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The Fatal Flaws of the "Sneak and Peek" Statute and How to Fix It

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ABSTRACT

In the USA PATRIOT Act, Congress authorized delayed notice search warrants—warrants authorizing a "sneak and peek" search, in which investigators conduct covert searches, notifying the occupant weeks or months after the search. These warrants also sometimes authorize covert seizures—a "sneak and steal" search—in which investigators seize evidence, often staging the scene to look like a burglary.

Covert searches invade the privacy of the home and should be used only in exceptional cases. The current legal rules governing delayed notice search warrants are conceptually flawed. The statute uses a legal doctrine—"exigent circumstances"—that does not make logical sense when applied to covert searching of physical spaces because it permits investigators to manufacture a justification for a covert search in almost any case. Covert searches without sufficient justification run afoul of the Fourth Amendment's "rule requiring notice" and are constitutionally unreasonable.

When confronted with a request for a covert search, courts should ask, "Why is it so important to do a covert search now, while the investigation is still ongoing, rather than a public search later, once police are ready to seize the evidence and arrest the suspects?" But the statute does not pose that question. Instead, the statute merely prompts courts to ask, "Assuming police conduct a search now but choose not to arrest anyone or seize the relevant evidence, will giving notice of the search likely lead to the destruction of evidence, escape of suspects, or otherwise seriously jeopardize the ongoing investigation?" Viewed this way, it is readily apparent that the answer will almost always be yes.

Stated differently, courts should be asking whether a proposed covert search is necessary—whether conducting a covert search is the

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only way to obtain evidence that cannot reasonably be obtained through conventional (and less invasive) investigative techniques.

This Article explains this conceptual error and addresses other flaws in the current statute. It then proposes new legislation that would fix the problems and properly regulate the invasive practice of covert searches and seizures.

Contents

INTRODUCTION

In the USA PATRIOT Act, Congress gave the executive a variety of tools to fight terrorism. One tool was the delayed notice search warrant—a warrant authorizing a "sneak and peek" search, in which investigators could conduct covert searches, notifying the occupant weeks or months after the search.[1] These warrants also sometimes authorize covert seizures—a "sneak and steal" search—in which investigators seize evidence during a covert search, often staging the scene to look like a burglary to keep the government seizure a secret.[2]

From the start, these "sneak and peek" warrants were not limited to terrorism investigations—they apply to any criminal investigation.[3] The statute permits a conventional search—with notice to the occupant—to be converted to a covert search if the police can show exigent circumstances.[4]

This approach is fundamentally flawed. Regulating covert searches through the rubric of "exigent circumstances" constitutes a basic conceptual error. The statute effectively authorizes police to opt for a covert search, rather than a traditional search, whenever they find it convenient or helpful. The current standard gives police almost unlimited power to manufacture a justification for a covert search. This plainly was not Congress's intent in the USA PATRIOT Act.

When confronted with a request for a covert search, courts should ask, "Why is it so important to do a covert search now, while the investigation is still ongoing, rather than a public search later, once police are ready to seize the evidence and arrest the suspects?" But the

1. *See* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Pub. L. No. 107-56, 115 Stat. 272, § 213 (2001). *See also* James B. Comey, *Fighting Terrorism and Preserving Civil Liberties*, 40 U. RICH. L. REV. 403, 410 (2006) (defending "sneak and peek" searches).

2. USA PATRIOT Act § 213. *See* 147 CONG. REC. S20,683 (daily ed. Oct. 25, 2001) (statement of Sen. Leahy) (referring to seizure provision as "sneak and steal"); Brett A. Shumate, *From "Sneak and Peek" to "Sneak and Steal": Section 213 of the USA Patriot Act*, 19 REGENT U. L. REV. 203 (2006).

3. *See* USA PATRIOT Act § 213; *Admin.'s Draft Anti-Terrorism Act of 2001: Hearing Before the H. Comm. on the Judiciary*, 107th Cong. 39–41 (2001) [hereinafter *Admin.'s Draft*] (statements of Rep. Bachus and Assistant Att'y Gen. Michael Chertoff) (noting that § 352 of the proposed legislation—now § 213 of the USA PATRIOT Act—applied to all criminal investigations, not just terrorism investigations); Jonathan Witmer-Rich, *The Rapid Rise of Delayed Notice Searches, and the Fourth Amendment "Rule Requiring Notice,"* 41 PEPP. L. REV. 509, 526 (2014) (detailing the legislative history of the delayed notice search warrant provision).

4. *See* 18 U.S.C. § 3103a (2013) (permitting a covert search if notice will cause an "adverse result"); 18 U.S.C. § 2705 (2013) (defining "adverse result" to effectively mean exigent circumstances).

statute does not pose that question. Instead, the statute merely prompts courts to ask, "Assuming police conduct a search now but choose not to arrest anyone or seize the relevant evidence, will giving notice of the search likely lead to the destruction of evidence, escape of suspects, or otherwise seriously jeopardize the ongoing investigation?" Viewed this way, it is readily apparent that the answer will almost always be yes.

Stated differently, courts should be asking whether a proposed covert search is necessary (as that term is used in the context of wiretapping under Title III)—whether conducting a covert search is the only way to obtain evidence that cannot reasonably be obtained through conventional (and less invasive) investigative techniques.

The "sneak and peek" statute is thus plagued with a fundamental error. By choosing the concept of "exigency" rather than "necessity," Congress failed to achieve its stated goal of creating a uniform national standard that would provide clear legal authority for covert searching, while limiting the practice to unusual cases of exceptional importance.[5] In 2005, Congress passed a reporting requirement meant to track the number of "sneak and peek" searches conducted annually.[6] Unfortunately, the data on "sneak and peek" searches appear to include information on other types of searches—such as GPS tracking, cell phone location searches, and covert searches of e-mail—making it impossible to determine the frequency of "sneak and peek" searches.[7]

By creating such a lenient standard, Congress also created constitutional problems. A covert search represents a deviation from the Fourth Amendment's "rule requiring notice"—the presumption that contemporaneous notice is required for a search to be "reasonable."[8] The current statutory standard fails to adequately justify

5. *See Admin.'s Draft, supra* note 3, at 41. In a White Paper issued in 2004, the DOJ stated that section 213 of the USA PATRIOT Act "simply established a uniform national standard" for delayed notice search warrants and that it permits delayed notice warrants "only in extremely narrow circumstances." U.S. DEP'T OF JUSTICE, DELAYED NOTICE SEARCH WARRANTS: A VITAL AND TIME-HONORED TOOL FOR FIGHTING CRIME 3–4 (2004), *available at* http://www.justice.gov/sites/default/files/dag/legacy/2008/10/17/patriotact213report.pdf [hereinafter DNSW White Paper].

6. *See* Witmer-Rich, *supra* note 3, at 530–31 (explaining the reporting requirement); H.R. REP. NO. 109-333, at 20 (2005) (requiring judges to report all applications for delayed notice search warrants, the number granted or denied, the period of delay, and the offenses specified in the warrant application).

7. *See* Witmer-Rich, *supra* note 3, at 531–49 (explaining the flaws in the reporting requirement and why the reports produced fail to provide meaningful information on the use of "sneak and peek" warrants).

8. *See* Wilson v. Arkansas, 514 U.S. 927, 929 (1995) ("[T]he common law of search and seizure recognized a law enforcement officer's authority to

deviating from this Fourth Amendment baseline, rendering covert searches under the existing statute unreasonable and therefore unconstitutional.

Covert searches and seizures must be effectively regulated because they impose serious privacy intrusions. Covert government searches of homes and businesses intrude into the heart of Fourth Amendment protection—the privacy and sanctity of the home. The practice of covert searching diminishes the privacy of the entire community because no one knows when or if the government has searched their private spaces. As Justice Sotomayor has recently pointed out, "[a]wareness that the Government may be watching chills associational and expressive freedoms."[9]

Covert seizures carry additional risks. When police want to both seize evidence and keep the search and seizure secret, they ordinarily stage the seizure to resemble a burglary.[10] Thus, the occupants believe they have been burglarized by unknown criminals rather than targeted by a government criminal investigation. If the occupants are violent criminals, there is a serious risk that they will retaliate against someone they suspect of having committed the burglary. The current "sneak and peek" statute, which authorizes covert seizures as well, does not appear to recognize this risk and does nothing to force investigators and courts to justify and mitigate the risk of harm to third parties.

It is not surprising that the "sneak and peek" statute—enacted quickly, as one small part of the USA PATRIOT Act, and with minimal deliberation—is conceptually flawed. This Article explains the core problems with the statute and proposes new legislation that would fix these errors. Grounding covert searches in the concept of "necessity" rather than just "exigency" would effectively limit this invasive practice and would go a long way toward rendering covert searching constitutionally reasonable.

Part I examines both the costs and benefits of covert searching with delayed notice search warrants. Part II examines the concepts of "necessity" and "exigent circumstances," surveying their constitutional origins and differences and establishing a conceptual framework for evaluating the sneak and peek statute. Part III uses this framework to explain why the rules set forth in the current statute—18 U.S.C. § 3103a—are fatally flawed. Section 3103a uses the concept of "exigent circumstances"—a doctrine that totally fails to effectively regulate and

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break open the doors of a dwelling, but generally indicated that he first ought to announce his presence and authority. . . . [This] principle forms a part of the reasonableness inquiry under the Fourth Amendment."); Read v. Case, 4 Conn. 166, 170 (1822) (referring to this common law principle as the "rule requiring notice"); Witmer-Rich, *supra* note 3, at 570–85.

9. United States v. Jones, 132 S. Ct. 945, 956 (2012) (Sotomayor, J., concurring).

10. *See* Shumate, *supra* note 2, at 222–31.

limit the practice of covert searching with delayed notice search warrants. Because § 3103a permits covert searching without requiring a sufficient showing to justify bypassing the Fourth Amendment baseline of notice, covert searching under § 3103a amounts to an unreasonable search.

Part IV proposes a solution, invoking the concept of "necessity"—that covert searching should be permitted only as a last resort when conventional Fourth Amendment search techniques are not sufficient. Courts should require investigators to make this "necessity" showing in order to conclude that a delayed notice search is "reasonable" under the Fourth Amendment. Part IV also suggests additional limitations to covert searching with delayed notice warrants, such as requiring prior authorization from a high-level DOJ official.

Part V turns to the unique dangers involved in covert seizures—"sneak and steal" cases. Part V explains how "sneak and steal" searches create serious risks of physical danger to innocent third parties—risks not recognized or regulated by the current statute.

Part VI proposes specific revisions to § 3103a that would effectively regulate the practice of covert searching and covert seizures, limiting covert searches to cases of true necessity and taking into account the unique dangers posed by delayed notice search warrants. Covert searches and seizures under the new limitations of this statute would be reasonable under the Fourth Amendment.

I. COVERT SEARCHES OF PHYSICAL SPACES: COSTS AND BENEFITS

Before analyzing the delayed notice statute, § 3103a, it is important to consider the costs and benefits of covert searching. At the outset, a clarification is in order: Delayed notice searches occur in several different contexts. During the debate over § 352 of the USA PATRIOT Act,[11] legislators focused on covert searching in the traditional Fourth Amendment context: searches of physical spaces, like homes and businesses.[12] But § 3103a creates a mechanism for delaying notice for

11. The delayed notice search provisions originally appeared in § 352 of the proposed legislation. Later versions moved the delayed notice search provisions to § 213. USA PATRIOT Act § 213.

12. *See, e.g.*, *Admin.'s Draft*, *supra* note 3, at 40 (statement of Michael Chertoff, Assistant Att'y Gen., U.S. Dep't of Justice, Criminal Div.) ("I can tell you from my own personal experience that there are circumstances in which you need to be able to go into a location and search . . . [b]ut you cannot give notice or wind up alerting people who may be very dangerous."); *id.* at 41 (statement of Rep. Spencer Bachus) ("[Y]ou're applying this [delayed notice] to all cases where you want to search someone's home."); 147 CONG. REC. S19,502 (daily ed. Oct. 11, 2001) (statement of Sen. Patrick Leahy) ("Normally, when law enforcement officers execute a search warrant, they must leave a copy of the warrant

any type of search warrant, not just warrants involving searches of physical spaces. For example, delayed notice search warrants are sometimes used to conduct GPS monitoring, to obtain cell phone location information, or to obtain e-mail or other electronic data from third-party service providers.[13]

At one level, all of these searches share a similarity: all involve the government obtaining information with a warrant that expressly provides that the search in question shall be conducted secretly and not disclosed until some later date. In another sense, there is a fundamental difference between covert searches of physical spaces, on the one hand, and covert government surveillance or data-gathering from nonphysical sources, on the other.

A government search of a physical space, such as a home, is the paradigmatic Fourth Amendment intrusion.[14] There is no dispute that these types of searches implicate Fourth Amendment privacy interests. And, as noted below, searches of physical spaces that are conducted covertly raise a specific set of concerns related to the privacy and sanctity of the home.

In contrast, government surveillance—such as GPS tracking or obtaining cell phone location information—raises a related but distinct set of concerns. Until recently, this type of surveillance was not thought to implicate Fourth Amendment privacy interests at all.[15] In recent years, courts have begun to suggest that some forms of covert tracking

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and a receipt for all property seized at the premises searched. Thus, even if the search occurs when the owner of the premises is not present, the owner will receive notice that the premises have been lawfully searched pursuant to a warrant rather than, for example, burglarized."); 147 CONG. REC. S20,702 (daily ed. Oct. 25, 2001) (statement of Sen. Russell Feingold) ("Notice is a key element of fourth amendment protections. . . . If . . . the police have received permission to do a 'sneak and peek' search, they can come in your house, look around, and leave, and may never have to tell you that ever happened. That bothers me. I bet it bothers most Americans.").

13. *See* Witmer-Rich, *supra* note 3, at 539–49 (explaining how § 3103a applies to delayed notice searches of nonphysical spaces).

14. Payton v. New York, 445 U.S. 573, 589–90 (1980) (The language of the Fourth Amendment "unequivocally establishes the proposition that '[a]t 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 instruction.'") (alterations in original) (quoting Silverman v. United States, 365 U.S. 505, 511 (1961)); Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 642–43 (1999) (arguing that even though "modern courts apply the Fourth Amendment to all privately owned property . . . contemporary cases still acknowledge that the house was meant to receive special protection").

15. *See* Witmer-Rich, *supra* note 3, at 542–44, 547–48.

and monitoring do raise Fourth Amendment concerns.[16] The precise boundaries of the Fourth Amendment in this area remain unsettled.

Likewise, government searches of nonphysical spaces—such as obtaining e-mail messages or other electronic data from a third-party service provider—also fall into a Fourth Amendment gray area. For many years, the government was able to covertly obtain much of this information without a search warrant, simply by using a subpoena or court order that did not have to include all the elements of a traditional Fourth Amendment warrant.[17] More recently, courts have begun imposing Fourth Amendment warrant requirements on some of these areas as well.[18]

The focus of this Article is on covert searches of physical spaces. Other forms of covert searching, such as government surveillance and searches of digital information, raise a different set of concerns that fall outside the scope of this Article. My criticisms of the existing delayed notice search warrant statute and my proposals for reform thus focus on the context of covert searches of physical spaces.

A. Covert Searches Impose Serious Privacy Costs and Implicate Core Fourth Amendment Interests.

In a previous article, I argued that covert searching infringes on privacy interests and implicates the Fourth Amendment's protection against "unreasonable" searches and seizures.[19] These concerns show why it is important to reserve covert searching to rare cases of exceptional importance.

Covert searching intrudes directly into the privacy and sanctity of the home, the values at the heart of the Fourth Amendment. "At the

16. *Id.*; *see also* United States v. Jones, 132 S. Ct. 945, 954 (2012) (holding that the installation of a tracking device on a car to conduct GPS location monitoring constitutes a search under the Fourth Amendment); *In re* Application of U.S. for Order Directing a Provider of Elec. Comm. Service to Disclose Records, 620 F.3d 304, 312 (3d Cir. 2010) (citing cases holding that the government must use search warrants to obtain various types of cell phone location data, and cases holding to the contrary); *In re* Application of U.S. for Order Pursuant to 18 U.S.C. § 2703(d), C.R. No. C-13-497M, 964 F. Supp. 2d 674 (S.D. Tex. May 8, 2013) (holding that government was required to show probable cause to obtain historical cell site information and citing cases holding that probable cause and the Fourth Amendment do not apply to historical cell site data and cases holding the contrary).

17. Witmer-Rich, *supra* note 3, at 545.

18. *Id.*; *see also* United States v. Warshak, 631 F.3d 266, 288 (6th Cir. 2010). In *Riley v. California*, the Supreme Court appeared to assume—without squarely addressing the question—that data held by third-party providers on "the cloud" are presumptively protected by the Fourth Amendment. Riley v. California, 134 S. Ct. 2473, 2491 (2014).

