Miami Beach City Councilwoman. On May 20, 2005, the Commission on the Status of Women of the City of North Miami Beach and Women in Politics will gather at a farewell luncheon to ''honor one of their own.''

Throughout Ms. Smith's 10-year term on the North Miami Beach City Council, she is best known for her work on programs for children and senior citizens. Ms. Smith is a liaison to children's ''Read Aloud Program.'' This tremendously rewarding program stimulates children's interest in reading and also promotes a decrease in television time by allowing children of all ages to listen to volunteers read books aloud. In addition, Ms. Smith is affiliated with the North Dade Children Center, where she is involved in youth and senior health fairs.

Ms. Smith has touched many peoples' hearts in North Miami Beach through her accomplishments as a member of numerous organizations. I want to applaud her tremendous commitment to community service, dedicating her time to organizations such as the National Organization of Women, the Carl Byoir Neighborhood Association, the Governing Board of Parkway Regional Hospital and the Board of Directors of United Democratic Club, just to name a few.

Besides serving as an elected official and community activist, Ms. Smith takes pride in being a teacher at Gertrude K. Edelman Sabal Palm Elementary School.

Ms. Smith has truly demonstrated that public service and education are achievements never beyond the reach of those willing to dedicate all their energy to accomplish the goals for the greater good of the public. I extend her my heartfelt gratitude for a superb job and wish her the best of luck in her retirement.

## PRESERVING THE FOUNDATION OF LIBERTY

### HON. DENNIS J. KUCINICH

OF OHIO

IN THE HOUSE OF REPRESENTATIVES

*Wednesday, May 18, 2005*

Mr. KUCINICH. Mr. Speaker, I commend my friend and colleague, Representative C. L. ''BUTCH'' OTTER, as well as Elizabeth Barker Brandt, Professor of Law at the University of Idaho, for their excellent article recently published in the Journal of Law, Ethics and Public Policy, Notre Dame Law School. I am proud to be an original cosponsor of Congressman OTTER'S Security and Freedom Ensured Act of 2005 (SAFE Act) that rolls back the most alarming provisions of the Patriot Act. The article, Preserving the Foundation of Liberty, is an important critique of the federal government's expanding prosecutorial powers in the wake of the terrorist events in September 2001.

PRESERVING THE FOUNDATION OF LIBERTY

C. L. ''BUTCH'' OTTER & ELIZABETH BARKER BRANDT

*The sacred rights of mankind are not to be rummaged for, among old parchments, or musty records. They are written, as with a sun beam, in the whole volume of human nature, by the hand of the divinity itself; and can never be erased or obscured by mortal power.*

—Alexander Hamilton

Foundations are supposed to be steadfast. The very idea of a foundation is to provide a pinion between the fixed and the transient, the permanent and the temporary. The foundation is the unalterable base upon which to build. So it is with our Constitution and Bill of Rights. They are the rock upon which we have built our modern republic, while protecting the individual from the government itself. For more than two centuries, they have provided the firm foundation of liberty and opportunity from which America and its people have taken wing, enjoying success and weathering failure, celebrating triumph and mourning tragedy.

After the terrorist attacks of September 11, 2001, forgetting our past and fearing our future, Congress began turning that foundation on its head, acting as if physical security requires the sacrifice of individual rights to government imperatives. While paying lip service to our heritage of limited government and individual liberty, we began acting as if individual rights are conditional, derived not from God nor inherent in the human condition, but subject to the collective expression of our fears. Worst of all, we convinced ourselves we were doing nothing of the kind, or that the manifest benefit of a safer society was worth risking the loss of individual liberties.

Congress passed the USA PATRIOT Act just weeks after the September 11 attacks, while the dead from the World Trade Center towers in Manhattan, the Pentagon in Washington, and from Flight 93 in Pennsylvania were still being buried. An anthrax threat, assumed by many at the time to be another terrorist attack, had forced members of Congress out of their offices. Few, if any, lawmakers were truly aware of the new and expanded law enforcement authority within the PATRIOT Act. They only knew that they had to do something to quiet the public's fears, and their own.

