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The USA-PATRIOT Act: Evaluating the Permissibility of Administrative Search and Seizures under the Fourth Amendment

Alan Lamberg

SUMMARY: Providing background on Fourth Amendment protections, emergency legislation during a crisis in national security, and relevant case law, this paper serves to evaluate the permissibility of contemporary administrative search and seizures under the Fourth Amendment. It briefly addresses the need for accountability measures as a means to check administrative discretion, followed by an evaluation of five key areas of administrative search and seizure as amended by the USA-PATRIOT Act. In concluding future stakeholders in the legislative process are invited to provide an authentic and thorough debate, lest administrative discretion goes unchecked and government authority further encroaches on civil liberties.

(I) INTRODUCTION

(A) The Relationship of Administrative Discretion to Protections Against Unreasonable Searches and Seizures

I.

The Fourth Amendment¹ and other amendments to the Constitution were derived from the principle that individuals should be left alone unless the government can show good legal cause that they should not be². Specifically, it protects individuals "in their persons, houses, papers, and effects, against unreasonable searches and seizures."³ It prohibits search warrants from being issued except "upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

However, the courts have not interpreted these rights to be absolute. Justice Oliver Wendell Holmes argued that the misuse of such rights creates "a clear and present danger" for others or for society⁴. For instance, what if someone yelled "Fire!" in a crowded theater, resulting in many people being trampled, and then the prankster claimed the constitutional right to do so? The need for government to protect its citizens extends to the right of the state to preserve national security, which is relevant to the increasing concern of terrorist actions. These actions are not simply employed by foreign nations but by decentralized cells of individuals, some of which may infiltrate a nation, as illustrated by the tragic events of September 11th, 2001. Thus, in order to preserve the security of the individual and the state, the courts have traditionally employed a balancing doctrine⁵.

Unfortunately, the Fourth Amendment is difficult to interpret and apply in practice. Generally, the Courts have ruled on search and seizure on a case-by-case basis, furthering the uncertainty of common law⁶. The circumstances surrounding the cases determine the reasonableness of search and seizure, and warrantless searches and seizures have been allowed when it could be demonstrated that circumstances made it unfeasible

to obtain a warrant.⁷ Furthermore, Fourth Amendment provisions tend to not be guaranteed to civil procedures because of the administrative costs incurred.⁸

Before we go further, it is necessary to define administrative discretion. Administrative discretion consists of informal actions performed by administrators, even though they may be acting within their formal authority.⁹ According to Kenneth C. Davis, at least 90 percent of all administrative action can be classified as informal.¹⁰ This breadth of discretionary power, the freedom to make choices of action or inaction,¹¹ has a major implication on Administrative Law, which focuses on how administrators should execute laws in a fair manner. There is a tension between the rights of the state versus the rights of the individual.¹² The balance has been redefined each time Americans face a challenge to national security. Despite alternating periods of ideological prominence, it has been established that the overall trend of all branches of American government to give preference to the state over the individual.¹³ However, we must not forget that while the state is a worthwhile concept, it will always be the individuals who are more "real."¹⁴ Individuals will always be responsible for the degree in which they exchange liberty and freedom for authority and safety. A classic parable by Fyodor Dostoyevsky, *The Grand Inquisitor*,¹⁵ is a fine parable to help comprehend of this immediately relevant phenomenon.

(B) Legislative History of the USA-PATRIOT Act of 2001

Whitehead & Aden¹⁶ summarize the "newly-created legal framework" brought about by the backdrop of the September 11th terrorist attacks. Within five weeks, President George W. Bush declared a state of national emergency, invoking presidential powers.¹⁷ The Bush Administration chose to view the attacks as acts of war by foreign aggressors, rather than as criminal acts that require redress by the justice system.¹⁸ Attorney General John Ashcroft, acting on behalf of the President, asked Congress for broad new powers to enable the Administration to conduct its "War on Terrorism," and redefined the Department of Justice's (DOJ) mission to place the defense of the nation and its citizens above all else.¹⁹ Ashcroft also emphasized that America cannot wait to take precautionary actions, as "we must prevent first, prosecute second."²⁰ On October 25th, 2001, Congress, significantly granting the requests of the DOJ, passed the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA-PATRIOT) Act²¹. The bill is 342 pages long and makes changes, some large and some small, to over 15 different statutes.²² The democratic integrity of this complex Act, compared to other major legislation, is suspect because:

"it seems clear that the vast majority of the sections included have not been carefully studied by Congress, nor was sufficient time taken to debate it or to hear testimony from experts outside of law enforcement in the fields where it makes major changes. This concern is amplified because several of the key procedural processes applicable to any other proposed laws, including inter-agency review, the normal committee and hearing processes and thorough voting, were suspended for this bill."²³

Thus is the nature of emergency law. Experience has demonstrated that when democratic nations are beset with crises, there is a tendency to "race to the bottom as far as the

protection of human rights and civil liberties . . . is concerned. Emergencies suspend, or at least redefine, *de facto*, if not *de jure*, much of our cherished freedoms and rights."²⁴

The Department of Justice's intention may be summed up best with a look into § 701 of the USA-PATRIOT Act, which amended Title I of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3796h) to address terrorist conspiracies and activities²⁵ and add a provision creating and implementing "secure information sharing systems" to enhance the government's ability in investigating and prosecuting "multi-jurisdictional terrorist conspiracies and activities."²⁶ This is in recognition of "the important intelligence role of local law enforcement in gathering information at the grass roots level . . ." ²⁷ Other purposes, as will be explored in this paper, are the updating of statute in response to new developments in technology, and the centralizing and enhancement of executive discretion.

(C) Discretionary Implications of Administrative Actions Allowed by the USA-PATRIOT Act

The USA-PATRIOT Act impacts (1) accountability measures, which serve to regulate administrative discretion, and (2) enhances, and in some cases, legitimizes certain search and seizure methods. These implications generally concern administrative discretion and are relevant to their permissibility under the Fourth Amendment. Herbert Kaufman asserted that administrative searches, which in good faith were designed to protect people, have become increasingly intrusive on our Fourth Amendment rights.²⁸ The paper will evaluate whether or not the USA-PATRIOT Act will enable administrators to exercise unchecked and abusive discretionary power in the name of national security. In other words, will this Act, an extralegal measure in the face of emergency law, further the encroachment on Fourth Amendment and procedural due process rights?

(II) EVALUATION OF IMPLICATIONS

(A) Accountability: The Means to Regulate Administrative Discretion

Three aspects of accountability will be covered, briefly: (1) reporting requirements of certain agency actions are important in facilitating (2) congressional evaluation and (3) judicial review, which both serve to check administrative power.

II. (1) Reporting Requirements Facilitate Congressional Evaluation and Judicial Review

Record keeping and reporting on certain actions as defined in statute have to do with the importance of openness on the part of administrators. However, provisions of the USA-PATRIOT Act prevent the reporting of certain administrative actions. For instance, in some surveillance situations, particularly the recent phenomenon of nationwide roving wiretaps, the FBI and CIA does not have to report where they served an order or what information they received, nor its usefulness.²⁹ It appears that the spirit that drives USA-PATRIOT Act, classified information in the name of national security, (as will be discussed later in this paper,) is used to justify the lack of reporting.

(2) The Need for Meaningful Congressional Evaluation

Congressional evaluation of agency action and statute serves to check administrative discretion. Common sense dictates that the legislature cannot evaluate every single action of an administrator, but when certain actions may tilt the delicate balance between civil liberties and national security, evaluation is warranted. Sunset provisions on statute have the potential to achieve this end, as several provisions of the USA-PATRIOT Act are set to expire at the end of 2005 if the legislature does not act to renew them.³⁰ However, sunset provisions are normally not very effective because, given the historical record, they are routinely extended.³¹ Further compounding this concern is the fact reporting requirements for several areas of concern were not established in the legislation, thus minimizing Congress' ability to effectively evaluate the implementation of key provisions.³²

III.

IV. (3) The Need for Meaningful Judicial Review

The lack of reporting requirements impacts judicial review in a similar way. Judicial review is a crucial component to accountability, and maintains a democratic system of government. Bernard Schwartz stated, "The absence of nonjudicial powers of imprisonment sharply distinguishes our legal system from those we disparagingly describe as totalitarian."³³ In his dissent in the *Abel* case, Justice William J. Brennan argued that the INS never had to justify its actions to an independent judge.³⁴ Without judicial regulation of administrative discretion, the seeds of tyranny may flourish and erode constitutional due process requirements. However, the USA-PATRIOT Act "reflects a distrust of the judiciary as an independent safeguard against abuse of executive authority."³⁵ Mathews³⁶ illustrates the provisions of the Act that insinuate this distrust:

"(1) § 203, permitting the disclosure of sensitive information about American citizens obtained through grand jury investigations and wiretaps without judicial review of the justification for disclosure; (2) § 216, minimizing judicial checks on electronic surveillance by permitting the police to obtain information about Internet communications under a meaningless standard of review; (3) § 358 allows law enforcement access to sensitive personal information without judicial review; and (4) § 412 authorizes the detention of suspects for seven days without judicial review."

(B) Enhancement of Search and Seizure Methods

As mentioned earlier, statute was amended so the Department of Justice could better address terrorist conspiracies and activities. Simply put, the USA-PATRIOT Act is an effort to protect the citizens of the United States from harm, even at the expense of civil liberties. One of the means to do this is to enhance the methods of search and seizure. This has been justified because of new developments in technology, e.g., in anticipation of "cyber-terrorism," and the use of cell-phones as a means to evade tracking.

