an executive order from a president reacting to a concrete and immediate threat.[7] This was not the temporary imposition of martial law in response to a natural disaster or military assault.[8] This was the world's greatest deliberative body hastily enacting an in-credibly

detailed, complex, and comprehensive piece of legislation without all the facts.[9] That haste and lack of deliberation left advocates backfilling many of the arguments in support of certain provisions of the law that now appear to be glaringly at odds with constitutional principles.

3.Uniting and Strengthening America by Providing Appropriate Tools Re-quired to Intercept and Obstruct Terrorism, Pub. L. No. 107–56, 115 Stat. 272 (2001) (hereinafter USA PATRIOT or PATRIOT Act) (codified as amended in scattered sec-tions of the United States Code).

4.*See generally* Clyde Haberman, *New Legal Powers, Fresh Anthrax Worries, Resilient Taliban*, N.Y. TIMES, Oct. 26, 2001, at B1 (reporting on the circumstances surrounding the signing of the PATRIOT Act into law); Eric Lipton, *Numbers Vary In Tallies Of the Victims*, N.Y. TIMES, Oct. 25, 2001, at B1 (reporting on the ongoing tally of the dead and missing in the World Trade Center attack).

5.*See* Todd S. Purdum, *More Checked For Anthrax: U.S. Officials Acknowl-edge Underestimating Mail Risks*, N.Y. TIMES, Oct. 25, 2001, at A1 (quoting President Bush as saying that the nation was "still under attack").

6.*Id.* As noted earlier, work on the PATRIOT Act was completed during an anthrax scare that moved many legislators out of their offices and was believed to be another terror attack. *Id.* The result was a bill adopted in an extremely short period of time with little or no open Congressional deliberation. The 402 page act, which amends over thirty sections of the U.S. Code and adds a number of new sections, was signed into law forty-five days after the September 11 attacks, without a single public hearing.

7.There has been much criticism regarding heavy-handed use of executive au-thority even during times of national emergency. *See generally* ARTHUR SCHLESINGER, JR., THE IMPERIAL PRESIDENCY (1973); *see also* John Dean, *The History of, and Chal-lenges to, Presidential Lawmaking: Why the Bush Administration's Use of Executive Orders is Nothing Novel*, FINDLAW LEGAL COMMENTARY (Dec. 21, 2001), *at* http://writ.findlaw.com/dean/20011221.html (last visited September 18, 2004) (on file with the Notre Dame Journal of Law, Ethics & Public Policy). Nonetheless, executive orders are generally viewed as a more temporal and limited response than legislation. This view appears to be rooted in the notion that executive orders need only last as long as a particular presidential administration as they can be revoked unilaterally by a new administration. *See generally* Tara L. Branum, *President or King? The Use and Abuse of Executive Orders In Modern-Day America*, 28 J. LEGIS. 1 (2002) (examining the continuing controversy surrounding the proper nature of executive power and the limitations that should be placed upon it, especially in regard to the issuance of execu-tive orders).

8.During the Civil War, President Abraham Lincoln suspended habeas corpus in 1861 and 1862. J.G. RANDALL & DAVID DONALD, THE CIVIL WAR AND RECONSTRUCTION 301–07 (2d ed. 1961). During World War II, President Franklin Roosevelt issued an executive order in 1942 authorizing internment of 120,000 individuals (including many United States citizens) of Japanese ancestry on the West Coast of the United States. *See* Exec. Order 9906, 7 Fed. Reg. 1407 (Feb. 19, 1942). The extraordinary measure of declaring martial law has been taken only a few times in the history of our country, and even then, under questionable constitutional authority and with much criticism. *See* Harry N. Shreiber and Jane L. Shreiber, *Bayonets In Para-dise: A Half-Century Retrospect on Martial Law in Hawaii, 1941–1946*, 19 HAWAII L. REV. 477, 480 (1997); *see also* Kirk L. Davies, *The Imposition of Martial Law in the United States*, 49 A.F. L. REV. 67 (2000) (setting forth a comprehensive overview of the definition, application, use, and constitutional and practical controversy of martial law in the United States). Even despite controversy, declarations of martial law have been short lived and temporary—revocable by the executive unilaterally.