This was not an executive order from a president reacting to a concrete and immediate threat. This was not the temporary imposition of martial law in response to a natural disaster or military assault. This was the world's greatest deliberative body hastily enacting an incredibly detailed, complex, and comprehensive piece of legislation without all the facts. That haste and lack of deliberation left advocates backfilling many of the arguments in support of certain provisions of the law that now appear to be glaringly at odds with constitutional principles.

I. CONSTITUTIONAL FOUNDATIONS

The Framers of our Constitution drew on an extensive body of law and tradition to recognize certain rights were inalienable—they transcended the power of government: The colonists who fostered the tree of liberty recognized that individual rights were its taproot. The notion that ''a man's home is his castle,'' a place free from the intrusion of government, was a time-honored theme—part of both the Code of Hammurabi and the pronouncements of the Roman Emperor Justinian. This notion was one of the inalienable rights with which Englishmen were thought endowed and which the English barons sought to protect, through the Magna Carta, from the ad hoc interference of King John.

The concept of inalienable rights infused the colonists' understanding of liberty. It can be seen in diverse writings, from Patrick Henry's rousing appeal for self-determination in the Parsons' Cause case of 1763 to the claim of the Declaration of Independence that ''all Men are created equal, that they are endowed by their Creator with certain unalienable Rights. . . .'' More than a desire for independence or equality, the idea that made America a reality and continues to make America great is that individual rights are God-given and unalienable and that government should be neither more nor less than man's collective expression of those rights. That is the contract, the foundation upon which America was imagined. It is designed to protect individuals—their persons, homes, property, speech, worship, associations, and privacy—from the tyranny of government by the majority.

Yet, the Fourth Amendment reflected more than a generalized notion of inalienable rights. It was a specific response to the British government's pre-constitutional violation of colonists' individual rights through the use of ''Writs of Assistance.'' The writs were general, universal, perpetual, and transferable search warrants used to enforce smuggling laws so the cash-strapped British crown could wring revenue from the colonies to satisfy the crushing debt of a worldwide empire. They authorized ''all and singular justices, sheriffs, constables, and all other officers and subjects'' to enter homes and businesses at will—ostensibly in search of smuggled items—and to seize virtually any property without accounting or recompense. Writs of Assistance blatantly disregarded personal privacy and offended basic civil liberties, as they were understood by colonial times. Not only were the writs broad and intrusive but many of the colonists believed they had been outlawed in Britain—that only the colonists were subject to such intrusions.

The infringement on personal privacy and property rights represented by the Writs of Assistance was so outrageous that, in 1761, it prompted Boston attorney James Otis, a loyal officer of King George III, to resign his position as an advocate general in the vice admiralty court. Subsequently, he was commissioned by Boston merchants to make their case against renewal of the writs. Otis's stirring five-hour argument indicted the expansion of government authority in violation of the individual rights of British subjects. ''It appears to me (may it please your honours) the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English lawbook.'' Otis's argument in the Writs of Assistance case hinged on several major points, one of which was the invocation of the ancient notion regarding the sanctity of the home. Otis argued that householders would reduced to servants under the writs because their homes would subject to search at any time: ''Now one of the most essential branches of English liberty is the freedom of one's house. Man's house is his castle; and while he is quiet, he is as well guarded as a prince in his castle. This writ, if it should I declared legal, would totally annihilate this privilege.''

John Adams, then a young lawyer, was in the courtroom hear Otis's argument. Fifty-six years later, in a letter to a colleague, the founding father and America's second president recalled the impassioned defense of liberty as a transcendent moment on the path to revolution: ''Then and there, the child Independence was born.''