This section will study particular provisions of the USA-PATRIOT Act, their purposes, justifications, and evaluate their permissibility under the Fourth Amendment.

The provisions are: (1) allowing "sneak and peek" by delay of notice; (2) adapting new, electronic technologies to enhance surveillance; (3) the erosion of the "firewall" between foreign intelligence and law enforcement; (4) implications on administrative seizure of property; and (5) implications on administrative seizure of persons (detention).

Before we begin, it would be helpful to ground the discussion on the fact that, historically, common law has eroded Fourth Amendment and other protections. In the early 1900s, cases such as *Hale v. Henkel*, 201 U.S. 43 (1906) and *Wilson v. United States*, 221 U.S. 361 (1906) raised a question that would later have implication in common law: Does the spirit behind the Fourth and Fifth Amendments really permit the government to compel individuals to produce self-incriminating records simply because these records also happen to be corporate records?³⁷ In the *White* case of 1944, a judge stated that privilege against self-incrimination was "limited to its historic function of protecting only the natural individual . . . through his own testimonial or personal records."³⁸ This language opened the way for future holdings, particularly in the *Fisher* and *Andresen* cases. It was held that the records seized included statements that had been "voluntarily committed to writing."³⁹ This established the "not being compelled to do anything" doctrine, which made it easier for courts to rule against individuals who cried foul against their due process rights when their property and records were illegally seized. This doctrine also chipped away at attorney-client privilege.⁴⁰

The *Fisher* and *Andresen* holdings were criticized by scholars as having ignored Fourth Amendment protections against illegal search and seizure, and virtually destroyed Fifth Amendment protections against being compelled by government officials to provide the government with self-incriminating personal business records.⁴¹ Justice Brennan in his dissent contended that the Court had never established that an illegal search and seizure must be executed before the Fifth Amendment's protection against self-incrimination can apply.⁴² In the couple decades leading up to passage of the USA-PATRIOT Act, court decisions such as *Matter of Grand Jury Empanelled* (1979) and *Doe* (1984) had further limited protections for business.⁴³ The former ruled that a subpoena to produce personal records of a sole proprietor could be served on the proprietor's "trusted employees" without violating the Fifth. The latter ruled that an individual could not contend that he or she was compelled to create incriminating documents. By this time, the Constitution provided "no protection to privacy other than the procedural standards of the warrant clause."⁴⁴

Historically, the warrant clause has been adversely affected in case law throughout the mid-Twentieth Century, resulting in great difficulty to apply it in protecting either government interest or privacy rights.⁴⁵ By 1973, Roger B. Dworkin remarked that the Fourth Amendment cases were a mess.⁴⁶ Fortunately, rulings since then had clarified administrative search case law in the regulatory scope, and, compared to other aspects of administrative law, became clear, consistent, and meaningful.⁴⁷ Kevin MacKenzie classified Supreme Court decisions into three distinct areas.⁴⁸ First, government officials "must, as a general rule, obtain a search warrant before they can force an individual or company to undergo an inspection," as espoused in *Camara v. Municipal Court* (1967), *See, Barlow's, Inc.* (1978), *Dow Chemical Co.* (1986), and *Riley* (1989).⁴⁹ Second, businesses that are "closely supervised by regulatory agencies do not require normal warrants," as held in *Colonnade Catering Corp.* and *Biswell*.⁵⁰ Third, an exception to the warrant requirement may be justified if "adequate administrative safeguards already existed to protect privacy interests in much the same way a search warrant would," as

discussed in *Martinez-Fuerte* and *Opperman*.⁵¹ With the advent of the reified "war on terrorism" and the passage of the USA-PATRIOT Act, the warrant clause of the Fourth Amendment has been impacted, most remarkably with delay of notice.

(1) Allowing "Sneak and Peek" by Delay of Notice; a Further Erosion of the Warrant Clause of the Fourth Amendment

Evans (2002) summarized the impact of § 213 on 18 U.S.C. 3103a, in that it authorizes federal district courts to delay required notices of the execution of a warrant if immediate notice might have an adverse result or under other specified circumstances.⁵² In an eloquent précis, Evans stated:

"The court has the authority to delay notice when it finds reasonable cause to delay the warrant, such as the possibility that execution of the warrant will have an adverse result,⁵³ when the warrant prohibits the seizure of any tangible property or wire or electronic communication,⁵⁴ or when the warrant provides that notice should be given within a specified period of time and that time is extended by the court for good cause shown.⁵⁵ The statute does not, however, define reasonable cause or reasonable necessity.⁵⁶ Furthermore, while FISA previously only authorized delayed notice for searches of oral and wire communications⁵⁷ this amendment would also permit delayed notice of searches for physical evidence."⁵⁸

The justification for delay of notice is evident in the definition of "adverse result," as borrowed from 18 U.S.C. 2705 (1995): (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. Whitehead and Aden point out that the last clause is open to highly subjective interpretation, allowing law enforcement authorities and courts broad discretion to expand the number of cases involving delayed notice (at 1113).

The erosion of the warrant clause, as with the expectation of privacy, is not a new phenomenon. Fifteen years before the USA-PATRIOT Act, a warrantless search was held as lawful in *Dow Chemical Co.* (1986) because the "search" did not really constitute a search under the Fourth Amendment.⁵⁹ The facts stated that the EPA had a congressionally mandated mission, and the search was conducted in lawful navigable air space, which was public. However, it implied that more sophisticated aerial spy equipment might pose constitutional problems, as later cases did. A divided Supreme Court in the 1989 *Riley* case upheld warrantless aerial. Dissenters thought that this could sanction George Orwell's dreaded vision of Big Brother watching us.⁶⁰ By 2001, *Kyllo v. United States*, 533 U.S. 27, held the use of infrared imaging on a home to be unconstitutional; however, traffic and sidewalk cameras were nearly omnipresent in public spaces in major cities. Over the decades, technological advances had made it easier for administrators to conduct surveillance. In response, the courts have used much rationale, some absurd, to justify this. The dominating argument is that the person or place being searched should have no expectation of privacy because the equipment used "only assisted" or "materially enhanced" the natural senses, or that the equipment is "widely available commercially."⁶¹ The impact of new technology and enhancement of surveillance will be discussed later in this paper.

(a) The Judiciary's Virtual Rejection of the Exclusionary Rule

Suppose an administrator performs a "sneak and peek" search on an individual, notifying him or her afterward that they have obtained evidence of crimes unrelated to terrorism,⁶² and that this evidence is to be used against him or her in court. What are the chances that the individual will consider the administrative action illegal and successfully invoke the Exclusionary Rule, thereby forcing to court to lessen or dismiss the charges? Historic case law is helpful in explaining the Judiciary's virtual rejection of the Exclusionary Rule. In 1980, the infamous *Payner* case held that "the federal courts' supervisory power does not permit a court to exclude otherwise admissible incriminating evidence, even if seized illegally from a third party not standing before the court."⁶³ This case was controversial because the IRS had paid a third party \$8,000 in cash to steal a briefcase containing incriminating evidence that would later be used as evidence to convict another party. Justices Marshall, Brennan, and Blackmun joined in drafting one of the most vehement dissenting opinions ever written. They argued: (1) the evidence was illegally obtained by the IRS; (2) the IRS acted in bad faith, "patently offensive to democratic values"; (3) the majority had sanctioned the deliberate wrongdoings of government; and (4) the federal court became an accomplice of a crime, which should not be permitted.⁶⁴ In 1984, the *Lopez-Mendoza* case held that the exclusionary rule does not apply in a deportation hearing, which set a precedent that would later justify the end of the exclusionary rule in all administrative proceedings.⁶⁵ A year later, the *Pullin v. Louisiana State Racing Com'm* case held that the evidence should not be excluded because it was a civil, not criminal trial, even if the evidence was seized illegally.⁶⁶ The "good faith exception," established in *United States v. Leon*, 468 U.S. 897 (1984), set a precedent that allowed throwing out the exclusionary rule if administrators acted in "good faith." This exception was used in the case of *Trinity Industries v. OSHRC, op. cit.*, (1994), along with a new argument that the benefits of a seizure may outweigh the costs to the party, despite having obtained the evidence illegally, without probable cause, and in clear violation of requirements for administrative inspections set forth in *Barlow's, Inc.*⁶⁷

Barlow's ruled that § 8(a) of the Occupational Safety and Health Act of 1970, which authorized warrantless searches by OSHA inspectors, violated the search warrant provisions of the Fourth Amendment. The argument drew from historical record in Virginia's Bill of Rights, which was the model for the Federal Bill of Rights. Virginia had specified *administrative* search warrants. However, the Court was careful to point out that government officials did not have to demonstrate probable cause in the same manner as law enforcement. The Court also rejected the argument that the warrant requirement would place a heavy strain on the administrative regulatory system. Further, in rebuttal to the argument that "surprise searches" are necessary to promote "inspection efficiency," the Court pointed out that after inspectors are refused entry, they can obtain an *ex parte* warrant and reappear at the business site at any reasonable "surprise time" they desire, since inspectors need not provide any further notice. Requirements were to show that the inspections were: (1) authorized by statute; (2) serve and are consistent with legislative goals and standards; (3) based in a "general administrative plan" necessary to enforce legislation; and (4) going to be carried out against a specific business cited on the warrant.⁶⁸

Bringing the discussion back to the hypothetical case of where an administrator performs a "sneak and peek" search on an individual, notifying him or her afterward that they have obtained evidence of crimes unrelated to terrorism, and that this evidence is to be used against him or her in court. In light of all the above, unless it can be proven that it was the intention of the administrators to act outside of their discretionary authority in an arbitrary and capricious manner, it is unlikely that the Exclusionary Rule will provide relief for the defendant.