19. Witmer-Rich, *supra* note 3.

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."[20] Every government search of the home invades into this protected space, yet the Fourth Amendment does not prohibit all intrusions into the home—only unreasonable ones. As provided by the Fourth Amendment, intrusions into the home are justified when a neutral magistrate finds individual probable cause.[21]

The physical intrusion into the home is the same whether a search is conducted covertly or with notice to the occupant—and that intrusion is justified by the warrant, whether it is a delayed notice warrant or not. But the covert nature of an otherwise justified search raises additional privacy concerns independent of the fact of the physical search.

A covert search causes feelings of distress and loss of privacy when the occupants learn the government secretly searched through their home. In *United States v. Freitas*,[22] the Ninth Circuit stated that "surreptitious searches and seizures of intangibles strike at the very heart of the interests protected by the Fourth Amendment" because "[t]he mere thought of strangers walking through and visually examining the center of our privacy interest, our home, arouses our passion for freedom as does nothing else."[23]

A homeowner suffers a different loss of privacy and control over their property when that property is searched covertly than when it is searched in the homeowner's presence. A homeowner who is present during a search can see what the police are doing, where they search, what, if anything, they take, and what, if any, damage they cause.[24] A

20. Silverman v. United States, 365 U.S. 505, 511 (1961). *See also* Semayne's Case, (1604) 77 Eng. Rep. 194, 195 (K.B.) (referring to the ancient common law principle that "the house of every one is to him as his . . . castle and fortress, as well for his defence [sic] against injury and violence, as for his repose").

21. *See* Georgia v. Randolph, 547 U.S. 103, 123 (2006) (Stevens, J., concurring) (citing Semayne's Case) ("At least since 1604 it has been settled that in the absence of exigent circumstances, a government agent has no right to enter a 'house' or 'castle' unless authorized to do so by a valid warrant.").

22. United States v. Freitas, 800 F.2d 1451 (9th Cir. 1986).

23. *Id.* at 1456.

24. Because police have the power to detain occupants during a search authorized by a warrant, the opportunity to observe the entire search may be substantially limited. *See* Michigan v. Summers, 452 U.S. 692, 705 (1981) ("[A] warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted."). Nevertheless, an occupant present during a search still has some limited opportunity to see

homeowner who later learns of a covert search can only imagine what the search involved and which parts of her private space have been violated.

A covert search also invites abuse. As early as 1628, Sir Edward Coke warned that "if a man's house could be searched while he was confined without being told the cause, 'they will find cause enough'"[25]—perhaps inventing evidence if it is not present.

Finally, the practice of covert government searches exacts what might be called a "privacy tax" on the entire community. When a government conducts covert searches of its own citizens, and citizens begin to learn of that practice, individuals in the community logically begin to wonder whether their home has been secretly invaded. Each person in the community, regardless of whether they have been targeted or not, suffers the uncertainty of not knowing whether the government has violated their privacy.

This uncertainty can have serious repercussions. In a different Fourth Amendment context, Justice Sotomayor recently observed that "[a]wareness that the Government may be watching chills associational and expressive freedoms."[26] In *United States v. Di Re*, the Court explained that "the forefathers, after consulting the lessons of history, designed our Constitution to place obstacles in the way of a too permeating police surveillance, which they seemed to think was a greater danger to a free people than the escape of some criminals from punishment."[27]

Secret government surveillance (of which covert searching is one manifestation) is used by totalitarian governments not merely to find incriminating evidence of dissent, but also to prevent citizens from pursuing dissent in the first place by instilling the fear that big brother is always watching. "[A] totalitarian government engages in systematic, often covert surveillance of its populace, 'penetrating,' in Mill's words, ever 'more deeply into the details of life,' with the object of 'enslaving the soul.'"[28] Professor Neil Richards explains that "[t]he most salient

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what the police are doing and what they are taking—far more so than a person not present during the search.

25. WILLIAM J. CUDDIHY, THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING 602–1791, at 141 (2009) (citing COMMONS DEBATES 1628, at 159 (Robert C. Johnson et al. eds., 1997)).

26. United States v. Jones, 132 S. Ct. 945, 956 (2012) (Sotomayor, J., concurring).

27. United States v. Di Re, 332 U.S. 581, 595 (1948). Justice Sotomayor, quoting *Di Re*, recently recognized "the Fourth Amendment's goal to curb arbitrary exercises of police power to and prevent 'a too permeating police surveillance.'" *Jones*, 132 S. Ct. at 956 (quoting *Di Re*, 332 U.S. at 595).

28. Jed Rubenfeld, *Privacy's End*, in LAW AND DEMOCRACY IN THE EMPIRE OF FORCE 217 (H. Jefferson Powell & James Boyd White eds., 2009) (quoting JOHN STUART MILL, ON LIBERTY 13 (photo. reprint 2002)

harm of surveillance is that it threatens . . . 'intellectual privacy'"—the idea "that new ideas often develop best away from the intense scrutiny of public exposure; that people should be able to make up their minds at times and places of their own choosing; and that a meaningful guarantee of privacy—protection from surveillance or interference—is necessary to promote this kind of intellectual freedom."[29]

These costs of covert searching suggest that the practice should either be forbidden or be permitted only in extraordinary cases, under careful oversight, and only when justified by sufficiently compelling government interests.

B. The DOJ's Examples for Why the Existing Statute Is Needed Are Not Fully Convincing.

Because covert searching involves a serious privacy invasion, the practice requires both a compelling government justification as well as effective oversight and legal constraints. Before turning to evaluate the present constraints, it is important to determine whether there is any sufficiently compelling government interest to justify any practice of covert searching.

There appears to be clear value to investigators in having the option of conducting a covert search—being able to acquire important information (or physical evidence) while continuing the investigation without the knowledge of the suspect. The Department of Justice has argued that covert searching under § 3103a is a "vital aspect" of its counterterrorism and criminal law enforcement efforts.[30]

There are at least two reasons to be somewhat skeptical of this claim. First, in the counterterrorism context, § 3103a is not the only source of covert search authority—investigators can already conduct covert searches under the Foreign Intelligence Surveillance Act (FISA). Thus, in the most compelling context—counterterrorism—§ 3103a is simply an additional tool to already-existing authority. Second, it is instructive to closely examine some of the examples the DOJ itself has given to show why § 3103a is needed. Many of these examples raise

(1859)). A detailed and chilling description of how the fear of constant surveillance in a totalitarian state destroys personal privacy, even within families, appears in Adam Johnson's Pulitzer Prize–winning novel, *The Orphan Master's Son*. Adam Johnson, THE ORPHAN MASTER'S SON (2012).

29. Neil M. Richards, *The Dangers of Surveillance*, 126 HARV. L. REV. 1934, 1945 (2013). *See also* Julie E. Cohen, *What Privacy Is For*, 126 HARV. L. REV. 1904, 1905 (2013) ("Privacy shelters dynamic, emergent subjectivity from the efforts of commercial and government actors to render individuals and communities fixed, transparent, and predictable. It protects the situated practices of boundary management through which the capacity for self-determination develops.").

30. DNSW White Paper, *supra* note 5, at 3.

some doubts about how often covert searching under § 3103a is a critical law enforcement tool.

In the end, there may be some cases in which covert search authority is justified, but that authority should be substantially curtailed to limit covert searching to truly extraordinary circumstances of compelling government necessity.

1. FISA Already Authorizes Covert Searches in Some Cases Involving International Terrorist Threats.

While the "sneak and peek" statute was never limited to terrorism investigations, the DOJ has consistently invoked counterterrorism as the area in which covert search authority is most important and compelling. Speaking of the USA PATRIOT Act as a whole, Attorney General John Ashcroft testified on September 24, 2001, that the proposed legislation would "provide law enforcement with the tools necessary to identify, dismantle, disrupt and punish terrorist organizations before they strike again."[31] Deputy Attorney General James Comey, testifying during the 2004 debate over the PATRIOT Act reauthorization, stated that the PATRIOT Act "provided our nation's law enforcement, national defense, and intelligence personnel with enhanced and vital new tools to prevent future terrorist attacks and bring terrorists and other dangerous criminals to justice."[32] As for delayed notice warrants in particular, Comey testified as follows:

> Section 213 of the PATRIOT Act codified and made nationally consistent an existing and important tool by expressly authorizing courts to issue delayed notification search warrants. Court-authorized delayed-notice search warrants are a vital aspect of the Justice Department's strategy of prevention—detecting and incapacitating terrorists before they are able to strike.[33]

Section 213 is not the only source of covert search authority in counterterrorism investigations. The Foreign Intelligence Surveillance Act (FISA) authorizes covert physical searches of terrorists operating on behalf of foreign terrorist organizations. FISA, usually discussed in

31. *Admin.'s Draft*, *supra* note 3, at 4 (statement of John Ashcroft, Att'y Gen. of the United States).

32. *A Review of Counter-Terrorism Legislation and Proposals, Including the USA PATRIOT Act and the SAFE Act: Hearing Before the S. Comm. on the Judiciary*, 108th Cong. 154 (2004) [hereinafter *Counter-Terrorism Legislation and Proposals*] (statement of James Comey, Deputy Att'y Gen. of the United States).

33. *Id.* at 157.

the context of electronic surveillance, contains express statutory authority for covert searches of physical spaces as well.[34]

Section 1822 authorizes federal agents to conduct physical searches based either on the authorization of the President or based on an order from the FISA Court.[35] These FISA physical searches are presumptively covert—there is no provision requiring contemporary notice of the search. On the contrary, the law specifically empowers federal agents to obtain any necessary information or assistance from third parties (such as landlords) as may be "necessary to accomplish the physical search in such a manner as will protect its secrecy . . . ."[36]

The statute provides for notice to the occupant only in two circumstances: (1) where the search involved the residence of a United States person, notice shall be given only if and when the Attorney General "determines there is no national security interest in continuing to maintain the secrecy of the search"[37]; or (2) when prosecutors intend to use FISA-obtained evidence against a defendant in a criminal prosecution, prosecutors must give notice to the defendant of the search and its fruits.[38]

To obtain a FISA physical search order, federal agents must show, among other things, that "the target of the physical search is a foreign power or an agent of a foreign power"[39]—terms that include those working on behalf of foreign governments and foreign terrorist organizations.[40] The search must be to obtain "foreign intelligence information"[41]—a term that includes information relating to international terrorism or the national security of the United States.[42]

Thus, in the context of terrorist threats from persons acting within the United States on behalf of a foreign terrorist organization or foreign government, FISA authorizes covert searches on the basis of

34. Part of Chapter 36 of Title 50 relates to "physical searches." *See generally* Daniel J. Malooly, Note, *Physical Searches Under FISA: A Constitutional Analysis*, 35 AM. CRIM. L. REV. 411 (1998).

35. 50 U.S.C. § 1822(a) (2012) (Presidential authorization); § 1822(b) (2012) (FISA Court orders).

36. 50 U.S.C. § 1824(c)(2)(B) (2012). *See also* 50 U.S.C. § 1822(a)(4) (2012) (providing the same authority for searches ordered by the Attorney General acting on presidential authorization rather than a FISA Court order).

37. 50 U.S.C. § 1825(b) (2011).

38. 50 U.S.C. § 1825(e) (2011).

39. 50 U.S.C. § 1823(a)(3)(A) (2012); § 1824(a)(2)(A) (2012).

40. 50 U.S.C. § 1801(a), (b) (2012) (defining "foreign power" and "agent of a foreign power").

41. 50 U.S.C. § 1823(a)(3)(B) (2012).

42. 50 U.S.C. § 1801(e) (2012) (defining "foreign intelligence information").

presidential authorization (in certain circumstances) or a secret FISA Court order. Unlike covert searches under § 3103a, these FISA covert searches usually remain secret indefinitely—until the evidence is used in a criminal prosecution or the Attorney General determines there is "no national security interest" in continued secrecy—a high bar to disclosure. The FISA covert search authority is independent of the covert search authority in § 3103a of Title 18.

Of course, not all terrorism investigations involve foreign organizations. The FISA covert search authority hinges on showing a link to a foreign government or foreign terrorist organization. When there is no evidence of such a link, FISA provides no authority. In such cases, covert search authority—if needed—comes only from § 3103a.

The need to detect and prevent terrorist attacks may be the most compelling justification for covert search authority, and it is one the government has repeatedly invoked to defend § 3103a.[43] While there are cases of domestic terrorism in which covert search authority may be needed, it is important to keep in mind that covert search authority already exists under FISA in cases involving international terrorism. This lessens, but does not eliminate, the need for covert searching under § 3103a.

2. The DOJ Examples for Why Section 3103a Is Needed Are Not Fully Convincing.

As noted above, the DOJ has claimed that covert search authority under § 3103a is a critical law enforcement tool. A close examination of the government's examples in support of this proposition casts some doubt on this claim. At the very least, the DOJ's examples raise questions about which types of cases truly necessitate covert search authority.

In the lead-up to the PATRIOT Act reauthorization in 2005, the DOJ prepared a white paper justifying its need for delayed notice search warrants, and also expounded on the topic in congressional testimony.[44] From the DOJ materials, several themes emerge. The counterterrorism examples are troubling; they show covert searching being conducted in cases in which the terrorism connection is either very indirect or seemingly nonexistent. More commonly, covert searching is used in ordinary criminal investigations to protect an existing wiretap. In addition, covert searching is sometimes used to seize drugs—and thus remove them from the stream of commerce—during an ongoing investigation that investigators wish to keep secret.

43. *See, e.g.*, DNSW White Paper, *supra* note 5, at 3; *Counter-Terrorism Legislation and Proposals*, *supra* note 32, at 20 (statement of James Comey, Deputy Att'y Gen. of the United States).

44. DNSW White Paper, *supra* note 5.

The DOJ states that the dilemma of choosing between searching and continuing the investigation "is especially acute in terrorism investigations, where the slightest indication of government interest can lead a loosely connected cell to dissolve, only to re-form at some other time and place in pursuit of some other plot."[45] The DOJ asks the following:

> Should investigators who receive a tip of an imminent attack decline to search the suspected terrorist's residence for evidence of when and where the attack will occur because notice of the search would prevent law enforcement agents from learning the identities of the remainder of the terrorist's cell, leaving it free to plan future attacks?[46]

The DOJ cited two cases to show the value of § 3013a in counterterrorism investigations. The first was the case of Alaa Odeh, a Staten Island–based deli owner who was operating a hawala business transferring money from the United States to Jordan and the West Bank.[47] Some of the money transferred through this hawala originated with a large Canada-based methamphetamine distribution conspiracy.[48] Odeh was charged with conspiracy to defraud and money-laundering—not with any terrorism offenses.[49] He pled guilty and was sentenced to thirty-seven months of imprisonment.[50]

James Comey testified about this case as follows:

> [I]n United States v. Odeh, a recent narco-terrorism case, a court issued a section 213 warrant to search the contents of an envelope that had been mailed to the suspect of an investigation. The search confirmed that the suspect was operating a hawala money exchange used to funnel money to the Middle East, including to an individual associated with someone accused of being an operative for Islamic Jihad in Israel. The delayed-notice provision allowed investigators to conduct the search without fear of

45. *Id.* at 2.

46. *Id.*

47. *See Id.* at 4–5; Press Release, DEA, DEA Investigation Leads to U.S. Charges Against Staten Island Man in Plot to Launder Drug Money by Sending Proceeds to the West Bank and Jordan (Apr. 15, 2003), http://www.justice.gov/dea/pubs/states/newsrel/2003/nyc041503.html.

48. *See* DNSW White Paper, *supra* note 5, at 4–5; *see also* Press Release, DEA, *supra* note 47.

49. *See* DNSW White Paper, *supra* note 5, at 4–5; *see also* Press Release, DEA, *supra* note 47.

50. *See* DNSW White Paper, *supra* note 5, at 4–5; *see also* Press Release, DEA, *supra* note 47.

> compromising an ongoing wiretap on the suspect and several of his confederates.[51]

In other words, Odeh is an example of how covert searching during drug investigations can sometimes unearth evidence of other criminal conduct, such as illegal money-laundering. Odeh is not an example of the most compelling justification for covert searching—discovering critical information about an existing terrorist cell so as to prevent and disrupt plots.

It is undoubtedly true that covert searching—like other invasive investigative tools—helps to unearth other forms of criminal conduct.[52] The fact that this may sometimes be true—and that it may occasionally relate at least tangentially to terrorism—is not a particularly compelling justification for covert searching.

