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Reforming the High-States Gamble of Covert Government Seizures

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REFORMING THE HIGH-STAKES GAMBLE OF COVERT GOVERNMENT SEIZURES

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ABSTRACT

In a covert government seizure, police secretly enter a home when no one is present and seize contraband, often staging the scene to look like a burglary. These covert seizures are authorized by delayed notice search warrants. This Article identifies two serious problems with this practice and proposes reforms.

The first problem is that a successful covert seizure will likely provoke violent retaliation against innocent third parties. If the target of the covert seizure—say a drug dealer—believes someone has stolen a valuable drug stash, the dealer will seek to kill or harm whomever they believe conducted the burglary. The statute authorizing covert seizures does nothing to address this grave danger to the safety of third parties, some of whom are wholly innocent bystanders.

The second, deeper problem relates to why police conduct covert seizures at all. According to the government, covert seizures allow police to seize evidence while maintaining the secrecy of an ongoing investigation, permitting that investigation to continue. But in many cases, that rationale is suspect. Law enforcement agents are not naïve. They know that covertly burglarizing a drug stash might quickly lead to violent retaliation. This means that often they also know that they cannot wait long before arresting the suspects.

If police know that a covert seizure is likely to prompt violent retaliation, thus necessitating quick intervention, why conduct the seizure covertly in the first place? In these cases, the answer cannot be what the government tells us—to allow law enforcement additional days, weeks, or months to continue the investigation—because the government knows that this will be impossible.

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This suggests a different, hidden rationale for covert seizures, one that is far more troubling and constitutionally objectionable. In conducting some covert seizures, law enforcement may simply intend to poke the hornet's nest—provoke an immediate reaction from the suspects, leading to additional, more serious criminal charges beyond those supported by the pre-existing conduct. This hidden practice should be recognized and expressly forbidden.

This Article proposes several reforms to the warrant process: giving magistrates a more robust oversight role over covert seizures, requiring law enforcement to identify and mitigate risks of harm created by covert seizures, and prohibiting the use of covert seizures as a tool to provoke additional criminal conduct.

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Covert government seizures are a high-risk, high-reward gamble. Law enforcement officers, armed with a delayed notice search warrant, secretly enter a home when no one is present and seize contraband.[1] They stage the scene to look like a burglary, keeping the government investigation secret so it may continue and hopefully unravel more of the complex conspiracy[2]—

1. *See* 18 U.S.C. § 3103a(b)(2); Brett A. Shumate, *From "Sneak and Peek" to "Sneak and Steal": Section 213 of the USA Patriot Act*, 19 REGENT U. L. REV. 203, 209–10 (2006); Jonathan Witmer-Rich, *When Cops 'Steal' Drugs, the Results Can Spin Out of Control*, N.Y. TIMES (May 8, 2018), https://www.nytimes.com/2018/05/08/opinion/police-drugs-warrants.html.

2. *See, e.g.*, DeArmon v. Burgess, 388 F.3d 609, 611 (8th Cir. 2004) ("According to appellants, the officers broke entry doors and locks on interior doors, damaged drywall and furniture, and seized a firearm, doorknobs and locks, photographs, personal papers, and jewelry."); United States v. Howard, 489 F.3d 484, 488 (2d Cir. 2007) (discussing officers "conducting the search of the vehicle to make it appear as though the vehicle had been vandalized while it was left unattended on the side of the Thruway. They broke a pool cue found in the back of the car, presumably belonging to the vehicle's occupants, and used it to pry open the glove compartment, damaging the glove compartment and making it appear as if there had been an attempted break-in."); United States v. Patel,

this, at least, is how the government describes the purpose of covert seizures.[3]

The danger is evident. When, for example, members of a drug conspiracy discover that someone has stolen their drug stash, they will be out for blood, seeking retaliation against whomever they believe conducted the burglary.[4] This is the first problem with covert seizures: they create predictable risks of violent retaliation. The statute authorizing this practice does nothing to address this grave danger to the safety of third parties, some of whom are wholly innocent bystanders.[5]

