

The USA PATRIOT Act and the Submajoritarian Fourth Amendment

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I. INTRODUCTION

Five weeks after September 11, 2001, Congress adopted the USA PATRIOT Act,¹ providing the executive branch with retrofitted tools to investigate terrorism.² Recognizing that its decisions were hasty and that the potency of the new tools was difficult to predict,³ Congress imposed four year sunsets on sixteen of the more controversial provisions.⁴ During 2005, Congress reconsidered those provisions and a few others and appeared willing to renew them all with few amendments and many fewer sunsets.⁵ As this Article is being published, the House and the Senate are in the throes of trying to reconcile their Patriot Act renewal bills, but the differences between the two versions, although bitterly disputed, are not substan-

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¹ USA PATRIOT Act is a labored acronym for the Act's full title: Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (Patriot Act), Pub. L. No. 107-56, 115 Stat. 272 (2001).

² The Patriot Act consists of hundreds of cryptic amendments to previous law, including many provisions not relating to surveillance and some surveillance provisions not limited to terrorism investigations. For a summary, see CHARLES DOYLE, CONGRESSIONAL RESEARCH SERVICE, THE USA PATRIOT ACT: A LEGAL ANALYSIS (2002), available at <http://www.fas.org/irp/crs/RL31377.pdf>.

³ For a fascinating insider account of Congress's decision-making process, see Beryl A. Howell, *Seven Weeks: The Making of the USA PATRIOT Act*, 72 GEO. WASH. L. REV. 1145 (2004).

⁴ See Patriot Act § 224(a) for a list of the Title II provisions without sunsets.

⁵ See Eric Lichtblau, *Congress Nears Deal to Renew Antiterror Law*, N.Y. TIMES, Nov. 17, 2005, at A01 (describing the draft conference report deemed likely to win approval); Eric Lichtblau, *Extension of Patriot Act Faces Threat of Filibuster*, N.Y. TIMES, Nov. 18, 2005, at A26 (reporting that accord had not yet been reached). See *infra* text accompanying notes 101–112, 147–151, 194, 220–222 for an explanation of the few areas where the House or Senate renewal bills which were generated during the summer of 2005 proposed amendments or sunsets. For a comparative summary of the provisions of the House and Senate bills, see CTR. FOR DEMOCRACY AND TECH., CDT ANALYSIS OF SENATE AND HOUSE PATRIOT ACT REAUTHORIZATION BILLS (2005), available at <http://www.cdt.org/security/usapatriot/20050726patriotauthorization.pdf>.

tial enough to dictate how history should characterize Congress's second look at the Patriot Act.

The legislation resulting from the sunset hearings, whether it ultimately favors the House or the Senate bill, can plausibly be described as failing to reflect the concerns of a majority of the public about the wisdom of conferring so much surveillance power on the executive branch. Several of the provisions at issue—especially the tellingly nicknamed “library” provision and “sneak and peek” authority—generated an extraordinary level of public consternation and resistance. A grassroots movement, spearheaded by the Bill of Rights Defense Committee,⁶ led seven states and 399 cities, towns, and villages to adopt resolutions condemning various Patriot Act provisions.⁷ These resolutions proclaimed the value of privacy, freedom of speech, and freedom of religious and other associations, and explicitly urged federal representatives to reexamine the Patriot Act critically.⁸ Similar views about some of the Patriot Act provisions were reflected among the public at large: almost three-quarters of Gallup poll respondents in 2004 opposed the “sneak and peek” provision,⁹ and approximately half opposed the “library” provision.¹⁰ Although a majority of those polled believed the Patriot Act as a whole did not go too far in restricting civil liberties,¹¹ the more respondents claimed to know about the content of the Act, the more likely they were to oppose its provisions.¹²

A majority of members of the House of Representatives agreed. During the year preceding the sunset hearings, the House had approved bills to restrict the power conferred by each of those two contested provisions. These limitations, however, were not included in the House Patriot Act

⁶ Bill of Rights Defense Committee Home Page, <http://www.bordc.org> (last visited Oct. 14, 2005).

⁷ The states are Alaska, Colorado, Hawaii, Idaho, Maine, Montana, and Vermont. See Bill of Rights Defense Committee, *Passing Statewide Civil Liberties Resolutions*, <http://www.bordc.org/involved/states> (last visited Nov. 27, 2005).

⁸ See New York City, N.Y., Res. 60-2004 (Feb. 4, 2004), available at <http://www.bordc.org/detail.php?id=69>, for a typical example of these provisions.

⁹ LYDIA SAAD, THE GALLUP ORG., AMERICANS GENERALLY COMFORTABLE WITH PATRIOT ACT (2004), available at <http://poll.gallup.com/content/default.aspx?ci=10858>. See *infra* text accompanying note 210.

¹⁰ SAAD, *supra* note 9. See *infra* text accompanying notes 84–92.

¹¹ When asked the question, “Based on what you have read or heard, do you think the Patriot Act goes too far, is about right, or does not go far enough in restricting people’s civil liberties in order to fight terrorism?” 26% of those polled in 2004 said the Act went too far, 21% thought it did not go far enough, while a 43% plurality believed it was “about right.” SAAD, *supra* note 9. In a 2005 follow up poll the question was modified, describing the government’s goal at the end of the sentence as “to investigate suspected terrorism” instead of “to fight terrorism,” and the numbers shifted slightly: 30% thought the Act went “too far,” 21% “not far enough,” and 43% rated it “about right.” DARREN K. CARLSON, THE GALLUP ORG., LIBERTY VS. SECURITY: PUBLIC MIXED ON PATRIOT ACT (2005), available at <http://poll.gallup.com/content/default.aspx?ci=17392>.

¹² In the 2005 poll, 45% of respondents describing themselves as very familiar with the Act believed it goes too far in restricting civil liberties, and 33% of those who claimed to be somewhat familiar with its provisions held that same opinion, adding up to more than double the disapproval rate of the public as a whole. CARLSON, *supra* note 11.

renewal bill¹³ because procedural maneuvering prevented them from reaching a vote on the floor.¹⁴ The Senate, sheltered by its politically insulated structure, was more willing to revise the provisions engaged citizens were questioning¹⁵ and was considerably more dignified in its proceedings.¹⁶

Partisan politics is only one reason why the final Patriot Act legislation may not accurately reflect the views of a majority of the public. Both public opinion and the legislative process have been distorted by widespread misunderstanding of the Patriot Act powers themselves, misapprehension of the procedural questions actually being debated, and the dense cloud of secrecy surrounding implementation of these powers.¹⁷ “Patriot Act” often seems like a trope—words conveying a symbolic meaning, in this case engaging a set of political attitudes, rather than a literal reference to a piece of legislation.

But even if a majority of Americans would, if fully informed, support most or even all of a renewed Patriot Act, what Congress decides should not be the final word on whether executive branch surveillance powers are reasonable.¹⁸ The controversial Patriot Act provisions implicate rights we generally expect the judiciary, not Congress, to protect against popular opinion: freedoms of speech, association, and exercise of religion, and expectations of privacy. Among those expressing greatest concern about the enhanced government surveillance powers are politically underrepresented minorities, particularly Arab and Muslim men, who fear that most Ameri-

¹³ See *infra* text accompanying notes 107–108.

¹⁴ For an account by dissenting Democrats of the amendments proposed and how they were treated, see DISSENTING VIEWS TO ACCOMPANY H.R. 3199, THE “USA PATRIOT AND INTELLIGENCE REFORM REAUTHORIZATION ACT OF 2005” (2005), available at http://www.house.gov/judiciary_democrats/demviews/hr3199patriotdissent109.pdf.

¹⁵ See *infra* text accompanying notes 101–106, 147.

¹⁶ In a praiseworthy attempt to rise above partisan politics and avoid legislative impasse, the Senate Judiciary Committee crafted a bipartisan compromise bill, which the Senate unanimously approved. See *infra* text accompanying note 106.

¹⁷ See *infra* text accompanying notes 90–92.

¹⁸ It is not my purpose in this Article to mount an argument against the Patriot Act provisions I explore, but to discuss the relative roles of Congress and the judiciary in evaluating arguments that those provisions go too far in restricting rights. Such arguments have been elaborated elsewhere, including by me. See, e.g., STEPHEN J. SCHULHOFER, RETHINKING THE PATRIOT ACT: KEEPING AMERICA SAFE AND FREE (2005) (arguing that although some Patriot Act provisions are essential and do provide protections for civil liberties, some of the powers conferred are too broad and insufficiently attentive to interests of transparency and accountability); ANN BEESON & JAMEEL JAFFER, ACLU, UNPATRIOTIC ACTS: THE POWER OF THE FBI TO RIFLE THROUGH YOUR RECORDS AND PERSONAL BELONGINGS WITHOUT TELLING YOU (2003), available at <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=13246&c=207>; NANCY CHANG, CTR. FOR CONSTITUTIONAL RIGHTS, THE USA PATRIOT ACT: WHAT’S SO PATRIOTIC ABOUT TRAMPLING THE BILL OF RIGHTS? (2001), available at http://www.ccr-ny.org/v2/reports/docs/USA_PATRIOT_ACT.pdf; John W. Whitehead & Steven H. Aden, *Forfeiting “Enduring Freedom” for “Homeland Security”*: A Constitutional Analysis of the USA PATRIOT Act and the Justice Department’s Anti-Terrorism Initiatives, 51 AM. U. L. REV. 1081, 1088–90 (2002); Susan N. Herman, *The USA Patriot Act and the US Department of Justice: Losing Our Balances?*, JURIST, Dec. 3, 2001, <http://jurist.law.pitt.edu/forum/forumnew40.htm> (arguing that the Patriot Act destroys essential checks and balances).

cans may be overly willing to sacrifice someone else's rights for their own sense of security.¹⁹

Justice Stone's venerable *Carolene Products* Footnote 4 framework²⁰ suggests that the courts have a special role to play in reviewing legislation affecting discrete and insular minorities or infringing a specific protection of the Bill of Rights. The Supreme Court's First Amendment jurisprudence generates an expectation that the Constitution will offer a cure if Congress has gone "too far" in pruning rights. The Supreme Court, from the Warren through the Rehnquist eras, has been willing to provide a counter-majoritarian²¹ check by finding an act of Congress to violate the First Amendment even if a majority of the public supports that act.²² The Court certainly has power under the Fourth Amendment²³ to invalidate an act of Congress permitting unconstrained executive branch surveillance that a majority of the public finds unreasonable, and even an act a majority approves. But although it could do so either as part of its mission to protect rights or under some form of representation-reinforcement theory,²⁴ the Court has been increasingly reluctant to interpret the Fourth Amendment as providing judicial constraints on government surveillance.²⁵ It is too soon to tell whether the Court will use its authority to modify Patriot Act provisions that impinge upon First Amendment values. It is not too soon to predict that the current Court is unlikely to interpret the Fourth Amendment, a pariah among constitutional rights, as providing any significant check on whatever surveillance powers Congress ultimately decides to afford the executive branch.

A central complaint about the Patriot Act provisions in question is that they do not always leave room for the courts to play their historic role in antecedent review of executive branch surveillance activities.²⁶ Ironically, the courts are also unlikely to play a major role in deciding whether this ever-increasing shift of authority from the judiciary to the executive

¹⁹ See *infra* text accompanying notes 320–324.

²⁰ *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

²¹ I use this word to describe judicial willingness to find that the Constitution sometimes constrains the choices of political majorities.

²² See *infra* note 247 for examples.

²³ U.S. CONST. amend. IV. ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.")

²⁴ See *infra* text accompanying notes 320–323.

²⁵ See *infra* notes 240–245 and accompanying text.

²⁶ Although I am focusing on Patriot Act provisions, I do not think that the Patriot Act's incremental changes should be viewed in isolation. The Patriot Act follows years of other legislation expanding the government's surveillance authority, like the Anti-Terrorism and Effective Death Penalty Act of 1996, passed in the wake of the Oklahoma City bombing, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (amending 28 U.S.C. §§ 2244, 2253–2255 (2000), and adding 28 U.S.C. §§ 2261–2266 (2000)). The baseline that the Patriot Act moved, even if only slightly in some areas, was already a fair distance from Fourth Amendment precepts.

branch is constitutional. Fourth Amendment challenges to the Patriot Act have proved stubbornly resistant to litigation. In the four years since the enactment of the Patriot Act, very few challengers have even attempted to litigate the constitutionality of any of the provisions discussed here. The course of litigation has been profoundly affected by the very nature of the legislation at issue. Because of the heightened secrecy surrounding the implementation of Patriot Act surveillance powers, targets do not know that they have been the subject of surveillance and custodians of records are not permitted to share that information.²⁷ Thus, there are few people who have both the necessary knowledge and the will to litigate. Custodians, if they have actually been asked to turn over records, do have standing to raise a narrow set of constitutional claims, but most have little desire or incentive to litigate against the government.²⁸ The automatic gag orders attached to several Patriot Act provisions threaten custodians with criminal prosecution for revealing to anyone (ostensibly even counsel or a court) that they have been asked to turn over records.²⁹ Although the government has formally demanded records from custodians tens of thousands of times under Patriot Act authority,³⁰ only two custodians, so far as the public knows, have gone to court to challenge those requests.³¹

There is a second and more critical reason why the role of the courts has been minimized. Fourth Amendment doctrine itself has created the loopholes within which the Patriot Act operates. Since the end of the Warren Court era, the Supreme Court has paid little more than lip service to Fourth Amendment precepts, generating myriad exceptions and exclusions to what the Fourth Amendment might otherwise require.³² Unlike the counter-majoritarian First Amendment doctrine, Fourth Amendment doctrine currently seems to be submajoritarian: that is, it appears to allow the government discretion to conduct surveillance that a majority of people would find unreasonable.³³ In our judiciocentric culture, if the courts find a government surveillance power constitutional, most observers will assume that

²⁷ Targets would presumably be notified if they were prosecuted on the basis of information obtained and could then bring a motion to suppress evidence derived from any allegedly unconstitutional surveillance. *See infra* notes 69–71 and accompanying text.

²⁸ Many custodians agree to provide requested information even in the absence of a court order. *See* Audrey Hudson, *Librarians Dispute Justice's Claim on Use of Patriot Act*, WASH. TIMES, Sept. 19, 2003, at A10. *See infra* text accompanying notes 128–141.

²⁹ *See infra* text accompanying notes 54–57, 118–119. This secrecy incidentally shields custodians from any public or personal opprobrium their compliance might generate.

³⁰ *See infra* note 122.

³¹ *See* *Doe v. Ashcroft*, 334 F. Supp. 2d 471 (S.D.N.Y. 2004); *Doe v. Gonzales*, No. 3:05-1256 (D. Conn. filed Aug. 9, 2005). These cases are discussed *infra* text accompanying notes 128–141.

³² There are certainly exceptions to this generalization, individual cases where the Supreme Court has shown a commitment to some Fourth Amendment principle. But the overall trend is clear. In the four years since September 11, for example, the Court has ruled against Fourth Amendment claims in thirteen of the fourteen cases it reviewed. *See infra* text accompanying notes 374–377.

³³ *See infra* Part III.

the power is ipso facto reasonable. When I have spoken about the Patriot Act to groups of lawyers, judges, students, and community groups, a common response from those who express concern about the breadth and unreviewability of the government's investigatory powers is to inquire whether the courts have found the controversial provisions unconstitutional. Observers, both lawyers and non-lawyers, seem inclined to conclude that if the courts are not striking down these provisions, their own concerns must be unfounded.³⁴

Acting against a fairly blank constitutional canvas, Congress may actually have provided more protection of individual privacy in some Patriot Act provisions than the Supreme Court would find the Constitution to require, even if Congress's conclusions are themselves submajoritarian. This is not consistent with our expectation about how constitutional ratchets are supposed to work, but it is consistent with the role Congress has found itself playing with respect to government surveillance throughout much of the twentieth century. The Supreme Court, for a confluence of reasons,³⁵ has often interpreted the Fourth Amendment as allowing executive branch surveillance without any check. Congress then responded to some of the Court's decisions by providing statutory procedural constraints so that surveillance power would not exceed what a majority of the public was actually willing to countenance.³⁶

My concern is that the role of the courts in this area has been so minimized—both in antecedent review of the reasonableness of executive branch surveillance decisions and in review of the constitutionality of legislative decisions delegating discretion to the executive branch—that one-third of the Constitution's design of checks and balances is all but missing. The purpose of this Article is to discuss the Patriot Act as an example of this radical shift of power and to consider possibilities for restoring the role of the courts. Part II of this Article describes four controversial Patriot Act provisions, the few stunted attempts to litigate their constitutionality, and the development of public and legislative reactions throughout the past four years. Part III recounts how the Supreme Court created some of the loopholes the Patriot Act exploits, by deciding, for example, that some government conduct (like commandeering business records) does not raise any Fourth Amendment concerns, and contrasts Congress's reactions to those decisions. Part IV discusses how and why the Fourth Amendment should be renovated to provide a credible judicial check on

³⁴ See Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1220 (1978) (“[A]s a general matter, the scope of a constitutional norm is considered to be coterminous with the scope of its judicial enforcement.”); Peter P. Swire, *Katz Is Dead. Long Live Katz*, 102 MICH. L. REV. 904, 919–21 (2004) (describing the inclination of Americans to defer to the Court's view because of the perceived moral and political authority of constitutional doctrine).

³⁵ These include profound ambivalence about the exclusionary rule. See *infra* text accompanying notes 250–256.

³⁶ See *infra* text accompanying notes 266–267, 279, 290–292.

executive and legislative branch decisions about when surveillance is reasonable.

The Supreme Court has had a notoriously difficult time making sense of the Fourth Amendment. Instead of undertaking to define the values the Fourth Amendment protects, the Court has adopted a general posture of deference to the elected branches. The Court's reluctance to make possibly countermajoritarian normative choices about values of privacy (especially as balanced against claims of security) is unlikely to end any time soon. Therefore, if the Fourth Amendment is to have any meaning, the answer must lie in a positivist approach. The Court would do well to attend to representation-reinforcement theory and recognize that whether a search is unreasonable is not always a matter of simply balancing liberty and security. Instead of deferring to ad hoc executive branch decisions about what is reasonable, the Court might adopt a version of the positivist hybrid rights theory it has used in other areas of constitutional interpretation—such as procedural due process and recent death penalty cases³⁷—to avoid making its own normative choices. As in those cases, the Court could look to legislation and other objective reflections of the privacy values society is actually willing to protect. Whatever conclusions this inquiry yields, the Court must then insist on the prerogative of the judiciary to decide what procedures are appropriate to protect those values.

Even if Congress is accurately representing the views of a majority, the Patriot Act, standing on the shoulders of earlier permissive statutes and judicial decisions, moves far enough from Fourth Amendment core principles that it begs for meaningful review by the judiciary. If Congress has missed the majoritarian mark in some spots, there is even more reason for the Court to provide a constitutional check. The greatest problem with the Patriot Act may not be that it is unconstitutional, as some argue, but that, in too many respects, it is not. Even more than the Patriot Act, Fourth Amendment doctrine needs reconsideration.

II. THE PATRIOT ACT IN ACTION

This Part's discussion of four of the most controversial surveillance provisions of the Patriot Act will show the roles that Congress, the executive branch, and the courts have played in deciding what level of surveillance is reasonable. Secrecy and executive branch control over the flow of information have undermined both political and judicial accountability.

The four selected provisions have provoked the greatest controversy in the public, the courts, and the legislature. Section 215, made famous by indignant librarians, allows the government to obtain a court order providing access to tangible things and records on the basis of a certification by executive branch officials (rather than a judicial determination) and or-

³⁷ See *infra* text accompanying notes 355–356.

ders the recipient not to tell anyone about the government's request.³⁸ Section 505 permits the government to issue National Security Letters to obtain customer records from Internet service providers and other custodians without even the perfunctory court order required by section 215, and under an even broader gag order.³⁹ Section 218 expands authority for surveillance under the Foreign Intelligence Surveillance Act (FISA).⁴⁰ Finally, section 213, the so-called "sneak and peek" authority, allows agents executing search warrants to delay telling the targets that their property has been searched or even seized.⁴¹ These four provisions exemplify several different ways in which Congress has allowed the executive branch to deviate from the presumptive Fourth Amendment model requiring: (1) some form of individualized suspicion (presumptively probable cause), (2) antecedent judicial review where feasible,⁴² and (3) notice of any search or seizure.⁴³ Sections 215 and 505 do not require the executive branch to obtain a warrant based on individualized suspicion.⁴⁴ Section 218 does require a court order to authorize electronic surveillance, but the requisite probable cause finding, the rule governing notice, and even the nature of the court itself diverge from the Fourth Amendment model. Section 213 creates an exception to the prototypical Fourth Amendment requirement of prompt notice to the target of a search or seizure.

The first Section describes how each of these provisions changed previous law and what critics have faulted. Each provision entails: (a) an enhancement of executive discretion about when to conduct surveillance, (b) an expansion of executive discretion to decide whether and when to divulge information about its own surveillance activities, (c) a minimization of

³⁸ See *infra* text accompanying notes 45–54 for a description of how this section changed previous law.

³⁹ See *infra* Part II.B.1.

⁴⁰ See *infra* Part II.C.1.

⁴¹ A court's permission is required in order to defer notice. See *infra* text accompanying notes 196–200. Other surveillance powers expanded by the Patriot Act also have been the subject of criticism for increasing governmental discretion, minimizing judicial oversight, and creating a more opaque veil of secrecy. See, e.g., Peter G. Madriñan, *Devil in the Details: Constitutional Problems Inherent in the Internet Surveillance Provisions of the USA PATRIOT Act of 2001*, 64 U. PITT. L. REV. 783 (2003) (critiquing section 206 roving wiretap authority); Rachel S. Martin, *Watch What You Type: As the FBI Records Your Key-strokes, the Fourth Amendment Develops Carpal Tunnel Syndrome*, 40 AM. CRIM. L. REV. 1271 (2003) (critiquing section 216 authority to collect any dialing, routing, addressing, or signaling information under the procedures governing acquisition of telephone numbers); Steven A. Osher, *Privacy, Computers and the Patriot Act: The Fourth Amendment Isn't Dead, But No One Will Insure It*, 54 FLA. L. REV. 521 (2002) (criticizing the scope of section 216).

⁴² *Chimel v. California*, 395 U.S. 752, 763 (1969). The Court has carved out innumerable exceptions, but this is said to be the default rule.

⁴³ See, e.g., *Groh v. Ramirez*, 540 U.S. 551, 557 (2004) (holding that a search was unconstitutional when the authorizing warrant did not prescribe in its terms the scope of the search, even though supporting documents provided that information).

⁴⁴ Congress may well have assumed that the conduct authorized in those sections does not constitute a "search" within the meaning of the Fourth Amendment. See *infra* Part III.B.1.c.

the judicial role in approving surveillance before the fact, and (d) a surprising minimization of the judicial role in reviewing the constitutionality of this channeling of discretion.

The second Section discusses what the public has and has not been told about the implementation of each section's authority and recounts the fate of attempts to litigate the section's constitutionality. These discussions will show how the executive branch has controlled the flow of information to shape public opinion (by deciding whether and when to disseminate information), to prevent litigation challenging the use of the powers conferred, and to disrupt the course of the few lawsuits that have been brought. The account of the one or two cases apiece concerning three of the four provisions will explain why the courts have thus far played such a small role in judging the constitutionality of the provisions in question.

The final Section describes the public and legislative reactions to each section over the past four years, providing a basis for assessing how Congress used its opportunity to reconsider these provisions.

A. Section 215: Librarians and Beyond

1. Contents and Critique

Section 215, titled "Access to Records and Other Items Under the Foreign Intelligence Surveillance Act,"⁴⁵ authorizes the government to acquire

⁴⁵ Because the provision has been so widely mischaracterized, it is worth setting out the relevant text:

(a)(1) The Director of the Federal Bureau of Investigation or a designee of the Director (whose rank shall be no lower than Assistant Special Agent in Charge) may make an application for an order requiring the production of any tangible things (including books, records, papers, documents, and other items) for an investigation to . . . protect against international terrorism or clandestine intelligence activities, provided that such investigation of a United States person is not conducted solely on the basis of activities protected by the first amendment to the Constitution

(b) . . . Each application under this section . . .