Moreover, the claimed link between Odeh and terrorist groups is quite indirect. The DOJ claims that Odeh sent some of the money to an individual who was "associated with" a third person. That third person was "accused" of being an Islamic Jihad operative. There is no claim that this third person in fact received any of the money sent by Odeh. Also, Odeh was not charged with providing material support to terrorism (or even attempting or conspiring to do so)—a charge that would have fit had there been evidence of money actually going to a terrorist operative.[53]

The second "terrorism" example given by the DOJ is even less compelling. The DOJ White Paper mentions a Chicago-area investigation in 2003, involving a plan to ship unmanned aerial vehicle (UAV) components to Pakistan.[54] Investigators obtained a delayed notice warrant to obtain e-mails (not a physical covert search), allowing them to track down all of the UAV components before arresting the main suspect. The suspect later pled guilty; the White Paper does not indicate what offenses were involved.[55]

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51. *Counter-Terrorism Legislation and Proposals*, *supra* note 31, at 158 (statement of James Comey, Deputy Att'y Gen. of the United States).

52. A similar example, not in the terrorism context, is mentioned in the DNSW White Paper. During a drug investigation, investigators conducting a wiretap learned of a counterfeit credit card operation. Using a delayed notice search warrant, investigators opened a package of counterfeit credit cards and allowed them to notify banks that certain accounts had been compromised. The delayed notice search permitted police to "prevent possible imminent harm from the credit card counterfeiting scheme while maintaining temporary confidentiality of the drug investigation." DNSW White Paper, *supra* note 5, at 7.

53. *See* 18 U.S.C. §§ 2339A, 2339B (2012).

54. DNSW White Paper, *supra* note 5, at 5.

55. *Id.*

According to press reports, the suspect, Mariam Aidroos, was charged with making false statements to government officials.[56] U.S. Attorney Patrick Fitzgerald explained that Aidroos was not charged with any terrorism-related offense: "We've charged her with lying to government officials. We've charged her with no more and no less than that. To be blunt, we're not alleging a terrorist connection at all."[57] Aidroos pled guilty in December 2003 and was sentenced to three years of probation.[58] According to the *Chicago Tribune*, "[t]here have been no allegations of links to terrorism since Aidroos' arrest in May 2003."[59]

There is no evidence that the second "terrorism" example given by the DOJ had any connection to terrorism whatsoever. Federal authorities were alarmed upon learning that someone in the United States was working on shipping UAV components to Pakistan. They conducted an investigation, which resulted in a prosecution for making a false statement. Had there been evidence that the suspect was connected to or attempting to aid any terrorist organizations, the DOJ surely would not have been satisfied with a relatively minor charge and a sentence of probation.

Neither of these real-world "counterterrorism" examples bears any resemblance to the hypothetical scenario proffered by the DOJ: the need to conduct a covert search to ward off an imminent attack without tipping off a clandestine terror cell.[60] Perhaps the DOJ had better examples but could not disclose them publicly. Or perhaps these scenarios simply do not arise very often—and when they do, FISA is sometimes used rather than § 3103a. The DOJ's statistics show that § 3103a is used in counterterrorism investigations only about a dozen times per year, whereas they are used thousands of times per year in drug investigations.[61]

Apart from the scarce information related to terrorism cases, the DOJ provided a number of examples of how covert searching has proven useful in drug investigations. The primary benefit covert searching provides in drug cases is to allow investigators to discover and seize drugs—thus preventing them from entering the market—while continuing the investigation.

This is a government interest that seems compelling in some cases and less compelling in others. The amount, value, and danger of the drugs involved is one crucial variable—a variable the statute does not

56. Matt O'Connor & Rick Jervis, *U.S. Says Woman Lied About Parts for Drones*, CHI. TRIB., May 30, 2003, at W1.

57. *Id.*

58. *Three Years' Probation for Lying to U.S.*, CHI. TRIB., May 4, 2004, at C2.

59. *Id.*

60. DNSW White Paper, *supra* note 5, at 2.

61. *See* Witmer-Rich, *supra* note 3, at 535, Figure 2.

take into account. This is addressed below, in Part V. The privacy cost of one covert search may be worth the benefit of preventing 100 kilograms of cocaine from hitting the streets; it would seem much less justified if the prize were preventing 50 grams of marijuana from being smoked at a frat party.

The White Paper again begins with a compelling case that appears to be hypothetical:

> Consider, for example, a case in which law enforcement received a tip that a large shipment of heroin was about to be distributed and obtained a warrant to seize the drugs. To preserve the investigation's confidentiality and yet prevent the drug's distribution, investigators would prefer to make the seizure appear to be a theft by rival drug traffickers. Should investigators be forced to let the drugs hit the streets because notice of a seizure would disclose the investigation and destroy any chance of identifying the drug ring's leaders and dismantling the operation—or to make the alternative choice to sacrifice the investigation to keep dangerous drugs out of the community?[62]

Turning to real-world examples, the White Paper refers to "Operation Candy Box," an investigation into a Canada-based ecstasy and marijuana trafficking organization.[63] In March 2004, investigators followed a car they had learned was carrying a large quantity of ecstasy.[64] Police obtained a delayed notice warrant for the car, and after it stopped at a restaurant, police entered the car and drove it away "while other agents spread broken glass in the parking space to create the impression that the vehicle had been stolen."[65]

Police seized 30,000 ecstasy tablets and ten pounds of marijuana from a hidden compartment in the vehicle. A few weeks later, more than 130 persons were arrested. Without the covert search, agents would have had to choose to either prematurely expose the investigation, or permit the 30,000 pills of ecstasy to continue on their path to distribution.[66]

A second example came from 2002 when, as part of a multistate methamphetamine investigation, the DEA learned that suspects were planning to distribute a large quantity of methamphetamine in Indianapolis.[67] With a delayed notice search warrant, DEA agents searched the stash location and seized 8.5 pounds of methamphetamine

62. DNSW White Paper, *supra* note 5, at 1–2.

63. *Id.* at 5.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at 6.

without notifying the suspects. As a result of this seizure, "two main suspects had a telephone conversation about the disappearance that provided investigators further leads, eventually resulting in the seizure of fifteen more pounds of methamphetamine and the identification of other members of the criminal organization."[68]

Here, two key benefits flowed from the covert search. First, investigators seized 8.5 pounds of methamphetamine—potentially providing approximately 15,000 individual hits, worth approximately $85,000–$130,000. Second, the covert seizure prompted participants in the conspiracy to discuss what happened—providing further leads, the seizure of additional drugs, and the identification of other individuals.[69]

This second benefit is worth contemplating. On the one hand, the value to the investigation was considerable—the seizure of a substantial amount of additional methamphetamine, as well as the identification of additional suspects. On the other hand, this type of "benefit" carries with it some grave risks, such as retaliation and violence to third parties. A covert seizure may well prompt criminal conspirators to discuss what happened, who might have been involved, and what to do about it. That can lead to valuable evidence about the conspiracy. It might also lead to retaliatory violence against third parties, including cases in which the conspirators do not discuss their plans over wiretapped phone lines and thus are not detected by investigators. This danger is discussed further in Part V below.

It is not clear that these isolated examples—selected by the DOJ—are representative of all covert searches conducted under § 3103a. These examples do suggest, however, that § 3103a is not terribly important for counterterrorism purposes—a context in which investigators have more powerful tools under FISA anyway. Instead, § 3103a is used to allow police to conduct covert searches while protecting wiretaps during ongoing investigations and to enable police to seize drugs and cash during ongoing drug investigations. The value of those goals—and the dangers posed by them—are discussed further in Part V.

II. Regulating Departures from Fourth Amendment Baselines

To understand the problem with the sneak and peek statute, as well as the logical fix for that problem, it is important to understand the concepts of exigent circumstances and necessity. Exigent

68. *Id.* The White Paper also gives a third example in which "more than 225 kilograms of drugs"—type not specified—were seized with a delayed notice search warrant. *Id.* Few details are given for this example.

69. A similar pattern occurred with the seizure of the 225 kilograms of drugs. The covert seizure in that case was followed by interceptions of discussions showing "that the suspects believed that other drug dealers had stolen their drugs," and communications on the wiretapped lines continued. *Id.*

circumstances and necessity might best be understood as two facets of a more basic underlying principle—the need for special circumstances to justify deviating from traditional Fourth Amendment rules.

A. Necessity and Exigency: Facets of Fourth Amendment Reasonableness

The doctrine of "exigent circumstances" justifies a warrantless government entry into a home.[70] The failure to obtain a warrant is excused due to the presence of an exigency. The common list of exigent circumstances consists of (1) the need to render emergency aid or protect someone from imminent injury, (2) the need to prevent the imminent destruction of evidence, and (3) the hot pursuit of a fleeing suspect.[71]

The concept of "necessity," in contrast, involves the notion that ordinary search techniques are inadequate—a lack of other reasonable alternatives.[72] For example, to obtain a wiretap order under Title III, police must show "that 'normal investigative procedures' have either failed or appear unlikely to succeed."[73] This requirement was "designed to assure that wiretapping is not resorted to in situations where traditional investigative techniques would suffice to expose the crime."[74] Title III itself does not use the term "necessity," but lower courts and commentators commonly refer to this rule as the "necessity" requirement for wiretapping.[75]

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70. Kentucky v. King, 131 S. Ct. 1849, 1856 (2011).

71. *Id.* (citing Brigham City v. Stuart, 547 U.S. 398, 403 (2006); Michigan v. Fisher, 130 S. Ct. 546, 548 (2009); United States v. Santana, 427 U.S. 38, 42–43 (1976); Georgia v. Randolph, 547 U.S. 103, 116 (2006); Minnesota v. Olsen, 495 U.S. 91, 100, 110 (1990)).

72. *See* Thomas K. Clancy, *The Fourth Amendment's Concept of Reasonableness*, 2004 UTAH L. REV. 977, 1037 ("'Necessity' means that it must be shown that utilizing the preferred model of reasonableness will not protect the governmental interest."); Paul Ohm, *Probably Probable Cause: The Diminishing Importance of Justificatory Standards*, 94 MINN. L. REV. 1514, 1554 (2010) (noting that a "necessity" requirement means that "given the especially invasive nature of a wiretap, the police must turn to it only as a last resort").

73. United States v. Kahn, 415 U.S. 143, 153 n.12 (1974) (citing 18 U.S.C. §§ 2518(1)(c), 2518(3)(c)(2012). Section 2518(1)(c) requires "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous." 18 U.S.C. § 2518(1)(c)(2012).

74. *Id.* (citing S. REP. NO. 90-1097, at 101 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112). *See* JAMES G. CARR & PATRICIA L. BELLIA, THE LAW OF ELECTRONIC SURVEILLANCE § 4.39 (2011).

75. *See, e.g.*, United States v. Rajaratnam, 719 F.3d 139, 145 (2d Cir. 2013); United States v. Barajas, 710 F.3d 1102, 1107 (10th Cir. 2013); United States v. Rice, 478 F.3d 704, 709 (6th Cir. 2007); United States v. Carter,

At times, it has appeared that the concept of "necessity" was part of—embedded in—the doctrine of exigent circumstances. Decisions articulating the "exigent circumstances" doctrine have sometimes used the language of "necessity" as synonymous with, or to help define, the concept of exigency. In *McDonald v. United States*,[76] Justice Jackson stated that "[w]hether there is reasonable necessity for a search without waiting to obtain a warrant certainly depends somewhat upon the gravity of the offense."[77] The Sixth Circuit has stated that "[i]n reviewing whether exigent circumstances were present, we consider the 'totality of the circumstances and the inherent necessities of the situation at the time.'"[78] The First Circuit has similarly stated that "[e]xigent circumstances exist where 'there is such a compelling necessity for immediate action as will not brook the delay of obtaining a warrant.'"[79]

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449 F.3d 1287, 1292 (D.C. Cir. 2006); United States v. Jackson, 345 F.3d 638, 644 (8th Cir. 2003); United States v. Blackmon, 273 F.3d 1204, 1206–07 (9th Cir. 2001); People v. Acevedo, 147 Cal. Rptr. 3d 467, 474 (Cal. Ct. App. 2012); People v. Rabb, 945 N.E.2d 447, 458 (N.Y. 2011) (Lippman, J., dissenting); State v. Finesmith, 974 A.2d 438, 442 (N.J. Super. Ct. App. Div. 2009); State v. Oster, 922 A.2d 151, 155 (R.I. 2007); Commonwealth v. Westerman, 611 N.E.2d 215, 220 (Mass. 1993); Shaktman v. State, 529 So. 2d 148, 150 (Fla. Dist. Ct. App. 1988); State v. Hale, 641 P.2d 1288, 1291 (Ariz. 1982). *See also* CARR & BELLIA, *supra* note 74, at § 4.39 (noting that the section 2518(1)(c) standard "may be roughly denominated as the necessity or exhaustion requirement"); Paul Ohm, *The Fourth Amendment in a World Without Privacy*, 81 MISS. L.J 1309, 1349–50 (2012); Jacqueline E. Ross, *Valuing Inside Knowledge: Police Infiltration as a Problem for the Law of Evidence*, 79 CHI.-KENT L. REV. 1111, 1149 n.17 (2004).

76. McDonald v. Unites States, 335 U.S. 451 (1948).

77. *Id.* at 459 (Jackson, J., concurring).

78. Ziegler v. Aukerman, 512 F.3d 777, 785 (6th Cir. 2008) (quoting United States v. Rohrig, 98 F.3d 1506, 1511 (6th Cir. 1996)) (citation and quotation marks omitted [sic]). *See also* United States v. Phillips, 931 F. Supp. 2d 783, 793 (E.D. Mich. 2013) ("As in Beasley, a number of police officers were at Defendant's residence, and the police could simply have secured the area by posting officers at the entrances to the house. Because there was no necessity to search the house, the officers' warrantless search cannot be justified on the basis of exigent circumstances.").

79. Fletcher v. Town of Clinton, 196 F.3d 41, 49 (1st Cir. 1999) (quoting United States v. Almonte, 952 F.2d 20, 22 (1st Cir. 1991)) (internal quotation marks omitted). *See also* State v. Tibbles, 169 Wash.2d 364, 372–73, 236 P.3d 885 (Wash. 2010) (en banc) (quoting State v. Patterson, 774 P.2d 10, 12 (Wash. 1989)) (The Washington Supreme Court has explained, "[t]he underlying theme of the exigent circumstances exception remains '[n]ecessity, a societal need to search without a warrant.'").

In *Berger v. New York*,[80] the Court contrasted the flawed New York wiretapping statute with a warrant for the installation of a covert listening device that the Court had approved a year earlier in *Osborn v. United States*.[81] The *Osborn* warrant, the Court explained, was constitutional in part because it permitted "no greater invasion of privacy was permitted than was necessary under the circumstances."[82] Commentators have relied on this language to suggest a "necessity" or "least intrusive means" component of Fourth Amendment reasonableness.[83]

Today, it is clear that there is a distinction between the concept of "exigent circumstances" and that of "necessity" (at least "necessity" in the sense of "last resort" or "least intrusive means") and that the former does not include the latter. The case that drove a clear wedge between these concepts was *Kentucky v. King*.[84] In *King*, the Court held that exigent circumstances could justify a warrantless search even if police could have conducted the same search—and found the same evidence—with a warrant. The Court noted that "[s]ome courts . . . fault law enforcement officers if, after acquiring evidence that is sufficient to establish probable cause to search particular premises, the officers do not seek a warrant but instead knock on the door and seek either to speak with an occupant or to obtain consent to search."[85] These courts were, in effect, imposing a necessity requirement as a part of the exigent circumstances test: a warrantless search was permissible, with exigent circumstances, only if ordinary search techniques (using a warrant) were not reasonably available. The Supreme Court rejected this approach, stating that it "unjustifiably interferes with legitimate law enforcement strategies" and that "[t]here are many entirely proper reasons why police may not want to seek a search warrant as soon as the bare minimum of evidence needed to establish probable cause is acquired."[86]

Instead, the Court held that if exigent circumstances are present, police may conduct a warrantless search even if they could have

80. Berger v. New York, 388 U.S. 41 (1967).

81. *Id.* at 56 (1967) (analyzing Osborn v. United States, 385 U.S. 323 (1966)).

82. *Id.* at 59. *See also* Katz v. United States, 389 U.S. 347, 355–56 (1967) (quoting this language with approval).

83. *See, e.g.*, Michael Goldsmith, *The Supreme Court and Title III: Rewriting the Law of Electronic Surveillance*, 74 J. CRIM. L. & CRIMINOLOGY 1, 31, 133 (1983); Daniel F. Cook, Note, *Electronic Surveillance, Title III, and the Requirement of Necessity*, 2 HASTINGS CONST. L.Q. 571, 579 (1975).

84. Kentucky v. King, 131 S. Ct. 1849 (2011).

85. *Id.* at 1860.

86. *Id.*

structured their investigation to obtain the same result by using a warrant.[87] Stated differently, the Court rejected the concept of necessity in the context of warrantless searches due to exigent circumstances. Under *King*, police making use of exigent circumstances do not have to show that they could not have achieved the same result using a warrant.

