Covert, Delayed Notice Searches: A Constitutional and Policy Failure—And a Solution

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COVERT, DELAYED NOTICE SEARCHES:
A CONSTITUTIONAL AND POLICY FAILURE—AND A SOLUTION

Jonathan Witmer-Rich*

Abstract

Over the past decade, law enforcement officials have conducted covert searches of American homes and businesses at a dramatically increasing rate. In some cases, investigators also seize evidence, keeping the search covert by staging the seizure to look like a burglary. These covert searches were authorized by the USA Patriot Act, through the use of delayed notice search warrants. The number of covert, delayed notice warrants has skyrocketed in the past five years, from around 175 in 2006 to 3,700 in 2011. About ten percent of all federal search warrants are now delayed notice warrants.

This article describes the legal evolution of delayed notice search warrants—through caselaw and legislation—and also presents a statistical description of the current use of delayed notice warrants. The article analyzes the constitutionality of the practice, first by examining the history of search and seizure up to 1791, and second by analyzing the privacy costs of covert searching in light of Fourth Amendment protections. This article argues that covert searches, in current form, are unreasonable searches under the Fourth Amendment. Covert searches presumptively violate the Fourth Amendment principle that searches must ordinarily give notice and demand entry before searching—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. Section 3103a does not adequately limit or justify this uniquely invasive search technique, but permits investigators to use covert searches whenever they are convenient—which is often.

This article proposes a solution that would substantially limit the number of covert searches, while preserving the technique for cases involving sufficiently compelling law enforcement interests. Covert searches should only be permitted when “necessary,” as that term is used in Title III wiretaps—when investigators can show that the only reasonable way to obtain evidence is through a covert search. In addition, Congress should require investigators to obtain high-level DOJ approval before requesting covert search authority, ensuring that covert searches are only used in sufficiently important investigations. So limited, covert, delayed notice searches could be constitutionally reasonable.

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Over the past decade, law enforcement officials have conducted covert searches of American homes and businesses at a rapidly increasing pace. A “covert search” is a search conducted secretly—without the occupant knowing, at least until well after the fact, that the government has intruded into her home and searched her possessions. Many covert searches also include secret government seizures—disguised to look to the occupant like a burglary. In the past, covert government searches and staged burglaries occurred rarely and were widely understood—even by those conducting them—to be illegal. Today, covert searches and seizures are becoming commonplace. Congress authorized the practice in the USA Patriot Act, codified at 18 U.S.C. section 3103a, and courts have accepted the practice as constitutional. Covert, delayed notice searching has received only modest scholarly attention and is still largely hidden from public view.

I argue that section 3013a is both unconstitutional and a policy failure. Covert searches as authorized by section 3013a are unconstitutional, because they violate (without adequate justification) the Fourth Amendment principle that searches must

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ordinarily be preceded by notice of the impending search and a demand for entry.

Section 3013a is a policy failure, because it has fostered a rapid expansion in the use of a dangerous and extremely invasive search tactic—covert searches—by allowing police to use covert searches whenever they are convenient or helpful. I am proposing fixing section 3103a to render the practice of covert, delayed notice searching unusual—rather than common—and permissible only when truly necessary and important—rather than when merely convenient.

Before the USA Patriot Act, covert, delayed notice search warrants were rare. By 2006, there were still only 174 delayed notice search warrants issued nationwide. By 2011, federal courts issued 3,733 warrants for covert searches, representing almost ten percent of all federal search warrants, and a more than 2000 percent increase from 2006. The Department of Justice has described delayed notice search warrants as a “time-honored tool for fighting crime,” even though the practice of covert, delayed notice warrants did not exist throughout hundreds of years of Anglo-American search and seizure law, first appearing in cases in the early 1980s. To date, courts have not subjected covert searching to any meaningful constitutional scrutiny.

This article argues that covert searching, through delayed notice search warrants, raises serious Fourth Amendment concerns that to date have not been recognized by courts, commentators, or Congress. Simply stated, it is clear from both history and Supreme Court doctrine that the reasonableness of a search under the Fourth Amendment depends in part on whether law enforcement officers give contemporaneous notice of the

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2 See infra at note 70.
search and demand entry from the occupants. Covert, delayed notice searches contravene this constitutional principle of prior notice and demand. The Supreme Court articulated this “notice and demand” principle in the context of the knock-and-announce rule, but the underlying principle—that searches ordinarily must be preceded by notice—applies equally (or with even greater force) to covert, delayed notice searches. Astoundingly, no courts or commentators analyzing delayed notice search warrants have yet drawn this connection to the Fourth Amendment “notice” principle. A practice that raises serious Fourth Amendment concerns has thus, to date, largely escaped any serious constitutional scrutiny.

While notice and demand for entry are a component of Fourth Amendment reasonableness, it is also clear from both pre-Fourth Amendment history and Supreme Court doctrine that there are some cases in which it is constitutionally permissible to delay notice of the search, at least briefly. Specifically, notice can be delayed—at least briefly—in exigent circumstances (to prevent the destruction of evidence, the escape of a suspect, or danger to the police or others). In drafting section 3103a, Congress provided that delayed notice search warrants are permissible in exigent circumstances, as well as in any case in which providing notice of the search would “seriously jeopardiz[e] an investigation.”

This framework has failed to adequately regulate the practice of covert searches. The doctrine of “exigent circumstances,” when applied to the practice of covert, delayed notice searching, effectively eliminates the “notice” requirement in broad range of cases, upending the Fourth Amendment presumption that searches must ordinarily be preceded

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by notice and a demand for entry. After all, conducting a search covertly, rather than with notice to the occupants, always decreases the likelihood that evidence may be destroyed or suspects escape.

More fundamentally, covert searches with delayed notice create serious privacy costs that are not adequately justified or limited by the current legal regime. Covert searches—unlike traditional searches or no-knock searches—impose broad privacy costs on the entire community, even those not searched, because everyone in the community is subjected to the uncertainty of wondering whether their private spaces have been covertly searched by the government. The more commonly covert searches are conducted—and the lengthier the delay in giving notice of the covert search—the larger this broad privacy intrusion becomes. And as regulated by section 3103a, the practice of covert searching has rapidly become very common, and notice of past covert searches is routinely delayed for months.

In short, the current statutory scheme for covert searches is a policy failure and constitutionally unreasonable under the Fourth Amendment. In practice, section 3103a authorizes covert searches in many routine criminal investigations, rather than preserving them for exceptional, unusual cases. It authorizes a deeply invasive search technique without requiring a sufficiently compelling government justification.

This article proposes a solution that would permit covert searches in unusual cases of sufficiently compelling government necessity, while eliminating the rampant use of covert searches in ordinary, routine cases. The solution is drawn from the limitations on wiretapping in Title III—which is fitting, as wiretapping is itself a form of covert, delayed notice searching. First, law enforcement officers seeking delayed notice search
warrants should be required to show that the covert nature of the search is “necessary,” as that term is used for Title III wiretaps. Second, Congress should amend section 3103a to require prior approval by a high-level Department of Justice official—a predicate for all Title III wiretaps—before investigators seek covert, delayed notice warrants. A Title III “necessity” limitation requires law enforcement to show that conducting a covert search is not merely convenient—the de facto current standard—but truly needed, in the specific sense that investigators could not reasonably find the evidence sought by using conventional search techniques. The prior authorization requirement would ensure that covert searches are sought only in cases of sufficient importance, and not in routine criminal investigations. Congress should amend section 3103a to require a showing of “necessity,” as that term is used in Title III, and to require prior DOJ approval of covert search applications. Courts should impose a “necessity” requirement as a matter of Fourth Amendment reasonableness.

Part I of this article describes the explosion in legal covert searches following statutory authorization by Congress. Part I.A. explains the current legal rules for delayed notice search warrants, and how those rules have evolved over time though both caselaw and legislation in the USA Patriot Act. Part I.B. provides an empirical description of how these warrants are being used. It shows how a tool passed as part of anti-terrorism legislation, purportedly meant only to codify existing practice, has quickly morphed into an extremely common search technique used mostly in drug cases and very rarely in terrorism investigations, and lacking some of the key limitations that had existed in the pre-Patriot Act caselaw. Part I.C. argues that the current legal regime, and the usage of delayed notice warrants, is a policy failure: the law permits delayed notice searches to be
conducted far more commonly than Congress intended, or than can be justified by the serious privacy costs imposed by covert searches.

Part II explains why covert, delayed notice searches under section 3103a are constitutionally unreasonable. Part II.A. argues that providing notice at the time of a search is a component of Fourth Amendment reasonableness. Part II.B. explains how covert searches with delayed notice presumptively violate that principle. This argument is based on a detailed examination of the history of search and seizure up to 1791, as well as an analysis of the privacy costs of covert searching in light of Fourth Amendment protections. Part II.C. acknowledges that the Fourth Amendment “notice” requirement can be bypassed in some cases—most notably in exigent circumstances—but explains that the current legal justifications for covert searches do not fit comfortably within that traditionally-recognized category.

Part III proposes a solution—requiring investigators to show “necessity” for covert, delayed notice searches, and obtaining prior DOJ approval for covert search applications—that would address the most pressing policy and constitutional failures of the existing legal regime. Part III explores the analogy between Title III wiretaps—another form of covert searching—and delayed notice search warrants. Part III explains how the “necessity” and “prior approval” requirements serve to effectively limit and justify the intrusion of Title III wiretaps, and how the same requirements would likewise serve to limit and justify the intrusion of covert, delayed notice searches.

I. The Statutory Authorization and Rapid Rise of Delayed Notice Search Warrants

Delayed notice search warrants, also known as “sneak and peek” warrants, authorize the government to conduct a covert search of a home or business, only notifying the
occupant some time after the search is conducted—usually about three months later.\textsuperscript{6}

Current law also authorizes “sneak and steal” searches—delayed notice search warrants that allow the government to seize evidence or contraband during the secret search.\textsuperscript{7} In “sneak and steal” cases, law enforcement often stages the seizure to resemble a burglary, perhaps by a rival drug gang, to prevent the target from suspecting a government search.\textsuperscript{8}

\textsuperscript{6} Covert, delayed notice searches are sometimes referred to as “sneak and peek” searches, or “sneak and steal” searches when evidence is seized. See Kevin Corr, \textit{Sneaky But Lawful: The Use of Sneak and Peek Search Warrants}, 43 U. Kan. L. Rev. 1103 (1995); Brett A. Shumate, \textit{From ‘Sneak and Peek’ to ‘Sneak and Steal’: Section 213 of the USA Patriot Act}, 19 Regent U. L. Rev. 203 (2006-2007). Congress, in section 3103a, refers to the practice as obtaining a “delayed notice search warrant.” 18 U.S.C. § 3103a. The phrase “sneak and peek” is colorful and descriptive, and conveys a negative connotation. While the negative connotation of “sneak and peek” is, in my view, largely justified, I will largely avoid that term in favor of the more neutral and descriptive term “covert search” or “covert, delayed notice search.” James Comey 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 Comey, \textit{Fighting Terrorism and Preserving Civil Liberties}, 40 U. Rich. L. Rev. 403, 410 (2006). Note that Comey does 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 simply not an image law enforcement would like the public to envision. The government’s preferred phraseology—“delayed notice search warrant”—is more neutral, but less descriptive. The phrase “delayed notice search warrant” conveys the ideas that a search warrant is involved, and that notice is being given but delayed. Those facts are true, but they elide the most salient feature of delayed notice search warrants, which is that the government is secretly—covertly—entering and searching a private home or business. The fact that the occupant learns of this covert search a month or two later is certainly important—it would be worse if she never learned—but in either case the government has conducted a covert search.

\textsuperscript{7} 18 U.S.C. § 3013a(b)(2).

A. Legal Rules

The current rules for delayed notice search warrants are found in section 3103a of Title 18, enacted as part of the USA Patriot Act in the wake of 9/11. In its current form, section 3103a provides that for any federal search warrant, “any notice required . . . may be delayed if . . . the court finds reasonable cause to believe that providing immediate notification of the execution of the warrant may have an adverse result.”\(^9\) 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.”\(^10\) The notice can be further extended “for good cause shown.”\(^11\) Police are permitted to seize property during a covert search only if “the court finds reasonable necessity for the seizure.”\(^12\)

Section 3103a thus 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.” Congress provided in section 3103a that the term “adverse result” has the same meaning as given in Section 2705 of Title 18 (part of the Stored Communications Act), with one minor exception.\(^13\) As defined in section 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

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\(^12\) 18 U.S.C. § 3103a(b)(2) (West 2012).
from prosecution; (C) destruction of or tampering with evidence; (D) intimidation of
potential witnesses; or (E) otherwise seriously jeopardizing an investigation . . . .”\textsuperscript{14}

The first three items on this list—subsections (A)-(C)—closely resemble the
Fourth Amendment categories of “exigent circumstances.”\textsuperscript{15} 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. Section
(E)—preventing serious jeopardy to an investigation—seems at first blush a much
broader, more general justification that lacks historical or doctrinal support as a reason to
bypass notice. As explained in Part II.C.2., however, this justification is actually always
implicitly present in every case involving traditional exigent circumstances, and does not
actually represent a separate justification for covert searching.

1. \textbf{History of Delayed Notice Search Warrants}

Delayed notice search warrants seem to have emerged from the mists of Oakland,
California, in the early 1980s. In United States v. Freitas, the first reported decision
discussing a delayed notice search warrant, the DEA agent who requested the warrant
claimed an earlier precedent, stating “that he knew that there had at one time been issued
a surreptitious entry warrant in Oakland.”\textsuperscript{16} This is the earliest evidence of a warrant
expressly authorizing a covert search in Anglo-American legal history. As stated in Part
II.A.3., there is no evidence of any delayed notice search warrants in the British or

\textsuperscript{14} Section 2705(E) also includes “unduly delaying a trial” as a reason to delay notice under the Stored
Communications Act. In section 3013a, providing for delayed notice search warrants, Congress
specifically rejected “unduly delaying a trial” as a reason for giving delayed notice of a conventional
warrant.
\textsuperscript{15} See infra Part II.C. As set forth in Part II.C, there is substantial historical and doctrinal support for
delaying notice of a search (at least very briefly) on the grounds of exigent circumstances.
\textsuperscript{16} Frietas, 800 F.2d 1451, 1460 (9th Cir. 1986) (Poole, J., dissenting) (quoting affidavit).
colonial courts before the drafting of the Fourth Amendment, and no mention of this practice in the United States until the 1980s.

Of course, there is long history of governments conducting covert searches of homes and businesses without notifying the occupants. But this practice was always understood to be illegal, not conducted pursuant to judicial oversight. In what were known “black bag jobs,” the F.B.I. long conducted secret break-ins, searches, and seizures of homes and businesses, never revealing that the break-in was the work of law enforcement. The F.B.I. typically concealed these activities by staging them to look like break-ins by ordinary burglars. Internal F.B.I. memoranda show that F.B.I. leaders knew of these covert searches, pursued them when the goal appeared sufficiently valuable, but also understood that the practice was illegal. An internal F.B.I. memorandum to the Deputy Director of the FBI, dated July 19, 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.” Despite their patent illegality, black bag jobs were used “because they represent an invaluable technique in combating subversive activities.”