The second problem is more insidious. Law enforcement agents are not naïve. They are well aware that covertly burglarizing a drug stash might quickly lead to violent retaliation.[6] This calls into question the standard government narrative about the purpose of covert seizures in the first place. Police know that violence is a high risk after a covert seizure.[7] This means that in many cases they also know that they cannot wait long before arresting the suspects.[8]

This reality substantially undermines the purported rationale for the covert seizure—to allow the investigation to continue for some meaningful period of time.[9] Stated differently, if police know that a covert seizure is likely to prompt violent retaliation, thus necessitating quick intervention, why conduct the seizure covertly in the first place? In these cases, the answer cannot be what the government tells us—to allow law enforcement additional days, weeks, or months to continue the investigation—because the government knows that this will be impossible.[10] Why not just conduct a regular search and seizure—arresting the targets during raid—rather than conducting a risky covert seizure that may precipitate imminent violence?

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579 F. App'x 449, 463 (6th Cir. 2014) ("On April 28, 2011, the DEA executed a delayed-notice search warrant at the apartment of Chirag Soni, who also stored boxes of billed-but-not dispensed medications for Patel. The DEA made this entry look like a break-in and theft.").

3. *See infra* Part III, notes 130–35, 151.
4. *See infra* Part II, notes 67–99.
5. *See* 18 U.S.C. § 3103a.
6. *See, e.g.*, United States v. Miranda, 425 F.3d 953, 956 (11th Cir. 2005).
7. *See id.*
8. *See id.*
9. *See* discussion *infra* Part III.
10. *See id.*

This suggests a different, hidden rationale for covert seizures, one that is far more troubling and constitutionally objectionable. In conducting some covert seizures, law enforcement may simply intend to poke the hornet's nest—provoke an immediate reaction from the suspects, leading to additional, more serious criminal charges beyond those supported by the pre-existing conduct.[11] In essence, law enforcement officers seek to deploy an exceptional type of search warrant (a delayed notice warrant) in order to sow chaos, and to do so in a way that creates a predictable danger to third parties.[12]

This hidden practice should be recognized and expressly forbidden. To the extent police can use covert searches and seizures to meaningfully prolong an investigation, that legitimate government interest may outweigh the dangers to others, so long as the investigation is sufficiently important and measures are in place to minimize the risk.[13] But to the extent police use covert seizures simply to provoke suspects into violent reaction, the government interest is less compelling and does not justify the deliberate creation of danger to third parties.[14]

Part I introduces the practice of covert seizures with delayed notice search warrants, briefly examining the history and current legal regulation of delayed notice warrants. Part II discusses the obvious danger of successful covert seizures—the risk that the targets will engage in violent self-help against innocent third parties they suspect of having stolen their contraband. Part III analyzes the government's justification for covert search and seizure—allowing law enforcement to prolong a complex investigation. It questions the validity of that justification in the context of covert seizures, and instead suggests that covert seizures may often be driven by an unspoken and more dangerous goal: to provoke suspects into violent criminal activity.[15] Part IV analyzes the Fourth Amendment principles implicated by covert seizures, and Part V proposes how courts might regulate this high-risk practice through the warrant process.

This Article proposes several reforms to the warrant process: giving magistrates a more robust oversight role over covert seizures, requiring law enforcement to identify and mitigate risks of violence created by covert

11. *See, e.g.*, *Miranda*, 425 F.3d at 956.
12. *See id.*
13. *See* discussion *infra* Part III.
14. *See id.*
15. *See id.*

seizures, and prohibiting the use of covert seizures as a tool to provoke additional criminal conduct.