Justice Ginsburg dissented for precisely this reason, arguing that exigent circumstances were present only when police had no reasonable alternatives for conducting a search with a warrant. Justice Ginsburg argued that the exigent circumstances "exception should govern only in genuine emergency situations."[88] If police "could pause to gain the approval of a neutral magistrate," then they should not be permitted to "dispense with the need to get a warrant by themselves creating exigent circumstances."[89]

Of course, the doctrine of exigent circumstances is not the only Fourth Amendment rule that regulates when police can deviate from ordinary constitutional requirements. At a higher level of generality, the Supreme Court has repeatedly interpreted the Fourth Amendment as establishing certain baseline requirements, or default rules, for conducting searches. To deviate from those baselines, police must show some kind of special circumstances justifying the deviation. The fundamental question, under the Court's current interpretation of the Fourth Amendment, is whether the search is "reasonable."[90]

This basic framework—baseline rules with exceptions permitted in specified circumstances—occurs in various Fourth Amendment contexts. The most fundamental baseline is the warrant. "It is a 'basic principle of Fourth Amendment law,'" the Court has repeatedly said, "'that searches and seizures inside a home without a warrant are presumptively unreasonable.'"[91] Police can deviate nevertheless from that baseline—search a home without a warrant—in special circumstances. And as noted above, one clearly established set of circumstances that justify deviating from the warrant baseline is the doctrine of "exigent circumstances."[92]

Another Fourth Amendment default rule is giving notice of the search. Before breaking into a home to execute a search warrant, police ordinarily must announce their presence and authority to search—sometimes called the "knock and announce" rule.[93] A search without

87. *Id.* at 1862.

88. *Id.* at 1864 (Ginsburg, J., dissenting).

89. *Id.*

90. *See id.* at 1856 (majority opinion); Brigham City v. Stuart, 547 U.S. 398, 403 (2006).

91. *King*, 131 S. Ct. at 1856 (quoting *Stuart*, 547 U.S. at 403).

92. *Id.*

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

notice is presumptively unreasonable.[94] But police can deviate from this baseline in special circumstances. Police can conduct a "no-knock search" when knocking and announcing would create a threat of physical violence or when it would risk the destruction of evidence.[95] Those circumstances should sound familiar: they are similar to two of the types of "exigent circumstances" justifying warrantless entry.

There is at least one other reason police can dispense with "knock and announce"—cases of "futility."[96] The "futility" exception is different from traditional "exigent circumstances" in the context of warrantless entry. "Futility" is the notion that police know it would be pointless to knock and announce, because the suspects inside are already aware of the police presence and are unwilling to open the door.[97] The "futility" exception to knock-and-announce has no real analogue in the context of warrantless searches.

Thus, there is some similarity between the "special circumstances" justifying warrantless search and those justifying a no-knock entry, but there are also differences. Returning to the higher level of generality, the core Fourth Amendment requirement (as interpreted by the Court) is reasonableness. Applying that reasonableness mandate in two different contexts—warrantless searches versus no-knock searches—the Court has tailored the exceptions to fit the particular factual context involved.

A covert search, conducted with a delayed notice search warrant, is another deviation from a Fourth Amendment baseline. Like a no-knock search, a covert search bypasses the ordinary notice requirement—except that for a no-knock search, notice is delayed by a minute or so, whereas with a covert search with a delayed notice search warrant, notice is delayed for weeks or months.

The key question, then, is determining whether there is a constitutional standard that might justify a covert search—a long-term deviation from the notice baseline. Part II.B turns to the analogous

94. *Id.* at 931–37; *King*, 131 S. Ct. at 1856 (quoting *Stuart*, 547 U.S. at 403 (quoting Groh v. Ramirez, 540 U.S. 551, 559 (2004))).

95. Richards v. Wisconsin, 520 U.S. 385, 390 (1997) (citing *Wilson*, 514 U.S. at 936). *See also* Hudson v. Michigan, 547 U.S. 586, 589–90 (2006).

96. *Richards*, 520 U.S. at 3944; *Hudson*, 547 U.S. at 589–90 (2006).

97. *Hudson*, 547 U.S. at 589–90 (2006). *See, e.g.*, United States v. Dunnock, 295 F.3d 431, 435 (4th Cir. 2002) (noting that no-knock entry permitted on grounds of futility: "Dunnock, having been arrested and questioned by the police outside his home, clearly had notice of the authority and purpose of the officers executing the search warrant"); United States v. Tracy, 835 F.2d 1267, 1270 (8th Cir. 1988) ("Under these circumstances, we agree the officers could have justifiably believed defendants were anticipating their arrival and knew their purpose. Thus, announcing their purpose would have been a useless gesture.").

context of wiretapping (itself a form of covert searching) to consider what the right constitutional standard might be.

B. Deviating from the "Rule Requiring Notice": Regulating Covert Wiretapping

The Supreme Court has never articulated a Fourth Amendment standard governing covert searches. The Court has made clear that a covert entry, incident to installing a court-authorized wiretap or listening device, can be constitutionally permissible.[98] But the Court has never directly addressed the permissibility of a covert search or covert seizure conducted for its own sake (as opposed to incident to a wiretap).

One type of search that involves a lack of contemporaneous notice is wiretapping. A wiretap consists of an ongoing search of private conversations as they occur, without contemporaneous notice to the parties. The covert nature of the search is a logical necessity for wiretapping to have any effectiveness—persons would not make incriminating statements if they knew investigators were listening.[99]

This section explains the "necessity" standard in the context of wiretapping and argues that this standard—which the Supreme Court has never stated is a Fourth Amendment requirement—is nonetheless constitutional in origin. It also explains why the drafters of Title III chose to regulate covert wiretapping with the concept of necessity rather than exigent circumstances.

The Title III "necessity" standard actually arose directly in connection with the concept of "exigent circumstances." Courts and commentators have long recognized that Congress sought to craft a wiretapping law that remedied a number of constitutional defects the Supreme Court had identified in *Berger v. New York* and other cases.[100]

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98. *See* Dalia v. United States, 441 U.S. 238, 247–48 (1979) ("[T]he Fourth Amendment does not prohibit *per se* a covert entry performed for the purpose of installing otherwise legal electronic bugging equipment.").

99. *See, e.g.*, Katz v. United States, 389 U.S. 347, 355–56 n.16 (1967) ("A conventional warrant ordinarily serves to notify the suspect of an intended search. But if Osborn had been told in advance that federal officers intended to record his conversations, the point of making such recordings would obviously have been lost; the evidence in question could not have been obtained.").

100. Cook, *supra* note 83, at 577–86 (1975) (explaining the origins of the Title III "necessity" requirement and arguing that it has a constitutional foundation); Michael Goldsmith, *Eavesdropping Reform: The Legality of Roving Surveillance*, 1987 U. ILL. L. REV. 401, 403 (1987) ("Title III culminated a constitutional debate transcending four decades of jurisprudence."); United States v. Torres, 751 F.2d 875, 884 (7th Cir. 1984) (Posner, J.) ("Title III was Congress's carefully thought out, and constitutionally valid . . . effort to implement the requirements of the Fourth Amendment with regard to the necessarily unconventional type of

In *Berger v. New York*, one of the many criticisms the Court leveled at New York's wiretapping statute was the lack of notice of the search:

> [The statute has] no requirement for notice as do conventional warrants, nor does it overcome this defect by requiring some showing of special facts. On the contrary, it permits uncontested entry without any showing of exigent circumstances. Such a showing of exigency, in order to avoid notice would appear more important in eavesdropping, with its inherent dangers, than that required when conventional procedures of search and seizure are utilized.[101]

In drafting Title III, Congress "prepared a checklist of *Berger* and *Katz* requirements" in an effort to draft legislation that was constitutionally sound.[102] Item eight on the checklist was "[a] showing of exigent circumstances in order to overcome the defect of not giving prior notice."[103] Congress recognized that the lack of notice inherent in wiretapping gave rise to constitutional concerns and that the standard mechanism for bypassing the notice requirement was the doctrine of exigent circumstances.

Notably, Congress did not create an "exigent circumstances" requirement for obtaining a Title III wiretap, as had been suggested by the *Berger* opinion. It did, however, require "some showing of special facts" justifying this intrusive search. Rather than requiring a showing of "exigency," Congress required police to show necessity—that ordinary investigative techniques had been exhausted or could not reasonably be used to accomplish the stated goals—even though such a requirement is not one of the eight listed by the Senate Report as distilled from *Berger*.[104]

Professor Ric Simmons has argued that the "necessity" requirement of Title III has "no basis in the Fourth Amendment" but is merely a statutory creation by Congress.[105] He notes that "*Berger* does not mention a 'least intrusive means' requirement" and that the "exigent circumstances" requirement "is not identical to the statutory

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warrant that is used to authorize electronic eavesdropping.") (internal citations omitted).

101. Berger v. New York, 388 U.S. 41, 60 (1967).

102. Goldsmith, *supra* note 83, at 38.

103. *Id.* at 39 (quoting S. REP. NO. 90-1097, at 66 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, at 2161–62).

104. 18 U.S.C. § 2518(1)(c) (2012).

105. Ric Simmons, *Can Winston Save Us from Big Brother? The Need for Judicial Consistency in Regulating Hyper-Intrusive Searches*, 55 RUTGERS L. REV. 547, 565, 567 (2003) (Simmons refers to the "necessity" requirement as the "least intrusive means" requirement; both terms refer to section 2518(1)(c)).

requirement that 'normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous.'"[106] Other commentators, as well as some courts, have nonetheless argued that the Title III "necessity" requirement is constitutional in origin and was drafted to remedy the lack of notice inherent in a wiretap.[107]

The Senate Report on the bill does not explain why the drafters of Title III chose to include the "necessity" standard and chose not to use the traditional language of "exigent circumstances."[108] Professor Robert Blakely, a leading drafter of Title III, linked the necessity requirement and the exigent circumstances doctrine in his congressional testimony about the bill:

> [S]uch a showing of "special facts" or "exigent circumstances" would unquestionably be met by a legislative requirement that judicial authorization for the use of electronic surveillance techniques be conditioned on a showing that "normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried."[109]

106. *Id.* at 565.

107. *See, e.g.*, Goldsmith, *supra* note 83, at 126 (The necessity requirement "stems from two distinct constitutional principles underlying Title III: (1) prior notice of fourth amendment intrusions, and (2) utilization of the least drastic means. . . . In effect, a showing of necessity thereby became a constitutional substitute for prior notice."); Cook, *supra* note 83 at 577–78; David P. Hodges, *Electronic Visual Surveillance and the Fourth Amendment: The Arrival of Big Brother?*, 3 HASTINGS CONST. L.Q. 261, 288–89 (1976); CARR & BELLIA, *supra* note 74, at § 2:53 ("To establish the showing of exigent circumstances required by the Supreme Court in *Berger*, § 2518(1)(c) provides that the application must include 'a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous.'"). United States v. Salemme, 91 F. Supp. 2d 141, 364 (D. Mass. 1999) (explaining in detail why "the necessity provision of Title III, § 2518(1)(c), is constitutional in origin"), *rev'd on alternative grounds*, United States v. Flemmi, 225 F.3d 78 (1st Cir. 2000).

108. S. REP. NO. 1097, at 66, (1968) *reprinted in* 1968 U.S.C.C.A.N. 2112-14.

109. *Controlling Crime Through More Effective Law Enforcement: Hearings Before the Subcomm. on Criminal Laws and Procedures of the Comm. on the Judiciary*, 90th CONG. 935 (1967). Professor Blakely also noted that this standard was part of England's wiretapping requirements. *Id.* at 977 (quoting 18 U.S.C. § 2518(1)(c) (2012)). *See also* CARR & BELLIA, *supra* note 74, at § 2:53 ("To establish the showing of exigent circumstances required by the Supreme Court in *Berger*, § 2518(1)(c) provides that the application must include 'a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they

In essence, Professor Blakely claimed that the necessity standard was a manifestation of the "exigent circumstances" requirement. Even so, Professor Simmons is right that, at least today, the doctrines of "necessity" and "exigent circumstances" are not the same. Neither Professor Blakely nor later commentators explain why the drafters chose the "necessity" rule in place of the more traditional "exigent circumstances" rules.[110]

Thus, the use of necessity rather than "exigent circumstances" remains something of a puzzle. As one district court acknowledged, "there is nothing in the Fourth Amendment, or in traditional search and seizure law, which requires that law enforcement personnel exhaust or otherwise attempt other investigative procedures before resorting to an application for a conventional search warrant."[111]

The key to this puzzle is not doctrinal but practical. The drafters of Title III appear to have done for wiretapping just what the Supreme Court has done in other contexts—attempt to discern the particular type of "special circumstances" that make sense to justify the particular type of departure in question. In the context of no-knock searches, for example, the Supreme Court did not reflexively graft the "exigent circumstances" rules for warrantless searches onto the context of no-knock searches. Instead, the Court considered the particular nature of no-knock searches to determine when departures from the

reasonably appear to be unlikely to succeed if tried or to be too dangerous.'")

110. Daniel Cook provides a comprehensive argument that the "necessity" standard does have a constitutional basis, in particular that it was intended and understood to fulfill the Fourth Amendment problem created by lack of notice. Cook, *supra* note 80, at 577–86. Cook also suggests that the "exigent circumstances" doctrine is a poor fit in the context of wiretapping. *Id.* at 579–84. Cook argues that "[t]hough the meaning of exigent circumstances as used in the *Berger* opinion has not been made clear, the most persuasive explanation is that it is a reference to what subsequently was codified in Title III as the necessity requirement." *Id.* at 579. This overstates matters. There is no reason to believe that the *Berger* Court was actually contemplating or invoking the concept of "necessity" when it mentioned the need for some exigency to justify the lack of notice. The Court was simply explaining one flaw in the New York wiretapping statute. It is not the case that the drafters of Title III somehow "discovered" that the Court in *Berger* really meant "necessity" when it said "exigency." Instead, the drafters of Title III articulated a standard that responded to the constitutional concerns identified in *Berger*. There is no reason to insist that constitutional standards must emerge first from the Court rather than the legislature. This is not to say that Congress defines what is constitutional, but rather that what is eventually recognized as a constitutional rule or standard may have been articulated by the legislature before it is recognized by the Court.

111. *Salemme*, 91 F. Supp. 2d at 365, *rev'd on alternative grounds*; *Flemmi*, 225 F.3d 78.

constitutional baseline were justified—or, using the language of the Fourth Amendment, were reasonable.

The drafters of Title III did the same. They seem to have recognized that in the context of wiretapping, it was important to craft "special circumstances" that made sense in light of the particular character of that type of search. They did not directly apply the "exigent circumstances" rules for warrantless searching because a direct application of that doctrine does not make sense in the different context of covert wiretapping.[112]

To excuse the lack of notice of the wiretap, why not require police to show that notice would create a danger to the officers or others, or would risk the destruction of evidence, or the escape of a suspect? The problem with this standard is that it would always be satisfied for any requested wiretap.

The evidence sought in a wiretap is the conversations themselves. Giving notice to the speakers would always risk the destruction of this evidence in the sense that the speakers would make no incriminating statements if they knew the search was being conducted.

In addition to losing the conversations, giving notice of a wiretap also inherently creates risks that the suspects will destroy (or conceal) other evidence, or that suspects will escape, or perhaps that third parties will be put in danger. The purpose of a wiretap is to covertly gather incriminating statements at a time when the investigation is ongoing—when contraband has not yet been seized and suspects have not yet been arrested. Notice of the wiretap would ordinarily put an end to the investigation—to require police to seize any desired contraband and arrest any suspects before the wiretap is put into place.

This explains why the drafters of Title III did not use the traditional "exigent circumstances" rules. That doctrine simply fails, as a logical and practical matter, to effectively regulate the practice of wiretapping. The rules regulating warrantless entry do not "fit" the factual context of covert wiretapping.

Instead, the drafters of Title III sought to articulate the type of "special circumstances" that would fit the practice of covert wiretapping—that would justify a departure from the Fourth Amendment baseline of providing notice of a search. They chose necessity, or the requirement of last resort. To make use of the unusually invasive technique of covertly listening to telephone

112. Of course, at the time Title III was drafted in the 1960s, the Court had not yet ruled that the knock-and-announce principle was a component of Fourth Amendment reasonableness—the Court first did so in *Wilson v. Arkansas*, in 1995. Even so, the common law knock-and-announce rule was well established long before 1995, and many of the exceptions that permitted no-knock entry are also ancient in origin. *See* Wilson v. Arkansas, 514 U.S. 927, 929–32 (citing cases); Witmer-Rich, *supra* note 3, at 572–76.

conversations, police must show that ordinary investigative techniques would not suffice.[113]

This analysis highlights a few key points that bear on the appropriate standard for covert searching with delayed notice search warrants. First, it is now clear, after *Kentucky v. King*, that the concepts of "exigent circumstances" and "necessity" are doctrinally distinct. A showing of "necessity" is not part of an "exigent circumstances" analysis—at least in the context of warrantless searching.