In the 1980s and 90s, 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

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USA Patriot Act. In the decade since, the practice has quickly caught on with federal investigators around the country. In the early years of the 2000s, around 25-75 delayed notice search warrants were issued each year.\textsuperscript{20} By 2011 that number has grown to 3,733 delayed notice warrants, almost ten percent of all federal search warrants issued that year.\textsuperscript{21}

In the first reported decision addressing delayed notice search warrants, Judge Lynch, a Regan appointee to the Northern District of California, ruled that delayed notice search warrants were constitutionally permissible, but only within strict limits.\textsuperscript{22} 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.”\textsuperscript{23} Noting the absence of controlling authority on point, the court analogized to Title III wiretaps, which likewise authorize a search without contemporaneous notice to the party being searched. The court reasoned that Title III’s surreptitious search requirements “give content to the minimum standards of the Fourth Amendment as applied to . . . a surreptitious entry.”\textsuperscript{24} 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” requirement “that ‘normal investigative procedures

\textsuperscript{20} See infra note 70.
\textsuperscript{21} Report of the Director of the Administrative Office of the United States Courts on Applications for Delayed-Notice Search Warrants and Extensions, Fiscal Year 2011 (Oct. 1, 2010-Sept. 31, 2011), Table 1 (warrants granted (3,733) or granted as modified (35)); see infra note 70.
\textsuperscript{22} United States v. Frietas, 610 F. Supp. 1560 (N.D. Cal. 1985).
\textsuperscript{23} Frietas, 610 F. Supp. at 1570.
\textsuperscript{24} Frietas, 610 F. Supp. at 1571.
have been tried and have failed or reasonably appear unlikely to succeed if tried or be too
dangerous.”

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.” In light of these failures, the court held that even assuming
surreptitious entry might sometimes be constitutionally permissible, it had “no difficulty
concluding that the surreptitious entry of the Clearlake residence violated the Fourth
Amendment.”

Several features in Judge Lynch’s analysis bear emphasis: (1) he concluded
(correctly, in light of the Supreme Court’s decision eleven years later in Wilson v.
Arkansas) that providing notice at the time of a search was a component of Fourth
Amendment reasonableness (not merely a requirement of Rule 41); (2) he recognized that
delayed notice may be constitutionally permissible when circumstances warranted; (3) he
analogized surreptitious warrants to Title III wiretaps—an analogy developed further in
this article; and (4) he held that to be constitutionally permissible, a warrant authorizing a
surreptitious search at the very least had to provide for some notice after the search, and
had to be shown to be necessary. On appeal, the Ninth Circuit adopted all of these key
points. The Ninth Circuit emphasized the significant privacy intrusion at stake:
“surreptitious searches and seizures of intangibles strike at the very heart of the interests

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26 Frietas, 610 F. Supp. at 1571.
27 Frietas, 610 F. Supp. at 1571.
28 United States v. Frietas, 800 F.2d 1451, 1456 (9th Cir. 1986).
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.”

Delayed notice search warrants received an even more welcome reception in the Second Circuit—the only other circuit to address the practice before section 3103a was enacted. In United States v. Villegas, the Second Circuit upheld a delayed notice search warrant used to secretly search a farmhouse in rural, upstate New York. In contrast with the Ninth Circuit, the Villegas court minimized the privacy intrusion. 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.”

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, that officers provide notice “within a reasonable

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29 Frietas, 800 F.2d at 1456. During the Congressional debate over delayed notice search warrants in the fall of 2001, Senator Patrick Leahy read this quote from Frietas into the record as reflecting his concerns over delayed notice search warrants. 147 Cong. Rec. S10547-01, S10557 (daily ed. Oct. 11, 2001).
30 United States v. Villegas, 899 F.2d 1324 (2d Cir. 1990).
31 Villegas, 899 F.2d at 1337.
time after the covert entry.”

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 statutory or rule-based requirements. 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.” Instead, officers need only show that “there is good reason for delay.”

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.”

A few years later, in United States v. Pangburn, the Second Circuit continued down the path of degrading the safeguards first articulated in Freitas. 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,” and concluded that notice was required only by Rule 41, not by the Fourth Amendment. 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. 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.

32 Villegas, 899 F.2d at 1337.
33 Villegas, 899 F.2d at 1337 (quoting 18 U.S.C. § 2518(3)(c)).
34 Villegas, 899 F.2d at 1337.
35 Villegas, 899 F.2d at 1337.
36 United States v. Pangburn, 983 F.2d 449 (2d Cir. 1993).
37 Pangburn, 983 F.2d at 453-54.
38 Pangburn, 983 F.2d at 449-50 (describing district court ruling).
39 Pangburn, 983 F.2d 449.
Thus over the course of about eight years, courts were embracing delayed notice search warrants, questioning whether notice was even a part of the Fourth Amendment, and admitting evidence obtained in clear violation of the requirements set forth in earlier cases.

A few years later, in what might seem a discrete 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. 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.\(^{40}\) The Court’s history here was well-founded. William Cuddihy explains that the drafters of the Fourth Amendment “shared a general consensus” of the specific features of search and seizure that were “unreasonable,” as that term is used in the amendment.\(^{41}\) In particular, “strong precedent against searching a house without prior, official declaration of intent to do so existed in England by 1604.”\(^{42}\) Cuddihy concludes that “[u]nnannounced searches were probably a third category [along with general warrants and nighttime searches] of the unreasonable processes that the Fourth Amendment forebade.”\(^{43}\)


\(^{42}\) Cuddihy, at lxv (citing *Semayne’s Case*, K.B. Michaelmas [Oct./Nov.] 1604, 5 Coke 91a at 91b; 77 E.R. 194 at 195-96).

\(^{43}\) Cuddihy, at 749.
The Court announced this “notice” ruling in the context of evaluating the common law “knock and announce” rule—the rule that officers executing a search warrant should knock and request entry before breaking down the door.44 As explained in Parts II.A.-II.B., the core holding in Wilson—that the Fourth Amendment required searchers to announce their presence and give notice of searches absent certain exceptions—clearly has implications for delayed notice search warrants. Among other things, Wilson implicitly overruled Pangburn’s holding that the Fourth Amendment contains no “notice” requirement.

While lower federal court judges (and litigants) presumably became aware of Wilson v. Arkansas, they apparently confined that decision to a discrete “knock and announce” doctrinal box. In all of the delayed notice search warrant cases following Wilson v. Arkansas, no court to date has once mentioned Wilson v. Arkansas or its notice requirement. 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.”45 Instead, courts (and soon enough, Congress) continued analyzing delayed notice search warrants under the now-illegitimate authority of cases like Pangburn.46

44 Wilson, 514 U.S. 927.
45 Wilson, 514 U.S. at 931.
The connection between Wilson’s knock and announce ruling and covert searching is discussed at length in Part II.B. For present purposes, what is most notable is that courts and Congress, in formulating the rules for delayed notice search warrants, completely disregarded Wilson and the “notice” requirement—without explaining why the constitutional notice requirement did not apply to delayed notice search warrants.

2. Congressional Authorization of Delayed Notice Search Warrants

In the context of this relatively sparse caselaw, the Department of Justice began seeking explicit statutory authority to conduct delayed notice searches. After several failed attempts to persuade Congress to authorize this practice, the DOJ prevailed in the USA Patriot Act, passed fairly rapidly after 9/11. The Department of Justice began evaluating and assembling proposed legislation on September 12 and first presented its legislative plan in a September 19 meeting with congressional and white house leaders. Over the next weeks, Attorney General Ashcroft worked with Senator Patrick Leahy and other legislators to craft the bill that became the USA Patriot Act.

The Patriot Act was not a new 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 combat terrorism. The Patriot Act included section 213, codified at section 3103a of Title 18, which provided for delayed

Wilson, that the failure to announce a search or leave a copy of the warrant did not implicate the Fourth Amendment); California v. Ceja, 2001 WL 1246632 (Cal. App. Ct. 6th Dist. Oct. 17, 2001) (upholding delayed notice search warrant; no mention of Wilson).

47 For example, delayed notice search warrants were proposed and rejected as part of the Children’s Health Act of 2000. 146 Cong. Rec. H8206-06, H8253, 2000 WL 1425570 (Sept. 27, 2000) (“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. . . . So some of those questionable parts are not in this legislation.”).

48 CITE to Congressional Record.

notice search warrants. 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. From the start, section 213 was not limited to terrorism-related investigations, but authorized covert searches in any type of criminal investigation. In addition, section 213 contained a provision authorizing seizures in some surreptitious searches—thus “sneak and peek” searches would sometimes become “sneak and steal” searches.\(^{50}\)

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. 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.

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—and the new tools of the Patriot Act overall—were critical to enable investigators to combat and prevent terrorism.\(^{51}\) Second, with


\(^{51}\) The administration repeatedly stated that the USA Patriot Act as a whole was a critical tool to fight terrorism. 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.” Administration’s Draft Anti-Terrorism Act of 2001: Hearings Before the Comm. on the Judiciary, House of Representatives, 107th Cong. __ (Sept. 24, 2001) (statement of Attorney General John Ashcroft). He further stated, “Today we seek to enlist your assistance, for we seek new laws against America's enemies, foreign and domestic. . . . [O]ur laws fail to make defeating terrorism a national priority. Indeed, we have tougher laws against organized crime and drug trafficking than terrorism.” Id. 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 and other dangerous criminals to justice.” James
respect to delayed notice search warrants specifically, the administration repeatedly
reassured Congress that section 213\textsuperscript{52} was simply a statutory codification of an existing
practice that had been approved (as constitutional) by every court to have considered it.\textsuperscript{53}

The limited debate over delayed notice search warrants reflects a few themes.
First, 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 (R-Alabama) stated that “the fourth amendment says we don’t search someone’s
house until they’re given notice.”\textsuperscript{54} Senator Russ Feingold explained, “[n]otice is a key
element of fourth amendment protections.”\textsuperscript{55} In Congressional testimony over the USA
Patriot Act, Jerry Berman, executive director of the Center for Democracy and
Technology, stated that “[n]otice is a bedrock Fourth Amendment protection from
mistaken or abusive searches and seizures.”\textsuperscript{56}

\textsuperscript{52} Delayed notice search warrants appeared in Section 352 in early versions of the legislation. Later
versions moved the delayed notice search warrant language to Section 213.
\textsuperscript{53} 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.” Administration’s Draft Anti-Terrorism Act of 2001:
Hearings Before the Comm. on the Judiciary, House of Representatives, 107th Cong. _ (Sept. 24, 2001)
(statements of Representative Bachus and Assistant Attorney General Michael Chertoff).
\textsuperscript{54} Administration’s Draft Anti-Terrorism Act of 2001: Hearings Before the Comm. on the Judiciary, House
of Representatives, 107th Cong. _ (Sept. 24, 2001) (statements of Representative Bachus). Later
Representative Bachus 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.
\textsuperscript{55} 147 Cong. Rec. S10990-02, S11021 (Oct. 25, 2001).
\textsuperscript{56} Protecting Constitutional Freedoms in the Face of Terrorism: Hearings Before the Subcommittee on the
Constitution, Federalism, and Property Rights of the Committee on the Judiciary, United States Senate,
107th Cong. _ (Oct. 3, 2001) (statement of Jerry Berman, executive director of the Center for Democracy and
Technology).
Second, some legislators opposed Section 213 on the ground that it authorized delayed notice searches in any type of criminal investigation, not just terrorism investigations. Representative Jerrold Nadler (D-NY), whose New York district included the site of the World Trade Center, complained that the delayed notice provision was not limited to terrorism cases but applied to all criminal cases: “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?” Representative Bachus stated, “this doesn’t just involve terrorist activities. This involves all Americans.” Representative Bobby Scott, Democrat of Virginia, 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 . . . .” Senator Feingold complained, “the 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.”

Third, legislators criticized one of the criteria for authorizing covert, delayed notice searches—the provision that authorized delayed notice when notice would seriously jeopardize an investigation. Legislators (presciently) argued that this provision could apply in a very broad range of cases. Representative Bachus stated, “I would say

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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.”

Senator Feingold worried that the standard could be met in almost any criminal investigation: “[t]he 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.”

Senator Orin Hatch responded to Senator Feingold’s concern over delayed notice search warrants, emphasizing that the bill simply codified (and made uniform) a practice that had already been approved by the courts: “what he 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 . . . .”

Senator Hatch claimed that the practice “is totally constitutional.” Going further than the few recent decisions approving of what appeared to be a novel practice, Senator Hatch claimed the practice has been upheld as constitutional “from the beginning of this country; some will say from the beginning of this country.” 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 1985—and there is no such evidence.

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B. Data on the Use of Covert, Delayed Notice Search Warrants

Since Congress authorized covert searches in the Patriot Act, the use of delayed notice search warrants has exploded. Data on delayed notice search warrants before 2006 is sparse. In 2005, however, as part of the Patriot Act Re-Authorization, Congress created a reporting requirement for delayed notice search warrants, allowing more meaningful evaluation of the practice since fiscal year 2006.65

The available data shows the following, explained in more detail below. Covert searching with delayed notice warrants has increased very rapidly, now representing around ten percent of all federal search warrants. When Congress enacted section 3103a there were likely less than one hundred covert searches conducted in the United States per year. By 2011 there were almost 3,700 covert searches with delayed notice warrants. Covert searches are overwhelmingly used in drug investigations, representing about 75 percent of all delayed notice warrants. While Congress authorized delayed notice search warrants as part of the Patriot Act—legislation justified primarily by the need to combat terrorism—only a small fraction of delayed notice warrants (less than one percent) are used in terrorism investigations. The default period for giving delayed notice has vacillated under the legal rules from seven days to a “reasonable time” to thirty days, the current standard. But in practice, the default period of delay is much longer: for half of all delayed notice search warrants, the delay is ninety days.

65 H.R. Conf. Rep. No. 109-333 (2005) (“Section 114, delayed notice search warrants, section 3103a is amended to add 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.”).
Before 2001 there are no firm data, but the practice was extremely rare. Delayed notice search warrants were first discussed in the *Frietas* decision in 1985, and from then until 2001 they appeared in only a handful of state or federal cases.

After Congress statutorily authorized delayed notice search warrants in October 2001, the practice remained relatively rare for a few years. The best available data for those years—an approximation based on Department of Justice internal surveys—suggests that fewer than one hundred delayed notice search warrants were issued each year in 2002-2005. In 2006 that number rose to 174, and by 2011 federal courts issued 3,733 delayed notice search warrants (in addition to over 3000 extensions of existing delayed notice warrants), an increase of over 2000 percent over five years. Figure 1 shows the increase over time in the use of delayed notice search warrants.

