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# The Rapid Rise of Delayed Notice Searches, and the Fourth Amendment “Rule Requiring Notice”

Jonathan Witmer-Rich

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# The Rapid Rise of Delayed Notice Searches, and the Fourth Amendment “Rule Requiring Notice”

Jonathan Witmer-Rich\*

*This article documents the rapid rise of covert searching, through delayed notice search warrants, and argues that covert searching in its current form presumptively violates the Fourth Amendment’s “rule requiring notice.”*

*Congress authorized these “sneak and peek” warrants in the USA Patriot Act of 2001, and soon after added a reporting requirement to monitor this invasive search technique. Since 2001, the use of delayed notice search warrants has risen dramatically, from around 25 in 2002 to 5601 in 2012, suggesting that “sneak and peek” searches are becoming alarmingly common. In fact, it is not at all clear whether true “sneak and peek” searches are on the rise. The data are confounded with other types of searches and thus are failing to capture what Congress intended. This article proposes an amendment to the reporting requirement to fix this problem and allow adequate monitoring of “sneak and peek” searches.*

*To date, most courts have concluded that delayed notice search warrants raise no Fourth Amendment concerns. This article argues to the contrary. As a matter of Fourth Amendment first principles, covert searches infringe on the privacy and sanctity of the home. Moreover, history shows that delayed notice warrants are a modern procedural innovation, and did not exist at common law in the years leading up to the drafting of the Fourth*

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\* Assistant Professor of Law, Cleveland-Marshall College of Law, Cleveland State University; J.D., University of Michigan School of Law; B.A., Goshen College. Thanks to Fabio Arcila, Jr., Michael Borden, Mary Bowman, Thomas Y. Davies, David C. Gray, Orin Kerr, Michael Mannheimer, Laurent Sacharoff, Jim von der Heydt, and participants in the Duquesne University School of Law faculty exchange, for their very helpful feedback on drafts of this article. Thanks to Rachel Kareha and Miles Welo for valuable research assistance.

*Amendment in 1791. Instead, covert searches presumptively violate the Fourth Amendment “rule requiring notice”—a principle deeply rooted in the history of search and seizure law, and meant to protect against many of the dangers created by covert, delayed notice searching.*

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Congress passed the USA Patriot Act soon after the terrorist attacks of September 11, 2001, giving federal authorities new powers to detect and prevent terrorism.<sup>1</sup> One of the lesser-noticed provisions authorized “sneak and peek” searches using “delayed notice search warrants”—warrants providing for covert searches of American homes and businesses.<sup>2</sup> The law also authorizes “sneak and steal” searches—delayed notice search warrants that allow the government to seize evidence or contraband during the secret search.<sup>3</sup> In “sneak and steal” cases, police often stage the seizure to resemble a burglary, perhaps by a rival drug gang, to prevent the target from suspecting a government search.<sup>4</sup>

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1. See *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001*, Pub. L. No. 107-56, 115 Stat. 272 (“To deter and punish terrorist acts in the United States and around the world, to enhance law enforcement investigatory tools, and for other purposes.”). A Department of Justice summary of the USA Patriot Act states that “Congress enacted the Patriot Act by overwhelming, bipartisan margins, arming law enforcement with new tools to detect and prevent terrorism.” U.S. Dep’t of Justice, *The USA PATRIOT Act: Preserving Life and Liberty*, [http://www.justice.gov/archive/ll/what\\_is\\_the\\_patriot\\_act.pdf](http://www.justice.gov/archive/ll/what_is_the_patriot_act.pdf).

2. USA PATRIOT Act § 352. Since the Patriot Act was passed, only a few law review articles have focused on the delayed notice search warrant provision. See Robert M. Duncan Jr., *Surreptitious Search Warrants and the USA Patriot Act: “Thinking Outside the Box but Within the Constitution,” or a Violation of Fourth Amendment Protections?*, 7 N.Y. CITY L. REV. 1 (2004); Nathan H. Seltzer, *Still Sneaking & Peeking*, 42 CRIM. L. BULL., Summer 2006, at 1; Nathan H. Seltzer, *When History Matters Not: The Fourth Amendment in the Age of the Secret Search*, 40 CRIM. L. BULL., March 2004, at 1; 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. 18 U.S.C. § 3103a(b)(2) (2012). See Shumate, *supra* note 2.

4. The terminology for these searches is contested. Congress refers to the practice as obtaining a “delayed notice” search warrant. 18 U.S.C. § 3103a. Courts and commentators often use the colorful labels “sneak and peek” and “sneak and steal.” See, e.g., *United States v. Mikos*, 539 F.3d 706, 709 (7th Cir. 2008); *United States v. Miranda*, 425 F.3d 953, 956 (11th Cir. 2005); Kevin Corr, *Sneaky but Lawful: The Use of Sneak and Peek Search Warrants*, 43 U. KAN. L. REV. 1103 (1995); Shumate, *supra* note 2. Former U.S. Deputy Attorney General James Comey has complained that “[w]e in law enforcement do not call them [sneak and peek warrants] because it conveys this image that we are looking through your sock drawer while you are taking a nap.” James B. Comey, *Fighting Terrorism and Preserving Civil Liberties*, 40 U. RICH. L. REV. 403, 410 (2006). Notably, Comey did not claim this negative image is inaccurate (except that police with delayed notice warrants look through your sock drawer when you are out of the house, rather than asleep), but rather that law enforcement would prefer the public not adopt that alarming image. The government’s phraseology—“delayed notice search warrant”—is less descriptive and potentially misleading. The most salient feature of a delayed notice search warrant is the secrecy of the search. The fact that the occupant learns of this covert search a month or two later is certainly important, but of secondary concern. This article uses the phrases “sneak and peek” and “sneak and steal,” as well as “covert search” or “covert, delayed notice search,” to focus attention on the fact that the practice at issue is a secret government search.

The Department of Justice, as well as legislators, claimed that the delayed notice warrant statute merely codified existing law and practice<sup>5</sup> and that “sneak and peek” searches should be used rarely—only “when it really, really matters.”<sup>6</sup> In 2005, as part of the Patriot Act Re-Authorization, Congress created a reporting requirement for delayed notice search warrants, designed to allow Congress—and the public—to see how frequently, and for what purposes, investigators were conducting “sneak and peek” searches.<sup>7</sup>

Data from the past six years shows an explosion in federal delayed notice search warrants, from around 174 warrants issued in 2006 to 5,601 in 2012—an astonishing rise.<sup>8</sup> Seventy-five percent of delayed notice warrants are used in drug investigations; less than one percent are used in terrorism investigations.<sup>9</sup> On its face, the data is cause for alarm, suggesting that a tool Congress intended to be used rarely, only when truly needed, has become commonplace in routine investigations.

Upon further investigation, it is far from clear that this story is accurate. The reported data likely includes a mix of different types of searches: some “sneak and peek” searches of physical spaces, some covert GPS monitoring, some covert cell phone location tracking, and some covert e-mail collection.<sup>10</sup> While each of these types of searches is worth monitoring, the existing data does not distinguish among them, making the data much less useful.<sup>11</sup> Moreover, many of these searches are showing up in the data in increasing numbers, not necessarily because the searches are increasing

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5. See U.S. DEP’T OF JUSTICE, DELAYED NOTICE SEARCH WARRANTS: A VITAL AND TIME-HONORED TOOL FOR FIGHTING CRIME 3 (2004) (“[S]ection 213 merely codified the authority that law enforcement had already possessed for decades and clarified the standard for its application.”); 147 CONG. REC. 20,704 (2001) (statement of Sen. Orrin Hatch) (Delayed notice search warrants “are already used throughout the United States, throughout our whole country. The bill simply codifies and clarifies the practice . . .”); see also *infra* Part I.A.

6. Comey, *supra* note 4, at 410.

7. H.R. REP. NO. 109-333 (2005) (Section 114 (Delayed Notice of Search Warrants) of section 3103a was amended by adding subsection (d), requiring judges to issue reports to the Administrative Office of the U.S. Courts stating (1) the fact that a delayed notice warrant was applied for, (2) whether it was granted, denied, or modified, (3) the period of delay, and the number and duration of extensions, and (4) the offense specified in the warrant).

8. See *infra* Part I.B.

9. From fiscal year 2006 through 2011, the percentage of all delayed notice warrants that were requested for drug investigations is as follows: 75% (2006); 72% (2007); 62% (2008); 7% (2009); 74% (2010); 72% (2011). The percentage used in terrorism investigations is as follows: 0% (2006); 1.4% (2007); 0.4% (2008); 0.5% (2009); 0.9% (2010); 0.3% (2011). See *infra* note 130.

10. See *infra* Part I.B.2.

11. See *infra* Part I.B.2.

(though they may be), but because of a coincidental change in how the searches are conducted—making the data even less informative.<sup>12</sup>

In particular, the inclusion of these other types of covert searches makes it impossible to do what Congress intended when it passed the reporting requirement—to monitor the highly intrusive practice of covert searches of homes and businesses, the paradigmatic “sneak and peek” search.<sup>13</sup>

While the data is inconclusive, the statute nevertheless gives cause for concern. Congress did not merely codify pre-Patriot Act case law—it chose to enact the less exacting of at least two competing standards. Since then, courts continue to issue “sneak and peek” warrants, but have not subjected them to meaningful constitutional scrutiny. Most courts conclude that providing “notice” of a search is at most a requirement of the criminal rules—subject to the statutory exception authorizing delayed notice warrants—not a requirement of the Fourth Amendment.<sup>14</sup> Few commentators have examined delayed notice warrants, and most follow the courts in concluding that the practice raises no serious Fourth Amendment issues.<sup>15</sup>

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12. See *infra* Part I.B.3.

13. See *infra* Part I.B.2.

14. See *United States v. Simons*, 206 F.3d 392, 399–400 (4th Cir. 2000); *United States v. Pangburn*, 983 F.2d 449, 455 (2d Cir. 1993); *United States v. Christopher*, Crim. No. 2008-0023, 2009 WL 903764, at \*7 (D.V.I. Mar. 31, 2009) (“The procedural requirements for giving notice after execution of a valid search warrant are ministerial tasks and a failure to comply therewith, without more, does not amount to deprivation of Fourth Amendment rights . . . .”); *United States v. Ludwig*, 902 F. Supp. 121, 126–27 (W.D. Tex. 1995); *California v. Ceja*, Nos. H021664, H021697, 2001 WL 1246632, at \*8 (Cal. Ct. App. Oct. 17, 2001). The Ninth Circuit, in contrast, has long held that covert searching does raise Fourth Amendment concerns. See *United States v. Freitas*, 800 F.2d 1451 (9th Cir. 1986).

15. See *Corr*, *supra* note 4; *Duncan*, *supra* note 2; Paul V. Kononov, Note, *On a Quest for Reason: A New Look at Surreptitious Search Warrants*, 48 HASTINGS L.J. 435 (1997); *Shumate*, *supra* note 2. One commentator has consistently argued that delayed notice search warrants raise serious Fourth Amendment problems. Seltzer, *When History Matters Not*, *supra* note 2; Seltzer, *Still Sneaking & Peeking*, *supra* note 2. A number of articles on the USA Patriot Act generally include sections briefly discussing delayed notice search warrants, without subjecting that topic to much sustained analysis. See, e.g., Gerald G. Ashdown, *The Blueing of America: The Bridge Between the War on Drugs and the War on Terrorism*, 67 U. PITT. L. REV. 753, 785–89 (2006); *Comey*, *supra* note 4, at 410–12; Beryl A. Howell, *Seven Weeks: The Making of the USA Patriot Act*, 72 GEO. WASH. L. REV. 1145, 1183–90 (2004); Seth F. Kreimer, *Rays of Sunlight in a Shadow “War”*: FOIA, the Abuses of Anti-Terrorism, and the Strategy of Transparency, 11 LEWIS & CLARK L. REV. 1141 (2007); Susan Nevelow Mart, *The Chains of the Constitution and Legal Process in the Library: A Post-USA Patriot Act Reauthorization Act Assessment*, 33 OKLA. CITY U. L. REV. 435, 481–85 (2008); Martha Minow, *What is the Greatest Evil?*, 118 HARV. L. REV. 2134, 2145 n.42 (2005) (reviewing MICHAEL IGNATIEFF, *THE LESSER EVIL: POLITICAL ETHICS IN AN AGE OF TERROR*

This article makes two key contributions. First, it examines what data is available about delayed notice search warrants, and explains why Congress's reporting requirement is broken—and how it should be fixed.<sup>16</sup>

Second, it argues that “sneak and peek” searches do raise a serious Fourth Amendment issue.<sup>17</sup> This conclusion is based on Fourth Amendment first principles, the history of notice at common law in the years leading up to the drafting of the Fourth Amendment, and the Supreme Court's recognition that the Fourth Amendment requires searchers to give notice of a search and demand entry—a point that has been overlooked by courts and commentators evaluating delayed notice search warrants.<sup>18</sup>

As a matter of first principles, covert searches strike at the heart of fundamental Fourth Amendment interests in the privacy and sanctity of the home, and in the freedom from covert government surveillance.<sup>19</sup> The covert nature of a search raises Fourth Amendment privacy concerns distinct from those of the physical invasion itself, including the sanctity and repose of the home.<sup>20</sup> The practice of covert searching also unsettles the privacy of the entire political community, leaving all individuals to wonder whether their home or business has been secretly searched. As a result, covert searching threatens to chill individual liberty to live, believe, and act without fearing that the government is watching.

Some covert searches also include secret seizures—“sneak and steal” cases in which police take evidence and disguise the scene to look like a burglary.<sup>21</sup> These covert seizures carry additional costs, including physical damage to the home and the fear of burglary.<sup>22</sup> Moreover, some persons targeted by government burglaries may well retaliate against suspected perpetrators—such as a rival drug dealer—giving rise to a cascade of violence.<sup>23</sup>

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(2004)) (“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.”).

16. See *infra* Part I.

17. See *infra* Parts II–III.

18. See *infra* Parts II–III.

19. See *infra* Part II.A.

20. See *infra* Part II.A.

21. See 18 U.S.C. § 3103a(b)(2) (authorizing covert seizures upon a showing of “reasonable necessity”); Shumate, *supra* note 2.

22. See *infra* Part II.B.

23. See *infra* Part II.B.

To date, no court or commentator has examined the history of search and seizure, in the founding era, for evidence of covert searching or delayed notice warrants.<sup>24</sup> Yet one senator claimed that the practice of covert, delayed notice searching has been upheld as constitutional “from the beginning of this country.”<sup>25</sup> On the contrary, the historical record shows that delayed notice search warrants are a recent innovation.<sup>26</sup> There is no evidence of judicially authorized covert searching, through a delayed notice warrant or any similar mechanism, in the history of search and seizure through 1791.<sup>27</sup> This fact alone does not show that delayed notice warrants are unconstitutional, or that the founders would have rejected them, but it should prompt a healthy skepticism about the legitimacy of the practice.

History and first principles come together in the “rule requiring notice”—the common law rule, now part of the Fourth Amendment reasonableness requirement, that persons executing a search warrant must ordinarily announce their presence and demand entry before forcibly entering.<sup>28</sup> Courts and commentators commonly refer to this as “knock and announce” rule,<sup>29</sup> and have never considered whether this rule has any bearing on covert searching with delayed notice warrants.<sup>30</sup> This doctrinal separation has never been explained, and it is unjustified. On its face, covert searching plainly runs afoul of the common law, and constitutional, “rule requiring notice.”<sup>31</sup> A delayed notice search is simply an extreme version of the “no-knock” search,<sup>32</sup> with notice delayed by weeks or months rather than minutes.<sup>33</sup> Moreover, a deeper look at the purposes underlying the “knock

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24. *See infra* Part III.

25. 147 CONG. REC. 20,704 (2001) (statement of Sen. Orrin Hatch).

26. *See infra* Part I.A.1.

27. *See infra* Part III.A.

28. *See Wilson v. Arkansas*, 514 U.S. 927, 934 (1995) (finding that the principle of announcement “is an element of the reasonableness inquiry under the Fourth Amendment,” but recognizing that it “was never stated as an inflexible rule requiring announcement under all circumstances.”).

29. *Id. passim*.

30. *See infra* note 86 and accompanying text.

31. *See supra* notes 2–4 and accompanying text (explaining that these covert searches essentially allow the government to search homes and businesses unannounced, which contradicts with the notice requirement).

32. *See Richards v. Wisconsin*, 520 U.S. 385, 394 (1997) (stating that the “no-knock” entry exception to the “knock and announce” rules is only justified if the police have reasonable suspicion that knocking and announcing their presence would be dangerous or would inhibit effective investigation of the crime).

33. *See infra* note 43 (describing a delayed notice search).



and announce rule”—better called the “rule requiring notice”—shows that delayed notice search warrants implicate similar and overlapping concerns.<sup>34</sup>

For all of these reasons—Fourth Amendment first principles, the absence of delayed notice searching in the founding era, and the Fourth Amendment “rule requiring notice”—delayed notice search warrants must be subjected to exacting constitutional scrutiny that has been largely absent in judicial decisions to date.<sup>35</sup>

In a separate article, I argue that covert searching, with delayed notice search warrants, may sometimes serve sufficiently compelling government interests to justify the serious privacy intrusion that that practice entails.<sup>36</sup> That article examines the current statutory regime, explaining why that regime fails to meaningfully curb the practice of delayed notice searching.<sup>37</sup> That article also proposes several solutions that would render the practice constitutionally reasonable, permitting covert searches when the government interest is sufficiently compelling, while prohibiting the use of this invasive search technique when it is merely convenient.<sup>38</sup>

Part I of this article describes the explosion in legal covert searches following the statutory authorization of delayed notice search warrants by Congress. Part I.A explains the current legal rules for delayed notice search warrants, and how those rules have evolved over time through both case law and legislation in the USA Patriot Act. Part I.B provides an empirical description of how these warrants are being used and explains the likely flaws in this data resulting from coincidental legal changes in how other forms of covert surveillance are conducted. Part I.B then proposes a relatively simple fix—one that could be imposed through legislation or perhaps regulation—that would enable Congress, and the public, to effectively monitor all of these types of covert searches.

Part II turns to Fourth Amendment first principles, explaining how covert searching infringes on the core values—the private sanctity and repose of the home—that the Fourth Amendment was designed to protect. Part II argues that delayed notice search warrants thus raise constitutional

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34. See *infra* Part III.B.

35. See, e.g., *United States v. Freitas*, 610 F. Supp. 1560 (N.D. Cal. 1985), *rev'd*, 800 F.2d 1451 (9th Cir. 1986) (subjecting warrant to normal balancing test rather than heightened scrutiny standard).

36. Jonathan Witmer-Rich, *The Fatal Flaws of the “Sneak and Peek” Statute—and How to Fix Them* (forthcoming 2014).

37. *Id.*

38. *Id.*

concerns, and that courts are mistaken in treating “notice” as merely a requirement of Rule 41 of the Federal Rules of Criminal Procedure, not a constitutional principle.

Part III evaluates covert searching and delayed notice search warrants in light of the history of search and seizure in the years leading up to the drafting of the Fourth Amendment in 1791. Part III.A shows that covert searching, including any legal mechanism resembling the delayed notice search warrant, did not exist in British and colonial common law in the years before 1791. Part III.A also evaluates the import of this history, ultimately concluding that the absence of covert searching in 1791 does not resolve the constitutionality of the practice. Part III.B turns to the question of notice and the Fourth Amendment more broadly, relying both on history and the Supreme Court’s modern doctrine to conclude that providing notice at the time of the search is a component of whether a search is reasonable under the Fourth Amendment. Part IV concludes.

#### I. THE RAPID RISE OF DELAYED NOTICE SEARCH WARRANTS

“Sneak and peek” searching existed for some time before Congress authorized the practice in the USA Patriot Act.<sup>39</sup> This section traces the legal history of “sneak and peek” searching, sets forth the current statutory scheme, and then turns to examine the data now available on delayed notice searching.<sup>40</sup> It then explains why that data likely paints a misleading picture, and how the law should be amended to provide meaningful data and enable congressional and public oversight.<sup>41</sup>

##### A. *The Legal Development of Covert Searching and Delayed Notice Search Warrants*

Delayed notice search warrants are authorized in 18 U.S.C. § 3103a, enacted as part of the USA Patriot Act in the wake of 9/11.<sup>42</sup> In its current form, § 3103a allows investigators to delay giving notice if “the court finds reasonable cause to believe that providing immediate notification of the execution of the warrant may have an adverse result,” a term defined

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39. See *supra* notes 5–6 and accompanying text.

40. See *infra* Part I.A.

41. See *infra* Part I.B.

42. 18 U.S.C. § 3103a (2012).

separately.<sup>43</sup> Notice of executing a search warrant is ordinarily required by Rule 41 of the Federal Rules of Criminal Procedure, which provides in part that

[t]he officer executing the warrant must give a copy of the warrant and a receipt for the property taken to the person from whom, or from whose premises, the property was taken or leave a copy of the warrant and receipt at the place where the officer took the property.<sup>44</sup>

Section 3103a creates an exception to that requirement.

Under § 3103a, the warrant must include a provision for giving notice to the person whose home was searched “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.”<sup>45</sup> The notice can be further extended “for good cause shown.”<sup>46</sup> A “sneak and steal” search—seizing property during a covert search and staging a burglary—is permitted only if “the court finds reasonable necessity for the seizure.”<sup>47</sup>

Thus, § 3103a allows for delayed notice—that is to say, a covert search with notice given later—in cases in which conducting an ordinary search “may have an adverse result.”<sup>48</sup> Congress provided that the term “adverse result” has the same meaning as given in 18 U.S.C. § 2705 (part of the Stored Communications Act) with one exception.<sup>49</sup> As defined in § 2705, 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 or unduly delaying a trial.”<sup>50</sup>

The first three items on this list—subsections (A) through (C)—closely

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43. *Id.* § 3103a(b)(1).

44. FED. R. CRIM. P. 41(f)(1)(C) (2010).

45. 18 U.S.C. § 3103a(b)(3).

46. *Id.* § 3103a(c).

47. *Id.* § 3103a(b)(2).

48. *Id.* § 3103a(b)(1).

49. *Id.*

50. *Id.* § 2705(a)(2). This section also includes “unduly delaying a trial” as a reason to delay notice under the Stored Communications Act. *Id.* § 2705(a)(2)(E). In § 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. *Id.* § 3103a(b)(1).

resemble the Fourth Amendment categories of “exigent circumstances.”<sup>51</sup> The other two “adverse results,” listed in subsections (D) and (E), are not traditional “exigent circumstances.” Section (D)—preventing intimidation of a potential witness—can perhaps be analogized to preventing the destruction of evidence, a traditional exigent circumstance.<sup>52</sup> Section (E)—preventing serious jeopardy to an investigation—seems to be a broader, more general justification that lacks historical or doctrinal support as a reason to bypass notice.<sup>53</sup>

### 1. History of “Sneak and Peek” Searching

Delayed notice search warrants first appeared in a reported judicial decision in 1985.<sup>54</sup> The DEA agent who requested the warrant in that case claimed an earlier precedent, stating “that he knew that there had at one time been issued a surreptitious entry warrant in Oakland.”<sup>55</sup> This is the earliest evidence of a warrant expressly authorizing a covert search in Anglo-American legal history. As will be shown in Part III.A, there is no evidence of any delayed notice search warrants in the British or colonial courts before the drafting of the Fourth Amendment, and no mention of this practice in the United States until this case in 1985. It may be impossible to date the first search warrant to expressly authorize a covert search, but the absence of any appearance in the case law before 1985 suggests the practice did not exist much earlier.