I. INTRODUCTION TO COVERT SEIZURES AND DELAYED NOTICE SEARCH WARRANTS

Consider the following two accounts of stealing a drug stash:

The Case of Omar Little. Omar Little was a stick-up boy—he robbed drug dealers in Baltimore.[16] One night, Omar and his crew stole a big stash of crack cocaine from Avon Barksdale.[17] Predictably, Avon was out for revenge.[18] Wallace, one of Avon's street dealers, saw Brandon (Omar's accomplice and paramour) at a corner store one night.[19] Avon's crew grabbed Brandon, tortured him to death, and left his body on display for the neighborhood to see what happens when you steal from Avon.[20] In Avon's words: "I want that motherf—-er on display. I'm gonna send a message to the courtyard about this motherf—-er. So people know we ain't playin."[21]

The Case of the Cleveland Meth Robbery. In March 2018, a group broke into a building on Olde Eight Road in a rural suburb outside Cleveland, Ohio.[22] The building housed a meth lab, and they stole 82 pounds of crystal meth.[23] The drug dealers running the lab predictably freaked out.[24] They decided it must have been an inside job.[25] After getting the green light from their Mexican supplier to kill the suspected thief, they agreed to "knock his head in."[26]

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16. *The Wire: Old Cases* (HBO television broadcast June 23, 2002).
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *140 Pounds of Meth Seized from Boston Heights Warehouse; Believed to be Largest Bust in Ohio History*, WKYC (Apr. 3, 2018), https://www.wkyc.com/article/news/local/summit-county/140-pounds-of-meth-seized-from-boston-heights-warehouse-believed-to-be-largest-bust-in-ohio-history/95-534636575 [https://perma.cc/9SB5-A73J].
23. *Id.*
24. *Id.*
25. *Id.*
26. *Cleveland Man and Two Mexican Nationals Charged in Federal Court After Agents Seize 140 Pounds of Methamphetamine; Bust Comes Days After Seizure of 44 pounds of Heroin in Akron*, U.S. DEP'T JUST. (Apr. 3, 2018), https://www.justice.gov

There are two important differences between these stories. The first story is fictional (from HBO's *The Wire*), whereas the second story happened in real life.[27] In addition, the nature of the stick-up crew was very different.[28] In the first case, Omar Little led a small band of thieves who operated locally in Baltimore.[29] The second break-in was conducted by a much larger, more powerful organization that steals drug stashes all over the country and has done so for years: the U.S. Department of Justice (DOJ).[30]

The Cleveland-area break-in was conducted by a joint federal-state Organized Crime Drug Enforcement Task Force, including Drug Enforcement Agency (DEA) agents and state and local police.[31] Officers sought a delayed notice search warrant to permit them to break into the building secretly, when no one was present, and seize any drugs and stage the scene to look like a burglary.[32]

Neither the warrant or the affidavit requesting covert search and seizure authority said anything about what would happen if the plan worked—if the drug dealers fell for the ruse that someone (not law enforcement) had stolen their drugs.[33] The documents did not mention or

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/usao-ndoh/pr/cleveland-man-and-two-mexican-nationals-charged-federal-court-after-agents-seize-140 [https://perma.cc/TWC6-7R87] [hereinafter *Cleveland Man*].

27. *See id.*; *The Wire: Old Cases*, *supra* note 16.

28. *The Wire: Old Cases*, *supra* note 16.

29. *Id.*

30. *See Cleveland Man*, *supra* note 26.

31. *Id.*

32. Although the DOJ press release states that investigators "executed a delayed notice search warrant" on the property, this is inaccurate. *Id.* While the affidavit *requested* authority for a delayed notice search, the warrant itself did not authorize delayed notice. *Compare* Affidavit in Support of Search Warrant, sworn and subscribed on May 24, 2018, 32–34 (on file with author) (setting forth a "request for delayed notice" for thirty days, including "the seizure of contraband . . . if there is reasonable necessity for the seizure"), *with* Search Warrant for 7592 Olde Eight Road, Hudson, Summit County, Ohio (on file with author) (failing to mention or authorize covert entry, covert seizure, or delayed notice, and instead expressly requiring that the agent serve a copy of the warrant and a written inventory on the targets of the search). Notwithstanding this lack of warrant authority, investigators treated the warrant as a delayed notice warrant, and executed a covert search and seizure. The government's response to a defense motion to suppress acknowledges this, conceding that the language in the warrant "contravenes the request in the affidavit to delay notice of the execution of the warrant." United States v. Johnson, Government Response in Opposition to Defendants' Motion to Suppress, filed Mar. 6, 2019, at 6.