(2) shall specify that the records concerned are sought for an authorized investigation conducted in accordance with subsection (a)(2) of this section to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities.

(c)(1) Upon an application made pursuant to this section, the judge shall enter an ex parte order as requested, or as modified, approving the release of records if the judge finds that the application meets the requirements of this section. . . .

(d) No person shall disclose to any other person (other than those persons necessary to produce the tangible things under this section) that the Federal Bureau of Investigation has sought or obtained tangible things under this section.

Patriot Act, Pub. L. No. 107-56, § 215, 115 Stat. 272 (2001) (codified at 50 U.S.C. § 1861 (Supp. II 2002)).

records and tangible things from custodians—including educational or financial institutions, Internet service providers, or even indignant librarians—under a court order.⁴⁶ The predecessor to this section, enacted after the Oklahoma City and 1993 World Trade Center bombings, allowed the government to obtain travel records⁴⁷ under the relatively permissive procedures of the Foreign Intelligence Surveillance Act (“FISA”)⁴⁸ on the basis of specific and articulable facts giving reason to believe that the person to whom the records pertain is a foreign power or agent of a foreign power.⁴⁹ The Patriot Act vastly expanded the kinds of records and objects the government could acquire under this provision, which now covers any type of record and tangible thing, and eliminated the requirement that the government demonstrate any form of individualized suspicion. FISA’s predicate showing that the target is an agent of a foreign power is at least a facsimile of the probable cause requirement if not the genuine article, providing an opportunity for a reviewing court to determine whether there is some convincing reason for the government to single out a target other than a foreign power.⁵⁰ Instead, section 215 only requires that the affiant, a highly placed designee of the Director of the FBI,⁵¹ certify that he or she believes that information relevant to an investigation against “international terrorism or clandestine intelligence activities” may be obtained.⁵² Once the affiant has done this, the court “shall” enter an ex parte order, “as requested, or as modified, approving the release of records.”⁵³

Section 215 contains a broad gag order that prohibits any person from disclosing to anyone “other than those persons necessary to produce the tangible things” that the FBI has sought or obtained tangible things under this section.⁵⁴ Other than this narrow pragmatic exception, there is no

⁴⁶ The order may require “the production of any tangible things (including books, records, papers, documents, and other items) . . .” *Id.* § 1861(a)(1).

⁴⁷ Peter P. Swire, *The System of Foreign Intelligence Surveillance Law*, 72 GEO. WASH. L. REV. 1306, 1331 n.166 (2004).

⁴⁸ 50 U.S.C. §§ 1801–1811 (2000). FISA’s procedural requirements are less rigorous than those imposed in criminal investigations. *See infra* text accompanying notes 306–308.

⁴⁹ 50 U.S.C. § 1861(b)(2)(B) (2000) (current version at 50 U.S.C. § 1861(b)(2) (Supp. II 2002)).

⁵⁰ This predicate substitutes for the showing that would be required in a criminal investigation: probable cause to believe the target is committing or has committed a crime.

⁵¹ The designee must be no lower than Assistant Special Agent in Charge. 50 U.S.C. § 1861(a)(1) (Supp. II 2002). This provision treats the involvement of higher executive officials as a sufficient safeguard against abuse, a political alternative to meaningful judicial review and oversight.

⁵² *Id.* § 1861(b)(2).

⁵³ *Id.* § 1861(c)(1). The person whose records are sought therefore need not be a suspect at all, but merely a potential source of information. It is unclear how much authority or independence the court could claim due to its statutory power to “modify” the order the government seeks. The statute does not invite a court to decline the government’s application. Of course, modification power exercised strenuously can be tantamount to a refusal. Because the FISA court operates in secrecy, the public cannot learn how broadly this modification power is used.

⁵⁴ One sign of the haste with which the Patriot Act was enacted is that not all provi-

boundary or time limit to the nondisclosure provision. Not only is the custodian never to tell the target that his or her records have been requested or turned over, but the statute contains no exception allowing custodians to consult counsel, to ask a court to lift the prohibition, or to report to the Inspector General or the press that the government has made such a request, even if they do not reveal the name of the target or the nature of the information requested.

The chief criticisms leveled against this provision target each feature described above. First, the provision allegedly violates Fourth Amendment principles of antecedent review by not requiring a court to find individualized suspicion before issuing the order.⁵⁵ The government may gather sensitive information, including medical, religious, or library records, about anyone even if there is no reason to suspect the person whose records are sought of any sort of misconduct or connection with terrorists. Because there is no requirement of any form of individualized suspicion, the court issuing the order has less to decide and less of a role than a court issuing a traditional search warrant (where the court would evaluate the existence of probable cause to believe the individual is involved in criminal activity).⁵⁶ Second, the gag order allegedly violates the Fourth Amendment because—unlike searches pursuant to a warrant or electronic surveillance in criminal investigations⁵⁷—it does not provide for notice to the target, even after the fact. Because the target never learns of the issuance of the order (unless and until a criminal prosecution is brought), the potential safeguard of giving the target an opportunity to invoke judicial review of any sort is eliminated.

First Amendment concerns are also raised about this section, as it allows the gathering of information about an individual's reading habits,

sions which are comparable to section 215 have their own gag orders, and the relationship of these provisions to section 215 is unclear. Section 507, for example, provides a procedure, comparable to that of section 215, for requiring educational institutions to turn over records that would have remained private under previous law. Section 507 appears to create its own procedure authorizing such court orders but does not mention nondisclosure. As a result, it is unclear whether a gag order applies to court orders under section 507, or whether the government can elect to acquire educational records under section 215 and thus shelter its request under that provision's gag order. *See* Patriot Act, Pub. L. No. 107-56, § 507, 115 Stat. 272 (2001) (codified at 20 U.S.C. § 1232g(j) (Supp. II 2002)).

⁵⁵ *See, e.g.,* ACLU, *Surveillance Under the USA PATRIOT Act*, <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=12263&c=206> (last visited Oct. 14, 2005); ACLU, *Section 215 FAQ*, <http://www.aclu.org/Privacy/Privacy.cfm?ID=11054&c=130>. *But see* USA PATRIOT Improvement and Reauthorization Act of 2005, S. 1389, 109th Cong. § 7 (2005).

⁵⁶ Even a court issuing a FISA surveillance order would be evaluating whether there is probable cause to believe the target is an agent of a foreign power or involved with international terrorism. *See infra* notes 154, 306 and accompanying text.

⁵⁷ Electronic surveillance in criminal investigations is conducted under the procedures set out in Title III, Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2518 (2000), which include showings of probable cause, judicial supervision, time limits, and provision of notice at the termination of the surveillance. For a concise summary of Title III, see Michael Goldsmith, *The Supreme Court and Title III: Rewriting the Law of Electronic Surveillance*, 74 J. CRIM. L. & CRIMINOLOGY 1 (1983).

Internet activities, or religious practices.⁵⁸ Even if the discretion to investigate is not actually used in such a manner, the specter of such use might chill people from engaging in lawful and valued forms of speech and association, like taking books out of a library or attending a mosque. In a nod to First Amendment values, Congress had provided in FISA that “United States persons” may not be subjected to FISA surveillance “solely upon the basis of activities protected by the first amendment”⁵⁹ Section 215 did not rescind this prohibition, but the protection is of limited value. United States persons may still be investigated based in part on First Amendment protected activities (including protected speech or association), non–United States persons may be investigated “solely” on the basis of their speech or association, and the gag order makes it impossible for targets to challenge politically or religiously motivated investigations because they will not know that such investigations are taking place.⁶⁰

The government, on the other hand, can plausibly argue that section 215 actually provides more process than is constitutionally necessary. The Supreme Court has held that targets have no Fourth Amendment rights with respect to governmental demands for business records held by a third party because such a demand does not count as a “search” within the meaning of the Fourth Amendment.⁶¹ If the Fourth Amendment does not apply, no prior judicial approval or showing of individualized suspicion is required. Thus, even if Congress leaves the section unamended, it will have exceeded the constitutional mark.⁶²

2. Implementation and Litigation of Section 215

The statute’s gag order, combined with the Department of Justice’s desire to keep its investigations of records secret, meant that for the first few years after the Act went into effect, the public knew nothing about the implementation of this provision. Ultimately, public opinion rather than court order led to some disclosure. In a Freedom of Information Act (“FOIA”) lawsuit asking for information about the frequency with which the section 215 authority had been used, the district court accepted the

⁵⁸ See Whitehead & Aden, *supra* note 18, at 1096–97 (arguing that anti-terrorism legislation has had a “deleterious effect” on free speech).

⁵⁹ Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. § 1824(a)(3)(A) (2000).

⁶⁰ I assume there is a loss of privacy when secret searches occur, but not everyone agrees. See, e.g., Paul Rosenzweig, *Privacy and Consequences: Legal and Policy Structures for Implementing New Counter-Terrorism Technologies and Protecting Civil Liberty*, in EMERGENT INFORMATION TECHNOLOGIES AND ENABLING POLICIES FOR COUNTER TERRORISM (Robert L. Popp & John Yen eds.) (forthcoming 2006) (questioning the extent to which privacy interests are actually compromised if the individual being searched is unaware of the search).

⁶¹ See *infra* text accompanying notes 275–292.

⁶² There are serious questions about whether one can distinguish business records involving new technologies, including the Internet, under these precedents or in areas where First Amendment interests overlap with privacy concerns. See *infra* note 325.

government's argument that even this statistical information was exempt from disclosure because, although the public clearly had an interest in such information, it could compromise national security to reveal even how frequently the power was used.⁶³ On September 18, 2003, in response to growing public concern about the breadth of this section (particularly its potential use in the context of libraries), Attorney General Ashcroft "declassified" information about the use of section 215 and announced that the authority under this section had not been used at all between the passage of the Patriot Act and that date.⁶⁴ What happened after September 2003 was an open question⁶⁵ until Attorney General Gonzales announced in April 2005 that section 215 authority had been used on thirty-five occasions, but never with respect to libraries or bookstores.⁶⁶

Figures about the use of section 215 do not provide an accurate gauge of how frequently the government has sought records from libraries or other custodians of records. First, section 505 of the Patriot Act provides an avenue for government requisition of some kinds of records from libraries and other service providers without even a court order.⁶⁷ In addition, if custodians voluntarily turn over requested records, no court order is necessary and so instances of cooperation will not become section 215 statistics. In a survey of librarians one year after enactment of the Patriot Act, 219 respondents said that their staffs had voluntarily supplied records while 225 reported that they had not voluntarily complied.⁶⁸

Section 215 has proved impervious to litigation. Because of the gag order, targets are unlikely to know if the government has actually acquired their records from a custodian unless and until the government wishes to use evidence derived from those records in a criminal prosecution. If the government discloses that evidence was obtained under an arguably un-

⁶³ *ACLU v. U.S. Dep't of Justice*, 265 F. Supp. 2d 20, 32–33 (D.D.C. 2003). The court commented that the House Judiciary Committee, in its oversight capacity, asked to receive accounts of how frequently section 215 orders were granted, denied, or modified, and noted the Department of Justice's reluctance to provide this information even to the Committee. *Id.* at 24–25.

⁶⁴ Eric Lichtblau, *U.S. Says It Has Not Used New Library Records Law*, N.Y. TIMES, Sept. 19, 2003, at A20.

⁶⁵ See Amy Goldstein, *Patriot Act Provision Invoked, Memo Says*, WASH. POST, June 18, 2004, at A11 ("The FBI asked the Justice Department last fall to seek permission from a secret federal court to use the most controversial provision of the USA Patriot Act, four weeks after Attorney General John D. Ashcroft said that part of the law had never been used . . .").

In a subsequent round of FOIA litigation, the ACLU argued that Attorney General Ashcroft's 2003 announcement demonstrated that such information could be released without compromising national security, but the court adhered to its earlier exemption ruling. *ACLU v. U.S. Dep't of Justice*, 321 F. Supp. 2d 24, 27 (D.D.C. 2004).

⁶⁶ U.S. DEP'T OF JUSTICE, FACT SHEET: PATRIOT ACT PROVISIONS SET FOR REAUTHORIZATION (2005), available at http://www.usdoj.gov/opa/pr/2005/April/05_opa_163.htm.

⁶⁷ See *infra* text accompanying notes 114–118.

⁶⁸ LEIGH S. EASTABROOK, PUBLIC LIBRARIES AND CIVIL LIBERTIES: A PROFESSION DIVIDED (2002), available at http://alexia.lis.uiuc.edu/gslis/research/civil_liberties.html.

constitutional provision,⁶⁹ a criminal defendant could bring a motion to suppress evidence on the ground that it was unconstitutionally obtained. The constitutionality of section 215 has not yet been litigated by anyone whose records were obtained under the authority of this section.⁷⁰ Indeed, the timing of criminal litigation is within the control of the government, which can decide whether or not to prosecute, whether or not to rely on evidence a defendant might challenge, and whether or not to enter a plea bargain in order to avoid a judicial decision on a defendant's motion to suppress evidence.⁷¹

Despite the paucity of public information about implementation, a number of Arab and Muslim groups in Detroit, Michigan, brought a constitutional challenge to section 215 in *Muslim Community Association of Ann Arbor v. Ashcroft* ("MCA").⁷² The plaintiffs asserted that they had a "well-founded belief that they and their members, clients and constituents . . . have been or are currently the targets of investigations conducted under Section 215."⁷³ One of the plaintiffs, an Islamic Center, contended that it was likely to be asked to provide records of its members and, due to the gag order, would be unable to challenge the constitutionality of such an order.⁷⁴ Some of the plaintiffs also alleged that concern about the potential use of this Patriot Act power was causing community members to be "afraid to attend a mosque, practice their religion, or express their opinions about religious and political issues."⁷⁵ This type of harm may be suffered even by

⁶⁹ Several magistrate judges have privately expressed to me their concern that the government may not always reveal in an affidavit for a later search warrant that evidence obtained under controversial statutory authorization provided a basis for their further investigations.

⁷⁰ In *United States v. Battle*, No. 02-399-JO, 2003 WL 751155 (D. Or. Feb. 25, 2003), the government brought a criminal prosecution against United States citizens for, inter alia, conspiracy to provide material support to terrorists. On learning that FISA wiretaps and physical searches had been conducted against them for a period of two months, the defendants filed a motion to suppress the FISA-derived evidence on the ground that it was unconstitutionally obtained. Defendant's Memorandum at 41 n.21, *Battle*, No. 02-399-JO (D. Or. Feb. 25, 2003), 2003 WL 751155; Brief of Amicus Curiae in Support of Defendants' Motion to Suppress Foreign Intelligence Surveillance Evidence at 1, 9-10, *Battle*, No. 02-399-JO (D. Or. Feb. 25, 2003), 2003 WL 751155. The defendants pleaded guilty before the motion to suppress was decided, however, so the constitutional issue was not resolved. Janine Robben, *Last Portland 7 Plea Deals Give Some Solace to the Guilty*, PORTLAND TRIB., Oct. 21, 2003, available at <http://www.portlandtribune.com/archview.cgi?id=20990>.

⁷¹ See Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 868-69, 884 (2004) (commenting on hurdles to Fourth Amendment litigation generally, including the Department of Justice's ability to control the timing and content of criminal prosecutions).

⁷² No. 03-72913 (E.D. Mich. 2003).

⁷³ Complaint for Declaratory and Injunctive Relief at 9, *Muslim Cmty. Ass'n of Ann Arbor*, No. 03-72913 (E.D. Mich. 2003), available at <http://www.aclu.org/Files/OpenFile.cfm?id=13247>. Other plaintiffs included the American-Arab Anti-Discrimination Committee, the Arab Community Center for Economic and Social Services, the Bridge Refugee & Sponsorship Services, the Council on American-Islam Relations, the Islamic Center of Portland, and Masjed As-Saber.

⁷⁴ *Id.* ¶¶ 149-151.

⁷⁵ *Id.* ¶ 152.

those who do not know whether the government is screening their records. The First Amendment chilling effect claim, unlike the Fourth Amendment claims, is not contingent on whether the power in question has actually been used.

The government moved to dismiss the complaint on the ground that the plaintiffs did not have standing to challenge the constitutionality of section 215 and that their claim was not ripe because they could not show that section 215 had actually been used with respect to them or, indeed, at that point, with respect to anyone.⁷⁶ The secrecy surrounding the use or non-use of section 215 proved a major impediment to the resolution of the case. The government's motion to dismiss, filed on October 3, 2003, still has not been decided more than two years later.⁷⁷ The plaintiffs noted that the government's disclaimer about the use of section 215 only covered the period of time prior to September 18, 2003, and suggested that the government might have used the section 215 authority subsequent to that date.⁷⁸ In response, the government submitted an *ex parte* declaration to the court, on the issue of the "use or non-use" of the section 215 powers. On August 19, 2004, the plaintiffs moved to exclude the *ex parte* declaration as unfair,⁷⁹ a motion the court denied on April 13, 2005.⁸⁰ Some of the facts on which the court's evaluation of standing and ripeness may be based, therefore, were not disclosed to the plaintiffs, creating a distortion in the adversary process.

The *MCA* case also suggests, as another case has shown,⁸¹ that the custodians of records, ironically, may be in a better position to claim constitutional rights than the targets whose privacy is actually at issue. At least one of the plaintiffs in the *MCA* case, as a custodian of records, has a discrete Fourth Amendment right to seek judicial review before being compelled to submit to a seizure of things in its possession.⁸² If a custodian can overcome the hurdles of establishing standing and ripeness, this argu-

⁷⁶ Defendants' Motion to Dismiss, *Muslim Cmty. Ass'n of Ann Arbor*, No. 03-72913 (E.D. Mich. 2003).

⁷⁷ See Docket Report, *Muslim Cmty. Ass'n of Ann Arbor v. Ashcroft*, No. 03-72913 (E.D. Mich. 2003).

⁷⁸ For the government's September 2003 disclaimer, see Lichtblau, *supra* note 64.

⁷⁹ Plaintiffs' Motion to Exclude *Ex Parte* Portions of the Supplemental Baker Declaration, *Muslim Cmty. Ass'n of Ann Arbor*, No. 03-72913 (E.D. Mich. 2003); Defendants' Reply to Plaintiffs' Response to Defendants' Letter of May 19 at 1, *Muslim Cmty. Ass'n of Ann Arbor*, No. 03-72913 (E.D. Mich. 2003).

⁸⁰ The denial was without prejudice to renewal. Order, *Muslim Cmty. Ass'n of Ann Arbor v. Ashcroft*, No. 03-72913 (E.D. Mich. 2005).

⁸¹ See *Doe v. Ashcroft*, 334 F. Supp. 2d 471 (S.D.N.Y. 2004) (discussed *infra* text accompanying notes 128–138).

⁸² See *id.* at 494–95. Section 215 is distinguishable from section 505, the subject of the *Doe* case, because there is a court order involved in the former. The antecedent approval process, however, is *ex parte*, and the custodian should still be afforded an opportunity to contest the reasonableness of the order, even if the standard the courts apply to evaluate a custodian's complaint is not very demanding. See *id.* at 495.

ment seems to have a greater likelihood of success than the Fourth Amendment claims of targets and potential targets.

The *MCA* case shows how profound an impact secrecy can have on constitutional litigation. Because of the secrecy surrounding the implementation of section 215, targets could not join the litigation, custodians had difficulty establishing both standing and ripeness, critical aspects of the litigation took place *ex parte* and *in camera*, and the plaintiffs' attorney was at a disadvantage without equal access to the facts on which arguments could be based. Because the Attorney General could decide whether and when to divulge information about the implementation of section 215, one party—the government—gained a considerable measure of control over multiple aspects of the litigation.⁸³

3. Public and Legislative Reaction

Approximately half the public and half the members of the House of Representatives have expressed grave reservations about the power conferred by section 215. Fifty-one percent of respondents in a 2004 Gallup Poll disapproved of “requiring businesses, including hospitals, bookstores, and libraries, to turn over records in terrorism investigations without informing their patients or clients.”⁸⁴ The American Library Association has been highly critical of the potential use of this power in libraries and has actively lobbied for modifications.⁸⁵ Some librarians decided to shred their records in order to avoid the prospect of being required to turn them over, while others have posted notices warning patrons that their records might be subject to scrutiny.⁸⁶ Communities have responded by introducing resolutions supporting their librarians.⁸⁷ A coalition of liberals and con-

⁸³ The executive branch also decides whether to grant court personnel, including a judge's law clerks and other aides, security clearances that are required for access to classified information. See Classified Information Procedures Act, Pub. L. No. 96-456, 94 Stat. 2025 (1980) (codified as amended at 18 U.S.C. app. §§ 1–16 (2000 & Supp. II 2002)).

⁸⁴ SAAD, *supra* note 9.

⁸⁵ Press Release, Am. Library Ass'n, In Wake of Declassified Report, ALA Renews Call for Legislative Amendments to PATRIOT Act (Sept. 18, 2003), available at <http://www.ala.org/ala/pressreleasesbucket/pressreleases2003sep/alarenewscall.htm>.

⁸⁶ See Am. Library Ass'n, Resolution on the USA Patriot Act and Related Measures that Infringe on the Rights of Library Users (Jan. 29, 2003), available at <http://www.ala.org/ala/oif/statementspols/ifresolutions/usapatriotactresolution.pdf> (“[T]he American Library Association urges librarians everywhere to defend and support user privacy and free and open access to knowledge and information.”); see also Rene Sanchez, *Librarians Make Some Noise Over Patriot Act*, WASH. POST, Apr. 10, 2003, at A20 (describing a “backlash” against provisions in the Patriot Act where “[a]long with posting warnings about the law, some libraries are rushing to destroy nearly all of the records they keep of what their patrons read, as well as sign-up logs of computer use”).

⁸⁷ See *Joint Resolution Strongly Urging the President to Revise Executive Orders and Policies, and for Congress to Amend Provisions of the U.S.A. Patriot Act [sic], Which Seriously Erode Fundamental Civil Liberties*, H.R.J. Res. 203, 2003–04 Leg. Sess. (Vt. 2003), available at <http://www.leg.state.vt.us/docs/2004/journal/HJ030220.htm> (resolving that “the General Assembly requests that the office of the Vermont Attorney General offer legal

servatives concerned about the breadth of Patriot Act powers targeted section 215 as one of three provisions on which to focus its lobbying efforts during the renewal hearings.⁸⁸ Commentators have also been highly critical of this section.⁸⁹

Public reactions are of course colored by the abundant misinformation surrounding this provision. The public may have underestimated how extensive the section 215 power is because Department of Justice spokespersons erroneously announced that such records could only be obtained on the basis of probable cause⁹⁰ and that the provision does not apply to citizens.⁹¹ The public may not have understood that the actual issues Congress was debating were narrow and procedural: not whether the government may ever acquire library records, but what judicial review is necessary before the government may commandeer those records; not whether librarians may tell patrons that the FBI has requested their records, but whether the librarians (or other custodians) could tell their attorneys, a court, or the press that they have received a request they considered objectionable.⁹²

support to any public library which is subject to a federal suit or administrative enforcement action for refusing to comply with the provision of the [Patriot] Act related to library patrons' records").

⁸⁸ See Eric Lichtblau, *Coalition Forms to Oppose Parts of Antiterrorism Law*, N.Y. TIMES, Mar. 23, 2005, at A10. The other two provisions targeted were the "sneak and peek" authority and the Patriot Act's expansive definition of terrorism.

⁸⁹ See, e.g., Swire, *supra* note 47, at 1357–60 (recommending changes in procedural requirements, advising elimination of—or at a minimum a six-month limit on—the gag rule, and suggesting that if this authority was not used during the two years following enactment of the Patriot Act it may be unnecessary).

⁹⁰ See *Patriotic Reading*, BANGOR DAILY NEWS, Apr. 9, 2003, at A8 (quoting Justice Department spokesperson Mark Corallo's assertion that concerns about section 215 of the Patriot Act are "completely wrong because, for the FBI to check on a citizen's reading habits, it must get a search warrant. And to get a warrant, it must convince a judge 'there is probable cause that the person you are seeking the information for is a terrorist or a foreign spy.'"). No probable cause showing is required. See *supra* text accompanying notes 50–53.