There is long history, predating 1985, of governments conducting covert searches of homes and businesses without notifying the occupants—but this practice was understood to be illegal, and was not conducted pursuant to judicial oversight or express statutory authorization.<sup>56</sup> In what were known as “black bag jobs,” the FBI long conducted secret break-ins, searches, and

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51. See *Kentucky v. King*, 131 S. Ct. 1849, 1856 (2011) (exigent circumstances include preventing danger to officer or others, preventing escape of a suspect when in hot pursuit, and preventing the imminent destruction of evidence); Witmer-Rich, *supra* note 36.

52. See *Kentucky v. King*, 131 S. Ct. at 1856 (describing the prevention of destruction of evidence as an exigent circumstance).

53. See Witmer-Rich, *supra* note 36 (examining these five exceptions).

54. *United States v. Freitas*, 610 F. Supp. 1560, 1569 (N.D. Cal. 1985), *rev'd*, 800 F.2d 1451 (9th Cir. 1986).

55. *United States v. Freitas*, 800 F.2d 1451, 1460 (9th Cir. 1986) (Poole, J., dissenting) (quoting affidavit).

56. HENRY M. HOLDEN, *FBI 100 YEARS: AN UNOFFICIAL HISTORY* 215 (Steve Gansen ed., 2008).

seizures of homes and businesses, never revealing that the break-in was the work of law enforcement.<sup>57</sup> The FBI typically concealed these activities by staging them to look like break-ins by ordinary burglars.

An internal FBI memorandum in 1966 stated frankly that “[w]e do not obtain authorization for ‘black bag’ jobs from outside the Bureau,” because “such a technique involves trespass and is clearly illegal; therefore, it would be impossible to obtain any legal sanction for it.”<sup>58</sup> Despite their patent illegality, black bag jobs were used “because they represent an invaluable technique in combating subversive activities.”<sup>59</sup> Thus, FBI leaders knew of these covert searches and pursued them when the goal appeared sufficiently valuable, but also understood that the practice was illegal.

In the 1980s and 1990s, secret government break-ins and staged burglaries slowly transitioned from the shadows of illegal government conduct to the more respectable position of a judicially overseen process, a transition that culminated in Congress giving express statutory authorization for delayed notice search warrants in section 213 of the USA Patriot Act.<sup>60</sup> In 2005, Congress added a reporting requirement to monitor how often delayed notice searches were being conducted, and for what sorts of crimes.<sup>61</sup>

In the first reported decision addressing delayed notice search warrants, Judge Eugene Lynch ruled that delayed notice search warrants were constitutionally permissible, but only within strict limits.<sup>62</sup> 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.”<sup>63</sup> Noting the absence of controlling authority on point, the court analogized delayed notice warrants to Title III wiretaps, which likewise authorize a search without contemporaneous notice

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57. *Id.*

58. Memorandum from William C. Sullivan to FBI Deputy Director Cartha (Deke) DeLoach (July 19, 1966) (reprinted in HENRY M. HOLDEN, *FBI 100 YEARS: AN UNOFFICIAL HISTORY* 215 (2008)).

59. *Id.*

60. *See* USA PATRIOT Act, *supra* note 1.

61. 18 U.S.C. § 3103a(d) (2012).

62. *United States v. Freitas*, 610 F. Supp. 1560, 1570–71 (N.D. Cal. 1985), *rev'd*, 800 F.2d 1451 (9th Cir. 1986).

63. *Id.* at 1570.

to the party being searched.<sup>64</sup> 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 be too dangerous.”<sup>65</sup>

Applying these limitations, the court observed that the warrant failed on both counts: “the surreptitious entry warrant contained no provision whatsoever for notice to Raymond Freitas or any other interested party,” even retrospectively; and the affidavit “made no reference to the inadequacy of other investigative techniques apart from the surreptitious entry.”<sup>66</sup> In light of these failures, the court held that even if surreptitious entry might sometimes be constitutionally permissible, it had “no difficulty concluding that the surreptitious entry of [Freitas’s] residence violated the Fourth Amendment.”<sup>67</sup>

On appeal, the Ninth Circuit fundamentally agreed with these key points.<sup>68</sup> It emphasized the significant privacy intrusion at stake:

[S]urreptitious searches and seizures of intangibles strike at the very heart of the interests protected by the Fourth Amendment. The 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. That passion, the true source of the Fourth Amendment, demands that surreptitious entries be closely circumscribed.<sup>69</sup>

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64. *Id.* at 1570–71.

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

66. *Id.*

67. *Id.*

68. *United States v. Freitas*, 800 F.2d 1451, 1456 (9th Cir. 1986). The Ninth Circuit declined to state whether a showing of necessity was required by the Fourth Amendment, although it added that a showing of necessity “could have strengthened the claim that the search and seizure in this case met the commands of the Fourth Amendment.” *Id.*

69. *Id.* at 1456. The Ninth Circuit remanded the question of whether the good faith exception applied, and ultimately held (in a later appeal) that it did. *United States v. Freitas*, 856 F.2d 1425 (9th Cir. 1988). During the Congressional debate over delayed notice search warrants in the fall of 2001, Senator Patrick Leahy read the quote from *Freitas* into the record as reflecting his concerns over delayed notice search warrants. 147 CONG. REC. 20,683 (2001).

Delayed notice search warrants received a more welcomed reception in the Second Circuit—the only other circuit to address the practice before § 3103a was enacted.<sup>70</sup> In *United States v. Villegas*, the Second Circuit upheld a delayed notice search warrant used to secretly search a farmhouse in rural New York.<sup>71</sup> In contrast with the Ninth Circuit, the *Villegas* court minimized the privacy intrusion.<sup>72</sup> Comparing surreptitious searches to conventional searches and Title III wiretaps, the court claimed that

in many ways [a surreptitious search] is the least intrusive of these three types of searches. It is less intrusive than a conventional search with physical seizure because the latter deprives the owner not only of privacy but also of the use of his property. It is less intrusive than a wiretap or video camera surveillance because the physical search is of relatively short duration, focuses the search specifically on the items listed in the warrant, and produces information as of a given moment, whereas the electronic surveillance is ongoing and indiscriminate, gathering in any activities within its mechanical focus.<sup>73</sup>

Nevertheless, the Second Circuit endorsed the same two limitations adopted by the Ninth Circuit, although in weaker form: first, officers must show “reasonable necessity for the delay,” and second, officers must provide notice “within a reasonable time after the covert entry.”<sup>74</sup> Notably, the court did not clarify whether these requirements flowed from the Fourth Amendment itself (as the Ninth Circuit held) or whether they were merely common law or rule-based requirements.<sup>75</sup> The Second Circuit did make it clear that neither requirement was terribly exacting. The court stated that the “necessity” requirement for surreptitious searches should not be as rigorous as Title III’s 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.”<sup>76</sup> Instead, officers need only show that “there is

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70. See *United States v. Villegas*, 899 F.2d 1324 (2d Cir. 1990).

71. *Id.*

72. *Id.* at 1337.

73. *Id.*

74. *Id.*

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

76. *Villegas*, 899 F.2d at 1337 (quoting 18 U.S.C. § 2518(3)(c) (2012)).

good reason for delay.”<sup>77</sup> Second, the court stated that seven days was a good starting point for delayed notice, but emphasized that “[f]or good cause, the issuing court may thereafter extend the period of delay.”<sup>78</sup>

A few years later, in *United States v. Pangburn*, the Second Circuit continued down the path of eroding the safeguards first articulated in *Freitas*.<sup>79</sup> The court in *Pangburn* noted that “[n]o provision specifically requiring notice of the execution of a search warrant is included in the Fourth Amendment,”<sup>80</sup> and concluded that notice was required only by Rule 41, not by the Fourth Amendment.<sup>81</sup> The district court in *Pangburn* had suppressed the evidence because the “delayed notice” warrant failed to require that notice of the covert search ever be given.<sup>82</sup> On appeal, the Second Circuit held that suppression was not required, since the failure to provide notice was only a statutory violation, not a constitutional one.<sup>83</sup> Thus, over the course of about eight years, courts embraced delayed notice search warrants and questioned whether notice was even a part of the Fourth Amendment.

A few years later, in an apparently separate constitutional universe, the Supreme Court decided *Wilson v. Arkansas*, holding that the common law “knock and announce” rule for executing search warrants was in fact part of the Fourth Amendment’s “reasonableness” requirement.<sup>84</sup> In a unanimous decision by Justice Thomas, the Court held that “part of the reasonableness inquiry under the Fourth Amendment” includes the rule from “the common law of search and seizure” that a law enforcement officer “generally . . . first ought to announce his presence and authority” before breaking into a home to execute a warrant.<sup>85</sup>

While lower federal court judges (and litigants) presumably became aware of *Wilson*, they apparently confined that decision to a discrete “knock and announce” doctrinal box. In all of the delayed notice search warrant cases following *Wilson*, no court to date has once mentioned *Wilson* or its

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77. *Id.*

78. *Id.*

79. *United States v. Pangburn*, 983 F.2d 449 (2d Cir. 1993).

80. *Id.* at 453.

81. *Id.* at 449–50.

82. *Id.* (describing district court ruling).

83. *Id.* at 449.

84. 514 U.S. 927, 930 (1995).

85. *Id.* at 929.



notice requirement.<sup>86</sup> No court (or, apparently, litigant) seems to have realized that, when evaluating whether warrants that expressly fail to provide notice of the search are constitutionally permissible, the starting point must be the Supreme Court decision that “leaves no doubt that the reasonableness of a search of a dwelling may depend in part on whether law enforcement officers announced their presence and authority prior to entering.”<sup>87</sup> Instead, courts continued analyzing delayed notice search warrants under cases like *Pangburn*, which had held that notice was not part of Fourth Amendment reasonableness.<sup>88</sup> At that level of generality, at least, *Wilson* clearly overruled *Pangburn*, yet courts have not yet noticed this issue.

Instead of considering the holding in *Wilson*, courts sometimes cited *Dalia v. United States* for the proposition that notice is not required by the Fourth Amendment.<sup>89</sup> In *Dalia*, the defendant argued that police had violated the Fourth Amendment by covertly entering his office to install “bugging equipment.”<sup>90</sup> The Court rejected the argument, holding that “[t]he Fourth Amendment does not prohibit *per se* a covert entry performed for the purpose of installing otherwise legal electronic bugging equipment.”<sup>91</sup> The

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86. Each of the following cases, all decided after *Wilson* was handed down on May 22, 1995, contain at least a mention of a delayed notice or “sneak and peek” search warrants. Some of these cases analyze a delayed notice search warrant or a failure to give notice; others merely mention delayed notice search warrants in passing. None of the cases discuss or cite *Wilson* or the “knock and announce” rule. *United States v. Andrews*, 471 F. App’x 824 (10th Cir. 2012); *United States v. Mikos*, 539 F.3d 706, 709 (7th Cir. 2008); *United States v. Miranda*, 425 F.3d 953 (11th Cir. 2005); *United States v. Simons*, 206 F.3d 392 (4th Cir. 2000) (holding, without mentioning *Wilson*, that the failure to announce a search or leave a copy of the warrant did not implicate the Fourth Amendment); *United States v. Christopher*, Crim. No. 2008-0023, 2009 WL 903764 (D.V.I. Mar. 31, 2009); *United States v. Prentice*, No. CR06-296C, 2007 WL 208068 (W.D. Wash. Jan. 24, 2007); *United States v. Hernandez*, No. 07-60027-CR, 2007 WL 2915856 (S.D. Fla. Oct. 4, 2007); *United States v. Espinoza*, No. CR-05-2075-7-EFS, 2005 WL 3542519 (E.D. Wash. Dec. 23, 2005); *United States v. Chimera*, 201 F.R.D. 72 (W.D.N.Y. 2001); *United States v. Heatley*, 41 F. Supp. 2d 284 (S.D.N.Y. 1999); *United States v. Rollack*, 90 F. Supp. 2d 263 (S.D.N.Y. 1999); *United States v. Ludwig*, 902 F. Supp. 121 (W.D. Tex. 1995) (upholding delayed notice search warrant; no mention of *Wilson*, which was decided five months earlier); *People v. Vasquez*, No. G037613, 2007 WL 3105890 (Cal. Ct. App. Oct. 24, 2007); *People v. Ceja*, Nos. H021664, H021697, 2001 WL 1246632 (Cal. Ct. App. Oct. 17, 2001).

87. *Wilson*, 514 U.S. at 931.

88. See, e.g., *Simons*, 206 F.3d at 403 (citing *Pangburn* for the proposition that “the notice requirement found in Rule 41(d) is not required by the Fourth Amendment”); *Christopher*, 2009 WL 903764, at \*5 (relying on *Pangburn*); *Ludwig*, 902 F. Supp. at 126 (same); *Ceja*, 2001 WL 1246632, at \*8 (same).

89. 441 U.S. 238 (1979).

90. *Id.* at 241–42.

91. *Id.* at 248.

Second Circuit cited *Dalia* as support for concluding that the Fourth Amendment contains no notice requirement at all.<sup>92</sup> Of course, stating that the Fourth Amendment does not prohibit *per se* a covert entry does not amount to holding that the Fourth Amendment contains no notice requirement at all.

The connection between *Wilson*'s ruling and covert searching, and the relevance of *Dalia* to this question, is discussed in Part III. For present purposes, what is most notable is that courts to date, in evaluating the constitutionality of delayed notice search warrants, have completely disregarded *Wilson* and the "notice" requirement—without explaining why that constitutional notice requirement does not apply.

## 2. Congressional Authorization of Delayed Notice Search Warrants

In the context of this relatively sparse case law, the Department of Justice (DOJ) began seeking explicit statutory authority to conduct delayed notice searches.<sup>93</sup> The DOJ eventually prevailed in the USA Patriot Act, which was passed soon after 9/11.<sup>94</sup> As early as September 12, the DOJ began evaluating and assembling proposed legislation to respond to the crisis.<sup>95</sup> On September 19, 2001, the DOJ first presented its legislative proposal in a meeting with congressional and White House leaders.<sup>96</sup> Over the next weeks, Attorney General John Ashcroft worked with Senator Patrick Leahy and other legislators to craft the bill that became the USA Patriot Act.<sup>97</sup>

The Patriot Act was not a unified, comprehensive statutory scheme for combating terrorism, but rather a pastiche of amendments and additions to existing statutes that would, in the view of the DOJ, provide new tools to

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92. *United States v. Pangburn*, 983 F.2d 449, 453 (2d Cir. 1993).

93. For example, delayed notice search warrants were proposed and rejected as part of the Children's Health Act of 2000. 146 CONG. REC. 19,757 (2000) (statement of Rep. Asa Hutchinson) ("There are some of the objections raised by the methamphetamine legislation that were deleted from this bill. For example, provisions allowing for delayed notice of a search warrant have been deleted.").

94. Howell, *supra* note 15, at 1145; Robert O'Harrow Jr., *Six Weeks in Autumn*, WASH. POST (Oct. 27, 2002), <http://www.washingtonpost.com/wp-dyn/content/article/2006/05/09/AR2006050900961.html>.

95. *Id.*

96. Howell, *supra* note 15, at 1152.

97. O'Harrow, *supra* note 94.

combat terrorism and other crimes.<sup>98</sup> One of these provisions was section 213,<sup>99</sup> now codified at 18 U.S.C. § 3103a,<sup>100</sup> providing for delayed notice search warrants. Section 213 contained a provision authorizing seizures in some surreptitious searches, thus “sneak and peek” searches would sometimes become “sneak and steal” searches.<sup>101</sup> While the Patriot Act was passed as a tool to combat terrorism, a number of the provisions, including section 213, were drafted to authorize new investigative tools in any criminal case, not only in terrorism investigations.<sup>102</sup>

The legislation was passed very quickly after September 11, with the first hearing on the administration’s proposal occurring on September 24, 2001, and the bill finally passing both houses and becoming law on October 26, 2001.<sup>103</sup> The delayed notice search warrant provision was not one of the most high-profile parts of the proposal, but it did garner some limited commentary during this period.<sup>104</sup>

The administration’s core message about delayed notice search warrants, repeated various times throughout the debate over the Patriot Act, was two-fold. First, the administration argued that section 213 (along with the other tools of the Patriot Act) was critical to enabling investigators to combat and prevent terrorism.<sup>105</sup> Second, the administration repeatedly

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98. See Orin S. Kerr, *Internet Surveillance After the USA Patriot Act: The Big Brother that Isn't*, 97 NW. U. L. REV. 607, 624 (2003) (“[I]t is crucial to recognize that the Patriot Act is not a single coherent law. The Act collected hundreds of minor amendments to federal law, grouped into ten subparts or ‘Titles,’ on topics ranging from immigration to money laundering. With many of these amendments, the devil is in the details . . .”).

99. In the first versions of the legislation, delayed notice search warrants appeared in section 352. Later versions moved the delayed notice search warrant language to section 213.

100. 18 U.S.C. § 3103a (2012).

101. 147 CONG. REC. 20,683 (2001) (statement of Sen. Leahy) (referring to seizure provision as “sneak and steal”).

102. *Id.* at 20,672 (“This is not done just to combat international terrorism, but for any criminal investigation that overlaps a broad definition of ‘foreign intelligence.’”).

103. *The USA PATRIOT Act*, UNITED STATES SENATE, COMMITTEE ON THE JUDICIARY, <http://www.judiciary.senate.gov/about/history/PatriotAct.cfm> (last visited Dec. 13, 2013).

104. See *infra* notes 105–06.

105. On September 24, 2001, Attorney General John Ashcroft testified before the House Judiciary Committee that the proposed legislation would “provide law enforcement with the tools necessary to identify, dismantle, disrupt and punish terrorist organizations before they strike again.” *Admin.’s Draft Anti-Terrorism Act of 2001: Hearing Before the H. Comm. on the Judiciary*, 107th Cong. (2001) (statement of John Ashcroft, Att’y Gen. of the United States). Deputy Attorney General James Comey, testifying during the 2004 debate over the Patriot Act re-authorization, 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

reassured Congress that section 213 simply created a consistent, uniform national standard for an existing practice that had been approved (as constitutional) by every court to consider it.<sup>106</sup>

Congress did, indeed, create uniformity where it had not previously existed—and it did so by rejecting the more restrictive approach from the existing case law. The Ninth Circuit (following Judge Lynch) held that covert searching implicated the Fourth Amendment, and held that police must show “necessity” (as used in Title III) for a delayed notice search.<sup>107</sup> The Second Circuit, in contrast, held that lack of notice did not implicate the Fourth Amendment, and that its version of the “necessity” requirement was much looser, requiring only a showing of “good reason for delay.”<sup>108</sup> In section 213, Congress did not impose a Title III-like “necessity” requirement, but instead listed specific reasons that constitute adequate reason for delay.<sup>109</sup>

The limited debate over delayed notice search warrants reflects a few themes. First, some legislators—unlike some federal judges—repeatedly asserted that giving notice of a search is part of the protections of the Fourth Amendment. Representative Spencer Bachus stated that “the fourth amendment says we don’t search someone’s house until they’re given

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and other dangerous criminals to justice.” *Counterrorism Legislative Review: Hearing Before the S. Comm. on the Judiciary*, 108th Cong. (2004) (statement of James Comey, Deputy Att’y Gen. of the United States). As for delayed notice warrants in particular, Comey stated that:

[s]ection 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.

*Id.*

106. At the September 24, 2001 House Judiciary Committee hearing, Representative Bachus discussed the delayed notice provision with Assistant Attorney General Michael Chertoff. Representative Bachus stated,

I’m looking at your Justice Department draft on notice, and what it says here is you’re going to establish a uniform standard for all searches without notice. . . . [T]here are courts already that have ratified this. What you say right now is that there’s presently a mix of inconsistent rules and practices varying from jurisdiction to jurisdiction, but that what you want to do is establish a statutory uniform standard for all notice.

Chertoff responded, “That’s correct.” *Admin.’s Draft Anti-Terrorism Act of 2001: Hearing Before the H. Comm. on the Judiciary*, 107th Cong. (2001) (statements of Rep. Bachus and Assistant Att’y Gen. Michael Chertoff). See also Shumate, *supra* note 2 (defending this view).

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

108. *United States v. Villegas*, 899 F.2d at 1324, 1337 (2d Cir. 1990).

109. 18 U.S.C. § 3103a (2012).

notice.”<sup>110</sup> Senator Russell Feingold explained, “[n]otice is a key element of fourth amendment protections.”<sup>111</sup>

Second, some legislators criticized section 213 on the ground that it authorized delayed notice searches in any type of criminal investigation, not just terrorism investigations. For example, Representative Jerrold Nadler (D-NY), whose district included the site of the World Trade Center, raised this complaint: “There may be justification for delaying notification of a search warrant sometimes, but in all criminal investigations? What does that have to do with terrorism?”<sup>112</sup>

Finally, several legislators warned that the statute appeared to authorize covert searches in a very broad range of cases.<sup>113</sup>

Senator Orrin Hatch responded to these critics, emphasizing that the bill simply codified a practice that had already been approved by the courts:

110. *Admin.’s Draft Anti-Terrorism Act of 2001: Hearing Before the H. Comm. on the Judiciary*, 107th Cong. (2001) (statement of Representative Bachus). Representative Bachus later stated, “you’re changing our fundamental laws as opposed to . . . searching their home without a notice, which are important fourth amendment guarantees against unreasonable search and seizures.” *Id.*

111. 147 CONG. REC. 20,702 (2001). Jerry Berman, executive director of the Center for Democracy and Technology, stated in congressional testimony that “[n]otice is a bedrock Fourth Amendment protection from mistaken or abusive searches and seizures.” *Protecting Constitutional Freedoms in the Face of Terrorism: Hearing Before the Subcomm. on the Constitution, Federalism, and Property Rights of the S. Comm. on the Judiciary*, 107th Cong. (2001).

112. 147 CONG. REC. 19,689 (2001). Representative Bachus warned that the delayed notice search warrant provision “doesn’t just involve terrorist activities”—it “involves all Americans.” *Admin.’s Draft Anti-Terrorism Act of 2001: Hearing Before the H. Comm. on the Judiciary*, 107th Cong. (2001). Representative Bobby Scott (D-VA) complained that the bill as a whole was not targeted only at terrorism: “First of all, this has limited to do with terrorism. This bill is general search warrant and wiretap law. It is not just limited to terrorism. Had it been limited to terrorism, this bill could have passed 3 or 4 weeks ago without much discussion . . . .” 147 CONG. REC. 20,443 (2001). Senator Feingold complained that

[T]he bill contains some very significant changes in criminal procedure that will apply to every federal criminal investigation in this country, not just those involving terrorism.

One provision would greatly expand the circumstances in which law enforcement agencies can search homes and offices without notifying the owner prior to the search.