(b) The Reasonableness of Probable Cause

Briefly, before we move on, it is necessary to understand the contemporary perspective on probable cause. The second clause of the Fourth Amendment proscribes the issuance of warrants without probable cause. One solution to the challenge of the Fourth Amendment is to jettison or water down the warrant clause, as the USA-PATRIOT Act has done with delay of notice and vague reasonable suspicion standards.⁶⁹ It can be shown that "the concept of probable cause evolved over the course of centuries prior to 1791, and indeed likely failed to have a specific meaning even in the minds of the Framers themselves."⁷⁰ In response to the fact that the judicial debate is stifled on whether probable cause exists in any particular case,⁷¹ Learner offers an in-depth, practical, and balancing solution by recasting probable cause within a "reasonableness framework," which can encourage resourceful discussion about obliging law enforcement concerns on the one hand and preserving civil liberties on the other.⁷² Judges and magistrates need to seriously consider and adapt this framework instead of deferring to agency expertise and administrators who operate under vague standards unfortunately set in statute. In sum, by making use of an available and practical framework, we must seek to preserve the warrant requirement as a vital check on the police.

(2) Adapting New, Electronic Technologies to Enhance Surveillance

It is the sense of Congress that "[t]he information revolution has transformed the conduct of business and the operations of government as well as the infrastructure relied upon for the defense and national security of the United States."⁷³

As summarized by the Electronic Frontier Foundation,⁷⁴ U.S. Law provides four basic mechanisms for surveillance on people living in the United States: (1) interception orders authorizing the interception of communications; (2) search warrants authorizing the search of physical premises and seizure of tangible things; (3) "pen register" and "trap-and-trace device" orders (pen/trap orders), which authorize the collection of telephone numbers dialed to and from a particular communications device; and (4) subpoenas compelling the production of tangible things, including records. Each mechanism has its own proof standards and procedures based on the Constitution, statutes, or both. The law also provided two separate "tracks" with differing proof standards and procedures for each of these mechanisms depending upon whether surveillance is done by domestic law enforcement or foreign intelligence. The USA-PATRIOT Act has made extensive revisions to all the above.⁷⁵

Overall, the issue here is how each method of surveillance, particularly electronic, is permissible to lower standards of probable cause under the Fourth Amendment. There are many examples where this is applied, justified by administrators needing only to show

a court that the surveillance is relevant to a criminal investigation based on reasonable grounds.⁷⁶ This applies to compelling an Internet Service Provider (ISP) to produce e-mail logs and addresses of past e-mail correspondents.⁷⁷ The Act also allows police, with a search warrant, to seize voicemail and other stored wire communications without an intercept order.⁷⁸ In allowing nationwide roving wiretaps, the FBI and CIA, at their discretion, may go from phone to phone, computer to computer without demonstrating that a suspect or target of an order is using any of these means of communication.⁷⁹ As explained earlier, the Act allows for delay of notice of "sneak and peek" warrants. The Act relaxes the general rule that search warrants must be obtained within a judicial district for searches in that district.⁸⁰ This makes it easier for a judge to issue search warrants regarding terrorism and electronic evidence as long as it is not in his or her own district. Furthermore, the Act explicitly sanctions high-tech and potentially highly intrusive technologies such as the FBI's "Magic Lantern" and "DCS 1000," formally known as "Carnivore;" as surveillance devices to record information and report back to the FBI.⁸¹ The former device can be used to infiltrate a suspect's computer and record keystrokes,⁸² while the latter scours the Internet as a virtual pen register that scans e-mail headers for patterns specified by the operator, a behavior known as packet sniffing.⁸³ The *United States v. Scarfo*, 180 F. Supp. 2d 572 (D.N.J. 2001) found that a key-logging device installed with a search warrant did not violate the Fourth Amendment (at 578). The court recognized the danger in undoing Constitutional rights in adjusting for modern technology, but it is equally dangerous to ignore that modern-day criminals will use technological advances to further their pursuits (at 583).⁸⁴ The primary concerns about this software are that it enables the operators' discretionary actions to be potentially untraceable and unaccountable.⁸⁵

Obviously, government surveillance impacts an individual's privacy. Originally, Fourth Amendment analysis focused on privacy as a property interest, limiting protections to physical searches of a person's property.⁸⁶ Protections to non-physical, electronic surveillance had been extended by the Supreme Court in *Katz v. United States*.⁸⁷ The Court held that the Fourth Amendment applied to people and not places, determining that a government agent need not physically intrude into a specific enclosure to violate the Fourth Amendment. The Court stated that a showing of probable cause after the search was completed would not satisfy the Fourth Amendment.⁸⁸ Justice Stewart added that the "omission of such authorization bypasses the safeguards provided by an objective predetermination of probable cause ..."⁸⁹ However, the Court recognized the possibility that in matters of national security prior authorization for electronic surveillance may not always be required.⁹⁰ The Court later addressed this issue in the 1972 *Keith* case.⁹¹ The high Court held that warrantless electronic surveillance of a domestic organization with no alleged connection to a foreign government constituted a breach of Fourth Amendment protections.⁹² In cases of national security, the Court recognized that the power of the executive branch to engage in surveillance should be stronger.⁹³ However, the Court noted that waiving the warrant requirement in domestic security cases could lead to broad abuses by the executive, greatly interfering with the needs of individuals for "privacy and the free expression." Justice Powell stated,

"Fourth Amendment protections become the more necessary when the targets of official surveillance may be those suspected of unorthodoxy in their political beliefs. The danger to political dissent is acute where the Government attempts to

act under so vague a concept as the power to protect 'domestic security.' Given the difficulty of defining the domestic security interest, the danger of abuse in acting to protect that interest becomes apparent."⁹⁴

Evans pointed out that the Court left open the possibility of different Fourth Amendment standards for national security investigations involving foreign organizations.⁹⁵

Evans also reminded us that when the same techniques that are used in gathering intelligence for national security purposes are also used in enforcing domestic criminal law, Fourth Amendment concerns arise, particularly with regard to the warrant requirement.⁹⁶ Shortly after *Keith*, Congress passed the Foreign Intelligence Surveillance Act⁹⁷ (FISA) of 1978, which was said to put the constitutional issue to rest.⁹⁸ These issues have largely remained untouched by the Supreme Court⁹⁹ while there are mixed results on the federal appellate level.¹⁰⁰ At this point in a confounded common law regarding Fourth Amendment protections and FISA, the time was ripe for the USA-PATRIOT Act to weaken the warrant requirement in FISA and partially repeal the "firewall" between foreign and domestic intelligence.

(3) Erosion of the "Firewall" Between Foreign Intelligence and Law Enforcement

The Department of Justice, acknowledging the organizational failure of all federal personnel to coordinate intelligence and prevent the 9-11 attacks, demanded that the "firewall" between foreign intelligence and law enforcement be undone. However, this was the desire of federal agencies since the controversy that had risen from COINTELPRO and the FBI's vendetta against Martin Luther King, Jr. in the 1960s.¹⁰¹ Provisions in the USA-PATRIOT Act were intended to amend statute to this end.¹⁰² The response of the courts to these provisions best illustrates the current trend in common law, and may hint at future developments regarding the Act and its implications on the Fourth Amendment.

On May 17, 2002, the Foreign Intelligence Surveillance Court (FISC) ordered that the Attorney General's 2002 Procedures be adopted, with modifications--portions of 1995 Procedures adopted to deal with the primary purpose standard--as "minimization procedures" to apply in all cases, thus imposing certain limitations on the government.¹⁰³ The Government, undeterred, made the first appeal from the FISC to the Court of Review since the passage of the Foreign Intelligence Surveillance Act (FISA) in 1978.¹⁰⁴ The Court of Review decided to reverse the FISC's orders that imposed conditions on the grant of the government's applications, vacated the FISC's Rule 11, and remanded with instructions to grant the applications as submitted.¹⁰⁵

The FISA Court of Review, in rejecting the FISC's limitation on the government's ability to use foreign intelligence information for law enforcement purposes, held that "FISA as passed by Congress in 1978 clearly did *not* preclude or limit the government's use or proposed use of foreign intelligence information, which included evidence of certain kinds of criminal activity, in a criminal prosecution."¹⁰⁶ It was in the Court's opinion that consultation and coordination between intelligence and law enforcement officials were "expressly sanctioned" by amendments from the USA-PATRIOT Act, and that the FISC erred by refusing to consider this.¹⁰⁷ Moreover, the Court held that the "significant purpose" provision did not violate the Fourth Amendment, based on

reasonable standards.¹⁰⁸ In sum, the Court of Review held the USA-PATRIOT Act amendments to FISA to be constitutional.¹⁰⁹