⁹¹ See Press Release, Dep't of Justice, Statement of Barbara Comstock, Dir. of Pub. Affairs, Regarding Section 215 of the USA PATRIOT Act (July 30, 2003), available at http://www.usdoj.gov/opa/pr/2003/July/03_opa_426.htm ("Section 215 can only be used in a narrow set of investigations: (1) to obtain foreign intelligence information about people who are neither American citizens nor lawful permanent residents . . ."); see also Zenaida A. Gonzalez, *FBI Can Request Library Logs*, FLA. TODAY, Sept. 23, 2002, at 1 ("Mark Corallo, a spokesman with the Department of Justice [said] that 'U.S. citizens cannot be investigated under this act.'"). This is also incorrect. The powers conferred by section 215 can apply to American citizens. See *supra* notes 59–60 and accompanying text.

⁹² In one recent poll, 53% of those surveyed favored permitting the government "to require libraries to turn over records in terrorism investigations and preventing the librarians from revealing to the patrons" that the records had been turned over. UNIV. OF CONN. CTR. FOR SURVEY RESEARCH & ANALYSIS ("CSRA"), NEW NATIONAL POLL ON THE USA PATRIOT ACT (2005), available at http://www.csra.uconn.edu/pdf/PATRIOTACTPRESS_RELEASE.pdf. The framing of the question, suggesting that an alternative to section 215 is to allow librarians to tell suspects that they are under investigation, may well have influenced the response. In the same poll, 55% percent of respondents opposed permitting the government to "require banks to turn over records to the government without a judge's prior approval," a question loaded in the other direction. *Id.* When a June 2005 Harris Poll asked instead whether the respondent favored "closer monitoring of banking and credit card transactions, to trace funding sources," the results shifted, and 62% favored the benign-sounding closer

Congress revealed its own wariness of this expansion of power in the Patriot Act itself, by imposing a sunset on this provision⁹³ and providing for special oversight of its implementation.⁹⁴ Subsequent dramatic events in Congress showed that these concerns did not diminish over time. Several attempts by the House of Representatives to restrict the breadth of this power were stymied by partisan politics.

The first attempt came on March 7, 2003, when Rep. Bernie Sanders (I-Vt.), one of the sixty-six representatives who had voted against the Patriot Act, introduced the Freedom to Read Protection Act.⁹⁵ This act would have returned the standards used to determine whether the FBI could obtain FISA orders to investigate library patrons and bookstore customers to those in force before the Patriot Act's passage.⁹⁶ Under Rep. Sanders's bill, the FBI would still have access to these records via a court-ordered search warrant, but reasonable cause, instead of the lower standard of section 215, would be a prerequisite to such a warrant. The act also called for public reporting to determine how provisions of the Patriot Act are being implemented, in order to allow better assessment of its effects on civil liberties.⁹⁷

As described on Rep. Sanders's website, the vote on his bill led to high drama in the House of Representatives on July 8, 2004.

[T]he amendment, facing threat of a Presidential veto, received a majority of votes in the U.S. House when the time for voting expired. However, the House Republican Leadership then held open the vote twice as long as scheduled, an additional 20 minutes, as they "persuaded" Republicans to switch their votes. As Democratic members chanted, "Shame, Shame, Shame," Republican leaders closed the vote on a 210 to 210 tie.⁹⁸

The Act thus did not pass.

monitoring. HARRIS INTERACTIVE, INC., HARRIS POLL #51 (2005), available at http://www.harrisinteractive.com/harris_poll/index.asp?PID=580.

⁹³ Patriot Act, Pub. L. No. 107-56, § 224(a), 115 Stat. 272 (2001).

⁹⁴ Patriot Act § 215 (codified at 50 U.S.C. § 1861 (Supp. I 2001)).

⁹⁵ To Amend the Foreign Intelligence Surveillance Act to Exempt Bookstores and Libraries from Orders Requiring the Production of Any Tangible Things for Certain Foreign Intelligence Investigations, and for Other Purposes (Freedom to Read Protection Act of 2003), H.R. 1157, 108th Cong. (2003).

⁹⁶ See *supra* text accompanying notes 45–53.

⁹⁷ H.R. 1157.

⁹⁸ Press Release, Bernie Sanders, Republican Leadership Hijacks U.S. House to Defeat Sanders' Patriot Act Amendment (July 8, 2004), available at <http://bernie.house.gov/documents/releases/20040708183514.asp>; see also Eric Lichtblau, *Effort to Curb Scope of Antiterrorism Law Falls Short*, N.Y. TIMES, July 9, 2004, at A16 (describing how frustrated Democrats "shouted 'Shame, Shame!' and 'Democracy!' as the voting continued").

Rep. Sanders tried again, and his bill passed as an amendment to an appropriations bill on June 15, 2005, by a vote of 238 to 187.⁹⁹ The appropriations bill as reported in the Senate, however, did not include this amendment.¹⁰⁰

During the sunset debates in 2005, both the Senate and the House focused on section 215, and both offered very modest amendments to this provision. On July 21, the Senate Judiciary Committee unanimously approved the bipartisan Specter-Feinstein bill renewing the provisions of the Patriot Act but amending section 215 to: (1) require that the government provide a “statement of facts” (as opposed to a mere certification) explaining to the court why the records are being sought, (2) require some connection with an agent of a foreign power, and (3) provide custodians with a right to consult counsel and to challenge the demand in court.¹⁰¹ These amendments were welcomed by the American Library Association,¹⁰² but did not provide all the safeguards critics had requested.¹⁰³ The Senate bill also provided enhanced oversight provisions¹⁰⁴ and a new four year sunset for section 215, although almost all other renewed provisions were made permanent.¹⁰⁵ On July 29, the Senate approved the bill by unanimous consent.¹⁰⁶

The House of Representatives passed its own Patriot Act renewal bill on July 21, 2005.¹⁰⁷ The House did not vote on some of the amendments

⁹⁹ See H.R. 2862, 109th Cong., 151 CONG. REC. H4494, 4534–43, 4551 (2005) (enacted); Eric Lichtblau, *House Votes for a Permanent Patriot Act*, N.Y. TIMES, July 22, 2005, at A11.

¹⁰⁰ See Science, State, Justice, Commerce, and Related Agencies Appropriations Act, 2006, H.R. 2862.RS, 109th Cong. (as reported in Senate, June 23, 2005).

¹⁰¹ USA PATRIOT Improvement and Reauthorization Act of 2005, S. 1389, 109th Cong. § 7 (2005). Under section 215, as amended, the application for a disclosure order would be required to include a statement of facts that demonstrate “reasonable grounds to believe” that the records or items sought are relevant to an investigation for foreign intelligence information and pertain to a foreign power. *Id.* § 7(a)(1). The FISA court would be required to find that those grounds for belief are reasonable. *Id.* § 7(a)(2). The tangible things sought would need to be described with “sufficient particularity.” *Id.* § 7(b). Approval from the Director or Deputy Director of the FBI would be required for certain applications, such as for library circulation records. *Id.* § 7(c). The amendments would also allow for a disclosure order to be challenged. *Id.* § 7(e).

¹⁰² Am. Booksellers Found. for Free Expression, *ABFFE Update: PATRIOT Act Showdown Looms* (Oct. 5, 2005), <http://www.abffe.com/update10-05-05.html> (urging support for Senate amendments).

¹⁰³ One could only bring such a challenge in the Foreign Intelligence Surveillance Court, where it would be heard and decided in secret, on the basis of secret evidence. Notice of the right to challenge would not be required. The bill also did not impose any limits on the permanent secrecy order, although it did make it possible to challenge the order. For a partisan discussion of the legislative process and how close it came to changes regarded by critics as desirable, see, e.g., Posting by Lisa Graves to Reform the Patriot Act Blog, (July 30, 2005, 12:38 EST) <http://blog.reformthepatriotact.org/index.php/?archives/2005/07.html>.

¹⁰⁴ S. 1389 § 7(f).

¹⁰⁵ S. 1389 § 9.

¹⁰⁶ See Eric Lichtblau, *Senate Makes Permanent Nearly All Provisions of Patriot Act, With a Few Restrictions*, N.Y. TIMES, July 29, 2005, at A11.

¹⁰⁷ USA PATRIOT and Terrorism Prevention Reauthorization Act of 2005, H.R. 3199,

the Senate had adopted because the House Rules Committee voted to disallow floor votes on half of the proposed amendments, including a reprise of the Sanders bill.¹⁰⁸ The House bill included a “relevance” standard instead of the heightened Senate standard (which would require submission of a statement of facts and some nexus with terrorism).¹⁰⁹ However, like the Senate bill, the House bill provided that a custodian may consult an attorney and challenge the order in the FISA court.¹¹⁰ The House bill made almost all provisions of the Patriot Act permanent but provided a ten year sunset for section 215, in contrast to the Senate’s four year sunset.¹¹¹ A motion to recommit the bill to the Committee to reconsider the sunset provisions split the House and barely lost by a vote of 209 to 218.¹¹² Neither the House nor the Senate modified the duration or scope of the gag order, which remained permanent and automatic.

The draft conference bill to reconcile the House and Senate bills included a diluted version of the Senate’s standard of proof and provided a seven year sunset.¹¹³

B. Section 505: National Security Letters

1. Contents and Critique

Section 505¹¹⁴ goes even further than section 215 in circumventing judicial oversight of the government’s collection of information from third party custodians. It allows the government to obtain records from a communications provider by issuing its own administrative subpoena, called a National Security Letter (“NSL”), to seek a various types of information about the customers of communications providers, including telephone companies, Internet service providers, and libraries with computer termi-

109th Cong. (2005). The difference between the House and Senate titles is telling. *See* S. 1389 (titled “USA PATRIOT Improvement and Reauthorization Act of 2005”). For a comparison of the provisions of the House and Senate bills, see CTR. FOR DEMOCRACY AND TECH., *supra* note 5.

¹⁰⁸ *See* DISSENTING VIEWS TO ACCOMPANY H.R. 3199, *supra* note 14. The House bill thus did not follow the Senate in enhancing the showing required for a section 215 order, and did not follow through on earlier attempts to exempt libraries from the lower Patriot Act standard.

¹⁰⁹ H.R. 3199 § 8(a).

¹¹⁰ *Id.* § 8(c).

¹¹¹ *See id.* § 3.

¹¹² 151 CONG. REC. H6293, 6306–08 (daily ed. July 21, 2005).

¹¹³ *See* Lichtblau, *Congress Nears Deal to Renew Antiterror Law*, *supra* note 5. The gag order was to remain indefinite and comprehensive, with an exception for consulting counsel. *Id.*

¹¹⁴ USA PATRIOT Act of 2001 (Patriot Act), Pub. L. No. 107-56, § 505, 115 Stat. 272, 365 (2001) (codified at 18 U.S.C. § 2709(b) (Supp. II 2002)). This section amends part of the Electronic Communications Privacy Act (“ECPA”) of 1986, which was modeled on the Right to Financial Privacy Act of 1978. 12 U.S.C. §§ 3401–3422 (2000). *See infra* note 279.

nals.¹¹⁵ Section 505 both dispenses with any showing of individualized suspicion and any form of antecedent judicial review.¹¹⁶ The Patriot Act eliminated the previous requirement of a showing that “specific and articulable facts existed” that the target was a “foreign power” or “agent of a foreign power.”¹¹⁷ Now, the government only needs to certify that information relevant to a terrorism investigation may be obtained. Section 505 also carries a nondisclosure provision even more broadly worded than the gag order of section 215, prohibiting any provider or agent served with an NSL from disclosing to “any person” that the FBI has sought or obtained records pursuant to this authority.¹¹⁸

The critique of this provision is the same as the critique of section 215—judicial role is inadequate and the gag order overly restrictive—but is even more fervent because section 505 contemplates no judicial role at all and institutes a more comprehensive gag order.¹¹⁹ The government has ardently defended its administrative subpoena power and sought to expand its use,¹²⁰ arguing that the NSL is comparable to a grand jury subpoena.¹²¹

2. Implementation and Litigation of Section 505

The public learned from a 2005 *Washington Post* article, rather than a government report or court order, that the FBI has issued more than 30,000 National Security Letters a year, an astronomical increase over “historic norms.”¹²²

The Justice Department had argued that, as with section 215, all information about use of this authority, even statistical information, should

¹¹⁵ The government may seek a customer’s “name, address, length of service, and toll . . . billing records” if a sufficiently highly placed agent certifies that this information is “relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities.” 18 U.S.C. § 2709(b)(1) (Supp. II 2002). The provision contains the same partial limitation as section 215 by requiring that “such an investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment.” *Id.*

¹¹⁶ The ECPA, which was amended by this section, required the government to show a specific reason to believe a nexus between the target and a foreign power existed. *See Doe v. Ashcroft*, 334 F. Supp. 2d 471, 481–84 (S.D.N.Y. 2004).

¹¹⁷ Swire, *supra* note 47, at 1333. “Foreign power” and “agent of a foreign power” are defined at 50 U.S.C. § 1801(a)–(b) (Supp. II 2002). This expansion parallels the enhanced authority conferred by section 215 to seek information under FISA even absent a reason to believe, as would have been required for other surveillance orders under FISA, that the target is an agent of a foreign power.

¹¹⁸ Patriot Act § 505, 18 U.S.C. § 2709(b) (Supp. II 2002). This provision, like the section 215 nondisclosure provision, has no time limit or procedure for obtaining relief, but, unlike section 215, does not even permit the recipient to share information with the employees or persons whose cooperation might be required to comply with the demand.

¹¹⁹ *See* BEESON & JAFFER, *supra* note 18, at 13.

¹²⁰ *See* DEP’T OF JUSTICE, USA PATRIOT ACT OVERVIEW, http://www.lifeandliberty.gov/patriot_overview_pversion.pdf (last visited Oct. 14, 2005).

¹²¹ *See Doe*, 334 F. Supp. 2d at 484–87, 493.

¹²² Barton Gellman, *The FBI’s Secret Scrutiny: In Hunt for Terrorists, Bureau Examines Records of Ordinary Americans*, WASH. POST, Nov. 6, 2005, at A01.

be exempt from disclosure to the public.¹²³ Unlike the section 215 FOIA litigation,¹²⁴ a FOIA lawsuit yielded a redacted list of instances of NSL use, which showed that section 505 had been used hundreds, perhaps thousands of times, but did not provide any actual number.¹²⁵ The FBI is required to report to Congress twice a year on the use of this authority, but the scope of the obligation is vague and members of Congress complained publicly that the reports were not always submitted promptly, making oversight difficult.¹²⁶

In retrospect, it seems likely that one reason the government has had so little occasion to use section 215 is that, at least as to some providers (including telephone and Internet providers), the government can avail itself of the more convenient self service of section 505.¹²⁷

Two attempts to litigate the constitutionality of this section bear marks of the same distortions in the litigation process that plagued the section 215 litigation: the impact of secrecy, the difference between the rights of targets and custodians, and the privileged position of First Amendment compared to Fourth Amendment claims. The first lawsuit challenging this section was brought by an Internet service provider who was served with an NSL. Instead of complying with the NSL, as virtually all other recipients had, this provider consulted counsel, even though the gag order on its face contained no exception for consulting counsel or anyone else.¹²⁸ The provider's counsel, the ACLU, filed a John Doe complaint claiming that section 505 violated the First, Fourth, and Fifth Amendments.

¹²³ See Brief of Amicus Curiae, *National Security Archive, et al.* in Support of Plaintiffs-Appellees at 25–29, *Ashcroft v. Doe, appeal pending sub nom. Doe v. Gonzales*, No. 05-0570-cv (2d Cir. Aug. 2, 2005) (discussing the public's inability to learn about usage of NSLs). Compare this level of secrecy with FISA, which requires public reporting of the number of times FISA orders have been issued. See *infra* note 159.

¹²⁴ See *supra* text accompanying notes 63–65.

¹²⁵ See ACLU, *TRANSACTIONAL RECORDS NSLS SINCE 10/26/2001* (2003), available at http://www.aclu.org/patriot_foia/FOIA/NSLlists.pdf. The list was so heavily redacted that little more than a general idea of the volume of use could be gleaned from viewing it.

¹²⁶ See Brief of Amicus Curiae, *National Security Archive, et al.*, *supra* note 122, at 30–31; *Hearing of the S. Select Comm. on Intelligence Holds a Hearing on the USA Patriot Act of 2001*, 109th Cong. (Apr. 27, 2005) (comment of Sen. Ron Wyden (D-Or.)) (“The Department of Justice is required to report to this committee on the use of national security letters by the FBI. We haven’t gotten the report for 2004. We haven’t gotten it. So that makes it hard for us to do oversight . . .”).

¹²⁷ This would explain apparent inconsistencies with Department of Justice reports on the non-usage of section 215. See Hudson, *supra* note 28 (“The Justice Department’s claim that the Patriot Act has never been used to search public library records came as a surprise to the American Library Association, which says it runs contrary to previous reports.”); Dan Mihalopoulos, *Suit Contests Anti-Terror Patriot Act*, CHI. TRIB., July 31, 2003, at 10 (“[An] FBI official said Wednesday that Patriot Act powers have been employed about 50 times to examine library computer records.”).

¹²⁸ *Doe v. Ashcroft*, 334 F. Supp. 2d 471, 478–79 (S.D.N.Y. 2004). Doe claimed that the FBI agent who informed him he was going to be served with an NSL told him he would be permitted to consult counsel; according to the agent, Doe informed the agent he intended to consult counsel but did not receive any ostensible authorization to do so.

Here again, the secrecy surrounding the implementation of this power meant that the unidentified target—the subscriber whose records were actually sought—did not participate in the litigation. The government’s interpretation of the need for secrecy also complicated the course of the litigation brought by the custodian. The ACLU, named as co-plaintiff, had initially filed the complaint under seal so as to avoid violating the very non-disclosure provision it was challenging. The parties agreed that documents would be redacted before being made public (to avoid divulging John Doe’s identity and to avoid disclosing what information the FBI had been seeking) and that further filings would be made under seal. When the redacted complaint became public, the ACLU posted the briefing schedule of the case on its website. The government objected to this disclosure as violating the sealing order.¹²⁹ In response, the ACLU moved to unseal the case in part, arguing that although certain aspects of the litigation should remain sealed, there was no real government interest in sealing information like docket entries. Thus, the court’s first decision in the case—mediating what could be disclosed to the public about the litigation itself—anticipated the merits of the challenge to the constitutionality of the non-disclosure provision.¹³⁰

In his subsequent decision on the merits, Judge Victor Marrero acknowledged that targets have only “a limited Fourth Amendment interest in records which they voluntarily convey to a third party.”¹³¹ Judge Marrero found that recipients of orders to surrender information, however, have an independent Fourth Amendment right that any seizure of information in their possession be conducted in a “reasonable” manner.¹³² The minimum procedure required in connection with such a seizure of information includes the availability of a neutral tribunal to determine whether or not the demand complies with the Fourth Amendment.¹³³

The government argued that the court could find section 505 constitutional by construing it to allow the NSL recipient to consult with counsel and to bring a judicial proceeding contesting the constitutionality of

¹²⁹ According to the ACLU website, the government demanded that the ACLU redact from its filed papers (1) a sentence that described John Doe’s business as “provid[ing] clients with the ability to access the Internet,” and (2) a direct quote from a Supreme Court case. In both these instances, the court allowed these sentences to be disclosed to the public. See ACLU, *Government Gag Exposed*, <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=16275&c=262> (last visited Oct. 14, 2005).

¹³⁰ *Doe v. Ashcroft*, 317 F. Supp. 2d 488 (S.D.N.Y. 2004).

¹³¹ *Doe*, 334 F. Supp. 2d at 494 n.118; see also *id.* at 508 n.171 (“Courts have . . . conclude[d] that internet users have no *Fourth Amendment* right to prohibit disclosure of information they have voluntarily turned over to ISPs.”). The court did find that Internet users have an independent First Amendment right. See *infra* text accompanying note 137.

¹³² *Doe*, 334 F. Supp. 2d at 494–96 (citing *United States v. Morton Salt Co.*, 338 U.S. 632, 651–52 (1950)).

¹³³ Once the custodian is in front of the tribunal, what he or she can argue is limited to whether the demand for production is unreasonably oppressive for the custodian (e.g., so broad as to be unduly burdensome). See *See v. Seattle*, 387 U.S. 541, 544–45 (1967).

the particular demand for information. The court rejected this argument, finding that the statute, in the manner in which it was being applied, exerted an “undue coercive effect” on NSL recipients because the recipient was not told that counsel could be consulted or that any form of judicial review might be available.¹³⁴ All but the most “mettlesome and undaunted” providers, the judge observed, would feel coerced into complying with the demand for information and the demand of absolute and permanent silence.¹³⁵ Focusing on the statute as applied, the court did not address the issue of whether the statute was indeed violative of the Fourth Amendment on its face.¹³⁶ It instead found that section 505 could be used in a manner that infringed the First Amendment rights of subscribers¹³⁷ and that the broad nondisclosure provision of section 505 violated the First Amendment.¹³⁸

During the next year, while the sunset hearings were pending, an unnamed organization (described in the complaint as a member of the American Library Association) was also served with an NSL, risked violating the statute’s gag order to contact the ACLU, and filed a lawsuit.¹³⁹ This suit

¹³⁴ *Doe v. Ashcroft*, 334 F. Supp. 2d 471, 494 (S.D.N.Y. 2004). As Judge Marrero noted, even before this decision several bills were pending in Congress to provide explicit authorization of judicial review, and to provide exceptions allowing recipients of NSLs to consult counsel and those employees or others necessary for compliance. *See id.* at 493. Judge Marrero thought it would be inappropriate for the court to interpret a statute creatively in order to render it constitutional when Congress itself had embarked on the task of amending the statute. He offered a thoughtful analysis of the relative roles of Congress and the federal court in this situation. *Id.* at 500–01.

The opinion also comments diplomatically on whether Congress intended the differences between the procedures respecting these NSLs and other parallel powers, or whether these discrepancies were a result of hasty drafting. *Id.* at 491–92.

¹³⁵ *Id.* at 502. This conclusion was based in part on the fact that although—according to a document the ACLU obtained in a separate FOIA lawsuit—at least hundreds of NSLs had been served, evidently no recipient had ever brought a challenge to the propriety or legality of the demands. *Id.*

Another impediment to possible litigation by custodians asked to provide information is that the Patriot Act’s endorsement of nationwide jurisdiction means that custodians may confront practical difficulties inherent in litigating a production order in the jurisdiction in which it was issued, which might be anywhere in the country. *See Fletcher N. Baldwin, Jr., Criminal Law, Rule of Law, Post-September 11th Counterterrorism Measures: The Rule of Law, Terrorism, and Countermeasures Including the USA PATRIOT Act of 2001*, 16 FLA. J. INT’L L. 43, 62 n.68 (2004).

¹³⁶ *Doe*, 334 F. Supp. 2d at 501.

¹³⁷ The basis for this aspect of the ruling was that individual Internet subscribers have a First Amendment right to engage in anonymous Internet speech, even though that right could be trumped in a particular case. *Id.* at 506–10. The court did not rule that subscribers have any right under the Fourth Amendment, but at the same time it did not endorse the conclusion that the *Miller* and *Smith* cases, holding that other types of business records are not covered by the Fourth Amendment, are indistinguishable. *See id.* at 508.

¹³⁸ *Id.* at 511–27. The court enjoined enforcement of the nondisclosure provision, finding it a prohibited prior restraint on speech. The government appealed and was granted a stay of the preliminary injunction. *Gonzales v. Doe*, No. 05-0570cv (2d Cir. Feb. 3, 2005).

