



# The USA PATRIOT Act at 20: Sneak and Peek Searches

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President George W. Bush signed the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (“USA PATRIOT Act” or Act) on October 26, 2001. [Section 213](#) of the Act, enacted as part of the legislative response to the September 11, 2001, terrorist attacks, authorizes sneak and peek search warrants. “Sneak and peek” refers to the unannounced execution of a warrant on premises where officers observe, examine, measure, conduct tests, and otherwise surreptitiously search, but do not seize tangible property, and where officers thereafter delay notice of the search for 30 days. Notice permits an individual to challenge the legality of the search. It could also lead to flight, destruction of evidence, or placing a witness in peril.

In FY2020, under the authority of Section 213, courts issued close to 20,000 such 30-day, delayed-notice search warrants, and approved extended delayed notice beyond 30 days in more than 10,000 cases. Drug cases accounted for more than 70% of the total number of the delayed-notice warrants issued. Authorities used delayed-notice warrants in fewer than 250 terrorism investigations.

## Background

Prior to the enactment of Section 213, uncertainty marked the legality of sneak and peek searches. As a [general rule](#), the Fourth Amendment and [18 U.S.C. § 3109](#) require officers to announce their authority and purpose before entering to execute a warrant. Notice may be excused for exigent circumstances, such as the risk of suspect flight or the destruction of evidence. Rule 41 of the Federal Rules of Criminal Procedure calls for executing officers to leave a copy of the warrant and an inventory of the property seized on the premises as well as with the issuing magistrate.

The Supreme Court [held](#) that the Fourth Amendment did not absolutely preclude officers’ covert entry into private premises in order to install an otherwise lawful listening device and that “officers need not announce their purpose before conducting an otherwise duly authorized search if such an announcement would provoke the escape of the suspect or the destruction of critical evidence.” Despite the Court’s decision, questions of the validity of sneak and peek searches divided the lower federal appellate courts. In [Frijetas](#), the Ninth Circuit confronted a search warrant that authorized drug enforcement agents to enter the home of an individual suspected of manufacturing methamphetamine when there was no one there, to look around but not seize tangible property, and to depart without leaving a copy of the warrant. The court

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recognized that “the Fourth Amendment does not prohibit all surreptitious entries,” but [concluded](#) that “the absence of any notice requirement in the warrant casts strong doubt on its constitutional adequacy.” The court explained that “surreptitious searches and seizures . . . strike at the very heart of the interests protected by the Fourth Amendment.” Therefore, the court held that the warrant in this case was “constitutionally defective” because it failed to provide “explicitly for notice within a reasonable, but short, time subsequent to the surreptitious entry.”

The covert entry warrant in the Second Circuit case, [Pangburn](#), authorized officers to enter a suspected methamphetamine lab, photograph the evidence found there, and depart without seizing any tangible property or leaving a copy of the warrant or inventory of items photographed. Unlike the Ninth Circuit, the Second Circuit “prefer[red] to root [its] notice requirement in Rule 41 [of the Federal Rules of Criminal Procedure] rather than the somewhat amorphous Fourth Amendment ‘interests’ concept developed by the *Frietas* court.” The court therefore reasoned that Rule 41 requires notice of the execution of a warrant but did not prescribe when such notice must be provided.

Neither court ordered suppression of the evidence that flowed from the sneak and peek search. The [Ninth Circuit](#) concluded that the officers’ reliance on the warrant entitled them to the good-faith exception to the Fourth Amendment exclusionary rule, and [both](#) courts held that a violation of Rule 41 does not merit exclusion in the absence of evidence of the officers’ intentional or deliberate disregard of the rule’s notice requirement. The Fourth Circuit in [Simons](#) (another pre-Section 213 case) came to comparable conclusions following a slightly different path.

Simons was a government employee suspected of viewing and downloading pornographic images at work. His office computer files were searched and copied remotely at the request of his employer, and investigators discovered several pornographic images on his work computer, including images containing child pornography. On that basis, the employer, working with the Federal Bureau of Investigation (FBI) and the U.S. Attorney’s office, secured a search warrant for Simons’s government office. Officers executed the warrant after hours. The warrant stated that the executing officers were to leave a copy of the warrant and a receipt of any property taken in Simons’s office. During the search, the officers copied the content of Simons’s computer, in addition to computer disks, videotapes, and personal papers they found in his desk. They left neither a copy of the warrant nor an inventory of the material they copied. The officers also subsequently secured a second search warrant, where they seized and removed evidence from Simons’s office, and left a copy of the warrant and an inventory of the items seized.

As to the initial warrantless remote search of Simons’s computer, the Fourth Circuit held that Simons had no Fourth Amendment-protected expectation of privacy. The court explained that Simons knew of the limitations and oversight regarding his use of the office computer. As for the warrantless physical search of his office, the court concluded that the search came within the exception to the warrant requirement available upon reasonable grounds to suspect that the search will reveal evidence of employee work-related misconduct.

The court determined that Simons’s challenges to the first search conducted pursuant to a search warrant did not violate his constitutional rights. Specifically, the court held that the officers’ failure to leave either a copy of the warrant or a receipt for the property taken during the first search did not render the search unreasonable under the Fourth Amendment, but remanded proceedings to the district court for a determination of whether the officers intentionally and deliberately disregarded the notice demands of Rule 41. The court rejected Simons’s constitutional challenge to the second search.

## Section 3103a and Rule 41

Section 213, which amended [18 U.S.C. § 3103a](#), authorizes federal delayed-notice search warrants, issued for evidence of a federal crime, under three conditions: where the magistrate issuing the warrant determines that immediate notice may have one of the adverse consequences listed in Section [2705](#) (*e.g.*,

suspect flight, destruction of evidence, or risk of serious bodily injury); where the warrant forbids seizure of tangible property or, unless otherwise permitted, phone or email communications; and where notice is provided within 30 days of execution of the warrant unless the deadline is extended.

Section 114 of The USA PATRIOT Improvement and Reauthorization Act of 2005 further amended Section 3103a by (1) eliminating the risk of trial delay as an adverse consequence justifying issuance of delayed-notice search warrant; (2) setting a 90-day guideline for extensions upon a showing of good cause; and (3) instructing the Administrative Office of the United States Courts to issue annual public reports on the exercise of authority under the section, based on the required reports of the judges who issued or denied the warrants.

In 2006, Congress acquiesced in the recommendations to amend Rule 41(f)(3), which [now](#) states, “Upon the government’s request, a magistrate judge—or if authorized by Rule 41(b), a judge of a state court of record—may delay any notice required by this rule if the delay is authorized by statute.”

Since 2006, there are few reported cases that discuss warrants permitting delayed notice under either Section 3103a or Rule 41(f)(3); fewer still in the context of a sneak and peek search warrant. In 2011, the Seventh Circuit [upheld](#) the denial of a suppression motion arising out the execution of a sneak and peek warrant for the search of the storage locker arsenal of a murder suspect after which officers had probable cause for a warrant to seize the evidence they had discovered earlier.

In the years since the 9/11 terrorist attacks, sneak and peek search warrants have been executed fairly [often](#), but rarely challenged. Although occasionally used in terrorism investigations, they are most often sought in more traditional law enforcement cases. For example, in various situations ([here](#) and [here](#)) authorities have relied on Section 3103a and Rule 41(f)(3) to surreptitiously ferret out the internet protocol addresses of child pornography suspects (using Network Investigative Technique), or to locate fugitives (using a cell phone [simulator](#)).

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