First, the Court of Review endeavored to debunk the notion of a firewall between intelligence and law enforcement, which they asserted had for two decades rested on a faulty premise established in the *Truong* case,¹¹⁰ which asserted that once the government moves to criminal prosecution, its foreign policy concerns are no longer a priority.¹¹¹ The Court of Review argued persuasively that this is not true as it relates to counterintelligence, and there was no "relevant language from the statute" to support it.¹¹² The Court went on to say that to read the 1978 FISA as excluding from its purpose the prosecution of foreign intelligence crimes was impossible. The Court stressed that the definition of an agent of a foreign power -- whether U.S. person or not -- is grounded on criminal conduct.¹¹³ Furthermore, it was asserted that the firewall was unstable because it "generates dangerous confusion and creates perverse organizational incentives,"¹¹⁴ and represents a standard dangerous to national security because it punishes cooperation between all the government's.¹¹⁵

The firewall, also known as the *Megahey* dichotomy, began construction in 1980 when enough circuit courts used the primary purpose test to establish a common law basis.¹¹⁶ To avoid failing the primary purpose test, the 1995 Procedures were implemented, limiting contacts between the FBI and Criminal Division in cases where the FBI for foreign intelligence or foreign counterintelligence purposes was conducting FISA surveillance or searches.¹¹⁷ In 2002, relying on its statutory authority to approve "minimization procedures," the FISC had drawn from these 1995 Procedures to impose the restrictions, which the government disputed. The Court of Review considered the FISC's construction of the minimization procedures as a "misconstruction" as well as an "end run around" the specific amendments in the USA-PATRIOT Act that were designed to alter the primary purpose standard. Thus, the Court held the minimization procedures to be "so intrusive into the operation of the Department of Justice as to exceed the constitutional authority of the Article III judges."¹¹⁸

Next, the Court held that the addition of the word "significant" to section 1804(a)(7)(B) "imposed a requirement that the government have a measurable foreign intelligence purpose, other than just criminal prosecution of even foreign intelligence crimes."¹¹⁹ Thus, the USA-PATRIOT Act for the first time gave the *Megahey* dichotomy a solid grounding in statute, rather than an unstable assumption. From this, the Court of Review interpreted section 1805 as empowering the FISC to review the government's purpose of surveillance.¹²⁰ After analyzing congressional intent, including the dichotomy, and weighing the practical implication of how surveillance may incidentally lead to the discovery evidence for criminal prosecution, the Court ruled that so long as the government "entertains a realistic option of dealing with the agent other than through criminal prosecution, it satisfies the significant purpose test."¹²¹

In response to the ACLU's argument¹²² that the significant purpose test could allow the government to have a primary objective of prosecuting an alleged agent of a foreign power for a non-foreign intelligence crime, the Court of Review regarded this as an "anomalous reading" of the USA-PATRIOT Act amendment, for there was "not the slightest indication that Congress meant to give that power to the Executive Branch . . ."¹²³ Thus, it was emphasized that the Executive cannot use the FISA process as a "device to investigate wholly unrelated ordinary crimes."¹²⁴

Lastly, the Court of Review considered whether the statute as amended is consistent with the Fourth Amendment. This was addressed because of the FISC's disapproval of the Attorney General's 2002 Procedures, which was based on the need to safeguard Americans' privacy against intrusive surveillances and searches.¹²⁵ The ACLU, in agreement with FISC, relied on two propositions: (1) that a FISA order is not considered a warrant within the context of the Fourth Amendment,¹²⁶ and (2) any government surveillance whose *primary purpose* is criminal prosecution of *whatever kind* is *per se* unreasonable if not based on a warrant.¹²⁷ In response to the ACLU's contest, the Court of Review applied a reasonable standards test previously used by the Supreme Court¹²⁸ in interpreting the warrant clause of the Fourth Amendment: (1) warrants must be issued by neutral, disinterested magistrates; (2) those seeking the warrant must demonstrate to the magistrate their probable cause to believe that the evidence sought will aid in a particular apprehension or conviction for a particular offense; (3) warrants must specifically describe the "things to be seized," as well as the place to be searched.

In sum, the Court of Review held: (1) no dispute that a FISA judge satisfies the Fourth Amendment's requirement of a "neutral and detached magistrate,"¹²⁹ because (2) it was clear that Congress intended a lesser showing of probable cause for espionage and clandestine intelligence activities than that applicable to ordinary criminal cases,¹³⁰ and FISA requires certification by an official that the information sought is foreign intelligence information,¹³¹ which would assure explicit accountability within the Executive Branch and provide an internal check against arbitrariness,¹³² and (3) Congress observed the justification for the elimination of the notice requirement when there is a need to preserve secrecy for sensitive counterintelligence sources and methods,¹³³ and while the subject of surveillance would be unaware and unable to challenge the legality of the surveillance, a district judge on a case-by-case basis would conduct an *in camera* and *ex parte* review to determine "whether the electronic surveillance was lawful, whether disclosure or discovery is necessary, and whether to grant a motion to suppress."¹³⁴ In sum, although the Court of Review does not decide on the issue of whether or not a FISA order is a "warrant" contemplated by the Fourth Amendment, it notes the extent a FISA order comes close to meeting Title III,¹³⁵ which hinges on its reasonableness under the Fourth Amendment.¹³⁶ The Court acknowledged that the Fourth Amendment question "has no definitive jurisprudential answer." However, in applying the balancing test drawn from *Keith*, the Court held that FISA as amended is constitutional because the authorized surveillances are reasonable.¹³⁷ In March of 2003, the Supreme Court, apparently in agreement with the Court of Review, denied the ACLU, *et al.* permission to intervene in order to file a petition for writ of *certiorari*.¹³⁸

Common law is beginning to accept the USA-PATRIOT Act at statutory face value. However, as stated above, the Fourth Amendment question is yet to have a definitive jurisprudential answer. Furthermore, the controversy due to the Act's passage through Congress, despite its complexity, should not be brushed aside just as quickly. Although the Court of Review held that the USA-PATRIOT Act was clearly backed by congressional intent (with a vote of 98 to 1 in the Senate, among other reasons),¹³⁹ the Court admitted this backing was composed not of committee reports but by floor statements.¹⁴⁰ The Court also made reference to a September 10, 2002 hearing of the Judiciary Committee "at which certain senators made statements -- somewhat at odds with their floor statements" prior to the Act's passage "as to what they had intended the year before." The Court dismissed these "post-enactment legislative statements" as "not

entitled to authoritative weight."¹⁴¹ Thus, common law is not the preferable venue for second-guessing the Legislative enhancement of the Executive.

Naturally, the Court of Review did a great job by: (1) striking down the lesser court's attempt to overextend its Article III powers by imposing legislative limits on the Executive; (2) emphasized that the Executive cannot use the FISA process to abuse its discretionary power; and (3) made it clear to Congress that by passing the USA-PATRIOT Act, despite some "post-enactment" reservations, they made their bed and have to sleep in it. This last point is especially relevant to this paper because it serves to show legislators that it is their responsibility to foster an authentic and thorough debate, even in the face of a national crisis. Should the amendments made to FISA by the USA-PATRIOT Act within time pave the way for administrators to abuse their discretionary power for their own agendas at the expense of individuals, let it serve as a testament to what is and what is not responsible law-making.

(4) Implications on Administrative Seizure of Property

Max Weber asserted that the public bureaucracy's strength resides in the information it collects, stores, and uses. Regulatory agencies could not be expected to regulate if the regulated did not keep records of its activities.¹⁴² Warrantless search and seizures have become allowed as long as the subject of the search is a government-regulated industry, and the records seized are not strictly personal.¹⁴³ Aside from regulation, there is a category that applies to the heightened interest of the state when there is a national emergency.¹⁴⁴ As discussed earlier, the Department of Justice has advocated the USA-PATRIOT Act as a statutory tool to address the threat of terrorism.

For instance, the Act amends 8 U.S.C.A. 1189 to facilitate the singling out of foreign terrorist organizations, block all financial transactions involving their assets in the United States, prohibit their representatives from entering the United States, and prevent people from providing material support.¹⁴⁵ This amendment in statute conflicts with *Nat'l Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192 (D.C. Cir. 2001), in which the Appellate Court held that the Secretary of State must afford putative terrorist organizations with due process prior to their designation under the Anti-Terrorism and Effective Death Penalty Act (AEDPA) of 2001. The Court also held that the Secretary must provide these organizations with notice of the basis of a designation and the opportunity to introduce rebuttal evidence into the record. However, Ellis, after a careful review of the AEDPA, current due process jurisprudence, and the facts of National Council, concluded that the Court was "incorrect in requiring pre-designation process,"¹⁴⁶ because "[p]rior notice of an impending designation would render the consequences of the designation ineffective due to the ability of an organization to quickly transfer its assets to another jurisdiction."¹⁴⁷ Ellis, aware of the Mathews test¹⁴⁸ as general rule for protection of due process, emphasized that exemptions to this general rule exist in "extraordinary situations" where valid governmental interest is at stake, justifying the postponement of a hearing until after the event,¹⁴⁹ or when it is impossible for the government to provide pre-deprivation process for the particular deprivation at issue.¹⁵⁰

The USA-PATRIOT Act, section 411, in defining terrorism, eliminated the requirement for the government to demonstrate a nexus between an alien's conduct and terrorist activity.¹⁵¹ This imposition of guilt by association to aliens allows the seizure of property and/or detention.¹⁵² For instance, the Treasury Department after September 11

froze the assets of various Muslim charities, including the Global Relief Foundation, Inc., which then challenged on multiple constitutional grounds both the search and seizure of its offices and the freezing of its assets. In June 2002, a district court rejected all of the challenges. It found that the freezing order did not constitute punishment and that, therefore, protections associated with the criminal process were not applicable. The court upheld both the search and seizure and the freezing order on the basis of secret information submitted *ex parte* and *in camera* to the court and not provided to the Global Relief Foundation or its lawyers.¹⁵³

In applying the permissibility of the above under the Fourth Amendment, we must ask an important question: When do searches and seizures become unreasonable? The Founders' intended in drafting the Bill of Rights to protect future generations of Americans from arbitrary intrusions into their private affairs by government. Protections are needed to prevent a totalitarian tendency of government to gain a position of dominance over citizenry by extending state officers discretionary powers to search and seize, and to spy on individuals and businesses. Thus, in protecting personal privacy rights, no government official should be allowed to intrude at their discretion into a person's private life.¹⁵⁴ The issue of reasonableness will be further explored in the next section.