¹³⁹ *See* Complaint for Declaratory and Injunctive Relief, *Doe v. Gonzales*, No. 3:05-1256 (D. Conn. filed Aug. 9, 2005), available at http://action.aclu.org/nsi/legal/redacted_complaint082405.pdf.

was also filed under seal, and also began with the plaintiffs' request to lift the gag order to allow facts about the litigation to be made public. The plaintiffs' counsel said, "Essentially the government is using the Patriot Act to silence people who question the Patriot Act."¹⁴⁰ Judge Janet Hall granted the motion to lift the gag order, as Judge Marrero had, and stayed her order to permit the government to appeal.¹⁴¹

3. Public and Legislative Reaction

At least one commentator has expressed concern about the breadth of this enhanced surveillance law.¹⁴² Public response to this section has not been measured. Were this power better known and understood, it is difficult to imagine the public would find it more acceptable than section 215. Members of the public objecting to some or all of the section 215 authority expressed concern about the ease of the government's access to personal records, especially records that implicate First Amendment protected activity.¹⁴³ If the public was so concerned about libraries and bookstores, would it be any less concerned with records of Internet usage?

Section 505 was not one of the Patriot Act sections scheduled to sunset.¹⁴⁴ Nevertheless, members of Congress debated this provision during the sunset hearings, evidently inspired by the District Court decision finding it partly unconstitutional.¹⁴⁵ The executive branch was unwilling to defend the constitutionality of the broad and indefinite gag order either in court or in Congress.¹⁴⁶ The Senate Patriot Act renewal bill amended section 505 along the lines suggested by the government in litigating the *Doe* case.¹⁴⁷ The House bill also allowed recipients of NSLs to bring a

¹⁴⁰ ACLU, "National Security Letters" and Your Privacy: Librarians Gagged from Participating in Patriot Act Debate, <http://action.aclu.org/reformthepatriotact/nsl.html> (last visited Oct. 29, 2005).

¹⁴¹ *Doe v. Gonzales*, 386 F. Supp. 2d 66 (D. Conn. 2005).

¹⁴² Swire, *supra* note 47, at 1333 (concluding that the expanded scope "likely deserves significant attention" because of its expansion of previous law).

¹⁴³ See *supra* text accompanying notes 6–8.

¹⁴⁴ In fact, Title V contains no sunset provisions at all. Compare Patriot Act, Pub. L. No. 107-56, § 224, 115 Stat. 272 (2001) (providing sunset provisions for Title II), with *id.* §§ 501–508.

¹⁴⁵ See *Material Witness Provisions of the Criminal Code, and the Implementation of the USA Patriot Act: Section 505 that Addresses National Security Letters, and Section 804 that Addresses Jurisdiction Over Crimes Committed at U.S. Facilities Abroad: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 109th Cong. 1, 23, 64–66, 72 (2005) (referring and reacting to the District Court decision).

¹⁴⁶ See *id.* at 69–70.

¹⁴⁷ The bill permitted recipients of an NSL to consult counsel and to challenge the NSL in court under standards similar to review of a grand jury subpoena. USA PATRIOT Improvement and Reauthorization Act of 2005, S. 1389, 109th Cong. § 8 (2005). The court is provided with a standard under which it may decide to set aside the secrecy order: whether the disclosure would harm national security, interfere with an investigation, interfere with diplomatic relations, or endanger life or physical safety. If the government certifies that

court challenge and to move to set aside the secrecy order under a comparable standard.¹⁴⁸ It also provided new, explicit penalties for violating the gag order.¹⁴⁹ Nonetheless, neither bill provided for any standard of individualized suspicion or even a statement of facts for a reviewing court to consult in determining whether the NSL is oppressive or unreasonable.¹⁵⁰ The House did not adopt the more extensive set of amendments in the Stop Self-Authorized Secret Searches Act, introduced in May 2005 by Rep. Jerrold Nadler (D-N.Y.).¹⁵¹

C. Section 218: Foreign Intelligence Surveillance

1. Contents and Critique

Section 218 expands the power of the government to use FISA warrants to conduct electronic surveillance instead of proceeding under the more demanding standards of Title III, which covers criminal investigations.¹⁵² The actual provision in the Patriot Act enigmatically provides, in its entirety, that two specified sections of FISA “are each amended by striking ‘the purpose’ and inserting ‘a significant purpose.’”¹⁵³ This seemingly trivial semantic amendment effected a major expansion of the government’s authority to conduct electronic surveillance. The government now only needs to persuade the FISA court that there is probable cause to believe that the target is an “agent of a foreign power,” rather than persuading a regular

one of these forms of harm would result, that certification is to be treated as “conclusive.” *Id.*

¹⁴⁸ H.R. 3199, 109th Cong. § 116 (as passed by House, July 21, 2005). Representatives did not vote on an amendment similar to the Senate’s to allow NSL recipients to consult counsel. *See* 51 CONG. REC. H6221, 6230–31 (2005) (statement of Rep. Waters, referring to the *Doe* ruling).

¹⁴⁹ H.R. 3199, § 118.

¹⁵⁰ This attention to the gag order and secrecy provisions may not have indicated opposition to the use of administrative subpoenas generally. While the sunset debates were proceeding, the Senate Intelligence Committee considered, behind closed doors, whether to afford the government more extensive use of administrative subpoenas. Press Release, ACLU, ACLU Disappointed with Patriot Act Expansion Bill Approved in Secret; Says “Administrative Subpoenas” Create End-Run Round Constitution (June 7, 2005), available at <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=18423&c=206>. The proposal for enhancing the administrative subpoena power was dropped as part of the compromise in the draft conference bill. *See* Lichtblau, *Congress Nears Deal to Renew Antiterrorism Law*, *supra* note 5.

¹⁵¹ Press Release, Rep. Jerrold Nadler, Rep. Nadler Introduces Bipartisan Stop Self-Authorized Secret Searches Act (May 26, 2005), available at http://www.house.gov/apps/list/press/ny08_nadler/SSSH052605.html (giving the recipient of an NSL the right to challenge the letter and its nondisclosure requirement, to receive legal counsel, and to challenge the use of the records; requiring notice to the target if the government seeks to use the records obtained under an NSL in subsequent proceedings; and placing a time limit on the gag order subject to a court-approved extension).

¹⁵² *See supra* note 57.

¹⁵³ Patriot Act, Pub. L. No. 107-56, § 218, 115 Stat. 272 (amending 50 U.S.C. §§ 1804(a)(7)(B), 1823(a)(7)(B) (2000)).

court that there is probable cause to believe that the target is involved in criminal activity.¹⁵⁴ Critics described section 218 as razing the wall that previous law had erected between criminal law enforcement and intelligence gathering, while others maintained that no such wall had actually existed under the earlier law.¹⁵⁵ Although the import of this amendment has been debated, the principal constitutional challenge to this expanded authority remains the same: that electronic surveillance should not be permitted in the absence of a more traditional judicial finding of probable cause.

As was the case with other Patriot Act provisions, section 218 was not the first or only expansion of the power conferred under FISA or the first contraction of FISA's initial safeguards.¹⁵⁶ Questions were raised about the constitutionality of FISA's compromise long before critics leveled similar charges at the Patriot Act,¹⁵⁷ claiming that the statute dispenses with a finding of traditional probable cause, requires less particularity, has no provision for even post hoc notice to the target (unless the government decides to use evidence derived from a FISA search in court),¹⁵⁸ and allows a secret ex parte court to issue surveillance orders.¹⁵⁹ On the other hand, the original statute did include a number of safeguards similar to those required when electronic surveillance is conducted in connection with a criminal investigation¹⁶⁰—like some judicial review of the government's reasons for select-

¹⁵⁴ Attorney General Ashcroft himself referred to the enhanced powers conferred by this provision as amounting to a "revolution." John Ashcroft, Attorney Gen., Remarks at the News Conference Regarding Decision of Foreign Intelligence Surveillance Court of Review (Nov. 18, 2002), available at <http://www.fas.org/irp/news/2002/11/ag111802.html>.

¹⁵⁵ See, e.g., William C. Banks, *And the Wall Came Tumbling Down: Secret Surveillance After the Terror*, 57 U. MIAMI L. REV. 1147, 1150 (2003) (contending that a wall had existed in practice); Swire, *supra* note 47, at 1338 (finding more persuasive the argument that the Patriot Act changed the permissible level of information sharing).

¹⁵⁶ See 50 U.S.C. §§ 1821–1829 (2000) (providing that FISA orders could be used to authorize physical searches in 1995 amendments); *id.* §§ 1841–1846 (allowing installation of pen registers and trap and trace devices in 1998 amendments); *id.* § 1801(b)(2)(D) (expanding the definition of "agent of a foreign power" in 1999 amendments); see also Swire, *supra* note 47, at 1354–56 (remarking that the expanded definition of "agent of a foreign power" could render Title III obsolete).

¹⁵⁷ See, e.g., SCHULHOFER, *supra* note 18, at 44 (describing broad scope of FISA authority).

¹⁵⁸ In contrast to the case-by-case evaluation required even under section 213, the lack of notice under FISA is categorical. See *infra* text accompanying notes 195–200.

¹⁵⁹ Out of 18,372 applications to the special FISA court established under 50 U.S.C. § 1803 to consider the government's requests, fewer than 100 were modified in any manner and only four were ultimately denied. See OFFICE OF THE ATTORNEY GENERAL, ANNUAL REPORTS (1979–2004) [hereinafter FISA ANNUAL REPORTS] (pursuant to the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. § 1807 (2000)), available at <http://www.fas.org/irp/agency/doj/fisa/>; see also Daniel J. Solove, *Reconstructing Electronic Surveillance Law*, 72 GEO. WASH. L. REV. 1264, 1290 (2004) (criticizing the FISA court's secrecy and government-favoring procedure).

¹⁶⁰ For a general comparison of Title III and FISA, see *In re Sealed Case*, 310 F.3d 717, 737–42 (FISA Ct. Rev. 2002) (concluding that although the two statutes have many overlapping procedures, the FISA order "may not be a 'warrant' contemplated by the Fourth Amendment," but "comes close to meeting Title III").

ing a target, and some minimization requirement.¹⁶¹ The Supreme Court has never ruled on the constitutionality of FISA, although there may be claims of unconstitutionality in both directions—that FISA grants too much or too little power to the executive.¹⁶²

Here, as with the sections previously described, targets and people who might be “aggrieved” by the use of such surveillance powers cannot avail themselves of any judicial remedy¹⁶³ because they are not given notice of the fact that they have been the subject of a search.¹⁶⁴ Such notice presumably would be given in a criminal prosecution where the government is planning to introduce evidence obtained under FISA, so the government can again control the existence and timing of litigation by not bringing to trial criminal prosecutions supported by evidence derived from FISA-based surveillance.¹⁶⁵ Nevertheless, the constitutionality of section 218 has been the subject of a judicial opinion, handed down in a highly unusual *ex parte* proceeding.¹⁶⁶

2. Implementation and Litigation of Section 218

As the account of the litigation below will show, the government began using this authority promptly and has used it extensively. According to Attorney General Gonzales, the government has submitted seventy-four percent more applications to the FISA court since the Patriot Act was enacted, all of which have been granted.¹⁶⁷ Although these numbers are available, there is no way for the public to evaluate how many applications would not have met the standards of Title III, how much useful information has been obtained as a result of such surveillance, or whether any of this information has prevented terrorist actions.¹⁶⁸

¹⁶¹ 50 U.S.C. § 1805(c) (2000).

¹⁶² One might argue either that the statutory scheme confers too much executive power and offends the Fourth Amendment, or that it imposes too many limits and violates the separation of powers by purporting to limit executive authority conferred by Article II.

¹⁶³ See 50 U.S.C. § 1810 (2000) (providing a civil remedy for aggrieved persons).

¹⁶⁴ Even a criminal defendant who must, under the statute, be notified of the government’s intent to use FISA-derived evidence might not learn whether there is any reason to be aggrieved by the circumstances of the surveillance because the court may decide, on application of the government, that disclosure or an adversary hearing concerning that particular surveillance may harm the national security and thus conduct review *in camera* and *ex parte*. See 50 U.S.C. § 1806(f) (2000).

¹⁶⁵ See *supra* text accompanying notes 69–83.

¹⁶⁶ See *infra* text accompanying notes 169–187.

¹⁶⁷ *The History and Application of the USA Patriot Act and the Importance of the Foreign Intelligence Surveillance Act of 1978 (FISA): Hearing Before the S. Comm. on Intelligence*, 109th Cong. 1 (2005) (statement of Alberto Gonzales, Attorney Gen. and Robert S. Mueller, III, Dir., FBI), available at <http://www.lifeandliberty.gov/subs/testimony/042705-ag-gonzalesfbimueller.pdf>. According to the testimony, 1758 FISA applications were made and granted, although in ninety-four instances the requested authority was modified. *Id.*

¹⁶⁸ The Department of Justice claims that this power has been essential. See DEP’T OF JUSTICE, *supra* note 120; see also NAT’L COMM’N ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT 416–19 (2004) [hereinafter 9/11 COMMIS-

The only case thus far concerning the constitutionality of section 218 took place in a unique context where the government was the only party to the litigation. Perhaps due to the distortions of the procedural context, the special court hearing the case essentially replicated legislative reasoning in concluding that the provision is reasonable. That the litigation arose at all was serendipitous. In March 2002, the Attorney General asked the FISA court to adopt new supplemental procedures which endorsed the use of FISA in investigations to be initiated, directed, or controlled by law enforcement rather than intelligence officials—a breach of the “wall” between these two functions. On May 17, 2002, the FISA court wrote an opinion rejecting the proposed procedures and requiring the government to follow certain restrictions with respect to its surveillance orders.¹⁶⁹ The court held that the government’s proposed procedures would have eliminated safeguards that prevented the government from inappropriately merging the criminal and intelligence surveillance powers.¹⁷⁰

The government appealed this decision to the Foreign Intelligence Surveillance Court of Review (“FISCR”), which Congress had created to hear appeals from the FISA court. This court had never before convened because the government, the only party in such proceedings, had virtually never lost in the FISA court¹⁷¹ and thus had previously had no reason to seek review of that court’s decisions. The appeal was, of course, *ex parte*, with the government appellant as the only party.

The existence of this appeal, perhaps surprisingly, became public because the FISA court—in response to the query by Senator Patrick Leahy (D-Vt.) about the implementation of section 218—decided to publish its May 2002 decision.¹⁷² When the opinion became public, two groups, the ACLU and the National Association of Criminal Defense Lawyers (“NACDL”), submitted amicus briefs to the appellate court. They argued against the government’s construction of the amendment’s impact on the previous statutory scheme and also argued that, no matter how construed, the revision violated the Fourth Amendment. The FISCR accepted the amicus briefs, but the amici were not invited to appear before the court to argue orally. Had these groups not filed amicus briefs, the constitutional issue might not have been raised or considered by the FISCR at all.

SION REPORT] (discussing the importance of information sharing), *available at* <http://www.9-11commission.gov/report/911Report.pdf>.

¹⁶⁹ *In re All Matters Submitted to the Foreign Intelligence Surveillance Court*, 218 F. Supp. 2d 611, 623 (FISA Ct. 2002). The FISA court found that the government was abusing its FISA authority by using it in criminal investigations in “an alarming number of instances.” *Id.* at 620.

¹⁷⁰ *Id.*

¹⁷¹ See FISA ANNUAL REPORTS, *supra* note 159.

¹⁷² *In re All Matters Submitted*, 218 F. Supp. 2d 611 (published opinion); *The USA Patriot Act in Practice: Shedding Light on the FISA Process: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. (Sept. 10, 2002) (statement of Sen. Patrick Leahy, Chairman, S. Comm. on Judiciary), *available at* http://judiciary.senate.gov/member_statement.cfm?id=398&wit_id=50.

The FISCR considered the argument of the amici that Congress had impermissibly attempted to modify the Fourth Amendment's minimum procedures. One argument considered was whether such searches are reasonable—despite the fact that FISA orders are not the equivalent of search warrants issued on the basis of probable cause¹⁷³—under a Supreme Court doctrine that creates an exception to the probable cause requirement for cases involving “special needs.”¹⁷⁴ Since FISA was first drafted, the Supreme Court has decided cases specifying that a “special needs” search is one whose “primary purpose” is not criminal law enforcement.¹⁷⁵ The original language of FISA, allowing surveillance only if “the” purpose was to gather foreign intelligence, could easily have passed this test; the Patriot Act language on its face does not, because if foreign intelligence gathering is only “a significant” purpose of the surveillance, the primary purpose might still be criminal law enforcement.

The FISCR construed the statute as intentionally rejecting the Fourth Amendment's “primary purpose” requirement,¹⁷⁶ which presumably would have rendered the provision unconstitutional under the Supreme Court special needs cases. The court decided not to apply the special needs cases, but instead to make its own independent assessment of whether the legislation was “reasonable.”¹⁷⁷ In doing so, the court relied on dicta in the Supreme Court's *Keith* case that standards different from those imposed by Title III “may be compatible with the Fourth Amendment if they are reasonable both in relation to the legitimate need of the government for intelligence information and the protected rights of our citizens.”¹⁷⁸ The special needs cases define one type of “reasonable” exception to the Fourth Amendment default rules, but not the only one. The court declared that “the constitutional question presented by this case—whether Congress's disapproval of the primary purpose test is consistent with the Fourth Amendment—has no definitive jurisprudential answer.”¹⁷⁹ The court then found that, even without factoring in the President's claim of inherent authority,¹⁸⁰ “the procedures and government showings required under FISA, if

¹⁷³ See *In re Sealed Case*, 310 F.3d 717, 741 (FISA Ct. Rev. 2002) (discussing whether the FISA order may not amount to a traditional warrant).

¹⁷⁴ See, e.g., *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987) (holding that a special need beyond law enforcement justifies a warrantless search of probationer's home).

¹⁷⁵ See *City of Indianapolis v. Edmond*, 531 U.S. 32, 48 (2000); see also *Ferguson v. City of Charleston*, 532 U.S. 67, 79 n.15, 80 (2001).

¹⁷⁶ The court held that the Patriot Act amendment had actually erected a wall where none had existed, adding a provision allowing for the sharing of information by intelligence and law enforcement officials and thus explicitly recognizing that dichotomy for the first time. *In re Sealed Case*, 310 F.3d at 728–41. In so doing, the court rejected the argument that FISA had originally been intended to be mutually exclusive with criminal law investigations conducted under Title III.

¹⁷⁷ *In re Sealed Case*, 310 F.3d at 742, 746.

¹⁷⁸ *Id.* at 742 (quoting *United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297, 322–23 (1972)). See *infra* Part III.B.2.b for background on *Keith*.

¹⁷⁹ *In re Sealed Case*, 310 F.3d 717, 746 (FISA Ct. Rev. 2002).

¹⁸⁰ The court distinguished between the argument it was not considering—that FISA

they do not meet the minimum Fourth Amendment warrant standards, certainly come close” and should therefore be deemed “reasonable” under the *Keith* balancing test.¹⁸¹

The court acknowledged that its decision created a conflict with the conclusions of some earlier appellate decisions interpreting the scope of the FISA authority in dual purpose investigations,¹⁸² so this case seemed destined for review by the Supreme Court. However, since the government, the only party to the proceeding, had now won, there was technically no losing party and therefore no one entitled to ask the Court to hear the case. The amici ACLU and NACDL filed a petition in the Supreme Court for leave to intervene so that they could petition the Court for certiorari. The motion to intervene was denied.¹⁸³

Thus, the only case to date on the constitutionality of section 218 was decided in a context where not only was no target a party, but the government was the only party. There was no adversarial process,¹⁸⁴ no full oral argument, and little prospect of Supreme Court review.¹⁸⁵ Perhaps because the targets were invisible to the court, their interests were nearly invisible in the court’s opinion. The Fourth Amendment test suggested by *Keith* did not require the court to ask whether some less restrictive alternative would have been available, or even to impose any burden on the government to show necessity.¹⁸⁶ Advantage to the government was built into both the structure of the special judicial process and the underlying Fourth Amendment law itself.¹⁸⁷

3. Public and Legislative Reaction

Because the statutory scheme and constitutional law involved are so complex, it would be unrealistic to expect meaningful public assessment

had improperly limited the President’s inherent power under Article II to conduct warrantless searches to obtain foreign intelligence—and the converse argument presented—that FISA had improperly expanded the President’s authority beyond what the Fourth Amendment would allow. *Id.* at 742.

¹⁸¹ *Id.* at 746.

¹⁸² *Id.* at 725–27, 742–45; see *United States v. Johnson*, 952 F.2d 565, 572 (1st Cir. 1991); *United States v. Truong*, 629 F.2d 908, 912–13 (4th Cir. 1980). These cases, decided after *Keith*, recognized a foreign intelligence surveillance exception to the usual Fourth Amendment warrant requirement, but only applied it to foreign intelligence gathering and not to criminal investigations.

¹⁸³ *ACLU v. United States*, 538 U.S. 920 (2003).

¹⁸⁴ Swire, *supra* note 47, at 1365–66 (advocating a more adversarial system in the FISC and FISCR).

¹⁸⁵ For an argument that the FISCR reached the wrong conclusion, see Michael P. O’Connor & Celia Rumann, *Emergency and Anti-Terrorist Power: Going, Going, Gone: Sealing the Fate of the Fourth Amendment*, 26 *FORDHAM INT’L L.J.* 1234, 1244–63 (2003); see also Swire, *supra* note 47, at 1339, 1352.

¹⁸⁶ See *infra* text accompanying notes 258–261.

¹⁸⁷ See *infra* text accompanying notes 359–367 for a discussion of the skew in Fourth Amendment balancing tests.

of the changes effected by section 218.¹⁸⁸ Academic commentators have, for the most part, been critical of the substantial expansion of the FISA surveillance authority.¹⁸⁹ Proponents of this section argue that it tears down whatever wall might have existed between the law enforcement and intelligence communities and permits sharing of information.¹⁹⁰ Most debate about the value of information sharing does not attend to the subtler constitutional question actually posed: What procedures should be required, either by the Fourth Amendment or by Congress, as a prerequisite to the gathering of such information? Perhaps realizing that there was little public understanding of this issue and little welcome in Congress, the coalition lobbying to amend the Patriot Act¹⁹¹ did not include section 218 among the three provisions it targeted.

Section 218 evidently concerned Congress in 2001. It was one of the provisions scheduled to sunset.¹⁹² But since then Congress has not taken any action to repeal or limit the scope of the authority this section confers. In fact, Congress has moved in the other direction. The so-called “Lone Wolf” amendment¹⁹³ now allows the easier FISA process to be used to authorize electronic surveillance even if the target is not believed to be “a foreign power or agent of a foreign power.”

During the sunset debates, both houses of Congress voted to renew section 218 without amendment and without sunset.¹⁹⁴ Courts other than the

¹⁸⁸ When asked if they would support a proposal to “allow federal law enforcement agents to use information collected in foreign intelligence investigations for domestic crime investigation,” 81% of respondents expressed support and 15% opposition. CSRA, *supra* note 92. This question does not really pose the procedural question addressed by section 218: What antecedent procedure should be required before information may be gathered in an intelligence investigation?

¹⁸⁹ See, e.g., Baldwin, *supra* note 135, at 66 (arguing that FISA expansion is “troubling”); Banks, *supra* note 155, at 1192 (describing section 218 expansion as ill-advised); Orin S. Kerr, *Internet Surveillance Law After the USA PATRIOT Act: The Big Brother that Isn’t*, 97 Nw. U. L. REV. 607, 625 n.75 (2003) (arguing that section 218, unlike other Patriot Act provisions, effects a serious expansion of government surveillance authority with possible serious negative consequences for privacy); Patricia Mell, *Big Brother at the Door: Balancing National Security with Privacy Under the USA PATRIOT Act*, 80 DENV. U. L. REV. 375, 406–26 (2002) (expressing concern about expansions in the government’s authority to conduct clandestine surveillance); O’Connor & Rumann, *supra* note 185, at 1255–62 (concluding that section 218 is unconstitutional and criticizing the FISC opinion’s “specious” reasoning); Solove, *supra* note 159, at 1303 (describing section 218 as a “troubling development” and advocating a return to pre-Patriot Act standards). The American Bar Association ran an online “sourceblog” where different perspectives on this and other Patriot Act issues were expressed. See Patriot Debates, <http://www.patriotdebates.com> (last visited Oct. 14, 2005).

¹⁹⁰ This was one of the chief recommendations of the 9/11 Commission, which blamed the events of September 11 in part on the lack of information sharing. 9/11 COMMISSION REPORT, *supra* note 168.