147 CONG. REC. 20,702 (2001).

113. Representative Bachus stated, “I would say notice . . . would probably have a tendency always to jeopardize an ongoing investigation . . . . I would think any time you give a notice, you’re interfering with law enforcement activities.” *Admin.’s Draft Anti-Terrorism Act of 2001: Hearing Before the H. Comm. on the Judiciary*, 107th Cong. (2001). Senator Feingold worried that the standard could be met in almost any criminal investigation: “The longstanding practice under the fourth amendment of serving a warrant prior to executing a search could be easily avoided in virtually every case, because the government would simply have to show that it had ‘reasonable cause to believe’ that providing notice ‘may’ seriously jeopardize an investigation.” 147 CONG. REC. 20,702 (2001).

“[W]hat [Senator Feingold] called a ‘sneak and peek’ search warrant, these warrants are already used throughout the United States, throughout our whole country. The bill simply codifies and clarifies the practice . . . .”<sup>114</sup> Senator Hatch deemed the practice “totally constitutional.”<sup>115</sup> He further claimed the practice had been upheld as constitutional “from the beginning of this country.”<sup>116</sup> Senator Hatch did not provide any authority for his claim that delayed notice search warrants have been permissible since the early years of the republic, or any time before the 1980s—and, as explained in Part III.A, no such evidence exists.

Support for the bill as a whole overwhelmed this limited opposition, and the USA Patriot Act, including section 213, passed the House on October 24, 2001, by a vote of 356–66, and passed the Senate on October 25, 2001, by a vote of 98–1.<sup>117</sup> President Bush signed the bill into law on October 26, 2001.<sup>118</sup>

In the debate surrounding the re-authorization of the USA Patriot Act in 2005, the Department of Justice prepared a “white paper” defending the constitutionality of delayed notice search warrants under § 3103a, calling them a “Time-Honored Tool for Fighting Crime.”<sup>119</sup> Like many courts, the DOJ white paper relied on circuit cases such as *Freitas* and *Villegas*, as well as the Supreme Court’s decision in *Dalia*, to argue that delayed notice warrants raised no serious Fourth Amendment issues.<sup>120</sup> The DOJ did not cite *Wilson v. Arkansas*, or mention the common law notice requirement.<sup>121</sup>

Parts of the Patriot Act were subject to a “sunset” provision—they expired automatically in 2005 and required new legislation to stay in effect.<sup>122</sup> Section 213, the delayed notice search warrant provision, was not subject to the sunset.<sup>123</sup> In 2003, Senator Feingold introduced a bill seeking

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114. 147 CONG. REC. 20,704 (2001).

115. *Id.*

116. *Id.*

117. Kerr, *supra* note 98, at 607 n.1.

118. See USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272; Kerr, *supra* note 98, at 607 n.1.

119. U.S. DEP’T OF JUSTICE, DELAYED NOTICE SEARCH WARRANTS: A VITAL AND TIME-HONORED TOOL FOR FIGHTING CRIME (2004), available at <http://www.justice.gov/dag/patriotact213report.pdf>.

120. *Id.* at 2–3.

121. See *supra* notes 84–88 and accompanying text.

122. USA PATRIOT Act, Pub. L. No. 107-56, § 224(a), 115 Stat. 272, 295 (2001) (“[T]his title and the amendments made by this title . . . shall cease to have effect on December 31, 2005.”).

123. *Id.*

to amend section 213 in several respects—to eliminate the “catch-all” exception in § 3103a(E), to make section 213 subject to the sunset provision, to shorten the notice period to seven days, and to require a public report on the number of times delayed notice search warrants were used.<sup>124</sup> His bill did not become law, but Senator Feingold re-introduced it in 2005 during the debate over re-authorization of the Patriot Act.<sup>125</sup>

Not all of Senator Feingold’s revisions carried the day, but the one provision that did become law was the reporting requirement. Senator Feingold explained it as follows:

[T]he bill requires a public report on the number of times that section 213 is used, the number of times that extensions are sought beyond the 7-day notice period, and the type of crimes being investigated with this power. This information will help the public and Congress evaluate the need for this authority and determine whether it should be retained or modified after the sunset.<sup>126</sup>

This reporting requirement was included in the final bill and became law.<sup>127</sup>

Accordingly, since 2006, the delayed notice search warrant statute has contained a reporting requirement.<sup>128</sup> Within thirty days of the “expiration of a warrant authorizing delayed notice . . . entered under this section, . . . the issuing or denying judge shall report” several things to the Administrative Office of the U.S. Courts.<sup>129</sup> Specifically, the judge must report that the warrant was applied for; whether it was granted, modified, or denied; the period of delay, including extensions; and the offense specified in the warrant.<sup>130</sup> The Administrative Office, in turn, is commanded to transmit to Congress an annual report summarizing this data.<sup>131</sup> Accordingly, starting in fiscal year 2007, the Administrative Office has published an annual report on delayed notice search warrants authorized under § 3103a (hereinafter,

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124. 149 CONG. REC. S12,377–87 (daily ed. Oct. 2, 2003). *See* Reasonable Notice and Search Act, S. 1701, 108th Cong. (2003).

125. 151 CONG. REC. S1130–34 (daily ed. Feb. 8, 2005). *See* Reasonable Notice and Search Act, S. 316, 110th Cong. (2005).

126. 151 CONG. REC. S1130–34 (daily ed. Feb. 8, 2005).

127. USA PATRIOT Act Improvement and Reauthorization Act of 2005, H.R. Conf. Rep. 109-333, 109th Cong. § 114 (2005), 2006 U.S.C.C.A.N. 184.

128. *Id.*

129. 18 U.S.C. § 3103a(d)(1) (2012).

130. *Id.*

131. *Id.* § 3103a(d)(2).

“Delayed Notice Reports”). The purpose of these reports, Senator Feingold explained, is to “help the public and Congress evaluate the need for this authority and determine whether it should be retained or modified.”<sup>132</sup>

*B. The Rapid Rise of Delayed Notice Search Warrants, and the Broken Reporting Requirement*

In the decade following congressional authorization of covert searches in 2001, the use of federal delayed notice search warrants has exploded, from less than 100 per year in 2002 to 5601 in 2012.<sup>133</sup> Just in the past six years, the rise is an incredible three thousand percent (from 174 in 2006 to 5601 in 2012).<sup>134</sup>

This data is alarming, but there is good reason to think it is misleading. Rather than showing a dramatic increase in the use of “sneak and peek” searches, the data may simply reflect a coincidental shift in the use of warrants for searches that used to be conducted without warrants: covert cell phone location tracking, covert GPS tracking, and covert searching of e-mail messages, among other things. Fundamentally, the data does not allow us to disentangle these effects, and thus the data is not much use in its current form. In particular, the data does not tell Congress, or the public, how often investigators are conducting covert searches of homes and businesses—precisely what Congress sought to track when it passed the reporting requirement in 2005.<sup>135</sup> In short, the reporting requirement is broken, and it should be fixed.

Part I.B.1 examines the available data, showing a dramatic rise in federal delayed notice search warrants. Part I.B.2 explains why this data is misleading, in light of several other trends in search warrant use. Part I.B.3 argues that Congress (by statute) or the Administrative Office of the United

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132. 151 CONG. REC. S1131 (2005).

133. *See infra* Figure 1.

134. *See infra* Figure 1.

135. *See generally* USA PATRIOT Reauthorization and Improvement Act § 114(c). The Act imposes notification and reporting requirements on judges who sanction delayed notice search warrants. When originally passed, section 213 lacked a reporting requirement, but a judge is now required to report to the Administrative Office of the U.S. Courts within thirty days after the expiration of a delayed notice warrant: (1) the fact that a warrant was applied for; (2) that the warrant or extension was granted, denied, or modified; (3) the term of delay in giving the notice permitted by the warrant and the number and duration of any extensions; and (4) the offense specified in the warrant. *Id.* The Administrative Office of the U.S. Courts must then supply details to Congress summarizing the data provided by federal judges. *Id.*



States Courts (by regulation) should fix the reporting requirement so that the data can do what was intended—“help the public and Congress evaluate the need for this authority and determine whether it should be retained or modified.”<sup>136</sup>

### 1. The Dramatic Rise in Federal Delayed Notice Search Warrants

When Congress enacted § 3103a there were likely less than one hundred “sneak and peek” searches conducted in the United States per year. There is no firm data before 2001, but the practice was rare. Delayed notice search warrants were first discussed in the *Freitas* decision in 1985,<sup>137</sup> and from then until 2001 they appeared in only a handful of state and federal cases.<sup>138</sup> After Congress passed § 3103a, the practice remained relatively rare for a few years. The best available data for those years—an approximation based on internal DOJ surveys—suggests that fewer than 100 delayed notice search warrants were issued each year between 2002 and 2005.<sup>139</sup> In 2006 that number rose to 174, and by 2012 federal courts issued 5601 delayed notice search warrants—an increase of over 3000% over five years.<sup>140</sup> Figure 1 shows the increase over time in the use of federal delayed notice search warrants.<sup>141</sup>

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136. 151 CONG. REC. S1117-01 (daily ed. Feb. 8, 2005) (statement of Sen. Feingold).

137. *United States v. Freitas*, 610 F. Supp. 1560 (N.D. Cal. 1985).

138. Delayed notice search warrants are mentioned (sometimes only in passing) in the following cases decided before enactment of § 3103a: *United States v. Johns*, 469 U.S. 478 (1984); *United States v. Pangburn*, 983 F.2d 449 (2d Cir. 1993); *United States v. Villegas*, 899 F.2d 1324 (2d Cir. 1990); *United States v. Freitas*, 800 F.2d 1451, 1456 (9th Cir. 1986); *United States v. Chimera*, 201 F.R.D. 72 (W.D.N.Y. 2001); *United States v. Ludwig*, 902 F. Supp. 121 (W.D. Tex. 1995); *People v. Ceja*, Nos. H021664, H021697, 2001 WL 1246632 (Cal. Ct. App. Oct. 17, 2001).

139. In the lead up to the 2005 PATRIOT Act Re-Authorization, the Department of Justice prepared a report for Congress on the use of delayed notice search warrants up to that time. Some details of that report were included in a report by Representative Sensenbrenner. H.R. REP. NO. 109-174(I), at 23 (2005). That report stated that there were sixty-one delayed notice search warrants between April 2003 and July 2004, and 155 delayed notice search warrants between October 26, 2001 and January 31, 2005. *Id.*

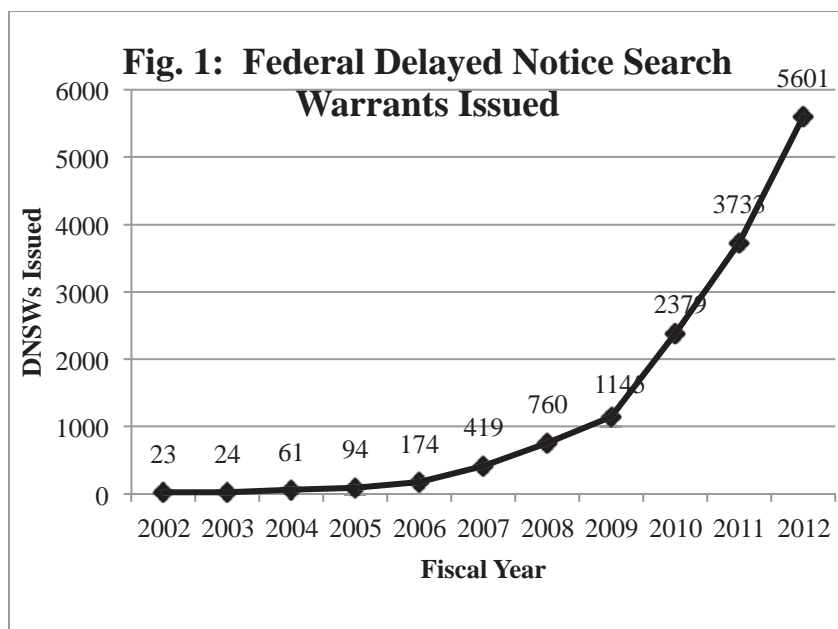
140. *See infra* Figure 1.

141. All of the data in Figure 1 is based on the federal fiscal year, not the calendar year, as that is the format used to report data by the Administrative Office of the U.S. Courts. *Judicial Facts and Figures*, U.S. COURTS, <http://www.uscourts.gov/Statistics/JudicialFactsAndFigures.aspx> (last visited Dec. 17, 2013). Figure 1 shows the number of delayed notice search warrants granted, not the number requested. It also does not include the number of extensions of existing delayed notice search warrants granted each year. The figures for 2002–2006 are estimates based on internal DOJ surveys. *See* H.R. REP. NO. 109-174, pt. 1, at 23 (2005). From this DOJ report, it can be inferred

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that forty-seven delayed notice search warrants were reported from the passage of the PATRIOT Act—October 26, 2001—through March 31, 2003. *Id.* at 463. Thus, over this seventeen-month period, forty-seven delayed-notice search warrants were issued. *Id.* The data for fiscal year 2004 are based on a survey of U.S. Attorney's Offices covering April 2003 through July 2004. *Id.* at 23. During that time, the report stated that sixty-one search warrants "had delayed notice." *Id.* The data for fiscal year 2005 is an estimate based on the following: From the DOJ report, it can be calculated that from August 2004 through January 31, 2005, forty-seven delayed-notice search warrants were issued. *Id.* Doubling that six-month number gives an estimated ninety-four delayed notice search warrants in fiscal year 2005. Data for fiscal year 2006 is based on a summary contained in the first report from the Administrative Office of the U.S. Courts. *See* REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS ON APPLICATIONS FOR DELAYED-NOTICE SEARCH WARRANTS AND EXTENSIONS (2008), available at <http://irregulartimes.com/images/AOUSCfiscal2007.pdf>. That report contained data from March 2006 through September 2006, and lists eighty-seven delayed notice search warrants. *Id.* at 5 tbl. 1a (fiscal year 2006: warrants granted (75) and granted as modified (12)). Doubling that number to estimate the twelve-month period produces the figure of 174 delayed-notice searches for 2006.

The numbers for fiscal years 2007–2012 are taken from the Administrative Office annual reports to Congress for each of those years. *See id.* at 3 tbl.1 (fiscal year 2007: warrants granted (404) and granted as modified (15)); REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS ON APPLICATIONS FOR DELAYED-NOTICE SEARCH WARRANTS AND EXTENSIONS 3 tbl.1 (2009) (fiscal year 2008: warrants granted (737) and granted as modified (23)), available at <http://irregulartimes.com/images/AOUSCfiscal2008.pdf>; REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS ON APPLICATIONS FOR DELAYED-NOTICE SEARCH WARRANTS AND EXTENSIONS 3 tbl.1 (2010) (fiscal year 2009: warrants granted (1124) and granted as modified (21)), available at <http://irregulartimes.com/images/AOUSCfiscal2009.pdf>; REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS ON APPLICATIONS FOR DELAYED-NOTICE SEARCH WARRANTS AND EXTENSIONS 3 tbl.1 (2011) (fiscal year 2010: warrants granted (2356) and granted as modified (23)), available at <http://irregulartimes.com/images/AOUSCfiscal2010.pdf>; REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS ON APPLICATIONS FOR DELAYED-NOTICE SEARCH WARRANTS AND EXTENSIONS 3 tbl.1 (2012) (fiscal year 2011: warrants granted (3698) and granted as modified (35)); REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS ON APPLICATIONS FOR DELAYED-NOTICE SEARCH WARRANTS AND EXTENSIONS 3 tbl.1 (2013) (fiscal year 2012: warrants granted (5559) and granted as modified (42)).



Requests for delayed notice search warrants are almost never denied: from 2006 to 2012, investigators have requested 14,216 delayed notice search warrants, and courts have denied these applications thirty-nine times—less than 0.3% of all applications.<sup>142</sup> In 2012, investigators applied for 5606 delayed notice search warrants and 4577 extensions of existing delayed notice warrants; of those over 10,000 applications, a total of ten were denied.

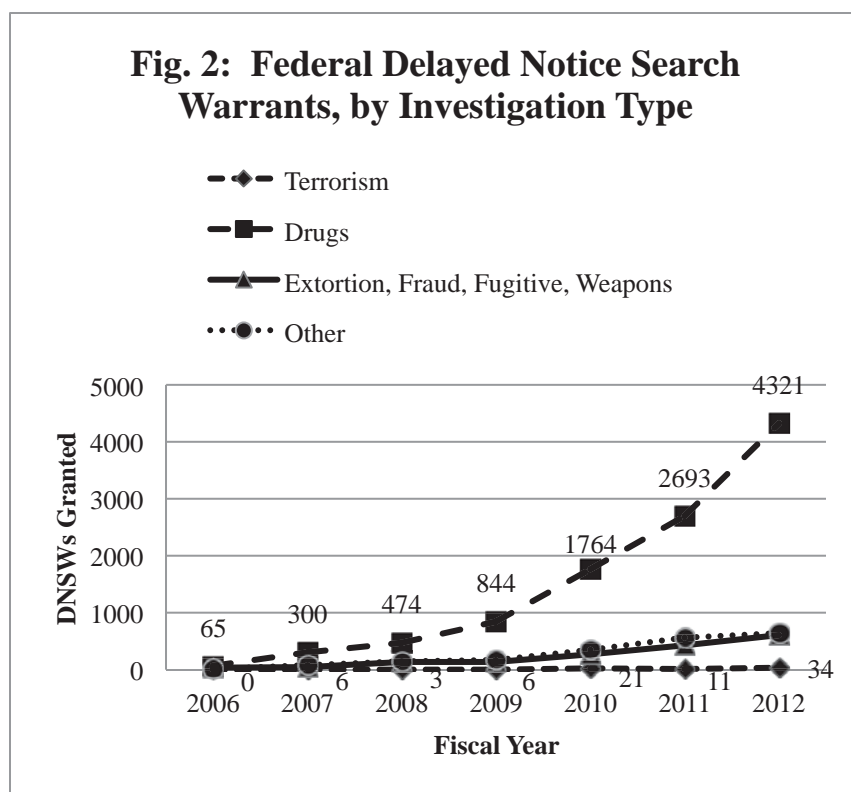
The data also shows that most delayed notice search warrants—about 75%—are obtained for drug investigations.<sup>143</sup> The next most common uses are for extortion, fraud, weapons offenses, and fugitive investigations, each representing approximately 3%–7% of delayed notice search warrants in a given year.<sup>144</sup> Only a tiny fraction of delayed notice search warrants—

142. See *supra* note 141 and accompanying text.

143. From fiscal year 2006 through 2012, the percentages of all delayed-notice warrants that were requested for drug investigations are as follows: 75% (2006); 72% (2007); 62% (2008); 74% (2009); 74% (2010); 72% (2011); 82% (2012). See *supra* note 141 and accompanying text.

144. For example, in 2010, delayed-notice warrants were used 79 times in extortion cases (3.3%),

usually less than 1% per year—is used in terrorism cases.<sup>145</sup> Figure 2 shows the number of delayed notice search warrants from 2006 to 2012 (the years for which this data is available), by type of criminal investigation.<sup>146</sup> Specific numbers are provided on the chart for drug investigations and terrorism investigations.<sup>147</sup>



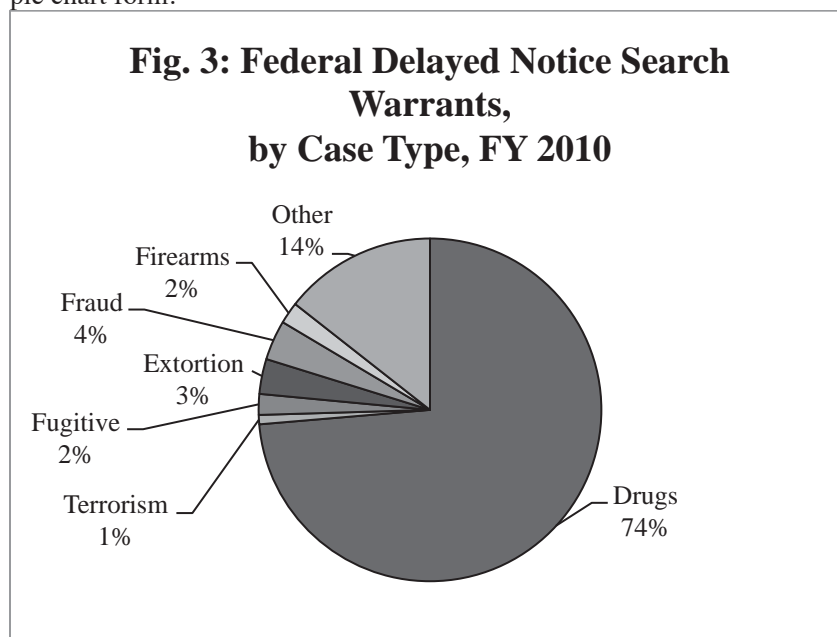
90 times in fraud cases (3.8%), 47 times in fugitive cases (2%), and 49 times in weapons cases (2.1%). See *supra* note 141 and accompanying text.

145. From fiscal year 2006 through 2012, the percentage of all delayed-notice warrants that were requested for terrorism investigations is as follows: 0% (2006); 1.4% (2007); 0.4 percent (2008); 0.5% (2009); 0.9% (2010); 0.3% (2011); 0.6% (2012). See *supra* note 141 and accompanying text.

146. See *infra* Figure 2.

147. Data for Figure 2 comes from the annual reports on delayed-notice warrants. See *supra* note 141 and accompanying text.

Figure 3 shows the break-down for fiscal year 2010, by type of case, in pie chart form.



Even when there is agreement that some sort of delay in notice may be appropriate, courts and legislators have debated how long notice should be delayed.<sup>148</sup> At the short end, some have argued that delay should not ordinarily exceed seven days, subject to extension in exceptional cases.<sup>149</sup> The Department of Justice initially sought authorization for a ninety-day delay, subject to extension.<sup>150</sup> Congress refused to provide “a blanket

148. See *infra* notes 149–52 and accompanying text.

149. See, e.g., *United States v. Villegas*, 899 F.2d 1324, 1337 (2d Cir. 1990) (“We . . . agree with the *Freitas* court that as an initial matter, the issuing court should not authorize a notice delay of longer than seven days. For good cause, the issuing court may thereafter extend the period of delay.”); *United States v. Freitas*, 800 F.2d 1451, 1456 (9th Cir. 1986) (delay “should not exceed seven days except upon a strong showing of necessity”); S. REP. NO. 111-92, at 4 (2009) (The USA Patriot Act Sunset Extension Act of 2009) (proposing an amendment to “to modify the presumptive time period for delayed notice search warrant from 30 days, which is the period under current law, to seven days,” which did not become law); 147 CONG. REC. S10557 (2001) (statement of Sen. Leahy) (“I would expect courts to be guided by the teachings of the Second and the Ninth Circuits that, in the ordinary case, a reasonable time is no more than seven days.”).