(5) Implications on Administrative Seizure of Persons (Detention)

In October of 2001, the detentions of a group of people that once totaled approximately 1200¹⁵⁵ were rationalized by the historical uses of power "to infringe upon civil liberties and the extreme measures that are required to assure safety in the wake of September 11th against the purview of Fourth Amendment law."¹⁵⁶ It was also justified by "the secrecy of the investigation" and the prerogative to protect the safety of the American population outweighs encroachments into civil liberties.¹⁵⁷

In evaluating the permissibility of the seizure of persons (detention) under the Fourth Amendment, the question raised here is when does the detention exceed the standard of reasonableness? Section 412 of the USA-PATRIOT Act, in amending detention periods and requirements for aliens,¹⁵⁸ does not provide any definitions of reasonableness, nor does it define a time limit regarding "the reasonably foreseeable future" with regard to removal or on the length of detention, provided the Attorney General "certify" an alien for detention if he is believed to be a risk to the community or is engaged in any other activity that endangers the national security of the United States.¹⁵⁹

While this is consistent with the Supreme Court's decision in *Zadvydas v. Davis*,¹⁶⁰ both the Court's decision and the statute are still ambiguous as to how long is it reasonable to hold aliens in connection with terrorism or other matters of national security.¹⁶¹

Discretionary action by administrators is relevant here because of concerns that persons with minor visa violations were being prosecuted and treated as criminals; instead of allowing them a chance to tidy up their paperwork, many were detained with those suspected of more serious crimes.¹⁶²

Historical cases can be informative about the evolution of common law regarding detention of persons. In 1896, during the era of legal formalism, *Wong Wing v. United States* (163 U.S. 228) explicitly held that persons may not be imprisoned as a punishment

unless they were first given a criminal trial, according to constitutional requirements, and sentenced by a judicial tribunal. Persons may be sent to jail as long as the intent is not to punish. In this case, it was reasoned that immigration administrators could legitimately detain or confine persons temporarily in order to carry out effectively their congressionally mandated legislative functions.¹⁶³ However, this language opened the door for *Abel v. United States*, 362 U.S. 217 (1960), which held that "an administrative official, with powers granted by Congress, can work with law enforcement officers to undermine the Fourth Amendment safeguards."¹⁶⁴ Three years later, *United States v. Alvarado*, 321 F.2d 336 (2d Cir.) upheld the constitutionality of an administrative arrest during which immigration authorities did not obtain an arrest warrant. Thus, it allowed persons to be searched and seized, without any cause being given to anyone before the seizure takes place. Warren noted here that such cases appeared only to "encourage dangerous administrative abuses and strip the Fourth's practical utility for individuals."¹⁶⁵ Furthermore, the *Abel* and *Alvarado* holdings conflict with the separation of powers doctrine because administrators are allowed to act as arresting officers, prosecutors, and judges.¹⁶⁶

The situation seemed to move from bad to worse, as a divided Supreme Court, in *United States v. Salerno*, 107 S.Ct. 2095, (1987) upheld the constitutionality of the Bail Reform Act of 1984, 18 U.S.C., § 3142(e), which permitted courts to "order pre-trial detention of persons charged with serious crimes if it is felt, after a pre-trial hearing, that they would impose a threat to the community."¹⁶⁷ Justice Marshall objected to the distinction between regulatory and punitive legislation.¹⁶⁸ Having drawn severe criticism, the Court responded in *Foucha v. Louisiana*, 112 S.Ct. 1780 (1992) by emphasizing that detention was "strictly limited in duration," and since freedom from restraint is a fundamental right, the state must have a particularly convincing reason for detention (at 1787-1788).¹⁶⁹

A couple years later, some of the Federal circuit courts, as in *Alexander v. City and County of San Francisco*, 29 F.3d 1355, resisted the general trend they claimed that would cause a weakening in the barriers that protect against intrusions by police (at 1361).¹⁷⁰

In 2000, the Supreme Court distinguished terrorism cases from cases involving lesser threats in *Zadvydas v. Davis*. The unanimous Court acknowledged the genuine danger represented by terrorism or other exceptional circumstances where "special arguments" could be applied for preventive detention and for "heightened deference to the judgments of the political branches with respect to matters of national security."¹⁷¹ Frazier goes on to conclude that "[a]lthough these seizures are unconstitutional under traditional notions of reasonableness, such detentions are imperative in the wake of the vulnerable and shifting state of the nation."¹⁷²

To counter, Makki insisted that aliens, even those subject to final orders of removal, have rights to procedural due process.¹⁷³ Makki relies on the Supreme Court holding that indefinite detention of deportable aliens to be unconstitutional, based on "the text of 8 U.S.C.A. 1231(a)(6), congressional intent in enacting the post-removal detention statute, and possible constitutional questions that could arise if the United States had a statute that permitted indefinite detention as a result of a civil proceeding."¹⁷⁴ Furthermore, by adopting a "reasonable time" standard, the Court has opened the door to litigation in the federal courts.¹⁷⁵

A good question to ask is: When do seizures and confinements become unreasonable and unjustified?¹⁷⁶ The Fourth Amendment emphasizes that its provisions "shall not be violated," and it does not suggest that its provisions cannot be violated by law enforcement officers but can be violated by other administrators.¹⁷⁷ However, regarding detention, a delay of trial may be lengthy. Anyone can be arrested and imprisoned for many months without ever stepping into a courtroom.¹⁷⁸ Bernard Schwartz, disturbed by the administrative device of labeling a detention "not criminal" asserted, "Imprisonment awaiting determination of whether that imprisonment is justifiable has precisely the same evil consequences to the individual . . . "¹⁷⁹

(III) CONCLUSION

It was established that administrative discretion, which accounts for 90 percent of all administrative action, empowers administrators to choose among many possible courses of action or inaction, and whether or not they execute laws in a fair manner has a major implication on administrative law. In light of the tragic events of September 11th, 2003, and the passage of the USA-PATRIOT Act five weeks later, we have seen that national emergencies redefine much of our cherished freedoms and rights. The complex Act has amended many statutes that impact notice of search and seizure, electronic surveillance, coordination between foreign intelligence and law enforcement, seizure of property, and detention. The overarching theme is to enhance administrative discretion and centralize executive authority, tipping the balance away from civil liberties, all in an effort to protect American citizens. This evaluation has shown that, despite the good intentions of the Department of Justice, would should be applauded for its efforts, there are kinks in the armor. The USA-PATRIOT Act has passed in haste; such a complex law, without the amount of debate afforded to previous forms of major legislation, raises a concern for the delicate balance between liberty and authority, freedom and safety. The Act's inherent conflict with Fourth Amendment protections is evident.

Justice Marshal, in his dissent to *Salerno*, voiced his frustration of the Court's increasing use of the technique for infringing the right of due process: ". . . merely redefine any measure which is claimed to be punishment as 'regulation,' and, magically, the Constitution no longer prohibits its imposition" (at 2108).¹⁸⁰ The encroachment on Fourth Amendment rights by the USA-PATRIOT Act may be justified in a similar vein. Instead of "regulation," it is "national security."

Whether or not the USA-PATRIOT Act or portions of it will be struck down by the Supreme Court depends on a few key factors: (1) being enacted by Congress makes it more durable than promulgated regulations by administrators because the Court believes legislative intention is closer to democratic representation than administrative rule-making; however, (2) if it can be shown that administrators are acting more arbitrarily and capriciously because of the Act, then the issue is whether or not it is constitutional. The clear language developed in common law based solely on *Martinez-Fuete* and *Opperman* remind future courts that frameworks may be used to prevent arbitrary searches by administrators by testing and repealing certain provisions and statute changes by the USA-PATRIOT Act, should these provisions prove to allow arbitrary and capricious discretionary authority. For instance, *Martinez-Fuerte* (at 545-566) held that routine searches of vehicles by border patrol officers did not require administrative search warrants because, *inter alia*: (1) the searches conducted were reasonably limited in scope;

(2) inspection officers had limited discretionary powers; (3) checkpoint authorities were quite stationary and visible; (4) inspection checkpoint stops were placed at fixed and known border locations; and (5) checkpoint sites were not selected by field inspectors, but by official policy makers.¹⁸¹ *Opperman* held that "warrantless administrative searches can be constitutional in some situations if administrative procedural checks exist which guard against the possibility that the searches may be administered arbitrarily."¹⁸² However, since Congress passed the Act, despite the unusually small degree of debate,¹⁸³ the Courts will likely not touch it as long as administrators do not abuse their enhanced discretionary powers. Love it or hate it, the USA-PATRIOT Act will be with us for the long haul. For those who love it, they can applaud our Department of Justice acting on behalf of the Bush Administration in an effort to protect American citizens. For those who hate it, they might want to consider a more intense debate for the next piece of emergency legislation that tries to roll through.