¹⁹¹ See Lichtblau, *supra* note 88.

¹⁹² See Patriot Act, Pub. L. No. 107-56, § 224, 115 Stat. 272 (2001).

¹⁹³ See Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 6001, 118 Stat. 3638, 2742 (2004).

¹⁹⁴ See, e.g., USA PATRIOT Improvement and Reauthorization Act of 2005, S. 1389, 109th Cong. (2005); USA PATRIOT and Terrorism Prevention Reauthorization Act of

FISCR, including the Supreme Court, are not likely to have occasion to review the constitutionality of this section unless the government is willing to provoke a challenge by relying on evidence obtained under section 218 in a criminal prosecution. Here too, the legislative debate followed the public's lack of concern or perhaps lack of knowledge about the content of this provision, and the courts did not impose any limitation on the executive branch beyond what Congress had provided.

D. Section 213: "Sneak and Peek"

1. Contents and Critique

Section 213, the so-called "sneak and peek" provision,¹⁹⁵ applies in cases where the government has honored the Fourth Amendment norm by obtaining a search warrant based on probable cause. This provision allows the government to ask a court for permission to defer notifying the target that a search (or sometimes even a seizure) has taken place on a finding, *inter alia*, that immediate notification might have "an adverse result."¹⁹⁶ The delay in notification may be extended, apparently indefinitely, "for good cause shown."¹⁹⁷ This authority is not limited to terrorism investigations and was not scheduled to sunset.¹⁹⁸ Courts are left a great deal of discretion: The statute provides no time limit,¹⁹⁹ the standard to be applied is fairly open ended, and notification of seizures as well as searches may be deferred.²⁰⁰

Critics of this section claim that the Fourth Amendment requires notice prior to a search. The searches affected by this provision are conducted pursuant to a search warrant, and frequently take place in homes—a venue the Supreme Court has found to enjoy special protection.²⁰¹ Moreover, the Supreme Court has held, although only relatively recently, that searches

2005, H.R. 3199, 109th Cong. (2005). The House bill provided for the "Lone Wolf" amendment to sunset again in four years. *See* Intelligence Reform and Terrorism Prevention Act of 2004 § 6001. The draft conference report changed the sunset to seven years. *See* Lichtblau, *Congress Nears Deal to Renew Antiterror Law*, *supra* note 5.

¹⁹⁵ Pub. L. No. 107-56, § 213, 115 Stat. 272 (2001) (codified at 18 U.S.C. § 3103a(b) (Supp. II 2002)).

¹⁹⁶ 18 U.S.C. § 3103a(b)(1). The term "adverse result" is defined in 18 U.S.C. § 2705(a)(2) (2000) to include the potential for physical or other harms to a person, or damage to a prosecution.

¹⁹⁷ *Id.* § 3103a(b)(3).

¹⁹⁸ *See* Patriot Act, Pub. L. No. 107-56, § 224, 115 Stat. 272 (2001).

¹⁹⁹ Judges may, but are not required to, impose a time limit. *See id.* § 213.

²⁰⁰ *Id.* *See also* C. L. "Butch" Otter & Elizabeth Barker Brandt, *Preserving the Foundation of Liberty*, 19 NOTRE DAME J.L. ETHICS & PUB. POL'Y 261, 272 (2005) (describing this authority as the "sneak-and-steal" provision). Co-author Otter is a member of Congress (R-Idaho).

²⁰¹ *See, e.g.*, *Silverman v. United States*, 365 U.S. 505, 511 (1961) ("At the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion."); *Kyllo v. United States*, 533 U.S. 27 (2001).

are presumptively unreasonable unless law enforcement officials “knock and announce” themselves before executing a warrant.²⁰² Having an opportunity to view the search warrant gives the target a chance to point out any mistakes—perhaps the address is wrong²⁰³—and to ensure that the search does not exceed the scope authorized.²⁰⁴

Lack of notice of a seizure allegedly constitutes a denial of due process. Earlier Supreme Court case law also suggested that when law enforcement agents seize property pursuant to a search warrant, due process requires that they take “reasonable steps to give notice that the property has been taken so the owner can pursue available remedies for its return.”²⁰⁵ Without notification, the target of a seizure might conclude that she or he was the victim of a burglary or might be entirely unaware of the government’s seizure, as might happen if the government copies the hard drive of the target’s computer. Thus, the individual may not have any opportunity to challenge the validity of the warrant or the propriety of the scope of its execution. In this section, unlike the other Patriot Act provisions described, a judge makes the decision in each individual case whether the statutory standard, however elastic, has been met.²⁰⁶

2. Implementation and Litigation of Section 213

According to a July 5, 2005, letter from the Department of Justice to Rep. Robert C. Scott (D-Va.), the deferred notification authority was used 153 times between enactment and January 31, 2005. Only eighteen of those uses were in terrorism investigations.²⁰⁷

There appears to have been no litigation over the constitutionality of this provision. The very secrecy targets might wish to contest prevents targets from learning whether they have been affected by this provision. The odds that this section will be the subject of litigation may be greater because it applies not only to terrorism investigations, where the government’s priority may be prevention rather than prosecution, but to all crimes.²⁰⁸ It

²⁰² *Wilson v. Arkansas*, 514 U.S. 927, 929 (1995).

²⁰³ *See Maryland v. Garrison*, 480 U.S. 79, 80 (1987) (providing an example of this happening).

²⁰⁴ *Cf. Groh v. Ramirez*, 540 U.S. 551, 557 (2004) (holding that a search was unconstitutional when the warrant did not on its face prescribe the scope of the search, even though supporting documents provided that information).

²⁰⁵ *City of West Covina v. Perkins*, 525 U.S. 234, 240 (1999).

²⁰⁶ *See Howell*, *supra* note 3, at 1187 (praising the Patriot Act for resolving this issue with clear legislation rather than ad hoc judicial rulings).

²⁰⁷ 151 CONG. REC. H6221, 6225 (2005) (statement of Rep. John Conyers (D-Mich.)). Ninety-seven of the uses were in drug investigations. *Id.*

²⁰⁸ This section does not aim to produce evidence and so is not susceptible to the usual vehicle for Fourth Amendment claims: the motion to suppress evidence in a criminal case. A case now pending before the Supreme Court raises the question of whether evidence acquired in a seizure violating Fourth Amendment “knock and announce” rules is subject to suppression under the exclusionary rule. *See People v. Hudson*, No. 246403, 2004 WL 1366947 (Mich. Ct. App. June 17, 2004), *cert. granted*, 125 S. Ct. 2964 (2005).

seems probable that if there are to be limitations on this authority, they will come from Congress, whose members seem more troubled than many courts have been about the specter of secret searches and seizures.

Although the Supreme Court has never decided a case on point, federal case law in some jurisdictions already authorized some forms of delayed notification, even in the absence of statutory authority, as “reasonable.”²⁰⁹ In these cases, rather than reviewing a legislative decision to allow delayed notification, the federal courts were leading the charge.

3. Public and Legislative Reaction

Respondents in the Gallup Poll had the most negative reaction to this provision. Seventy-one percent of those surveyed disapproved of allowing agents to search a home secretly and, for an unspecified period of time, not to inform the person of that search.²¹⁰ A number of commentators have likewise been critical of this provision.²¹¹ Perhaps recognizing the level of concern in the legislature and among the public, the coalition lobbying against the Patriot Act selected section 213 as one of three provisions to target.²¹² An especially spirited critique singling out this provision as an assault on our fundamental freedoms was co-authored by a member of Congress, Rep. Butch Otter (R-Idaho),²¹³ who did not confine his criticism to the law reviews. Otter introduced an amendment to the 2004 Appropriations Bill withdrawing all federal funding for “sneak and peek” searches under section 213. This bill passed the House of Representatives in July 2003.²¹⁴ Several other euphemistically titled bills have been introduced in

²⁰⁹ Rule 41(f) of the Federal Rules of Criminal Procedure, on its face, required prompt notification of searches and seizures. Fed. R. Crim. P. 41(f) (1993) (version in effect prior to passage of Patriot Act). Congress created a limited exception with respect to searches involving stored electronic communications held by third parties. See 18 U.S.C. § 2705 (2000) (permitting deferred notification on a showing of danger to the life or safety of a person, and other specified dangers).

Nevertheless, some federal courts authorized deferred notification under varying conditions. The Ninth Circuit permitted notification to be deferred not more than seven days. *United States v. Freitas*, 800 F.2d 1451, 1456 (9th Cir. 1986). The Second Circuit required a showing of necessity, an inventory of property seized, and notification within a short period of time. *United States v. Villegas*, 899 F.2d 1324 (2d Cir. 1990). The authority of courts to approve deferred notification remained unsettled. See, e.g., *United States v. Pangburn*, 983 F.2d 449, 453–55 (2d Cir. 1993).

²¹⁰ See SAAD, *supra* note 9. In another poll, seventy-four percent of respondents disfavored this measure. See CSRA, *supra* note 92.

²¹¹ See Kevin Corr, *Sneaky but Lawful: The Use of Sneak and Peek Search Warrants*, 43 KAN. L. REV. 1103 (1995); see also Baldwin, *supra* note 135, at 62 (describing section 213 as “troubling” while approving of other Patriot Act expansions of power); Sharon H. Rackow, Comment, *How the USA PATRIOT Act Will Permit Governmental Infringement upon the Privacy of Americans in the Name of “Intelligence” Investigations*, 150 U. PA. L. REV. 1651 (2002).

²¹² See *supra* note 88 and accompanying text.

²¹³ Otter & Brandt, *supra* note 200.

²¹⁴ H. Amend. 292 to H.R. 2799, 108th Cong. (2003) (introduced by Rep. Otter); 149 CONG. REC. H7284, 7289–93, 7299 (daily ed. July 22, 2003).

the House since then, but failed to become law. The Security and Freedom Ensured Act of 2003²¹⁵ would have amended the “sneak and peek” authority by limiting the circumstances under which delayed notification is permitted and requiring that notice be provided within seven days.²¹⁶ The Patriot Act Oversight Restoration Act would have added a sunset date.²¹⁷ Senator Russell Feingold (D-Wis.) recently introduced a bill to limit the use of section 213 powers and to require a semiannual public report providing the number of times that authority was used, the number of extensions that were granted, and the nature of the crimes being investigated.²¹⁸

The 2001 Congress evidently did not anticipate this level of controversy. The Patriot Act did not provide for section 213 to sunset.²¹⁹ During the sunset debates, however, the provision was discussed and the resulting Senate bill proposed amending this section by providing time limits circumscribing the period of delay²²⁰ and requiring more specific reporting to Congress about the provision’s use.²²¹ The time limits, however, included very elastic provisions allowing exceptions, making the amendments vulnerable to the criticism that they do not implement any real reform. The House bill imposed outer limits on delayed notification and also enhanced oversight provisions.²²²

The draft conference report proposed some time limits, but the limits were similarly elastic and subject to renewal.²²³

E. Summary of Part II

Overall, the history of these four Patriot Act provisions shows that secrecy and other forces have impeded both political and judicial accountability. Three of these four provisions were among the chief subjects of debate during the sunset hearings and virtually the only provisions either the House or Senate even considered amending. But although many people were troubled by the breadth of these particular powers, the public did not have enough information to evaluate how the powers had been used or whether they had been abused. Information about the volume of sec-

²¹⁵ S. 1709, 108th Cong. (2003). This bill was referred to the Senate Judiciary Committee and never became law. *See* 149 CONG. REC. S12376, 12384–85 (2003).

²¹⁶ S. 1709 § 3.

²¹⁷ S. 1695, 108th Cong. § 2 (2003).

²¹⁸ Reasonable Notice and Search Act, S. 316, 109th Cong. § 2 (2005).

²¹⁹ *See* Patriot Act, Pub. L. No. 107-56, § 224, 115 Stat. 272 (2001).

²²⁰ S. 1389, 109th Cong. § 5 (2005). The initial period of delay is limited to seven days and extensions are limited to periods of ninety days or less, although both of these time limits provide for exceptions if “the facts of the case justify” a longer delay.

²²¹ *Id.*

²²² H.R. 3199, 109th Cong. §§ 108, 121 (2005).

²²³ *See* Timothy H. Edgar, *ACLU Memo to Interested Persons Regarding Conference Report on H.R. 3199, the USA PATRIOT Improvement and Reauthorization Act of 2005* (Nov. 16, 2005), available at <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=19410&c=206>.

tion 215 use was classified and a FOIA lawsuit permitted such information to remain exempt from disclosure.²²⁴ Attorney General Ashcroft's disclosure about the infrequent use of the section 215 authority attempted to quiet public (especially librarians') fears, but did not explain that this section had not been used because section 505 provides a more convenient route to much of the same information. A FOIA lawsuit compelled the Department of Justice to divulge limited information showing that section 505 NSLs had been used on a large but indeterminate number of occasions,²²⁵ but the press proved better able than the courts or Congress to ferret out that the government was issuing 30,000 NSLs a year.²²⁶ Figures on how frequently FISA orders are granted are publicly available,²²⁷ as are figures about the frequency of use of the "sneak and peek" authority.²²⁸ Even so, these patches of information about the volume of use are not very revealing. Executive discretion to conduct foreign intelligence wiretaps was limited during the 1970s after the public learned that the FBI had Dr. Martin Luther King under surveillance.²²⁹ Such potentially unsettling stories are not likely to emerge today. Targets cannot tell their stories if they do not know they are targets, and custodians of records cannot legally recount their own experiences.²³⁰ With both the courts and the public unable to learn more, congressional oversight becomes critical, but this oversight will take place largely outside of the public purview.²³¹ In the trenchant words of Elaine Scarry, "[t]he Patriot Act inverts the constitutional requirement that people's lives be private and the work of government officials be public."²³²

It remains to be seen whether any of the Senate's modest amendments will survive the reconciliation process. Whatever the results, the bottom line is that the bulk of the Patriot Act provisions hastily passed in October 2001 seem destined to become permanent law. Attention will now turn to the courts.

That secret investigations lead to expanded executive authority is not news. It is more surprising that, in four years, the courts have played so small a role in reviewing the reasonableness of these incremental delega-

²²⁴ See *supra* notes 63, 65.

²²⁵ See *supra* note 125.

²²⁶ See *supra* note 122.

²²⁷ See *supra* note 159.

²²⁸ See *supra* note 207 and accompanying text.

²²⁹ See *infra* text accompanying notes 304–305.

²³⁰ If the modifications found necessary by both Congress and a district judge are retained, custodians who are troubled about a request for information will at least be allowed to consult their attorneys and a court.

²³¹ Whether Congress has been receiving sufficient information from the Department of Justice to fulfill its oversight functions is another issue. See *supra* notes 63, 123–126 and accompanying text.

²³² Elaine Scarry, *Resolving to Resist: Local Governments are Refusing to Comply with the Patriot Act*, BOSTON REV., Feb.-Mar. 2004, at 6, available at <http://www.bostonreview.net/BR29.1/scarry.html>.

tions of power and of the government's use of its accumulated powers. FOIA has provided the courts with some opportunity to review executive branch decisions to withhold information, with mixed results. Yet secrecy in many guises, combined with executive branch control of information as well as the venue and timing of litigation about its own actions, have created impediments to any meaningful form of judicial review. Section 218 was upheld by the FISC, but in an ex parte case with only the government as a party and without a channel to Supreme Court review.²³³ In a decision still pending appeal, section 505 was found unconstitutional in part, although not on the basis of any surveillance target's Fourth Amendment rights.²³⁴ The only constitutional challenge to section 215 remains in legal limbo,²³⁵ while section 213 does not seem to have been litigated at all.

More significantly in the long run, the Supreme Court has minimized the role of the judiciary by construing the Fourth Amendment to allow so many deviations from principles of antecedent judicial review, individualized suspicion, and notice. Even if opportunities to review the constitutionality of these provisions do arise, the courts are too likely to offer predetermined easy answers to difficult questions about what is reasonable. Sections 215 and 505 involve governmental activities that probably will not be defined as "searches" or "seizures" within the meaning of the Fourth Amendment.²³⁶ Section 218 may be "reasonable" under the *Keith* balancing test because Fourth Amendment interests are readily outweighed by security needs. Section 213's permission to defer notice of searches and seizures is likely to prove most challenging to the courts, simply because it falls in an area of law that the Supreme Court has not developed.

Although there is some space for arguments about the constitutionality of particular aspects of these provisions,²³⁷ Congress and the Department of Justice have exploited preexisting constitutional loopholes that, even if they are not deemed to accommodate every aspect of all of these provi-

²³³ See *supra* text accompanying notes 172–183.

²³⁴ See *supra* text accompanying notes 128–138.

²³⁵ See *supra* text accompanying notes 72–80.

²³⁶ A Department of Justice spokesperson testified that there is adequate judicial review of the NSL power because if a custodian declines to comply, the government will have to go to court for an enforcement order. See *Material Witness Provisions of the Criminal Code, and the Implementation of the USA Patriot Act: Section 505 That Addresses National Security Letters, and Section 804 That Addresses Jurisdiction Over Crimes Committed at U.S. Facilities Abroad Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 109th Cong. 12–13, 17–18 (2005) (statement of Matthew Berry, Counselor to the Assistant Attorney General, United States Department of Justice), available at <http://judiciary.house.gov/media/pdfs/printers/109th/21396.pdf>. However, the claim custodians can raise in court is very limited, see *supra* text accompanying notes 132–133, custodians are not likely to resist such requests (as shown by the fact that in four years, tens of thousands of NSLs were served but only two custodians are known to have come forward to challenge government demands), and this is an extremely haphazard means of protecting the privacy interests of targets.

²³⁷ See *infra* text accompanying note 325.

sions, do invite most. The next Section investigates why there were so many large loopholes in the Fourth Amendment for the Patriot Act to exploit.

III. THE SUBMAJORITARIAN FOURTH AMENDMENT

The Supreme Court's Fourth Amendment entrance test looks majoritarian in theory, asking what expectations of privacy society is willing to protect.²³⁸ However, the Court has in some cases applied this test in a manner that looks distinctly submajoritarian—allowing government discretion to conduct surveillance under conditions that a majority of the public would find unreasonable.²³⁹ Current Fourth Amendment law is consistent only in its tendency to defer to the will of the elected branches.²⁴⁰ Since the demise of the Warren Court, the Supreme Court has shown marked reluctance to play any countermajoritarian role in its Fourth Amendment jurisprudence. The Court is unlikely to upset decisions made by legislative bodies or policymakers about what searches and seizures are reasonable.²⁴¹ Instead, the Court uses government-friendly balancing tests in an increasing number of Fourth Amendment contexts. These balancing tests tend to focus narrowly on the governmental claim of need on the one hand and the nature and weight of the individual's interest on the other; they almost invariably lead the Court to conclude that the former outweighs the latter.²⁴² The value of the Fourth Amendment's procedural checks is not placed on the scale. Any concerns about equality or the perspectives of minorities are shoveled into the Equal Protection Clause, where they are unlikely to prevail.²⁴³ The Fourth Amendment does not enjoy the judicial solicitude proposed in *Carolene Products's* footnote 4²⁴⁴ because the Court has not articulated any fundamental privacy value for the judiciary to enforce, as rights-based theories would entail, and has not regarded the Fourth Amend-

²³⁸ *Katz v. United States*, 389 U.S. 347 (1967). See *infra* text accompanying notes 269–272.

²³⁹ See *infra* text accompanying notes 275–292.

²⁴⁰ Erwin Chemerinsky, *The Supreme Court 1988 Term: Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 46–47 (1989).

²⁴¹ See, e.g., *Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177 (2004) (holding that Nevada's "stop and identify" statute does not violate the Fourth Amendment); *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) (finding that warrantless arrests authorized by state law do not violate the Fourth Amendment, even if for minor offenses punishable only by a fine).

²⁴² See, e.g., *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 654–65 (1995). In upholding the student drug testing program at issue on the ground that the school's interest in stopping student drug use outweighed the students' privacy concerns, the Court essentially replicated the school district's policymaking process.

²⁴³ In his opinion for the Court in *Whren v. United States*, 517 U.S. 806, 813 (1996), Justice Scalia deflected concerns about discriminatory enforcement to the Equal Protection Clause, where the necessity of proving discriminatory intent rather than just impact imposes a virtually insurmountable burden on plaintiffs. See, e.g., *Chavez v. Ill. State Police*, 251 F.3d 612 (7th Cir. 2001) (affirming grant of summary judgment to law enforcement officers on the ground that, as a matter of law, statistics showing disparity of enforcement correlating with race did not demonstrate discriminatory intent).

²⁴⁴ *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

ment as requiring consideration of the perspectives of minorities, as representation-reinforcement theory might suggest.²⁴⁵ The Fourth Amendment in many respects has become an exception to any coherent theory of constitutional interpretation.

A. Fourth Amendment Exceptionalism

The current Supreme Court is as comfortable with a countermajoritarian role in interpreting the scope of First Amendment protections as its Warren Court predecessors.²⁴⁶ Even if a majority of legislators wishes to criminalize flag desecration or adopt broad measures to protect children from viewing pornography on the Internet, the Court has been willing to find popular legislation unconstitutional on the ground that it unduly limits freedom of speech.²⁴⁷ This lack of deference is effectuated through doctrine that puts a thumb on the scale in favor of the individual right at issue. The classic First Amendment test does not simply balance the government interest in preserving respect for the flag or protecting children against the value of the speech.²⁴⁸ The government must show that its interest is compelling, will actually be served by the measure it proposes, and cannot be achieved by a less restrictive alternative that does not impinge on the individual's rights.²⁴⁹

²⁴⁵ See *infra* text accompanying notes 320–324. Four Justices in *Illinois v. Wardlow*, 528 U.S. 119, 132–36 (2000) (Stevens, J., dissenting in part) argued that the Court should be more attentive to the perspective of racial minorities than the police and to empirical evidence of discriminatory enforcement.

²⁴⁶ See Erwin Chemerinsky, *Eldred v. Ashcroft: Intellectual Property, Congressional Power, and the Constitution: Balancing Copyright Protections and Freedom of Speech: Why the Copyright Extension Act is Unconstitutional*, 36 *LOY. L.A. L. REV.* 83, 89–95 (2002) (describing the existing Rehnquist Court as activist in the First Amendment field).

²⁴⁷ See *Ashcroft v. ACLU*, 542 U.S. 656 (2004) (invalidating provisions of the Child Online Protection Act (“COPA”)); *Reno v. ACLU*, 521 U.S. 844 (1997) (invalidating provisions of the Communications Decency Act intended to protect children from viewing obscene or indecent materials); *Texas v. Johnson*, 491 U.S. 397, 399 (1989) (finding state flag protection legislation a violation of the First Amendment); *United States v. Eichman*, 496 U.S. 310, 312 (1990) (finding similar federal legislation a violation of the First Amendment).

²⁴⁸ There is a vast literature on the propriety of using balancing tests to evaluate governmental conduct that infringes on freedom of speech. See, e.g., John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 *HARV. L. REV.* 1482, 1501 (1975) (arguing that in considering whether dangerous messages may be proscribed, balancing tests “inevitably become intertwined with the ideological predispositions of those doing the balancing—or if not that, at least with the relative confidence or paranoia of the age in which they are doing it”); Laurent B. Frantz, *The First Amendment in the Balance*, 71 *YALE L.J.* 1424 (1962) (arguing that balancing, as opposed to applying rules, tends to be overly deferential to the government or popular prejudices).

²⁴⁹ See, e.g., *Ashcroft v. ACLU*, 542 U.S. at 701 (“As the Government bears the burden of proof on the ultimate question of COPA’s constitutionality, respondents must be deemed likely to prevail unless the Government has shown that respondents’ proposed less restrictive alternatives are less effective than COPA.”).