68 The Department of Justice prepared a report for Congress, in the lead-up to the 2005 Patriot Act Re-Authorization, 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) (2005). That report stated that there were 61 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.
69 See infra note 70.
70 Figure 1 shows the number of delayed notice search warrants granted, not the number requested. In each year, only a small number of applications were denied—zero in 2006 and 2007, three in 2008, five in 2009, sixteen in 2010, and ten in 2011. Figure 1 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 Department of Justice surveys. Data for FY 2002 and 2003 are estimates based on a survey by DOJ of US Attorney’s Offices. See H.R. Rep. No. 109-174(I) (2005). From the report, it can be inferred that 47 delayed notice search warrants were reported from the start of the PATRIOT Act, October 26, 2001, through March 31, 2003. Thus over this 17-month period, 47 delayed notice search warrants were issued. The data for FY 2004 are based on a survey of US Attorney’s Offices, conducted by the DOJ and reported to Congress, covering April 2003 through July 2004. During that time the report stated that 61 search warrants “had delayed notice.” H.R. Rep. No. 109-174(I) (2005). The data for FY 2005 is an estimate. From a report from DOJ, it can be calculated that from August 2004-Jan 31, 2005, there were 47 delayed notice search warrants. H.R. Rep. No. 109-174(I) (2005). This is a 6-month period. To estimate the total number of delayed notice search warrants over a 12-month period, that number is doubled, giving an estimated 94 delayed notice search warrants in FY 2005. Data for FY 2006 contains only data from March 2006-Sept 2006, a six or seven month period, and lists 87 delayed notice search warrants. Doubling that...
The reasons for this explosion in delayed notice search warrants are not entirely clear. Most likely, many federal investigators were not aware of the practice, were not confident in how to legally conduct delayed notice searches, or were not sure how relevant or helpful the practice would be to their investigations. After a few years of statutory authorization, investigators began to learn about the practice, heard about successful delayed notice searches from their colleagues, and became more confident in judicial acceptance of the practice. In addition, investigators likely began to realize both number to estimate the 12-month period produces the figure of 174 delayed notice searches for 2006. See Report of the Director of the Administrative Office of the United States Courts on Applications for Delayed-Notice Search Warrants and Extensions, Fiscal Year 2007, Table 1a (reporting 87 warrants granted in the seven-month period covered by the report in fiscal year 2006). The numbers for fiscal years 2007-2011 are taken directly from the annual reports for each of those years. See Report of the Director of the Administrative Office of the United States Courts on Applications for Delayed-Notice Search Warrants and Extensions, Fiscal Year 2008 (Oct. 1, 2007-Sept. 31, 2008), Table 1 (warrants granted (737) or granted as modified (23)); Report of the Director of the Administrative Office of the United States Courts on Applications for Delayed-Notice Search Warrants and Extensions, Fiscal Year 2009 (Oct. 1, 2008-Sept. 31, 2009), Table 1 (warrants granted (1124) or granted as modified (21)); Report of the Director of the Administrative Office of the United States Courts on Applications for Delayed-Notice Search Warrants and Extensions, Fiscal Year 2010 (Oct. 1, 2009-Sept. 31, 2010), Table 1 (warrants granted (2356) or granted as modified (23)); Report of the Director of the Administrative Office of the United States Courts on Applications for Delayed-Notice Search Warrants and Extensions, Fiscal Year 2011 (Oct. 1, 2010-Sept. 31, 2011), Table 1 (warrants granted (3,733) or granted as modified (35)).
how useful the practice could be and—equally importantly—how many searches could qualify for delayed notice under section 3103a.

The use covert, delayed notice searches has increased so rapidly that delayed notice search warrants now constitute around ten percent (perhaps more) of all federal search warrants. In 2011 the U.S. Courts reported that 51,104 “search warrants” were handled by federal magistrate judges.71 Using that figure, 3,733 delayed notice warrants represents 7.2 percent of all federal search warrants—but that estimate is clearly substantially too low. The 51,104 figure in the U.S. Courts report represents all search orders of any kind issued by federal magistrates (pen registers, trap and trace devices, other surveillance orders), not only traditional search warrants requiring probable cause and regulated by the Fourth Amendment.72 A reasonable estimate is that of all search orders entered by federal magistrates, somewhere around twenty-five to forty percent of those are not traditional Fourth Amendment search warrants.73 A reasonable estimate is

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72 The guidelines for U.S. Magistrate Judges provide instructions for magistrate judges to report the figures collected in the Annual Report. For the “search warrants” listed in Table M-3, the Guidelines state that magistrate judges should report all traditional search warrants under Federal Rule 41, as well as “all applications for pen registers, pen register extensions, electronic tracking devices, radio transponders, toll records, beepers, and trap and trace devices.” See A Guide to Reporting Magistrate Judge Workload Statistics Through CM/ECF (MJSTAR), Section V.A.2.a (Search Warrants), at p. V-6 (March 2011) (on file with the author). Federal magistrate judges do not issue Title III wiretap orders, so those are not included in the 51,104 “search warrants” listed in Table M-3.

73 There are no data revealing the exact percentage of traditional warrants versus other search orders (pen registers, trap and trace devices, etc.). One federal magistrate judge with 25 years of experience estimated that around 75 percent of search orders are traditional probable cause warrants, and 25 percent are other search orders such as pen registers. Magistrate Judge Tommy E. Miller, correspondence with the author. Using that estimate, federal magistrates issued about 38,000 traditional “probable cause” search warrants in 2011 (75 percent of 51,104); 3,733 of those were delayed notice warrants, or about 9.6 percent of all federal search warrants. Magistrate Judge Tommy E. Miller, correspondence with the author. Another estimate with more statistical foundation comes from a 2009 study by the Federal Judicial Center on sealed cases in federal court. Federal Judicial Center, Sealed Cases in Federal Court, October 23, 2009, Tim Reagan and George Cort, available at
that delayed notice search warrants now constitute at least ten percent, and perhaps as much as twelve percent, of all federal search warrants.\textsuperscript{74}

A substantial majority—about 75 percent—of all delayed notice search warrants are obtained for drug investigations.\textsuperscript{75} A small percentage—around three to seven percent—of delayed notice warrants are used to investigate extortion, fraud, weapons offenses, and fugitive cases.\textsuperscript{76} Of the total number of delayed notice search warrants obtained each year, only a tiny fraction—usually less than one percent—are used in terrorism cases.\textsuperscript{77} Figure 2 shows the number of delayed notice search warrants from 2006-2011 (the years in which this data is available), by type of criminal investigation.

Specific numbers are provided on the chart for drug investigations and terrorism investigations.\textsuperscript{78}

\textsuperscript{74} Using the 75-25 estimate, federal magistrates handled about 38,000 traditional “probable cause” search warrants in 2011 (75 percent of 51,104); 3,733 of those were delayed notice warrants, or about 9.6 percent of all federal search warrants. Using the 60-40 estimate, federal magistrates handled about 30,662 traditional search warrants in 2011 (60 percent of 51,104); 3,733 of those were delayed notice warrants, or about 12.1 percent of all federal search warrants.


\textsuperscript{76} For example, in 2008 delayed notice warrants were used 23 times in extortion cases (3% of all delayed notice warrants for that year), 53 times in fraud cases (7%), 25 times in fugitive cases (3.3%), 39 times in weapons cases (5.1%), and 146 times in other cases. In 2010 delayed notice warrants were used 79 times in extortion cases (3.3%), 90 times in fraud cases (3.8%), 47 times in fugitive cases (2%), and 49 times in weapons cases (2.1%). See supra note 71.

\textsuperscript{77} 2006: 0%; 2007: 1.4%; 2008: 0.4%; 2009: 0.5%; 2010: 0.9%. See supra note 71.

\textsuperscript{78} Data for Figure 2 comes from the annual reports on delayed notice warrants, see supra note 70.
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. At the short end, some have argued that delay should not ordinarily exceed seven days, subject to extension in exceptional cases.\footnote{United States v. Frietas, 800 F.2d 1451, 1456 (9th Cir. 1986) (delay “should not exceed seven days except upon a strong showing of necessity”); United States v. Villegas, 899 F.2d 1324, 1337 (2d Cir. 1990) (agreeing “with the Frietas 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.”); Senator 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.” 147 Cong. Rec. S10547-01, S10557 (Oct. 11, 2001); “Senator Feingold offered an amendment to S. 1692 to modify the presumptive time period for delayed notice search warrant from 30 days, which is the period under current law, to seven days. The amendment was accepted by a roll call vote,” but did not become law. S. Rep. 111-92 (2009) (The USA Patriot Act Sunset Extension Act of 2009).} The Department of Justice initially sought
authorization for a ninety-day delay, subject to extension.\(^{80}\) Congress refused to provide
“a blanket 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.”\(^{81}\)
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.”\(^{82}\)

In 2005, Congress changed the standard delay to a period not to exceed thirty
days, subject to extension.\(^{83}\) In another Patriot Act reauthorization in 2009, the Senate
Judiciary Committee approved a bill “shortening the presumptive time period for delayed
notice from 30 days to 7 days,” noting that the A.O. Reports showed “that these so-called
‘sneak and peek’ warrants are only very rarely used in terrorism cases.”\(^{84}\) 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.\(^{85}\)

Statistics show that substantial extensions of the thirty-day delay period are the
rule, not the exception. Of all delayed notice search warrants, notice is given in thirty

\(^{80}\) Section 352 of the administration’s first proposal would have authorized delay “pursuant to the standards, terms, and conditions set forth in section 2705 [of the Stored Communications Act], unless otherwise expressly provided by statute.” Administration’s Draft Anti-Terrorism Act, Pub. L. No. 107-56 (2001). Section 2705 provided (and still provides) for a ninety-day delay under the Stored Communications Act, subject to extension.

\(^{81}\) Statement of Senator Leahy: Stating 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 explaining 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.” 147 Cong. Rec. S10547-01, S10557 (Oct. 11, 2001). See also 18 U.S.C. § 3103(a)(b)(3) (2001) (providing for notice to be delayed for “a reasonable time”).

\(^{82}\) 147 Cong. Rec. S10547-01, S10557 (Oct. 11, 2001).


While the DOJ failed to persuade Congress to make a ninety-day delay the norm, a ninety-day delay has nevertheless become the norm in practice. About half of all delayed notice search warrants involve ninety-day delays. A minority of cases, but still a substantial number, involve delays of six months or more. For example, in 2007 there were about fifty instances of delays of 180 days or more. In all, more than half of all delayed notice search warrants involve notice given 90 days or more after the search. Delays range from one day up to 455 days. Figure 3 shows the average delay per year as well as the mean delay—always 90 days, and representing very close to half of all delayed notice warrants. Figure 3 also shows the range of delays from that year, from lowest to highest.

<table>
<thead>
<tr>
<th>Fiscal Year</th>
<th>Average Delay (Days)</th>
<th>Mean Delay (Days)</th>
<th>Range of Delays (Days)</th>
</tr>
</thead>
<tbody>
<tr>
<td>2006</td>
<td>67</td>
<td>n/a</td>
<td>n/a</td>
</tr>
<tr>
<td>2007</td>
<td>75</td>
<td>90 (47% of cases)</td>
<td>5-365</td>
</tr>
<tr>
<td>2008</td>
<td>68</td>
<td>90 (46% of cases)</td>
<td>3-365</td>
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<tr>
<td>2009</td>
<td>64</td>
<td>90 (47% of cases)</td>
<td>7-300</td>
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<tr>
<td>2010</td>
<td>65</td>
<td>90 (51% of cases)</td>
<td>1-455</td>
</tr>
<tr>
<td>2011</td>
<td>66</td>
<td>90 (51% of cases)</td>
<td>1-366</td>
</tr>
</tbody>
</table>

The Patriot Act provided five possible reasons—already contained in the Stored Communications Act—for investigators to request (and courts to approve) delayed notice

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86 The total number of delayed notice search warrants and warrant extensions between 2007-2011 is 14,625. Of those, notification was given within thirty days (or less) in about 4,545 cases, or 31 percent of the time. These figures are compiled from the delayed notice search warrant reports from 2007-2011, see supra note 70.
87 The data on this point are remarkably stable, from 2006 through 2010 varying only between 46% and 51%.
88 The report calls this the “most frequently reported period of delay.”
89 Estimated, see supra note 70.
for regular search warrants: preventing physical danger to any person, flight from prosecution, destruction of evidence, intimidation of a witness, or serious jeopardy to an investigation.\textsuperscript{90} The Administrative Office reports do not break down which of these reasons are most commonly invoked for delayed notice search warrants.\textsuperscript{91} That said, there are good reasons to believe the courts most commonly approve delayed notice search warrants based on the fifth criteria—preventing serious jeopardy to an investigation.

FBI Director Robert Mueller has said as much, at least as for warrants sought by the FBI. In his April 2005 testimony in support of the Patriot Act re-authorization, Director Mueller testified that “[i]n most instances, the FBI seeks delayed notice when contemporaneous notice would reasonably be expected to cause serious jeopardy to an ongoing investigation.”\textsuperscript{92} Various witnesses from the Department of Justice testified before Congress, identifying claimed successes from delayed notice search warrants. Of the few concrete examples given, most delays were justified by the need to protect an ongoing investigation.\textsuperscript{93} This pattern also appears in the caselaw: most cases since 2001 involve delayed notice warrants issued for the purpose of protecting an investigation.\textsuperscript{94}

In addition, the available data on average length of delay strongly suggests heavy reliance on the “jeopardize an investigation” criterion. Of the various reasons for

\textsuperscript{90} The law initially provided six reasons, which has since been reduced to five. The Stored Communications Act gives five reasons to delay notice, but the fifth provision (section 2705(a)(2)(E)) really contains two separate reasons: seriously jeopardizing to an investigation, or unduly delaying a trial. In the 2005 Patriot Act reauthorization, Congress eliminated that final reason—unduly delaying a trial—from the permissible grounds for issuing a delayed notice search warrant under section 3103a. See 18 U.S.C. § 3103a(b)(1) (2006).

\textsuperscript{91} A 2005 proposal by Representative Flake (Arizona), which did not become law, would have also required reporting on “the adverse result that occasioned [the] delay.” H.R. Rep. 109-178 (2005).

\textsuperscript{92} Testimony of Robert Mueller, 4.5.2005, 2005 WL 760100.

\textsuperscript{93} CITES.

\textsuperscript{94} CITES.
requesting delayed notice, most would not ordinarily require a very lengthy delay. Consider the “preventing destruction of evidence” criterion. Say the DEA searches a drug dealer’s house, hoping to find some information identifying the dealer’s stash house. The DEA might request a delayed notice warrant, hoping to identify—and raid—the stash house before the drug dealer, alerted by the first search, alerted his confederates and emptied the stash house of all contraband. How long of a delay would be required to accomplish this? If the DEA does discover information disclosing a separate stash house, it could be raided within days. A delay of a few days, or a week or two at the outside, would suffice. The same seems true in most cases involving physical danger to some person, or flight from prosecution. In most such cases, a relatively brief delay—often a few days, and rarely more than 30 days—would suffice to prevent the identified danger.