33. *See Cleveland Man*, *supra* note 26.

address the risk that the drug dealers might decide to kill the suspected thief.[34] They did not address what steps, if any, law enforcement would take to mitigate that risk.[35] No independent judge was involved in weighing this risk to public safety or deciding whether the risk was worth the government interest in this particular investigation.[36]

The investigators had wiretap orders on phone lines being used by the suspects and thus heard them discuss getting the "green light" to kill.[37] The agreement to "knock his head in" is a quote from the wiretap.[38] Fortunately, police promptly arrested the suspects before they carried out the murder.[39]

This practice—covert seizures with delayed notice search warrants—is a high-risk, high-reward gamble by law enforcement. Covert seizures give rise to a predictable risk of danger to innocent third parties.[40] Currently, the law authorizing the practice does nothing to address this risk or require law enforcement to justify or mitigate the risk.[41] Because covert seizures create a serious risk of danger to others, they implicate the privacy and security guaranteed by the Fourth Amendment.[42] Unless adequately limited, covert seizures are constitutionally "unreasonable."

Covert seizures of physical evidence—the specific focus of this Article—are a subset of covert government searches of various kinds.[43] This Article focuses on the particular risks associated with covert seizures of evidence or contraband, in contrast with the issues associated with the broader universe of covert government surveillance, much of which does not involve a secret seizure of evidence or contraband.

It is worth briefly situating covert seizures of physical evidence into the broader universe of covert government surveillance. Many types of government surveillance are conducted secretly, without the target's knowledge.[44] This surveillance includes things such as secretly tracking a

34. *See id.*
35. *Id.*
36. *See generally id.*
37. *See id.*
38. *See id.*
39. *Id.*
40. *See, e.g., id.*
41. *See* 18 U.S.C. § 3103a.
42. *See id.*; U.S. CONST. amend. IV.
43. *See generally* 18 U.S.C. § 3103a.
44. *See, e.g.*, United States v. Jones, 565 U.S. 400 (2012); Carpenter v. United States,

suspect's location using GPS[45] or cell site location[46] or installing secret video cameras to record suspects either out in the open[47] or inside a home or business.[48] The government sometimes installs a wiretap to listen in on phone calls[49] or searches a suspect's e-mails, text messages, or Internet search history.[50] The government can even physically enter a home or business covertly—with a delayed notice search warrant—simply to look around and take photographs, without physically disturbing the scene or physically removing anything.[51] These covert physical intrusions have traditionally been referred to as "sneak and peek" searches.[52]

For searches conducted with a search warrant, criminal rules of procedure generally require that the suspect receive notice of the search at the time it is conducted.[53] In some cases, however, criminal rules or statutes permit police to "delay" this notice—to conduct the search or surveillance

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138 S. Ct. 2206 (2018).

45. *E.g.*, *Jones*, 565 U.S. 400.

46. *E.g.*, *Carpenter*, 138 S. Ct. 2206.

47. *Compare* United States v. Houston, 813 F.3d 282, 287–88 (6th Cir. 2016) (holding that installation of a pole camera to monitor defendant's rural home over a ten-week period did not intrude into the defendant's reasonable expectation of privacy and thus was not a search under the Fourth Amendment), *with* State v. Jones, 903 N.W.2d 101, 113–14 (S.D. 2018) (holding that installation of a pole camera directed at defendant's home over a two-month period intruded into the defendant's reasonable expectation of privacy and thus constituted a search under the Fourth Amendment).