The Court has been far more uncertain about its role in interpreting the Fourth Amendment.²⁵⁰ The Warren Court made some key choices of direction, none of which the current Court has actually overruled: First, the governing clause of the Fourth Amendment is the Warrant Clause, not the Reasonableness Clause.²⁵¹ Therefore, as a general matter, the central question in a Fourth Amendment case is supposed to be not whether a search or seizure is reasonable, but whether there is a sufficient justification for dispensing with antecedent judicial review of the government's probable cause. Second, the Warren Court incorporated the Fourth Amendment,²⁵² so part of the Court's role is to nationalize a concept of when searches and seizures are "unreasonable." Finally, the Warren Court adopted the exclusionary rule as the chief remedy for violations of the Fourth Amendment.²⁵³ Subsequent Courts have shown tremendous ambivalence about two of these three decisions. The current Court is highly skeptical of the value of antecedent judicial review, often preferring to evaluate after the fact whether or not a search or seizure was "reasonable,"²⁵⁴ and even more skeptical of the exclusionary rule.²⁵⁵ The Court continues to honor national uniformity in its Fourth Amendment interpretation, even if this means lowering the national floor.²⁵⁶

The Court's reluctance to find that the Fourth Amendment requires antecedent judicial review (with the result that evidence might be excluded in a criminal case if that requirement has not been met), combined with the Court's tacit concerns about federalism and dislike of subjective constitutional tests, has impeded the Court's ability to forge a coherent approach to the Fourth Amendment.²⁵⁷ The result is Fourth Amendment exceptionalism, in which constitutional doctrine is more deferential to the elected

²⁵⁰ See Craig Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1468 (1985) (describing Fourth Amendment doctrine as "the Supreme Court's tar baby"); Silas J. Wasserstrom & Louis Michael Seidman, *The Fourth Amendment as Constitutional Theory*, 77 GEO. L.J. 19 (1988) (commenting extensively on the Court's failure to develop any coherent theory of constitutional interpretation in its Fourth Amendment case law).

²⁵¹ See *Chimel v. California*, 395 U.S. 752, 763 (1969).

²⁵² See *Mapp v. Ohio*, 367 U.S. 643 (1961).

²⁵³ See *id.*

²⁵⁴ See *Richards v. Wisconsin*, 520 U.S. 385, 395–96 n.7 (1997) (analyzing whether or not no-knock entry was reasonable without regard to the magistrate's prohibition of a no-knock search in that case, and alluding to the fact that some states require officers executing a warrant to seek permission for a no-knock search from a magistrate without even discussing imposing any such requirement).

²⁵⁵ See, e.g., *United States v. Leon*, 468 U.S. 897 (1984) (adopting a cost-benefit analysis in deciding not to apply the exclusionary rule in a particular context); *United States v. Calandra*, 414 U.S. 338 (1974) (same); John Burkoff, *The Court that Devoured the Fourth Amendment: The Triumph of an Inconsistent Exclusionary Doctrine*, 58 OR. L. REV. 151 (1979).

²⁵⁶ As Justice Powell feared when he argued against the Warren Court's incorporation test, *Johnson v. Louisiana*, 406 U.S. 356, 375 (1972) (Powell, J., concurring), the nationalization of the Fourth Amendment has led to a lowering of protections in the federal system. See George C. Thomas, III, *When Constitutional Worlds Collide: Resurrecting the Framers' Bill of Rights and Criminal Procedure*, 100 MICH. L. REV. 145 (2001) (advocating a return to greater Fourth Amendment protection against the federal government).

²⁵⁷ How the Court might proceed is discussed *infra* Part IV.

branches and more internally inconsistent than other areas of Bill of Rights interpretation.²⁵⁸ The Court tacks wildly between rules and standards,²⁵⁹ between requirements of antecedent judicial review for probable cause and post hoc judicial review for reasonableness. In its Fourth Amendment balancing tests, the Court does not inquire about or consider the existence of less restrictive alternatives²⁶⁰ and does not put any thumb on the scale for individual rights. The government can easily pass such lenient tests. Because of the Court's restrictive definition of what constitutes a "search" or "seizure," in many cases the government does not have to pass any judicial test at all, either before or after its investigations.²⁶¹

The next Section will recount how the Court developed a submajoritarian view of what the Fourth Amendment requires in two areas relevant to the Patriot Act provisions discussed above: (1) the scope of the Fourth Amendment, which determines whether there are any constitutional constraints on gathering information held by third party custodians; and (2) application of the Fourth Amendment to electronic surveillance in various contexts, including foreign intelligence surveillance. In both these areas, Congress has often been more protective of privacy than the Court's decisions required. In the third area raised by the sample Patriot Act provisions discussed—notice—Congress has had free rein for a different reason—the relevant Supreme Court case law is underdeveloped.

B. Defining the Fourth Amendment

1. The Scope of the Fourth Amendment: Searches and Seizures

The first question in any review of the government's acquisition of records and tangible things in a third party's custody is whether or not a search is involved. If so, the Fourth Amendment will require that the government's conduct be reasonable. If not, the executive will have free rein to search at will unless Congress decides to impose limits. The Supreme Court's definition of the scope of the Fourth Amendment has fluctuated, beginning with a formal and exclusionary definition of "searches and sei-

²⁵⁸ This phenomenon has hardly gone unnoticed. See Burkoff, *supra* note 255; Silas J. Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257 (1984). See generally Chemerinsky, *supra* note 240 (describing the Rehnquist Court's deferential approach in a variety of constitutional contexts).

²⁵⁹ Compare *New York v. Belton*, 453 U.S. 454 (1981) (creating a bright line rule circumscribing power to search vehicles incident to arrest to the passenger compartment and containers therein), with *Thornton v. United States*, 541 U.S. 615 (2004) (allowing search incident to arrest of a "recent" occupant, defined in terms of temporal and spatial relationship to the vehicle).

²⁶⁰ See Nadine Strossen, *The Fourth Amendment in the Balance: Accurately Setting the Scales Through the Least Intrusive Alternative Analysis*, 63 N.Y.U. L. REV. 1173 (1988).

²⁶¹ See, e.g., *Florida v. Bostick*, 501 U.S. 429, 439–40 (1991) (holding that confronting and questioning an individual on a bus was not a "seizure" within the meaning of the Fourth Amendment and so did not require any justification).

zures” in a Prohibition era case, turning expansive during the 1960s and, in the backlash of the 1970s, developing exceptions Congress found unacceptable.

a. Olmstead and Congressional Reaction

The first time the Supreme Court was called upon to decide whether electronic surveillance of a suspect constituted an unreasonable search and seizure, the Court answered the question in the broadest and most dismissive manner possible. In 1928, the Court ruled in *Olmstead v. United States* that the Fourth Amendment’s guarantee of a right to be secure in one’s “persons, houses, papers, and effects” only provided protection against searches and seizures of tangible things.²⁶² Consequently, defendant Olmstead, the subject of wiretapping by federal agents, did not have any Fourth Amendment claim. Because the government’s conduct fell outside the protection of the Fourth Amendment, the question of whether the agents’ conduct was “reasonable,” or whether the agents should have acquired a warrant before tapping Olmstead’s phone, simply did not arise.

The formalistic opinion written by Chief Justice Taft on behalf of a five Justice majority has not withstood the judgment of history.²⁶³ It is two of the dissenting opinions in *Olmstead*, written in eminently quotable rhetoric by Justices Louis Brandeis and Oliver Wendell Holmes, that have been remembered for their articulation of a more court-oriented Fourth Amendment philosophy—especially the Brandeis “right to be let alone.”²⁶⁴ But four decades passed before the Court finally overruled the holding of *Olmstead* in *Katz v. United States*.²⁶⁵

During those four decades, the only limitations on the federal government’s authority to conduct electronic surveillance were derived from statutes. In his opinion in *Olmstead*, Taft explicitly invited Congress to “protect the secrecy of telephone messages by making them, when intercepted, inadmissible in evidence in federal criminal trials, by direct legislation”²⁶⁶ Congress accepted the invitation a few years later, providing in

²⁶² 277 U.S. 438, 464 (1928).

²⁶³ See, e.g., James Boyd White, *Judicial Criticism*, 20 GA. L. REV. 835, 847–69 (1986) (critiquing the opinion and its approach to constitutional interpretation).

²⁶⁴ “The makers of our Constitution . . . conferred, as against the [g]overnment, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.” *Olmstead*, 277 U.S. at 478 (Brandeis, J., dissenting).

²⁶⁵ 389 U.S. 347 (1967). See *infra* text accompanying notes 269–272.

²⁶⁶ *Olmstead*, 277 U.S. at 465. Even before the *Olmstead* decision, there was precedent for a legislative role; some state legislatures had limited their own state enforcement officers’ ability to intrude upon conversational privacy. In fact, in wiretapping Olmstead’s phone the federal agents violated a statute of the state in which they were operating (Washington) that made it a misdemeanor to “intercept” telegraph or telephone messages. See *id.* at 468. The Court said that the state statute did not contain an exclusionary rule and so evidence obtained as a result of a statutory violation would not be inadmissible under common law, and that in any event the state could not delimit the use of evidence in a fed-

the Federal Communications Act of 1934 that “no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person”²⁶⁷ Politically accountable actors provided more protection for a form of privacy that society evidently was prepared to protect than did the politically insulated Supreme Court.²⁶⁸

b. Katz and Reasonable Expectations of Privacy

In *Katz v. United States*, the Court announced that the Fourth Amendment “protects people, not places.”²⁶⁹ Katz could reasonably expect privacy in his telephone conversation, the Court held, even if he was using a public telephone booth. The conclusion that the agents’ conduct in eavesdropping on Katz’s conversation was after all a “search” within the meaning of the Fourth Amendment did not, of course, mean that the wiretap was impermissible—just that the Fourth Amendment’s procedural requirements applied, so the agents would presumably have to persuade a neutral and detached magistrate that they had probable cause to believe Katz was committing a crime before they would be allowed to intercept his conversation.²⁷⁰

In overruling *Olmstead*, the Court ostensibly rejected that opinion’s narrow, formalistic, property-oriented approach to defining the Fourth Amendment and instead declared that the Fourth Amendment protects “reasonable expectations of privacy.”²⁷¹ This decision provided an opportunity for the Court to apply Fourth Amendment protection to more than property rights already protected by legislatures. It was not long, however, before the Court retreated. Instead of using *Katz* as a springboard to a meaningful

eral court. *Id.* at 469.

²⁶⁷ 48 Stat. 1064, 1104 (codified as amended at 47 U.S.C. § 605 (2000)). By 1967, thirty-six states had also banned or regulated wiretapping. Of those, twenty-seven allowed “authorized” interception by law enforcement under varying procedural conditions. *See Berger v. New York*, 388 U.S. 41, 48 n.5 (1967).

²⁶⁸ In addition to eliminating the Fourth Amendment as a potential source of constitutional limitation on electronic surveillance, the Supreme Court also ruled out the possibility that a defendant might rely on the Due Process Clause to challenge evidence obtained by electronic surveillance. *See Irvine v. California*, 347 U.S. 128 (1954) (distinguishing the case of *Rochin v. California*, 342 U.S. 165 (1952), which held that evidence obtained by pumping a suspect’s stomach was inadmissible because it had been obtained in a manner shocking to the conscience). This meant that for four decades the courts played no role at all in reviewing the constitutionality of electronic surveillance.

²⁶⁹ 389 U.S. at 351.

²⁷⁰ *Katz* did suggest that the rules might be different if a matter of national security were involved. *See id.* at 362–64 (White, J., concurring).

²⁷¹ *Id.* at 360–61 (Harlan, J., concurring). One prominent commentator recognized *Katz* as essentially a tautology: The Court declared that something constituted a “search” if an individual could reasonably expect to maintain it as private. Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1974).

judicial role, the Court adopted a counterintuitive and cramped definition of what constitutes a “search,” removing much governmental investigation from the purview of the courts altogether.²⁷²

c. Obtaining Financial and Other Records from Third Party Custodians: Miller and Congressional Reaction

Some post-*Katz* decisions adopted *Olmstead*'s technique for addressing government seizures of information held by third parties. These cases ruled that this means of obtaining at least some forms of information, whether by subpoena, request, or command, is not a “search” or “seizure” within the meaning of the Fourth Amendment.

Warren Court stalwarts Thurgood Marshall and William Brennan thought *Katz* should have been interpreted as a self-conscious acceptance of a role they believed the Fourth Amendment itself conferred on the judiciary. “By its terms, the constitutional prohibition of unreasonable searches and seizures assigns to the judiciary some prescriptive responsibility,”²⁷³ said Marshall. To decide when the Fourth Amendment imposes limitations on the government’s power to obtain information, a reviewing court must evaluate the “intrinsic character” of the investigative practices at issue with reference to the basic values underlying the Fourth Amendment. When the court finds “extensive intrusions that significantly jeopardize [individuals’] sense of security,” it should require “more than self-restraint” on the part of law enforcement officers.²⁷⁴

In the decade following *Katz*, a majority of the Court rejected Marshall’s proposed normative approach and developed a limiting rule that countered *Katz*’s expansiveness: A person “has no legitimate expectation of privacy in information he voluntarily turns over to third parties.”²⁷⁵ One of the clearest statements of this principle came in *United States v. Miller*,²⁷⁶ where the Court considered a defendant’s contention that when the government acquired copies of his checks and other financial records from his bank (under an allegedly defective subpoena *duces tecum*), that conduct constituted a “search” or “seizure” and therefore should not have been permitted in the absence of a court order. Miller argued that the bank was re-

²⁷² I am certainly not the first to notice the retreat from *Katz*. See, e.g., Kerr, *supra* note 71, at 825; Deirdre K. Mulligan, *Reasonable Expectations in Electronic Communications: A Critical Perspective on the Electronic Communications Privacy Act*, 72 GEO. WASH. L. REV. 1557, 1577 (2004); Swire, *supra* note 34, at 907–11; see also Mell, *supra* note 189, at 380–406 (discussing post-*Katz* cases and concluding that “[t]hrough its interpretation of the Fourth Amendment, the Supreme Court has narrowed the legitimate sphere of the individual’s privacy in the attempt to balance the government’s need to regulate activity and the citizens’ right to live free from government involvement”).

²⁷³ *Smith v. Maryland*, 442 U.S. 735, 750 (1979) (Marshall, J., dissenting).

²⁷⁴ *Id.* (Marshall, J., dissenting) (quoting *United States v. White*, 401 U.S. 745, 786 (1971) (Harlan, J., dissenting)).

²⁷⁵ *Id.* at 743.

²⁷⁶ 425 U.S. 435 (1976).

quired to keep the records in question by the federal Bank Secrecy Act of 1970, and so the government had circumvented the orderly procedure of the Fourth Amendment by first requiring the bank to maintain records and then demanding that the records be turned over to the government. A seven Justice majority declared that Miller had no legitimate expectation of privacy and therefore no Fourth Amendment claim because he had voluntarily conveyed the information in question to the bank and thereby exposed it to the bank employees.²⁷⁷ Earlier cases had held that one assumes the risk that, in communicating any information to another person, that person might choose to reveal it to the government, or might him or herself be an undercover government agent.²⁷⁸

Congress, in the Right to Financial Privacy Act of 1978,²⁷⁹ reacted to the dearth of protections for private financial information the Court left after *Miller*. As with the legislative response to *Katz*, this procedural protection did not forbid government access to the information in question, but rather required antecedent justification to preclude fishing expeditions and arbitrary or discriminatory surveillance.²⁸⁰

Congress's decision that some procedural protection should be provided before the government can demand access to one's financial records comports with an interesting empirical evaluation of the public's concern about the privacy of bank records. Since the premise of the *Katz* test is that society is prepared to protect some forms of privacy but not others, Christopher Slobogin and Joseph Schumacher created a questionnaire to test empirically whether the public would agree with the Supreme Court's estimation of what society considers private.²⁸¹ The study found perusal

²⁷⁷ *Id.* at 442–43. Justice Brennan argued that the majority was incorrect first in describing Miller's divulging his financial information to the bank as "volitional"—one must share information with financial institutions in order to participate in the economic life of contemporary society—and second in concluding that Miller had assumed the risk that the bank would turn over his financial information to the government. *Id.* at 448, 451 (Brennan, J., dissenting). The very question the Court was being asked to decide was what Miller should be entitled to assume would remain private.

²⁷⁸ See *United States v. White*, 401 U.S. 745, 747 (1971) (holding that *Katz* did not overrule this line of cases, which permitted the use of statements made to an undercover agent as evidence).

²⁷⁹ 12 U.S.C. §§ 3401–3422 (2000). A response to *Miller*, this act was intended to protect customers of financial institutions from "unwarranted intrusion into their records while at the same time permitting legitimate law enforcement activity." H.R. REP. NO. 95-1383, at 28 (1978), reprinted in 1978 U.S.C.C.A.N. 9273, 9305–06. See S. REP. NO. 99-541, at 3 (1986), reprinted in 1986 U.S.C.C.A.N. 3555, 3558 (discussing the need for legislative protection of the privacy of electronic communications); M. Elizabeth Smith, *The Public's Need for Disclosure v. The Individual's Right to Financial Privacy: An Introduction to the Financial Right to Privacy Act of 1978*, 32 ADMIN. L. REV. 511, 529–33 (1980) (offering a summary of the legislative history and the requirements of the Financial Privacy Act).

²⁸⁰ Holding that the target has no rights also removes a disincentive for violating the privacy rights of information custodians. See *United States v. Payner*, 447 U.S. 727 (1980) (holding that the target of a search did not have standing to challenge the flagrantly illegal search of a bank officer's briefcase for the target's bank records).

²⁸¹ Christopher Slobogin & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at "Understandings*

of bank records one area where those surveyed disagreed sharply with the Court, rating such government activity as highly intrusive.²⁸²

Instead of Marshall's inquiry into what forms of privacy the Court should be prepared to protect, the Court chose to ask what forms of privacy society was prepared to protect and then, evidently, provided answers inconsistent with those "society" itself would have provided.²⁸³ Although it purports to be majoritarian, the *Katz* test has been applied, at least in some areas, in a distinctly submajoritarian manner.²⁸⁴

d. Pen Registers and Trap and Trace Orders: Smith and Congressional Reaction

In *Smith v. Maryland*,²⁸⁵ the Court took the same approach it had adopted in *Miller* in deciding that there is no "search" or "seizure" if the government obtains records from the telephone company listing what telephone numbers an individual has called (recorded by a pen register) or from what telephone numbers an individual has received calls (trap and trace). Quoting *Miller*, the majority announced that society was not prepared to recognize any legitimate expectation of privacy here because Smith had voluntarily exposed numerical information regarding his telephone calls to the telephone company and therefore assumed the risk that the telephone company would reveal that information to the government.²⁸⁶ The telephone company did not act voluntarily in Smith's case any more than the bank had in *Miller's*,²⁸⁷ but under the post-*Katz* cases, as long as the information might have found its way to the government in another manner, the government could force an unwilling custodian to divulge it.

This result was slightly more divisive than *Miller*, with three Justices dissenting, including Justice Stewart, author of the *Katz* opinion.²⁸⁸ Add-

Recognized and Permitted by Society," 42 DUKE L.J. 727 (1993).

²⁸² On a scale of 1 to 100, perusal of bank records showed a mean valuation for intrusiveness of 71.60, with looking at foliage at a public park rating a mean of 6.48, searching a bedroom an 85.23, and a body cavity search a 90.14. *Id.* at 738–39.

²⁸³ See Orin S. Kerr, *The Fourth Amendment in Cyberspace: Can Encryption Create a "Reasonable Expectation of Privacy?"*, 33 CONN. L. REV. 503, 507–12 (2001) (finding the Supreme Court's constitutional "reasonable expectation of privacy" diverges from the actual expectations of privacy of a reasonable person); Kerr, *supra* note 189, at 87; Mulligan, *supra* note 272, at 1571–72 (describing a gap between society's actual expectations of privacy and Fourth Amendment protections, as evidenced anecdotally by shocked reactions of people on learning what the law allows).

²⁸⁴ The Court has found no reasonable expectation of privacy to exist even in cases where the government acted in violation of laws protecting property. *See infra* note 349.

²⁸⁵ 442 U.S. 735 (1979).

²⁸⁶ *Id.* at 744–45.

²⁸⁷ The police requested the telephone company install the pen register, but did not obtain a warrant or court order. The Court considered this installation "state action." *Id.* at 737, 739 n.4.

²⁸⁸ Justice Powell did not participate in the decision, leaving a 5 to 3 split. *Id.* at 746–47. Stewart, agreeing with Marshall, thought that the question should be not what Smith could realistically expect, but what he should be entitled to assume. *Id.* at 747 (Stewart, J.,

ing to the concerns raised in *Miller*, Justice Marshall's dissent criticized the Court's all-or-nothing approach to the question of whether one gives up all constitutional protection, even of the most confidential or personal information, by sharing it with anyone under any conditions. "Privacy," he wrote, "is not a discrete commodity, possessed absolutely or not at all."²⁸⁹

Congress reacted to the Court's decision not to provide any constitutional protection for the privacy of telephone records, as it had with respect to financial records, by enacting a statute providing procedural limitations on the government's ability to seek pen register or trap and trace information.²⁹⁰ The statute requires a court order based on a government certification that evidence relevant to a criminal investigation may be found.²⁹¹ As with wiretapping after *Olmstead* and financial privacy after *Miller*, the federal statute provides procedural protections beyond those the Court found to be constitutionally required, although less than what the Warrant Clause would have mandated if the government's information gathering had been found to constitute a "search."²⁹² The Court was evidently unwilling to demand that the government secure a court order based on a showing of probable cause before obtaining such records. With the Constitution out of the picture, Congress was able to avoid the language of the Warrant Clause by requiring a court order, but not one based on probable cause.

2. Title III and FISA: Berger, Keith, and Congressional Reaction

While Congress provided process that the Supreme Court had found constitutionally superfluous in the areas described above, the respective roles of Congress and the Court have been quite different in the area of electronic surveillance. There, Congress sometimes follows the lead of the Court, and sometimes leads a retreat from the Fourth Amendment paradigm.²⁹³ With respect to electronic surveillance in criminal investigations, Congress responded to a Court decision threatening to derail electronic surveillance by establishing extensive procedural safeguards with Title III. In contrast, with respect to national security surveillance, the Supreme Court explicitly invited Congress to formulate procedures legislatively, hinting that whatever Congress worked out would be regarded as reasonable and therefore constitutional.²⁹⁴ The Supreme Court has never evaluated whether Title III or the ever expanding realm under FISA succeed in

dissenting).

²⁸⁹ *Id.* at 749 (Marshall, J., dissenting).

²⁹⁰ See 18 U.S.C. §§ 3121–3127 (2000).

²⁹¹ *Id.* § 3123.

²⁹² Public opinion on this issue was not measured by the Slobogin and Schumacher study. See Slobogin & Schumacher, *supra* note 281, at 744.

²⁹³ See Solove, *supra* note 159, for an excellent account of the law relating to electronic surveillance.

²⁹⁴ *United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297, 322–23 (1972).

meeting the constitutional mark, but its lengthy silence functions as approbation.²⁹⁵

a. Berger v. New York and Title III

Shortly before the Supreme Court actually overruled *Olmstead*, *Berger v. New York*²⁹⁶ prodded Congress by invalidating a state statute permitting electronic surveillance performed under court order. The New York State Constitution, apparently in reaction to *Olmstead*, had provided explicit constitutional protection against unreasonable electronic interceptions.²⁹⁷ The New York legislature had accordingly included in its electronic surveillance statute many of the procedural protections usually required by the Fourth Amendment before the government may conduct a physical search.²⁹⁸ In a quintessential Warren Court opinion, the Court found that the New York statute, although far exceeding federal constitutional expectations when it was passed, was nevertheless constitutionally deficient. Justice Clark's opinion for the Court explained that the statute had not satisfied the Fourth Amendment's particularity requirement.²⁹⁹ Some observers believed that the *Berger* opinion reflected a rooted Warren Court hostility to the intrusive nature of electronic surveillance that might be impossible to overcome, no matter how many procedural protections a statute incorporated.³⁰⁰

²⁹⁵ The Court has ruled on several applications of Title III without ever suggesting that it might be unconstitutional. See *Dalia v. United States*, 441 U.S. 238 (1979) (permitting covert entry without explicit judicial permission in order to install surveillance equipment authorized under Title III procedures); *Scott v. United States*, 436 U.S. 128 (1978) (refusing to find a wiretap unconstitutional despite the officer's subjective intent to disregard the minimization requirement of Title III).

²⁹⁶ 388 U.S. 41 (1967).