Also born that day, and reared to maturity by Adams and many others, was a critical element of America's constitutional foundation—the commitment to protect ''the freedom of one house,'' which became the Fourth Amendment. The idea that those rights transcend the needs of any particular time and place is embedded in our jurisprudence. Justice Robert Jackson wrote:

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and

other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

With those words, the U.S. Supreme Court struck down the widely popular practice, adopted in a burst of patriotism during World War II, of requiring public school students to salute the American flag. Writing for the majority, Justice Jackson crystallized the argument for protecting most vigorously the least popular of our individual rights in the overheated political climate of the moment. While public displeasure served as a natural defense of liberty against the Writs of Assistance once Otis sounded the alarm, the Constitution and Bill of Rights institutionalized protection of minority rights from majority will and created a foundation for individual liberty. The test of such a foundation is how firmly it is reinforced against time and tides.

II. ''SNEAK-AND-PEEK'' WARRANTS PRIOR TO THE USA PATRIOT ACT

Just as the British crown felt compelled, in the interest of empire, to sacrifice the rights of citizens remote from the seat of government, section 213 of the PATRIOT Act, in the name of fighting terrorism, deprives Americans of the right to be ''as well guarded as a prince in his castle.'' Section 213 of the PATRIOT Act greatly expands what already was constitutionally questionable authority for delayed notification of the execution of search warrants.

Prior to the PATRIOT Act, the Federal Rules of Criminal Procedure established the framework for the execution and return of warrants. Rule 41(f) requires that the officer executing the warrant enter the date and time of its execution on its face. It further requires that an officer present at the search prepare and verify an inventory of any property seized. Moreover, Rule 41(f) provides that the officer executing the warrant ''give a copy of the warrant and a receipt for the property taken to the person from whom or from whose premises, the property was taken'' or ''leave a copy of the warrant and receipt at the place where the officer took the property.'' Congress recognized an extremely limited exception to the notification requirements under certain circumstances where notification would endanger the life or physical safety of an individual, would result in flight from prosecution, destruction of evidence, or intimidation of witnesses, or would otherwise jeopardize an investigation.

The case law regarding surreptitious searches was unsettled at the time the USA PATRIOT Act was adopted. The U.S. Supreme Court never directly addressed the constitutionality of broad surreptitious search provision. In Berger v. New York, the Court struck down New York's wiretapping statute because it lacked a number of procedural safeguards to limit the intrusiveness of wiretapping. Among the statute's deficiencies was that it had no requirement for notice. And, in contrast to other wiretapping statutes, the New York provision did not make up for the deficiency by requiring a showing of exigent circumstances to justify the lack of notice. However, in Dalia v. United States, the Court refused to hold all surreptitious searches per se unconstitutional. Rather, the Court reasoned that under some circumstances, surreptitious searches could be authorized where such searches were reasonable, such as where they were supported by a warrant.

On this landscape, the federal circuit courts addressed the constitutionality of delayed notification of searches. In United States v. Freitas, the Ninth Circuit held that a warrant that failed to provide for notice within a ''reasonable, but short time'' after the surreptitious entry was constitutionally defective. The Freitas court held that a delay in notification should not exceed seven days, except when supported by a ''strong showing of necessity.''

Even courts upholding delayed notification of search warrants have imposed significant limitations on such searches. In United States v. Villegas, the Second Circuit reasoned:

Though we believe that certain safeguards are required where the entry is to be covert and only intangible evidence is to be seized, we conclude that appropriate conditions were imposed in this case. Certain types of searches or surveillances depend for their success on the absence of premature disclosure. The use of a wiretap or a ''bug,'' or a pen register, or a video camera would likely produce little evidence of wrongdoing if the wrongdoers knew in advance that their conversations or actions would be monitored. When non-disclosure of the authorized search is essential to its success, neither Rule 41 nor the Fourth Amendment prohibits covert entry.

The Second Circuit determined that a number of safeguards applied to surreptitious searches. First, the court noted that if tangible evidence was seized during the search, officers must leave an inventory of the property taken at the location or must provide the inventory to the owner of the searched premises. Additionally, the court concluded that, with regard to electronic surveillance, the requirements of federal wiretapping laws provided significant safeguards. The court further reasoned that the safeguards of the federal wiretapping statute also apply by analogy to video surveillance. Even with regard to surreptitious entries in which no tangible property is seized, the Second Circuit held that law enforcement officers must establish that there is a reasonable necessity for the delay of notice and must provide notice within a reasonable, but short, period of time after the search. Although the Villegas court did not adopt the seven-day limitation of Freitas, the court did conclude that, as an initial matter, delays of longer than seven days should not be authorized.