150. Section 352 of the administration’s first proposal would have authorized delay “pursuant to

authorization for up to a 90-day delay,” instead amending the language to require “that notice be given within a reasonable time of the execution of the warrant.”<sup>151</sup> Senator Leahy stated his (optimistic) expectation for “courts to be guided by the teachings of the Second and the Ninth Circuits that, in the ordinary case, a reasonable time is no more than seven days.”<sup>152</sup>

In 2005, Congress changed the standard delay to a period not to exceed thirty days, subject to extension.<sup>153</sup> In another Patriot Act reauthorization in 2009, the Senate Judiciary Committee approved a bill that “shorten[ed] the presumptive time period for delayed notice from 30 days to 7 days,” noting that the Delayed Notice Reports showed “that these so-called ‘sneak and peek’ warrants are only very rarely used in terrorism cases.”<sup>154</sup> That amendment failed to carry the day, however, and the reauthorization that passed did not modify the thirty-day notification default, which remains the law today.<sup>155</sup>

Statistics show that substantial extensions of the thirty-day delay period are the rule, not the exception.<sup>156</sup> In fact, of all delayed notice search warrants, notice is given in thirty days (or less) only about one-third of the time.<sup>157</sup> While the DOJ failed to persuade Congress to make a ninety-day delay the statutory norm, a ninety-day delay has nevertheless become the

the standards, terms, and conditions set forth in section 2705 [of the Stored Communications Act], unless otherwise expressly provided by statute.” *Admin.’s Draft Anti-Terrorism Act of 2001: Hearing Before the H. Comm. on the Judiciary*, 107th Cong. 44 (2001) (internal quotation marks omitted). Section 2705 provided (and still provides) for a ninety-day delay for orders issued under the Stored Communications Act, subject to extension. *See* 18 U.S.C. § 2705 (2012).

151. 147 CONG. REC. 19,502 (2001) (statement of Sen. Leahy). Senator Leahy stated that the administration’s proposal “would have extended the permissible period of delay to a maximum of 90 days, instead of the presumptive seven-day period provided by the caselaw on sneak and peek warrants,” and explained that the revised provision “now requires that notice be given within a reasonable time of the execution of the warrant rather than giving a blanket authorization for up to a 90-day delay.” *Id.* *See also* 18 U.S.C. § 3103a(b)(3) (2012) (providing for notice to be delayed for “a reasonable period”).

152. 147 CONG. REC. 19,502 (2001).

153. 18 U.S.C. § 3103a(b)(3).

154. S. REP. NO. 111-92 (2009).

155. 18 U.S.C. § 3103a(b)(3).

156. *See supra* note 141 (listing the number of modified warrants granted for each fiscal year between 2007 and 2012).

157. The total number of delayed notice search warrants and warrant extensions between fiscal years 2007 and 2012—the years for which this data is available—is 24,808. Of those, notification was given within thirty days (or less) in approximately 8,500 cases, or 34% of the time. These figures are compiled from the delayed notice search warrant reports from 2007–2012. *See supra* note 141.

norm in practice. About half of all delayed notice search warrants involve ninety-day delays.<sup>158</sup> A minority of cases, but still a substantial number, involve delays of six months or more.<sup>159</sup> In 2007, for example, there were about fifty instances of delays of 180 days or more.<sup>160</sup> In all, more than half of all delayed notice search warrants involve notice given ninety days or more after the search.<sup>161</sup> Delays range from one day up to 455 days.<sup>162</sup>

Table 1 shows the average delay per fiscal year as well as the median delay—which in each year is ninety days, and represents very close to half of all delayed notice warrants.<sup>163</sup> Table 1 also shows the range of delays from that year, from lowest to highest.

<b>Fiscal Year</b>	<b>Average Delay (Days)</b>	<b>Median Delay (Days)<sup>164</sup></b>	<b>Range of Delays (Days)</b>
2006 <sup>165</sup>	67	n/a	n/a
2007	75	90 (47% of cases)	5–365
2008	68	90 (46% of cases)	3–365
2009	64	90 (47% of cases)	7–300
2010	65	90 (51% of cases)	1–455
2011	66	90 (51% of cases)	1–366
2012	65	90 (50% of cases)	1–365

158. The data on this point are remarkably stable from 2006 through 2012, varying only between 46% and 51%. *See supra* note 141.

159. *See supra* note 141 and accompanying text.

160. *See supra* note 141.

161. *See supra* note 141.

162. *See* REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS ON APPLICATIONS FOR DELAYED-NOTICE SEARCH WARRANTS AND EXTENSIONS (2011), *supra* note 141.

163. *See supra* note 141.

164. The report calls this the “most frequently reported period of delay.” *See supra* note 141.

165. The data for fiscal year 2006 is estimated. *See supra* note 141.

In summary, the available data shows a rapid explosion in the use of federal delayed notice search warrants, used mostly in drug cases and only rarely in terrorism cases, and with lengthy delays in giving notice. Part I.B.2 now turns to cast a questioning eye on what these figures truly represent.

## 2. The Broken Reporting Requirement

Congress was focused on covert searches of physical spaces when it passed § 3103a and the corresponding reporting requirement.<sup>166</sup> When Congress passed the reporting requirement in § 3103a(d), Congress expected to receive data showing how often investigators were covertly entering people's homes and businesses. Instead, Congress is receiving data showing how often investigators get authority to delay notice on many different types of warrants, including many that do not involve covertly entering any physical space, such as cell phone location tracking, GPS tracking, and searching e-mails.<sup>167</sup> There are good reasons to be concerned about the privacy implications of all of these types of covert surveillance, yet the privacy concerns in each type of search are somewhat different. Moreover, the use of these various types of searches is evolving rapidly—and in different ways, depending on the type of search—and thus a single report lumping all of these types of searches together is of little use. Finally, as explained below, the data does not even reliably show whether there is an overall increase in these various types of covert searches (even though there likely is such an increase). In short, the reporting requirement is broken—it is not giving us the data Congress or the public needs—and should be fixed.

Section 3103a(b) is framed in general terms: for any “warrant . . . 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” in the circumstances set forth.<sup>168</sup> The reporting requirement is similarly general: soon after “the expiration of a warrant authorizing delayed notice . . . entered under this section, . . . the issuing or denying judge shall report” various types of information about the

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166. See *infra* note 172 and accompanying text.

167. See *infra* notes 181–82 and accompanying text (discussing the use of search warrants for cell phone data).

168. 18 U.S.C. § 3103a(b) (2012).



warrant.<sup>169</sup> Neither the statutory authority for delayed notice warrants nor the reporting requirements are limited to particular types of searches.<sup>170</sup> In particular, they are not limited to physical invasions of homes or businesses, but apply to any type of warrant to search for and seize evidence of a crime.<sup>171</sup>

Congressional discussions of delayed notice search warrants—both criticisms and defenses—focused on physical searches of homes and businesses.<sup>172</sup> Congressional testimony, by officials from the DOJ and others, likewise focused on physical searches of spaces or packages.<sup>173</sup>

169. *Id.* § 3103a(d)(1).

170. *See id.* §3103a.

171. *Id.*

172. *See, e.g., Admin.'s Draft Anti-Terrorism Act of 2001: Hearing Before the H. Comm. on the Judiciary*, 107th Cong. 73–74 (2001) (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.* (statement of Rep. Spencer Bachus) (“you’re applying this [delayed notice] to all cases where you want to search someone’s home”); 147 CONG. REC. 19,502 (2001) (statement of Sen. Patrick Leahy) (“Normally, when law enforcement officers execute a search warrant, they must leave a copy of the warrant 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. 20,702 (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.”).

173. *See, e.g., Protecting Constitutional Freedoms in the Face of Terrorism: Hearing Before the Subcomm. on the Judiciary*, 107th Cong. 26 (2001) (statement of Jerry Berman, Exec. Dir., Ctr. for Democracy and Tech.) (characterizing the delayed notice search warrant provisions as “[a]llow[ing] secret searches of homes and offices”); *Letter to the House Urging Them to Vote “No” on the PATRIOT Act*, ACLU (Oct. 12, 2001), <http://www.aclu.org/national-security/letter-house-urging-them-vote-no-patriot-act> (“Sneak and Peek Searches: this section authorizes the wholesale use of covert searches for any criminal investigation thus allowing the government to enter your home, office or other private place and conduct a search, take photographs, and download your computer files without notifying you until later.”); *A Review of Counter-Terrorism Legislation and Proposals: Hearing Before the S. Comm. On the Judiciary*, 108th Cong. 14 (2004) (statement of Hon. James Comey, Deputy Att’y Gen., U.S. Dep’t of Justice) (defending delayed notice search warrants and giving examples of successful uses of this authority; examples given were opening an envelope with a delayed notice search warrant, and breaking into a car to seize drugs); *Implementation of the USA PATRIOT Act: Sections 201, 202, 223 of the Act That Addresses Criminal Wiretaps, and Section 213 of the Act That Addresses Delayed Notice: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 109th Cong. 14 (2005) (statement of Chuck Rosenberg, Chief of Staff to Deputy Att’y Gen., U.S. Dep’t of Justice) (giving examples of successful uses of delayed notice search warrants; example given was opening a Fed Ex package); *Patriot Act Reauthorization: Hearing Before the H. Comm. on the Judiciary*, 109th Cong. 13 (2005)

There is no mention, in any of the discussion of § 3103a, that this general authority would also apply to search warrants that did not involve physical intrusions into homes, businesses, and packages. All of this is not to suggest that § 3103a was implicitly limited to physical intrusions—by its terms, it is not<sup>174</sup>—but to show that Congress was focused on the paradigmatic case of a delayed notice search warrant, namely a covert physical invasion of homes and businesses. This focus continued through debates, in later years, over re-authorization. As recently as 2011, a congressional report characterized “delayed notice search warrants” as involving covert searches of homes and businesses.<sup>175</sup>

As noted earlier, Congress in 2005 passed a reporting requirement designed to produce annual data on the use of § 3103a.<sup>176</sup> In the words of Senator Feingold, this reporting requirement and the data it would produce were intended to “help the public and Congress evaluate the need for this authority and determine whether it should be retained or modified.”<sup>177</sup> Given Congress’s focus on covert entry into physical spaces, it is reasonable to conclude that the reporting requirement in § 3103a(d) was primarily intended to monitor covert searches of homes and businesses.

As of 2006, when the Administrative Office began compiling the Delayed Notice Reports, there is good reason to believe that the reported data indeed captured the number of “sneak and peek” searches. The AO reported eighty-seven delayed notice search warrants for March through September 2006, or approximately 174 delayed notice search warrants in a year.<sup>178</sup> That number is higher than figures given by DOJ officials for earlier years—reports suggested around sixty-one for 2004 and ninety-four for 2005<sup>179</sup>—but not dramatically higher. By fiscal year 2007, the number was

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(statement of James B. Comey, Deputy Attorney Gen., U.S. Dep’t of Justice) (example given was conducting covert searches of drug “stash houses”).

174. See 18 U.S.C. § 3103a; see also *supra* notes 170–71 and accompanying text (stating that the text of the statute does not define which searches are eligible for delayed notice).

175. S. REP. NO. 112-13, at 15 (2011) (“Section 213 of the 2001 USA PATRIOT Act authorized the use of delayed notice, or ‘sneak and peek,’ search warrants in criminal cases. These warrants allow law enforcement agents to enter and search an American’s home or business, but not notify the owner until weeks or even months later.”).

176. See *supra* note 7 and accompanying text.

177. 151 CONG. REC. S1131 (daily ed. Feb. 8, 2005).

178. See *supra* Figure 1; *supra* note 141.

179. See *supra* Figure 1; *supra* note 141.

on the rise, up to 419, and the rise has continued rapidly.<sup>180</sup>

In the past few years, several changes have occurred in the use of search warrants with delayed notice—changes that were largely unrelated to the passage of § 3103a, but which have likely impacted this data.<sup>181</sup> These developments involve changes in the use of search warrants to conduct various types of searches, all involving new electronic technologies: tracking a person’s location using cell phone location information, searching the contents of e-mail messages, and using GPS tracking devices, among other things. There is good reason to believe that at least in the past few years, and possibly earlier, some substantial portion of federal delayed notice search warrants involve these types of searches, rather than covert searches of physical space.

*Cell Phone Location Information.* Investigators in recent years have increasingly used a variety of technological approaches to track the location of individuals through their cell phones, almost always covertly.<sup>182</sup> Police can track a person through cell site location information (CSLI), which shows the location of a phone within a given area by identifying which cell tower a user’s cell phone was communicating with at the time of a call.<sup>183</sup> Police can obtain historical CSLI from cell phone providers to show past locations, or can obtain prospective CLSI that enables them to track the location of a cell phone in real time.<sup>184</sup> Police can also use GPS devices, now a standard feature in most mobile phones, to track a user’s location.<sup>185</sup> Police can obtain GPS information from cell phone service providers, from third-party apps, or by covertly “pinging” a user’s phone to determine the location, even when a call is not being made. Police may also determine a user’s location through business records showing which wireless internet connections a phone was connected with and when those connections

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180. See 2008 REPORT ON APPLICATIONS FOR DELAYED-NOTICE SEARCH WARRANTS AND EXTENSIONS, *supra* note 141.

181. Thanks to Professor Orin Kerr for raising this issue and bringing some of these developments—and their potential impact on the data—to my attention.

182. See Stephanie K. Pell & Christopher Soghoian, *Can You See Me Now?: Toward Reasonable Standards for Law Enforcement Access to Location Data that Congress Could Enact*, 27 BERKELEY TECH. L.J. 117, 120 (2012); Jeremy H. Rothstein, Note, *Track Me Maybe: The Fourth Amendment and the Use of Cell Phone Tracking to Facilitate Arrest*, 81 FORDHAM L. REV. 489, 493–94 (2012).

183. Rothstein, *supra* note 182, at 494.

184. *Id.*

185. *Id.* at 493.

occurred.<sup>186</sup>

The volume of cell phone location tracking is huge, with one federal judge estimating in 2011 that “federal courts alone approve 20,000–30,000 tracking requests annually, and the number is rising.”<sup>187</sup> These different cell phone tracking technologies are governed by a variety of different legal regimes, and there is considerable uncertainty about which legal regimes govern which types of tracking.<sup>188</sup> In many cases, investigators have been able to covertly track cell phone locations without using a search warrant, for example through court orders under 18 U.S.C. § 2703(d) (the Stored Communications Act) or pen/trap orders under 18 U.S.C. § 3123.<sup>189</sup>

In recent years, a number of federal magistrate judges have begun demanding that police obtain search warrants for various categories of cell phone tracking data, while other courts continue to permit investigators to use less stringent forms of statutory authority.<sup>190</sup> Amidst this uncertainty, it is clear that investigators are increasingly (though not uniformly) using Fourth Amendment search warrants to conduct various kinds of cell phone location tracking, and that those warrants are always delayed notice

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186. Pell & Soghoian, *supra* note 182, at 126–32; Susan Freiwald, *Cell Phone Location Data and the Fourth Amendment: A Question of Law, Not Fact*, 70 MD. L. REV. 681, 702–16 (2011) (detailing the richness and precision of various types of cell phone location data).

187. Rothstein, *supra* note 182, at 491 (footnotes omitted) (citing Julia Angwin & Scott Thurm, *Judges Weigh Phone Tracking*, WALL ST. J., Nov. 9, 2011, at A1) (“Police track thousands of cell phones every year. Generally, neither the target nor the public ever learns of a tracking order. Requests to track cell phones are sealed, and the judges who consider them seldom publish opinions.”). *See also* Pell & Soghoian, *supra* note 182, at 121 (“[Requests for] location information grew ‘exponentially’ over the past few years, with major wireless carriers now receiving thousands of requests per month. Sprint Nextel received so many requests that it developed a web interface that gave law enforcement direct access to its subscribers’ location data. Law enforcement agents used the website to ‘ping’ Sprint subscribers over eight million times in a single year.”).

188. Pell & Soghoian, *supra* note 182, at 126–32; Susan Freiwald, *Cell Phone Location Data and the Fourth Amendment: A Question of Law, Not Fact*, 70 MD. L. REV. 681 (2011).

189. Pell & Soghoian, *supra* note 182, at 133–50.

190. *See* Pell & Soghoian, *supra* note 182, at 137–38; Freiwald, *supra* note 186, at 683–84 (noting that the Third Circuit in 2010 “held that magistrate judges retain the *option* to impose a warrant requirement on government agents who seek location data *or* may instead permit them to satisfy the less demanding statutory standard before obtaining an order compelling disclosure”); *In re* Application of U.S. for Order Directing a Provider of Elec. Comm. Service to Disclose Records, 620 F.3d 304 (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, 2013 WL 1934491 (S.D. Tex. May 8, 2013) (holding that government was required to show probable cause to obtain historical cell site information; citing cases holding that probable cause and the Fourth Amendment do not apply to historical cell site data, and cases holding the contrary).

warrants.<sup>191</sup> Some courts have been requiring search warrants for at least some types of cell phone location data (such as prospective, real-time tracking) since at least 2005.<sup>192</sup>

To the extent investigators engage in covert cell phone location tracking using statutory orders that are not search warrants, that practice will not be reported in the Delayed Notice Reports (which reports on “warrants” issued under § 3103a). But to the extent investigators conduct the exact same covert tracking using search warrants, that tracking will be reported in the Delayed Notice Reports. It is impossible to determine precisely what percentage of the delayed notice search warrants in the covered years (2006–2012) are warrants for cell phone location tracking. Some investigators likely continue to perform this tracking without using reported search warrants.<sup>193</sup> But given the judicial pressure to use search warrants, it is quite likely that investigators are increasingly using reported search warrants to conduct cell phone location tracking.<sup>194</sup> This shift—from conducting covert cell location tracking searches with court orders, to conducting that same covert tracking with delayed notice search warrants—would result in a steady increase in the reported number of “delayed notice search warrants” in the Delayed Notice Reports. This increase would appear even if the total number of covert cell phone location tracking remained constant.

*E-mail messages.* A similar trend may be occurring with covert searches of e-mail messages, although the time frame here is somewhat more recent. At least since 2010, however, and arguably since 2007 or earlier, investigators have been under increasing pressure to use delayed notice search warrants (reported in the Delayed Notice Reports) for any

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191. See Freiwald, *supra* note 186, at 729.

192. See, e.g., *In re* Application of U.S. for Order, Case Nos. 1:06-MC-6, 1:06-MC-7, 2006 WL 1876847 (N.D. Ind. July 5, 2006) (requesting an order “(1) Authorizing the Installation & Use of a Pen Register & Trap & Trace Device; (2) Authorizing the Release of Subscriber & Other Information; & (3) Authorizing the Disclosure of Location-Based Services”); *In re* Application for Pen Register & Trap/Trace Device, 396 F. Supp. 2d 747, 765 (S.D. Tex. 2005); *In re* Application of U.S. for Order, 396 F. Supp. 2d 294, 327 (E.D.N.Y. 2005) (requesting an order “(1) Authorizing the Use of a Pen Register and a Trap and Trace Device and (2) Authorizing Release of Subscriber Information and/or Cell Site Information”). Other courts during this same time have permitted access to this same data through less stringent statutory authority rather than Fourth Amendment search warrants. See, e.g., *In re* Application of U.S. for Order for Prospective Cell Site Location Info., 460 F. Supp. 2d 448, 461 (S.D.N.Y. 2006); *In re* Application of U.S. for Disclosure of Telecomm. Records, 405 F. Supp. 2d 435, 449 (S.D.N.Y. 2005).

193. See Freiwald, *supra* note 186, at 722.

194. See Pell & Soghoian, *supra* note 182, at 161–62.

covert searching of e-mail messages, instead of using other (unreported) legal mechanisms to do so.<sup>195</sup>

Access to e-mail messages is governed by the Stored Communications Act (SCA), passed by Congress in 1986.<sup>196</sup> Under the SCA, investigators can obtain e-mail messages in several ways, some of which do not require a search warrant. Depending on the circumstances, investigators can obtain e-mail messages by using a subpoena, with a court order under § 2703(d), or with a search warrant.<sup>197</sup> In some cases, investigators want to access e-mail records without notifying the owner of the account, and the SCA expressly authorizes that practice in specified circumstances.<sup>198</sup> Indeed, recall that it is precisely this list, from the SCA, that Congress chose to cross-reference in section 3103a for delayed notice search warrants.<sup>199</sup>

In short, investigators in past years have been able to obtain e-mail messages without using search warrants (at least in some circumstances), and often have been able to obtain those e-mails covertly, without giving notice to the account holder until some later date.<sup>200</sup> These covert e-mail searches—if conducted without search warrants—would not have been reported in the annual Delayed Notice Reports.

In the past few years, court decisions may be prompting investigators to conduct these same searches using search warrants with delayed notice under § 3103a. These searches would be included in the Delayed Notice Reports, as they fall under the reporting definition.

In 2004, the Ninth Circuit adopted a novel interpretation of the

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195. See Orin S. Kerr, *A User's Guide to the Stored Communications Act, and a Legislator's Guide to Amending It*, 72 GEO. WASH. L. REV. 1208, 1218–20 (2004).

196. See 18 U.S.C. §§ 2701–11 (2012).

197. For e-mail messages that have been stored for 180 days or less by a provider of “electronic communication service” (ECS), investigators must use a traditional search warrant. *Id.* § 2703(a). The required notice, however, need only be given to the Internet Service Provider, not the individual e-mail account holder. See *In re Application of U.S. for Search Warrant of Elec. Mail*, 665 F. Supp. 2d 1210 (D. Or. 2009). For e-mail messages that have been stored by an ECS for more than 180 days, or for any message stored by a provider of remote computing service (RCS), the government has several options. First, it can access e-mail messages by subpoena—in which case it must give contemporaneous notice to the subscriber. 18 U.S.C. § 2703(b). Second, it can access e-mail messages with a court order. *Id.* § 2703(d). This court order is not a traditional search warrant, and issuance is not (under the statute) subject to the same requirements as a warrant under the Fourth Amendment. See Kerr, *supra* note 195, at 1218–24.

198. See 18 U.S.C. § 2705; Kerr, *supra* note 195, at 1218–19.

199. See *infra* Part II.A.

200. See Kerr, *supra* note 195, at 1214, 1223.

difference, under the SCA, between an “electronic communication service” and a “remote computing service.”<sup>201</sup> One implication of the decision was to require the government—at least in the Ninth Circuit—to obtain warrants for a much larger category of e-mails.<sup>202</sup> The impact of *Theofel v. Farey-Jones* was likely limited to the Ninth Circuit, however, as other courts have not adopted *Theofel*’s analysis.<sup>203</sup>

More significant developments have occurred in the Sixth Circuit, which squarely held that individual e-mail account holders have a “reasonable expectation of privacy” in the contents of e-mails (even stored on public internet service providers), and that those e-mails are thus protected under the Fourth Amendment.<sup>204</sup> As a result, the court explained, those portions of the SCA permitting investigators to access e-mails without a search warrant are unconstitutional.<sup>205</sup>

A panel of the Sixth Circuit first announced this holding in June of 2007, although that decision was vacated soon thereafter on the grounds that the issue was not yet ripe for adjudication.<sup>206</sup> After further developments in the litigation, the issue did become ripe, and a Sixth Circuit panel in December 2010 again held that “a subscriber enjoys a reasonable expectation of privacy in the contents of emails” stored with an internet service provider, that the government must obtain “a warrant based on probable cause” to access these e-mails, and that “to the extent that the SCA purports to permit the government to obtain such emails warrantlessly, the SCA is unconstitutional.”<sup>207</sup>

This decision means that in the Sixth Circuit, since December 2010, investigators must use search warrants to obtain e-mail messages.<sup>208</sup> And if they want to do so covertly, with notice given later, they must get

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201. *Theofel v. Farey-Jones*, 359 F.3d 1066 (9th Cir. 2004).