I. CONSTITUTIONAL FOUNDATIONS

The framers of our Constitution drew on an extensive body of law and tradition to recognize certain rights were inalienable—they tran-scended the power of government. The colonists who fostered the tree of liberty recognized that individual rights were its taproot. The notion that "a man's home is his castle," a place free from the intrusion of government, was a time-honored theme—part of both the Code of Hammurabi and the pronouncements of the Roman Emperor Justin-ian.[10] This notion was one of the inalienable rights with which Eng-lishmen were thought endowed and which the English barons sought to protect, through the Magna Carta, from the ad hoc interference of King John.[11]

9.*See supra* note 8.

10.R.W. LEE, ELEMENTS OF ROMAN LAW WITH A TRANSLATION OF THE INSTITUTES OF JUSTINIAN (4th ed. 1956).

11.The Magna Carta did not directly confer rights; it protected the rights of Englishmen—rights not conferred by the state, but pre-existing the state and above the law of the state. Interestingly, the Magna Carta did not directly address search and sei-zure. Rather, it was an attempt to limit the power of the Monarch to interfere unilater-ally with unnamed and presumably transcendent rights of Englishmen. It is one of the early sources of the notion of substantive due process. *See generally* SAMUEL DASH, THE INTRUDERS: UNREASONABLE SEARCHES AND SEIZURES FROM KING JOHN TO JOHN ASHCROFT (2004) (describing a recent discussion of the Magna Carta and its role in the development of search and seizure law); s*ee also* SOURCES OF OUR LIBERTIES 22 (Rich-ard L. Perry ed., 1959). It was understood by the framers of the United States Consti-tution as a protection of inalienable rights against the power of the king. *See* Thomas B. McAffee, *Inalienable Rights, Legal Enforceability, and American Constitutions: The Fourteenth Amendment and the Concept of Unenumerated Rights*, 36 WAKE FOREST L. REV. 747, 760 (2001); *see also* Jane Rutherford, *The Myth of Due Process*, 72 B.U. L. Rev. 1, 45 (1992).

The concept of inalienable rights infused the colonists' under-standing of liberty. It can be seen in diverse writings, from Patrick Henry's rousing appeal for self-determination in the Parson's Cause case of 1763[12] to the claim of the Declaration of Independence that "all Men are created equal, that they are endowed by their Creator with cer-tain unalienable Rights . . . ."[13] More than a desire for independence or equality, the idea that made America a reality and continues to make America great is that individual rights are God-given and unalienable and that government should be neither more nor less than man's collec-tive expression of those rights. That is the contract, the foundation upon which America was imagined. It is designed to protect individu-als—their persons, homes, property, speech, worship, associations, and privacy—from the tyranny of government by the majority.

Yet, the Fourth Amendment reflected more than a generalized no-tion of inalienable rights. It was a specific response to the British gov-ernment's pre-constitutional violation of colonists' individual rights through the use of "Writs of Assistance." The writs were general, uni-versal, perpetual, and transferable search warrants used to enforce smuggling laws so the cash-strapped British crown could wring reve-nue from the colonies to satisfy the crushing debt of a worldwide em-pire. They authorized "all and singular justices, sheriffs, constables, and all other officers and subjects" to enter homes and businesses at will—ostensibly in search of smuggled items—and to seize virtually any property without accounting or recompense.[14] Writs of Assistance blatantly disregarded personal privacy and offended basic civil liber-ties, as they were understood by colonial times. Not only were the writs broad and intrusive but many of the colonists believed they had been outlawed in Britain—that only the colonists were subject to such intrusions.[15]

12.STEPHAN B. PRESSER & JAMIL S. ZAINALDIN, LAW AND JURISPRUDENCE IN AMERICAN HISTORY 52–54 (3d ed. 1995) (discussing the cases collectively known as the "Parsons' Cause"). The cases involved resistance to British authority disapproving of the lowering of clergy salaries by the Virginia Colonial legislature. Henry argued for the legitimacy of the Virginia enactment based on the consent of the people of Vir-ginia to be governed by the colonial legislature. *Id.*

13.THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

14.For detailed history of the Vice Admiralty Courts, see CARL UBBELOHDE, THE VICE-ADMIRALTY COURTS AND THE AMERICAN REVOLUTION (1960). For a detailed history of the use of Writs of Assistance, see M.H. SMITH, THE WRITS OF ASSISTANCE CASE (1978).