While there is a paucity of case law on the general questions of whether and when notice of the execution of a search required, significant authority also establishes the closely related notion that law enforcement officials must knock and announce themselves before executing a search warrant. Even before American independence, British law required law enforcement officials to knock and announce themselves before executing a search warrant. The United States Supreme Court has recognized that whether law enforcement officers knock and announce themselves is a factor to be considered in determining whether a search is reasonable. The Court's reasoning was based substantially on the notion that government officials must provide notice before entering a person's home. The Court acknowledged that this notion formed part of the Framers' understanding of what constituted a reasonable search. While the Court has recognized an exigency exception to the ''knock and announce'' rule, it has not overruled it.

Thus, at the time the PATRIOT Act was adopted, no federal court had authorized unlimited use of ''sneak-and-peek'' warrants. Moreover, even those courts authorizing limited surreptitious entry had placed significant limitations on such searches.

III. ''SNEAK-AND-PEEK'' WARRANTS UNDER THE USA PATRIOT ACT

No federal court has ever confronted the virtually unlimited authority to dispense with notice contained in the PATRIOT Act. Section 213 eliminates the time limits for notification under prior federal law, makes judicial review of the necessity of delayed notification perfunctory and so loosens the standard for delayed notification as to render it meaningless. It strikes at the foundation of liberty embodied in the Fourth and Fifth Amendments and at the essential protections of probable cause, due process, and separation of powers.

Section 213 amends 18 U.S.C. §3103a to add the following language:

''With respect to the issuance of any warrant or court order under this section, or any other rule of law, to search for and seize any property or material that constitutes evidence of a criminal offense in violation of the laws of the United States, any notice required, or that may be required, to be given may be delayed if (1) the court finds reasonable cause to believe that providing immediate notification of the execution of a warrant may have an adverse result (as defined in section 2705);

''(2) the warrant prohibits seizure of any tangible property, any wire or electronic communication (as defined in section 2510), or, except as expressly provided in chapter 121, any stored wire or electronic information, except where the court finds reasonable necessity of the seizure; and (3) the warrant provides for the giving of such notice within a reasonable period of its execution, which period may thereafter be extended by the court for good cause shown.''

Section 213 changes prior federal law regarding notification of searches in several important ways. First, it permits delayed notification of a search in any case in which the government demonstrates that one of several adverse factors ''may'' occur, regardless of whether the investigation involves terrorism or the gathering of foreign intelligence. The adverse factors justifying delayed notice are that notification would endanger the life or physical safety of an individual, would result in flight from prosecution, destruction of evidence, intimidation of witnesses, or would otherwise jeopardize an investigation or unduly delay a trial.

This standard is so open-ended that these invasive warrants could be obtained as a matter of course; the government need only state that notification of a search ''may'' ''seriously jeopardize'' an investigation. Although the standard for delay was part of pre-PATRIOT law, the earlier statute was limited to covert seizures of electronic communications held in third-party storage.

The nature of criminal investigation is that unpredictable things may happen. It is always conceivable that the target of a search may act in an unpredictable fashion when he or she is notified of the warrant and thereby jeopardize an investigation. As a result, section 213 places virtually no limit on ''sneak-and-peek'' searches.

The second distinction between the PATRIOT Act and prior law is that officers may seize tangible property using a covert warrant under the PATRIOT Act without leaving an inventory of the property taken. Thus, the PATRIOT Act actually authorizes ''sneak-and-steal'' warrants. The law requires only that the warrant ''provides for the giving of such notice within a reasonable period of its execution, which period may thereafter be extended by the court for good cause shown.''