This evaluation of the USA-PATRIOT Act serves to cast light on important implications on Fourth Amendment protections and other due process rights for individuals. However, this does not disregard the importance of seeking a healthy balance between the shared rights of the state and the individual. To strike this balance, all citizens -- voters, representatives, judges, administrators, and scholars alike -- are invited to engage in open and authentic debate to determine how we should broker liberty and authority. There will always be an urgent need for debate regarding administrative law borne from such legislation as the USA-PATRIOT Act. Justice William O. Douglas warned two decades ago, "Absolute discretion, like corruption, marks the beginning of the end of liberty."¹⁸⁴ So be forewarned, that due to the undeniable trend elaborated above, a lack of authentic debate will be the harbinger to the kind of scene set Dostoyevsky's *The Grand Inquisitor*.

NOTES on following pages

¹ U.S. Const. amend. IV.

² Warren, Kenneth F. (1996). *Administrative Law in the Political System*. 3rd ed. Prentice Hall: Upper Saddle River, New Jersey, at 512.

³ A person is seized "only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544 (1980), at 554. Property is seized when governmental intrusion meaningfully interferes with an individual's possessory interest in that property. *United States v. Jacobsen*, 466 U.S. 109 (1984), at 113. (Cited from endnote 26 in Evans, J.C. (2002, Summer). COMMENT: Hijacking Civil Liberties: The USA PATRIOT Act of 2001. *Loyola University Chicago Law Journal*, 33: 933.)

⁴ See *Schenk v. United States*, 249 U.S. 47 (1919); cited in Warren, at 512.

⁵ Warren, at 512-513.

⁶ *Id.*, at 513.

⁷ *Id.*

⁸ *Id.*, at 514.

⁹ *Id.*, at 362.

¹⁰ Davis, Kenneth C., & Pierce, Jr., Richard J. (1994.) *Administrative Law Treatise*, 3rd ed., vol. 1. Boston: Little, Brown, at 22; cited in Warren, at 360.

¹¹ Davis, Kenneth C. (1980, 1969). *Discretionary Justice: A Preliminary Inquiry*. Westport, Conn: Greenwood, at 4; cited in Warren, at 362.

¹² Warren, at 509.

¹³ *Id.*, at 509-512.

¹⁴ Kaufman, Herbert. (1977). *Red Tape*. Washington, D.C.: Brookings Institution, at 19; cited in Warren, at 511.

¹⁵ Dostoyevsky, Fyodor. (1880; Trans. David McDuff, 1993). The Grand Inquisitor. In *The Brothers Karamazov*. New York: Penguin Books.

¹⁶ Whitehead, J.W., & Aden, S.H. (2002, August). ARTICLES: Forfeiting "Enduring Freedom" for "Homeland Security": A Constitutional Analysis of the USA PATRIOT Act and the Justice Department's Anti-Terrorism Initiatives. *The American University Law Review*, 51: 1081, at "Overview: The Newly-Created Legal Framework."

¹⁷ See *id.*; and Proclamation No. 7463, 66 Fed. Reg. 48,199 (Sept. 14, 2001); (The President may only utilize those powers and authorities made available in national emergencies specifically cited within the proclamation or a subsequent published executive order.) 50 U.S.C. 1631 (1994).

¹⁸ See *id.*, "Overview: The Newly-Created Legal Framework," ¶2.

¹⁹ See *id.*; and DOJ Oversight: Preserving Our Freedoms While Defending Against Terrorism Before the Senate Comm. on the Judiciary, 107th Cong. (2001) (Dec. 6, 2001) (written statement of the Honorable John Ashcroft, Attorney General), retrieved April 23, 2003 from: http://www.senate.gov/7Ejudiciary/print_testimony.cfm?id=121&wit_id=42

²⁰ See *id.*, Homeland Defense Before the Senate Comm. on the Judiciary, 107th Cong. (2001) (Sept. 25, 2001) (written testimony of the Honorable John Ashcroft, Attorney General), retrieved April 23, 2003 from: http://www.senate.gov/%7EJudiciary/print_testimony.cfm?id=108&wit_id=42

²¹ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (hereinafter USA-PATRIOT Act), Pub. L. No. 107-56, 115 Stat. 272 (2001). Retrieved April 23, 2003 from: http://www.eff.org/Privacy/Surveillance/Terrorism_militias/hr3162.php

²² Including: International Emergency Economic Powers Act; Foreign Intelligence Surveillance Act (FISA); The Wiretap Act; some anti-money laundering acts; Immigration and Nationality Act; National Information Infrastructure Protection Act of 1996, among others.

²³ Electronic Frontier Foundation. (2001, October 31). *EFF Analysis Of The Provisions of the USA PATRIOT Act: That Relate To Online Activities*. Retrieved April 23, 2003 from: http://www.eff.org/Privacy/Surveillance/Terrorism_militias/20011031_eff_usa_patriot_analysis.html at §: A Rush Job, ¶1-2. The bill was also "... a large and complex law that had over four different names and several versions in the five weeks between the introduction of its first predecessor and its final passage into law."

²⁴ Gross, O. (2003, March). Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional? *Yale Law Journal*, 112: 1011.

²⁵ 42 U.S.C. 3796h(a), as amended by § 701(1) of the USA-PATRIOT Act.

²⁶ 42 U.S.C. 3796h(b), as amended by § 701(2) of the USA-PATRIOT Act.

²⁷ Testimony of David Cohen, the NYPD's Deputy Commissioner for Intelligence, dated September 12, 2002 ("Cohen I"), at 61; cited in *Handschu v. Special Servs. Div.*, 71 Civ. 2203 (CSH), UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, 2003 U.S. Dist. LEXIS 2134, February 11, 2003, Decided, February 11, 2003, Filed, Later proceeding at *Handschu v. Special Servs. Div.*, 2003 U.S. Dist. LEXIS 3643 (S.D.N.Y., Mar. 12, 2003).

²⁸ Kaufman, Herbert, *Red Tape*, at 19; Cited in Warren, at 510-511.

²⁹ See Electronic Frontier Foundation, at § "Chief Concerns" (1)(b), and § II (F)(4).

³⁰ Provisions of the USA-PATRIOT that sunset at the end of 2005 are: §§ 201; 202; 203(b),(d); 206; 207; 209; 212; 214; 215; 217; 218; 220; 223.

³¹ Warren, at 195-196.

³² Electronic Frontier Foundation, at § "Sunset Provisions."

³³ Schwartz, Bernard. (1991). *Administrative Law*, 3rd ed. Boston: Little, Brown, at 98-99; cited in Warren, at 514.

³⁴ See *Abel v. United States*, 362 U.S. 217 (1960), at 248-256; cited in Warren, at 516.

³⁵ Weich, R. (2001, October). *Upsetting Checks and Balances: Congressional Hostility Toward the Courts in Times of Crisis*, American Civil Liberties Union Report, at 4.

³⁶ Mathews, M.K. (2002.) CURRENT PUBLIC LAW AND POLICY ISSUES: Restoring The Imperial Presidency: An Examination Of President Bush's New Emergency Powers. *Hamline Journal of Public Law & Policy*, 23: 455, at §: "The USA Patriot Act Threatens Civil Liberties," ¶2; also see USA PATRIOT Act.

³⁷ Warren, at 546.

³⁸ See *United States v. White*, 322 U.S. 694 (1944), at 701-702; cited in Warren, at 546-547.

³⁹ See *Fisher v. United States*, 425 U.S. 391 (1976); *Andresen v. Maryland*, 427 U.S. 463 (1976); cited in Warren, at 545-549.

⁴⁰ Warren, at 548.

⁴¹ *Id.*, at 549-551.

⁴² Dissenting in *Andresen v. Maryland*, 427 U.S. 463 (1976); cited in Warren, at 550.

⁴³ See *Matter of Grand Jury Empanelled*, 597 F.2d 851 (1979); *United States v. Doe*, 465 U.S. 605 (1984).

⁴⁴ *Id.*; Warren, at 551-554.

⁴⁵ Warren, at 532.

⁴⁶ Dworkin, R.B. (1973, Spring). Fact Style Administration and the Fourth Amendment: The Limits of Lawyering. *Indiana Law Journal* 48: 329; cited in Warren, at 532.

⁴⁷ Warren, at 532.

⁴⁸ MacKenzie, K. I. (1979). Administrative Searches and the Fourth Amendment: An Alternative to the Warrant Requirement. *Cornell Law Review* 64: 864-871; cited in Warren, at 522-532.

⁴⁹ See *Camara v. Municipal Court*, 387 U.S. 523 (1967); *See v. City of Seattle*, 387 U.S. 541; *Marshal v. Barlow's, Inc.*, 436 U.S. 307 (1978); *Dow Chemical Co. v. United States*, 106 S.Ct. 1819 (1986); and *Florida v. Riley*, 109 S.Ct. 693 (1989).