In contrast, a delay requested for the purpose of protecting an ongoing investigation could easily require a much lengthier delay. Complex investigations routinely last for many months or years, and keeping the investigation secret is typically a critical part of the investigation’s success.

As noted above, the available data show that lengthy delays—ninety days or more—are the norm, not the exception. This provides further evidence to believe that for the substantial majority of delayed notice search warrants, the justification for the delay (or at least one of the justifications) is to prevent serious jeopardy to an investigation.95

In addition, it appears that a large number of the delays justified by protecting an ongoing investigation involve Title III wiretaps. In a number of reported decisions, law enforcement justify the need to delay notice of a physical search by pointing to an

95 The delay would be prolonged by this criterion so long as it is one reason for the delayed notice—even if there are other reasons as well.
ongoing Title III wiretap that would be disclosed—and thus compromised—if notice were given of the physical search.\textsuperscript{96} The need to protect ongoing Title III wiretaps also appears in DOJ testimony regarding delayed notice search warrants.\textsuperscript{97}

As noted above, the “jeopardy to an investigation” criterion has been controversial from the start. During the relatively limited legislative debate about the delayed-notice search provision leading up to the passage of the Patriot Act in October 2001, at least two legislators (from opposite sides of the aisle) questioned the wisdom of this specific provision, arguing that it would authorize delayed notice in a very broad range of cases.\textsuperscript{98}

At least one attempt has been made to completely eliminate “jeopardizing an investigation” as an approved reason for delaying notice. In 2003, Senator Feingold introduced a bill, the “Reasonable Notice and Search Act,” to amend various parts of section 3103a. Among other provisions, this bill would have eliminated “jeopardy to an investigation” as a justification for delayed notice warrants.\textsuperscript{99} Senator Feingold argued that this provision was “too easily susceptible to abuse.” The bill did not become law.

In summary, the available data show that the current legal regime has facilitated a rapid explosion in the use of covert searches. As predicted by a few dissenting lawmakers, the statutory scheme enacted by Congress allows for covert, delayed notice searches in a very broad range of criminal investigations, not only in exceptional or unusual cases. Moreover, a tool enacted as part of anti-terrorism legislation has quickly become a tool used mostly in drug investigations and very rarely in terrorism

\textsuperscript{96} CITE.
\textsuperscript{97} CITE.
\textsuperscript{98} See supra at __.
\textsuperscript{99} Congressional Record: October 2, 2003 (Senate), Page S12377-S12387.
investigations. Finally, the ordinary period of delay is three months, substantially longer than the presumed legal default of thirty days.

C. Policy Failure: Excessive Use of Unnecessary Delayed Notice Warrants

The most glaring problem with covert, delayed notice searches is that the current legal regime allows covert searching in far too many cases, without requiring investigators to show that this uniquely invasive search technique is truly necessary for an important investigative purpose. The statistics showing the frequent use of covert searches establishes a *prima facie* case that covert, delayed notice searches are not adequately regulated and limited by the existing legal regime.

A review of the relatively small universe of delayed notice search warrant cases decided to date provides further evidence of this police failure. In many cases, investigators obtained approval for a covert search with a minimal showing, and the resulting covert search appears wholly unnecessary to a successful investigation.

In one recent case, *United States v. Christopher*, 100 a police officer in St. Croix received a tip that a wooden shack, located on the property of one Amobi Christopher, was being used to grow marijuana. On June 27, 2008, the officer obtained a delayed notice search warrant to permit a covert search of the shed, at night, and to delay notice for thirty days. The reason for delayed notice was “to continue the investigation and to identify suspects.” 101 The affidavit further provided that “providing immediate notification of the execution of the warrant will cause the target subjects to destroy evidence and conceal themselves from law enforcement.” 102 Officers conducted the

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100 United States v. Christopher, 2009 WL 903764 (D. Virgin Islands March 31, 2009).
101 Affidavit in Support of Search Warrant, p. 1, Christopher case (on file with the author).
102 Affidavit in Support of Search Warrant, p. 3, Christopher case (on file with the author).
covert search and found the suspected marijuana, but did not seize anything. Police then obtained a warrant on July 9 to conduct visual video surveillance inside the shack, which captured images of Christopher “watering, pruning, harvesting, and growing marijuana plants.” Police later obtained a conventional search warrant, searched the shack and seized the marijuana, and arrested Christopher.

The *Christopher* case shows how a covert search can be helpful in a criminal investigation, in particular a drug investigation. The problem is that a covert search could be helpful in almost any case. It was helpful in *Christopher*, as it would be in many cases, to covertly enter and confirm the presence of contraband.

The *Christopher* case also seems like a good example of how covert searches are being used even when they are unnecessary—even when ordinary investigative techniques could have worked just as well. Because section 3103a contains no “necessity” requirement, the police officer made no effort in his affidavit to explain why ordinary investigative techniques would not have worked. And from what can be gleaned from the court opinion and the officer’s affidavit, it is hard to see why ordinary investigative techniques would not have sufficed.

The police could have conducted visual surveillance (or video surveillance) of the shack from the road, and thereby observed Christopher repeatedly entering and exiting the shack on his property. They could also have seen whether anyone else entered or left the shack. After doing so, they could have done exactly what they did eventually do—obtain a conventional search warrant to search the shack and arrest Christopher. In doing so, they would have obtained adequate evidence to convict Christopher of growing

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103 Christopher, 2009 WL 903764 at *1.
104 Christopher, 2009 WL 903764 at *1.
105 Christopher, 2009 WL 903764 at *1.
marijuana: the evidence would consist of the marijuana grow operation in the shack—evidence they eventually seized in the conventional search—as well as testimony from the officers that the shack was on Christopher’s property, that he was repeatedly observed entering and exiting the shack, and that no one else was observed doing so. This evidence is somewhat less conclusive than actual video footage of Christopher tending to his plants, but is still easily sufficient to prove, beyond a reasonable doubt, that Christopher was growing marijuana in his shack.

Other drug cases follow this same basic pattern. Police use covert entry, authorized by delayed notice search warrants, to enter and confirm that drugs or other contraband are present in a suspected location. They continue their investigation using conventional techniques, and gather evidence—not related to the covert entry—of who is connected to the drugs or contraband. At some point they then obtain a traditional search warrant, seize the drugs and other evidence, and arrest the suspects. The covert search was helpful, but the result would have been the same had no covert search occurred. The covert search was, as in Christopher, unnecessary.

The Frietas decision helps show how the necessity requirement would limit covert searches. Much like the Christopher case, in Frietas a DEA agent sought a delayed notice warrant to search a home suspected to have a methamphetamine laboratory. The affidavit provided ample probable cause to believe this was true, but

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106 For cases fitting this basic pattern, see, e.g., United States v. Frietas, 610 F.Supp. 1560, 1563 (N.D. Cal. 1985); United States v. Villeges, 899 F.2d 1324 (2d Cir. 1990); United States v. Pangburn, 983 F.2d 449 (2d Cir. 1993); United States v. Ludwig, 902 F. Supp. 121 (W.D. Tex. 1995); People v. Ceja, 2001 WL 1246632 (Cal. App. 6 Dist. Oct. 17, 2001). It is not possible to definitively conclude that the search was “unnecessary” in some of these cases, because the courts did not impose a necessity requirement (with the exception of Ceja and Frietas), and thus the police made no efforts to explain why the covert search was essential given the circumstances. Nonetheless, the facts of these cases strongly suggest that the covert search was, in fact, unnecessary.

did very little to explain the need for a delayed notice search. The affidavit stated, “[i]t would be advantageous for the investigation and safety of the surrounding residents if agents were able to enter 9839 Crestview Drive and determine the status of the laboratory, and any chemicals that may be present.”108 In a declaration filed much later, after the eventual suppression hearing, the DEA agent “said that the agents decided to apply for a covert entry warrant because ‘this would enable us to maintain the secrecy of the investigation and also confirm to a certainty our probable cause information that a lab was present.’”109

The agents executed the delayed notice warrant on December 13, 1984, searching the house at night when no one was present, and confirmed that there was a meth lab inside. But there was no evidence that the agents had any real need in Frietas to conduct a covert search. They had ample cause to believe there was a meth lab in the house. Agents took no action after the covert search to prevent possible environmental damage to the neighborhood. They did not obtain any leads inside the house during the covert search (and never claimed they were looking for any). After the covert search on December 13, they executed ordinary search warrants on several locations on December 20 and arrested Frietas. It appears that the investigation would have turned up precisely the same evidence—and arrests—had agents simply skipped the covert search on December 13.

The district court concluded the covert search was illegal, because it appeared to be unnecessary. The affidavit “made no reference to the inadequacy of other

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108 Frietas, 610 F.Supp. at 1564 (Quoting Hayes affidavit, ¶ 9).
109 Freitas, 800 F.2d 1451, 1460 (9th Cir. 1986) (Poole, J., dissenting) (quoting affidavit).
investigative techniques apart from the surreptitious entry.”\textsuperscript{110} The affidavit merely demonstrated that the covert search “would benefit the investigation, presumably by informing the agents as to the most effective time to execute the original warrants . . . .”\textsuperscript{111} Showing some benefit to the investigation, without any showing of necessity, “is obviously not a sufficient reason to permit this type of extraordinary procedure.”\textsuperscript{112} The Ninth Circuit agreed, stating that “[w]ith respect to a necessity requirement, the record before us . . . merely demonstrates that the search and seizure would facilitate the investigation of Freitas, not that it was necessary.”\textsuperscript{113}

The two early Second Circuit cases—\textit{Villegas} and \textit{Pangburn}—did not require police to show “necessity” (as that term is used in Title III). These cases nonetheless contain discussion that suggests, albeit indirectly, that the covert searches were unnecessary. In both \textit{Villegas} and \textit{Pangburn}, the Second Circuit concluded that the delayed notice search warrant was valid, and that the resulting evidence was legally obtained.\textsuperscript{114} In addition, however, the court in both cases also explained that even had there been some illegality, suppression would not be appropriate because all of the evidence discovered in the covert searches was also discovered in conventional searches.

In \textit{Villegas}, the court explained, “[w]e do not find in the record any suggestion that during the May 13 search the officers found any records or other writings that substantially assisted in their further investigations. What they gained from that search was confirmation rather than new leads.”\textsuperscript{115} The court thus had “no doubt” that “even

\textsuperscript{110} Frietas, 610 F. Supp. 1560, 1571.
\textsuperscript{111} Frietas, 610 F. Supp. 1560, 1571.
\textsuperscript{112} Frietas, 610 F. Supp. 1560, 1571.
\textsuperscript{113} Frietas, 800 F.2d 1451 (9th Cir. 1986).
\textsuperscript{114} United States v. Villegas, 899 F.2d 1324 (2d Cir. 1990); United States v. Pangburn, 983 F.2d 449 (2d Cir. 1993).
\textsuperscript{115} Villegas, 899 F.2d at 1338.
without any inspection of the interior of the Johnnycake farm buildings,” investigators nonetheless had ample probable cause “for the issuance of a warrant to search and seize any evidence of a cocaine manufacturing operation at Johnnycake farm.” In other words, at least in retrospect, the covert search of the farmhouse was unnecessary. The eventual search, seizure of evidence, and arrest of eleven occupants, would all have been accomplished by the conventional investigation techniques, regardless of the covert entry two months earlier.

In Pangburn, investigators conducted a covert search of a storage locker, finding precursor chemicals to manufacture illegal drugs. As in Villegas, the Pangburn court denied the suppression motion in part by explaining the lack of prejudice to the defendant from the covert search: “there was no prejudice to Salcido because the search of his storage locker would have taken place in exactly the same way if Rule 41 had been followed with regard to notice of the entry.” That is to say, the covert search in Pangburn seemed unnecessary: the agents would have found the same evidence, and arrested the same defendants, even if they had skipped the covert searches. The covert searches did not result in developing any new evidence against co-conspirators (nor does it appear to have been designed to accomplish that goal). The searches simply appear to have allowed the officer to confirm that chemicals were present in the lockers.

The caselaw, then, confirms the impression created by the statistics related to delayed notice search warrants. Under the current legal regime, police can obtain warrants for a covert search in many routine cases, as it is not difficult to show that keeping a search secret would prevent suspects from destroying evidence or escaping

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116 Villegas, 899 F.2d at 1338.
117 United States v. Pangburn, 983 F.2d 449 (2d Cir. 1993)
118 Pangburn, 983 F.2d at 455.
while the investigation continues. The cases also suggest that covert searches are being
used in many cases in which they are unnecessary—in which investigators could
successfully gather the same evidence and arrest the same suspects without using a covert
search. Drug cases account for most of the rapid grown in covert searches, and
unnecessary covert searches seem most common in drug cases—investigators enter and
confirm their suspicions that drugs are present, but end up with no new evidence than had
they waited to conduct a conventional search and seizure.

In short, covert, delayed notice searches were a procedural tool passed by
Congress as part of anti-terrorism legislation, meant to codify existing practice. That tool
has rapidly become an extremely common search technique—used in around ten percent
of all federal search warrants. It is used overwhelmingly in drug cases, and only rarely in
terrorism cases. The actual default period of delay in notice is ninety days, not the thirty
days envisioned by Congress. And covert searching is frequently used in cases in which
it is unnecessary—the same evidence and suspects could be obtained using conventional
search techniques.
II. The Unreasonableness of Covert, Delayed Notice Searches Under Section 3013a

Delayed notice search warrants raise serious Fourth Amendment issues, because providing notice to the occupant before searching is a component of Fourth Amendment reasonableness. The Supreme Court, relying on compelling historical precedents in the years leading up to the drafting of the Fourth Amendment, has held 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.”119 The Court so held in the context of the knock-and-announce rule—that officers must ordinarily announce their presence and request admission before breaking doors to search. But the logic of providing “notice” for a reasonable search is not confined to “knock and announce,” but also applies to delayed notice searches.

As explained above, courts and commentators evaluating delayed notice search warrants over the past three decades have never drawn any connections between delayed notice warrants and this common law notice requirement. It is not that courts have considered the issue and concluded that the common law requirement does not apply to delayed notice warrants. Instead, no court has ever considered the question at all. 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.

This doctrinal separation has never been explained or justified, merely assumed. This article argues that the common law “knock and announce” requirement, and the

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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.

This part first explains the origins and nature of the common law “knock and announce” requirement—or what I call, more broadly, the common law “notice” requirement. I then explain why covert, delayed notice searching clearly implicates this constitutional principle.

A. 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.”\(^{120}\) That common law rule, the Court held, “forms a part of the reasonableness inquiry under the Fourth Amendment.”\(^{121}\)

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. 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

\(^{120}\) Wilson, 514 U.S. at 929.

\(^{121}\) Wilson, 514 U.S. at 929.
the time of the framing.”122 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.”123

The starting point is the ancient common law maxim that a man’s house is his castle.124 That claim is at the same time majestic and vastly 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 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 1791.125 A speech given in the port city of Charleston in 1734 captures the deep passion of this view. A public assembly arose after a sea captain died attempting to keep a marshal off his ship.