48. *E.g.*, Scott Zamost, Hannah Kliot & Bianca Fortis, *Robert Kraft Case Reveals How Police Can Secretly Install Cameras Inside a Private Business*, CNBC (Mar. 21, 2019), https://www.cnbc.com/2019/03/14/robert-kraft-case-shows-how-police-use-hidden-cameras-to-get-evidence.html [https://perma.cc/84M3-BHEP].

49. *See* 18 U.S.C. §§ 2510–2520.

50. *See, e.g.*, State v. Maranger, 110 N.E.3d 895, 917 (Ohio Ct. App. 2018) (discussing a search warrant authorizing a search for "e-mail, text messages and internet search history," among other items).

51. *See* 18 U.S.C. § 3013a; United States v. Freitas, 800 F.2d 1451, 1453 (9th Cir. 1986) (involving a warrant in which "the agents were permitted to enter the home while no one else was there, look around, and leave without removing anything").

52. *See* Jonathan Witmer-Rich, *The Rapid Rise of Delayed Notice Searches, and the Fourth Amendment "Rule Requiring Notice"*, 41 PEPP. L. REV. 509, 511 n.4 (2014) (discussing history of "sneak and peek" terminology) [hereinafter Witmer-Rich, *The Rapid Rise*].

53. *See* FED. R. CRIM. P. 41(f)(1)(B), (C) (requiring officer executing the warrant provide the warrant and a completed inventory to the owner of the premises, if possible); OHIO R. CRIM. P. 41(D)(1) (similar).

secretly, only notifying the suspect weeks or months later.[54] In particular, one provision of the USA PATRIOT Act, passed in the wake of September 11, 2001, sets forth statutory standards for the issuance of "delayed notice search warrants."[55] Delayed notice search warrants expressly authorize covert searches and, sometimes, covert seizures—with notice given only weeks or months after the search.[56]

This Article focuses on the types of covert searches that also involve seizures—physical intrusions into a home or business in which law enforcement officers seize physical evidence or contraband. These cases do not merely involve covert collection of information, but a legally authorized government seizure of physical property.[57] While much has been said about the risks of covert government surveillance generally, the practice of covert seizures carries unique risks that warrant particular attention and concern.[58]

There is little data available about the frequency of covert seizures. Congress did create a data reporting requirement that applies generally to all delayed notice search warrants,[59] and thus, the Administrative Office of the U.S. Courts releases an annual delayed notice search warrant report.[60]

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54. 18 U.S.C. § 3103a(b).

55. *See* 18 U.S.C. § 3103a; Witmer-Rich, *The Rapid Rise*, *supra* note 52, at 517–31 (recounting the history of covert searches and the enactment of the delayed notice search warrant law).

56. *See* 18 U.S.C. § 3103a.

57. In the case of digital surveillance, it is unclear whether the mere copying of data constitutes a "seizure" of that data. *See* Arizona v. Hicks, 480 U.S. 321 (1987) (copying serial numbers does not constitute a seizure of that information); Note, *Digital Duplications and the Fourth Amendment*, 129 HARV. L. REV. 1046, 1048 (2016) ("[U]ntil very recently, [the caselaw] tended to suggest that the Fourth Amendment had no application to duplication because it is neither a search nor a seizure. If the government just 'copies' the data, without looking at it, then there is no invasion of privacy."); Paul Ohm, *The Fourth Amendment Right to Delete*, 119 HARV. L. REV. 10 (2005) (arguing that duplication of data is a seizure because it interferes with the owner's "right to delete" the data); Orin S. Kerr, *Fourth Amendment Seizures of Computer Data*, 119 YALE L.J. 700 (2010) (arguing that "copying data 'seizes' it under the Fourth Amendment when copying occurs without human observation and interrupts the stream of possession or transmission").

58. *See, e.g.*, Neil M. Richards, *The Dangers of Surveillance*, 126 HARV. L. REV. 1934 (2013). DAVID LYON, SURVEILLANCE STUDIES: AN OVERVIEW (1st ed. 2007).

59. *See* 18 U.S.C. § 3103a(d)(1).