⁵⁰ See *Colonnade Catering Corp v. United States*, 397 U.S. 72 (1970); and *United States v. Biswell*, 406 U.S. 311 (1972).

⁵¹ See *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976); and *South Dakota v. Opperman*, 428 U.S. 364 (1976).

⁵² Evans, *supra* note 3, (at endnote 262) also neatly summarized case law regarding the delay of notice: "The Second and Ninth Circuits have recognized a limited exception to the requirement that even if a search occurs when the owner of the premises is not present, the owner must receive notice that the premises has been lawfully searched pursuant to a warrant. *United States v. Villegas*, 899 F.2d 1324 (2d Cir. 1990); *United States v. Freitas*, 800 F.2d 1451 (9th Cir. 1986); ... The Second and Ninth Circuits have held that when specifically authorized by the issuing judge or magistrate, notice of a search may be delayed in order to avoid compromising an ongoing investigation or for some other good reason. *Villegas*, 899 F.2d at 1336-38; *Freitas*, 800 F.2d at 1457. Both cases dealt only with situations in which a physical search occurred, but no tangible property was removed. *Villegas*, 899 F.2d at 1324; *Freitas*, 800 F.2d at 1451. The Second Circuit explained that these searches were "less intrusive than a conventional search with physical seizure because the latter deprives the owner not only of privacy but also for the use of his property." *Villegas*, 899 F.2d at 1337. The Ninth Circuit held that, while notice of the search could be delayed, it must be provided within a reasonable period thereafter, generally no more than seven days. *Freitas*, 800 F.2d at 1456."

⁵³ See USA PATRIOT Act, § 213(2).

⁵⁴ See *id.*

⁵⁵ See *id.*; Evans (at endnote 265) added that Senator Hatch testified that the so-called "sneak and peek" search warrants are already used throughout the United States, stating that "the bill simply codifies and clarifies the practice making certain that only a Federal court, not an agent or prosecutor, can authorize such a warrant." 147 Cong. Rec. S10990, S11023 (daily ed. Oct. 25, 2001) (statement of Sen. Hatch).

⁵⁶ See USA PATRIOT, § Act 213.

⁵⁷ See American Civil Liberties Union. (2001, October 23). How the USA Patriot Act Expands Law Enforcement "Sneak and Peek" Warrants. Retrieved April 23, 2003 from: <http://www.aclu.org/congress/L102301b.html>

⁵⁸ See USA PATRIOT, § Act 213.

⁵⁹ See *Dow Chemical Co.*, 106 S.Ct. 1819 (1986); and Warren, at 525-526.

⁶⁰ Dissenting opinion in *Florida v. Riley*, 109 S.Ct. 693 (1989); cited in Warren, at 526.

⁶¹ Steele, L.J. (1991, Fall). The View From on High: Satellite Remote Sensing Technology and the Fourth Amendment. *High Tech Law Journal*, vol. 6; cited in Warren, at 527.

⁶² See Electronic Frontier Foundation, at § "Future Actions" (3) (emphasizing the need for the courts to "appropriately punish" those who misuse the USA-PATRIOT Act to spy on innocent people or "harm the rights of ordinary Americans involved in low-level crimes unrelated to terrorism").

⁶³ See *United States v. Payner*, 447 U.S. 727 (1980); cited in Warren, at 554.

⁶⁴ *Id.*; cited in Warren, at 554-555.

⁶⁵ See *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984); cited in Warren, at 555-556.

⁶⁶ See *Pullin v. Louisiana State Racing Com'm.* (1985); (citations omitted), cited in Warren, at 556-557.

⁶⁷ Warren, at 557.

⁶⁸ Warren, at 524-525.

⁶⁹ For delay of notice, see *supra* § II (B)(1); for vague reasonable suspicion standards, see *infra* § II (B)(3) & § II (B)(5).

⁷⁰ Lerner, C.S. (2003, March). ARTICLE: The Reasonableness of Probable Cause. *Texas Law Review*, 81: 951, at § IV, ¶4.

⁷¹ *Id.*, at § II (B)(9) ¶5.

⁷² *Id.*, at § IV, ¶5.

⁷³ USA-PATRIOT Act, § 1016 (b)(1).

⁷⁴ Electronic Frontier Foundation, at § "Expanded Surveillance with Reduced Checks and Balances," ¶1.

⁷⁵ Exemplifying the dearth and complexity of the USA-PATRIOT Act, the amendments to statute regarding electronic surveillance will only be summarized here. For an in-depth outline, see Pikowsky, R.A. (2002, Fall). GENERAL ARTICLE: An Overview of the Law of Electronic Surveillance Post September 11, 2001. *Law Library Journal*, 94: 601, at §: "USA PATRIOT Act Amends the Law Governing Wiretaps, Access to Stored Communication, and Pen Registers."

⁷⁶ Electronic Frontier Foundation, at § "Expanded Surveillance with Reduced Checks and Balances," at ¶3.

⁷⁷ USA-PATRIOT Act, § 216; modifies 18 U.S.C. 3121(c).

⁷⁸ *Id.*, § 209.

⁷⁹ Electronic Frontier Foundation, at § “Chief Concerns” (1)(b).

⁸⁰ USA-PATRIOT Act, §§ 219, 220.

⁸¹ Hartzog, N. (2002, Winter). COMMENT: The "Magic Lantern" Revealed: A Report of the FBI's New "Key Logging" Trojan and Analysis of its Possible Treatment in a Dynamic Legal Landscape. *The John Marshall Journal of Computer & Information Law*, 20: 287, at 294.

⁸² *Id.*, at 304.

⁸³ See Tufaro, G. (2002, Spring). NOTES & COMMENTS: Will Carnivore Devour the Fourth? An Exploration of the Constitutionality of the FBI Created Software. *New York Law School Journal of Human Rights*, 18: 305, at 308-310.

⁸⁴ See Woo, C., & So, M. (2002, Spring). NOTE: The Case for Magic Lantern: September 11 Highlights the Need for Increased Surveillance. *Harvard Journal of Law & Technology*, 15: 521.

⁸⁵ Young, M.G. (2001, December). NOTE: What Big Eyes and Ears You Have!: A New Regime for Covert Governmental Surveillance. *Fordham Law Review*, 70: 1017, at 1072. Also see Smith, S.P. et al. (2000, December 8). IIT Research Institute, *Independent Technical Review of the Carnivore System*, at 4-2 ("Carnivore represents technology that protects privacy and enables lawful surveillance better than alternatives such as commercially available "sniffer" software").

⁸⁶ Evans, at § II (B).

⁸⁷ *Katz v. United States*, 389 U.S., at 359.

⁸⁸ *Id.* at 358.

⁸⁹ *Id.*, citations omitted.

⁹⁰ *Id.*, at 358.

⁹¹ *United States v. United States District Court*, 407 U.S. 297, 299 (1972) [hereinafter *Keith*]. *Keith* was the federal district court judge who heard the case. Subsequently, commentators have typically referred to this case as the "*Keith*" decision.

⁹² *Id.* at 321-22, 324.

⁹³ *Id.*, at 313.

⁹⁴ *Id.*, at 313-15.

⁹⁵ Evans, at § II (B) ¶3; *Id.* at 322.

⁹⁶ *Id.*, at § II (B) ¶5.

⁹⁷ Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 1556, 92 Stat. 1783 (authorizing electronic surveillance to obtain foreign intelligence information). The current FISA is found in 50 U.S.C. 1800-1829 (2002).

⁹⁸ *ACLU Found. of S. Cal. v. Barr*, 952 F.2d 457, 460 (D.C. Cir. 1991).

⁹⁹ Several circuit courts have held that FISA is a "constitutionally adequate balancing of the individual's Fourth Amendment rights against the nation's need to obtain foreign intelligence information." *United States v. Duggan*, 743 F.2d 59, 73 (2d Cir. 1984).

¹⁰⁰ See *United States v. Butenko*, 494 F.2d 593, 602 (3d Cir. 1974) (en banc) (holding electronic surveillance conducted without a warrant was constitutional, even though the primary purpose of the

surveillance was to obtain foreign intelligence information); *United States v. Brown*, 484 F.2d 418 (5th Cir. 1973) (holding that unwarranted electronic surveillance for foreign intelligence purposes was constitutional when an American citizen was incidentally overheard); see also *United States v. Cavanagh*, 807 F.2d 787, 790-91 (9th Cir. 1987) (holding that when balancing the government's interests in pursuing intelligence activity against the individual's freedom from governmental intrusion, FISA warrants satisfy Fourth Amendment concerns); *United States v. Pelton*, 835 F.2d 1067, 1075 (4th Cir. 1987) (stating that FISA safeguards provide sufficient protection under the Fourth Amendment for FISA issued warrants); infra Part II.D.3 (providing a discussion of FISA requirements). But see *Zweibon v. Mitchell*, 516 F.2d 594, 613-14 (D.C. Cir. 1975), aff'd in part, rev'd in part, 606 F. 2d 1172 (D.C. Cir. 1979) (holding narrowly that absent exigent circumstances, a warrant must be obtained before conducting electronic surveillance of domestic organizations with no foreign connection, rejecting arguments by the government that any national security exception to the warrant requirement would be constitutionally permissible, and refusing to broaden its holding to include all foreign security surveillance). (cited in Evans, at endnote 92).