15.*See* Entick v. Carrington, 95 Eng. Rep. 807 (K.B. 1765) (holding general warrants issued in Britain were unlawful). The court concluded that the secretary of state could not "lawfully break into a man's house and study to search for evidence against him; this would be worse than the Spanish Inquisition; for ransacking a man's secret drawers and Boxes to come at evidence against him, is like racking his body to come at his secret thoughts." *Id.* The holding in *Entick* probably only meant that the King did not unilaterally have the jurisdiction to issue a general warrant, but that the King in council could issue such warrants. Nonetheless, the opinion, written in grand language, was understood by some members of Parliament at the time and by the colo-nists to be an unequivocal condemnation of general warrants. *See* DASH, *supra* note 12, at 1 (William

Pitt declared to Parliament, "The poorest man may in his cottage, bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England may not enter; all his force dare not cross the threshold of the ruined tenement."); *see also* DASH, *supra* note 14,at 26–32.

The infringement on personal privacy and property rights repre-sented by the Writs of Assistance was so outrageous that, in 1761, it prompted Boston attorney James Otis, a loyal officer of King George III, to resign his position as an advocate general in the vice admiralty court.[16] Subsequently, he was commissioned by Boston merchants to make their case against renewal of the writs. Otis's stirring five-hour argument indicted the expansion of government authority in violation of the individual rights of British subjects. "It appears to me (may it please your honours) the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law-book."[17] Otis's argument in the Writs of Assistance case hinged on several major points, one of which was the invocation of the ancient notion regarding the sanctity of the home.[18] Otis argued that householders were reduced to servants under the writs because their homes were subject to search at any time: "Now one of the most essential branches of English liberty is the freedom of one's house. A man's house is his castle; and while he is quiet, he is as well guarded as a prince in his castle. This writ, if it should be de-clared legal, would totally annihilate this privilege."[19]

John Adams, then a young lawyer, was in the courtroom to hear Otis's argument. Fifty-six years later, in a letter to a colleague, the founding father and America's second president recalled the impas-sioned defense of liberty as a transcendent moment on the path to revo-lution: "Then and there, the child Independence was born."[20]

Also born that day, and reared to maturity by Adams and many others, was a critical element of America's constitutional foundation—the commitment to protect "the freedom of one's house," which be-came the Fourth Amendment. The idea that those rights transcend the needs of any particular time and place is embedded in our jurispru-dence.[21] Justice Robert Jackson wrote:

16.SMITH, *supra* note 15, at 316–17.

17.Otis's argument in the famous case was not transcribed or reported but was summarized by John Adams. *See* John Adams, *Abstract of the Argument*, *in* 2 LEGAL PAPERS OF JOHN ADAMS 134, 140 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965).

18.Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 601–02 (1999).

19.SMITH, *supra* note 15, at 344.

20.Letter from John Adams to William Tudor (Mar. 29, 1817), *in* 10 WORKS OF JOHN ADAMS at 247–48 (Charles Francis Adams ed., 1856).

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to estab-lish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.[22]

With those words, the U.S. Supreme Court struck down the widely popular practice, adopted in a burst of patriotism during World War II, of requiring public school students to salute the American flag. Writing for the majority, Justice Jackson crystallized the argument for protecting most vigorously the least popular of our individual rights in the overheated political climate of the moment. While public displeas-ure served as a natural defense of liberty against the Writs of Assis-tance once Otis sounded the alarm, the Constitution and Bill of Rights institutionalized protection of minority rights from majority will and created a foundation for individual liberty. The test of such a founda-tion is how firmly it is reinforced against time and tides.

II. "SNEAK—AND—PEEK" WARRANTS PRIOR TO THE USA PATRIOT ACT

Just as the British crown felt compelled, in the interest of empire, to sacrifice the rights of citizens remote from the seat of government, Section 213 of the PATRIOT Act, in the name of fighting terrorism, deprives Americans of the right to be "as well guarded as a prince in his castle." Section 213 of the PATRIOT Act greatly expands what al-ready was constitutionally questionable authority for delayed notifica-tion of the execution of search warrants.