60. *See Delayed-Notice Search Warrant Report*, U.S. CTS., https://www.uscourts.gov/statistics-reports/analysis-reports/delayed-notice-search-warrant-report [https://perma.cc/BB9A-8SZH] (reports for 2007–2020).

These reports show the total number of delayed notice search warrants issued under § 3103a, the types of cases in which they are used, and the number of warrants per judicial district, including denials.[61] Unfortunately, this data is of limited value, because it combines together very different types of covert surveillance—such as warrants for digital tracking devices, warrants for covertly accessing e-mail or text messages—in addition to actual physical intrusion into homes and businesses.[62] The data does not separate out these different types of searches.[63] In addition, the data does not separately record covert seizures—delayed notice searches that involve not only secret entry, but a staged burglary to conceal the physical seizure of evidence or contraband.[64] Thus, there are no good data on the frequency of covert seizures, or the types of cases in which they are used.

Accordingly, the only currently available evidence of covert seizures are news reports or judicial opinions discussing the practice.[65] A number of those cases are discussed in Part II, which turns to consider the predictable dangers that accompany covert seizures of physical evidence.

II. THE PREDICTABLE DANGERS OF COVERT SEIZURES

The danger created by covert seizures is clear, and is illustrated by the Ohio case discussed above. When drug dealers believe someone has stolen large amounts of their product, they are likely to resort to violent self-help: figuring out who they believe stole the drugs, and killing or injuring that them. The targets of the Ohio meth lab seizure quickly got the "green light" to kill the individual they suspected of the theft.[66]

A second example of this danger is illustrated by a covert seizure case that occurred in Oregon.[67] In that case, police were not able to keep events from spinning out of their control, and it was only good fortune that

61. *Id.*; *see, e.g.*, *Delayed-Notice Search Warrant Report 2020*, U.S. CTS. (Sept. 30, 2020), https://www.uscourts.gov/statistics-reports/delayed-notice-search-warrant-report-2020 [https://perma.cc/N7MR-S25Q].

62. *See* Witmer-Rich, *The Rapid Rise*, *supra* note 52, at 539–49.

63. *Id.*

64. *Id.* at 539–42.

65. *See* discussion *infra* Part II.

66. *See Cleveland Man*, *supra* note 26.

67. *See* Maxine Bernstein, *Secret Drug Raid by Feds Backfires in Portland: "Someone Could Have Been Killed,"* OREGONIAN (Apr. 15, 2018), https://www.oregonlive.com/portland/2018/04/secret_drug_raid_by_feds_backf.html#incart_target2box_default_ [https://perma.cc/F27W-76P5].

prevented the covert seizure from resulting in the death of an innocent bystander.[68] A federal-state joint task force obtained a delayed notice search warrant to seize about 500 pounds of marijuana from a storage facility in Portland.[69] After covertly seizing the drugs, investigators instructed a manager at the storage facility to call the drug dealers and tell them someone had broken into their storage unit.[70] Police then followed the dealers as they went to the storage facility.[71]

At some point, police surveillance apparently broke down.[72] Several of the conspirators, after seeing that the drugs were in fact gone, kidnapped the manager of the storage facility and held him at gunpoint.[73] Police presumably missed this event, as they did nothing to step in and prevent the kidnapping or rescue the manager.[74] The drug dealers bound the manager's hands and feet with duct tape, went through his pockets, and took his keys.[75] They interrogated him at gunpoint, demanding to know what had happened to the drugs.[76]

He told them the truth—that he had discovered the door of the storage unit ripped off the track and reported the break-in to the police.[77] He also shared with them something even stranger: "I think the police did [it]. That is what my boss said. . . .[M]y boss said it wasn't a break in."[78] The dealers, apparently spooked, left the manager tied up in the storage facility and fled to the airport, where they were eventually arrested by law enforcement officers.[79] Fortunately, the dealers did not shoot the manager before they fled.[80]

Several judicial decisions involving delayed notice search warrants have recognized the danger created by covert seizures, although no court has

68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*

yet focused on this risk as a reason the practice might violate the Fourth Amendment.[81]