202. *See In re Application of U.S. for Search Warrant of Elec. Mail and Order to Not Disclose Warrant*, 655 F. Supp. 2d 1210, 1214 n.1 (D. Or. 2009) (explaining the impact of *Theofel*). *See also* Kerr, *supra* note 195, at 1217–18, 1224.

203. *See* *United States v. Weaver*, 636 F. Supp. 2d 769 (C.D. Ill. 2009) (rejecting *Theofel*); *Lazette v. Kulmatycki*, Case No. 3:12CV2416, 2013 WL 2455937, at \*7 n.13 (N.D. Ohio June 5, 2013) (same). *See also* Kerr, *User’s Guide*, 72 GEO. WASH. L. REV. at 1217–18, 1224 (criticizing *Theofel*).

204. *Warshak v. United States (Warshak I)*, 490 F.3d 455, 475 (6th Cir. 2007).

205. *Id.*

206. *Warshak v. United States (Warshak II)*, 532 F.3d 521 (6th Cir. 2008) (en banc) (holding the issue decided in *Warshak I* was not ripe for adjudication).

207. *United States v. Warshak (Warshak III)*, 631 F.3d 266, 288 (6th Cir. 2010).

208. *Id.*

authorization under § 3103a rather than merely § 2705.<sup>209</sup> And that means, finally, that all covert e-mail searches in the Sixth Circuit are now being reported in the Delayed Notice Reports, whereas in earlier years many such covert searches were not being reported. Investigators in other jurisdictions may also be relying increasingly on search warrants to obtain e-mails, out of abundance of caution or in anticipation that additional courts may follow the Sixth Circuit's approach. It is hard to tell whether and to what degree this is occurring.

*GPS Tracking.* The data in the Delayed Notice Reports is also likely being impacted by the quite recent increase in the use of search warrants to conduct GPS tracking. For many years, police have conducted GPS tracking of cars or packages, first with small beepers and later with small GPS devices.<sup>210</sup> So long as the tracking occurred outside of homes or businesses, the tracking was largely done without search warrants (or, indeed, any court involvement).<sup>211</sup> This type of tracking technology has become cheaper and more effective, and has become more and more common.<sup>212</sup>

More recently, however, courts have pressured police to use search warrants for at least some types of GPS monitoring, in particular long-term monitoring.<sup>213</sup> To the extent search warrants are used, they are invariably delayed notice search warrants—no investigator wants to inform a driver that they are about to install a GPS device on his or her car. In August of 2010, in *United States v. Maynard*, the D.C. Circuit held that long-term GPS surveillance of car was a “search” under the Fourth Amendment, suggesting that a search warrant might be required for these searches.<sup>214</sup> A week later, five judges on the Ninth Circuit, in a dissenting opinion, similarly argued that GPS tracking may infringe on a reasonable expectation of privacy and should be governed by the Fourth Amendment.<sup>215</sup>

This question quickly reached the Supreme Court, which held in *United States v. Jones* that long-term GPS monitoring of a car (at least through the

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209. See Freiwald, *supra* note 186, at 700.

210. See generally WAYNE LAFAVE, 1 SEARCH & SEIZURE § 2.7(f) (5th ed. 2013) (discussing the use of electronic tracking devices, such as GPS, in criminal investigations).

211. *Id.*

212. *Id.*

213. *Id.*

214. 615 F.3d 544, 558–67 (D.C. Cir. 2010).

215. *United States v. Pineda-Moreno*, 617 F.3d 1120 (9th Cir. 2010) (Kozinski, C.J., joined by Reinhardt, Wardlaw, Paez, and Berzon, J.J., dissenting from the denial of rehearing en banc).



attachment of a GPS device) was a search under the Fourth Amendment.<sup>216</sup> Notably, Rule 41 of the Federal Rules of Criminal Procedure was amended in 2006 to authorize (though not require) the use of search warrants to conduct tracking (such as with GPS devices).<sup>217</sup> Since *Jones*, in early 2012, many investigators are obtaining search warrants—invariably of the delayed notice variety—to conduct most GPS tracking.

The phenomenon of GPS tracking has existed for some time. When the practice was conducted without warrants, however, government GPS tracking was not reported on the Delayed Notice Reports. To the extent that investigators now obtain delayed notice search warrants for at least some GPS tracking, these searches are beginning to show up in the Delayed Notice Reports. These legal developments in GPS tracking have been quite recent (although the Federal Rules change occurred in 2006), so it is difficult to say when this would have begun to impact the data.

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In light of these developments, it is hard to know what to make of the data in the Delayed Notice Reports. The reporting requirement passed in 2005 was primarily intended to monitor true “sneak and peek” searches—covert searches of physical spaces.<sup>218</sup> This is the type of search Congress was thinking about when it passed § 3103a, and is the only type of delayed notice search that legislators have discussed in connection with § 3103a.

None of this is to say that the public should not be interested in other forms of covert searching—such as covert searching of e-mail messages, covert GPS tracking, or covert cell phone location tracking. But there is good reason to think that covert searches of physical spaces are uniquely invasive to core Fourth Amendment concerns, and require monitoring separate from other types of covert searching.

The problem with the current Delayed Notice Reports is two-fold. First, the reports do not show how frequently investigators are conducting “sneak and peek” searches, covert GPS tracking, covert cell phone location tracking, or covert e-mail searching, because the data on all of these searches are mixed up together. Second, the reports do not even provide a very good picture of “covert searching” overall. As explained above, many forms of covert government surveillance have been, and to varying degrees continue

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216. *United States v. Jones*, 132 S. Ct. 945 (2012).

217. FED. R. CRIM. P. 41 (2010).

218. *See* 151 CONG. REC. S1131 (daily ed. Feb. 8, 2005); *see also supra* Part I.B.

to be, conducted without using Fourth Amendment search warrants.<sup>219</sup> To the extent this is occurring, those searches are not included in the Delayed Notice Reports. The increase in “delayed notice search warrants” in the Delayed Notice Reports is in fact, at least in part, caused by the *increasing* Fourth Amendment protections in some areas of covert surveillance. Judicial pressure to use search warrants, rather than less stringent court orders or no judicial oversight at all, has resulted in searches being included in the Delayed Notice Reports when in previous years those same searches were not included in those reports.

Unless the Delayed Notice Reports break down the type of covert search being conducted—a physical “sneak and peek,” versus cell phone location data, versus covert searching of e-mail messages—the data is serving very little purpose.

### 3. Monitoring “Sneak and Peek”: Fixing the Reporting Requirement

Fortunately, this problem should be relatively easy to fix, and the fix could conceivably be done in one of two ways. First, Congress could amend § 3103a to require that the Delayed Notice Reports include data on the type of search for which delayed notice warrants are being used. Congress might specify several possible options from which data reporters may choose: searches of physical spaces, searches of physical packages, searches of electronic communications, searches for cell phone location information, or the use of other tracking devices (such as GPS).

This same change might be possible even without congressional action, through regulations enacted by the Administrative Office. Section 3103a provides that the Director of the Administrative Office, “in consultation with the Attorney General, is authorized to issue binding regulations dealing with the content and form of the reports required to be filed.”<sup>220</sup> Currently the Attorney General has not exercised this authority—there are no existing regulations governing the content and form of the Delayed Notice Reports. Given this authority, the Administrative Authority could adopt regulations requiring reporting bodies to include the type of search—along the same lines suggested above—in all Delayed Notice Reports.

This relatively simple amendment—either by statute or regulation—

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219. *See supra* Part I.A.

220. 18 U.S.C. § 3103a(d)(3) (2012).

would give Congress, and the public, the ability to monitor true “sneak and peek” search warrants, as well as the ongoing development and use of other forms of covert government surveillance through delayed notice warrants.

## II. “SNEAK AND PEEK” SEARCHES INVADE CORE PRIVACY INTERESTS PROTECTED BY THE FOURTH AMENDMENT

“Sneak and peek” searches raise serious Fourth Amendment issues. Covert searches of homes, discussed in Part II.A, invade the privacy and repose of the home in ways distinct from the ordinary invasion of a traditional search. Covert seizures, discussed in Part II.B, raise an additional set of concerns. As a matter of first principles, these privacy invasions intrude directly on the privacy and sanctity of the home, values that the Fourth Amendment was designed to protect. Contrary to the views of many courts and commentators, covert searching raises serious constitutional questions, not merely possible violations of Rule 41.

It is notable that during the debate over delayed notice search warrants, several legislators squarely asserted that the Fourth Amendment did require that notice be given at the time of a search.<sup>221</sup> While the supporters of § 3103a carried the day, no legislators took the floor to disagree with this core belief that the Fourth Amendment ordinarily requires notice of a search.<sup>222</sup> Lower courts, in contrast, mostly hold that notice of a search is only a function of Rule 41, not a requirement of the Fourth Amendment.<sup>223</sup> For the reasons set forth below, the legislators have the better of the constitutional argument—the Fourth Amendment does require, at least ordinarily, notice of a search.

### *A. Covert Searches Invade the Privacy and Repose of the Home*

The Supreme Court has repeatedly affirmed that physical invasion into the privacy of the home lies at the heart of the Fourth Amendment. 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

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221. See *supra* Part I.A.2.

222. *Administration’s Draft Anti-Terrorism Act of 2001: Hearing Before the H. Comm. on the Judiciary*, 107th Cong. (2001).

223. See *supra* note 14 (citing cases).

intrusion.”<sup>224</sup> The Fourth Amendment rests on the ancient common law principle that “the house of every one is to him as his . . . castle and fortress, as well for his defence against injury and violence, as for his repose.”<sup>225</sup>

Of course, the home is not wholly immune from state invasion. The Fourth Amendment permits entry into the homeowner’s “castle and fortress” through the instrument of the specific warrant—an authorization to enter a specific home based on probable cause to believe that home contains contraband or evidence of a crime.<sup>226</sup> A covert search conducted under the terms of a delayed notice search warrant is done pursuant to a warrant, issued by a neutral magistrate upon a showing of probable cause to enter the specific home in question. In that sense, then, the invasion into the home is accomplished by the means dictated by the Fourth Amendment.

The covert nature of that intrusion, however, raises additional Fourth Amendment privacy concerns apart from the fact of physical intrusion (which itself is justified by the warrant). There are at least two privacy intrusions caused by the covert nature of an otherwise-legal search: (1) the distress and loss of privacy experienced when an individual learns the government secretly searched through his or her home; and (2) the loss of privacy imposed on the entire community when each person, knowing the government sometimes secretly searches homes, suffers the uncertainty of wondering whether the government has secretly searched his or her home.

The first interest was recognized by the Ninth Circuit in *United States v. Freitas*: “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.”<sup>227</sup> On this view, while it is certainly unpleasant to watch government officials search your home, it is a separate harm to imagine

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224. *Payton v. New York*, 445 U.S. 573, 589–90 (1980) (alterations in original) (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)).

225. *Semayne’s Case*, (1604) 77 Eng. Rep. 194 (K.B.). “The people’s protection against unreasonable search and seizure in their ‘houses’ was drawn from the English common-law maxim, ‘A man’s home is his castle.’” *Minnesota v. Carter*, 525 U.S. 83, 94 (1998) (Scalia, J., joined by Thomas, J., concurring) (emphasis omitted) (citing *Semayne’s Case*).

226. 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.”).

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

government officials searching your home when you are absent.<sup>228</sup> The Second Circuit argued in *Villegas* that a covert search was less intrusive than a conventional search and seizure, because a search and seizure “deprives the owner not only of privacy but also of the use of his property.”<sup>229</sup> But even this statement recognizes that a covert search—even with no seizure—does “deprive[] the owner . . . of privacy.”<sup>230</sup> The added observation that a seizure represents an additional deprivation is true—but that is true whether the search is covert or not. Moreover, this does not negate the distinct privacy invasion of a covert search.

When the occupant is present during a search, she can at least observe what is being done, and what is found. The Federal Rules of Criminal Procedure require an officer to “prepare and verify and inventory of any property seized,” and to do so “in the presence of another officer and the person from whom . . . the property was taken.”<sup>231</sup> When the search is conducted secretly, the occupant can only imagine where the officials searched, and what was found. 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.’”<sup>232</sup> A secret search invites abuse, such as Coke’s accusation that officials will invent evidence if they cannot find it.

The Fourth Amendment seeks to protect “the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.”<sup>233</sup> Individuals suffer a distinct privacy intrusion in knowing that the government searched through their homes—their “castle and fortress,” “defence against injury and violence,” and place of “repose”<sup>234</sup>—without

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228. See Nathan H. Seltzer, *When History Matters Not: The Fourth Amendment in the Age of the Secret Search*, 40 CRIM. LAW BULL., Summer 2004, at \*15–16 (2004) (“Certainly the right to be secure in one’s home includes the right to oversee the boundaries of a police search, or at the very least, to be notified of that search immediately.”).

229. *United States v. Villegas*, 899 F.2d 1324, 1337 (2d Cir. 1990). One later court shortened this to the less accurate view that covert searches are “less intrusive than conventional searches.” *United States v. Ludwig*, 902 F. Supp. 121, 126 (W.D. Tex. 1995) (citing *United States v. Pangburn*, 983 F.2d 449, 454–55 (2d Cir. 1993)).

230. *Villegas*, 899 F.2d at 1337.

231. FED. R. CRIM. P. 41(f)(1)(B).

232. 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)).

233. *Silverman v. United States*, 365 U.S. 505, 511 (1961).

234. *Semayne’s Case*, (1604) 77 Eng. Rep. 194 (K.B.) 195.

their knowledge.<sup>235</sup>

A second privacy intrusion of covert searches is the broad, chilling effect on the entire community's sense of privacy in their homes. Justice Sotomayor recently observed that "[a]wareness that the Government may be watching chills associational and expressive freedoms."<sup>236</sup> Covert searching is a "known unknown"<sup>237</sup>—persons in the community know that the police have the authority to (and sometimes do) conduct covert searches of homes and businesses, and also know that the timing and targets of those searches are unknown.

In this respect, the concern over covert searching overlaps with Fourth Amendment concerns over surveillance more broadly—the generalized concern of the government gathering information about citizens without their knowledge. The Court has recognized that freedom from government surveillance is a fundamental concern of the Fourth Amendment. 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."<sup>238</sup> An oft-quoted opinion by Justice Jackson likewise links Fourth Amendment privacy to the idea of freedom from surveillance: "The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance."<sup>239</sup>

The Fourth Amendment has sometimes proved an ineffective restraint on government surveillance generally, because much of that surveillance increasingly takes place without any physical invasion into the home or

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235. See Seltzer, *supra* note 228 ("As a general principle, sneak and peek searches are wholly inconsistent with the Framers' notions of liberty and security.").

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

237. *PIECES OF INTELLIGENCE: THE EXISTENTIAL POETRY OF DONALD H. RUMSFELD 2* (Hart Seely ed., 2003).

238. *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.'" *United States v. Jones*, 132 S. Ct. 945, 956 (quoting *Di Re*, 332 U.S. at 595).

239. *Johnson v. United States*, 333 U.S. 10, 14 (1948) (quoted with approval in *Michigan v. Summers*, 452 U.S. 692, 703 n.18 (1981); and *Welsh v. Wisconsin*, 466 U.S. 740, 748 n.10 (1984)). See also *United States v. U.S. Dist. Court for E. Dist. of Mich.*, 407 U.S. 297, 316 (1972) ("Though physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed, its broader spirit now shields private speech from unreasonable surveillance.").

other protected physical space.<sup>240</sup> This problem is not present for delayed notice search warrants, which introduce covert government surveillance directly into the home—an area unquestionably protected by the Fourth Amendment.<sup>241</sup> Covert searches of homes, then, should be properly understood to raise serious Fourth Amendment concerns even under current Fourth Amendment doctrines, which sometimes fail to adequately respond to other forms of surveillance.<sup>242</sup>

As noted above, covert searching unsettles the privacy of the entire community in a way that traditional searches do not.<sup>243</sup> And the loss of privacy felt by the entire community increases dramatically as covert searches are used more frequently.<sup>244</sup> If covert searches are rare, many persons in the community will not even know they occur, and those who do know will understand that the likelihood that they have been subjected to a covert search is quite small. The more frequently these covert searches are conducted, however, the more reasonable it becomes for each person to wonder whether the government has searched their private spaces.<sup>245</sup>

Covert searches and surveillance are a favorite tactic of totalitarian governments precisely for this reason: the general knowledge in the community that one's home may be secretly searched by the state dramatically decreases each person's sense of privacy, even if that person's home has never been searched. “[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

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240. See generally CHRISTOPHER SLOBOGIN, *PRIVACY AT RISK: THE NEW GOVERNMENT SURVEILLANCE AND THE FOURTH AMENDMENT* (2007) (analyzing the failures of traditional Fourth Amendment doctrines to appropriately limit government surveillance, and proposing substantial revisions to Fourth Amendment doctrine to better respond to the privacy threats of government surveillance).

241. See Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 642–43 (1999).

242. See Neil M. Richards, *The Dangers of Surveillance*, 126 HARV. L. REV. 1934, 1942–45, 1953 (2013).

243. See *supra* notes 236–37 and accompanying text.

244. See Richards, *supra* note 242, at 1936 (“[W]e must recognize that *surveillance is harmful*. Surveillance menaces intellectual privacy and increases the risk of blackmail, coercion, and discrimination; accordingly, we must recognize surveillance as a harm in constitutional standing doctrine.”).

245. See *id.* at 1935 (explaining there will be “power dynamic between the watcher and the watched”).

‘enslaving the soul.’”<sup>246</sup> In the words of Professor Neil Richards, “[t]he most salient 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.<sup>247</sup>

Citizens who fear constant government intrusion into their private spaces will be much less likely to maintain a free and robust private life.<sup>248</sup>

Of course, the rapid rise in covert searches does not show that the United States has become a totalitarian state.<sup>249</sup> But the fact that covert searches and surveillance are favorite tools of totalitarian control and repression should alert us to the very real dangers to privacy, liberty, and dissent posed by covert searches.<sup>250</sup>

Traditional searches (with notice) do not carry this “known unknown” privacy cost.<sup>251</sup> With traditional searches, each person in the community knows when and if her home or business has been searched by the government.<sup>252</sup> That person suffers a significant privacy intrusion—an intrusion justified by the finding of probable cause to believe that the specific home or business contains contraband or evidence of a crime.<sup>253</sup> The privacy intrusion of these searches is deep but narrow—deep in the sense that one’s home has been searched, and narrow in the sense that the invasion impacts only those few who are searched. With delayed notice

246. Jed Rubenfeld, *Privacy’s End*, in *LAW AND DEMOCRACY IN THE EMPIRE OF FORCE* 217 (H. Jefferson Powell & James Boyd White eds., 2009).

247. Richards, *supra* note 242, at 1945–46. 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.”).

248. See Richards, *supra* note 242, at 1952–53.

249. *Id.* at 1952.

250. *Id.* at 1934.

251. See *supra* note 237 and accompanying text.

252. See *FED. R. CRIM. P.* 41(f)(1)(c) (2010).

253. See, e.g., *Michigan v. Summers*, 452 U.S. 692, 704-05 (1981).



searches, however, every member of the community suffers a more indirect and uncertain loss of privacy. Delayed notice searches thus create an additional privacy intrusion, one that is shallow but broad—broad in the sense that everyone in the jurisdiction might feel the privacy loss, and shallow in the sense that this feeling of uncertainty is a less severe privacy loss than that caused by an actual, invasive search.

This unique feature of delayed notice searches also occurs in wiretaps—another form of covert, delayed notice search.<sup>254</sup> As Kent Greenawalt observes, the more often wiretapping (covert searches of conversations) occurs, the greater the privacy intrusion on the entire community.<sup>255</sup> The more wiretapping there is,

the larger will be the class of people who will have realistic fears that someone is trying to hear, and succeeding. And even those who have no specific basis for such a fear will be exposed to an increasing probability that mere curiosity seekers are listening to what they say.<sup>256</sup>

This loss of privacy in telephone conversation may also infringe free and open communication in the society at large: “As the commonplace overhearing of society’s leading figures became widely publicized, the idea that it is not safe to divulge secrets would frighten those not actually threatened. Any general inhibition on free communication for an important segment of society would certainly seep through to society as a whole.”<sup>257</sup>

These two privacy invasions—the distress of knowing the government secretly searched one’s home, and the broad uncertainty created in the entire community by covert searches—are distinct from the privacy costs of the underlying physical intrusion itself. In the years leading up to the drafting of the Fourth Amendment, “Samuel Adams complained that customs searches of houses under general warrants left citizens ‘cut off from that domestick security which renders [life agreeable].’”<sup>258</sup> These distinct privacy intrusions

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254. See generally Kent Greenawalt, *The Consent Problem in Wiretapping & Eavesdropping: Surreptitious Monitoring with the Consent of a Participant in a Conversation*, 68 COLUM. L. REV. 189 (1968).

255. *Id.* at 218.

255. *Id.* at 218.

256. *Id.*

257. *Id.*

258. Davies, *supra* note 241, at 602 n.139 (alteration in original).

caused by covert searching threaten to cut off the “domestick security” of the home in a particularly corrosive and broad-reaching manner.<sup>259</sup> As a matter of Fourth Amendment first principles, covert searching infringes on the privacy and repose of the home—the castle and fortress guarded by the Fourth Amendment.<sup>260</sup> This does not show that delayed notice search warrants are always and everywhere unconstitutional. But it does suggest, contrary to the approach of most courts to date, that covert searching raises serious Fourth Amendment issues that warrant skepticism and demand more compelling justifications.

*B. Covert Seizures Create Fear of Burglary and the Risk of Private Violence*

Covert seizures—“sneak and steal” searches—raise additional Fourth Amendment concerns beyond those raised by covert searches.<sup>261</sup> To keep the government’s role in the seizure secret, the government often stages the seizure to appear as a private burglary.<sup>262</sup> This gives rise to a variety of concerns.<sup>263</sup>

First, the government often damages additional property, such as breaking windows or doors, to create the impression of a break-in.<sup>264</sup> In one case involving the covert search of a car, officers

directed the personnel conducting the search of the vehicle to make it appear as though the vehicle had been vandalized while it was left unattended on the side of the Thruway. They broke a pool cue found in the back of the car, presumably belonging to the vehicle’s occupants, and used it to pry open the glove compartment, damaging the glove compartment and making it appear as if there had been an attempted break-in.<sup>265</sup>

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259. *Id.*

260. *Id.* at 602–03.

261. *See* Shumate, *supra* note 2.

262. *See* Shumate, *supra* note 2.

263. *Id.* at 209–11.

264. *See, e.g.,* DeArmon v. Burgess, , 611 (8th Cir. 2004) (“According to appellants, the officers broke entry doors and locks on interior doors, damaged drywall and furniture, and seized a firearm, doorknobs and locks, photographs, personal papers, and jewelry.”).

265. *United States v. Howard*, 489 F.3d 484, 488 (2d Cir. 2007) (Sotomayor, C.J.).

Preventing this type of physical damage is one of the rationales for the general Fourth Amendment “notice” rule recognized in *Wilson v. Arkansas*, as discussed below.<sup>266</sup> This additional physical damage to the home is thus one of the types of harm the Fourth Amendment was designed to prevent.