Prior to the PATRIOT Act, the Federal Rules of Criminal Proce-dure established the framework for the execution and return of war-rants. Rule 41(f) requires that the officer executing the warrant enter the date and time of its execution on its face. It further requires that an officer present at the search prepare and verify an inventory of any property seized. Moreover, Rule 41(f) provides that the officer execut-ing the warrant "give a copy of the warrant and a receipt for the prop-erty taken to the person from whom or from whose premises, the prop-erty was taken" or "leave a copy of the warrant and receipt at the place where the officer took the property."[23] Congress recognized an ex-tremely limited exception to the notification requirements under certain circumstances where notification would endanger the life or physical safety of an individual, would result in flight from prosecution, de-struction of evidence, or intimidation of witnesses, or would otherwise jeopardize an investigation.[24]

21.At the time of the framing of the Constitution, the debate over whether to include an enumerated charter of rights was significant. Many argued against such in-clusion believing that there was no need to enumerate such transcendent rights when the powers of government were appropriately limited, and worrying that any such enumeration would be incomplete. They also believed the people would be protected by the individual states' Bills of Rights. Others, having just fought a revolution, lacked confidence in government's limited powers and sought to enumerate the liberties for which they had fought. *See* DASH, *supra* note 12, at 39–41.

22.West Virginia St. Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

The case law regarding surreptitious searches was unsettled at the time the USA PATRIOT Act was adopted. The U.S. Supreme Court never directly addressed the constitutionality of a broad surreptitious search provision. In *Berger v. New York*,[25] the Court struck down New York's wiretapping statute because it lacked a number of procedural safeguards to limit the intrusiveness of wiretapping. Among the stat-ute's deficiencies was that it had no requirement for notice. And, in contrast to other wiretapping statutes, the New York provision did not make up for this deficiency by requiring a showing of exigent circum-stances to justify the lack of notice.[26] However, in *Dalia v. United States*,[27] the Court refused to hold all surreptitious searches *per se* un-constitutional. Rather, the Court reasoned that under some circum-stances, surreptitious searches could be authorized where such searches were reasonable, such as where they were supported by a warrant.[28]

23.FED. R. CRIM. P. 41(f).

24.*See* 18 U.S.C. § 2705 (2000). Section 2705 permits notification for searches involving electronic communications held in third party storage for more than ninety days where there "is reason to believe that notification of the existence of the court or-der may have an adverse result . . . ." *Id.* "Adverse result" is defined in section 2705 as:

(a) endangering the life and physical safety of an individual;
(b) flight from prosecution;
(c) destruction of or tampering with evidence;
(d) intimidation of potential witnesses; or
(e) otherwise seriously jeopardizing an investigation or unduly delaying a trial.

Id. As pointed out later, these provisions are not an effective limit on the power to search surreptitiously. The threat of Section 2705 is limited, however, by its scope (only electronic communications stored with third parties). *See infra* note 49 and ac-companying text.

25.Berger v. New York, 388 U.S. 41 (1967).

26.*Id.* at 60.

27.Dalia v. United States, 441 U.S. 238 (1979). *Dalia* involved a surreptitious entry to install bugging devices. *Id.* The entry was not explicitly authorized in the warrant although it was implicitly necessary to effectuate the warrant. *Id.*

On this landscape, the federal circuit courts addressed the consti-tutionality of delayed notification of searches.[29] In *United States v. Freitas*, the Ninth Circuit held that a warrant that failed to provide for notice within a "reasonable, but short time" after the surreptitious entry was constitutionally defective.[30] The *Freitas* court held that a delay in notification should not exceed seven days, except when supported by a "strong showing of necessity."[31]

Even courts upholding delayed notification of search warrants have imposed significant limitations on such searches.[32] In *United States v. Villegas*, the Second Circuit reasoned:

> Though we believe that certain safeguards are required where the entry is to be covert and only intangible evidence is to be seized, we conclude that appropriate conditions were imposed in this case. Certain types of searches or surveillances depend for their success on the absence of premature disclosure. The use of a wiretap or a ""bug," or a pen register, or a video camera would likely produce little evidence of wrongdoing if the wrongdoers knew in advance that their conversations or actions would be monitored. When non-disclosure of the authorized search is essential to its success, neither Rule 41 nor the Fourth Amendment prohibits covert entry.[33]