In *United States v. Espinoza*, the court granted a motion to suppress the fruits of a covert search.[82] The court's analysis primarily focused on the warrant's facial deficiency—the police had requested a delayed notice search warrant, but the actual warrant did not authorize a covert search.[83] At the end of the opinion, however, the court also raised the potential dangers of a covert seizure of contraband.[84] When the officers covertly seized the drugs in the *Espinoza* case, they "left a California license plate in order to divert any suspicion from law enforcement and toward other individuals."[85] The court observed that this tactic "has the dangerous potential of injuring innocent third persons. When an individual discovers that others have been on their property uninvited, there exists a natural desire to learn who the intruder was."[86] This "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."[87]

Indeed, just like in the Ohio case, the investigators in *Espinoza* had a wiretap in place that recorded the suspects discussing this issue: "The transcripts of recorded telephone conversations demonstrate that the Riveras had focused on the brother of Ms. Espinoza exposing him to danger of injury."[88] The court in *Espinoza* held that the search was invalid on other grounds, and thus did not opine on whether this risk might independently invalidate the search warrant.[89]

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81. *See generally* United States v. Espinoza, No. CR-05-2075-7-EFS, 2005 WL 3542519, at *5 (E.D. Wash. Dec. 23, 2005); United States v. Miranda, 425 F.3d 953, 956 (11th Cir. 2005).

82. *Espinoza*, 2005 WL 3542519, at *5.

83. *Id.* at *4–5. In the search warrant affidavit, the investigators had requested a delayed notice search warrant under § 3103a. The warrant itself, however, did not actually authorize delayed notice. *Id.*

84. *Id.* at *5.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* at *4–5.

In *United States v. Miranda*, the Eleventh Circuit briefly discussed a covert seizure with a delayed notice search warrant.[90] The legality of the covert seizure was not at issue in *Miranda*, so the court did not address the lawfulness of the tactic; the decision simply serves as another illustration of how covert seizures operate.[91] In *Miranda*, police investigating a drug conspiracy developed probable cause to search a particular house for methamphetamine.[92] Police obtained a delayed notice search warrant and conducted the search at 4:45 a.m., when no one was present, seizing three pounds of methamphetamine.[93]

According to the court, this covert seizure was designed to provoke the suspects into additional criminal activity: "By staging a burglary, the agents *hoped to precipitate activity* within the Cuevas conspiracy that would provide additional evidence of criminal conduct."[94]

The tactic was successful:

> The ruse had the desired effect. Mr. Cuevas discussed the apparent theft of the methamphetamine from the 499 Alcott Street stash house with Jesus Alvear Uribe. . . . Mr. Uribe suggested that Mr. Mojica was the thief. Mr. Cuevas suspected that the culprit was a man who had been employed to wash the methamphetamine at the 499 Alcott Street stash house. After the entry into the 499 Alcott Street stash house and the apparent theft of methamphetamine, Mr. Cuevas moved his methamphetamine and cocaine operation to Apartment 29G.[95]

The *Miranda* court does not discuss this issue further. The facts, however, illustrate the concern.[96] Similar to the Ohio case, the *Miranda* suspects apparently decided that the theft was an inside job perpetrated by a lower-level participant in the conspiracy.[97] While the court does not say, it is reasonable to assume that Mr. Mojica—the suspected thief—then became a potential target for violent retaliation.[98]

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90. United States v. Miranda, 425 F.3d 953, 956 (11th Cir. 2005).
91. *See generally id.*
92. *Id.* at 956.
93. *Id.*
94. *Id.* (emphasis added).
95. *Id.*
96. *See id.*
97. *See id.*; *Cleveland Man*, *supra* note 26.
98. *See Miranda*, 425 F.3d at 956.