‘A greasy fellow with a leather apron’ proclaimed that ‘my house is my castle, and so is my ship, and therefore . . . I lay it down as a fundamental Law of Nations, that if the greatest Officer the King has, was to come with a thousand Warrants against me for any crime whatsoever, if he offers to take me out of my castle, I can kill him, and the law will bear me out.’126

122 Wilson, 514 U.S. at 931.
123 Wilson, 514 U.S. at 929.
124 Wilson, 514 U.S. at 929 (citing 3 W. Blackstone, Commentaries *288). See also William Pitt before Parliament in 1763, quoted by Douglas, J., in dissent in Frank v. Maryland, 359 U.S. 360, 378-79 (1959) (“The poorest man may in his cottage, bid defiance of all the forces 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 that ruined tenement!”).
125 Cuddihy, at 105-128 (“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 185-188 (“Popular Opinions on Search and Seizure in the Colonies, to 1760”).
126 Cuddihy, at 188. See also Cuddihy, at lxii (“[W]hen Constable Valington Witman attempted to serve a warrant on three fellow Rhode Islanders in 1663, they replies that ‘they . . . were Resoulffed to knock
This greasy fellow’s sentiment is clear, even though his legal analysis is wrong: a single valid warrant, let alone a thousand, was a lawful basis to forcibly remove a man from his castle in the eighteenth century and earlier.\textsuperscript{127}

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 \textit{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.\textsuperscript{128}

What was the nature of this “notice” requirement? In the \textit{Case of Richard Curtis}, in 1757, the court explained that “no 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.”\textsuperscript{129} 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.”\textsuperscript{130} Several early cases refer to the principle as one of “demand and refusal.”\textsuperscript{131}

\[\text{Down any man that should pry upon the for ther howse was ther Castle and this was the mine [i.e., mind] of one and all [\text{sic}].}” (citing Ct. recd., 16 May 1663, R.I. Ct. Recs., vol 2 (1662-70), pp. 15-16)).

\textsuperscript{127} Wilson, 514 U.S. at 931 (citing Semayne’s Case, 5 Co. Rep. 91a, 91b, 77 Eng.Rep. 194, 195 (K.B.1603)). Wilson cites other early authorities for the proposition. See Wilson, 514 U.S. at 932.

\textsuperscript{128} Wilson, 514 U.S. at 931-32 (quoting Semayne’s Case, 5 Co. Rep. 91a, 91b, 77 Eng.Rep. 194, 195-196 (K.B.1603)).


\textsuperscript{130} Case of Richard Curtis, Fost. 135, 137, 168 Eng.Rep. 67, 68 (Crown 1757).

\textsuperscript{131} Memorandum, 1682, 1 January 1682, (1682) Jones, T. 233, 84 E.R. 1233, 1682, [233] Post Term. Trin. 35 Car. 2; King v Bird, 89 E.R. 811, 812 (1690-01-01), (1690) 2 Shower. K.B. 87.
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.” In a British case decided a decade after the Fourth Amendment was drafted, Justice [Judge?] 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.”

Many pre-revolutionary authorities repeat this principle. The “notice” principle continued to be repeated in cases in the years soon after the 1791 drafting of the Fourth Amendment. In Read v. Case, an 1822 Connecticut case, the court refers to this principle as “the rule requiring notice.”

As Wilson makes clear, there are circumstances—discussed below—in which this “notice” principle does not apply—such as danger to the officers and risk of destruction of evidence. Before turning to the exceptions from the notice principle, however, we must first evaluate whether this notice rule has any application to the practice of covert, delayed notice searching.

132 See 1 M. Hale, Pleas of the Crown *582 (quoted in Wilson, 514 U.S. at 932).
134 See, e.g., Memorandum, 1682, 1 January 1682, (1682) Jones, T. 233, 84 E.R. 1233, 1682, [233] Post Term. Trin. 35 Car. 2 (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.”); King v Bird, 89 E.R. 811, 812 (1690-01-01), (1690) 2 Shower. K.B. 87 (“upon 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”).
135 Ratcliffe v Burton, 127 E.R. 123, 126 -127 (1802-11-18) (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”); John Hutchison v. Birch and Another, Sheriffs of London, 12 November 1812, (1812) 4 Taunton 619, 128 E.R. 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).
B. The “Rule Requiring Notice” and Covert, Delayed Notice Searches

1. Covert, Delayed Notice Searching Presumptively Violates the Notice Principle

In the most straightforward sense, a covert, delayed notice search plainly infringes on this “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 “signifying the cause of his coming,” or “mak[ing] request to open doors.” A delayed notice searcher enters the home without “first . . . announ[ing] his presence and authority.”

A delayed notice search is simply a more extreme version of a no-knock search. Rather than postponing the required notice for a minute or two (as in a no-knock search), officers in a delayed notice search postpone notice for thirty days or longer. In a no-knock search, there is no prior notice of the search, but notice occurs immediately upon entry: the shock and surprise suffered by the occupants in a no-knock search is part of receiving notice of the search, by the sudden entry of government officials. In a delayed notice search, the notice is delayed much longer.

Notwithstanding the fact that a delayed notice search plainly implicates the notice requirement recognized in Wilson v. Arkansas, no one—no court, legislator, or commentator—has ever discussed Wilson v. Arkansas in the context of delayed notice search warrants. On the contrary, many courts analyzing delayed notice search

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138 Wilson, 514 U.S. at 929.
139 Wilson v. Arkansas is not cited in any of the cases (after 1995, when Wilson was decided) analyzing delayed notice search warrants. None of the delayed notice search warrant cases, starting with Frietas in 1985, discuss the common law “knock and announce” requirement. None of the law review articles analyzing delayed notice searches discuss the practice under the rubric of Wilson or the “knock and announce” requirement. One article—not focused on analyzing delayed notice warrants, but discussing the practice to illustrate a thesis concerning federalism—does mention Wilson v. Arkansas in the context of delayed notice warrants. Robert M. Bloom & Hillary Massey, Accounting for Federalism in State Courts:
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.”\(^{140}\) 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.”\(^{141}\) 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.”\(^{142}\) Far from explaining why the constitutional “notice and demand” requirement is not implicated by a covert search, the court in *Christopher* was operating in an entirely separate constitutional universe, one in which notice of a search is a ministerial matter not of constitutional magnitude. Notwithstanding *Wilson*, the disregard of the “notice” principle in *Christopher* is typical of delayed notice search warrant cases.

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

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\(^{141}\) *Christopher*, 2009 WL 903764, *7 (citing United States v. Cafero, 473 F.2d 489, 499 (3d Cir. 1973)).

\(^{142}\) *Wilson*, 514 U.S. at 929.
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 mental categories—without explaining why they do not overlap—courts and commentators have then proceeded to analyze cases within one box or the other box, without ever pausing to realize 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 (I engage one such argument below). But there is no justification for the total failure of courts and commentators to engage in the argument at all.

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. Stated differently, one must identify the interests protected by the “knock and announce” requirement, and evaluate whether a delayed notice search infringes on those same interests.

**2. Covert, Delayed Notice Searching: A More Extreme Version of No-Knock Searching**

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. Ultimately, this article argues that the interests affected by these two types of “no-notice” searches are sufficiently similar in character 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 justifies subjecting the practice to Fourth Amendment scrutiny.

As Tracey Maclin explained, “[a]ccording to pre-Framing era English common-law sources, the announcement rule served three purposes: it decreased the potential for violence; it protected a home’s privacy; and it prevented the physical destruction of the home.”

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. Another concern is the “fear and dismay” created by a no-knock search—the unpleasant surprise of strangers breaking into one’s home. Following on the heels of “fear and dismay” is the concern that an unannounced search might provoke violent resistance from the surprised occupant. Thus it was important

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144 Semayne’s Case, 77 Eng.Rep. 194, 195-196 (K.B. 1603) (“great damage and inconvenience might ensue to the party” who, had he known of the process, might have obeyed it).
145 Ratcliffe v Burton, 127 E.R. 123, 126 (1802-11-18) (Opinion of Heath, J. “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.”); Note, Announcement in Police Entries, 80 Yale L.J. 139, 140-42 (1970).
146 Launock v. Brown, 2 B. & Ald. 592, 594 (“how 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.”); Joel Prentiss Bishop, 3rd Ed., Boston, Little, Brown & Co. 1880 (“§ 201. Notice and Demand.” (quoting Launock); Note, Announcement in Police Entries, 80 Yale L.J. 139, 140-42 (1970).
not only to be given notice that someone was about to invade, but that the invader was acting pursuant to lawful authority.\footnote{Case of Richard Curtis, Fost. 135, 137, 168 Eng.Rep. 67, 68 (Crown 1757) (“[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 ...”)}

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 relevant locks or otherwise gains entry without causing any physical damage.\footnote{See, e.g., United States v. Villegas, 899 F.2d 1324 (2d Cir. 1990); United States v. Pangburn, 983 F.2d 449 (2d Cir. 1993); United States v. Ludwig, 902 F. Supp. 121 (W.D. Tex. 1995); United States v. Hernandez, 2007 WL 2915856 (S.D. Fla. Oct. 4, 207); United States v. Christopher, 2009 WL 903764 (D. Virgin Islands, March 31, 2009). 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.} This is sometimes true in “sneak and peek” cases, where the officials conduct a search and perhaps take photographs or photocopy documents, but do not remove anything. In other cases, however, the government gains entry by damaging a lock, door, or window.\footnote{See, e.g., United States v. Espinoza, 2006 WL 3542519 (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); United States v. Miranda, 425 F.3d 953 (11th Cir. 2005) (agents conducted a covert search, “removed three pounds of methamphetamine,” and made “it appear that a burglary had been committed”); James Ewinger, Federal Investigators used delayed-notice search warrant to help crack Greater Cleveland heroin ring, The Plain Dealer, Sept. 26, 2010 (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”). See also United States v. Howard, 289 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.”).} In particular, 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. 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.

The second concern, “fear and dismay,” applies 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. 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.

Delayed notice searches, however, create other forms of “fear and dismay.” In all delayed notice cases, the searched party likely experiences some type of dismay upon eventually being notified that the government searched her home or business weeks or months earlier. Rather than being startled at the presence of unexpected officers breaking into one’s house, the searched party is suddenly appraised of the “thought of strangers walking through and visually examining the center of our privacy interest, our home,” without the occupant having known they were there. The searched party might begin trying to remember where she was at the time of the likely search, and whether she noticed anything amiss in her home. She may wonder how many times the government has invaded her home without her knowledge. Much like a person who returns home to discover her home broken into, she experiences the painful loss of privacy caused by the knowledge that an uninvited, unwanted stranger has been present inside one’s home.

150 See supra note ___.
151 Frietas, 800 F.2d at 1456.
This privacy loss is real and painful even in the absence of any stolen goods or damaged property.

In “sneak and steal” cases in which officials seize items during a surreptitious search, the occupants suffer the additional fear and dismay of believing their home has been robbed. For those present when the government breaks in without notice, there is the sudden fear and alarm of experiencing a home invasion—an alarm that substantially abates upon learning that the invader is a government official, not a burglar. Targets of a delayed notice search experience the sinking feeling of learning about a past invasion. Their sudden alarm is not as acute (there are no strangers bursting through the door), but their dismay lasts much longer. Their belief that a stranger invaded their home is not resolved within minutes, as in a conventional unannounced search, but may last several months, until they eventually receive government notice of the search. Thus targets of a “sneak and steal” search suffer the fear and dismay of criminal victimization.

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, covert entry is done at a time when officers have good reason to believe no one is present—there is minimal danger of an immediate violent confrontation from the occupants.

That said, 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. When a drug dealer discovers that his home has been burglarized and his drugs and money stolen, he will almost invariably suspect certain
persons—such as rival gangs—of committing the theft. This creates a serious danger that he will respond violently to whichever rival drug dealer he suspects may have conducted the raid. 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.” 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.” 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.” 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 move operations to another location. The court does not mention the attendant risk that the “activity” “precipitated” by the staged burglary could have been something much more violent.

Delayed notice searches create other types of “fear and dismay” not present with conventional searches. As stated by the Ninth Circuit in 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.” On this view, while it is certainly unpleasant to watch

154 425 F.3d 953 (11th Cir. 2005).
155 Freitas, 800 F.2d at 1456.
government officials search your home, it is even worse to imagine government officials searching your home when you are away. When present, the occupant can at least observe what is being done. When the search is conducted secretly, the occupant can only imagine where the officials searched.

Last but not least, delayed notice searches, unlike conventional searches or “no-knock” searches, impose a direct privacy cost on all members of the political community. With traditional searches, each person in the community knows when and if her home or business has been searched by the government. That person suffers a significant privacy intrusion—an intrusion justified by the finding of probable cause that the specific home or business contains contraband or evidence of a crime. With delayed-notice searches, however, every member of the community now suffers a more indirect and uncertain loss of privacy. The more frequently the government conducts covert searches on private residences and businesses, the more each person in the community must begin to wonder whether their own private sanctuary has been invaded by a covert government search.

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].’” Covert searching threatens to cut off “domestick security” in a particularly corrosive and broad-reaching manner.

With ten traditional search warrants, ten individuals in the community of one thousand suffer a significant privacy invasion. The remaining 990 individuals suffer no privacy intrusion—they rest assured in the knowledge that their homes have not been

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invaded. With ten delayed notice warrants, no person is aware—until notice is provided a month or more later—that their privacy has been invaded. But all one thousand members of the community now suffer a state of uncertainty—wondering whether government officials were recently searching through their home or business.

The privacy intrusion of a traditional search, then, 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. Delayed notice searches feature this same deep but narrow intrusion, as the few persons whose homes were searched suffer the same privacy intrusion of a traditional search. But delayed notice searches 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 of wondering whether the government has recently searched their home, 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. The delayed notice aspect of wiretapping is a necessity, if the wiretap is to be of any use. Giving speakers notice that their conversation is being recorded would, presumably, prompt them to alter their conversation to remove any incriminating statements.\(^{157}\)

As Kent Greenawalt has observed, however, the more wiretapping (covert searches of conversations) occurs, the greater the privacy intrusion on the entire community. 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

\(^{157}\) That said, the human capacity for self-incrimination seems to know no bounds, as there are many examples of persons making inculpatory statements over phone lines they knew were being recorded. See, e.g., United State v. Bennett, 664 F.3d 997 (5th Cir. 2011).
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.”158 This loss of privacy in telephone conversation may also infringe free and open communication in the society at large: “[a]s 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.”159 With delayed notice searches of physical spaces, a similar danger exists. The more widespread the practice, the more everyone in the community will begin wondering whether their private property has been invaded.

It was argued above that, as a matter of literal search mechanics, delayed notice searches are simply a more extreme version of a no-knock search—the notice delayed by weeks or months rather than minutes. When considering the deeper 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 manner not implicated by “no-knock” searches. As a matter of underlying principles, then, a delayed notice search is a more extreme version of a no-knock search—it implicates many similar privacy interests, and creates additional and significant privacy intrusions.

