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Burglars With Badges

The Return of 'Black Bag Jobs'

Others say, Law is our Fate;
Others say, Law is our State;
Others say, others say
Law is no more,
Law has gone away.
—W.H. Auden

THERE WERE SOME MEMBERS OF CONGRESS WHO FEARED—AS THE BUSH-ASHCROFT ANTI-TERRORISM BILL WAS RUSHED THROUGH—THAT THE CONSTITUTION WAS IN THE LINE OF FIRE. BUT AS THE LEAD EDITORIAL IN THE OCTOBER 25 "WASHINGTON POST" ("A PANICKY BILL") NOTED: ¶ "MEMBERS WITH RESERVATIONS FEARED OBJECTING LEST THERE BE A FURTHER TERRORIST ATTACK AND THEY BE BLAMED FOR HAVING FAILED TO GIVE THE GOVERNMENT the means to prevent it."

Then, when a "sunset" clause was agreed to—requiring Congress to review its handiwork in four years—uneasy members figured they could repair any holes in the Bill of Rights at that time. But if the terrorists—including the "sleepers" hidden among us—are not obliterated in four years, well, the citizenry will want to give up even more of its freedoms. And Congress will not dare stand in the way.

However, the worst assault on our liberties in the USA PATRIOT Act is *not* subject to the sunset clause. It is now a permanent part of our laws.

The new act includes "Sneak and Peek Warrants," as they are cosmetically called—known in J. Edgar Hoover's days as warrantless "black bag jobs." It legalizes, with warrants, burglars with FBI badges. Now the new FBI director, Robert Mueller, can enhance that tradition.

As described by the American Civil Liberties Union, this provision "would allow law enforcement agencies to delay giving notice when they conduct a search. This means that the government could enter a house, apartment, or office with a search warrant when the occupant was away, search through her property and take photographs, and in some cases, seize physical property and electronic communications, and not tell her until later. This provision would mark a sea change in the way search warrants are executed in the United States."

What is particularly ominous about these secret searches is underlined by Boston University law professor Tracey Maclin, a leading expert on the Fourth Amendment. In the November 5 *National Law Journal*, Maclin warned that these break-ins are "not tied (only) to cases in which national security or threats from foreign agents appear to be the focus of investigations. *It can apply to any intrusion.*" (Emphasis added.) That is, any criminal investigation. Rule 41 (d) of the Federal Rules of Criminal Procedure specifically requires that the officer conducting the search shall "leave a copy and receipt at the place from which the property was taken."

With timely notice of a black bag job, you can challenge it in court before any action is taken against you. Did the official burglars take only what the warrant allowed them to take? And if you know what they did take, you will be able to justify your non-criminal possession of what is now in their hands.

Previously, there has been limited authority to delay notice of a secret search—if, the ACLU notes, "an individual's physical safety will be endangered, someone will flee prosecution, evidence will be tampered with, potential witnesses will be intimidated, or an investigation will be jeopardized or a trial unduly delayed."

But now, the ACLU continues, Section 213 of the USA PATRIOT Act would take this limited authority "and expand it so that it will be available in any kind of search (physical or electronic) and in any kind of criminal case. . . . Law enforcement agents will seek to delay notification whenever it is to their advantage to do so. Over time, the delayed notice 'exception' would become the rule and would deal another serious blow to the privacy protections afforded by the Fourth Amendment."

As soon as the anti-terrorism bill was signed by the president, Attorney General Ashcroft informed all the United States attorneys and the FBI to push the provisions of this new law to the limit. That includes break-ins.

Section 213 of the new law does say that notice of a secret search is to be given within "a reasonable period." Ashcroft's Justice Department interprets that to mean within 90 days. But the government can ask a judge to extend that period for "good cause." As Barry Steinhardt, counsel for the ACLU in Washington, tells me, extensions can be granted indefinitely.

Remember that these black bag jobs—where no one leaves a receipt for what has been taken—apply to *any* criminal investigation, not only to terrorism probes. Professor Maclin makes the necessary point:

"It's all a question of how we view the Fourth Amendment. The amendment's essential purpose is to control the discretion of government officials to intrude in our lives. How many judges, particularly where criminal contraband is discovered, are going to say the government's request is unreasonable? They're not going to do it."

And if the government claims that the criminal investigation is also based on a suspicion of terrorist activity, what judge will refuse as many delays of notice as the FBI, or any other agency, ardently desires?

Supreme Court Justice William Brennan once told me his belief that the key precipitating cause of the American Revolution was the "general writ of assistance" that allowed the British to search and seize whatever they wanted in the colonists' homes and businesses.

The Committee of Correspondence spread the word of these infuriating abuses of privacy throughout the colonies, as in this report from Boston:

"Our houses and even our bed chambers are exposed to be ransacked, our boxes, chests, and trunks broke open, ravaged, and plundered. . . . Flagrant instances of the wanton exercise of this power have frequently happened. . . . By this we are cut off from that domestic security which renders the lives of the most unhappy in some measure agreeable."

In 1761, James Otis challenged a new writ of assistance in the Massachusetts Superior Court: "A man's house is his castle. . . . This writ, if it should be declared legal, would totally annihilate this privilege." It was declared legal, and the Declaration of Independence was a result.

And that's why we have a Fourth Amendment, to prevent such abuses from happening ever again. Or rather, we *had* a Fourth Amendment.



FBI DIRECTOR ROBERT MUELLER AT HOME IN THE J. EDGAR HOOVER BUILDING, WASHINGTON

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