Again, prior statutory provisions for delayed notification applied only to electronic communications in third-party storage. The cases dealing with delayed notification authorized surreptitious entry but required officers to leave an inventory if property was taken. Although the approach of courts like the Second Circuit in Villegas, in our view, did not properly limit the use of ''sneak-and-peek'' warrants, it is significantly more limited than the PATRIOT Act approach.

Third, section 213 permits delayed notification even where the government seizes electronic information, so long as the court issuing the warrant finds ''reasonable necessity'' for the seizure. Thus, if officers get a warrant under federal wiretapping statutes, they still must comply with a complex set of safeguards. For all other warrants involving electronic communications—those involving video or Internet surveillance, for example—delayed notification under the PATRIOT Act applies.

Fourth, section 213 places no express limit on the length of the delay. Instead, it authorizes delay for a ''reasonable period'' of time and permits extensions of the delay for ''good cause shown.'' Section 213 opens the door for secret searches extending over months or even years without the knowledge of the target of the search. Such delays render notice meaningless. Although the judge in any particular case may impose a specific deadline by which notice must be given, the statute does not require such a deadline. Where the warrant itself does not impose specific time limits, judicial review of the necessity of continuing delay in notification is impaired. No concrete timeframe triggers a governmental duty to justify continued delay. Because the target of the search is, by definition, unaware of the search, he or she cannot be expected to seek review of the need for continued delay. Courts would have the opportunity to review the necessity of delay only after the fact, while also under the pressure to prosecute and admit evidence obtained through the notice-less search.

Finally, section 213 extends the availability of ''sneak-and-peek'' warrants far beyond the PATRIOT Act's stated purpose of fighting terrorism. The provision contains no limitation on the types of cases in which a covert warrant could be used.

CONCLUSION

The threatening nature of section 213 is not obvious, and thus, it is more dangerous to the cause of preserving liberty. If the public is blinded by fear of terrorism or ignorance of what is at risk, section 213 has the potential to become the insidious mechanism of steady but discernible erosion in the foundation of our freedoms. Section 213 takes the exception and makes it the rule—in fact, makes it the law of the land. It gives broad statutory authority to secret searches in virtually any criminal case. Even if the Supreme Court upholds the constitutionality of such practices, Congress can—and should—limit them by statute. In such cases, justice delayed truly is justice denied.

Terrorism is a scourge that must be addressed. Government has a fundamental duty to protect its people from enemies, foreign or domestic. Fear of terrorism, or anything else, deprives us of free choice as surely as does tyranny; indeed, terrorism is an instrument of tyranny. We must not, however, allow fear to erode the constitutional foundation of our freedom. We can no more gain real security by being less free than we can gain wealth or wisdom or anything else of value. No such trade-off is possible. That is the definition of ''unalienable''—rights with which we were endowed by our Creator, and which therefore cannot be repudiated or transferred to another. Our Constitution recognizes that higher law, and we ignore it at our peril.

We now are engaged in a national crisis, an unconventional war in which our surreptitious enemies use the camouflage of a free society's commitment to privacy and diversity to achieve their goals. Our government is justified in adapting its law enforcement methods to the new threat, but we must take care to ensure those methods are consistent with the timeless principles of our founding. To do less is to sanction a dangerous expansion of governmental authority and a corresponding reduction of personal privacy.

Our body of laws serves as both a connecting mortar and a protective barrier between the foundation of our Constitution and the structure of our government. Laws are necessary for applying constitutional principles to the endless variety of everyday life. They join the abstract and the concrete. They enable us to safely explore our freedom and realize the potential of liberty.

However, when laws reach beyond limits imposed by the Constitution, when they grant too much power to government and too little deference to the source of that power, they cease to connect or protect. If unchecked, these laws can destroy the foundation of individual rights. Proponents contend that we have nothing to fear from section 213 or any other provision of the PATRIOT Act. This may be true, as long as the public is as vigilant as the American colonists were after Otis inflamed their passions regarding the Writs of Assistance. But can we trust that the law will be used as judiciously, with as much care to protecting civil liberties, once the public's attention has turned to other matters?