¹⁰¹ Johnson, M. (2002, January). *The Dangers of Domestic Spying by Federal Law Enforcement: A Case Study on FBI Surveillance of Dr. Martin Luther King*. American Civil Liberties Union: Washington, D.C. Retrieved April 22, 2003 from: <http://archive.aclu.org/news/2002/n011702d.html> or <http://archive.aclu.org/congress/mlkreport.PDF>

¹⁰² USA PATRIOT Act, §§ 206, 207, 214, 218, 225, 701, 901, 902, 904, 905, to name a few. For an in-depth outline, see Pikowsky, at § "USA PATRIOT Act Amends the Foreign Intelligence Surveillance Act", ¶10.

¹⁰³ *Sealed Case* No. 02-001; 310 F.3d 717.

¹⁰⁴ *In re: Sealed Case* No. 02-001; 310 F.3d 717 (Foreign Int. Surv. Ct. Rev. 2002).

¹⁰⁵ *Id.*, at 746.

¹⁰⁶ *Id.*, at 727 (original emphasis).

¹⁰⁷ *Id.*, at 729.

¹⁰⁸ *Id.*, at part II & III.

¹⁰⁹ *Id.*, at conclusion.

¹¹⁰ *United States v. Truong Dinh Hung*, 629 F. 2d 908 (4th Cir. 1980). A case that involved an electronic surveillance carried out prior to the passage of FISA and predicated on the President's executive power.

¹¹¹ Foreign Int. Surv. Ct. Rev. 2002, at 743.

¹¹² *Id.*, at 721.

¹¹³ *Id.*, at 723.

¹¹⁴ Foreign Int. Surv. Ct. Rev. 2002, at 743; also *See, e.g.*, AGRT Report at 723-26., which told the Court of Review that the FBI thought it necessary because of FISA court rulings to pass off a criminal investigation to another governmental department when the FBI was conducting a companion counterintelligence inquiry.

¹¹⁵ *Id.*, at 734.

¹¹⁶ *United States v. Megahey*, 553 F. Supp. 1180 (E. D.N.Y. 1982), was the first major challenge to a FISA search. The district court held that surveillance under FISA would be "appropriate only if foreign

intelligence surveillance is the Government's primary purpose" (at 1189-90). Beginning with the Second Circuit's endorsement of the *Megahey* dichotomy (*United States v. Duggan*, 743 F.2d 59, 78 (2nd Cir. 1984).), the Fourth, Eleventh, and First circuits followed suit. See *United States v. Pelton*, 835 F. 2d 1067, 1075-76 (4th Cir. 1987), *cert. denied*, 486 U.S. 1010 (1988); *United States v. Badia*, 827 F.2d 1458, 1464 (11th Cir. 1987), *cert. denied*, 485 U.S. 937 (1988); *United States v. Johnson*, 952 F.2d 565, 572 (1st Cir. 1991), *cert. denied*, 506 U.S. 816 (1992). However, the Ninth circuit had refused to "draw too fine a distinction between criminal and intelligence investigations" (*United States v. Sarkissian*, 841 F. 2d 959, 964 (9th Cir. 1988) (citations omitted).

¹¹⁷ Foreign Int. Surv. Ct. Rev. 2002, at 727.

¹¹⁸ *Id.*, at 722.

¹¹⁹ *Id.*, at 735.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² Since the government was the only party to FISA proceedings, the Court of Review accepted briefs by the American Civil Liberties Union and the National Association of Criminal Defense Lawyers as *amici curiae*.

¹²³ Foreign Int. Surv. Ct. Rev. 2002, at 736.

¹²⁴ *Id.*

¹²⁵ *Id.*, paraphrased at 737.

¹²⁶ The Court of Review considered this only an assumption.

¹²⁷ Foreign Int. Surv. Ct. Rev. 2002, at 737. (original emphasis)

¹²⁸ *Dalia v. United States*, 441 U.S. 238, 255, 60 L. Ed. 2d 177, 99 S. Ct. 1682 (1979) (citations omitted).

¹²⁹ Foreign Int. Surv. Ct. Rev. 2002, at 738.

¹³⁰ *Id.*

¹³¹ *Id.*, at 739.

¹³² *Id.*

¹³³ *Id.*, at 741.

¹³⁴ *Id.*; See 50 U.S.C. §§ 1806(f), (g). However, the Court of Review stated that "the issue whether such a decision protects a defendant's constitutional rights in any given case" was not before them.

¹³⁵ Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2522.

¹³⁶ Foreign Int. Surv. Ct. Rev. 2002, at 742.

¹³⁷ *Id.*, at 746.

¹³⁸ Westlaw Bulletin (2003, March 24). U.S. Supreme Court denied intervention on February 25th, 2003.

¹³⁹ Foreign Int. Surv. Ct. Rev. 2002, at 732-736.

¹⁴⁰ *Id.*, at 732.

¹⁴¹ *Id.*, at 734.

¹⁴² Warren, at 519.

¹⁴³ *Id.*, at 549-551.

¹⁴⁴ Warren, at 514-515.

¹⁴⁵ Ellis, J.A. (2002). NOTES & COMMENTS: Designation of Foreign Terrorist Organizations Under the AEDPA: The National Council Court Erred in Requiring Pre-Designation Process. *Brigham Young University Law Review*: 675, at ¶1.

¹⁴⁶ *Id.*, at ¶2.

¹⁴⁷ *Id.*, at "Conclusion," ¶1.

¹⁴⁸ Ellis, at 688-690; *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). The Mathews test considers three factors to identify "the specific dictates of due process." First, a court must consider "the private interest that will be affected by the official action." Second, a court must inquire into "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards." The third and final factor embodies a consideration of "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

¹⁴⁹ Ellis, at 689; *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971).

¹⁵⁰ Ellis, at 689; See *Zinermon v. Burch*, 494 U.S. 113, 129 (1990). (In circumstances where it would be impossible for a state to provide notice and a hearing prior to the deprivation, the Court has held that a state common law tort remedy is sufficient procedure under the Due Process Clause.)

¹⁵¹ Amended the Immigration Act, 8 U.S.C. 1182(a)(3)(B)(iii) (2000).

¹⁵² Cole, D. (2002, May). ARTICLE: Enemy Aliens. *Stanford Law Review*, 54: 953, at 960-975.

¹⁵³ See *Global Relief Found. v. O'Neill*, 207 F. Supp. 2d 779 (N.D. Ill. 2002).

¹⁵⁴ Warren, at 521.

¹⁵⁵ Frazier W.D. 2002. NOTE: The Constitutionality of Detainment in the Wake of September 11th. *Kentucky Law Journal*, 90: 1089, at endnote 9; Lewis, N.A. (2001, October 30). *Detentions After Attacks Pass 1,000, U.S. Says*, N.Y. TIMES, at B1; *Contra Preserving Our Freedoms While Defending Against Terrorism: Hearing: Before the Judiciary Committee of the United States Senate on DOJ Oversight*, 107th Cong. (2001).

¹⁵⁶ Frazier, at 1115.

¹⁵⁷ *Id.*

¹⁵⁸ USA-PATRIOT Act §§ 411, 412; The Act specifically affects immigrants with its redefinition of the length and reasons for which suspected terrorists can be detained under the Immigration and Naturalization Act.

¹⁵⁹ Frazier, at 1112-1113; See also USA PATRIOT Act § 412.

¹⁶⁰ See *Zadvydas v. Davis*, 121 S. Ct. 2491 (2001).

¹⁶¹ See *id.* (holding the post-removal detention statute limits the detention period of an alien to a period reasonably necessary to facilitate the alien's removal from the United States and forbids indefinite detention); Elaborated in Frazier, at endnote 200.

¹⁶² Frazier, at 1113-1114.

¹⁶³ Warren, at 514.

¹⁶⁴ Id.

¹⁶⁵ Id, at 516.

¹⁶⁶ Id, at 518.

¹⁶⁷ Id, at 518.

¹⁶⁸ Id, at 518-519.

¹⁶⁹ Id, cited at 519.

¹⁷⁰ Id, cited at 516.

¹⁷¹ *Zadvydas*, 121 S. Ct. at 2502; Elaborated in Frazier, at 1118-1120.

¹⁷² Frazier, at 1124.

¹⁷³ Makki, B. (2002, Spring). NOTE: The United States Supreme Court Holds Indefinite Detention of Deportable Aliens to be Unconstitutional: Where Do They Go From Here? *University of Detroit Mercy Law Review*, 79: 479, at 500.

¹⁷⁴ Id, at 500.

¹⁷⁵ Id.

¹⁷⁶ Warren, at 515.

¹⁷⁷ Id, at 517.

¹⁷⁸ Id, at 515.

¹⁷⁹ Schwartz, Bernard. *Administrative Law*, 3rd ed., at 107; cited in Warren, at 515.

¹⁸⁰ Cited in Warren, at 518-519.

¹⁸¹ Cited in Warren, at 531.

¹⁸² Warren, at 531.

¹⁸³ See Electronic Frontier Foundation, at § “Were our Freedoms the Problem?” (“In fact, in asking for these broad new powers, the government made no showing that the previous powers of law enforcement and intelligence agencies to spy on US citizens were insufficient to allow them to investigate and prosecute acts of terrorism. The process leading to the passage of the bill did little to ease these concerns.”)

¹⁸⁴ Dissent in *New York v. United States*, 342 U.S. 882, at 884 (1951); cited in Warren, 521.