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.

3. Covert Searching with Delayed Notice Warrants Does Not Appear in the Historical Record

The historical case regarding delayed notice search warrants does not consist solely of the analogy to the knock and announce rule. Delayed notice search warrants are not a technological innovation, like wiretapping or GPS monitoring. Instead, the practice is a procedural innovation that would have been available to those requesting warrants throughout history. The idea of a secret search—and the benefits that secrecy provides—are fairly obvious.

There was no technological barrier to delayed notice searches, and the basic concept of a covert search is simple and ancient. That said, it does not seem to have occurred to searchers, in the centuries in England and the colonies leading up to 1791, to ask for search warrants authorizing a secret search with notice given only after the fact (or not at all).

There are many cases, discussed above, emphasizing that searchers must announce their presence and authority before breaking a door to conduct a search. Those cases, however, all presume that the occupants will learn of the search the instant the door is broken and the searchers loudly enter and begin their rough 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, without notice—does not appear in any of the historical work on pre-
Fourth Amendment search and seizure. The practice does not appear in Cuddihy’s magisterial history of search and seizure up to the Fourth Amendment. Nor does this practice appear in earlier canonical works by Nelson Lasson and Jacob Landynski, or more recent scholarship by Thomas Davies and others. It is difficult to effectively convey negative results of research efforts, even when those negative results are informative. Suffice it to say that in addition to reviewing the authorities cited above, repeated searches for pre-revolutionary cases discussing delayed notice search practices have resulted in the discovery of many cases repeating the “demand and refusal” requirement stemming from Semayne’s Case (or earlier), and zero cases discussing a legally authorized covert search.

There are two incidents from what might be called the “pre-history” of the Fourth Amendment that bear mention: covert searches conducted at Cambridge University in 1557, and a covert search of Sir Edward Coke’s home and law offices in 1621. Neither of these cases involve search warrants authorizing covert entry, and neither case can be described as an immediate precursor to the Fourth Amendment. Nonetheless, both stories involve covert, delayed notice searches, and both stories are part of the long history of

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161 Nelson B. Lasson, The History and Development of the Fourth Amendment to the United States Constitution (Du Capo Press 1970) (1937); cite Landynski; Davies, Recovering, supra note __.

162 See Wilson, 514 U.S. at 932 n.2 (noting that the principle “appears to predate even Semayne’s Case,” possibly as far back as 1275 or earlier).

163 For cases expressing the “notice” requirement, see supra notes __.
abuse and oppression that led to the development of British search and seizure limitations and, in the new American republic, to the Fourth Amendment.\footnote{164}{My description of both cases is drawn from Cuddihy, The Fourth Amendment, supra note __.}

The sixteenth and seventeenth featured many invasive, general searches for the purpose of discovering and punishing religious dissent.\footnote{165}{Cuddihy, 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).} In 1557, during the reign of Catholic Queen Mary, a royal commission was “[d]ispatched to Cambridge University to investigate its conformity to Catholicism.”\footnote{166}{Cuddihy, at 73-74.} The commission “demanded that each member of the university community submit an inventory of his personal library to facilitate the destruction of heretical books.”\footnote{167}{Cuddihy, at 74.} The head of each college of the university was instructed to enforce this decree. 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. In response, the commission “devised an efficient 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.”\footnote{168}{Cuddihy, at 74.}

In other words, the commission turned to covert searches of scholarly residences, deliberately conducted without notice—when the scholars were away by design. It is hard to imagine that the scholars in question could have destroyed 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. Sir Edward Coke, author of the Institutes of the Common Law, had previously served as Attorney General and in the King’s Privy Council. By 1621, however, Coke had fallen out of favor and was imprisoned by James I. Government searchers conducted a similar tactic as that employed in the Cambridge University searches—search a man’s home while he was away. “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.” 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. Years later, in 1628 in a speech to the House of Commons, Coke cited this interrogation and search “as illustrating the need for what became the clause against imprisonment without cause shown. Coke contended that if any man’s house could be searched while he was confined without being told the cause, ‘they will find cause enough.’”

Neither of these cases provides direct commentary on the legality of a covert search authorized by delayed notice warrant. Both, however, show the use of covert searches, deliberately conducted when the occupant was absent. And both cases are part

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169 Cuddihy, at 140.
170 Cuddihy, at 141.
171 Cuddihy, at 141 (citing S., 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).
of the history of abusive search practices that eventually led to the drafting of the Fourth Amendment.

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. 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.” If not, then silence is irrelevant: “[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.”

In one sense, the basic concept of a covert search was clearly within the imagination of the founders. It is less clear whether they would have thought of the notion of conducting a traditional warrant-authorized search, but doing so covertly. The absence of delayed notice search warrants seems a function of the focus of the criminal justice system, and the institutions (or lack thereof) surrounding those conducting searches. Today, investigators use delayed notice search warrants mostly in complex investigations, in attempts to unravel complicated, ongoing criminal conspiracies. 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.

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172 See, e.g., H. Jefferson Powell, Rules for Originalists, 73 Va. L. Rev. 659, 671-672 (1987) (“Rule 4: Arguments from silence are unreliable and often completely ahistorical.”); 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.”).
175 See supra Part __.
Criminal law then, like now, punished violent crime like murder or rape, as well as a variety of theft offenses. But delayed notice search warrants (today) are 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. 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 to look for fingerprints or other incriminating forensic evidence.\footnote{Davies, Recovering, at 620.} Indeed, “[i]n the late eighteenth century, searches were still of limited utility to criminal law enforcement.”\footnote{Davies, Recovering, at 620.} 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.\footnote{Davies, Recovering, at 620.  Cuddihy explains that colonial search warrants “were often used to capture fugitives, collect revenues, stop counterfeiting, and seize contraband of various sorts.” Cuddihy, at 231. See generally Cuddihy 232-241 for a discussion of the typical subjects of colonial warrants.}

Criminal investigations were very different because law enforcement officials were very different. In the centuries before 1791, neither England nor the colonies had standing police forces with powers of criminal investigation.\footnote{Lawrence Friedman, Crime and Punishment in American History 27 (1993); Davies, Recovering, at 620-623.} “There were no police in the modern sense. . . . Constables made arrests, and night watchmen patrolled the streets of the bigger towns.”\footnote{Friedman, Crime and Punishment in American History at 27.} 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.\footnote{Friedman, Crime and Punishment in American History at 27; Davies, Recovering, at 620.}
and criminal investigation in particular, was conducted by amateurs, not trained, salaried professionals.\textsuperscript{182} Today, delayed notice search warrants today are sought and executed mostly by the FBI,\textsuperscript{183} a large, well-funded institution devoted to criminal investigation that has no counterpart in the colonial era.

The amateur nature 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.”\textsuperscript{184} 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 investigate crime.”\textsuperscript{185}

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.’”\textsuperscript{186} 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.”\textsuperscript{187} It is not very surprising that these actors did not develop a new procedural tool most useful for long-term complex criminal investigations.

\textsuperscript{182} Friedman, Crime and Punishment in American History at 27.
\textsuperscript{183} See supra Part __.
\textsuperscript{184} Davies, Recovering, at 620.
\textsuperscript{185} Davies, Recovering, at 621-622.
\textsuperscript{186} Davies, Recovering, at 640-41.
\textsuperscript{187} Davies, at 641 (citing Friedman, at 68).
Customs searches—a major focus of the framers’ interest in general warrants—were somewhat different. They were initiated by higher-status customs officers rather than lowly constables. Even so, customs officers did not have anything like the standing, salaried investigative team of today’s joint task force operations. Instead, relatively few customs officers sought to monitor smuggling in large areas, assisted by local officials dragged into service through writs of assistance.\footnote{Cuddihy, at 491-500.} Colonial customs officers struggled mightily simply to execute basic searches and confiscate untaxed goods. They faced a hostile merchant population dependent on widespread smuggling for large parts of the colonial economy.\footnote{Cuddihy, at 491-500.} Even when smuggled goods were discovered, customs agents often lacked the manpower to effectively secure those goods before locals brazenly spirited them away.\footnote{Cuddihy observes that “an obstructive public and uncooperative local officials” effectively defeated the purpose of general customs searches. 511. Colonists “[t]arred and feathered customs officers, cowed magistrates,” and conducted “mob ‘liberations’ of seizures.” 511. “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, Bernard [a customs agent] 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.” Cuddihy, at 511.} Colonial courts repeatedly refused to grant customs officers search powers necessary to carry out their duties.\footnote{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 officers seized the ship Polly on the Tauton River, loaded with molasses far exceeding what had been declared. That evening, “a mob of forty locals empties the ship and left her aground.” Id. at 491-92. In 1776, two customs agents found “over ten hogsheads of smuggled rum and sugar” in Enoch Isley’s store in Falmouth. They could not remove the barrels themselves, and neighbors refused to help. They obtain a writ of assistance, which was physically torn from the pocket of a local official, and were attacked by a local mob. By the next day, the hogsheads had vanished from Isley’s store. Id. at 496. 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. Their attempt to search Malcolm’s cellar led to an escalating confrontation between customs agents and Malcolm that nearly led to bloodshed. Id. at 496-500.} In short, colonial customs officers were waging a losing battle to even detect and confiscate untaxed 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. They were busy fighting to obtain adequate legal authority and manpower to simply search and seize contraband goods; they did not have the time to pursue lengthy, complex investigations for which delayed notice search warrants would have proved a useful tool.

In sum, while the general idea of a covert search was clearly within the conceptual world of the framers, the specific idea of obtaining a warrant for a covert search as part of an extended criminal investigation likely would not have occurred to them. Pre-revolutionary law enforcement officials did not ask for delayed notice search warrants because criminal investigation was a simpler and more direct task. Unpaid volunteers sought to keep the peace and bring wrongdoers before the courts, not conduct elaborate stings or long-term investigations. Under-staffed customs officers struggled mightily to execute ordinary searches and seize smuggled goods, and had no time or ability to sustain a complex, covert investigation.

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.”\textsuperscript{192} Scholars must resist trying to “discover” the hidden views of the framers on specific issues that did not confront them, and which they never discussed.\textsuperscript{193} As Justice Thomas has wisely 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

\textsuperscript{192} Davies, Recovering, at 750.
\textsuperscript{193} Davies, Recovering, at 734-35 (“the 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.”)
common law provides much guidance.”

Covert searches do appear—in the search at Cambridge and of Sir Edward Coke—in the history of search abuses leading up to legal reforms such as the Fourth Amendment. And the common law had firmly adopted a 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—and 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.” 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. The drafters articulated relatively extreme search restrictions not only to vindicate privacy interests, but also as a political maneuver—an extremely effective one—to split the anti-federalists by offering them an amendment that seriously curtailed federal (not state) search power. By proffering a Bill of Rights that dramatically limited federal powers, the Federalists sought to garner support from a sufficient number of Antifederalists to ensure ratification of the constitution. As Cuddihy

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195 Davies, Recovering, at 749-750.
196 Cuddihy, 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”).
197 Cuddihy, at 706-712. Cuddihy explains that James Madison “designed the Bill of Rights as a wedge between the moderate and radical factions of Antifederalism.” 708.
explains, “[t]he short-term goal of the Fourth Amendment and 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.”

Part of those restrictions, as the Supreme Court recognized in *Wilson v. Arkansas*, is the longstanding common law requirement that notice of a search be given before searchers break into private dwellings. The delayed notice search warrant is a novel procedural device that presumptively contravenes that common law—and constitutional—requirement. In addition, the procedural innovation of delayed notice search warrants results in serious intrusions into the privacy of the “home as castle”—intrusions that go beyond conventional search warrants. For all these reasons, it is reasonable to treat delayed notice search warrants as constitutionally suspect, and permissible only with compelling government justifications and corresponding procedural limitations. The specific content of those justifications, and procedural limitations, is the subject of the next section.

**C. Exceptions to the Rule Requiring Notice**

Part II.A set forth the general rule that providing notice of a search and demanding entry was required at common law, and is required today by the Fourth Amendment. Part II.B argued that this “rule requiring notice” clearly has bearing on the legality of delayed notice search warrants. As noted above, however, the common law “rule requiring notice” was not absolute. The pre-revolutionary caselaw recognizes—and

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198 Cuddihy, at 710.
Wilson v. Arkansas reaffirms—that searches sometimes can be conducted without advance notice: specifically, in exigent circumstances.

This section briefly explains the exigent circumstances that justify dispensing with advance notice, and then compares the current justifications under section 3103a for delaying notice of a search with the traditionally recognized categories of exigent circumstances.

Briefly stated, section 3103a allows for delayed notice in five circumstances (listed in section 2705(a)(2)(A)-(E)). Four of those circumstances—subparts (A)-(D)—fall roughly under the traditional doctrine of exigent circumstances. The fifth justification for delayed notice—subpart (E)—is not an exigent circumstances. This fifth justification—permitting delayed notice to protect an ongoing investigation is thus, at first glance, constitutionally suspect.