Second, the person whose property has been seized will presumably, upon returning home, believe their home has been burglarized.<sup>267</sup> By conducting a covert seizure, the government causes the homeowner to suffer the fear and distress of a home burglary—a serious infringement on the privacy and repose of the home.<sup>268</sup>

Finally, when the property seized is contraband (as will often be the case), there is a danger that the aggrieved party will resort to private remedies, including violence, in response to the perceived burglary.<sup>269</sup> If the “victims” of the “burglary” are in fact criminals involved in serious or violent crime, those victims are more likely to seek a remedy in private retaliation rather than police involvement.<sup>270</sup> In *United States v. Espinoza*, the district court warned that “when property is seized, as it was in this case, 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.”<sup>271</sup> The court noted that following the “sneak and steal” search, the targets of the search “focused on the brother of Ms. Espinoza” as the possible burglar, thereby “exposing him to danger of injury.”<sup>272</sup> In *United States v. Miranda*, DEA agents specifically intended for their burglary operation to trigger a response from the targets of the “break-in”: “the agents hoped to precipitate activity within the Cuevas conspiracy that would provide additional evidence of criminal conduct.”<sup>273</sup> The staged burglary “had the desired effect,” prompting two drug dealers to debate—in a recorded conversation—about the identity of the burglar, and to

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266. See *infra* notes 431, 436–40 and accompanying text.

267. Shumate, *supra* note 2, at 231.

268. See, e.g., *Mayfield v. Gonzales*, No. Civ. 04-1427-AA, 2005 WL 1801679, at \*3 (D. Or. July 28, 2005) (reciting allegations that covert government searches “caus[ed] the Mayfield family to be frightened and believe that they had been burglarized”).

269. See *infra* notes 271–73 and accompanying text.

270. See *infra* note 273 and accompanying text.

271. *United States v. Espinoza*, No. CR-05-2075-7-EFS, 2005 WL 3542519, at \*5 (E.D. Wash. Dec. 23, 2005).

272. *Id.*

273. 425 F.3d 953, 956 (11th Cir. 2005).

move operations to another location.<sup>274</sup> The court does not mention the attendant risk that the “activity” “precipitated” by the staged burglary easily could have become something much more violent than mere discussion.<sup>275</sup>

In summary, the covert nature of a search intrudes on the privacy and sanctity of the home in ways distinct from the existing intrusions of a traditional search. As a matter of Fourth Amendment first principles, covert searching clearly implicates the protections of the Fourth Amendment.

### III. COVERT SEARCHING AND THE FOUNDING-ERA HISTORY OF SEARCH AND SEIZURE: DELAYED NOTICE RUNS AFOUL OF THE “RULE REQUIRING NOTICE”

The Supreme Court has repeatedly stated that the meaning of the Fourth Amendment is informed by the history of search and seizure law in the years leading up to the drafting of the Bill of Rights.<sup>276</sup> What precise role that history should play and what the historical record shows, are matters of considerable dispute.<sup>277</sup> Those disputes can be set aside, at least temporarily,

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274. *Id.*

275. *Id.*

276. *See, e.g.,* *Virginia v. Moore*, 553 U.S. 164, 168 (2008) (“In determining whether a search or seizure is unreasonable, we begin with history. We look to the statutes and common law of the founding era to determine the norms that the Fourth Amendment was meant to preserve.”); *Atwater v. City of Lago Vista*, 532 U.S. 318, 326 (2001) (“In reading the [Fourth] Amendment, we are guided by the traditional protections against unreasonable searches and seizures afforded by the common law at the time of the framing, since [a]n examination of the common-law understanding of an officer’s authority to arrest sheds light on the obviously relevant, if not entirely dispositive, consideration of what the Framers of the Amendment might have thought to be reasonable.” (alteration in original) (citations omitted) (internal quotation marks omitted)); *Florida v. White*, 526 U.S. 559, 563 (1999) (“In deciding whether a challenged governmental action violates the [Fourth] Amendment, we have taken care to inquire whether the action was regarded as an unlawful search and seizure when the Amendment was framed.”); *Wyoming v. Houghton*, 526 U.S. 295, 299 (1999); *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995); *Carroll v. United States*, 267 U.S. 132, 149 (1925).

277. Compare Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994) (arguing, in part based on history, that the central command of the Fourth Amendment is not warrants or probable cause, but that searches and seizures be “reasonable”), with Thomas Y. Davies, *Can You Handle the Truth? The Framers Preserved Common-Law Criminal Arrest and Search Rules in “Due Process of Law”—“Fourth Amendment Reasonableness” Is Only a Modern, Destructive, Judicial Myth*, 43 TEX. TECH L. REV. 51 (2010) (arguing that the warrant clause is the core of the Fourth Amendment, and that the “reasonableness” clause is simply a reference to searches conducted with prohibited general warrants). *See also* CUDDIHY, *supra* note 232, at 773–82 (rejecting Amar’s claim and stating that his rejection of probable cause for non-warrant searches “amounts to delusional pontification,” and arguing that Davies’ conception of “unreasonable searches and seizures” is too narrow).

in light of the Court's repeated assertions that historical practice is relevant at least in some manner.<sup>278</sup>

To date, no court or commentator has searched the historical record for evidence—either for or against—of delayed notice search warrants or any other form of legally authorized, covert searching at the time of the founding.<sup>279</sup> If it were clear, for example, that delayed notice search warrants were commonly used without objection in the years leading up to 1791, this would suggest that the practice is constitutionally permissible. During congressional debate over the USA Patriot Act in 2001, Senator Orrin Hatch argued that delayed notice search warrants are “totally constitutional,” and that the practice has been upheld “from the beginning of this country.”<sup>280</sup> Strong evidence to the contrary—such as evidence that colonial courts and commentators had repeatedly denounced delayed notice search warrants—would cast doubt on the constitutionality of the practice.

The first important historical question, then, is whether there is record of any discussion of covert searching or delayed notice search warrants around the time of the founding and the drafting of the Bill of Rights. As explained in Part III.A, there is not: there is no evidence that officials ever sought, or courts or commentators ever discussed, a legal mechanism authorizing officials to conduct a search covertly, giving notice only later or never giving notice at all.

The second question, also addressed in Part III.A, is how this history bears on the constitutionality of this relatively new procedural innovation. I argue that no strong normative conclusions can be drawn from this history. The lack of delayed notice search warrants at the time of the founding does not show that the framers (or the common law) implicitly rejected or endorsed this practice. Instead, the absence of delayed notice search warrants is more likely a reflection of the eighteenth-century criminal justice system, in particular the lack of law enforcement organizations that would conduct complex, forward-looking investigations.

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278. See Amar, *supra* note 277, at 759; see also Davis, *supra* note 277 (analyzing whether the Fourth Amendment decisions should be based on history and how well the Supreme Court sets out Fourth Amendment history); CUDDIHY, *supra* note 232 (extensively reviewing and commenting on the origins and original meaning of the Fourth Amendment).

279. See, e.g., CUDDIHY, *supra* note 232; JACOB B. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT: A STUDY IN CONSTITUTIONAL INTERPRETATION (1966); NELSON B. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION (Da Capo Press 1970) (1937).

280. 147 CONG. REC. 20,704 (2001).

This does not end the historical inquiry. While there is no historical evidence of a delayed notice search warrant procedure, there is ample evidence that the common law contained a requirement that clearly implicates this modern procedural innovation.<sup>281</sup> As explained in Part III.B, the common law required persons executing search warrants to give notice of the impending search, and demand entry from the occupant, before breaking down the door. The Supreme Court has held that this common law requirement is incorporated into the Fourth Amendment, as part of the prohibition against “unreasonable searches and seizures.”<sup>282</sup> Delayed notice search warrants presumptively violate this “rule requiring notice,” and thus raise serious Fourth Amendment concerns. To date, courts and commentators have implicitly assumed—without discussion or analysis—that the common law “notice” requirement has no relevance to the constitutionality of covert, delayed notice searches.<sup>283</sup> In Part III.B, I argue that this assumption is unjustified and incorrect.

*A. Covert, Delayed Notice Searches Did Not Exist at the Time of the Founding*

It is often difficult to evaluate modern practices by looking to eighteenth-century historical practice because modern practices often involve new technologies that did not exist (and were not readily imaginable) in 1791. Trying to figure out what the framers would have thought about GPS monitoring of cars, for example, risks devolving into a debate over miniaturized constables riding below horse-drawn carriages.<sup>284</sup> But delayed notice search warrants do not involve technological innovations like wiretapping or GPS monitoring.<sup>285</sup> The practice is a procedural

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281. *Wilson*, 514 U.S. at 927.

282. *Id.*

283. *See supra* notes 120–21 and accompanying text.

284. *Id.* at 958 (Alito, J., concurring) (“But it is almost impossible to think of late-18th-century situations that are analogous to what took place in this case. (Is it possible to imagine a case in which a constable secreted himself somewhere in a coach and remained there for a period of time in order to monitor the movements of the coach’s owner?)”); *id.* at 950 n.3 (Alito, J., concurring) (“The Court suggests that something like this might have occurred in 1791, but this would have required either a gigantic coach, a very tiny constable, or both—not to mention a constable with incredible fortitude and patience.”).

285. U.S. DEP’T OF JUSTICE, DELAYED NOTICE SEARCH WARRANTS: A VITAL AND TIME-HONORED TOOL FOR FIGHTING CRIME (2004), available at <http://www.justice.gov/dag/patriotact213report.pdf> (citing three cases in which delayed notice search warrants were upheld and

innovation that could have been pursued by those requesting warrants throughout history.<sup>286</sup> The idea of a secret search—and the benefits that secrecy provides—has been evident for millennia.<sup>287</sup>

Even so, it did not occur to searchers in England and the colonies in the centuries leading up to 1791 to ask for search warrants authorizing a secret search with notice given only long after the fact (if at all). There are many cases, discussed in Part III.B, emphasizing that searchers must announce their presence and authority before breaking a door to conduct a search.<sup>288</sup> Those cases, however, all presume that the occupant will learn of the search the instant the door is broken and the searchers loudly enter and begin their search. None of these cases contemplates the idea that the entire search might be secret, with notice provided (if at all) only days or weeks later.

The idea of a delayed notice warrant—or any search specifically authorized to be conducted secretly—does not appear in any of the historical work on pre-Fourth Amendment search and seizure.<sup>289</sup> The practice does not appear in William Cuddihy’s magisterial history of British and colonial search and seizure through 1791.<sup>290</sup> Nor does it appear in earlier canonical works by Nelson Lasson and Jacob Landynski.<sup>291</sup> Thomas Davies’s extensive scholarship on the history of search and seizure leading up to the drafting of the Fourth Amendment likewise unearths no evidence of delayed notice search warrants.<sup>292</sup> Extensive review of case law and commentary likewise reveals no discussion, either before 1791 or in the following decades, of the concept of a legally authorized covert search, or anything resembling a delayed notice search warrant.

There are two incidents from what might be called the “pre-history” of the Fourth Amendment that have some marginal relevance: covert searches

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technologies were not necessarily used in the search).

286. *Id.*

287. *Id.*

288. *See, supra*, notes 348, 354–75 and accompanying text.

289. *See supra* note 279.

290. CUDDIHY, *supra* note 232. Legal historian Leonard Levy has stated, “Cuddihy is the best authority on the origins of the Fourth Amendment.” LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS’ CONSTITUTION 441 n.1 (1988). Other commentators have stated that “[o]ur knowledge of the Fourth Amendment’s history was fundamentally transformed” by William Cuddihy’s 1990 Ph.D. dissertation, now published in book form by Oxford. Tracey Maclin & Julia Mirabella, *Framing the Fourth*, 109 MICH. L. REV. 1049, 1050 (2011).

291. LASSON, *supra* note 279; LANDYNSKI, *supra* note 279.

292. *See Davies, supra* note 277; Davies, *supra* note 241.

conducted at Cambridge University in 1557,<sup>293</sup> and a covert search of Sir Edward Coke's home and law offices in 1621.<sup>294</sup> Neither of these cases involved search warrants authorizing covert entry, and neither case can be described as an immediate precursor to the Fourth Amendment.<sup>295</sup> Nonetheless, both incidents involve covert, delayed notice searches, and both form a part of the long history of abuse and oppression that led to the development of British search and seizure limitations and, in the new American republic, to the Fourth Amendment.<sup>296</sup>

Sixteenth- and seventeenth-century England featured many invasive, general searches for the purpose of discovering and punishing religious dissent.<sup>297</sup> In 1557, during the reign of Catholic Queen Mary, a royal commission was "[d]ispatched to Cambridge [University] to investigate its conformity to Catholicism."<sup>298</sup> The commission "demanded that each member of the university community submit an inventory of his personal library to facilitate the destruction of heretical books."<sup>299</sup> The head of each college of the university was instructed to enforce this decree.<sup>300</sup> In a turn that should warm the hearts of any university faculty, the college administrators did a poor job of ferreting out heresy, seeming to choose loyalty to faculty independence over fealty to the royal commission.<sup>301</sup> In response, the commission "devised an effective counterstrategy: summon one or two leading scholars at a time and concurrently search their vacant residences during their absence. For three days, the university's records attested to the strategy's effectiveness as whole containers of books were surrendered."<sup>302</sup>

In other words, the commission turned to covert searches of scholarly residences, deliberately conducted without notice when the scholars were

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293. CUDDIHY, *supra* note 232, at 73–74.

294. *Id.* at 140.

295. *Id.* at 73, 140.

296. *Id.*

297. *Id.* at 73 ("The most vigorous, far-reaching searches before 1642 aimed at persons and books that criticized the Crown or the established church."); *id.* at 73–84 (relating various searches in the 1500s and 1600s conducted to root out religious dissent).

298. *Id.* at 73–74.

299. *Id.* at 74.

300. *Id.*

301. *Id.*

302. *Id.*



away by design.<sup>303</sup> It is hard to imagine that the scholars in question could have hidden all of their heretical texts had the searches been conducted in the manner of a modern, conventional search—with a knock and demand for entry moments before breaking in. But even so, it was no doubt even more convenient to conduct searches when the occupants were absent—avoiding the unpleasantness of confrontation and, perhaps, warnings to other colleagues of impending searches.

The second covert search incident comes from 1621.<sup>304</sup> Sir Edward Coke, author of the *Institutes of the Common Law*, had previously served as Attorney General and in the King's Privy Council.<sup>305</sup> By 1621, however, Coke had fallen out of favor and was imprisoned by King James I.<sup>306</sup> Government searchers employed a tactic similar to that used in the Cambridge University searches—the search of a home while the owner was away.<sup>307</sup> “While the Crown’s legal officers interrogated Coke and denied him access to all books, other agents of the king entered his house in Broad Street and his legal chambers in the Inner Temple.”<sup>308</sup> The searches were conducted with warrants, but there is no suggestion that the warrant said anything about whether the search would be executed with notice to the occupant or without.<sup>309</sup> Years later, in a 1628 speech to the House of Commons, Coke cited this interrogation and search as an example of the need for a bill of rights. “Coke contended that if a man’s house could be searched while he was confined without being told the cause, ‘they will find cause enough.’”<sup>310</sup>

Neither of these cases provides direct commentary on the legality of a covert search authorized by a delayed notice warrant. Both, however, show the use of covert searches, deliberately conducted when the occupant was absent. There is no evidence that the framers, or the colonists more generally, were aware of these specific instances of search abuses. But both cases are part of the history of abusive search practices that gradually led

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303. *Id.*

304. *Id.* at 140.

305. *Id.*

306. *Id.*

307. *Id.*

308. *Id.* at 141.

309. *Id.*

310. *Id.* at 141 (quoting Sp., Coke, 29 April 1628, *Commons Debates, 1628*, vol.#3 (21 Apr.–27 May), pp. 150, col. 2; 154, 159, 162; col. 2; quote at p. 159, col. 2).

Englishmen—eventually including the colonists—to view broad search powers with suspicion, and to insist on limitations of that power. It would be wrong to claim that these two examples were in the founders’ minds when drafting the Fourth Amendment, or that the examples show the framers specifically contemplated outlawing covert searches. At the same time, the Fourth Amendment emerged out of a centuries-long history of legal, political, and popular opposition to expansive and abusive search powers.<sup>311</sup> These two incidents of covert searching are part of that history of abuse.

Apart from these two cases, the historical record contains no reference to the practice of a search warrant authorizing covert entry with notice given later, if at all. What can be inferred from the absence in the historical record of delayed notice search warrants?

Arguments from silence must always be approached with great care.<sup>312</sup> For opponents of delayed notice search warrants, it is tempting to conclude that, because delayed notice warrants could have existed in 1791 but did not, the founders implicitly rejected them. Perhaps covert searching was simply so far beyond the pale that the framers did not think to explicitly address that practice in the Fourth Amendment. For example, one commentator states, “[t]he Framers likely never contemplated ordinary officers being permitted to enter an individual’s home, conduct a search, potentially seize property, and not provide notice of the search until some time in the future.”<sup>313</sup> This is true—as explained below, the framers likely never contemplated this practice. What is far less clear is the relevance of this fact to constitutional interpretation.

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311. *Id.* at lxiii-lxviii.

312. *See, e.g.*, John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 2032 (2011) (“Silence, however, is not a terribly reliable basis for inferring a constitutional prohibition.”); H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659, 671–72 (1987) (“Rule 4: Arguments from silence are unreliable and often completely ahistorical.”). Powell’s article is aimed at “originalists,” but the dangers of arguing from silence apply to anyone relying on history to inform constitutional interpretation, whether from an originalist perspective or otherwise.

313. Seltzer, *supra* note 228. I do not mean to suggest that Seltzer’s historical argument consists primarily of the (faulty) argument that “the framers never contemplated it, thus it must be unconstitutional.” The sentence quoted above has shades of that view. Seltzer’s main historical argument relies on first principles—that history shows that the “Framers particularly valued the sanctity and security of the home,” and that covert searching violates those values. *Id.* In that regard, I agree broadly that the first principles underlying the Fourth Amendment are clearly implicated by the practice of covert searching. *See supra* Part II.

Given the silent historical record, the first question is whether the delayed notice search warrant was a practice that “could have been raised by the founders—was thinkable in their conceptual world.”<sup>314</sup> If not, then silence is not very relevant: “[n]ot even a tentative conclusion can be drawn from an argument *ex silentio* when our concern is one totally alien to the founders’ conceptual and political universe.”<sup>315</sup>

In one sense, the basic concept of a covert search was clearly “thinkable” to the founders. But that does not show that the concept was something the founders actually considered and rejected. On the contrary, there is good reason to believe the founders never contemplated, and thus took no stance on, the notion of a covert search using a delayed notice search warrant. This absence is best explained by considering the nature of the eighteenth-century criminal justice system, and in particular the nature and context of the searches that so troubled the colonists.<sup>316</sup> Today, investigators use delayed notice search warrants mostly in complex investigations, in attempts to unravel complicated, ongoing criminal conspiracies.<sup>317</sup> The criminal justice system of the seventeenth and eighteenth centuries had a different focus, and was populated by entirely different law enforcement actors and institutions.<sup>318</sup>

Criminal law then, like now, punished violent crimes like murder or rape, as well as a variety of theft offenses.<sup>319</sup> But delayed notice search warrants (today) are usually not used to investigate ordinary murders, rapes, or theft offenses—they are used to investigate ongoing conspiracies or complex criminal schemes, mostly involving drugs, as well as extortion and fraud.<sup>320</sup> Officials in the eighteenth century were not conducting searches to slowly assemble evidence for the prosecution of complex conspiracies. The lack of forensic science meant there was no need to conduct a covert search

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314. Powell, *supra* note 312, at 671.

315. *Id.* at 671–72.

316. Davies, *supra* note 241, at 734–35 (“[T]he concern with fitting the historical meaning to modern doctrine has tainted prior accounts with prochronistic concerns and ideological slants that were foreign to the authentic history. The authentic history can be recovered only by respecting the foreignness of the past and by immersing oneself in its records.”).

317. See *supra* Part I.B.

318. See LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 27–30 (1993) (describing the colonial justice system as a “business of amateurs” where many of the actors were lay citizens).

319. *Id.* at 6.

320. See *supra* Part I.B, Figure 1, note 141.

for fingerprints or other incriminating forensic evidence.<sup>321</sup> Indeed, “[i]n the late eighteenth century, searches were still of limited utility to criminal law enforcement.”<sup>322</sup> Officials searched for the object of the crime—such as the stolen property or the smuggled goods—rather than evidentiary items that could be used to construct a more elaborate proof of the crime.<sup>323</sup>

Criminal investigations were very different in part because law enforcement officials were very different. In the centuries before 1791, neither England nor the colonies had standing police forces with broad powers of criminal investigation.<sup>324</sup> “There were no police in the modern sense. . . . Constables made arrests, and night watchmen patrolled the streets of the bigger towns.”<sup>325</sup> Constables and night watchmen were relatively low-status, unpaid volunteers, pressed into temporary service—while maintaining their paid jobs—as part of fulfilling their civic duty.<sup>326</sup> Thus the colonial criminal justice system in general, and criminal investigation in particular, was conducted by amateurs, not trained, salaried professionals.<sup>327</sup> Today, delayed notice search warrants are sought and executed mostly by the FBI, a large, well-funded institution devoted to criminal investigation that had no counterpart in the colonial era.<sup>328</sup>

The amateur nature of colonial law enforcement meant criminal investigations were likewise much simpler affairs. “Proactive criminal law enforcement had not yet developed by the framing of the Bill of Rights; in fact, even post-crime investigation by officers was minimal.”<sup>329</sup> The charge of volunteer constables was “to preserve order by keeping an eye on taverns, controlling drunks, apprehending vagrants, and responding to ‘affrays’ (fights) and other disturbances—but they were not otherwise expected to

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321. Davies, *supra* note 241, at 627 (“In the absence of forensic science, items other than stolen property would usually have been of limited evidentiary value.”).

322. *Id.*

323. *Id.* Cuddihy explains that colonial search warrants “were often used to capture fugitives, collect revenues, stop counterfeiting, and seize contraband of various sorts.” CUDDIHY, *supra* note 232, at 231. See generally *id.* at 236–41 for a discussion of the typical subjects of colonial warrants.

324. FRIEDMAN, *supra* note 318, at 27; Davies, *supra* note 241, at 620–23.

325. FRIEDMAN, *supra* note 318, at 28.

326. *Id.* at 27; Davies, *supra* note 241, at 620.

327. FRIEDMAN, *supra* note 318, at 27; see also STEPHANOS BIBAS, *THE MACHINERY OF CRIMINAL JUSTICE* 3–6 (2012).

328. See HOLDEN, *supra* note 56.

329. Davies, *supra* note 241, at 620.

investigate crime.”<sup>330</sup>

Because colonial law enforcement was conducted by unpaid amateurs, not salaried professionals, “the Framers did not share the modern expectation that police officers will tend to be overzealous in ‘the often competitive enterprise of ferreting out crime.’”<sup>331</sup> On the contrary, “[t]he amateur constable of the framing-era . . . had little motive to act ‘at his own risk,’” and “[t]he principal historical complaint regarding constables was not their overzealousness so much as their inaction.”<sup>332</sup> It is not surprising that these actors did not develop a new procedural tool most useful for assembling evidence as part of a long-term criminal investigation.