Second, the Court has interpreted the Fourth Amendment as setting certain "baseline" or "default" search rules, such as using a warrant and giving notice of a search. At the same time, the Court permits deviations from those baseline rules under "special circumstances." The fundamental test is one of "reasonableness."

Third, the Court uses different standards for judging "special circumstances" depending on the baseline in question and the type of departure sought. The Court tailors the "special circumstances" that might permit the departure in question by considering the purpose of the baseline rule and by evaluating what mechanisms might appropriately regulate and justify departures from that baseline.

With this conceptual groundwork in place, we can now turn to the question of whether covert searches of physical spaces can be constitutionally reasonable under the Fourth Amendment.

III. THE FLAW IN THE SNEAK AND PEEK STATUTE

The statutory grounds for conducting a covert, delayed notice search largely mirror the Fourth Amendment "exigent circumstances" doctrine. Part III.A sets forth the current standards, under § 3103a, for delayed notice searches, and compares them to the "exigent circumstances" doctrine. Part III.B explains the core problem with this model: the "exigent circumstances" doctrine is a fundamentally ineffective way to regulate covert searching.

A. Current Regulation of Delayed Notice Search Warrants

Delayed notice search warrants did not originate with the USA PATRIOT Act. At least as early as 1985, some courts issued search warrants expressly authorizing a covert entry of a physical space for

113. "This showing of necessity reflects the Fourth Amendment requirement that searches and seizures be 'reasonable' and addresses the related statements in *Berger* . . . and *Katz* . . . that courts should authorize 'no greater invasion of privacy . . . than [is] necessary under the circumstances.'" United States v. Ferrara, 771 F. Supp. 1266, 1288 (Mass. 1991) (citations omitted).

purpose of searching.[114] There were only a few judicial decisions analyzing the legality of this practice.[115] The Ninth Circuit held that covert searches implicated the Fourth Amendment but that they were permissible so long as notice was provided within seven days and so long as investigators showed "necessity" for the search.[116] The Second Circuit took a more permissive approach, questioning whether "notice" had any basis in the Fourth Amendment and stating that investigators need only show "there is a good reason for the delay."[117]

After the attacks of September 11, 2001, the DOJ sought—and was granted—express statutory authority to conduct "sneak and peek" searches through section 213 of the USA PATRIOT Act, codified at 18 U.S.C. § 3103a.[118] The DOJ has argued that under the current statute, "delayed-notice warrants can be used . . . only in extremely narrow circumstances."[119] This is not true. As explained below, the current statute authorized delayed notice searches in almost any case in which law enforcement wishes to conduct one.

In drafting the delayed notice search warrant statute, Congress looked to another statute—the Stored Communications Act—to come up with the list of justifications for a covert search. Instead of drafting new language unique to delayed notice search warrants, Congress provided that contemporaneous notice can be delayed when the government shows that notice would cause an "adverse result," as defined in § 2705 of the Stored Communications Act.[120] The warrant must require notice within thirty days of execution, although that time

114. *See* Witmer-Rich, *supra* note 3, at 519–31 (giving a history of the legal development of sneak and peek searches). *See also* United States v. Freitas, 800 F.2d 1451 (9th Cir. 1986) (first reported judicial opinion discussing delayed notice search warrants). The idea of a "sneak and peek" warrant showed up in popular culture before passage of the USA PATRIOT Act in October 2001. In an episode of *The Sopranos* that first aired March 4, 2001, federal investigators request—and are granted—what the magistrate judge refers to as a "sneak and peek" warrant to install a bug, disguised as a lamp, in Tony Soprano's basement. *The Sopranos*: *Mr. Ruggerio's Neighborhood* (HBO television broadcast Mar. 4, 2001).

115. *See* Witmer-Rich, *supra* note 3, at 519–25 (discussing cases).

116. *Freitas*, 800 F.2d at 1456.

117. United States v. Villegas, 899 F.2d 1324 (2d Cir. 1990); United States v. Pangburn, 983 F.2d 449 (2d Cir. 1993).

118. *See* Witmer-Rich, *supra* note 3 at 525–31 (detailing the debate over, and passage of, section 213, denoted as section 352 in earlier versions of the proposed legislation).

119. DNSW White Paper, *supra* note 5, at 4.

120. *See* 18 U.S.C. § 3103a(b)(3) (2012); 18 U.S.C. § 2705 (2012).

is subject to extension.[121] In practice, over half of all delayed notice warrants involve delays of ninety days or more.[122]

An "adverse result," for purposes of obtaining a delayed notice search warrant, consists of any of the following:

> (A) endangering the life or physical safety of an individual;
>
> (B) flight from prosecution;
>
> (C) destruction of or tampering with evidence;
>
> (D) intimidation of potential witnesses; or
>
> (E) otherwise seriously jeopardizing an investigation.[123]

The first four items on this list—subsections (A)–D)—closely resemble the Fourth Amendment categories of "exigent circumstances." Subsection (A), preventing danger to the "life or physical safety of any individual," is substantively the same as the "emergency aid" type of "exigent circumstance." "Under the 'emergency aid' exception, . . . 'officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury.'"[124] This exception includes circumstances in which obtaining a warrant would create a danger of physical harm to the police themselves, not only to third parties.[125]

Subsection (B), "flight from prosecution," is equivalent to the next exception, which allows warrantless searches when in hot pursuit or otherwise to prevent the escape of a suspect.[126] This type of "exigent circumstance" has more broadly been described as including any action

121. 18 U.S.C. § 3103a(b)(3) (2012).

122. Witmer-Rich, *supra* note 3, at 537–38 & Table 1.

123. Section 2705(a)(2)(E) also includes "unduly delaying a trial" as a reason to delay notice under the Stored Communications Act. 18 U.S.C. § 2705(a)(2)(E) (2012). In section 3013a(b)(3), providing for delayed notice search warrants, Congress specifically rejected "unduly delaying a trial" as a reason for giving delayed notice of a conventional warrant. 18 U.S.C. § 3103a(b)(3) (2012).

124. Kentucky v. King, 131 S. Ct. 1849, 1856 (2011) (quoting Brigham City v. Stuart, 547 U.S. 398, 403 (2006)).

125. *See* Minnesota v. Olson, 495 U.S. 91, 101 (1990) (noting that an exception may arise when there is "risk of danger to the police or to other persons inside or outside the dwelling") (internal quotations omitted).

126. *King*, 131 S. Ct. at 1856 (citing United States v. Santana, 427 U.S. 38, 42–43 (1976)).

required to prevent the escape of a suspect (not merely when in hot pursuit).[127]

Subsection (C), "destruction of or tampering with evidence," mirrors the third type of exigent circumstance: the need "'to prevent the imminent destruction of evidence,'" which "has long been recognized as a sufficient justification for a warrantless search."[128]

The fourth statutory exception, "intimidation of potential witnesses," is not found in the traditional list of "exigent circumstances." Broadly speaking, however, this exception is similar to concerns over the destruction of evidence. In both cases, the concern is ensuring that the Fourth Amendment does not enable the suspects to obstruct justice or subvert the proper purposes of the search. Subsection (D), then, seems a logical application of the "destruction of evidence" exception to the context of delayed notice search warrants.

Subsection (E) authorizes a covert search when notice would "otherwise seriously jeopardiz[e] an investigation."[129] This catch-all exception clearly goes beyond the traditional doctrine of "exigent circumstances." Indeed, critics of § 3103a have often focused on this subsection (E) "catch-all" provision, and legislators have attempted to remove subsection (E) from § 3103a. As explained below in Part IV.C, this focus on subsection (E) is misplaced. The true problem with § 3103a lies in subsections (A)–(D).

B. The Fatal Flaw: How "Exigent Circumstances" Functions in Covert Searches

A more careful consideration of how delayed notice search warrants operate shows why the doctrine of exigent circumstances, or the related exceptions permitting no-knock searches, do not adequately limit the practice of delayed notice search warrants.

Many criminal investigations force law enforcement officers to balance two competing concerns: (1) the need to gather evidence, and

127. *See King*, 131 S. Ct. at 1864 (Ginsburg, J., dissenting) ("Circumstances qualify as 'exigent' when there is an imminent risk of death or serious injury, or danger that evidence will be immediately destroyed, or that a suspect will escape.") (citing *Stuart*, 547 U.S. at 403).

128. *King*, 131 S. Ct. at 1856–57 (citing *Stuart*, 547 U.S. at 403; Georgia v. Randolph, 547 U.S. 103, 116 n.6 (2006); *Olson*, 495 U.S. at 100).

129. Section 2705(a)(2)(E) also includes "unduly delaying a trial" as a reason to delay notice under the Stored Communications Act. 18 U.S.C. § 2705(a)(2)(E) (2012). In section 3103a, providing for delayed notice search warrants, Congress specifically rejected "unduly delaying a trial" as a reason for giving delayed notice of a conventional warrant. 18 U.S.C. § 3103a(b)(1) (2012).

(2) the need to continue the investigation.[130] These two goals are not always in tension, but often they are. The easiest and most effective ways to gather evidence often involve (or at least risk) tipping off suspects to the existence of the investigation. And when suspects become aware that police are on to them, they often seek to escape, destroy or conceal evidence, or otherwise frustrate any future investigation.

Covert searching offers a way for investigators to have their cake and eat it too—discovering evidence while keeping the investigation secret and thus ongoing. As the DOJ White Paper states:

> investigators and prosecutors on the front lines of fighting crime and terrorism should not be forced to choose between preventing immediate harm—such as a terrorist attack or an influx of drugs—and completing a sensitive investigation that might shut down the entire terror cell or drug trafficking operation. Thanks to . . . delayed-notice warrants . . . they do not have to make that choice.[131]

The problem with the current statute is that it offers police this option in almost every case, not merely when police have some extraordinary need.

Consider an ordinary drug investigation. Assume police have developed probable cause to believe that drugs are being manufactured or stored in a given location. With traditional "notice" searching, police have two basic options. First, they could obtain and execute a search warrant now, seizing any evidence and arresting any suspects who are present, but losing most of their opportunity to develop more evidence or identify more suspects. Second, they could elect to continue the investigation, hoping to develop additional evidence and identify new suspects, all the while taking the risk that the evidence will disappear and the suspects will escape. Covert searching offers a third option: execute a covert search and seizure today, keeping the investigation secret and ongoing.

When should this third option be available? Under § 3103a, police have this third option whenever they can show that giving notice of the search would create exigent circumstances—destruction of evidence, danger to the police or others, or escape of a suspect—or otherwise seriously jeopardize the investigation. In practice, this means that the police can obtain a delayed notice search warrant whenever they wish to do so.

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130. The DOJ white paper explains that providing notice in every case creates a "quandary in certain sensitive investigations: how to accommodate both the urgent need to conduct a search and the equally pressing need to keep the ongoing investigation confidential." DNSW White Paper, *supra* note 5, at 1.

131. *Id.* at 8.

Return to the drug investigation described above. Police would like to enter the suspected home to confirm that drugs are present. They would also like to continue their investigation for another few weeks. If they conduct a regular search—notifying the occupants—but elect not to seize the evidence or arrest the suspects, there is a high likelihood that the suspects will destroy the evidence and escape. Of course, investigators would never do such a strange thing—conduct a search with notice yet elect not to seize the evidence or arrest the suspects. The point is that exigent circumstances inevitably arise—triggering the conditions for a covert search under § 3103a—in any case in which police wish to both conduct a search and continue the investigation. Thus, when police wish to conduct a covert search, § 3103a authorizes one—not just in exceptional cases, but in any case.

The current statutory scheme does not require the police to show that there is some good reason to conduct the search now, rather than later, or that there is some important reason not to seize the evidence or arrest the suspects now, rather than later. The statute does not require police to justify their choice of investigative tactics—whether they will arrest the suspects during the search, or whether they will seize the evidence. In short, it allows police to create exigency in almost any case by conducting a premature search at a time when police do not want to seize evidence or arrest suspects.

A review of the some of the delayed notice search warrant cases decided to date illustrates this problem. In *United States v. Christopher*,[132] a police officer in St. Croix received a tip that a wooden shack, located on the property of Amobi Christopher, was being used to grow marijuana.[133] On June 27, 2008, the officer obtained a delayed notice search warrant to permit a covert search of the shed at night, and to delay notice for thirty days. According to the affidavit, the reason for delayed notice was "to continue the investigation and to identify suspects."[134] The affidavit further stated that "providing immediate notification of the execution of the warrant will cause the target subjects to destroy evidence and conceal themselves from law enforcement."[135] Officers covertly entered and searched the shed, finding marijuana and growing equipment; they did not seize anything.[136] Later police obtained a second delayed notice warrant, authorizing the installation of video recording equipment inside the shed. Finally police

132. United States v. Christopher, No. 2008-0023, 2009 WL 903764 (D. V.I. Mar. 31, 2009).

133. *Id.* at *1.

134. Affidavit in Support of Search Warrant (on file with the author); *Christopher*, 2009 WL 903764, at *1.

135. Christopher Aff. at 3.

136. *Christopher*, 2009 WL 903764 at *1.

obtained a conventional search warrant, searched the shack, seized the marijuana, and arrested Christopher.[137]

Note what the initial delayed notice search affidavit asserted and what it failed to assert. It stated that conducting a regular search with notice would cause the suspects to destroy evidence and hide. That seems obviously true. If the police searched the shack, provided notice to Christopher, and elected not to seize any evidence or arrest any suspects, there is every reason to believe Christopher would have destroyed (or moved) the evidence and also tried to escape himself.

The affidavit does *not* explain why it was important to enter the shed on or around June 27, rather than waiting until the end of the investigation. It does not do so because § 3103a does not require this showing. The affidavit adequately explains the exigent circumstances—created by the police—but totally fails to explain the necessity for the search.

Had the police conducted the same investigation but omitted the covert search, it is hard to see how anything would have been different. They already had suspicion (indeed, probable cause) that there were drugs in the shack; the covert search merely confirmed those suspicions. The same marijuana plants observed during the final search would still have been there (as, indeed, they were).[138]

The same problem is evident in *United States v. Espinoza*.[139] In 2004, federal and local authorities in Yakima, Washington, were investigating three suspected drug traffickers—brothers Gilberto, Gerardo, and Rigoberto Rivera.[140] DEA Special Agent John Schrock suspected that Gilberto's girlfriend, Alice Espinoza, was also involved in the conspiracy and that the traffickers were storing drugs, weapons, or other equipment in the outbuildings on Espinoza's property at 1406 South 12th Avenue in Yakima.[141] Police had obtained wiretap orders for phone lines used by the Rivera brothers, which were set to expire on May 4, 2005, with a grand jury presentation to follow in June.[142] On April 21, 2005, Agent Schrock sought a delayed notice search warrant

137. *Id.*

138. *See id.* If there was some compelling reason why this covert search was not merely convenient but also necessary, the affidavit does not describe it. And the affidavit does not give that reason (if it existed) because the statute does not require that it be given.

139. United States v. Espinoza, No. CR-05-2075-7-EFS, 2005 WL 3542519 (E.D. Wash. Dec. 23, 2005).

140. Application and Affidavit of John R. Schrock; *Espinoza*, 2005 WL 3542519 (2005) (No. CR-05-2075-7-EFS).

141. *Id.* ¶ 33.

142. *Id.* ¶ 34.

to search the outbuildings at Alice Espinoza's 1406 South 12th Avenue home and to seize narcotics, weapons, or cash found therein.[143]

Agent Schrock's affidavit—and the justifications he gives for delayed notice—show the same flaw that was present in *Christopher*. In *Espinoza*, the affidavit stated that "[i]t is the desire of the Yakima DEA to obtain an order allowing for the search of the outbuildings at 1406 S 12th Avenue, Yakima, Washington, and that notice and inventory not be made for a period of 60 days . . . in order to preserve the secrecy of the investigation."[144] Turning to the standards set out in § 3103a and § 2705, Agent Schrock stated, "I believe that adverse results will happen should the investigation become known to the targets. It is feared that the targets will cease use of their telephones currently being monitored, destroy evidence, flee the jurisdiction or otherwise seriously jeopardize the investigation."[145]

These two sentences are the entire explanation offered for the delayed notice request, and they appear to satisfy the statutory standard. The earlier parts of the affidavit detail an extensive investigation involving multiple officers and agencies, using wiretaps, extended human surveillance, and trash pulls. There is every reason to believe that if officers conducted an ordinary search of the outbuildings on or around April 21, 2005, but failed to arrest all of the suspects and search for all relevant evidence, the suspects would have escaped and destroyed or moved evidence.