1. Notice and Exigent Circumstances

In Wilson v. Arkansas and later cases, the Court recognized several long-established justifications for dispensing with the common law “knock and announce” requirement. As Wilson demonstrates, there is ample historical evidence that the common law rule was flexible, and permitted searches without advance notice in certain circumstances.199 Over time, the Court has described these exceptions as “exigent circumstances.”200

First, “because the common-law rule was justified in part by the belief that announcement generally would avoid ‘the destruction or breaking of any house ... by which great damage and inconvenience might ensue,’ courts acknowledged that the

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199 Wilson, 514 U.S. at 934.
presumption in favor of announcement would yield under circumstances presenting a
threat of physical violence.”\footnote{Wilson, 514 U.S. at 935-36 (quoting Semayn’s Case).} An early Connecticut Case, Read v. Case, explained that
while notice is the general rule, “there are cases not within the reason of it, and which,
manifestly, form a just and reasonable exception.”\footnote{Read v. Case, 5 Conn. 166, 170 (1822) (quoted in Wilson at 936). See also Mahomed v. The Queen, 4 Moore 239, 247, 13 Eng.Rep. 293, 296 (P.C.1843) (“While he was firing pistols at them, were they to knock at the door, and to ask him to be pleased to open it for them? The law in its wisdom only requires this ceremony to be observed when it possibly may be attended with some advantage, and may render the breaking open of the outer door unnecessary”) (quoted in Wilson).} In Read, the occupant “had
resolved . . . to resist [arrest] even to the shedding of blood,” and thus the court held that
the case “was not within the reason and spirit of the rule requiring notice.”\footnote{Read v. Case, 5 Conn. 166, 170 (1822).} The
searching party was not “obliged by law to make a demand, that would probably issue in
the destruction of his life.”\footnote{Read v. Case, 5 Conn. 166, 170 (1822).} The Read court observes that “[i]mminent danger to
human life, resulting from the threats and intended violence . . ., constitutes a case of high
necessity; and it would be a palpable perversion of a sound rule to extend the benefit of it
to a man, who had full knowledge of the information he insists should have been
communicated; and who waited only for a demand, to wreak on . . . [the searcher] the
most brutal and unhallowed vengeance.”\footnote{Read v. Case 1822 WL 11, 4 (Conn. 1822)}

Second, “courts held that an officer may dispense with announcement in cases
where a prisoner escapes from him and retreats to his dwelling.”\footnote{Wilson, 514 U.S. at 936.} An early New York
case explained, “[w]here a party arrested by an officer, breaks away and shuts himself up
in his house, the officer is justifiable, in the attempt to re-take him, to break open
the outer door of the house of such party, without making known his business demanding

\begin{footnotes}
\footnotetext[1]{Wilson, 514 U.S. at 935-36 (quoting Semayn’s Case).}
\footnotetext[2]{Read v. Case, 5 Conn. 166, 170 (1822) (quoted in Wilson at 936). See also Mahomed v. The Queen, 4 Moore 239, 247, 13 Eng.Rep. 293, 296 (P.C.1843) (“While he was firing pistols at them, were they to knock at the door, and to ask him to be pleased to open it for them? The law in its wisdom only requires this ceremony to be observed when it possibly may be attended with some advantage, and may render the breaking open of the outer door unnecessary”) (quoted in Wilson).}
\footnotetext[3]{Read v. Case, 5 Conn. 166, 170 (1822).}
\footnotetext[4]{Read v. Case, 5 Conn. 166, 170 (1822).}
\footnotetext[5]{Read v. Case 1822 WL 11, 4 (Conn. 1822)}
\footnotetext[6]{Wilson, 514 U.S. at 936.}
\end{footnotes}
admission and receiving a refusal, where the pursuit is fresh and the party consequently aware of the object of the officer.”\textsuperscript{207}

Third, the \textit{Wilson} Court asserted, “courts have indicated that unannounced entry may be justified where police officers have reason to believe that evidence would likely be destroyed if advance notice were given.”\textsuperscript{208} In this final category the Court is on considerably less firm historical ground. Rather than citing cases pre-dating 1791 (or in the decades soon after), the Court cites two twentieth century cases, \textit{Ker v. California} (1963) and \textit{People v. Maddox} (Cal. 1956). Neither \textit{Ker} nor \textit{Maddox} cites to any historical support for the idea that notice can be dispensed of to prevent the destruction of evidence. The lack of historical support for this exception has not prevented the Court from firmly adopting this exception to the notice requirement.\textsuperscript{209}

The historical record on this point is silent—there are no pre-1791 cases endorsing the argument that notice can be delayed for fear of losing evidence, and there are no pre-1791 cases rejecting that argument. The lack of discussion of this issue in the early cases is most likely due to the objects of pre-1791 searches. The “destruction of evidence” exigency is today invoked most commonly in cases where the object of the search is illegal drugs. Illegal drugs, at least in small quantities, can be readily disposed of inside of a house with only moment’s notice. But seventeenth and eighteenth century searches were not looking for bags of cocaine or marijuana (and for that matter, there were no flush toilets inside the house providing for ready disposal\textsuperscript{210}). Instead, they were

\textsuperscript{207} Allen v. Martin, 10 Wend. 300, 300 (1833).
\textsuperscript{208} Wilson, 514 U.S. at 936.
\textsuperscript{210} Indoor plumbing did not become common in the United States until the nineteenth century. Wally Seccombe, Weathering the Storm: Working-Class Families from the Industrial Revolution to the Fertility Decline, at 47 (Verso 1995). The United States, in a 1995 brief to the Supreme Court argued this very point: “various indoor plumbing facilities . . . did not exist” when the “knock and announce” rule was
looking mostly for suspected felons, stolen goods, and untaxed commercial goods.\footnote{211}

There was not much practical likelihood that suspects would be able to completely destroy the objects of the search in the few minutes’ time occasioned by the announcement of the impending search. It is therefore not surprising that pre-1791 cases do not analyze this contemporary justification for bypassing the notice requirement.

2. The Hidden Unity of “Exigent Circumstances” and “Protecting an Investigation”

At first glance, it seems that the legal justifications for delayed notice search warrants differ in an important respect from the justifications for no-knock searches. No-knock searches are permissible in exigent circumstances: to prevent the destruction of evidence, the escape of a suspect, or physical harm to the police or some other person.

When Congress wrote for the criteria for delayed notice searches (in section 3103a), it appeared to add a new justification. In addition to authorizing delayed notice searches in cases basically consisting of exigent circumstances (section 2705(A)-(D)), Congress also authorized delayed notice searches to prevent serious jeopardy to an investigation (section 2705(E)). This seems to be a significant expansion of the traditional grounds for bypassing the notice requirement—in particular since evidence shows that the “protecting an investigation” criterion is the one most commonly invoked to obtain delayed notice search warrants under section 3103a.

A deeper analysis, however, reveals that the justifications for no-knock searches and the justifications for delayed notice searches are fundamentally the same. Despite the

\footnote{211 See supra note \_\_ [Cuddihy, at 231. See generally Cuddihy 232-241 for a discussion of the typical subjects of colonial warrants.]}

\footnote{adopted. Accordingly, “if the officers knew that . . . the premises contain no plumbing facilities . . . then the invocation of the destruction-of-evidence justification for an unannounced entry would be unreasonable.” [FIND CITATION].}
apparent differences, in both cases the search technique is always justified by a combination of exigent circumstances and the need to protect the secrecy of the investigation. The reasons for authorizing a no-knock entry and a covert entry are, in this sense, identical: keeping the police investigation secret (whether for another minute or for days or weeks) in order to prevent some bad outcome from resulting (destruction of evidence, escape, etc.).

The “exigent circumstances” doctrine does not seem to encompass the broad category of preventing jeopardy to an ongoing investigation.\(^{212}\) In *Wilson* and its progeny, the Court has made clear that advance notice may be dispensed of in exigent circumstances, but has never asserted that notice can be bypassed for the general purpose of protecting an ongoing investigation.

In the USA Patriot Act, however, Congress provided that a delayed notice search warrant may be authorized for exigent circumstances or to protect an ongoing investigation. At first glance, then, Congress seems to have added a new criterion—not recognized in the pre-1791 notice cases or the Supreme Court’s knock-and-announce cases—for bypassing the notice requirement.

Despite the apparent differences between the justifications for no-knock searches and delayed notice (covert) searches, in both cases the search technique is always justified by a combination of exigent circumstances and the need to protect the secrecy of the investigation. In the case of either a no-knock entry or a covert search, the purpose of the technique is to keep the police investigation secret (whether for another minute or for

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\(^{212}\) Exigent circumstances include: (1) the emergency aid exception, (2) hot pursuit of a suspect, and (3) the need to prevent the destruction of evidence. *Kentucky v. King*, 131 S.Ct. 1849, 1856-57 (2011).
days or weeks) in order to prevent some bad outcome from the search (destruction of evidence, escape, etc.).

At first blush, a no-knock entry does not seem to be justified by the desire to prevent serious jeopardy to an investigation. With a no-knock entry, after all, the occupants learn of the search only a minute or two after they would otherwise have learned with notice and a demand for entry. Thus a no-knock search does nothing to protect the long-term viability of a covert investigation.

What a no-knock entry does do—and what is the precise object of bypassing the notice and demand rule—is to keep the investigation (in particular, the impending search) secret for an additional minute or two beyond what would occur with the notice and demand requirement. The way a no-knock entry protects against the exigent circumstance—the destruction of evidence, escape of a suspect, or danger to the police—is by keeping the investigation secret for an additional few minutes, during which the occupants might otherwise take action to compromise the investigation—through evasive action or preparing to resist. Thus preventing “serious jeopardy to an investigation” is always a key part of any no-knock search. The mechanism used to prevent the exigency is temporarily keeping the investigation secret. Accordingly, every no-knock search necessarily incorporates both of these seemingly different justifications—preventing the occurrence of some bad outcome (exigent circumstance) by maintaining the secrecy of the investigation (and thereby protecting the investigation from serious jeopardy).

In the context of covert, delayed notice searches, the same is true: every covert search is logically justified by both exigent circumstances and preventing harm to the investigation. These seemingly separate justifications—listed under different subsections
of section 2705—are, in substance, inextricably intertwined in every delayed notice search.

In a sense, the purpose of a covert search is always to protect the ongoing investigation—that is precisely the benefit that a covert search provides as compared to a search with contemporaneous notice.

Take the following common example. A DEA investigator has probable cause to believe marijuana is being grown in a shed on a particular piece of property. The investigator wants to search the shed and determine whether marijuana is present. At the same time, the agent wants the investigation to remain secret, to give the agent more time to identify the suspects who might be associated with the shed. If investigators conducted a traditional search of the shed, it would tip off the suspects. Those suspects might destroy any other evidence of the drug crime and might also try to flee before they can be identified by law enforcement.

The exigencies of preventing the destruction of evidence and preventing the escape of a suspect are both present in this example. These exigencies, however, are present only because investigators want to do two things at the same time: (1) conduct a physical search now (rather than later), and (2) preserve the secrecy of the investigation. The need to protect the ongoing investigation, and the need to prevent the exigencies from arising, are one and the same.

Take another, more unusual example. Assume a criminal gang has kidnapped a teenage girl and demanded ransom for her release. Police reasonably believe the girl is in

213 These facts are based roughly on those forming the basis of United States v. Christopher, 2009 WL 903764 (D. Virgin Islands, March 31, 2009). The basic nature of these facts is also similar to those in, for example, United States v. Frietas, 610 F.Supp. 1560 (N.D. Cal. 1985); United States v. Villegas, 899 F.2d 1324 (2d Cir. 1990); and United States v. Hernandez, 2007 WL 2915856 (S.D. Fla. Oct. 4, 2007).
imminent danger of serious physical harm or even death. An informant tells them the location of the gang’s hideout. The girl is not there, the informant says, but the hideout might contain evidence pointing to her location. If the gang knew the police had searched the hideout (and discovered evidence leading them to the girl), they would likely respond by moving her to a new location (or by harming or killing her). If the hideout can be searched covertly, however, police might be able to discover the girl’s location and save her.

Again, the covert search here is justified in part due to exigent circumstances—the need to prevent physical harm to the kidnapped girl. At the same time, the covert search is also justified by the need to protect an ongoing investigation—that is precisely what will allow investigators to prevent harm to the victim. The two go hand in hand.

Logically speaking, there are no cases in which a covert search is justified solely on the grounds of exigent circumstances and not also to protect the secrecy of an ongoing investigation. This is because if police use a covert search to prevent exigent circumstances, it must be because they believe protecting the secrecy of the ongoing investigation—the key benefit a covert entry provides—is what will accomplish that goal.

The converse is also true: there are no cases in which a covert search is justified solely on the grounds of protecting the secrecy of an investigation and not also because of exigent circumstances (broadly defined). After all, conducting a covert search to protect the secrecy of an investigation is not an end in itself. Police seek to protect the secrecy of investigation because they are concerned that if the investigation is known, bad

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214 At least, it should not be in a liberal democracy. Totalitarian regimes sometimes use covert searches not only to gather evidence, but as a tool to instill fear in a population. The very fact that a regime is conducting frequent, secret searches can be a tool to terrorize and intimidate a population, apart from the value of any evidence or contraband those searches reveal. This purpose of covert searches—to intimidate and terrorize the population—is not, of course, a proper objective for a liberal, democratic state.
consequences will follow—suspects will escape, evidence will be moved or destroyed (or will never come into existence in the first place), or someone will be harmed.

Despite the superficial difference in justifications, then, both no-knock searches and delayed notice searches share an underlying symmetry. In both cases, police want to keep the investigation secret from the targets—whether for a few more minutes or for days, weeks, or months—to prevent the targets from thwarting the investigation by escaping, destroying evidence, or harming someone. Recognizing this symmetry is critical in understanding how covert, delayed notice searches function, and how they can best be regulated.

3. **Covert, Delayed Notice Searches Cannot Be Regulated As No-Knock Searches**

While no-knock searches and delayed notice searches share this symmetry in justifications, the two search techniques nonetheless play out in different ways. No-knock searches are self-limiting, in that they are only useful in certain factual scenarios. Covert searches with delayed notice searches are not self-limiting, in that they can prove useful in almost any criminal case. Using “exigent circumstances” to justify no-knock searches—searches with notice delayed by a minute or two—provides some limited benefit to investigators in certain circumstances. But pushing that doctrine further, and using exigent circumstances to justify covert searches with delays lasting weeks or months, threatens to open Pandora’s Box and eliminate notice from a large number of cases. Finally, covert searches impose greater privacy costs than no-knock searches. For all of these reasons, limiting delayed notice search warrants to cases of “exigent circumstances” is not much of a limitation at all, and certainly not a sufficient way to regulate the serious privacy intrusion of covert searches.
No-knock searches are not advantageous to the police in all circumstances. Sometimes, a no-knock entry is dangerous to the police. If police simply break into a home violently, with no advance notice, there is some danger that the occupant will take up arms in self-defense, not knowing the intruders are police officers with lawful authority to search.\footnote{See, e.g., Launock v. Brown, 2 B. & Ald. 592, 594 (“how is it possible for a party to know what the object of the person breaking open the door may be? He has a right to consider it as an aggression on his private property, which he will be justified in resisting to the utmost.”); United States v. Cantu, 230 F.3d 148, 152 (5th Cir. 2000) (“allowing the police to attempt entry into a home before announcing their presence heightens the possibility that the occupants of a house will react violently against the unknown aggressor, particularly if they resemble highwaymen in ski masks”). See Radley Balko, Overkill: The Rise of Paramilitary Police Raids in America (Cato Institute White Paper 2006), available at http://www.cato.org/publications/white-paper/overkill-rise-paramilitary-police-raids-america (recounting examples of no-knock searches resulting in physical injury and death to occupants and/or the police).} In addition, in many cases no-knock entry is pointless—it does nothing to aid the investigation. If police are executing a search warrant at a medical office in a health care fraud investigation, there is no reason to believe that one minute’s notice of the search would allow the occupants to destroy large file cabinets full of possible documentary evidence, or a medicine cabinet full of drugs. No-knock entry provides benefits to the police only in cases in which occupants with momentary advance notice could take some immediate action that would compromise the investigation. Given the prevalence of searches for small quantities of drugs, these cases are not so rare as they would have been in the past—and many have criticized no-knock entry as being far too commonplace.\footnote{See, e.g., CITES.} But even so, there remain many cases in which there is simply no meaningful benefit, as a factual matter, to keeping the investigation secret for an additional minute. In that sense, no-knock searches are inherently self-limiting (albeit not as self-limiting as some would prefer).

Covert searches do not share this self-limiting quality. Almost any criminal investigation can benefit if police can gather evidence without letting anyone know they

\footnote{See, e.g., CITES.
are conducting an investigation. Many criminal investigations force law enforcement officers to balance the competing needs to (1) gather evidence, while (2) continuing an effective investigation. Covert searching solves that problem in many cases.