Customs searches—a major focus of the framers’ concern over general warrants—were somewhat different. They were initiated by higher-status customs officers rather than lowly constables.<sup>333</sup> Even so, customs officers did not have anything like the salaried investigative team of today’s joint task force operations. Instead, relatively few customs officers attempted to monitor smuggling over large areas, assisted by local officials dragged into service through writs of assistance.<sup>334</sup> Colonial customs officers struggled mightily simply to execute basic searches and confiscate untaxed goods.<sup>335</sup> They faced a hostile merchant population dependent on widespread smuggling for large parts of the colonial economy.<sup>336</sup> Even when smuggled goods were discovered, customs agents sometimes lacked the manpower to effectively secure those goods before locals brazenly spirited them away.<sup>337</sup>

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330. *Id.* at 621–22 (footnotes omitted).

331. *Id.* at 640–41 (quoting *Johnson v. United States*, 333 U.S. 10, 13–14 (1948)).

332. *Id.* at 641 (citing FRIEDMAN, *supra* note 318, at 68).

333. See CUDDIHY, *supra* note 232, at 779–80.

334. *Id.* at 490–503.

335. *Id.*

336. *Id.* Cuddihy observes that “an obstructive public and uncooperative local officials” effectively defeated the purposes of general customs searches. *Id.* at 511. Colonists “[t]arred and feathered customs officers, cowed magistrates,” and conducted “mob ‘liberations’ of seizures.” *Id.*

By 1776, more than a decade of epidemic smuggling had eviscerated the British customs establishment in Massachusetts. That prominent merchants had openly run whole cargoes ashore was common knowledge in Boston by 1768. . . . In such an atmosphere [Governor Francis] Bernard remarked that the customs officers either did not know, or found it healthy not to know, the location of smuggled goods, while merchants bragged publicly that they would not allow even their ships to be searched.

*Id.*

337. Cuddihy recounts a number of colorful stories showing how hostile the local merchant population was to customs searches. The Polly affair, in 1765, “illustrated . . . the impotence of British customs authorities in enforcing general warrants in Massachusetts.” *Id.* at 491. Customs

Colonial courts repeatedly refused to grant customs officers search powers necessary to carry out their duties.<sup>338</sup>

Colonial customs officers were waging a losing battle to detect and confiscate untaxed goods, and were kept busy fighting to obtain adequate legal authority and manpower to simply search and seize contraband goods. They did not have the resources necessary to conduct more elaborate investigations that might have unearthed the larger conspiracies behind the rampant colonial smuggling, and for which delayed notice search warrants would have proved a useful tool.

What conclusions, then, can be drawn from the absence of delayed notice search warrants in the centuries leading up to the Fourth Amendment? In many cases, history “will not provide answers to specific issues.”<sup>339</sup> Scholars must resist trying to “discover” the hidden views of the framers on issues that did not confront them, and which they never discussed.<sup>340</sup> As Justice Thomas has written, “because of the very different nature and scope of federal authority and ability to conduct searches and arrests at the founding, it is possible that neither the history of the Fourth Amendment nor the common law provides much guidance.”<sup>341</sup>

Covert searches do appear—in the search at Cambridge and of Sir

officers seized the ship Polly on the Tauton River, loaded with molasses far exceeding what had been declared. *Id.* That evening, “a mob of forty locals emptied the ship and left her aground.” *Id.* at 491–92.

In another incident, in 1776, two customs agents found “over ten hogsheads of smuggled rum and sugar” in shopkeeper Enoch Isley’s store in Falmouth, Massachusetts. *Id.* at 496. They could not remove the barrels themselves, and neighbors refused to help. *Id.* They obtain a writ of assistance, which was physically torn from the pocket of a local official, and were attacked by a local mob. *Id.* By the next day, the hogsheads had vanished from Isley’s store. *Id.*

In the Malcolm affair, which Cuddihy describes as “the most famous search in colonial America,” customs agents sought to search for untaxed brandy at the home of Daniel Malcolm. *Id.* at 496–501. Their attempt to search Malcolm’s cellar led to an escalating confrontation between customs agents and Malcolm that nearly led to bloodshed. *Id.*

338. *See id.* at 503–05. Cuddihy describes customs officials’ attempts to “extend writs of assistance to all of the colonies beyond Massachusetts and New Hampshire” as “one of the most arrant failures in American legal history.” *Id.* at 508–09.

339. Davies, *supra* note 241, at 750.

340. *Id.* at 734–35 (“[T]he concern with fitting the historical meaning to modern doctrine has tainted prior accounts with prochronistic concerns and ideological slants that were foreign to the authentic history. The authentic history can be recovered only by respecting the foreignness of the past and by immersing oneself in its records.”).

341. *Groh v. Ramirez*, 540 U.S. 551, 572 (2004) (Thomas, J., dissenting). Justice Thomas made this comment as a general statement of the potential limitations of relying on history to resolve contemporary Fourth Amendment interpretation disputes.

Edward Coke—in the history of search abuses leading up to legal reforms such as the Fourth Amendment.<sup>342</sup> And as discussed in Part III.B, the common law had firmly adopted the principle—subject to exceptions—that searchers should give notice and demand entry before breaking down a door. On the narrow question of delayed notice search warrants, however, the common law of search and seizure provides little guidance because the practice did not exist. Most likely, it did not exist because of radical differences in the pre-1791 criminal justice system.

Thinking more broadly, the history of the Fourth Amendment “shows that framing-era doctrine provided a much stronger notion of a ‘right to be secure’ in person and house than does modern doctrine,” and thus “the burden of justification for further expansions of police power . . . should fall squarely on the proponents of police power.”<sup>343</sup> The Fourth Amendment was a radical restriction on search powers relative to the status quo in the 1790s—radical primarily in its insistence on the specific rather than general warrant in all circumstances.<sup>344</sup> The drafters articulated relatively extreme search restrictions not only to vindicate privacy interests, but also as a political maneuver—an extremely effective one.<sup>345</sup> By proffering a Bill of Rights that dramatically limited federal powers, the Federalists successfully sought to fracture the Antifederalist coalition and garner support from a sufficient number of Antifederalists to ensure ratification of the Constitution.<sup>346</sup> In light of this general history, it is appropriate to approach this procedural innovation with some level of skepticism.

### *B. Covert Searching Violates the Fourth Amendment “Rule Requiring Notice”*

Part II explained how covert searching infringes on the fundamental privacy concerns, related to the sanctity of the home from unreasonable

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342. See *supra* Part III.A,

343. Davies, *supra* note 241, at 749–50.

344. CUDDIHY, *supra* note 232, at 279 (“The Fourth Amendment incorporated an extreme rather than the norm of British thought on search and seizure not only by repudiating general warrants but also by intruding specific warrants in their place.”).

345. *Id.* at 704–12. Cuddihy explains that James Madison “designed the Bill of Rights as a wedge between the moderate and radical factions of Antifederalism.” *Id.* at 708.

346. “The short-term goal of the Fourth Amendment and of its neighboring amendments was not to insure rights regarding search, seizure, or other government activities but to isolate the extreme Antifederalists by seducing their moderate compatriots into the Federalist ranks.” *Id.* at 710.

government intrusion, that the Fourth Amendment was designed to protect. Providing notice at the time of a search—the opposite of covert searching—prevents the various harms identified above from occurring.<sup>347</sup> And the argument that covert searching raises Fourth Amendment concerns does not rest only on a generalized analysis of privacy interests, but also on the common law—and constitutional—“rule requiring notice.”

In *Wilson v. Arkansas*, the Supreme Court relied on historical precedents in the years leading up to the founding to conclude that “the Fourth Amendment incorporates the common law requirement that police officers entering a dwelling must knock on the door and announce their identity and purpose before attempting forcible entry.”<sup>348</sup> The Court so held in the context of what is now often called the “knock and announce” rule—that officers must ordinarily announce their presence and request admission before breaking doors to search.<sup>349</sup>

As noted in Part I.A, courts and commentators evaluating delayed notice search warrants over the past three decades have almost uniformly failed to draw any connection between delayed notice warrants and this common law notice requirement.<sup>350</sup> It is not that courts have considered the issue and concluded that the common law requirement does not apply to delayed

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347. See *supra* Part II.

348. *Richards v. Wisconsin*, 520 U.S. 385, 387 (1997) (citing *Wilson v. Arkansas*, 514 U.S. 927 (1995)).

349. See *id.* at 387–88.

350. See *supra* note 89. One exception is Paul V. Kononov, who discusses “sneak and peek” searches in light of *Wilson v. Arkansas* soon after *Wilson* was decided. Kononov, *supra* note 15, at 462–64. Kononov appears to misunderstand *Wilson*. He claims that *Wilson* held “that a ‘knock and announce’ procedure (that functions primarily as a means of providing notice) is *not* constitutionally required.” *Id.* at 463 (emphasis added). Starting with that (erroneous) view of *Wilson*’s holding, he thus concludes that “*Wilson* provides further support for the proposition that the Fourth Amendment does *not* require notice.” *Id.* (emphasis added). This gets matters precisely backwards. To be sure, the Court in *Wilson* did not hold that prior notice of entry was *always* required. But the Court did hold that notice of entry is a constitutional requirement (subject to exceptions): the common law rule that “generally indicated that [a searcher] first ought to announce his presence and authority . . . forms a part of the reasonableness inquiry under the Fourth Amendment.” *Wilson*, 514 U.S. at 929. In a later case, the Court more squarely stated that “the Fourth Amendment incorporates the common law requirement that police officers entering a dwelling must knock on the door and announce their identity and purpose before attempting forcible entry.” *Richards*, 520 U.S. at 387 (citation omitted). Kononov’s view implies that if notice is not *always* required, then notice is not a constitutional requirement at all. On the contrary, *Wilson* (and later cases) made clear that notice *is* a constitutional requirement, albeit one subject to certain exceptions. See Jonathan Witmer-Rich, *Fatal Flaws*, *supra* note 36 (analyzing the exceptions to the notice rule and comparing those to the statutory authorizations for delayed-notice search warrants).



notice warrants.<sup>351</sup> Instead, no court has ever considered the question at all.<sup>352</sup> Courts—as well as commentators—appear to place the common law notice requirement firmly into a discrete “knock and announce” box, kept separate and apart from the practice of covert searches through delayed notice search warrants.<sup>353</sup>

This doctrinal separation has never been explained or justified, merely assumed. The assumption is unwarranted. The common law “knock and announce” requirement, and the practice of covert searching with delayed-notice warrants, both implicate the same fundamental Fourth Amendment principle that notice must be provided at the time a search is executed, absent exceptional circumstances. There is no justification for separating the two doctrines. Covert searching with delayed notice warrants, if constitutional at all, must be evaluated from the starting premise that providing notice of a search is a critical component of Fourth Amendment reasonableness, and any derogation from that constitutional command must be justified by sufficiently compelling government interests.

Part III.B.1 first explains the origins and nature of the common law “knock and announce” requirement—or what more accurately might be called the common law “notice” requirement. Part III.B.2 argues that covert, delayed notice searching is subject to this constitutional principle. Part III.B.3 compares the interests protected by the common law “notice” rule with the privacy interests endangered by a covert search, further supporting the conclusion that covert searching is subject to the common law “notice” rule.

#### 1. Notice Is Part of Fourth Amendment Reasonableness

In *Wilson v. Arkansas*, Justice Thomas, writing for a unanimous court, explained that “the common law of search and seizure recognized a law enforcement officer’s authority to break open the doors of a dwelling, but generally indicated that he first ought to announce his presence and authority.”<sup>354</sup> That common law rule, the Court held, “forms a part of the reasonableness inquiry under the Fourth Amendment.”<sup>355</sup>

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351. See *infra* Part III.B.1–3.

352. See *supra* notes 86–88 and accompanying text.

353. See *supra* notes 84–86 and accompanying text.

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

355. *Id.*

The *Wilson* Court concluded that “notice” is part of Fourth Amendment “reasonableness” by relying primarily on the history of search and seizure pre-dating the Fourth Amendment.<sup>356</sup> To give content to the meaning of “unreasonable” search and seizure in the Fourth Amendment, the Court explained that it looks “to the traditional protections against unreasonable searches and seizures afforded by the common law at the time of the framing.”<sup>357</sup> The Court’s “examination of the common law of search and seizure leaves no doubt that the reasonableness of a search of a dwelling may depend in part on whether law enforcement officers announced their presence and authority prior to entering.”<sup>358</sup>

The Court has repeatedly stated that the common law limitations on search and seizure at the time of the founding help define the meaning of an “unreasonable search and seizure” under the Fourth Amendment.<sup>359</sup> It is worth noting that this—the very first step in the Court’s use of founding-era history to interpret the Fourth Amendment—is contested.<sup>360</sup> That debate is beyond the scope of this article. Given the state of the doctrine, this article proceeds from the Supreme Court’s premise—which shows no signs of changing—and evaluates the constitutionality of delayed notice search

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356. *Id.* at 929–30.

357. *Id.* at 931.

358. *Id.*

359. *See supra* note 276.

360. Thomas Davies has forcefully argued that the Court’s starting premise is mistaken. Davies, *supra* note 277. He argues that the phrase “unreasonable search and seizure” simply refers to general warrants, not to some broader “reasonableness” standard, and not to other common law search and seizure limitations unrelated to the general warrant. *Id.* at 85–107. William Cuddihy agrees that the phrase “unreasonable search and seizure” was not meant to create an amorphous “reasonableness” balancing test often employed by the Supreme Court today. CUDDIHY, *supra* note 232, at 739, 770–72. Cuddihy argues, however, that “unreasonable search and seizure” not only referred to the general warrant, but also to specific and well-understood limitations on search and seizure law circa 1791, including the prohibition against “[u]nannounced searches.” *Id.* at lxx, 739–72. Davies, in turn, agrees that the common law required searchers to give notice of their presence and demand entry before using force to enter. Thomas Y. Davies, *The Fictional Character of Law-and-Order Originalism: A Case Study of the Distortions and Evasions of Framing-Era Arrest Doctrine in Atwater v. Lago Vista*, 37 WAKE FOREST L. REV. 239, 264 n. 67 (2002). Davies argues, however, that the history of the drafting of the Fourth Amendment plainly shows that “unreasonable search and seizure” referred only to the use of general warrants, and that there is no “evidence of a broad reasonableness standard regarding arrests or searches in the historical record.” Davies, *supra* note 277, at 60. The history of the drafting of the Fourth Amendment, in particular, provides powerful evidence that the framers used the phrase “unreasonable search and seizure” as a way to describe general warrants—that is to say, warrants issued in derogation of the requirements of the warrant clause. *See id.* at 85–107.

warrants under existing doctrine.

The Court was on firm ground in finding evidence of the “notice” rule in pre-1791 common law.<sup>361</sup> The starting point is the ancient common law maxim that a man’s house is his castle.<sup>362</sup> That claim is at the same time majestic and overstated: there were (and are) many circumstances in which a person’s home must give way to unwanted government intrusions. But the core notion expressed by this maxim—the individual’s right to privacy in the home against government intrusion—was felt concretely by British subjects both in England and the colonies leading up to the American revolution and the drafting of the Fourth Amendment in 1791.<sup>363</sup>

The government’s right to break into a subject’s house pursuant to valid process was limited by “an important qualification,” articulated in the now-landmark 1603 decision of *Semayne’s Case*:

But before he breaks it, he ought to signify the cause of his coming, and to make request to open doors . . . , for the law without a default in the owner abhors the destruction or breaking of any house (which is for the habitation and safety of man) by which great damage and inconvenience might ensue to the party, when no default is in him; for perhaps he did not know of the process, of which, if he had notice, it is to be presumed that he would obey it . . . .<sup>364</sup>

The common law thus required police to notify the occupant of an impending search, and ask for the door to be opened, before breaking the

361. See, e.g., CUDDIHY, *supra* note 232, at lxv, 749; Davies, *supra* note 360, at 264 n.67 (“Justice Thomas correctly recited common-law authorities that stated a knock-and-announce requirement for legal execution of a warrant.”).

362. *Wilson*, 514 U.S. at 929 (citing 3 WILLIAM BLACKSTONE, COMMENTARIES \*288). See also William Pitt before Parliament in 1763, quoted by Justice Douglas, dissenting, in *Frank v. Maryland*, 359 U.S. 360, 378–79 (1959) (“The poorest man may in his cottage bid defiance to all the force of the Crown. It may be frail—its roof may shake—the wind may blow through it—the storm may enter, the rain may enter—but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement!”).

363. CUDDIHY, *supra* note 232, at 105–28 (Chapter 5, English Thought on Search and Seizure, 1642–1700); *id.* at 185 (“Resistance to the searching constable was an ingrained part of the legal and intellectual history of the colonies. Although their arguments were more visceral than intellectual, many ordinary colonists regarded not only their cabins but also their ships and even their persons as sanctuaries against the government.”); *id.* at 185–88 (“Popular Opinions on Search and Seizure in the Colonies, to 1760”).

364. *Wilson*, 514 U.S. at 931–32 (quoting *Semayne’s Case*, (1604) 77 Eng. Rep. 194, 195–96 (K.B.)).

door forcibly.<sup>365</sup>

What was the nature of this “notice” requirement? In the *Case of Richard Curtis*, in 1757, the court explained that “[n]o precise form of words is required,” so long as “the party hath notice, that the officer cometh not as a mere trespasser, but claiming to act under a proper authority.”<sup>366</sup> A few of the nine judges in that case expressed the view that “for want of this due notice the officers are not to be considered as acting in discharge of their duty, but as mere trespassers.”<sup>367</sup> Several early cases refer to the principle as one of “demand and refusal.”<sup>368</sup>

Sir Mathew Hale stated that “the officer may break open the door . . . if after acquainting them of the business, and demanding the prisoner, he refuses to open the door.”<sup>369</sup> In a British case decided a decade after the Fourth Amendment was drafted, Justice Heath stated emphatically: “The law of England, which is founded on reason, never authorises such outrageous acts as the breaking open every door and lock in a man’s house without any declaration of the authority under which it is done.”<sup>370</sup>

Many pre-revolutionary authorities support this principle.<sup>371</sup> The “notice” principle continued to be repeated in cases in the decades following the 1791 drafting of the Fourth Amendment.<sup>372</sup> In *Read v. Case*, an 1822

365. *See id.*

366. *Id.* at 932 (quoting *Case of Richard Curtis*, (1757) 168 Eng. Rep. 67, 68 (K.B.)) (internal quotation marks omitted).

367. *Case of Richard Curtis*, 168 Eng. Rep. at 67–68.

368. *Hitchens v. Stephens*, (1682) 84 Eng. Rep. 1233 (K.B.); *The King v. Bird*, (1690) 89 Eng. Rep. 811, 812 (K.B.).

369. *See Wilson*, 514 U.S. at 932 (quoting 1 MATTHEW HALE, PLEAS OF THE CROWN \*582) (internal quotation marks omitted).

370. *Ratcliffe v. Burton*, (1802) 127 Eng. Rep. 123, 126 (K.B.).

371. *See, e.g., Hitchens*, 84 Eng. Rep. at 1233 (resolving “[t]hat the constable or other officer having a warrant to levy the money adjudged by the justice to be levied by force of the said Act, may on demand and refusal, break open the door to execute his warrant.”); *Bird*, 89 Eng. Rep. at 812 (“[U]pon a *capias utlagatum*, though on *mesne process*, and at the suit of the subject, yet upon that writ they may break open any outward doors after demand and refusal.”); *see also* CUDDIHY, *supra* note 232, at 749 (“In most states, custom, practice, or legislation required searchers to request admittance into a house and break in only if they had to. Every legal manual for American justices of the peace between 1788 and 1791 forbade unannounced, forcible entry to accomplish an arrest.”).

372. *Hutchison v. Birch*, (1812) 128 Eng. Rep. 473 (determining that once officers lawfully enter the house, they need not further provide notice and demand before breaking the inner doors of a house; opinion assumes that notice and demand must be given before breaking the outer door); *Ratcliffe v. Burton*, (1802) 127 Eng. Rep. at 126–27 (noting that it is “necessary for the officer to make a demand,” and that entry without demand “must tend to create fear and dismay, and breaches of the peace provoking resistance”).

Connecticut case, the court refers to this principle as “the rule requiring notice.”<sup>373</sup>

As *Wilson* makes clear, there are circumstances in which this “notice” principle does not apply—such as danger to the officers or escape of a suspect.<sup>374</sup> It is not clear then that delayed notice search warrants would be unconstitutional, were they to be subjected to this rule. For purposes of this article, however, I simply seek to establish that delayed notice search warrants do raise a serious constitutional issue, and must be squared with the Fourth Amendment rule requiring notice.<sup>375</sup>

## 2. Covert, Delayed Notice Searching Presumptively Violates the “Rule Requiring Notice”

In the most straightforward sense, a covert, delayed notice search plainly infringes on the “rule requiring notice.” An application for a delayed notice search is a request by the searchers to be permitted to break into a house without “signify[ing] the cause of his coming,” or “mak[ing] request to open doors.”<sup>376</sup> A delayed notice searcher enters the home without “first . . . announc[ing] his presence and authority.”<sup>377</sup>

A delayed notice search is simply a more extreme version of a no-knock search. In a no-knock search, notice is delayed by a minute or two.<sup>378</sup> There is no prior notice of the search, but notice occurs immediately upon entry by the government officials.<sup>379</sup> In a delayed notice search, the notice is delayed much longer—by weeks or months, rather than minutes.<sup>380</sup>

Notwithstanding the fact that a delayed notice search plainly implicates the notice requirement recognized in *Wilson v. Arkansas*, no court has ever

373. *Read v. Case*, 4 Conn. 166, 170 (1822).

374. *Wilson*, 514 U.S. at 934–36.

375. In a separate article, I examine the common law and constitutional exceptions to the “notice” rule, and compare those exceptions to the statutory rules permitting delayed notice warrants under section 3103a. Witmer-Rich, *supra* note 36. I conclude that the current statutory scheme is unconstitutional, as it fails to limit the intrusion of a covert search to cases of sufficient government necessity. *Id.*

376. *Wilson*, 514 U.S. at 931–32 (quoting *Semayne’s Case*, (1604) 77 Eng. Rep. 194, 195–96 (K.B.)).

377. *Id.* at 929.

378. *See, e.g.*, *United States v. Ramirez*, 523 U.S. 65, 68–69 (1998) (police gave notice simultaneously with entry).