The Second Circuit determined that a number of safeguards ap-plied to surreptitious searches. First, the Court noted that if tangible evidence was seized during the search, officers must leave an inventory of the property taken at the location or must provide the inventory to the owner of the searched premises.[34] Additionally, the court con-cluded that, with regard to electronic surveillance, the requirements of federal wiretapping laws provided significant safeguards.[35] The Court further reasoned that the safeguards of the federal wiretapping statute also apply by analogy to video surveillance.[36] Even with regard to sur-reptitious entries in which no tangible property is seized, the Second Circuit held that law enforcement officers must establish that there is a reasonable necessity for the delay of notice and must provide notice within a reasonable, but short, period of time after the search.[37] Al-though the *Villegas* court did not adopt the seven-day limitation of *Freitas*, the court did conclude that, as an initial matter, delays of longer than seven days should not be authorized.[38]

28.*Id.* at 246–47. The Court relied on a number of its earlier decisions, includ-ing Irvine v. California, 347 U.S. 128, 132 (1954) (holding a warrantless entry to in-stall bugging devices unconstitutional); Silverman v. United States, 365 U.S. 505, 511–512 (1961) (concluding that the warrantless secret entry into a home was unconstitu-tional); Katz v. United States, 389 U.S. 347, 355 n. 16 (1967) (holding that officers need not knock and announce their purpose when conducting an otherwise authorized search when it would provoke the escape of the subject or the destruction of critical evidence); United States v. Donovan, 429 U.S. 413, 429 n. 19 (1977) (upholding wire-tap statute as constitutional where it authorized notice upon completion of surveil-lance).

29.United States v. Freitas, 800 F.2d 1451, 1453 (9th Cir. 1986); *see also* United States v. Johns, 948 F.2d 599 (9th Cir. 1991) (holding that the failure to provide notice of search until conclusion of investigation violated Rule 41 and the Constitution but was excused because officers acted in good faith); United States v. Sitton, 968 F.2d 947 (9th Cir. 1992) (holding that search violated standard of *Freitas*, but was excused by the good faith of the officers). The surreptitious warrants in both *Johns* and *Sitton* were issued before the Ninth Circuit's decision in *Freitas*, leading, in part, to the good faith determinations in both cases.

30.*Freitas*, 800 F.2d at 1453.

31.*Id.* at 1456.

32.899 F.2d 1324 (2d Cir. 1990).

33.*Id.* at 1336.

While there is a paucity of case law on the general question of whether and when notice of the execution of a search is required, sig-nificant authority also establishes the closely related notion that law en-forcement officials must knock and announce themselves before exe-cuting a search warrant. Even before American independence, British law required law enforcement officials to knock and announce them-selves before executing a search warrant.[39] The United States Supreme Court has recognized that whether law enforcement officers knock and announce themselves is a factor to be considered in determining whether a search is reasonable.[40] The Court's reasoning was based substantially on the notion that government officials must provide no-tice before entering a person's home. The Court acknowledged that this notion formed part of the framers' understanding of what consti-tuted a reasonable search.[41] While the Court has recognized an exi-gency exception to the "knock and announce" rule,[42] it has not over-ruled it.

34.*Id.* at 1337.

35.*Id.* The Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510–2520 (2000), provides for a number of safeguards: the period of surveillance must be no longer than necessary, the surveillance techniques must minimize the inter-ception of communications by individuals not targets of the surveillance, and an inven-tory of the surveillance must be provided within ninety days of the end of the surveil-lance. 18 U.S.C. §2518.

36.*Villegas*, 899 F.2d at 1337.

37.The court specifically reasoned that the showing of necessity need not rise to the level required for a wiretap. *Id.* By statute, officers are required to certify that "normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous." 18 U.S.C. § 2518(3)(c).