The longer the delay in notice, the more the “exigent circumstances” exception threatens to do away with the notice requirement entirely. When notice is delayed for only moments, exigent circumstances authorized delayed notice in some but not all or most cases. But when notice is delayed for days or weeks, suddenly it becomes very easy to explain why giving notice of the search will likely lead to the destruction of evidence, danger to some witness or victim, or escape of a suspect. When used to justify covert searches that remain secret for days or weeks, the “exigent circumstances” doctrine opens a Pandora’s Box. It threatens to overturn the ordinary Fourth Amendment presumption that a “reasonable” search is one conducted with advance notice and a demand for entry, instead rendering covert searches the norm.

Accordingly, while no-knock searches and covert, delayed notice searches share the same underlying logic, the doctrine of exigent circumstances may be adequate to regulate the former but utterly fails to meaningfully regulate the latter. By attempting to limit covert searches to cases of “exigent circumstances”—defined to mean any case in which a covert search will help prevent evidence from being destroyed, someone being hurt, or a suspect escaping—Congress actually failed to limit covert searches in any meaningful way at all. The rubric of “exigent circumstances” is simply inadequate, as a logical and practical matter, as a tool to limit covert searches. Something else is required.
4. Covert, Delayed Notice Searches Impose Higher Privacy Costs than No-Knock Searches

Part II.B above compared the privacy costs imposed by no-knock searches and the privacy costs imposed by covert, delayed notice searches. Part II.B concluded that covert, delayed notice searches were a more extreme version of a no-knock search. Part II.B also identified unique privacy costs of covert, delayed notice searches—“[t]he mere thought of strangers walking through and visually examining the center of our privacy interest, our home.”217 In particular, covert searches create an uncertainty felt by the entire community, including those not searched, as to whether their home has been subject to a covert government search. These unique privacy costs suggest that covert, delayed notice searches should be available only in exceptional cases where the government interest is truly compelling.

This same privacy cost exists in another context, also involving a form of covert searching: Title III wiretapping. The similarity between covert, delayed notice searches and Title III wiretapping was noted by the first judge to evaluate delayed notice searches—Judge Lynch in United States v. Frietas. But in drafting section 3103a, Congress did not look to wiretapping to construct the limits on delayed notice searches.

Both wiretapping and delayed notice physical searches involve secret government intrusion into private areas—private conversations or private physical space. The secrecy of the government intrusion, in both cases, entails a unique privacy cost not associated with traditional warrants executed with notice to the occupant. With traditional searches, each person in the community knows when and if her home or business has been

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217 Frietas, 800 F.2d at 1456. See also 147 Cong. Rec. S10547-01, S10557 (Oct. 11, 2001) (Statement of Senator Leahy, quoting Frietas).
searched by the government. That person suffers a significant privacy intrusion—an intrusion justified by the finding of probable cause that the specific home or business contains contraband or evidence of a crime.

With wiretapping or delayed-notice searches, however, every member of the community suffers a more indirect and uncertain loss of privacy. No member of the community knows—you do not know, and I do not know—whether the government had been, or is, listening in on our private conversations, or looking through our homes and private offices.

Moreover, the more frequently these covert searches are conducted, the more reasonable it becomes for each person to wonder whether the government has searched their private spaces. If covert searches are rare, many persons in the community will not even know they exist, and those who know will understand that the likelihood that they have been subjected to a covert search is quite small. Covert searches, and covert 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.\(^{218}\) With a sufficient number of covert searches, a totalitarian government can instill in all of its citizens—even those who have not been searched—a fear that they cannot keep anything secret from the government. Citizens who fear constant government intrusion into their private spaces will be much less likely to keep or

\(^{218}\) See, e.g., Jeb Rubenfeld, Privacy’s End, in James Boyd White and H. Jefferson Powell, eds., Law and Democracy in the Empire of Force, p. 217 (University of Michigan Press 2009) (“The aim of a totalitarian state is to obliterate personal life. In a totalitarian state, conformity with public norms obtains in principle at all times and in all places. To bring this about, a totalitarian government engages in systematic, often covert, surveillance of its population, ‘penetrating,’ in Mill’s words, ever ‘more deeply into the details of life,’ with the object of ‘enslaving the soul.’”); Hannah Arendt, The Totalitarian State (1951).
read dissident literature. They will be less likely to discuss matters with their friends—or people whom they believe to be their friends—that would displease the state. In short, covert searches are a dangerous and effective tool for instilling fear, paranoia, and a loss of any sense of privacy into a large population.\textsuperscript{219}

The rapid rise in covert searches in the United States does not mean our country has become a totalitarian state, any more than the lawful but limited existence of covert wiretapping over the past fifty years means that. But the fact that covert searches and surveillance are a favorite tool of totalitarian control and repression should alert us to the very real dangers to privacy, liberty, and dissent posed by covert searches. Those dangers should prompt both courts and Congress to place new, meaningful limits on what has become a far too common practice.

The length of the delay in notice is also a significant factor for calculating the magnitude of the privacy cost. If notice is never given—as is often true for FISA wiretaps—the uncertainty lasts forever. Longer delays in notice entail larger privacy costs, because larger chunks of one’s life fall under the zone of uncertainty. If notice is always given within seven days, that zone of uncertainty shrinks, and the privacy cost likewise shrinks. If the government always gave notice of a covert search within seven days, individuals only have to wonder about their privacy over the past week. If norm instead is that notice is usually delayed for ninety days—which is in fact the norm today—individuals instead wonder about their privacy over the past three months.

\footnote{See, e.g., Hannah Arendt, The Totalitarian State (1951); Andrews Schobell, Kim Jong II and North Korea: The Leader and the System (2006), p. 34: totalitarian measures create a “climate of terror . . . instilled not just be the visible elements of the coercive apparatus . . . but by a fear of being informed on by a colleague, friend or even a loved one.”}
Speaking about officials searching homes under general warrants, “Samuel Adams complained that . . . [general searches] left citizens ‘cut off from that domestick security which renders [life agreeable].’”

Covert searches—in the form of wiretapping or delayed notice physical searches—threaten to cut citizens off from that domestic security in a uniquely harmful and pervasive manner. As such, covert searches must be used only in exceptional circumstances—as a last resort.

The costs and dangers of covert searches vary according to (1) their frequency, and (2) the length of delay in notice. To minimize the privacy costs of covert searches, then, we should limit their frequency as well as the length of delay in any given case.

Part III sets forth a solution to achieve these goals.

III. Solution: Permit Covert Searches only in Cases of Necessity, and with DOJ Authorization

Covert, delayed notice searches are currently permitted in far too many cases, and are not supported by a sufficiently compelling government necessity to justify using this invasive, uniquely dangerous search technique. This represents a clear policy failure, and a constitutionally unreasonable search practice in light of the “rule requiring notice” in the Fourth Amendment.

In 2001 the Department of Justice sought to assure Congress that section 3103a would merely represent a codification of existing practice. At the time, “existing practice” was that covert, delayed notice searches were extremely rare. Moreover, in one of the two circuits to have addressed the practice, covert searches were permitted only when police could show they were “necessary,” in the strict Title III meaning of that

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220 Davies, Recovering, infra note 156.
221 See supra note 55.
term—that the only reasonable way to discover the desired evidence was through the use of a covert search. Since Congress enacted section 3103a, the practice of covert searches has changed dramatically. The number of covert searches has grown exponentially, with almost 3,700 issued nationwide in 2011. And the default time delay established by Congress—thirty days—is the default in theory only. In practice, the normal delay in providing notice of covert searches is ninety days, with some cases involving delays of a year or more.

The solution to the constitutional and policy failures of covert, delayed notice searches is to impose a strict “necessity” requirement, akin to Title III, on all delayed notice searches, and further require that investigators also show necessity for the length of the delay. In addition, police seeking delayed notice search warrants should be required to obtain authorization for the search from high-level Department of Justice official—as with Title III wiretaps—to ensure that covert searches are sought only in cases of sufficient importance.

Congress could fix the statute simply by amending section 3103a to add a necessity requirement and a provision requiring authorization from a DOJ official. In the meantime, courts must grapple with the reality—ignored to date—that delayed notice searches clearly implicate the Fourth Amendment’s “notice and demand” requirement.

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222 Martha Minow hinted at this approach—using the term “need” rather than “necessity,” and without developing the idea. Minow stated, “[t]he Patriot Act’s authorization of ‘sneak-and-peek’ warrants—allowing for delayed notification to the subject—also seems to violate the Fourth Amendment and the Federal Rules of Criminal Procedure absent a strong demonstration of need, at least for the broad scope permitted.” Martha Minow, What is the Greatest Evil? (Book Review), 118 Harv. L. Rev. 2134, 2145 n. 42 (2005).

The uniquely invasive nature of covert, delayed notice searches warrants heightened judicial scrutiny under the Fourth Amendment’s “reasonableness” requirement. Following the lead of Judge Lynch, and based on the compelling analogy to Title III wiretaps, courts should at the very least require investigators to demonstrate “necessity” for the extreme intrusion of a covert entry. Stated differently, if investigators do not demonstrate that a covert entry is necessary—pursued as a last resort—then the resulting search is unreasonable under the Fourth Amendment.

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

While both wiretaps and delayed notice warrants are forms of covert searches, they are currently regulated with entirely different legal mechanisms. As described above, delayed notice search warrants are permitted based on a showing of “exigent circumstances.” Title III wiretaps do not require a showing of exigent circumstances—and for good reason. In any case in which officers want to listen in on private phone conversations, it would be easy to show that if advance notice of the wiretap were given, the evidence sought would be hidden or “destroyed”—that is to say, the participants in the phone call would not state any of the incriminating information they might otherwise say. Using the exigent circumstances doctrine to regulate Title III wiretaps would not work well, because police officers could show, in almost any wiretap case, that providing notice to the parties of the wiretap would lead the suspects to hide the “evidence”
sought—i.e., not make any incriminating statements. The “exigent circumstances” doctrine is a poor tool to regulate wiretaps for the same reason it is a poor tool to regulate delayed notice search warrants—it ends up authorizing covert searches in far too many investigations.

Instead of requiring a showing of “exigent circumstances,” police seeking Title III wiretaps must satisfy other requirements. Investigators must demonstrate, among other things, necessity for the wiretap order.\textsuperscript{224} In the context of Title III, necessity means that the issuing judge must determine that “normal investigative procedures have been tried and have failed or reasonably appear unlikely to succeed if tried or be too dangerous.”\textsuperscript{225} That is, investigators must show that the wiretap is a “last resort”—the only reasonable way to obtain the evidence sought. The necessity requirement “assure[s] that wiretapping is not resorted to in situations where traditional investigative techniques would suffice to expose the crime.”\textsuperscript{226}

The same requirement should exist for covert, delayed notice searches. A necessity requirement addresses two related problems with covert searches under section 3103a. First, covert searches are becoming far too common, now representing around ten percent of all federal search warrants. Second, covert searches are being used in cases in which there is not a sufficiently compelling government interest—in particular, in cases where ordinary investigative techniques could have achieved the same investigative goals. A necessity requirement would reduce the burgeoning number of covert searches and limit them to circumstances in which a covert entry is the only reasonable way to accomplish the investigative goals.

\textsuperscript{224} 18 U.S.C. § 2518(3)(c)  
\textsuperscript{225} 18 U.S.C. § 2518(3)(c).  
Another Title III limitation also makes sense for delayed notice search warrants. Before federal agents can seek a Title III wiretaps order from a federal judge, they must obtain prior authorization from a high-level official within the Department of Justice.\footnote{See 18 U.S.C. § 2516(1).} This requirement ensures that wiretaps are used only in circumstances deemed sufficiently important to warrant involvement of a high-level DOJ official, and after some internal deliberation at higher levels of the department.

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

A number of cases, discussed above in Part II.C, readily illustrate how covert searches are being used unnecessarily, and how imposing a necessity requirement would genuinely limit the prevalence of covert searches.

The parallels between Title III wiretaps and covert, delayed notice searches illustrate how current covert search practice is constitutionally unreasonable, and that adding a “necessity” requirement would go a long way in making the practice reasonable. The parallels to Title III also indicate that adding a “necessity” requirement to covert searches would work well as a policy matter. In addition, requiring prior authorization by a high-level DOJ official would limit covert, delayed notice searches to important
investigations in which a covert search is really needed, as opposed to rule-of-the-mill investigations in which a covert search seems convenient.

These two limitations—“necessity” and prior DOJ approval—strike a balance between permitting covert, delayed notice searches when the government interest is sufficiently compelling (the search is necessary to accomplish investigative goals that are deemed important by high-level DOJ officials), while prohibiting the use of an invasive search technique when the government interest is not compelling (because the government investigative goals can be reasonably accomplished without using a covert search, or the investigation is not sufficiently important to warrant DOJ involvement).

Conclusion

Congress passed section 3103a ostensibly to codify and unify the existing practice of covert, delayed notice searching. In the decade since section 3103a was enacted, the practice of covert searching has exploded, now constituting roughly ten percent of all federal search warrants. In practice, the limitations in section 3103a effectively authorize covert searches in a very broad range of cases—essentially whenever a covert search is convenient to investigators—and does not adequately limit the practice to cases of sufficient necessity and importance.

The history of search and seizure law up to the passage of the Fourth Amendment shows clearly that a key component of the “reasonableness” of a search is whether officials given notice of the search and demand entry before forcibly entering. Covert, delayed notice searching contravenes that fundamental Fourth Amendment principle. There is no evidence, in the pre-1791 authorities, of searches conducted with warrants
that authorized covert entries and extensive delays in providing notice. In short, covert, delayed notice searching is constitutionally suspect.

Covert searching is also imposes unique and substantial privacy costs on the entire community, not only those whose homes and businesses are actually searched. The practice searches create uncertainty in the entire populace over whether the state has subjected them to unknown searches—which is precisely why covert searching and surveillance is a tool exploited by totalitarian regimes. The practice of covert searching is dangerous, especially if conducted frequency and with lengthy delays in notice, and must therefore be closely regulated.

Section 3103a fails in this task. Using “exigent circumstances” to regulate covert searching is fundamentally flawed, because covert searching can very easily be justified by the need to protect evidence, prevent escape of suspects, or protect law enforcement or others from danger. The “exigent circumstances” rubric threatens to reverse the presumption that all searches should be conducted with notice—a danger readily observed in the data showing an exponentially increasing rate of covert searching.

Covert, delayed notice searching should only be permitted in unusual cases of sufficiently compelling government importance and necessity. Law enforcement officers seeking delayed notice search warrants should be required to show that the covert nature of the search is “necessary,” as that term is used for Title III wiretaps. And Congress should amend section 3103a to require prior approval by a high-level Department of Justice official—a predicate for all Title III wiretaps—before investigators seek covert, delayed notice warrants. These requirements would ensure that covert searches are not
used merely when they are convenient in routine cases—the current standard—but only when necessary, and only in sufficiently important cases.