²⁹⁷ N.Y. CONST. art. I, § 12 (amended 1938).

²⁹⁸ See N.Y. CRIM. PROC. § 813-a; *Berger*, 388 U.S. at 43 n.1. To conduct such surveillance, a state agent was required to obtain a court order based on a showing that there were reasonable grounds to believe that evidence of a crime might be obtained—i.e., individualized suspicion and antecedent judicial review.

²⁹⁹ *Berger*, 388 U.S. at 55–56. The Fourth Amendment requirement that any search warrant “particularly describ[e] the place to be searched, and the persons or things to be seized,” U.S. CONST. amend. IV, was breached because the order did not specify what crime was being investigated or what conversations were to be overheard, and permitted surveillance for up to sixty days in what the Court described as a “series” of intrusions. *Berger*, 388 U.S. at 59.

³⁰⁰ Two concurring Justices would have gone further than the majority. Justice William Douglas spoke of electronic surveillance as placing an “invisible policeman” in a home or office on the basis of what amounted to a general warrant. *Berger*, 388 U.S. at 65 (Douglas, J., concurring). Justice Stewart thought the standard of reasonableness required by the Fourth Amendment should be calibrated to the level of intrusion involved, maintaining that while probable cause might be enough to justify a conventional search or arrest, a higher level of justification should be required before allowing “an intrusion of the scope and duration that was permitted in this case.” *Id.* at 70 (Stewart, J., concurring).

Congress reacted to the *Berger* and *Katz* decisions by formulating wiretapping rules designed to meet the Court's objections in *Berger*.³⁰¹ The Supreme Court had effectively raised the Fourth Amendment bar, and Congress responded by providing a measure of procedural protection that may even have exceeded what the Court would have found to be constitutionally required.

b. *Keith and FISA*

President Richard Nixon's claim that he had inherent authority to conduct surveillance of domestic dissidents without prior judicial approval was rejected by the Supreme Court in *Keith*,³⁰² but the Court left room for a claim of executive authority to conduct surveillance of non-citizen "foreign powers" in the interest of national security, possibly without prior judicial approval.³⁰³

It was not only the Justices who were skeptical of the broad claim of executive branch discretion to conduct national security wiretaps. In 1976, the Church Commission, investigating complaints that President Nixon had abused his claimed surveillance powers, concluded that "[u]nless new and tighter controls are established by legislation, domestic intelligence activities threaten to undermine our democratic society and fundamentally alter its nature."³⁰⁴ Nixon had authorized the FBI's COINTELPRO, which wiretapped Dr. Martin Luther King, Jr., and other dissidents and anti-war protestors, often choosing targets solely on the basis of their political activities.³⁰⁵ The Church Commission's work led to the enactment of FISA, which represented a compromise between the claims of inherent executive authority to conduct electronic surveillance in the absence of judicial authorization and concerns about allowing the executive branch this potentially vast and dangerous power.³⁰⁶

³⁰¹ See *supra* note 57, describing Title III.

³⁰² *United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297 (1972). The Court believed that both First Amendment and Fourth Amendment values were jeopardized by the possibility of such unconstrained executive discretion to wiretap. See *id.* at 314.

³⁰³ *Id.* at 321–23. The *Keith* Court rejected the government's argument that requiring prior judicial approval for such national security wiretaps would obstruct the government's investigative efforts. The Court disagreed with the government that, first, the courts would not be sufficiently expert to evaluate the government's reasons for wanting to conduct surveillance. If the government was unable to explain to a court why it wished to conduct surveillance, the Court said, perhaps that was a sign that there was not sufficient justification for such intrusive surveillance. *Id.* at 320. The Court also rejected the argument that prior judicial approval would compromise the need for secrecy in such investigations, noting that proceedings could be conducted *ex parte* and *in camera* if required. *Id.* at 320–21.

³⁰⁴ SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS (BOOK II), S. REP. 94-755, at 2 (1976).

³⁰⁵ *Id.*

³⁰⁶ FISA, as originally enacted, allowed the Attorney General to authorize electronic surveillance without a court order only if the surveillance is directed at "foreign powers,"

The original FISA compromise came close to the Title III Fourth Amendment paradigm. Since then, Congress has continually expanded the reach of FISA and reduced its procedural protections.³⁰⁷ The Supreme Court has never reviewed the constitutionality of FISA, perhaps because, as is evidently the case with Title III, it is satisfied with this legislative response. This lack of review is another form of deference to the elected branches. The *Keith* balancing test, as applied by the FISC court,³⁰⁸ allowed Congress to decide what check on executive discretion is necessary. Instead of following the Warrant Clause approach, which provides a judicial check on executive branch searches, the FISC court's version of the reasonableness approach permits Congress to adjust the relative roles of the executive branch and the courts.

3. Notice and the Fourth Amendment

The Supreme Court has been slow in developing the idea that the Fourth Amendment's standard of reasonableness includes a presumption in favor of notice. It was not until 1995 that the Court found no-knock searches to be presumptively unconstitutional on the basis of what was said to have been the rule at common law.³⁰⁹ Additionally, search warrants are frequently executed in homes, a venue whose privacy the Court is inclined to esteem.³¹⁰ The Court recently found a search to have been invalidly executed when the search warrant did not on its face provide notice of the scope of the search, even though the scope had been circumscribed in other documents.³¹¹

50 U.S.C. § 1802(a)(1)(A)(i) (2000), and there is “no substantial likelihood that the surveillance will acquire the contents of any communication to which a United States person is a party,” *id.* § 1802(a)(1)(B). To receive a court order to conduct surveillance of a “United States person,” *id.* § 1801(i) (defined as a United States citizen, an alien lawfully admitted for permanent residence, or certain associations or corporations), the Attorney General was required to certify that the target was a “foreign power or agent of a foreign power,” a finding that was not permitted to be made “solely on the basis of activities protected by the first amendment to the Constitution of the United States.” *Id.* § 1805(a)(3)(A). Under the definition in FISA prior to the Patriot Act amendment, a United States person could be considered an “agent of a foreign power” if the person: knowingly engaged in potentially illegal clandestine intelligence gathering activities for a foreign power; knowingly engaged in sabotage, international terrorism, or activities in preparation therefore on behalf of a foreign power; knowingly entered the United States under a false or fraudulent identity on behalf of a foreign power or later assumed such an identity; or knowingly aided or abetted any of the conduct described. *Id.* § 1801(b)(2). The Patriot Act eliminated the required nexus to a foreign power in some contexts. *See supra* text accompanying notes 45–53. For a fuller account of the development of FISA, see Swire, *supra* note 47, at 1310–26.

³⁰⁷ *See supra* note 156.

³⁰⁸ *See supra* text accompanying notes 177–181.

³⁰⁹ *See Wilson v. Arkansas*, 514 U.S. 927, 929 (1995). *Compare id.*, with *Ker v. California*, 374 U.S. 23, 37–41 (1963) (leaving open the question of whether the Constitution requires notice of a search).

³¹⁰ *See supra* note 201.

³¹¹ *Groh v. Ramirez*, 540 U.S. 551 (2004).

The Supreme Court has, thus far, left the question of deferred notification to the lower courts and Congress. Section 213 does provide a role for the judiciary in deciding when to authorize deferred notification, so while the provision leaves open the significant question of what standard to apply, at least there is antecedent judicial participation in deferral decisions.

IV. RESTORING FOURTH AMENDMENT JUDICIAL REVIEW

Those who believe that the Patriot Act strikes a sound balance are not likely to object either to the reluctance of Congress to amend its provisions more extensively or to the obstacle Fourth Amendment jurisprudence poses to meaningful judicial review. Even those who harbor concerns about whether the surveillance provisions go “too far” may argue that the responsibility for striking the balance lies with Congress rather than the Court. Orin Kerr, for example, notes that Congress has frequently exceeded the Court’s constitutional floor³¹² and concludes that the question of whether surveillance statutes are constitutional is actually a distraction from the policy questions that Congress, the superior decision-maker, should be making.³¹³ Others argue that meaningful judicial review is dispensable because congressional oversight will be more effective in uncovering and checking executive abuses.³¹⁴

In many respects, Congress is indeed a superior policymaker when it comes to striking the balance of what is reasonable—it can consider more than individual cases, it can demand that information, even classified information, be regularly shared in connection with its oversight authority, it is free from government control of the timing and contours of litigation in criminal cases, and it can reflect public opinion about what is reasonable.³¹⁵ Kerr’s account, however, underestimates the need for judicial involvement in several respects. First, as Peter Swire has observed,³¹⁶ Congress’s most generous procedural protections of privacy have often been inspired by the stimulus of a Supreme Court decision, as happened after both *Berger* and *Keith*. This pattern is unlikely to recur if the Court does not take an active role in reviewing executive surveillance powers.³¹⁷ Swire provides a com-

³¹² Kerr, *supra* note 71, at 806, 839–57.

³¹³ See *id.* at 858–82 (describing institutional advantages of legislative decision-making, especially concerning procedures to govern surveillance using new technologies).

³¹⁴ See, e.g., Michael T. McCarthy, *Recent Developments: USA PATRIOT Act*, 39 HARV. J. ON LEGIS. 435, 453 (2002) (concluding that if the executive branch uses its surveillance powers wisely and Congress provides oversight, the Patriot Act powers will not pose a problem).

³¹⁵ See Wasserstrom & Seidman, *supra* note 250, at 47–50 (attributing the Supreme Court’s earlier reluctance to employ balancing tests to the Court’s understanding of its own lack of competence to explain how it is assessing the relative values).

³¹⁶ Swire, *supra* note 34, at 915–19.

³¹⁷ *Id.*

elling explanation of why Congress will tend, over time, to expand government surveillance authority—a phenomenon he describes as “ratcheting up.”³¹⁸ Expansions of surveillance authority adopted in a time of emergency tend to become permanent and to set a new standard of what is acceptable.³¹⁹

Swire also recognizes that the Court has a unique countermajoritarian role to play in reviewing the reasonableness of legislatively authorized surveillance practices.³²⁰ Majority opinion that a practice is unreasonable should usually lead to or parallel the conclusion that the practice violates the Fourth Amendment, but the Fourth Amendment floor should not also be its ceiling. John Ely, one of the principal architects of representation-reinforcement theory, suggests that the Fourth Amendment should be viewed as a necessary means of protecting the rights of minorities.³²¹ One of the most unfortunate aspects of the Supreme Court’s abdication in this area is the Court’s refusal to consider the potential for discriminatory enforcement as a significant part of its Fourth Amendment review.³²² In the areas in which the Patriot Act surveillance powers operate, the potential for unequal or biased enforcement creates a particular need for politically insulated review of otherwise invisible search and seizure authority granted to the government.³²³ Even if a majority of Americans were willing to sacrifice the privacy of Arab and Muslim men, the presumed targets of much of the government’s attention, that does not make a discriminatory search policy reasonable.³²⁴

I believe that the Patriot Act provisions described should be subjected to more rigorous judicial review than current Fourth Amendment law is

³¹⁸ *Id.*; see also Chemerinsky, *supra* note 240, at 84 (observing that the legislature rarely strengthens Fourth Amendment protections); Swire, *supra* note 47, at 1348–50 (attributing this effect to, inter alia, the gap between short- and long-term preferences and the role of the Justice Department in proposing changes in legislation).

³¹⁹ See William Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137, 2181 (2002) (predicting that states are likely to follow expansions in federal surveillance authority by amending their own laws to provide comparable powers).

³²⁰ Swire, *supra* note 34, at 922–23.

³²¹ JOHN HART ELY, *DEMOCRACY AND DISTRUST* 172–73 (1980) (arguing that the Fourth Amendment warrant and probable cause requirements may be viewed as methods of preventing discriminatory use of the search and seizure power). But see Wasserstrom & Seidman, *supra* note 250, at 93–94, for a critique of Ely’s approach.

³²² See *supra* note 243.

³²³ See, e.g., Christopher Edley, Jr., *The New American Dilemma: Racial Profiling Post-9/11*, in *THE WAR ON OUR FREEDOMS* 170, 192 (Richard C. Leone & Greg Anrig, Jr., eds., 2003) (arguing that the courts are needed to enforce the liberties of discrete and insular minorities in defining what constitutes impermissible racial profiling).

³²⁴ See DAVID COLE, *ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM* 1–21, 183–208 (2003) (arguing against double standards and willingness to sacrifice the liberty of Arab and Muslim men in order to promote “our” security); Samuel R. Gross & Debra Livingston, *Racial Profiling Under Attack*, 102 COLUM. L. REV. 1413 (2002) (discussing racial profiling in the context of anti-terrorism investigations); Natsu Taylor Saito, *Symbolism Under Siege: Japanese American Redress and the “Racing” of Arab Americans as “Terrorists,”* 8 ASIAN L.J. 1, 12 (2001); Whitehead & Aden, *supra* note 18, at 1094–95 (describing how Patriot Act provisions and other government policies show a lack of concern for the rights of non-citizens).

likely to provide. This Section will discuss what form that review might take and how the Court might forge a new partnership with Congress and the state legislatures in evaluating when searches and seizures are reasonable.

A. Sections 215 and 505 and the Katz Test

Miller and *Smith*, broadly read, would lead to the conclusion that obtaining any of the records covered by section 215 or 505 does not implicate any constitutional rights of targets, who therefore would not be entitled to any antecedent judicial review. Several commentators, including Patricia Bellia and Deirdre Mulligan, have offered powerful arguments for distinguishing *Miller* and *Smith* in the context of the Internet.³²⁵ The earlier discussion of the reactions to section 215³²⁶ shows that many members of the public and Congress view libraries as a special venue that should be entitled to greater protection than other institutions and businesses covered by section 215. It is plausible that the Court might distinguish *Miller* and *Smith* and find a reasonable expectation of privacy with respect to some of the records subject to acquisition under section 215, perhaps on the ground that specially protected areas are involved³²⁷—areas implicating First Amendment freedoms, like activity on the Internet or in libraries.³²⁸

Instead of asking only what exceptions there might be to the *Miller/Smith* test, the Court should renovate its approach to defining the scope of the Fourth Amendment by embarking on the three step program described

³²⁵ Patricia L. Bellia, *Surveillance Law Through Cyberlaw's Lens*, 72 GEO. WASH. L. REV. 1375, 1397–1403 (2004) (arguing that a broad reading of *Miller*, in the context of the Internet, is inconsistent with *Katz*); Mulligan, *supra* note 272, at 1577–82 (arguing for limiting the theory of *Miller* and *Smith*, described as undermining the promise of *Katz*, and for upgrading procedural protection under the Electronic Communications Privacy Act); see also Madriñan, *supra* note 41, at 806–12 (arguing that *Smith* is distinguishable in the context of the Internet).

Other commentators have noted how emerging technologies—both surveillance technology and communications technology—have challenged the Court's doctrinal framework. See, e.g., Tracey Maclin, *Katz, Kyllo, and Technology: Virtual Fourth Amendment Protection in the Twenty-First Century*, 72 MISS. L.J. 51, 123–41 (2002) (applying *Katz*, *Kyllo*, and *Smith* to searches of e-mail, including the use of Carnivore technology); Raymond Shih Ray Ku, *The Founders' Privacy: The Fourth Amendment and the Power of Technological Surveillance*, 86 MINN. L. REV. 1325, 1350–68 (2002) (arguing that in light of *Kyllo*, what constitutes a search should depend on the technology involved); Ric Simmons, *From Katz to Kyllo: A Blueprint for Adapting the Fourth Amendment to Twenty-First Century Technologies*, 53 HASTINGS L.J. 1303, 1343 (2002); see also Bellia, *supra*, at 1379 nn.15–16, 1457 n.414 (regarding evaluation of ECPA), 1441–48 (deploring paucity of good Internet law scholarship as well as effective Internet law).

³²⁶ See *supra* text accompanying notes 6–8, 10, 84–89.

³²⁷ Ironically, this is very similar to the type of reasoning *Katz* declared it was replacing. See *Katz v. United States*, 389 U.S. 347, 347, 350 (1967) (declining to accept question presented as whether *Katz* was in a “constitutionally protected area”).

³²⁸ See *supra* text accompanying notes 131–138 for Judge Marrero's views on the relationship of First Amendment and Fourth Amendment rights of Internet service providers and their customers.

below. This is just a sketch of what such a program might entail, as fleshing out an entire theory of the Fourth Amendment is beyond the scope of this Article. By whatever avenue, my goal is to encourage the courts to play some meaningful role in evaluating the reasonableness of government surveillance.

1. Reconceptualize the Relationship Between the Warrant Clause and Reasonableness

It sometimes seems that the current Court only actually believes in the primacy of the Warrant Clause (other than with respect to physical searches of a home) when it is trying to avoid its implications.³²⁹ The submajoritarian decisions in *Miller* and *Smith* can best be explained as exposing the Court's reluctance to live with the consequences of continuing to hold that the Warrant Clause dominates the Fourth Amendment. Finding that requisitioning records is a "search" would have led, under current doctrine, to a holding that top tier antecedent review based on probable cause is required before the government may compel third parties to turn over such records.³³⁰ The language of the Warrant Clause specifies that "no Warrants shall issue, but upon probable cause,"³³¹ so finding that a search is involved leads, under current theory, to a warrant requirement and to the probable cause standard. Congress decided in the legislation reacting to *Miller* and *Smith*, as well as in section 215, that the government must seek a court order before obtaining certain records. However, Congress provided standards of review less rigorous than probable cause. Some federal statutes merely require the government to provide the court with a certification; others require the court to play an active role in reviewing whether the surveillance would be reasonable under some standard less rigorous than probable cause.³³² To allow this flexibility, the Court had to find the Fourth Amendment inapplicable. Thus, the Court plays no role in reviewing which of these standards is appropriate, and plays no role if Congress decides to eliminate antecedent review altogether, as it essentially did in section 505.

Justice Scalia and others have advocated³³³ that the Court should regard the Reasonableness Clause as dominating Fourth Amendment analy-

³²⁹ See Silas J. Wasserstrom, *The Court's Turn Toward a General Reasonableness Interpretation of the Fourth Amendment*, 27 AM. CRIM. L. REV. 119 (1989) (commenting on the Court's negative view of the Warrant Clause).

³³⁰ Such a finding could also lead, of course, to the exclusion of evidence in a criminal prosecution. It is impossible to overestimate the influence of the exclusionary rule on the Court's Fourth Amendment doctrine.

³³¹ U.S. CONST. amend. IV.

³³² The standard the Senate proposed for section 215, for example, would charge the court with evaluating whether relevant information is likely to be obtained and whether a sufficient nexus to terrorism exists. See USA PATRIOT Improvement and Reauthorization Act of 2005, S. 1389, 109th Cong. § 7(a)(1) (2005).

³³³ See, e.g., *California v. Acevedo*, 500 U.S. 565, 581 (1991) (Scalia, J., concurring) (declaring that the Fourth Amendment does not by its terms require a prior warrant for searches

sis³³⁴ because they wish to avoid the warrant requirement.³³⁵ The ideal of antecedent judicial review should not be so lightly discarded.³³⁶ Attempts to litigate the constitutionality of the Patriot Act provisions show some of the difficulties inherent in post hoc review for reasonableness. “Reasonable,” however, need not always connote post hoc judicial review. A “reasonable” search, in my view, would still presumptively be preceded by some form of judicial review where neutral and detached magistrates would play some role in evaluating whether or not the search should take place.

Truly recognizing the preference for warrants as one aspect of an overarching reasonableness inquiry might allow the Court to provide some form of judicial review in circumstances where it now provides none. This might include requiring the government to show a lesser quantum of individualized suspicion than probable cause as a precondition to the acquisition of sensitive records. The standard of reasonableness could become an umbrella for more particular questions about what rules should be applied, including the precise nature of the showing required to obtain a court order.

2. Reform the Katz Test

The Court established a majoritarian minimum in the *Katz* test, but lowered the Fourth Amendment standard below this floor when it adopted an exaggerated notion of assumption of risk that does not comport with society’s actual expectations. There have been many interesting suggestions for how reasonable expectations of privacy could be redefined. Sherry Colb, for example, argues that the Fourth Amendment threshold should be

and seizures, but merely prohibits searches and seizures that are “unreasonable”). Some commentators argue that Scalia’s preference for the reasonableness inquiry is historically well founded. See TELFORD TAYLOR, *TWO STUDIES IN CONSTITUTIONAL INTERPRETATION* 38–44 (1969); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 759 (1994). Others maintain that the Warren Court’s interpretation is correct. See Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 591–619 (1999) (citing the widespread opposition to allowing officers to exercise discretionary search authority and the fact that “reasonableness was not used as a standard for assessing searches or arrests in framing-era legal sources”).

³³⁴ Many commentators argue that this has already occurred in practice even if not in theory. See Richard H. Seamon, *Kyllo v. United States and the Partial Ascendance of Justice Scalia’s Fourth Amendment*, 79 WASH. U. L.Q. 1013, 1024 (2001) (arguing that Justice Scalia’s preference has largely been honored by the Court); David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739, 1744 (2000) (noting Scalia’s influence on Fourth Amendment law); see also Tracey Maclin, *The Complexity of the Fourth Amendment: A Historical Review*, 77 B.U. L. REV. 925, 928 (1997) (observing that the Rehnquist Court favors a reasonableness interpretation); Wasserstrom, *supra* note 329.

³³⁵ Critics have different reasons for their willingness to dispense with antecedent judicial review. See, e.g., Wasserstrom & Seidman, *supra* note 250, at 27–35 (critiquing the warrant requirement as an ineffectual rubber stamp).

³³⁶ See Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 825, 846–56 (1994) (defending the current preference for warrants and challenging the wisdom and feasibility of Akhil Amar’s alternative proposals).

lowered substantially, and that reasonable expectations of privacy should merit some form of protection unless an individual may be deemed to have essentially consented to a search.³³⁷

I do not argue that the Court should define the scope of the Fourth Amendment on the basis of public opinion polls, but I do think that a more generous definition of what the Fourth Amendment requires is necessary. There are several different ways the Court might approach the question of the scope of the Fourth Amendment. In the approach advocated by Justices Brennan and Marshall, the Court would shoulder the responsibility of deciding what the public has the right to expect by defining the values embodied in the Fourth Amendment. It is unimaginable that the current Supreme Court will adopt such an avowedly normative approach.³³⁸

The alternative must be some sort of positivist³³⁹ test. Justice Antonin Scalia's brand of originalism has provided a new positivist gloss on the *Katz* test. The reconstructed views of the framers are taken as an objective measure of Fourth Amendment values. In the recent *Kyllo* case,³⁴⁰ the Court was willing to find that the government's use of a particular technology was a "search" even though that conclusion led to imposition of a warrant requirement. Scalia's opinion for the Court held that the use of a thermal imaging device was a "search" within the meaning of the Fourth Amendment because the device gathered information (about heat levels) from inside a home that would not have been available in the day of the framers without a physical entry into the home.³⁴¹ The Court's pro-warrant decision in *Kyllo* occurred in the context of a decision about the privacy of the home, a privileged venue in the Supreme Court's Fourth Amendment jurisprudence, and may not extend beyond that context.³⁴² Nevertheless, *Kyllo* shows that the Court has some interest in forging a role for itself in checking executive discretion to use surveillance technology rather than delegating that job entirely to legislatures.³⁴³ Originalism is an unpredict-

³³⁷ See Sherry F. Colb, *What Is a Search? Two Conceptual Flaws in Fourth Amendment Doctrine and Some Hints of a Remedy*, 55 STAN. L. REV. 119 (2002) (arguing that risk-taking does not always invite exposure, and that limited exposure does not always invite universal exposure).

³³⁸ I am sympathetic to the argument that the Court cannot make sense of the Fourth Amendment without owning values choices. See Chemerinsky, *supra* note 240, at 74–87; see also Wasserstrom & Seidman, *supra* note 250, at 105 (concluding after extensive analysis that the difficulty of defining either norms or a satisfying positivist theory should not eliminate a meaningful judicial role).

³³⁹ For a good working definition of what I mean by "positivism," see Wasserstrom & Seidman, *supra* note 250, at 67 (defining constitutional positivism as "forsak[ing] the goal of standing outside of current preferences and assum[ing], instead that the Constitution is embodied in the fair expression of those preferences").

