

SNEAK AND PEEK SEARCH WARRANTS

Published in slightly different form in *Flagpole Magazine*, p. 12 (September 11, 2002).

Author: Donald E. Wilkes, Jr., Professor of Law, University of Georgia School of Law.

In his recent article "Taking Liberty with Freedom," author Richard P. Moore reminds us that the USA Patriot Act, signed by President Bush last Oct. 26 in the wake of the Sept. 11 terrorist attacks, "gives the government the kind of sweeping powers of arrest, detention, surveillance, investigation, deportation, and search and seizure that ... assault ... our most basic freedoms."

"No hearings were held in either the House or Senate on the USA Patriot Act," legal scholar John Dean tells us, "and few--if any--members of Congress were really aware of what was actually in this massive, complex, highly technical 30,000 word statute, which is divided into ten titles, with more than 270 sections and endless subsections that cross-reference and amend a dozen or more different laws."

I want to examine here a single section of the USA Patriot Act--section 213, definitely one of the most sinister provisions of this monstrous statute.

In euphemistic language that conceals the provision's momentous significance, section 213 states that with regard to federal search warrants "any notice 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 ...; [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."

Section 213 may be couched in Orwellian terminology, but there is no doubt about what it does.

Section 213 is the first statute ever enacted in the history of American criminal procedure to specifically authorize an entirely new form of search warrant--what legal scholars call the sneak and peek warrant (also dubbed the covert entry warrant or the surreptitious entry warrant). A sneak and peek search warrant authorizes police to effect physical entry into private premises without the owner's or the occupant's permission or knowledge to conduct a search; generally, such entry requires a breaking and entering.

In authorizing search warrants to be served stealthily sneak and peek warrants are a radical departure from conventional search warrants.

Inhabitants of premises searched under a conventional warrant know of the search either at the time it occurs or shortly thereafter. This is because traditionally search warrants have been executed openly and at a time when the inhabitants of the premises searched are present. Conventional search warrants authorize the seizure of physical objects (such as drugs or stolen property); if such articles are found and taken away by police the occupants will certainly know it. (Indeed, if possession of the articles is illegal, the occupants will be arrested on possession charges.) In addition, conventional search warrants require police to give a copy of the warrant

and a receipt for any items seized to the persons present on the premises, or else leave the copy and the receipt on the premises. In those instances where no one is present when the warrant is served the occupants will nevertheless usually soon be aware of the search and seizure: there will be signs of a forcible entry; the premises will have been ransacked and any seized items will be missing; and a copy of the warrant and the receipt will be on the premises.

The regime of sneak and peek warrants is drastically different. We know this because in the 1980's the FBI and the DEA managed, incredibly, to persuade certain federal judges to issue at least 35 sneak and peek warrants, despite the absence of any statutory authorization for such warrants at the time; and there are five reported federal appellate court decisions detailing the facts concerning the issuance and execution of such warrants.

Under a sneak and peek warrant the search occurs only when the occupants are absent from the premises. The entry, search, and any seizures are conducted in such a way as to keep them secret. The search and seizure focus on obtaining intangibles, i.e., information concerning what has been going on, or now is inside, the premises. Photographs may be taken. Usually, no physical objects are removed. If objects are removed this is accomplished in such a way that the removal remains clandestine; for example, an item seized might be replaced with another item that appears to be the original. No copy of the warrant or receipt is left on the premises. Sometimes the same premises is subjected to repeated covert entries under successive warrants. Generally, it will not be until after the police make an arrest or return with a conventional search warrant that the existence of any covert entries is disclosed. This may be weeks or even months after the surreptitious search or searches.

Although section 213, like the USA Patriot Act itself, was ostensibly designed to suppress terrorism, the section is not restricted to terrorists or terrorism offenses; it may be used in connection with any federal crime, including misdemeanors. Section 213 also is exempted from the Act's sunset provisions and therefore will remain on the books permanently unless repealed. Although section 213 governs federal search warrants, it is only a question of time before states begin enacting legislation authorizing state and local police to obtain sneak and peek warrants from state judges.

If a sneak and peek warrant targets a person who, as it turns out, is in fact innocent and the search uncovers nothing criminal, it is unlikely that the victim of the search will ever find out about it.

Exactly who, after all, is going to make sure that police notify such a person of the search? At any rate, police will rarely admit that an innocent person was subjected to a covert search, even when it did happen, because police can be counted on, whenever they deem it necessary to protect themselves, to plant evidence or to testify falsely as to what they observed. Where the search is surreptitious and the occupants are not present to observe the search the potential for police abuse is limitless. The widespread problem of lawlessness in law enforcement in this country will simply become exacerbated under a system where police learn at the police academy how to clandestinely burglarize the premises of Americans.

It may also be expected that over time the use of sneak and peek warrants will tend to become

common rather than exceptional. Search warrants are issued on an ex parte basis; at the time a warrant is issued no one knows that police have requested it, or that a judge has granted the request, except the police and the judge. The judges who issue search warrants are usually low-level magistrates who rubberstamp whatever police request, and police constantly strive to expand their power by using increasingly aggressive investigative techniques.

Furthermore, the history of American criminal procedure conclusively shows that intrusive investigative procedures which police claim they need to use on special occasions to deal with the worst criminals soon become standard operating procedures used against ordinary suspects.

Take, for example, the use of no-knock search warrants in Georgia. These warrants, which permit police to burst into occupied homes unannounced, came into existence because police claimed there were some dangerous criminals who would resist entry or destroy evidence if (as traditionally has been required) police were to announce their purpose and authority before forcibly entering to execute a conventional search warrant. But no-knock search warrants (which, despite their frequent use, are not authorized by statute in this state) have become the rule instead of the exception in Georgia. Over a decade ago the Georgia Court of Appeals pointed out that such warrants "simply have become customary ... in drug cases." (The overwhelming majority of all search warrants involve drugs.) Even here in Clarke county, in 1997 (the latest year for which I have statistics), 69 of the 143 search warrants issued (48%) had a no-knock provision (every one of which was based entirely on boilerplate allegations by police about drug offenders generally rather than any specific facts of the particular case).

Undoubtedly section 213 will be challenged in court on grounds it violates Fourth Amendment protections against unreasonable searches and seizures. However, the federal courts are packed with statists and majoritarians appointed by Nixon, Reagan, and both Bushes for the specific purpose of narrowing "the right of criminals" and strengthening "the peace forces." These judges have, with a few exceptions, displayed unrelenting hostility to Fourth Amendment rights, handing down decision after decision expanding police investigative powers at the expense of individual privacy. In 1979, in one of worst Fourth Amendment decisions of all time, the U. S. Supreme Court upheld the validity of covert entries into private premises by federal police to install court-authorized listening devices, even though the federal electronic surveillance statute is starkly silent on the issue of covert entries. Law reviews are now filled with articles with such titles as "The Incredible Shrinking Fourth Amendment" and "The Court That Devoured the Fourth Amendment." There is, therefore, no possibility that the federal courts will hold sneak and peek warrants to violate the Fourth Amendment.

Nearly two decades ago a courageous 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." Echoing this sentiment, an article in the San Diego Law Review several 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" with protections for individual rights, and "the risk of abuse and the subsequent intrusion into privacy is ... severe."

Until Congress repeals it, section 213 means that from now on Americans will, in the words of another law review article, published in the Stanford Law Review, be forced to live in "Orwellian fear that government agents may intrude secretly at any time."