38.*Id.*; *see also* United States v. Simons, 206 F.3d 392, 403 (2000) ("[I]nsofar as the . . . [search] satisfied the requirements of the Fourth Amendment, i.e., it was conducted pursuant to a warrant based on probable cause issued by a neutral and de-tached magistrate, we perceive no basis for concluding that the forty-five day delay in notice rendered the search unconstitutional."); United States v. Pangburn, 983 F.2d 449, 453–55 (2d Cir. 1993) (holding that the notice requirement of Rule 41 is not con-stitutionally required).

39.*See* Semayne's Case, 77 Eng. Rep. 194 (K.B. 1603); *see also* Craig Hem-mons, *I Hear You Knocking: The Supreme Court Revisits the Knock and Announce Rule*, 66 UMKC L. REV. 559, 566–68 (1998); Charles Patrick Garcia, *The Knock and Announce Rule: A New Approach to the Destruction-of-Evidence Exception*, 93 COLUM. L. REV. 685, 687–691 (1993); Jennifer M. Goddard, Note, *The Destruction of Evidence Exception to the Knock and Announce Rule: A Call for Protection of the Fourth Amendment*, 75 B.U. L. REV. 449, 453–55 (1995).

Thus, at the time the USA PATRIOT Act was adopted, no federal court had authorized unlimited use of "sneak-and-peek" warrants. Moreover, even those courts authorizing limited surreptitious entry had placed significant limitations on such searches.

III. "SNEAK-AND-PEEK" WARRANTS UNDER THE USA PATRIOT ACT

No federal court has ever confronted the virtually unlimited au-thority to dispense with notice contained in the PATRIOT Act. Section 213 eliminates the time limits for notification under prior federal law, makes judicial review of the necessity of delayed notification perfunc-tory and so loosens the standard for delayed notification as to render it meaningless. It strikes at the foundation of liberty embodied in the Fourth and Fifth amendments and at the essential protections of prob-able cause, due process, and separation of powers.

Section 213 amends 18 U.S.C. § 3103a to add the following lan-guage:

> 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 of-fense 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 a warrant may have an adverse result (as defined in section 2705);[43]
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> 40.*See* Williams v. Arkansas, 514 U.S. 927, 930 (1995). Significant debate exists among various justices of the Supreme Court and scholars regarding whether the principal command of the Fourth Amendment is that a search is reasonable (regardless of whether it is supported by a warrant), or whether the command of the Fourth Amendment is twofold—that searches be both supported by a warrant and be reason-able. *See, e.g.*, Lewis R. Katz, *In Search of a Fourth Amendment for the Twenty-First Century*, 65 IND. L. J. 549 (1990); Davies, *supra* note 19. Regardless of the debate, only reasonableness is implicated in both the "knock and announce" cases and the ""sneak-and-peek"" cases, as both situations generally arise where law enforcement officials have secured a warrant. *See also* Richardson v. Wisconsin, 520 U.S. 385 (1997) (finding that a state blanket exception to "knock and announce" rule in drug cases violated Fourth Amendment).
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> 41.*See Wilson*, 514 U.S. at 931–34 ("Given the longstanding common-law en-dorsement of the practice of announcement, we have little doubt that the Framers of the Fourth Amendment thought that the method of an officer's entry to a dwelling was among the factors to be considered in assessing the reasonableness of a search.").
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> 42.*See, e.g.*, *Katz v. United States*, 389 U.S. 347, 355 n. 16 (1967) ("[O]fficers need not announce their purpose before conducting an otherwise authorized search if such announcement would provoke the escape of the suspect or the destruction of criti-cal evidence.").
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> (2) the warrant prohibits 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 reason-able necessity of the seizure; and
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> (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.[44]

Section 213 changes prior federal law regarding notification of searches in several important ways. First, it permits delayed notifica-tion of a search in any case in which the government demonstrates that one of several adverse factors "may" occur, regardless of whether the investigation involves terrorism or the gathering of foreign intelli-gence. The adverse factors justifying delayed notice are that notifica-tion would endanger the life or physical safety of an individual, would result in flight from prosecution, destruction of evidence, intimidation of witnesses, or would otherwise jeopardize an investigation or unduly delay a trial.[45]

This standard is so open-ended that these invasive warrants could be obtained as a matter of course; the government need only state that notification of a search "may" "seriously jeopardize" an investigation. Although the standard for delay was part of pre-PATRIOT law, the earlier statute was limited to covert seizures of electronic communica-tions held in third-party storage.