³⁴⁰ *Kyllo v. United States*, 533 U.S. 27 (2001).

³⁴¹ *Id.* at 34–35.

³⁴² The decision is also limited to technologies not in "public use." See *id.* at 34.

³⁴³ See Kerr, *supra* note 71, at 802–05 (describing *Kyllo* as reflecting the "prevailing view" that the courts should have primary responsibility for deciding when the use of technology in surveillance is reasonable).

able basis for evaluating new technologies, but it does provide some platform for an independent judicial role in deciding when the Fourth Amendment will apply.

3. *Adopt a Positivist Hybrid Rights Approach to Defining Reasonableness*

Another alternative would borrow from the Court's approach to defining other constitutional standards. In other areas of Bill of Rights interpretation, the Court has constructed a two step positivist doctrine that attempts to avoid highly subjective judicial standards and to preserve some democratic choice about the scope of rights—a hybrid rights approach.³⁴⁴ Procedural due process doctrine provides the best example. Justices Brennan and Marshall had proposed that the Court adopt a normative approach in defining what process is due, arguing that the Supreme Court should insist that the government provide case-appropriate process wherever the government threatens an individual with a “grievous loss” of property³⁴⁵ or liberty.³⁴⁶ This assertive judicial posture is comparable to the role the same Justices proposed for courts wielding the *Katz* test. Instead, a majority of the Supreme Court adopted a more judicially modest bifurcated approach to procedural due process, asking first if state or federal law has created an entitlement to the form of property or liberty in question and, only if the answer to that threshold question is yes, going on to consider what process is due to protect that entitlement.³⁴⁷ Society, through its lawmakers, decides what interests are worth protecting, and the Court then decides what procedures will provide adequate protection for the favored interests.

In its Fourth Amendment cases, however, the Court has thus far rejected such positivist approaches.³⁴⁸ The Court does not look to property law as

³⁴⁴ See Susan N. Herman, *The New Liberty: The Procedural Due Process Rights of Prisoners and Others Under the Burger Court*, 59 N.Y.U. L. REV. 482 (1984) [hereinafter Herman, *The New Liberty*] (describing and critiquing positivist due process doctrine as applied to prisoners' liberty interests); Susan N. Herman, *Applying Apprendi to the Federal Sentencing Guidelines: You Say You Want a Revolution?*, 87 IOWA L. REV. 615, 635–40 (2002) (describing a hybrid rights approach applied in interpreting Bill of Rights guarantees and discussing the possible application to sentencing guidelines).

³⁴⁵ See Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 588 (1972) (Marshall, J., dissenting); Goldberg v. Kelly, 397 U.S. 254, 263 (1970) (quoting Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951)).

³⁴⁶ See Meachum v. Fano, 427 U.S. 215, 229–30 (1976).

³⁴⁷ Roth, 408 U.S. at 577. The courts make the second stage decision—what process is due—under a three factor balancing test that is unaffected by any decisions the legislature may have made about what process should be due. See Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541 (1985); Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

³⁴⁸ Justice Scalia, who is not shy about exercising judicial independence, dislikes the hybrid rights approach. He has unequivocally rejected the idea of referring to local law as a baseline in Fourth Amendment interpretation because it would lead to varying results from jurisdiction to jurisdiction. For example, in *Whren v. United States*, 517 U.S. 806, 813–16 (1996), Scalia's opinion for the Court declined to consider whether or not an officer conducting a stop was acting beyond his authority under the law of the District of Colum-

a baseline for evaluating what society expects to remain private.³⁴⁹ *Katz* criticized the *Olmstead* approach of making property rights the ceiling of Fourth Amendment protection.³⁵⁰ Under current doctrine, property rights are not even a floor.³⁵¹

Some version of the hybrid rights approach might be adapted to Fourth Amendment analysis of what constitutes a “reasonable expectation of privacy” and help the Court avoid setting the Fourth Amendment bar too low. Such an inquiry might well provide a narrower definition than what I think the *Katz* test should offer, but it might also prove more attractive to a Court concerned about making countermajoritarian values choices. The entitlements inquiry of the procedural due process doctrine is not directly transferable, but it offers a model of how the threshold Fourth Amendment inquiry could be bifurcated.³⁵² The Court could consider first whether legislation (perhaps legislation throughout the country) or other evidence of society’s opinions suggests that the people expect a particular form of privacy to be respected.³⁵³ Legislation protecting a particular interest, like the Financial Privacy Act and its state counterparts, or trespass laws creating property rights, is a more objective referent than the Court’s own subjective guess of which interests society is prepared to protect.

After concluding that a particular form of surveillance should be measured against Fourth Amendment norms, an inquiry that should not be too

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³⁴⁹ See, e.g., *Oliver v. United States*, 466 U.S. 170 (1984) (holding that police entry and examination of a field is not a search under the definition of *Katz* because the expectation of privacy in such fields is not “legitimate” and does not infringe upon the personal and social values protected by the Fourth Amendment, despite the fact that the police entry violated state trespass law).

Part of the Court’s reluctance to regard property law as providing a Fourth Amendment floor may be ascribed to the variation in state laws. In *California v. Greenwood*, 486 U.S. 35 (1988), the Court found that police acquisition from trash collectors of bags of trash left for collection was not a “search.” In response to respondent’s argument that California state law recognized a right to privacy in garbage, the Court characterized this argument as “no less than a suggestion that concepts of privacy under the laws of each State are to determine the reach of the Fourth Amendment. We do not accept this submission.” *Id.* at 44. Note that the Court’s approach—declining to consider this conduct a search—also results in regulation of this conduct varying from jurisdiction to jurisdiction, although not in the name of the United States Constitution.

³⁵⁰ *Katz v. United States*, 389 U.S. 347, 350–52 (1967) (stating that “the Fourth Amendment protects people, not places”).

³⁵¹ Orin Kerr concludes that, in its post-*Katz* cases, the Court has returned to interpreting the Fourth Amendment as protecting property rights. See Kerr, *supra* note 71, at 809–37. However, as Peter Swire notes, the Court frequently does not even interpret the Fourth Amendment to protect property rights if that result would disadvantage the government. See Swire, *supra* note 34, at 905–10.

³⁵² With respect to new technologies, commentators seem very much divided about where privacy may reasonably be expected. See Kerr, *supra* note 71, at 808 (observing that “no one knows whether an expectation of privacy in a new technology is ‘reasonable’”).

³⁵³ While I have criticized this approach to assessing the value of prisoners’ freedom, see Herman, *The New Liberty*, *supra* note 344, at 543–74, there would presumably be greater accountability in political decisions defining property rights and the value of privacy that all will share than in defining the value of a prisoner’s interest in freedom.

restrictive, the Court could then preserve to itself the second stage decision about what procedural protections should accompany those expectations. This could include what showing the government should have to make and what role the courts should play in reviewing the government's use of that technique in a particular case. This is a more limited procedural task than the Brennan/Marshall approach, comparable to what the Court does in deciding what process is due to protect entitlements created by legislative or executive action.³⁵⁴

The second stage of the due process test is the most helpful analogy in the Fourth Amendment area because it stresses the unique ability and responsibility of the courts to decide what procedures are appropriate even where the Court is reluctant to select the values to be protected. But the clarity of judicial role in the second step will be unavailing if the Court rarely finds values to protect in the first step. The procedural due process analogy is not very tight in this first step inquiry, precisely for the reason judicial review is needed: legislatures may not wish to constrain executive branch discretion to search and seize in many circumstances. So instead of the narrow focus of the procedural due process cases on the wording of statutes and regulations, the Court might adopt an eclectic approach in defining when society reasonably expects privacy, like the approach it has recently used in the Eighth Amendment area to determine what punishments society deems cruel and unusual.³⁵⁵ A majority of the Court in recent death penalty cases has looked to trends in legislation around the country, the views of professional associations, and international and even foreign law in attempting to derive an objective measure of what our evolving standards of decency demand.³⁵⁶ The Fourth Amendment's benchmark of reasonableness seems to invite a comparable approach—trying to identify what “the people” consider “unreasonable.”

Adopting a hybrid rights approach would have the advantage of recognizing legislatures as partners in developing appropriate constraints for executive action, rather than either the target of the Court's Fourth Amendment scrutiny or the sole defender of privacy values. The Fourth Amendment is not the only area where legislative decisions are not at the core of the problem the Constitution addresses. In *Missouri v. Hunter*,³⁵⁷ for example, the Court held that the Double Jeopardy Clause constrains state or federal prosecutors who decide what prosecutions to bring, but does not limit legislators who decide how to define crimes. If legislatures define overlapping

³⁵⁴ See *Mathews v. Eldridge*, 424 U.S. 319 (1976), where the Court, after finding that a liberty or property interest exists, weighs what process is due under a multi-factor balancing test.

³⁵⁵ See *Roper v. Simmons*, 125 S. Ct. 1183 (2005); *Atkins v. Virginia*, 536 U.S. 304 (2002).

³⁵⁶ See *Roper*, 125 S. Ct. at 1191–94 (examining trends in the states), 1198–1200 (looking at international and foreign law); *Atkins*, 536 U.S. at 313–17, 321.

³⁵⁷ 459 U.S. 359 (1983).

crimes, that does not in itself do any harm. It is only if prosecutors use redundant statutes to prosecute the same individual that double jeopardy concerns are triggered. Similarly, constraining executive discretion to search and seize is the main task of the Fourth Amendment. The problem with the Patriot Act provisions is not that Congress itself is violating any rights. Rather, the Patriot Act provisions raise concerns about threats to our constitutional values to the extent that they fail to provide for the kinds of restraints on executive discretion to search that the courts could and should be providing themselves through constitutional law.

The Court could conclude that Congress' inclusion of some form of antecedent review in section 215 suggests that a reasonable expectation of privacy does exist with respect to library and medical records. Upon having found that this form of governmental surveillance is a form of activity the Fourth Amendment governs, the Court would make an independent judgment, as in the second stage of procedural due process cases, about what procedures the reasonableness standard requires. Total deference to Congress on that second question would be no more appropriate than total deference to legislatures on the question of what procedures should be provided when a form of liberty or property is at stake.³⁵⁸ But a level of flexibility in deciding what procedures are reasonable, added to freedom from the automatic assumption that antecedent judicial review requires a showing of probable cause, might lead the Court to play some role other than simply deferring to Congress.

B. Section 218 and Reasonableness

If courts are assessing the reasonableness of certain forms of government surveillance, they must ask more nuanced questions than whether the need for security outweighs individual privacy interests. Courts are required to evaluate the constitutionality of government investigations authorized by section 218, because the option of holding that electronic surveillance is not a "search" died with *Olmstead*. Under a classic Warrant Clause approach, an electronic surveillance warrant may not be issued in the absence of classic probable cause and so the FISA-based provisions of section 218 would be unconstitutional. Relying on the Supreme Court's invitation in *Keith*, however, the FISCER used an open-ended balancing test to decide whether searches under section 218 are "reasonable," declining to follow the Supreme Court's administrative search cases, which offer a more concrete approach to examining the reasonableness of a government "search" not governed by the Warrant Clause.³⁵⁹ The court

³⁵⁸ See *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985) (holding that a court must make its own decision about what process is due after finding the existence of a property interest).

³⁵⁹ See *supra* text accompanying notes 173–181. Whether the FISCER was right to use a freewheeling balancing test rather than the administrative search doctrine is the subject of

treated the issue of reasonableness as a seesaw battle between the demands of privacy and of national security.

In a pitched battle with security, whether in Congress or the courts, Fourth Amendment claims of a right to privacy will lose. The government alleges that information gained and shared under section 218 will help to ensure our safety and that the incremental loss of privacy entailed is not great relative to the pre-Patriot Act status quo.³⁶⁰ It is impossible for us to know whether any terrorist or other criminal actually has been or will be caught through the use of a particular power,³⁶¹ or to evaluate whether other apprehension techniques could have been used that impinge less on civil liberties. On the benefit side of the balance, therefore, is the unquantifiable possibility that a particular surveillance technique might be useful in averting what might be great harm. On the other side is an unquantifiable list of costs. As we do not know how extensively the government has used the provisions in question, we cannot measure how much privacy has been forfeited or whether the power conferred has been used in a discriminatory fashion. The breadth of the Patriot Act's net imposes some costs even if the Act's powers are never used, such as the chilling effect created by the potential use of these powers and the fear of Arabs and Muslims that they are being targeted. It is impossible to quantify and weigh these costs against the government's assertion that it needs to add particular tools to its security arsenal.

Casting the decision as a stark balance also misstates the nature of the issues raised by these sections of the Patriot Act. The constitutional argument made by most critics is not that anything should be immune from government scrutiny, but is rather about judicial role and procedure: what antecedent justification the government must show before engaging in certain kinds of surveillance, when and to whom notice must be provided, how broad the veil of secrecy should be, and how extensive or minimal a role the courts are to play. Marc Rotenberg has aptly observed that the liberty versus security question tends to divert attention from the critical analysis of how much secrecy and lack of accountability we are willing to tolerate in the government's use of its surveillance powers.³⁶² It is a different

the FISCR decision and the heavily critical commentary on that court's analysis. *See supra* note 189.

³⁶⁰ *See* DEP'T OF JUSTICE, *supra* note 120.

³⁶¹ Perhaps because its aim has been prevention, the government has prosecuted relatively few terrorism suspects since September 11. *See* TRAC REPORTS, A SPECIAL TRAC REPORT: CRIMINAL ENFORCEMENT AGAINST TERRORISTS, <http://trac.syr.edu/tracreports/terrorism/report011203.html> (last visited Oct. 14, 2005).

³⁶² Marc Rotenberg, *Modern Studies in Privacy Law: Foreword: Privacy and Secrecy After September 11*, 86 MINN. L. REV. 1115 (2002). Rotenberg argues that liberty and security are complementary rather than warring values, *id.* at 1126–27, disagreeing with the balancing approach advocated by Amitai Etzioni. *See* AMITAI ETZIONI, *HOW PATRIOTIC IS THE PATRIOT ACT: FREEDOM VERSUS SECURITY IN THE AGE OF TERRORISM* (Routledge 2004) (applying a balancing approach and concluding the Patriot Act is a reasonable protection of security).

question to ask not whether a particular form of surveillance is useful or even necessary, but whether the government should have the discretion to decide whether to search without any judicial review.

Fourth Amendment exceptionalism, as described above,³⁶³ has led the Court to ignore what it knows in other areas of constitutional analysis: Generalized balancing tests stack the deck against claims of individual rights.³⁶⁴ For that reason, First Amendment balancing tests carefully calibrate standards of review and burdens of proof, including the burden on the government to show that no less restrictive alternative is available. I do not believe that the courts will or should transplant the model of First Amendment analysis to the Fourth Amendment. Although the Fourth Amendment is some kind of right, it is not the same kind of right as the First Amendment. However, I do believe that balancing tests examining what is reasonable should evaluate more than the “promote security” vs. “limit liberty” choice pollsters pose. Any Fourth Amendment balancing test should be more considerate not only of the costs of surveillance to individuals, but the costs of secrecy and lack of accountability. Any balancing test should impose some burden on the government to show not just a need for the tools of surveillance, but a need to dispense with the forms of judicial review the Warrant Clause (or a reasonable facsimile in the case of lesser intrusions) would impose.³⁶⁵ Focusing on procedural alternatives rather than just the relative weight of the governmental and individual interests involved would provide a court with a more nuanced and appropriate inquiry than the Hobson’s Choice between liberty and security.³⁶⁶ This would allow courts to do something other than replicate the legislative debate about the balance between liberty and security.³⁶⁷

Finally, courts must take the Fourth Amendment seriously as providing an opportunity and an obligation for judicial constraint on discriminatory as well as arbitrary searches and seizures. It is all too easy for “the people” to give up a certain amount of privacy in exchange for security if it is only someone else’s privacy they are giving up.³⁶⁸ In relegating to the Equal Pro-

William Stuntz, evidently assuming that the kinds of tools the Patriot Act provides will succeed in reducing the threat of terrorism, argues that the level of Fourth Amendment protection should be calibrated according to the threat posed. *See* Stuntz, *supra* note 319, at 2140–42.

³⁶³ *See supra* text accompanying notes 246–261.

³⁶⁴ *See supra* note 248.

³⁶⁵ The *Keith* Court surveyed and rejected the government’s arguments that judicial review will be too costly where national security is at stake. *See supra* note 303. The fear that a judicial review requirement would prevent the government from conducting surveillance seems overblown in light of the fact that the FISA court grants virtually all of the government’s requests. *See supra* note 159.

³⁶⁶ *See* Strossen, *supra* note 260, at 1194–1207 (critiquing general Fourth Amendment balancing tests as structurally overvaluing the government’s interests).

³⁶⁷ *See* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 *YALE L.J.* 943, 984–86 (1987) (describing the constitutional balancing process as replicating the legislature’s role).

³⁶⁸ *See supra* notes 323–324 and accompanying text.

tection Clause questions about the discriminatory impact of law enforcement conduct, the Court has unduly limited the ability of the Fourth Amendment to serve as a countermajoritarian check³⁶⁹ and failed to recognize that political accountability has its blind spots.

C. Section 213 and Notice

Even though the nickname “sneak and peek” authority reveals a deep antipathy on the part of the people to secret searches, this is one area in which Fourth Amendment law is not hardened. In fact, the Supreme Court is a latecomer to the issue of Fourth Amendment notice.³⁷⁰ In reviewing the constitutionality of the authority this section affords, courts will need to make the same choice of methodology described above. Will the Supreme Court itself set a norm, will an originalist approach prevail, or will the Court find some way to incorporate the apparent opinion of “the people” that secret searches are unreasonable? What the courts should not do is reflexively defer to whatever Congress decides.

V. CONCLUSION

The Patriot Act has generated strong reactions,³⁷¹ even if those reactions are sometimes based more on attitudes than on information about its actual content. In this Article, I have discussed how some of the most controversial surveillance provisions change previous law, what reactions those provisions have provoked from the public and from Congress, and what the courts are likely to say if and when they are directly confronted with litigable challenges to the constitutionality of those provisions. The discussion reveals that there is a serious gap between the kinds of concerns raised by informed critics and the kinds of questions the courts will ask in applying what has become submajoritarian Fourth Amendment law.

In my diagnosis and discussion of Fourth Amendment law, I have not addressed arguments that the Fourth Amendment’s provisions should not apply to terrorism investigations in the same manner they apply to crime.³⁷² Even before September 11, the Fourth Amendment’s procedural protec-

³⁶⁹ See ELY, *supra* note 321, at 172 (commenting on the difficulty of proving invidious intent, as required for an equal protection claim, in individual cases).

³⁷⁰ See *supra* text accompanying notes 309–311.

³⁷¹ The Bill of Rights Defense Committee movement, see *supra* text accompanying notes 6–8, is a good example of what Larry Kramer describes as “popular constitutionalism.” See LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004).

³⁷² One version of this argument is that Fourth Amendment standards should be variable, and so the level of Fourth Amendment resistance to executive surveillance authority should depend on the nature of the threat. See Stuntz, *supra* note 319. Another basis for arguing that the usual Fourth Amendment rules do not apply is the President’s inherent authority under Article II, particularly in time of war.

tions were weakened in the service of the war on drugs.³⁷³ It may well be that both Congress and the courts will decide to further dilute the Fourth Amendment, given the climate in which decisions about its constraints are now being made. Since September 11, the Supreme Court has decided thirteen of the fourteen Fourth Amendment cases it has heard in favor of the government,³⁷⁴ allowing some contested government investigations on the theory that they do not even constitute a search or seizure,³⁷⁵ approving a roadblock stop for investigatory purposes,³⁷⁶ and endorsing broad discretion to stop, search, and arrest the occupants of vehicles.³⁷⁷ My concern is that with respect to both the Patriot Act and the Fourth Amendment, the baseline was located too far in the government's direction even before September 11.

My argument in this Article does not address what results any challenges to the Patriot Act should yield, but instead focuses on the relative roles of Congress and the Supreme Court in evaluating those challenges. Members of the public and members of Congress should free themselves of the assumption that the courts will scrutinize Congress's decisions about the content of the Patriot Act, and also of the assumption that this or any other legislation is satisfactory if it passes the very low threshold of Fourth Amendment constitutionality set by the Supreme Court. And the Supreme Court should reconsider the sycophantic Fourth Amendment doctrine that does little more than defer to whatever decisions Congress makes, even when the Fourth Amendment's "people" disagree, and even when a minority of those people bear the brunt of those decisions.

The Court's ambivalence about whether to adhere to the Warren Court's key decisions about how to interpret the Fourth Amendment—the preeminence of the Warrant Clause with its strict probable cause requirement, incorporation, and reliance on the exclusionary rule to remedy violations—has engendered disingenuous rulings that some government surveillance does not fall within the purview of the Fourth Amendment at all, and other equally evasive maneuvers. The Court could forge an appropriate judicial role by recognizing that the idea of antecedent judicial review can be one

³⁷³ See, e.g., David Rudovsky, *The Impact of the War on Drugs on Procedural Fairness and Racial Equality*, 1994 U. CHI. LEGAL F. 237 (1994).

³⁷⁴ *Muehler v. Mena*, 125 S. Ct. 1465 (2005); *Illinois v. Caballes*, 125 S. Ct. 834 (2005); *Devenpeck v. Alford*, 543 U.S. 146 (2004); *Hiibel v. Sixth Judicial Dist. Court of Nev.*, 542 U.S. 177 (2004); *Thornton v. United States*, 541 U.S. 615 (2004); *United States v. Flores-Montano*, 541 U.S. 149 (2004); *Illinois v. Lidster*, 540 U.S. 419 (2004); *Maryland v. Pringle*, 540 U.S. 366 (2003); *United States v. Banks*, 540 U.S. 31 (2003); *Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 536 U.S. 822 (2002); *United States v. Drayton*, 536 U.S. 194 (2002); *United States v. Arvizu*, 534 U.S. 266 (2002); *United States v. Knights*, 534 U.S. 112 (2001). The only exception to this one-sided series of rulings was *Groh v. Ramirez*, 540 U.S. 551 (2004), where the Court found that execution of a search warrant requires adequate notice of the scope of the search.

³⁷⁵ *Caballes*, 125 S. Ct. 834; *Drayton*, 536 U.S. 194.

³⁷⁶ *Lidster*, 540 U.S. 419.

³⁷⁷ *Thornton*, 541 U.S. 615; *Pringle*, 540 U.S. 366; *Arvizu*, 534 U.S. 266.

aspect of an overarching reasonableness inquiry. If the Court allowed itself flexibility to tailor appropriate judicial roles in reviewing various forms of government surveillance, the Court could play an independent role in considering the kinds of questions Congress addressed in its Patriot Act renewal hearings—most often questions of what the judicial role should be in overseeing executive branch surveillance authority. But in asking questions about the reasonableness of government surveillance, the Court should not simply substitute merely rhetorical balancing questions for evasive decisions about what the Fourth Amendment does not cover.

There is no substitute for vigorous legislative oversight of the surveillance authority created by the Patriot Act and other legislation. In today's climate, however, the role of the courts should not be minimized as acutely as it is under current Fourth Amendment doctrine. The Supreme Court in *Hamdi v. Rumsfeld*³⁷⁸ made a dramatic statement about the need for the courts to play a role in curbing excessive executive discretion to detain people in connection with the war on terror, despite its conclusion that Congress had authorized the executive detention in question.³⁷⁹ With respect to surveillance authority, Congress so far has shown an inclination to yield considerable decision-making authority to the executive branch. Congress can still leave room for the courts to play their historical role in reviewing the executive branch's implementation of its surveillance authority before surveillance takes place. If Congress does not do so, the Supreme Court should dust off the citation to *Marbury v. Madison*³⁸⁰ one more time, review its previous Fourth Amendment doctrine, and insist that the courts play their part in deciding when the executive branch should not simply be given a blank check.

³⁷⁸ 542 U.S. 507 (2004).

³⁷⁹ *See id.* at 535–36 (“[A] state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens. Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.” (internal citation omitted)).

³⁸⁰ 5 U.S. 137 (1 Cranch) (1803).