As in *Christopher*, however, there is no explanation in this paragraph for why it was important to conduct this covert search on or around April 21 rather than waiting until May or June, when investigators seemed ready to arrest all suspects and seize evidence. It is easy to see why conducting a regular search would disrupt the investigation—which is all the statute requires police to show. In contrast, it is hard to see why this covert search was necessary at all—which the statute does not require police to explain.[146]

143. *Id.* ¶¶ 34–36.

144. *Id.* ¶ 34.

145. *Id.* ¶ 35.

146. Notably, the actual search warrant in *Espinoza* did not authorize a delayed notice search. Instead, apparently following boilerplate language, the search warrant commanded the searchers to "leav[e] a copy of this warrant and receipt for the person or property taken." *Espinoza*, 2005 WL 3542519 at *3; Defendant Alice Espinoza's Motion to Suppress with Supporting Memorandum, Exhibit A (Search Warrant). The affidavit had expressly requested authority to delay notice by sixty days, and had given specific reasons (tracking the language of section 3013a and 2705) for the requested delay. *Espinoza*, 2005 WL 3542519, at *3. The failure of the warrant itself to authorize the delayed notice appears to have been an oversight—the government presented the trial court with "a declaration from Agent Schrock stating he had a telephone conversation with the issuing court and was told the warrant was a § 3103a warrant." *Id.* The

The police in *Espinoza* also wanted to seize any drugs and guns they might find inside the outbuildings. Section 3103a requires a showing of "reasonable necessity" to justify a covert seizure.[147] This aspect of the *Espinoza* case is discussed below, in Part V, dealing with covert seizures.

In another case, *United States v. Parrilla*,[148] DEA agents used a delayed notice search warrant to search a commercial building in Fort Lauderdale, Florida. Agents claimed that suspects, including Felix Parrilla, were involved in a drug conspiracy and that they were storing cocaine and related evidence in the building.[149]

As for the need for a covert search, the affidavit stated that "there is reasonable cause to believe that providing immediate notification would seriously jeopardize the investigation."[150] Specifically, "notification of this warrant would reveal to Parrilla the existence of the current investigation," and "members of drug trafficking organizations often change their methods of committing crimes once they learn of the existence of an investigation."[151] The agent stated that "if Parrilla were given notification of this warrant it would jeopardize the investigation occurring outside of this district."[152]

The agent further explained, "I seek only to search the premises for these items [cocaine and related contraband] to determine if they are present" at the location.[153] She also requested authority to seize any contraband found—but made no attempt to explain the "reasonable necessity" that would justify that seizure.

The magistrate judge issued the warrant and authorized covert entry and seizure of any contraband. The affidavit does not explain why a covert search was so important to the investigation. The affidavit seems to suggest that investigators simply wanted to confirm their suspicions, namely, that the commercial buildings were being used to store cocaine.

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warrant itself, however, failed to incorporate any of the affidavits, and expressly required notice. *Id.* at *4. As a result, the trial court held that the search violated the Fourth Amendment and the statute, and suppressed the resulting evidence. *Id.*

147. 18 U.S.C. § 3103a(b)(2) (2012).

148. United States v. Parrilla, No. 13-cr-360-AJN, 2014 WL 2111680 (S.D.N.Y. May 13, 2014).

149. Affidavit of Agent Karen Berra at ¶ 12, *Parrilla*, 2014 WL 2111680 (No. 1:13-cr-360-AJN).

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.* ¶ 11.

The same basic problem is evidence in earlier cases using a similar standard even though they were decided before § 3103a was enacted. In *United States v. Villegas*,[154] police obtained a delayed notice warrant to search a rural New York farmhouse to confirm their suspicions that it was being used to manufacture cocaine.[155] Eventually, after prolonged surveillance and additional investigation, the police raided the home with a conventional warrant, seizing evidence and arresting eleven occupants.[156] Overall, the investigation was a great success. It also seems obvious that if police had conducted the earlier search with notice to the occupants—while declining to seize evidence or make any arrests—much evidence would have been destroyed and many suspects would have escaped.

What is less clear is why the covert search was necessary. There is no suggestion that the covert search led police to uncover other leads or identify conspirators. Indeed, the Second Circuit said as much. After rejecting the defendant's Fourth Amendment argument on the merits, the court added that even if the lack of notice was somehow unlawful, suppression would not be an appropriate remedy due to a lack of causation. That is to say, the eventual seizure of the drugs had not been caused by the earlier covert search. The court explained, "[w]e do not find in the record any suggestion that during the May 13 search the officers found any records or other writings that substantially assisted in their further investigations. What they gained from that search was confirmation rather than new leads."[157] The court thus had "no doubt" that "even without any inspection of the interior of the Johnnycake farm buildings," investigators nonetheless had ample probable cause "for the issuance of a warrant to search and seize any evidence of a cocaine manufacturing operation at Johnnycake farm."[158]

The court made this point to explain why suppression was not an appropriate remedy. But at the same time, it suggests the covert May 13 search was unnecessary. The covert search allowed police to confirm what they already suspected but did not allow them to find new leads or obtain any different evidence. If *Villegas* had been decided under § 3103a, the result would have been the same. It is easy to conclude that the covert nature of the May 13 search prevented the destruction of evidence and the escape of suspects. The fact that there was no

154. United States v. Villegas, 899 F.2d 1324 (2d Cir. 1990).

155. *Id.* at 1330–31.

156. *Id.* at 1331.

157. *Id.* at 1338.

158. *Id.*

evident need to conduct a search of any kind on May 13, covert or not, is not relevant under the "adverse result" test.[159]

C. Justifying No-Knock Searches: Why Exigency Works

The previous section explains why the doctrine of "exigent circumstances" fails, as a practical matter, to adequately regulate covert searching with delayed notice warrants. One final doctrinal puzzle is to consider why (or whether) the "exigent circumstances" doctrine does work in the context of no-knock searches when it fails completely in the context of covert searches.

Both no-knock searches and covert searches are, in a sense, variations on the same theme. In both types of searches, investigators delay the notice that ordinarily must be given. In a no-knock entry, notice is delayed by seconds or minutes. Rather than knocking and announcing, police simply break open the door. Instead of receiving notice of the search a minute or so before entry, occupants receive notice at the moment police break open the door. With a covert search, in contrast, notice is delayed much longer—weeks or months.

In practice, there is a very substantial difference between a very brief delay in notice and a lengthy delay, and that difference explains why these two practices should be regulated differently. While the "exigent circumstances" doctrine fails completely in the context of covert searches, it works reasonably well to regulate no-knock searches.

No-knock searches are not advantageous to the police in all circumstances. Sometimes, a no-knock entry is dangerous to the police. If police simply break into a home violently, with no advance notice,

159. The same can be said of the other Second Circuit case, *United States v. Pangburn*, 983 F.2d 449, 450 (2d Cir. 1993). Police obtained a delayed notice search warrant to search a storage locker they suspected—correctly—was being used to store methamphetamine precursor chemicals. *Id.* at 450–52. The warrant stated that giving notice of the search would "impede the investigation of a suspected felony." *Id.* at 450. The officers conducted the covert search on April 18, 1989, taking pictures of chemicals in the storage locker. *Id.* The investigation continued, and on May 3, 1989, police executed a second delayed notice warrant, again taking pictures of chemicals in the storage locker. *Id.* at 451. On August 8, police executed conventional search warrants, seized evidence, and arrested the suspects. *Id.* In evaluating the defendant's suppression motion, the Second Circuit held that the Fourth Amendment contains no notice requirement at all. *Id.* at 455. Alternatively, however, the court again made an observation about causation: "there was no prejudice to Salcido because the search of his storage locker would have taken place in exactly the same way if Rule 41 had been followed with regard to notice of the entry." *Id.* As in *Villegas*, this "prejudice" analysis seems to suggest that the surreptitious nature of the search in *Pangburn* was unnecessary. The covert searches did not result in developing any new evidence against co-conspirators (nor does it appear to have been designed to accomplish that goal). The searches simply appear to have allowed the officer to confirm that chemicals were present in the lockers.

there is some danger that the occupant will take up arms in self-defense, not knowing the intruders are police officers with lawful authority to search.[160]

In addition, in many cases no-knock entry is pointless—it does nothing to aid the investigation. If police are executing a search warrant at a medical office in a health care fraud investigation, there is no reason to believe that one minute's notice of the search would allow the occupants to destroy large file cabinets full of possible documentary evidence, or a medicine cabinet full of drugs. No-knock entry provides benefits to the police only in cases in which occupants with momentary advance notice could take some immediate action that would compromise the investigation. Given the prevalence of searches for small quantities of drugs, these cases are not so rare as they would have been in the past. But even so, there remain many cases in which there is simply no meaningful benefit, as a factual matter, to keeping the investigation secret for an additional minute. In that sense, no-knock searches are inherently self-limiting—albeit not as self-limiting as some would prefer.

Covert searches do not share this self-limiting quality. Almost any criminal investigation stands to benefit if police can gather evidence without letting anyone know they are conducting an investigation. Once police begin gathering evidence through the use of searches and seizures, the suspects ordinarily become aware of the investigation. This does not necessarily mean the investigation must end, but it does immediately suggest to the suspects that any evidence that has not been found and seized should be disposed of quickly, and any suspects who have not been arrested should do their best to disappear.

No-knock searches offer police the benefit of an additional minute or two of secrecy. That is a real benefit in some cases, but in many cases it provides little or no benefit at all. Covert searching with a delayed notice search warrant offers police the benefit of additional weeks or months of secrecy. That stands to be a benefit in many cases—

160. *See, e.g.*, Launock v. Brown (1819), 106 Eng. Rep. 482, 483; 2 B. & Ald. 592, 594 ("[H]ow is it possible for a party to know what the object of the person breaking open the door may be? He has a right to consider it as an aggression on his private property, which he will be justified in resisting to the utmost."); United States v. Cantu, 230 F.3d 148, 152 (5th Cir. 2000) ("[A]llowing the police to attempt entry into a home before announcing their presence heightens the possibility that the occupants of a house will react violently against the unknown aggressor, particularly if they resemble highwaymen in ski masks."). *See* Radley Balko, *Overkill: The Rise of Paramilitary Police Raids in America*, CATO INST. (2006), http://www.cato.org/publications/white-paper/overkill-rise-paramilitary-police-raids-america (last visited Oct. 1, 2014) (recounting examples of no-knock searches resulting in physical injury and death to occupants and/or the police).

almost any case in which the police seek to keep an investigation secret for any meaningful period of time.[161]

Accordingly, limiting no-knock searches to cases of "exigent circumstances" is a meaningful limitation on that practice; there are many cases in which knocking and announcing, instead of conducting a no-knock search, will not risk the destruction of evidence or escape of suspects. The same is not true of covert searching. Accordingly, it is entirely appropriate to use a different standard to regulate covert searching than no-knock searching.

* * *

As the cases discussed above illustrate, the "exigent circumstances" doctrine is not the right tool for regulating covert searches. It threatens to overturn the ordinary Fourth Amendment presumption that a "reasonable" search is one conducted with notice and a demand for entry, instead rendering covert searching the norm. By limiting covert searches to cases of "exigent circumstances," Congress actually failed to limit covert searches in any meaningful way at all. The rubric of "exigent circumstances" is simply inadequate, as a logical and practical matter, as a tool to limit covert searches. Something else is required. As suggested in the discussion above, there is a standard that would do a better job in limiting covert searches: necessity.

161. This is not to say that police will conduct a covert search on a whim; on the contrary, covert searching is a risky and expensive proposition. But the risks of covert searching are different from the inherent limitations of no-knock searches. No-knock searches offer police only the very limited benefit of an extra minute or two of surprise; covert searching is a more powerful tool, in particular, in a long-term investigation. The risks of covert searches suggest that police will not use them constantly. There is always a danger that an occupant will unexpectedly return, or that an undetected person remains inside the house. Police risk exposing their secret investigation and even risk harm to themselves. In one episode of the HBO drama *The Sopranos*, police obtain a "sneak and peek" warrant to install a listening device in Tony Soprano's basement. Much of the narrative tension of the episode comes from the almost comical efforts of police to track the routine movements of every member of the Soprano household and ensure that none of them will inadvertently return while the police are installing the device. *The Sopranos*, *supra* note 114. Currently there are no data on the number of "sneak and peek" searches conducted per year, due to the flaws in the reporting requirement passed by Congress in 2005. *See* Witmer-Rich, *supra* note 3, at 512–13. Thus it is not currently possible to say how common sneak and peek searches have become. In any event, a strong case remains that covert searching should be effectively regulated by a meaningful standard.

IV. A BETTER WAY TO REGULATE COVERT SEARCHING: NECESSITY

The solution to the constitutional and policy failures of § 3103a is to impose a strict "necessity" requirement, somewhat similar to the standard used in Title III, for all covert searches of physical spaces.[162] Several additional limitations might also make sense. Congress could require police seeking delayed notice search warrants to obtain authorization for the search from a high-level Department of Justice official—as with Title III wiretaps—to ensure that covert searches are sought only in cases of sufficient importance.[163] In addition—as discussed below in Part V, relating to covert seizures—Congress could try to limit the types of cases in which delayed notice searches could be used, such as by permitting covert searches in drug cases only if the quantity or value of the suspected drugs exceeded some threshold amount.

A. The Necessity Requirement

Congress could ameliorate the too-permissive nature of the current standard by amending § 3103a to add a necessity requirement. In the meantime, courts must grapple with the reality—ignored to date—that delayed notice searches clearly implicate the Fourth Amendment's "rule requiring notice."[164] The uniquely invasive nature of covert, delayed notice searches justifies heightened judicial scrutiny under the Fourth Amendment's "reasonableness" requirement. Based on the compelling analogy to Title III wiretaps, courts should require investigators to demonstrate "necessity" for the extreme intrusion of a covert entry.

162. As explained below, I do not propose that Congress adopt the exact language or standard set forth in Title III, but rather articulate a necessity standard for covert searches based on the same basic concept as used in Title III. In an evaluation of the USA PATRIOT Act, Martha Minow hinted at a similar approach: "The Patriot Act's authorization of 'sneak-and-peek' warrants—allowing for delayed notification to the subject—also seems to violate the Fourth Amendment and the Federal Rules of Criminal Procedure absent a strong demonstration of need, at least for the broad scope permitted." Martha Minow, *What Is the Greatest Evil?*, 118 HARV. L. REV. 2134, 2145 n.42 (2005) (reviewing MICHAEL IGNATIEFF, THE LESSER EVIL: POLITICAL ENTITIES IN AN AGE OF TERROR (2004)).

163. Under 18 U.S.C. § 2516(1), federal officers seeking a Title III wiretap order must first obtain approval from the Attorney General, Deputy Attorney General, Associate Attorney General, or any Assistant Attorney General. In practice, Title III wiretap applications are usually approved by a Deputy Assistant Attorney General for the Criminal Division. *See Electronic Surveillance Section 9.7.100*, U.S. ATTORNEY'S MANUAL, http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/7mcrm.htm (last visited Sept. 13, 2014).

164. *See* Witmer-Rich, *supra* note 3, at 576–84.

Stated differently, if investigators do not demonstrate that a covert entry is necessary—pursued as a last resort—then the resulting search is unreasonable under the Fourth Amendment.

The procedural mechanisms used to limit and regulate Title III wiretaps are a natural and logical place to find tools to regulate delayed notice search warrants. Both Title III wiretaps and delayed notice search warrants are forms of covert searching. In both cases, investigators invade private areas and gather information covertly, without letting the targets know of the search.

As set forth in Part II, wiretapping requires a showing of "necessity" rather than exigent circumstances. The "exigent circumstances" doctrine is a poor tool to regulate wiretaps for the same reason it is a poor tool to regulate delayed notice search warrants—it ends up authorizing covert searches in far too many investigations.

Instead of requiring a showing of "exigent circumstances," police seeking Title III wiretaps must demonstrate, among other things, necessity for the wiretap order.[165] The issuing judge must determine that "normal investigative procedures have been tried and have failed or reasonably appear unlikely to succeed if tried or be too dangerous."[166] That is, investigators must show that the wiretap is a "last resort"—the only reasonable way to obtain the evidence sought. The necessity requirement "assure[s] that wiretapping is not resorted to in situations where traditional investigative techniques would suffice to expose the crime."[167]

165. 18 U.S.C. § 2518(3)(c) (2012).

166. *Id.*

167. United States v. Kahn, 415 U.S. 143, 153 n.12 (1974). In the Title III context, the necessity requirement has been subject to considerable judicial interpretation. Courts have said that:

> The affidavit in support of a search warrant must simply explain the retroactive or prospective failure of several investigative techniques that reasonably suggest themselves. However, a comprehensive exhaustion of all possible investigative techniques is not necessary before applying for a wiretap. The statute was not intended "to foreclose electronic surveillance until every other imaginable method of investigation has been unsuccessfully attempted, but simply to inform the issuing judge of the difficulties involved in the use of conventional techniques."