379. *Id.*

380. 18 U.S.C. § 3103a(b)(3) (2012) (permitting notice to be delayed for up to thirty days).

discussed *Wilson* in the context of delayed notice search warrants.<sup>381</sup> On the contrary, many courts analyzing delayed notice search warrants treat “notice of a search” as a relatively unimportant, ministerial detail. In one recent delayed notice search warrant case, *United States v. Christopher*, the court stated that “[t]he procedural requirements for giving notice after execution of a valid search warrant are ministerial tasks and a failure to comply therewith, without more, does not amount to deprivation of Fourth Amendment rights necessitating suppression.”<sup>382</sup> The court found it “difficult to accept the proposition” that an otherwise reasonable search could be “invalidated because of the operation of some condition subsequent, to-wit, a failure to provide notice.”<sup>383</sup> This is a startlingly casual approach to covert searches, given the Supreme Court’s statement that “the reasonableness of a search of a dwelling may depend in part on whether law enforcement officers announced their presence and authority prior to entering.”<sup>384</sup>

Courts and commentators do not explain why the notice rule from *Wilson* does not apply to delayed notice searches—they simply disregard *Wilson* entirely. It appears that courts and commentators have placed delayed notice search warrants firmly into one doctrinal box, and placed the *Wilson* “notice” rule firmly into the “knock and announce” doctrinal box. Having separated these rules into discrete conceptual categories—without explaining why they do not overlap—courts and commentators have then

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381. *Wilson v. Arkansas* is not cited in any of the cases (after 1995, when *Wilson* was decided) analyzing delayed notice search warrants. See *supra* note 86. None of the delayed notice search warrant cases, starting with *Freitas* in 1985, discuss the common-law “knock and announce” requirement. See *supra* note 86. None of the law review articles analyzing delayed notice searches discuss the practice under the rubric of *Wilson* or the “knock and announce” requirement, except for one, which erroneously states that under *Wilson* notice is not a constitutional requirement. See *supra* note 350 (criticizing Konovalov, *supra* note 15, at 461–64). Nathan Seltzer discusses *Wilson v. Arkansas* in connection with delayed notice search warrants, but only to observe that “it is probable that a general reasonableness standard would apply to sneak and peek searches.” Seltzer, *supra* note 228. Seltzer does not consider the notion that covert searching is simply a straightforward violation of the “knock and announce” rule. *Id.* Thomas Clancy, in his Fourth Amendment treatise, explains the “knock and announce” requirement in section 12.5.4, and then discusses “notice of a search” in the following section 12.5.5 (“Other rule based execution issues”), without connecting the two issues or explaining the (implied) distinction between them. THOMAS K. CLANCY, *THE FOURTH AMENDMENT: ITS HISTORY AND INTERPRETATION* 594–97 (2008).

382. *United States v. Christopher*, No. 2008-0023, 2009 WL 903764, at \*7 (D.V.I. Mar. 31, 2009).

383. *Id.* (citing *United States v. Cafero*, 473 F.2d 489, 499 (3d Cir. 1973)).

384. *Wilson*, 514 U.S. at 931.

proceeded to analyze cases within one box or the other box, without ever pausing to consider the underlying logic connecting the two. There is, perhaps, room for argument over whether the constitutional “knock and announce” requirement somehow does not apply to delayed notice searches. But there is no justification for the total failure of courts and commentators to engage in the argument at all.

The language of the early common law cases—relied upon by the Court in *Wilson v. Arkansas* as the foundation of the “knock and announce” rule—is not confined to “knock and announce.” One case refers to “the rule requiring notice.”<sup>385</sup> Several early cases refer to the principle as one of “demand and refusal.”<sup>386</sup> Another case explains that officers searching without “due notice” are “mere trespassers.”<sup>387</sup> The key is that “the party hath notice, that the officer cometh not as a mere trespasser, but claiming to act under a proper authority.”<sup>388</sup>

The phrase “knock and announce” has been used as a shorthand in modern cases,<sup>389</sup> but is never used in the pre-1791 cases. And the phrase “knock and announce” does not capture the core command of this common law (and constitutional) doctrine. A literal knock, for example, is not required—ringing a bell or simply shouting to request entry could do as well, depending on the circumstances.<sup>390</sup> The essence of the rule is “notice,”<sup>391</sup> “demand[,] and refusal.”<sup>392</sup> The key steps are (1) notice of the search—alerting the occupant that an official (acting on behalf of the state) intends to enter and search the home; (2) demand for entry—requesting that the occupant let the officer enter without the need to use force; and (3) refusal—giving the occupant a reasonable time to comply with the demand for entry before (upon refusal) forcible entry.<sup>393</sup>

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385. *Read v. Case*, 4 Conn. 166, 170 (1822).

386. *Hitchens v. Stephens*, (1682) 84 Eng. Rep. 1233 (K.B.); *King v Bird*, (1690) 89 Eng. Rep. 811, 812 (K.B.).

387. *Case of Richard Curtis*, (1757) 168 Eng. Rep. 67, 68 (K.B.).

388. *Id.* (quoted in *Wilson*, 514 U.S. at 932).

389. *See, e.g.*, *Hudson v. Michigan*, 547 U.S. 586, 589 (2006); *Brigham City, Utah v. Stuart*, 547 U.S. 398, 407 (2006).

390. *Brigham City*, 547 U.S. at 401 (officers opened a screen door and then announced their presence verbally).

391. *Read v. Case*, 4 Conn. 166, 170 (1822).

392. *Hitchens v. Stephens*, (1682) 84 Eng. Rep. 1233 (K.B.); *King v Bird*, (1690) 89 Eng. Rep. 811, 812 (K.B.).

393. *See* William D. Bremer, *What Constitutes Compliance with Knock-and-Announce Rule in*

Thus understood, a delayed notice search warrant plainly implicates this aspect of Fourth Amendment reasonableness. In a covert search, the police deliberately plan the search so that the occupant will not be present and cannot be given notice of the search. This likewise precludes the police from making a demand for entry and waiting for a refusal—with no one home, these measures would be nothing but a charade.

The Supreme Court has also made clear, not only in *Wilson*, that the Fourth Amendment does not require notice in all circumstances. In *United States v. Dalia*, the Court held that “[t]he Fourth Amendment does not prohibit *per se* a covert entry performed for the purpose of installing otherwise legal electronic bugging equipment.”<sup>394</sup> The defendant in *Dalia* argued that the police violated the Fourth Amendment by covertly entering his office to install bugging equipment.<sup>395</sup> The Court called that argument “frivolous,” noting that the Court had earlier stated that “officers need not announce their purpose before conducting an otherwise [duly] authorized search if such an announcement would provoke the escape of the suspect or the destruction of critical evidence.”<sup>396</sup>

Courts and other parties have relied on *Dalia* to argue that notice is not part of the Fourth Amendment at all.<sup>397</sup> This claim is overstated. *Wilson* held that the Fourth Amendment ordinarily does require notice of a search,<sup>398</sup> and *Dalia* is consistent with this view.<sup>399</sup> *Wilson* also explained that notice is not *always* required.<sup>400</sup> In *Dalia*, the Court implicitly linked the question of delayed-notice searches with the “notice” rule first given constitutional

*Search of Private Premises—State Cases*, 85 A.L.R. 5th 1, 29 (2001).

394. *Dalia v. United States*, 441 U.S. 238, 248 (1979).

395. *Id.* at 246.

396. *Id.* at 247–48 (quoting *Katz v. United States*, 389 U.S. 347, 355 n.16 (1967)).

397. See, e.g., *United States v. Pangburn*, 983 F.2d 449, 453 (2d Cir. 1993); *United States v. Simons*, 206 F.3d 392, 403 (4th Cir. 2000); *United States v. Christopher*, Crim. No. 2008-0023, 2009 WL 903764, at \*7 (D.V.I. 2009) (“The procedural requirements for giving notice after execution of a valid search warrant are ministerial tasks and a failure to comply therewith, without more, does not amount to deprivation of Fourth Amendment rights . . .”). The DOJ white paper on delayed notice search warrants relies on *Dalia*. U.S. DEP’T OF JUSTICE, DELAYED NOTICE SEARCH WARRANTS: A VITAL AND TIME-HONORED TOOL FOR FIGHTING CRIME (2004). The House Report for the USA Patriot Act Reauthorization asserts that the “U.S. Supreme Court expressly held in *Dalia v. United States* that the Fourth Amendment does not require law enforcement to give immediate notice of the execution of a search warrant.” H.R. REP. NOS. 109-174, pt. 1, at 22 (2005) (citing *Dalia v. United States*, 441 U.S. 238, 248 (1979)).

398. *Wilson v. Arkansas*, 514 U.S. 927, 936 (1995).

399. *Dalia*, 441 U.S. at 247–48.

400. *Wilson*, 514 U.S. at 934.



status twenty years later in *Wilson*.<sup>401</sup> The Court in *Dalia* explained that the Fourth Amendment did not *always* require notice, and cited exceptions to the “knock and announce” rule (as articulated in *Katz*) as support for that position.<sup>402</sup> *Dalia* did not hold that notice is never required by the Fourth Amendment—a claim that would have been plainly at odds with the holding in *Wilson*.

While a covert, delayed notice search plainly violates the “rule requiring notice,” it can be argued that the common law “knock and announce” requirement addresses a separate set of privacy concerns than those implicated by covert, delayed notice searches, and thus that the common law “notice” requirement should be confined—as courts have implicitly done to date—to the “knock and announce” context. It is important, then, to evaluate the purposes served by the common law “knock and announce” rule, and compare those purposes to the practice of covert, delayed notice searching.

### 3. Covert Searching and No-Knock Searching Each Implicate Overlapping Privacy Interests

A comparison of interests shows that delayed notice searches implicate some of the same interests as no-knock searches, but do not implicate others—or at least not in the same way. The interests affected by these two types of “no-notice” searches are sufficiently similar in character, however, as to justify treating covert, delayed notice searches as a species of “no-knock” search, subject to the “notice” requirement recognized in *Wilson*. In fact, covert, delayed notice searches impose privacy costs that are much more substantial than those created by no-knock searches alone, and that further show the need for closer Fourth Amendment scrutiny.

The purposes of the so-called “knock and announce” rule are fairly well settled. First, the most basic concern is the physical damage done by the break-in—damage that might have been avoided had the occupant, with notice, simply opened the door to comply with the warrant.<sup>403</sup> A second

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401. *Dalia*, 441 U.S. 238.

402. *Id.* at 247–48 (quoting *Katz v. United States*, 389 U.S. 347, 355 n.16 (1967)).

403. *Semayne’s Case*, (1604) 77 Eng. Rep. 194, 195–96 (K.B.) (“great damage and inconvenience might ensue to the party” who, had he known of the process, might have obeyed it). See *Hudson v. Michigan*, 547 U.S. 586, 594 (2006); Tracey Maclin, *Let Sleeping Dogs Lie: Why the Supreme Court Should Leave Fourth Amendment History Unabridged*, 82 B.U. L. REV. 895, 905

concern is the “fear and dismay” created by a no-knock search—the unpleasant surprise of strangers breaking into one’s home.<sup>404</sup> Stated differently, the notice rule protects “those elements of privacy and dignity that can be destroyed by a sudden entrance.”<sup>405</sup> Third, and following on the heels of “fear and dismay,” is the concern that an unannounced search might provoke violent resistance from the surprised occupant.<sup>406</sup> Thus, early courts stressed that it was important not only that searchers give notice that someone was about to invade, but also that the invader was acting pursuant to lawful authority.<sup>407</sup>

Some of these same concerns apply to delayed notice searches, or apply in a different manner. Some of these concerns do not apply. Delayed notice searches also give rise to additional privacy concerns not threatened by traditional searches.

First, the physical damage caused by breaking open doors may or may not occur with a delayed notice search. In some cases—at least today—the government picks the lock or otherwise gains entry without causing any physical damage.<sup>408</sup> This is often true in “sneak and peek” cases, where officials conduct a search and perhaps take photographs or photocopy

(2002); Note, *Announcement in Police Entries*, 80 YALE L.J. 139, 140–42 (1970) (citing cases).

404. *Ratcliffe v Burton*, (1802) 127 Eng. Rep. 123, 126 (“The law of England, which is founded on reason, never authorises such outrageous acts as the breaking open every door and lock in a man’s house without any declaration of the authority under which it is done. Such conduct must tend to create fear and dismay, and breaches of the peace by provoking resistance.”); *Maclin*, *supra* note 404, at 905.

405. *Hudson v. Michigan*, 547 U.S. 586, 594 (2006).

406. *Launock v. Brown*, (1819) 106 Eng. Rep. 482 (K.B.) 483 (“[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.”); 1 JOEL PRENTISS BISHOP, *CRIMINAL PROCEDURE; OR, COMMENTARIES ON THE LAW OF PLEADING AND EVIDENCE AND THE PRACTICE IN CRIMINAL CASES* § 201 (Boston, Little, Brown & Co. 3d ed. 1880) (quoting *Launock*, 106 Eng. Rep. at 483); *Hudson*, 547 U.S. at 594.

407. *Case of Richard Curtis*, (1757) 168 Eng. Rep. 67, 68 (“[N]o precise form of words is required in a case of this kind. It is sufficient that the party hath notice, that the officer cometh not as a mere trespasser, but claiming to act under a proper authority . . .”).

408. *See, e.g.*, *United States v. Pangburn*, 983 F.2d 449 (2d Cir. 1993); *United States v. Villegas*, 899 F.2d 1324 (2d Cir. 1990); *United States v. Christopher*, Crim. No. 2008-0023, 2009 WL 903764 (D.V.I. Mar. 31, 2009); *United States v. Hernandez*, No. 07-60027-CR, 2007 WL 2915856 (S.D. Fla. Oct. 4, 2007); *United States v. Ludwig*, 902 F. Supp. 121 (W.D. Tex. 1995). The opinions in these cases do not explicitly state that no physical damage occurred, but that can reasonably be inferred. In each case, the searches were conducted covertly, nothing was seized, and care was taken not to leave any evidence that would tip off the occupant that the search had occurred. *Id.*

documents but do not remove anything.<sup>409</sup> In other cases, however, the government gains entry by damaging a lock, door, or window.<sup>410</sup> As noted above, in “sneak and steal” cases in which the government actually seizes goods, officials often stage the break-in to resemble a robbery so as to prevent the occupant from suspecting a government search.<sup>411</sup> In addition to the physical damage of the actual break-in, these “sneak and steal” cases sometimes include additional property damage—not required for the actual break-in—inflicted solely to create the ruse of a private burglary.<sup>412</sup>

The second concern, “fear and dismay,” applies to delayed notice searches in a different way than it applies to no-knock searches. In a no-knock search, occupants experience the subjective fear and distress caused by an unexpected break-in of government officials.<sup>413</sup> In a delayed notice search, executed without the occupants’ knowledge, there is no one present to experience the sudden alarm and surprise of government officials breaking into one’s home.<sup>414</sup>

Delayed notice searches, however, create other forms of “fear and dismay” that invade on the “elements of privacy and dignity” of the home.<sup>415</sup> In all delayed notice cases, the searched party experiences some type of dismay upon eventually being notified that the government searched her

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409. See *supra* note 2 and accompanying text.

410. See, e.g., *United States v. Howard*, 489 F.3d 484, 488 (2d Cir. 2007) (Sotomayor, J.) (After secret search of a car, “[t]he team leaders directed the personnel conducting the search of the vehicle to make it appear as though the vehicle had been vandalized while it was left unattended on the side of the Thruway. They broke a pool cue found in the back of the car, presumably belonging to the vehicle’s occupants, and used it to pry open the glove compartment, damaging the glove compartment and making it appear as if there had been an attempted break-in.”); *United States v. Miranda*, 425 F.3d 953, 956 (11th Cir. 2005) (agents conducted a covert search, “removed three pounds of methamphetamine,” and made “it appear that a burglary had been committed”); *United States v. Espinoza*, No. CR-05-2075-7-EFS, 2005 WL 3542519, at \*5 (E.D. Wash. Dec. 23, 2005) (officers seized drugs during a covert search and “left a California license plate in order to divert any suspicion from law enforcement and toward other individuals,” presumably causing property damage as well); James Ewinger, *Federal Investigators Used Delayed-Notice Search Warrant to Help Crack Greater Cleveland Heroin Ring*, CLEVELAND.COM (Sept. 26, 2010, 2:01 PM), [http://blog.cleveland.com/metro/2010/09/federal\\_investigators\\_used\\_del.html](http://blog.cleveland.com/metro/2010/09/federal_investigators_used_del.html) (describing a staged break-in in Akron, Ohio, in 2006 in which authorities seized “half a ton of marijuana and \$2.8 million in cash”).

411. See *supra* note 410 and accompanying text.

412. *Id.*

413. See *supra* notes 404–05 and accompanying text.

414. See *supra* note 2 and accompanying text.

415. *Hudson v. Michigan*, 547 U.S. 586, 594 (2006); see also *supra* Part II.A.

home or business weeks or months earlier.<sup>416</sup> Rather than being startled at the presence of unexpected officers breaking into one's house, the searched parties learn that weeks or months earlier, "strangers [were] walking through and visually examining the center of [their] privacy interest, [their] home," without the occupants having known they were there.<sup>417</sup> Much like a person who returns home to discover his or her home broken into, the occupant experiences the loss of privacy and dignity caused by the knowledge that an uninvited, unwanted stranger has been present inside one's home.<sup>418</sup>

In "sneak and steal" cases, the occupants suffer the additional fear and dismay of believing their home has been robbed.<sup>419</sup> For those present during a "no-knock search"—when the government breaks in without notice—there is the sudden fear and alarm of experiencing a home invasion, a fear that substantially abates upon learning that the invader is a government official, not a burglar. For targets of a "sneak and steal" search, the sudden alarm is not as acute (there are no strangers bursting through the door), but the dismay lasts longer. The belief that some burglar invaded the home is not resolved within minutes, as in a conventional unannounced search, but may last weeks or months, until the occupants eventually receive notice of the government search.<sup>420</sup> Thus, targets of a "sneak and steal" search suffer the fear and dismay of criminal victimization.

Finally, as explained in Part II, covert searches invade the "privacy and dignity" of *all* homes in the community, by creating uncertainty among all members of the community over whether the government has secretly searched his or her home. This broad but shallow privacy loss, born by everyone in the community, is an invasion into the dignity and privacy that makes one's home feel like a "castle and fortress." It is an additional invasion into privacy that does not occur in "no-knock" searches.

The third concern underlying the "knock and announce" requirement is that occupants might violently resist an unannounced search by government officials. This danger applies differently in the context of delayed notice searches. Assuming the covert search is done competently—that is, when officers covertly enter with good reason to believe no one is present—there

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416. See *supra* notes 227–35 and accompanying text.

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

418. See *supra* notes 227–35 and accompanying text.

419. See *supra* Part II.B.

420. See *supra* Part II.B; see also *supra* notes 45–46 and accompanying text.

is minimal danger of an immediate violent confrontation from the occupants. As noted above, however, a delayed notice search can create a different risk of violent confrontation—violence by the resident against private third parties suspected to be the perpetrators of the staged break-in.<sup>421</sup>

As argued above, delayed notice searches—as a matter of literal search mechanics—are simply a more extreme version of a no-knock search, with the notice delayed by weeks or months rather than minutes.<sup>422</sup> When considering the underlying interests protected by the “knock and announce” rule, a similar conclusion can be drawn: delayed notice searches implicate a similar (although somewhat different) set of interests implicated by “no-knock” searches, and also impact the privacy interests of the entire political community in a broader manner not implicated by “no-knock” searches.

In sum, both as a matter of basic search mechanics and underlying principles, the constitutional command of providing advanced notice of a search—absent special circumstances—applies both to no-knock searches and to delayed notice searches.

#### IV. CONCLUSION

Congress passed § 3103a ostensibly to codify and unify the existing practice of covert, delayed notice searching, and to provide law enforcement with the tools it needed to fight terrorism.<sup>423</sup> A few years later, in apparent recognition of the potential dangers of “sneak and peek” searches, Congress passed a reporting requirement to monitor the practice.<sup>424</sup> The resulting data shows an explosion in covert searching with delayed notice warrants.<sup>425</sup> As explained, however, this data cannot be taken at face value—data on “sneak and peek” searches is likely being mixed with data on other forms of covert searching.<sup>426</sup> A relatively simple amendment to the reporting requirement (by Congress or through regulation) can fix this problem, and provide Congress—and the public—with the information it needs on covert

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421. *See* United States v. Espinoza, No. CR-05-2075-7-EFS, 2005 WL 3542519, at \*5 (E.D. Wash. Dec. 23, 2005).

422. *See supra* Part III.B.2.

423. *See supra* Part I.A.2.

424. *See supra* notes 124–32 and accompanying text.

425. *See supra* Part I.B.1.

426. *See supra* Part I.B.2.

searching.<sup>427</sup>

The practice of covert searching of homes and businesses raises serious Fourth Amendment questions that must be scrutinized by courts.<sup>428</sup> The practice is a recent procedural innovation that must be viewed with constitutional skepticism.<sup>429</sup> The history of search and seizure law up to the passage of the Fourth Amendment shows that a key component of the legality of a search is whether officials gave notice of the search and demanded entry before forcibly entering.<sup>430</sup> Covert, delayed notice searching contravenes that fundamental Fourth Amendment principle.<sup>431</sup> This “notice” principle is not absolute, so it is not clear that subjecting delayed notice search warrants to this requirement would render the practice unconstitutional.<sup>432</sup> The exceptions to the notice requirement, and how they apply to delayed notice search warrants, are taken up in a separate article.<sup>433</sup>

Covert searching also imposes unique and substantial privacy costs on the entire community, not only those whose homes and businesses are actually searched.<sup>434</sup> The practice creates uncertainty in the entire populace over whether the state has subjected its citizens to unknown searches<sup>435</sup>—which is precisely why covert searching and surveillance are tools exploited by totalitarian regimes.<sup>436</sup> The practice of covert searching is dangerous, especially if conducted frequently and with lengthy delays in notice, and must therefore be subjected to exacting constitutional scrutiny that has been largely absent in judicial decisions to date.<sup>437</sup>

Courts and Congress can devise new procedural protections to limit the alarmingly rapid proliferation of delayed notice search warrants.<sup>438</sup> Covert searching, with delayed notice search warrants, may sometimes serve sufficiently compelling government interests to justify the serious privacy

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427. *See supra* Part I.B.3.

428. *See supra* Part II.

429. *See supra* Part III.A.

430. *See supra* Part III.B.1.

431. *See supra* Part III.B.2.

432. *See supra* Part III.A.

433. Witmer-Rich, *supra* note 36.

434. *See supra* Part II.A.

435. *See supra* notes 236–40 and accompanying text.

436. *See supra* notes 248–50 and accompanying text.

437. *See supra* Part II.B, III.B.3; *see also* Witmer-Rich, *supra* note 36.

438. Witmer-Rich, *supra* note 36.

intrusion that practice entails.<sup>439</sup> In a separate article, I propose several solutions that might accomplish this goal.<sup>440</sup> Courts should authorize covert entry, with delayed notice, only when police show true necessity for the search, as that concept is used in Title III—that the only reasonable way to gather the evidence sought is through a covert search.<sup>441</sup> This limitation, and others, would serve to strike a balance between permitting covert, delayed notice searches when the government interest is sufficiently compelling, while prohibiting the use of an invasive search technique when it is merely convenient.<sup>442</sup>

As a first step, however, courts—and Congress—must recognize that delayed notice search warrants pose a serious danger to the Fourth Amendment guarantee against “unreasonable search and seizure.”<sup>443</sup> And “sneak and peek” searching must be effectively monitored—as Congress intended—to assure that this invasive search technique is adequately controlled by meaningful judicial oversight and Congressional controls.<sup>444</sup>

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439. *Id.*

440. *Id.*

441. *Id.*

442. *Id.*

443. *See supra* Part II.

444. *See supra* Part I.B.3.