The nature of criminal investigation is that unpredictable things may happen. It is always conceivable that the target of a search may act in an unpredictable fashion when he or she is notified of the war-rant and thereby jeopardize an investigation. As a result, Section 213 places virtually no limit on "sneak-and-peek" searches.

The second distinction between the PATRIOT Act and prior law is that officers may seize tangible property using a covert warrant un-der the PATRIOT Act without leaving an inventory of the property taken. Thus, the PATRIOT Act actually authorizes "sneak-and-steal" warrants. The law requires only that the warrant "provides for the giv-ing of such notice within a reasonable period of its execution, which period may thereafter be extended by the court for good

cause shown."[46]

43.For the text of 18 U.S.C. § 2705, see *supra* note 25.

44.18 U.S.C. § 3103a (incorporating the provisions of Rule 41 of the Federal Rules of Criminal Procedure into federal statutory law). Thus, the new language of section 3103a, added by the PATRIOT Act, applies to all warrants issued to federal law enforcement officials.

45.*See supra* note 25.

Again, prior statutory provisions for delayed notification applied only to electronic communications in third-party storage. The cases dealing with delayed notification authorized surreptitious entry but re-quired officers to leave an inventory if property was taken.[47] Although the approach of courts like the Second Circuit in *Villegas*, in our view, did not properly limit the use of "sneak-and-peek" warrants, it is sig-nificantly more limited than the PATRIOT Act approach.

Third, Section 213 permits delayed notification even where the government seizes electronic information, so long as the court issuing the warrant finds "reasonable necessity" for the seizure. Thus, if offi-cers get a warrant under federal wiretapping statutes, they still must comply with a complex set of safeguards.[48] For all other warrants in-volving electronic communications—those involving video or Internet surveillance, for example—delayed notification under the PATRIOT Act applies.

Fourth, Section 213 places no express limit on the length of the delay. Instead, it authorizes delay for a "reasonable period" of time and permits extensions of the delay for "good cause shown." Section 213 opens the door for secret searches extending over months or even years without the knowledge of the target of the search. Such delays render notice meaningless. Although the judge in any particular case may impose a specific deadline by which notice must be given, the statute does not require such a deadline. Where the warrant itself does not impose specific time limits, judicial review of the necessity of con-tinuing delay in notification is impaired. No concrete timeframe trig-gers a governmental duty to justify continued delay. Because the target of the search is, by definition, unaware of the search, he or she cannot be expected to seek review of the need for continued delay. Courts would have the opportunity to review the necessity of delay only after the fact, while also under the pressure to prosecute and admit evidence obtained through the notice-less search.

Finally, Section 213 extends the availability of "sneak-and-peek" warrants far beyond the PATRIOT Act's stated purpose of fighting ter-rorism. The provision contains no limitation on the types of cases in which a covert warrant could be used.

46.18 U.S.C. § 3103a; *see also* notes 44–46 and accompanying text.

47.*See supra* notes 33–35 and accompanying text.

48.*See supra* note 36.

CONCLUSION

The threatening nature of Section 213 is not obvious, and thus, it is more dangerous to the cause of preserving liberty. If the public is blinded by fear of terrorism or ignorance of what is at risk, Section 213 has the potential to become the insidious mechanism of steady but dis-cernible erosion in the foundation of our freedoms. Section 213 takes the exception and makes it the rule—in fact, makes it the law of the land. It gives broad statutory authority to secret searches in virtually any criminal case. Even if the Supreme Court upholds the constitu-tionality of such practices, Congress can—and should—limit them by statute. In such cases, justice delayed truly is justice denied.

Terrorism is a scourge that must be addressed. Government has a fundamental duty to protect its people from enemies, foreign or domes-tic. Fear of terrorism, or anything else, deprives us of free choice as surely as does tyranny; indeed, terrorism is an instrument of tyranny.

We must not, however, allow fear to erode the constitutional founda-tion of our freedom. We can no more gain real security by being less free than we can gain wealth or wisdom or anything else of value. No such trade-off is possible. That is the definition of "unalienable"—rights with which we were endowed by our Creator, and which there-fore cannot be repudiated or transferred to another. Our Constitution recognizes that higher law, and we ignore it at our peril.