The concern is not new or unique to the PATRIOT Act. Few of our Founding Fathers had greater faith in his fellow man than Thomas Jefferson. Yet that faith had its limits. In the Kentucky Resolutions, Jefferson wrote:

[I]t would be a dangerous delusion were a confidence in the men of our choice to silence our fears for the safety of our rights: that confidence is everywhere the parent of despotism-free government is founded in jealousy, and not in confidence; it is jealousy and not confidence which prescribes limited constitutions, to bind down those whom we are obliged to trust with power: that our Constitution has accordingly fixed the limits to which, and no further, our confidence may go . . . .

Due process. Probable cause. Those are the constitutional limits within which we ''bind down those whom we are obliged to trust with power'' and preserve our individual rights. A law that sets those limits aside, or obfuscates them in vague statutory language and legalistic definitions, has the potential for eroding the foundation of freedom as surely as terrorists have the potential for breaching the ramparts of our security. An informed people and a vigilant and responsive Congress are the keys to guaranteeing that our rights to security and freedom are ensured. They are essential to protecting the foundation of liberty and preserving each individual's God-given role as the architect of his or her own destiny. As John Stuart Mill warned:

A people may prefer a free government, but if, from indolence, or carelessness, or cowardice, or want of public spirit, they are unequal to the exertions necessary for preserving it; if they will not fight for it when it is directly attacked; if they can be deluded by the artifices used to cheat them out of it; if by momentary discouragement, or temporary panic, or a fit of enthusiasm for an individual, they can be induced to lay their liberties at the feet even of a great man, or trust him with powers which enable him to subvert their institutions; in all these cases they are more or less unfit for liberty.

## TO HONOR MR. JIM BRODIE

### HON. RAÚL M. GRIJALVA

OF ARIZONA

IN THE HOUSE OF REPRESENTATIVES

*Wednesday, May 18, 2005*

Mr. GRIJALVA. Mr. Speaker, It is with great honor that I recognize Jim Brodie. Jim was a respected member of the community, providing tireless hours to the youth, community and Habitat for Humanity.

Jim was a lifelong union ironworker, working in industrial and commercial construction. Upon retirement, he continued his service to our community by assisting Habitat for Humanity of Tucson in the construction and later supervision of projects throughout the Old Pueblo.

The energy and expertise he provided for Habitat for Humanity, its volunteers and its clients was unprecedented. He was a gifted leader, working on multiple projects and at various stages of the products. Among his many talents was the ability to work with young and old alike. This is especially noted with his success in working on the High School Build Program, proving to be a mentor, role model, and friend to the students he supervised.

For the last 8 years of his life, Jim's work with the Habitat High School Build programs inspired the youth, their parents, and their teachers. Although initially hesitant to work the students, his ability to motivate and provide guidance came to him second nature. He was a natural teacher, impacting multiple lives and instilling pride in the lives that he impacted.

Jim's role in supervising the Habitat High School Build programs, which included five schools and the State Prison programs, was unique. Furthermore, it was a true gift to our community and youth. He worked closely with the high school teachers to develop important mentoring relationships with students. His dedication went well beyond the building projects and will influence students for years to come.

His legacy includes the 40 families that now live in Habitat homes built by students participating in the High School Build program. Jim was admired by all who met or heard of him. His life and work is an inspiration to us all.

## THE FAIR MINIMUM WAGE ACT OF 2005

### HON. GEORGE MILLER

OF CALIFORNIA

IN THE HOUSE OF REPRESENTATIVES

*Wednesday, May 18, 2005*

Mr. GEORGE MILLER of California. Mr. Speaker, today, together with 100 of my colleagues, we are introducing legislation to raise the Federal minimum wage from $5.15 to $7.25 over 2 years. Senator EDWARD KENNEDY is introducing identical legislation in the Senate. Two reports that are also being released today, one by the Center for Economic and Policy Research and one by the Children's Defense Fund, make obvious the importance of raising the minimum wage for workers, children, and families.

American workers are long overdue for a raise. Real wages are actually declining for the first time in more than a decade, while