United States v. De La Cruz Suarez, 601 F.3d 1202, 1214 (11th Cir. 2010) (citations omitted) (quoting and citing United States v. Van Horn, 789 F.2d 1492, 1496 (11th Cir. 1986)); United States v. Alonso, 740 F.2d 862, 868 (11th Cir. 1984). *See* CLIFFORD S. FISHMAN & ANNE T. MCKENNA, WIRETAPPING AND EAVESDROPPING: SURVEILLANCE IN THE INTERNET AGE § 8:73 (3d ed. Supp. 2013).

A similar requirement should exist for covert, delayed notice searches.[168] Covert searches are being used in cases in which there is not a sufficiently compelling government interest—in particular, in cases where ordinary investigative techniques could have achieved the same investigative goals. A necessity requirement would limit them to circumstances in which a covert entry is the only reasonable way to accomplish the investigative goals.

The value of using "necessity" to regulate covert, delayed notice searching was recognized by the very first judge to confront the practice (at least in a published judicial opinion). In *United States v. Freitas*,[169] Judge Eugene Lynch, of the United States District Court for the Northern District of California, ruled that delayed notice search warrants were constitutionally permissible, but only within strict limits.[170] Judge Lynch stated that "the privacy interests implicated here are substantial," but "even highly intrusive searches may pass constitutional scrutiny provided there are sufficiently compelling reasons for the search and adequate safeguards to protect against potential abuse."[171]

Noting the absence of controlling authority on point, Judge Lynch analogized delayed notice warrants to Title III wiretaps, which likewise authorize a search without contemporaneous notice to the party being searched. The court highlighted several Title III procedural limitations: (1) "the requirement that an inventory of the intercepted communications be sent to the surveilled parties 'within a reasonable time' after the surveillance is terminated"; and (2) the "necessity" or "exhaustion" requirement "that 'normal investigative procedures have been tried and have failed or reasonably appear unlikely to succeed if tried or [to] be too dangerous.'"[172]

Several features in Judge Lynch's analysis bear emphasis: (1) he concluded (correctly, in light of the Supreme Court's decision eleven years later in *Wilson v. Arkansas*) that providing notice at the time of a search was a component of Fourth Amendment reasonableness (not

168. Some commentators have criticized the implementation of § 2518(3)(c), arguing that courts have interpreted the Title III necessity rule too leniently. *See, e.g.*, CARR & BELLIA, *supra* note 73, at § 4:39. For that reason, and because the particular context of covert searching of physical spaces raises different Fourth Amendment and policy concerns than wiretapping, I argue for a legal standard similar but not identical to that in section 2518(3)(c).

169. United States v. Freitas, 610 F. Supp. 1560 (N.D. Cal. 1985), *rev'd*, 800 F.2d 1451 (9th Cir. 1986).

170. *Id.* at 1570.

171. *Id.*

172. *Id.* at 1571 (citing 18 U.S.C. § 2518(8)(d) (1982) (notice); 18 U.S.C. § 2518(3)(c) (1982) (necessity)).

merely a requirement of Rule 41); (2) he recognized that delayed notice may be permissible constitutionally when circumstances warranted; (3) he analogized delayed notice search warrants to Title III wiretaps (another form of covert searching); and (4) he held that to be constitutionally permissible, a warrant authorizing a surreptitious search at the very least had to provide for some notice after the search and had to be shown to be necessary. On appeal, the Ninth Circuit adopted all of these key points.[173]

The *Freitas* case illustrates how the necessity requirement would limit covert searches. Much like the drug cases discussed above, in *Freitas*, a DEA agent sought a delayed notice warrant to search a home suspected to have a methamphetamine laboratory.[174] The affidavit provided ample probable cause to believe this was true but did very little to explain the need for a delayed notice search. The affidavit stated that "[i]t would be advantageous for the investigation and safety of the surrounding residents if agents were able to enter 9839 Crestview Drive and determine the status of the laboratory, and any chemicals that may be present."[175] In a declaration filed much later, after the eventual suppression hearing, the DEA agent "said that the agents decided to apply for a covert entry warrant because 'this would enable [them] to maintain the secrecy of the investigation and also confirm to a certainty [their] probable cause information that a lab was present.'"[176]

The agents executed the delayed notice warrant on December 13, 1984, searching the house at night when no one was present, and confirmed that there was a meth lab inside. Clearly, had the agents conducted the search when Freitas was present and then chosen not to seize any evidence or arrest Freitas, the result would have been both the destruction of evidence and the escape of the suspect.

But there was no evidence that the agents had any real need to conduct a covert search. They had ample cause to believe there was a meth lab in the house. They took no action after the covert search to prevent possible environmental damage to the neighborhood. They did not obtain any leads inside the house during the covert search (and never claimed they were looking for any). After the covert search on December 13, they executed ordinary search warrants on several locations on December 20 and arrested Freitas. It appears that the investigation would have turned up precisely the same evidence and arrests had agents simply skipped the covert search on December 13.

173. United States v. Freitas, 800 F.2d 1451, 1456 (9th Cir. 1986).

174. *Freitas*, 610 F. Supp. at 1563.

175. *Id.* at 1564 (quoting Hayes Affidavit at ¶ 9).

176. *Freitas*, 800 F.2d at 1460 (9th Cir. 1986) (Poole, J., dissenting) (quoting Hayes Affidavit).

Judge Lynch, applying the "necessity" requirement he had determined should be used to govern delayed notice search warrants, explained that the affidavit "made no reference to the inadequacy of other investigative techniques apart from the surreptitious entry."[177] In light of that failure (and the failure to require even retrospective notice), the court had "no difficulty concluding that the surreptitious entry of the Clearlake residence violated the Fourth Amendment."[178]

A necessity requirement for covert searches makes sense for the same reasons that that standard is used for wiretaps. In both cases, investigators seek to deviate from the traditional Fourth Amendment presumption that notice must be given at the time of the search. To justify that deviation, investigators should be required to show that conventional Fourth Amendment techniques are inadequate—that the covert search is necessary.

B. DOJ Authorization

Another Title III limitation also makes sense for delayed notice search warrants. Before federal agents can seek a Title III wiretap order from a federal judge, they must obtain prior authorization from a high-level official within the Department of Justice.[179] This requirement ensures that wiretaps are used only in circumstances deemed sufficiently important to warrant involvement of a high-level DOJ official, and after some internal deliberation at higher levels of the department.

Congress should require the same for covert, delayed notice searches. Like Title III wiretaps, covert searches of physical space represent a substantial intrusion into personal privacy. Both forms of covert searching impose a privacy cost on the entire community, as more and more individuals wonder whether their phones—or homes—have been secretly searched by the government. Covert, delayed notice searches of physical space should be permitted only when officials at high levels of the Department of Justice consider the circumstances and determine that the investigative interest is sufficiently compelling to justify this invasive search tool.

These two limitations—"necessity" and prior DOJ approval—strike a balance between permitting covert, delayed notice searches when the government interest is sufficiently compelling (because the search is necessary to accomplish investigative goals that are deemed important by high-level DOJ officials), while prohibiting the use of an invasive search technique when the government interest is not compelling (because the government investigative goals can be reasonably

177. *Freitas*, 610 F. Supp. at 1571.

178. *Id.* After two appeals to the Ninth Circuit, that court ultimately denied the defendant's motion to suppress due to the *Leon* good faith exception. United States v. Freitas, 856 F.2d 1425, 1432 (9th Cir. 1988).

179. *See* 18 U.S.C. § 2516(1) (2012).

accomplished without using a covert search, or the investigation is not sufficiently important to warrant DOJ involvement).

C. The Misplaced Focus on Section 3103a's "Catch-All" Provision

Subsections (A)–(D) of § 3103a authorize delayed notice warrants in circumstances that closely resemble "exigent circumstances." But even if "exigent circumstances" are not present, subsection (E) further authorizes delayed notice warrants whenever notice of a search would "otherwise seriously jeopardiz[e] an investigation."[180] Subsection (E) is on considerably shakier constitutional ground, as it departs clearly from the "exigent circumstances" doctrine.

Accordingly, critics of delayed notice search warrants have often focused on this "catch-all" provision,[181] and legislators seeking to curb the use of delayed notice search warrants have sought to repeal subsection (E).[182] In some ways, subsection (E) is an appealing target, in part because, as explained above, this exception finds no support whatsoever in the common law exceptions to the "rule requiring notice."

In reality, however, this focus on subsection (E) is largely misplaced. Trying to fix § 3103a by eliminating subsection (E) is both too narrow and too broad a fix. Eliminating subsection (E) is not an adequate fix for the problems in § 3103a. As explained above, the exceptions listed in subsections (A)–(D) are already far too permissive, allowing covert searches in almost any case. At the same time, eliminating subsection (E) is too drastic a remedy because delayed notice warrants should be available in some cases that may not fit the traditional "exigent circumstances" doctrine.

1. Eliminating Subsection (E) Does Not Correct the Problem.

The first problem with focusing on subsection (E) is that repealing that subsection would not solve the core problem with the current regulatory scheme. As explained above, subsections (A)–(D)—roughly

180. 18 U.S.C. § 2705(2)(E) (2012).

181. *See* Nathan H. Seltzer, *When History Matters Not: The Fourth Amendment in the Age of the Secret Search*, 40 CRIM. L. BULL. 105, 114 (2004) (criticizing subsection (E) as "permit[ting] virtually limitless justifications by law enforcement authorities in their requests for delayed notification," and claiming that "the fact that subsection (E) of the 'adverse result' definition is borrowed from a different context[] renders the provision constitutionally suspect").

182. In 2003, Senator Russ Feingold introduced the "Reasonable Notice and Search Act," designed to amend section 213 of the USA PATRIOT Act related to delayed notice searches. 149 CONG. REC. S12,377 (daily ed. Oct. 2, 2003) (statement of Sen. Russ Feingold). Senator Feingold did not propose to eliminate delayed notice search warrants but to add several new limitations. Among other things, the bill would have eliminated the "catch-all" justification in subsection (E) ("seriously jeopardize an investigation or unduly delay a trial"), which Senator Feingold called "too easily susceptible to abuse." *Id.* at 12,378.

speaking, the "exigent circumstances" doctrine—fail to meaningfully regulate delayed notice search warrants. Subsections (A)–(D) ask whether giving notice of a search will lead to destruction of evidence or escape of suspects. If the police choose to conduct a search without seizing the evidence or arresting the suspects, the answer to that question will almost always be yes. Subsections (A)–(D) do not ask police to give the justification that should be demanded—namely, why police think it is so important to conduct a covert search now, rather than an ordinary search later when the investigation is concluding. Repealing subsection (E) obviously does not correct the problem of using the exigent circumstances doctrine in the first place.

Thus, even if subsection (E) were repealed, subsections (A)–(D) would continue authorizing covert searches in a broad range of cases where these invasive searches are unnecessary and unjustified. Recall the *Christopher* case and others like it. A DEA investigator has probable cause to believe marijuana is being grown in a shed on a particular piece of property. The investigator wants to search the shed and determine whether marijuana is present. At the same time, the agent wants the investigation to remain secret, to give the agent more time to identify the suspects who might be associated with the shed.[183] If investigators conducted a traditional search of the shed, it would tip off the suspects. Those suspects might destroy any other evidence of the drug crime and might also try to flee before they can be identified by law enforcement. The exigencies of preventing the destruction of evidence and preventing the escape of a suspect are both present in this example. Even though the scenario above satisfies subsections (A)–(D), these facts do not show whether a covert search is truly necessary or important to the investigation. Thus, even if subsection (E) were repealed, a fundamental problem would remain with subsections (A)–(D).

That objection alone does not suffice to show that subsection (E) should be preserved or that it is not worthy of at least some of the criticism that has been lodged against it. It could be the case that subsection (E) should be repealed, and subsections (A)–(D) should also be amended. On the contrary, I argue that repealing subsection (E) would be a mistake, as there are some important circumstances in which a covert search is important and necessary, and yet might not be authorized under subsections (A)–(D).

183. These facts are based roughly on those forming the basis of United States v. Christopher, No. 2008-0023, 2009 WL 903764 (D. V.I., Mar. 31, 2009). The basic nature of these facts is also similar to those in, for example, United States v. Freitas, 610 F. Supp. 1560 (N.D. Cal. 1985); United States v. Villegas, 899 F.2d 1324 (2d Cir. 1990); and United States v. Hernandez, 2007 WL 2915856 (S.D. Fla. Oct. 4, 2007).

2. Eliminating Subsection (E) May Prohibit Covert Searching in Some Cases in Which It Serves a Compelling Government Interest.

Subsection (E) should not be eliminated because there are some circumstances in which the government need for a covert search is both substantial and compelling, and which may be authorized only by subsection (E) and not by subsections (A)–(D). Subsections (A)–(D) cover most of the reasons investigators would like to conduct a covert search. The paradigmatic "terror cell" case, in which the government conducts a covert search to discover and disrupt an imminent terrorist plot, without prematurely tipping off the members of the terror cell, falls comfortably under subsections (A) and (B): without a covert search, the members of the terror cell might escape (subsection (B)) and re-form later to carry out another attack (subsection (A)).

The one recurring case that does not necessarily fit under subsections (A)–(D) is the need to protect an ongoing wiretap. The DOJ has given several examples of cases in which a covert search is justified by the desire to find (and perhaps seize) evidence while protecting an existing wiretap.[184] In this type of case, investigators want to find and possibly seize evidence but fear that if they do so (with notice), persons involved in the illegal conduct will cease communicating—at least incriminating communications—over wiretapped phone lines. These cases may not necessarily involve risk to any person, or the destruction of (existing) evidence, or the escape of suspects. Instead, the risk may simply be that persons who have been talking on a tapped phone line will stop conducting incriminating conversations on that phone line.

This danger does not seem to fit under the justifications listed in subsections (A)–(D). The closest provision is subsection (C)—"destruction of or tampering with evidence." One could argue that this provision, read broadly, could cover the risk of compromising a wiretap. Compromising a wiretap can be said to involve the "destruction of evidence" in the sense that evidence that would come into existence in the future—future conversations—will never materialize. It is not clear whether courts would accept this somewhat strained reading of subsection (C). Arguably, the concept of "destruction of evidence" implies that evidence already exists and that evidence will be lost or destroyed.[185] It is unclear whether the loss of potential future incriminating statements by wary suspects involves destroying evidence.

184. *See infra* Part IV.C.2.

185. In the context of Title III wiretapping, Daniel Cook interpreted the "destruction of evidence" test narrowly: "Obviously, evidence could not be destroyed if notice were given prior to the execution of the order since the 'evidence' does not yet exist. . . . If presearch notice were given, no evidence would be destroyed; it simply would not materialize . . . ." Cook, *supra* note 83, at 581.

Protecting an existing wiretap is plainly authorized by subsection (E). Danger to an existing wiretap is a circumstance that might seriously jeopardize an investigation, even in the absence of danger to any person, danger of escape, risk of destruction of evidence, or possible witness intimidation.

Protecting a wiretap is also a sufficiently important government interest, at least in some cases, to justify a covert search. The paradigmatic terror cell case could easily fit this pattern. Suppose investigators seek to conduct a covert search of the location of a suspected terror cell. Investigators also have an existing wiretap on the phone of a key suspect. The covert search (and possibly seizure of evidence) could allow investigators to gather critical evidence to prevent a terrorist attack while preserving the integrity of an existing wiretap that can be used to determine the identity of suspects and prove their involvement in the terror plot.

In sum, the need to protect an existing wiretap is at least sometimes a sufficiently compelling government interest to justify a covert search and/or seizure. That concern may not be adequately covered by subsections (A)–(D) and is most evidently authorized by subsection (E). Repealing subsection (E), then, would jeopardize the government's ability to conduct covert searches for the purpose of protecting an existing wiretap, even when doing so is justified by the most compelling of circumstances.

Subsection (E) is the wrong target for those seeking to reform the practice of covert searching under § 3103a. Repealing subsection (E) would both accomplish far too little—as subsections (A)–(D) currently authorize covert searches in many unnecessary cases—and accomplish too much—potentially eliminating the ability to use covert searches to discover important evidence while protecting existing wiretaps.

V. REGULATING COVERT SEIZURES

Covert seizures of physical evidence and contraband carry additional problems not present with covert searches. The current statute prohibits any seizures during covert searches unless the court specifically authorizes one based on a showing of "reasonable necessity" for the seizure.[186] The statute fails to recognize or regulate a very significant danger involved in covert seizures—retaliatory violence against third parties. In addition, the "reasonable necessity" standard is not very helpful in identifying which types of covert seizures are sufficiently important to justify these risks.