We now are engaged in a national crisis, an unconventional war in which our surreptitious enemies use the camouflage of a free society's commitment to privacy and diversity to achieve their goals. Our gov-ernment is justified in adapting its law enforcement methods to the new threat, but we must take care to ensure those methods are consistent with the timeless principles of our founding.[49] To do less is to sanction a dangerous expansion of governmental authority and a corresponding reduction of personal privacy.

Our body of laws serves as both a connecting mortar and a protec-tive barrier between the foundation of our Constitution and the struc-ture of our government. Laws are necessary for applying constitutional principles to the endless variety of everyday life. They join the ab-stract and the concrete. They enable us to safely explore our freedom and realize the potential of liberty.

49.A narrowly tailored response to the current crisis could be crafted. For ex-ample, the proposed Security and Freedom Ensured Act of 2003, S. 1709, 108th Cong. (2003) [hereinafter SAFE Act] would permit delayed notification, but only where the government demonstrates that notice of the search "will" result in endangering the life or physical safety of an individual, flight from prosecution, destruction of evidence or intimidation of witnesses, or will otherwise seriously impair the investigation or delay trial. Moreover, the SAFE Act requires that notice be provided within seven days of the search. SAFE Act §3. Another possible approach would be to limit "sneak-and-peek" searches only to terrorism investigations and/or to provide the power to delay notification of a search until some time in the future when the current crisis has passed.

However, when laws reach beyond limits imposed by the Consti-tution, when they grant too much power to government and too little deference to the source of that power, they cease to connect or protect. If unchecked, these laws can destroy the foundation of individual rights. Proponents contend that we have nothing to fear from Section 213 or any other provision of the PATRIOT Act. This may be true, as long as the public is as vigilant as the American colonists were after Otis inflamed their passions regarding the Writs of Assistance. But can we trust that the law will be used as judiciously, with as much care to protecting civil liberties, once the public's attention has turned to other matters?

The concern is not new or unique to the PATRIOT Act. Few of our Founding Fathers had greater faith in his fellow man than Thomas Jefferson. Yet that faith had its limits. In the Kentucky Resolutions, Jefferson wrote:

> [I]t would be a dangerous delusion were a confidence in the men of our choice to silence our fears for the safety of our rights: that confidence is everywhere the parent of despotism—free government is founded in jealousy, and not in confidence; it is jealousy and not confidence which prescribes limited con-stitutions, to bind down those whom we are obliged to trust with power: that our Constitution has accordingly fixed the limits to which,[50] and no further, our confidence may go . . . .

Due process. Probable cause. Those are the constitutional limits within which we "bind down those whom we are obliged to trust with power" and preserve our individual rights. A law that sets those limits aside, or obfuscates them in vague statutory language and legalistic definitions, has the potential for eroding the foundation of freedom as surely as terrorists have the potential for breaching the ramparts of our security. An informed people and a vigilant and responsive Congress are the keys to guaranteeing that our rights to security and freedom are ensured. They are essential to protecting the foundation of liberty and preserving each individual's God-given role as the architect of his or her own destiny. As John Stuart Mill warned:

> A people may prefer a free government, but if, from indolence, or carelessness, or

cowardice, or want of public spirit, they are unequal to the exertions necessary for preserving it; if they will not fight for it when it is directly attacked; if they can be de-luded by the artifices used to cheat them out of it; if by momen-tary discouragement, or temporary panic, or a fit of enthusiasm for an individual, they can be induced to lay their liberties at the feet even of a great man, or trust him with powers which enable him to subvert their institutions; in all these cases they are more or less unfit for liberty.[51]

50.THOMAS JEFFERSON, *Resolutions Relative to the Alien and Sedition Laws, in* 17 THE WRITINGS OF THOMAS JEFFERSON 379, 388–89 (Andrew A. Lipscomb et al. eds., 1905).

51.JOHN STUART MILL, *Considerations on Representative Government, re-printed in* UTILITARIANISM, ON LIBERTY, AND CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 191 (H.B. Acton ed., 1972).