A. Mitigating the Danger to Third Parties

Covert seizures create at least one serious danger not present with covert searches. If a covert seizure is successful, the owner of the seized

186. 18 U.S.C. § 3103a(b)(2) (2012).

property will believe the property has been stolen in a burglary, not seized by the government. The seized items will almost always be contraband, and thus the target of the seizure will not report the crime to the police but may well seek private remedies—retaliation against the suspected burglars.[187]

The current statute does not acknowledge this problem or direct investigators or courts to deal with it, creating another constitutional defect in § 3103a. A search and seizure that predictably prompts the target to retaliate against innocent third parties is an "unreasonable" search. Courts issuing delayed notice warrants that authorize covert seizures should press investigators to explain whether the covert seizure creates a risk of harm to third parties and also to explain what measures will be taken to minimize that harm. Congress should amend § 3103a to specifically require a consideration of this danger.

At least one court has recognized the danger posed by covert seizures. In *United States v. Espinoza*,[188] the court granted a motion to suppress the fruits of a covert search because the search warrant did not authorize it.[189] The court's analysis focused on the warrant's facial deficiency under § 3103a and did not dwell much on the details of the actual search. At the end of the opinion, however, the court made some brief but intriguing comments on the potential dangers of a delayed notice search staged to look like a break-in.

The court explained that "[t]he officers left a California license plate in order to divert any suspicion from law enforcement and toward other individuals."[190] The court stated that this tactic—typical in covert seizures—"has the dangerous potential of injuring innocent third persons. When an individual discovers that others have been on their property uninvited, there exists a natural desire to learn who the intruder was . . . ."[191] When investigators seize property and stage a

187. A fictional example comes from *The Wire*. After Omar Little robs a drug stash run by the Avon Barksdale gang, Barksdale puts a bounty on the head of the robbers and says he wants their dead bodies to be displayed publicly:

Barksdale: "I want that mother—er on display. We send a message to the courtyard about this mother—er. So people know we ain't playin'."

Wee-Bey: "Yeah, we got peoples on it."

The Wire: Old Cases (HBO television broadcast June 23, 2002).

188. United States v. Espinoza, No. CR-05-2075-7-EFS, 2005 WL 3542519 (E.D. Wash. Dec. 23, 2005).

189. *Id.* at *5. In the search warrant affidavit, the investigators had requested a delayed notice search warrant under § 3103a. The warrant itself, however, did not actually authorize delayed notice. *Id.*

190. *Id.*

191. *Id.*

burglary, "it creates the potential for innocent people being injured because the owners of the property may incorrectly blame and sanction in some way a person innocent of the seizure."[192] Indeed, the court noted that the Title III wiretap had produced evidence of just such a risk: "[t]he transcripts of recorded telephone conversations demonstrate that the Riveras had focused on the brother of Ms. Espinoza exposing him to danger of injury . . . ."[193]

Another case similarly illustrates this danger, and shows that investigators sometimes use covert seizures for precisely this purpose—to provoke conspirators into action—thereby providing further evidence of their criminal conduct. In *United States v. Miranda*,[194] the Eleventh Circuit described a "sneak and peek" search accompanied by a covert seizure.[195] During an investigation into a drug conspiracy, police learned the location of the stash house. Agents conducted a "sneak and peek" search of the house at 4:45 a.m. and seized three pounds of methamphetamine with a street value of around $24,000–$30,000.[196]

Remarkably, the very purpose of this covert seizure appears to have been to provoke the members of the conspiracy: "By staging a burglary, the agents hoped to precipitate activity within the Cuevas conspiracy that would provide additional evidence of criminal conduct."[197] This tactic was successful:

> The ruse had the desired effect. Mr. Cuevas discussed the apparent theft of the methamphetamine from the 499 Alcott Street stash house with Jesus Alvear Uribe. . . . Mr. Uribe suggested that Mr. Mojica was the thief. Mr. Cuevas suspected that the culprit was a man who had been employed to wash the methamphetamine at the 499 Alcott Street stash house. After the entry into the 499 Alcott Street stash house and the apparent theft of methamphetamine, Mr. Cuevas moved his methamphetamine and cocaine operation to Apartment 29G.[198]

The court does not discuss the matter further, but these facts illustrate the concerns raised by the *Espinoza* court. After the members of a large-scale drug conspiracy discover what they believe to be a burglary of $30,000 worth of drugs, they predictably begin analyzing who

192. *Id.*

193. *Id.*

194. United States v. Miranda, 425 F.3d 953 (11th Cir. 2005).

195. *Id.* The covert search and seizure were not challenged on appeal, so the Eleventh Circuit described them in passing but did not analyze the legality of the search or seizure.

196. *Id.* at 956.

197. *Id.*

198. *Id.*

committed the burglary. This discussion may have several purposes—including prevention of additional thefts—but one of those purposes was no doubt to consider retaliation against the suspected thief.

The current statute does not recognize this danger or take any steps to address it. Covert seizures under § 3103a do require an additional showing beyond that required for covert searches. Delayed notice warrants issued under § 3103a must "prohibit[] the seizure of any tangible property . . . except where the court finds reasonable necessity for the seizure."[199] The statute does not define "reasonable necessity," and there is no case law to date interpreting this requirement.[200] Given the lack of a statutory definition and the "reasonable" adjective, it is unlikely that courts would interpret this requirement as equivalent to the Title III "necessity" standard in § 2518(1)(c).

Courts, as well as Congress, must address this problem. Investigators should be required to confront this issue head-on in any application for a covert seizure of tangible goods—to explain whether the covert seizure will create any risk of harm to third parties, and to explain what measures they will take to mitigate that harm. A court should not authorize covert seizures unless it is satisfied that any risk of harm to third parties is outweighed by some substantial government interest in the seizure requested. Part VI below proposes specific statutory language for this requirement.

B. Requiring a Substantial Government Interest for Covert Seizures

Covert seizures present another problem in addition to the danger of retaliation against third parties. If the object of a covert search is fungible goods—such as drugs or cash—police may be able to easily demonstrate "necessity" as well as "exigent circumstances" in almost any case. That may be true even in cases in which the goods in question are not uniquely valuable to the investigation and do not pose any substantial danger to the public.

Suppose police suspect a college student is selling small quantities of marijuana from his dorm room. They would like to continue their investigation for another week or two to permit them to try to identify other conspirators, and perhaps to identify the student's supplier. Police seek a delayed notice warrant to search the dorm room while he is away and also seek permission to seize any marijuana and any cash they find. Under existing statute, how would this request fare?

199. 18 U.S.C. § 3103a(b)(2) (2012).

200. *Espinoza* is the only case to mention it, and the court there does not discuss or define the term. United States v. Espinoza, No. CR-05-2075-7-EFS, 2005 WL 3542519 (E.D. Wash. Dec. 23, 2005). The requirement to show "reasonable necessity" for covert seizures was not included in the Bush Administration's original proposed legislation, but it was added by Congress before passing the USA PATRIOT Act. 147 CONG. REC. S10,547 (daily ed. Oct. 11, 2001) (statement of Sen. Patrick Leahy).

It is easy to see how a search with notice given to the student would prompt him to destroy evidence. If police search his dorm room and confirm the presence of marijuana, it is near certain that the suspect, after the police leave, will then destroy or dispose of the marijuana. Thus it is easy to show "exigent circumstances" to justify the covert search.

Can the police also show "reasonable necessity" for the covert seizure? Assume police plan on conducting a covert search on one date—say, April 10—but do not plan on seizing any evidence or arresting the suspect until ten days later. It is likely that any marijuana they see on April 10 will no longer be there by April 20. That is true even if they are confident that *some* marijuana, most likely in a similar quantity, will be present on April 20. The *particular* marijuana they see on April 10 will almost certainly be long gone—up in smoke—by April 20. Thus police might claim "reasonable necessity" for the seizure: if they do not seize this marijuana during the April 10 covert search, it will be gone—used or distributed to third parties—by the time of the later search.

The result is the same even under the proposed "necessity" standard. Assume police must show that normal investigative techniques do not suffice—that the evidence cannot be obtained without a covert search and seizure. Police can explain, correctly, that any particular marijuana they might find on April 10 is not likely to be present on April 20, and thus ordinary investigative techniques would not suffice to obtain that evidence. Thus in any case in which investigators are looking for fungible goods—such as drugs or guns—they may be able to readily show that a covert seizure is "necessary." That is true even in cases, like our small-time marijuana dealer, in which there does not appear to be any compelling government interest that justifies the extraordinary measures of a covert search and seizure.

Search warrant affidavits in covert seizure cases illustrate this problem. In *Espinoza*, the agents sought permission to conduct a covert seizure in addition to the covert search. The affidavit does not use the phrase "reasonable necessity" but nonetheless appears to be drafted to satisfy that (rather amorphous) standard. The affidavit states that seizure of any drugs should be permitted "to protect the public from the distribution of the same; to preserve the evidence as the nature of this drug organization is to move the inventory, and because it is obvious contraband."[201] The affidavit also sought permission to seize any weapons found during the covert search "to protect the public from the use of the firearms in relation to drug trafficking crimes."[202] Finally,

201. Affidavit in Support of Search and Seizure Warrant at 14 ¶ 36, United States v. Espinoza, No. CR-05-2075-7-EFS, 2005 WL 3542519 (E.D. Wash. Dec. 23, 2005) (M-05-4073-00).

202. *Id.*

the affidavit sought permission to seize any currency found near any illegal drugs, because "the currency is related to illicit narcotics trafficking and its fungible nature makes it unlikely that it would be present when the case is concluded."[203]

This paragraph seems to show "reasonable necessity" for the seizure, even if "necessity" in this context is understood in the relatively strict Title III sense (and it is not clear that courts interpret it that strictly), requiring a showing that there is no other reasonable way to get this evidence through ordinary investigative techniques. In cases like this—almost any drug investigation—a covert seizure, unlike a covert search, really does provide police with evidence they would not otherwise obtain without compromising the investigation. The problem is that, in some cases, that fact may seem important enough to justify a covert seizure, whereas in other cases, it may not. For example, in a case involving a large quantity of drugs, a covert seizure may be justified to prevent the distribution of a large quantity of drugs into the black market. In contrast, in a case involving a small quantity of drugs, such as a small amount of marijuana, a covert seizure may not be justified. The "necessity" standard does not distinguish between the two types of cases.

There are several possible ways to try to solve this problem. Congress could draw a specific line, authorizing covert searches and seizures in drug cases only when the drugs in question cross a specified threshold. For example, Congress could provide that covert seizures of drugs are permitted only when the quantity suspected is above that provided in 21 U.S.C. § 841(b)(1)(A).[204] This would permit investigators to request a covert seizure of drugs only when they believe they would remove a substantial quantity of drugs from the stream of commerce—under § 841(b)(1)(A), at least 1 kilogram of heroin, 5 kilograms of cocaine, 280 grams of crack, or other specified drug-specific quantities.[205]

The benefit of this approach is to provide a bright-line limit below which any drugs that might be present are in small enough quantities as to not justify the risks and privacy invasions of a covert seizure. It may be unwieldy, however, to use specific drug quantities as a cut-off for covert search and seizure authority because investigators often may not know the drug quantities involved at the time they seek the warrant.

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203. *Id.*

204. Section 841(b)(1)(A) lists drug quantities, by type of drug, for the purposes of federal sentencing and mandatory minimums. These drug-specific quantities listed in § 841(b)(1) represent an existing measure of the relative "seriousness" of various types of controlled substances. 21 U.S.C. § 841(b)(1)(A) (2012).

205. *Id.* § 841(b)(1)(A). If Congress wanted to draw the line differently, it could instead authorize covert seizures in cases involving amounts listed in 21 U.S.C. § 841(b)(1)(B): at least 100 grams of heroin, 500 grams of cocaine, 28 grams of crack, and so on.

Another approach would be to require investigators to show, and the court to find, that a covert seizure would further a "substantial government interest." Instead of creating a bright line, this requirement would push investigators to explain why a covert seizure is so important and allow courts to exercise some case-specific judgment about what circumstances present sufficiently important government interests to justify a covert search and seizure.

VI. Proposed Legislation

This Article has identified a number of flaws in the existing delayed notice search warrant statute and explained some of the revisions that would better regulate the practice. There is good reason to believe that Congress, in § 3103a, sought to create a uniform standard for covert searches of physical space, one that would permit the practice in exceptional cases involving compelling government interests but that would not authorize the practice in any routine case. The following proposed revisions better reflect this legislative goal. The proposed revisions appear in italics. Explanatory commentary appears in footnotes.

Proposed Section 3103a

(b) Delay.— 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 the warrant may have an adverse result (as defined in section 2705, except if the adverse results consist only of unduly delaying a trial);

(2) in the case of a physical search (as defined in 50 U.S.C. § 1821(5))[206], the court finds:

(i) that the application for delayed notice has been approved by one of the officials listed in section 2516(1) of Title 18[207]; and

206. As noted in Part V, the fundamental problems related to covert searches identified in this Article involve physical searches, not other types of covert searches such as GPS monitoring or obtaining digital records. Another federal statute—the Foreign Intelligence Surveillance Act (FISA)—already differentiates between searches of physical spaces and other types of searches. 50 U.S.C. § 1821(5) (2012). Thus, FISA's statutory definition of a "physical search" is used here.

207. This section is part of the Title III wiretapping statute. 18 U.S.C. § 2516(1) (2012). It lists the following officials who can authorize an application for a Title III wiretap and, as incorporated here, who can authorize an application for a delayed notice search warrant involving a physical search:

(ii) that the objectives of the search cannot substantially be accomplished through normal investigative procedures (including a later search conducted with contemporaneous notice);[208]

(3) the warrant prohibits the 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 for~~ *that* the seizure *will serve a substantial government interest*;

(4) in the case that a seizure of tangible property is authorized, and that seizure of tangible property creates a risk of serious physical harm to any person (through retaliation or otherwise), the court finds:

(i) that the government has proposed procedures that will minimize that risk; and

(ii) that the government interest in the covert seizure outweighs any risk of serious physical harm to any person;

(5) in the case of a seizure of controlled substances, the court finds that the controlled substances likely to be seized meet or exceed the quantities listed in section 841(b)(1)(A) of Title 18;

and

(6) the warrant provides for the giving of such notice within a reasonable period not to exceed 30 days after the date of its execution, or on a later date certain if the facts of the case justify a longer period of delay.

CONCLUSION

Covert searching is a dangerous tool. It allows the government to secretly enter the sanctuary of the home, which stands at the center of the Fourth Amendment protection against unreasonable search and seizure. Covert government intrusion into the home carries serious privacy costs; "[a]wareness that the Government may be watching chills associational and expressive freedoms."[209] At the same time, covert searching can be a critical law enforcement tool, permitting police to

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> The Attorney General, Deputy Attorney General, Associate Attorney General, or any Assistant Attorney General, any acting Assistant Attorney General, or any Deputy Assistant Attorney General or acting Deputy Assistant Attorney General in the Criminal Division or National Security Division specially designated by the Attorney General . . . .

Id.

208. This language is meant to reflect a similar "necessity" standard as appears in the wiretapping context. 18 U.S.C. § 2518(1)(c) (2012). The proposal does not use the exact language of § 2518(1)(c) but instead seeks to invoke the underlying concept of "necessity" in the particular context of covert searches of physical spaces.

209. United States v. Jones, 132 S. Ct. 945, 956 (2012) (Sotomayor, J., concurring).

maintain the secrecy of an investigation while discovering crucial information or securing dangerous contraband.

The deeply invasive nature of covert searching requires a compelling government justification, and covert searches should be reserved for cases of true necessity. The current legal rules governing delayed notice search warrants are conceptually flawed. The statute uses a legal doctrine—"exigent circumstances"—that does not make logical sense when applied to covert searching of physical spaces and which permits investigators to conduct a covert search in almost any case they would find it convenient or helpful. Covert searches without sufficient justification run afoul of the Fourth Amendment's "rule requiring notice" and are constitutionally unreasonable.

Courts must recognize the Fourth Amendment interests implicated by covert searching and demand more exacting justifications. Congress should revise the delayed notice search warrant statute, requiring police to demonstrate true necessity for a covert search—a showing that conducting a covert search is the only way to obtain evidence that cannot reasonably be obtained through conventional (and less invasive) investigative techniques. In addition, Congress should require investigators to obtain high-level approval from within the DOJ, to ensure that covert searches are conducted only in cases of sufficient importance and not in run-of-the-mill criminal investigations. Congress should also revise the statute to regulate the serious risk of physical harm that arises from the dangerous practice of covert seizures staged to look like burglaries.

With these revisions, covert searches and seizures can be limited to cases of sufficient importance and necessity, thus rendering them constitutionally reasonable.