The cases above demonstrate that covert seizures often create a predictable danger of violent retaliation. This is not necessarily true for every covert seizure—the nature and degree of the risk created depends very much on the targets of the investigation and the nature of their criminal activity.[99] In some contexts, violent retaliation seems much less likely.[100]

For example, in *United States v. Patel*, the government conducted a lengthy investigation into a suspected health care fraud conspiracy.[101] The health care fraud involved, among other things, prescribing expensive medications that were billed to Medicare or Medicaid but never distributed to patients.[102] Instead, the participants in the fraud would order these medications, store them for a period of time, and then either return them or sell them on the black market.[103]

The investigation involved a variety of tactics, including a Title III wiretap that began in January 2011 and a delayed notice search and seizure conducted in April 2011.[104] The April covert seizure targeted "the billed-but-not-dispensed medications," and the DEA seized medications and "made this entry look like a break-in and theft."[105] Following this covert seizure, the government continued monitoring the Title III wiretap, picking up incriminating conversations.[106] The investigation continued until August 2011, when the targets were finally arrested.[107]

The *Patel* opinion does not focus on the legality of the delayed notice search and seizure, but simply mentions it in passing as part of the evidence showing guilt.[108] However, the nature of the investigation, as well as the timing of the covert seizure and later arrests, suggests that this is an example of a covert seizure that did not create an imminent risk of violence.[109] Unlike the examples given above, the arrests in the *Patel* case came months after the covert seizure of the medications.[110] This suggests that the delayed notice

99. *See id.*
100. *See, e.g.*, United States v. Patel, 579 F. App'x 449, 463–64 (6th Cir. 2014).
101. *Id.*
102. *Id.* at 451.
103. *Id.*
104. *Id.* at 455, 463–64.
105. *Id.* at 463.
106. *Id.* at 463–64.
107. *Id.* at 451.
108. *Id.* at 463.
109. *See id.* at 463–64.
110. *Id.* at 451, 463.

search and seizure was used to gather evidence while permitting the investigation to continue—the standard justification given by the DOJ for this practice.[111]

Moreover, the nature of the conspiracy also suggests violent retaliation was less likely than in other types of conspiracies. Unlike the Ohio methamphetamine conspiracy or the Oregon marijuana conspiracy, the *Patel* case involved prescription drug fraud.[112] The wiretap makes it clear that the targets of the "theft" were upset and wanted to find out what had happened, but there was no evidence that they planned any violent retaliation.[113] Instead, one conspirator suggested hiring a private investigator to determine what had occurred.[114] Contrast that with the Ohio methamphetamine case, in which the targets instead suggested they would attack the suspected thief and "knock his head in."[115]

Accordingly, it seems reasonable to conclude that some types of covert seizures create a serious risk of harm to others, whereas other covert seizures do not.[116] A key problem with the covert search and seizure statute is that it does not address this danger at all, let alone provide any procedure for differentiating between the two types of cases.[117] A solution to this flaw is discussed below in Part V.

For those covert seizures that do present serious risks of violent retaliation, there is every reason to believe that law enforcement officials are aware of those dangers.[118] Covert searches and seizures are often conducted by special police units, often a joint federal-state drug task force, that

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111. *See Delayed Notice Search Warrants: A Vital and Time-Honored Tool for Fighting Crime*, U.S. DEP'T JUST. (Sept. 2004), http://www.justice.gov /dag/patriotact213 report.pdf [https://perma.cc/33M6-AQ24] [hereinafter DNSW White Paper].

112. *Patel*, 579 F. App'x at 463–64; *Cleveland Man*, *supra* note 26; Bernstein, *supra* note 67.

113. *Patel*, 579 F. App'x at 464 ("When Patel told Acharya that boxes had been stolen from Chirag's place, Acharya wanted to know 'how' and 'who' stole them. Patel named the person he suspected of committing the theft. In a later call, Acharya asked Patel the value of the stolen medications and he told her $500,000. Acharya exclaimed, 'Oh, my God. Can you not catch him?' Patel answered, 'I am trying to now. I am going to search for a private detective and see how we do that and where it is.'").

114. *Id.*

115. *See Cleveland Man*, *supra* note 26.

116. *Compare id.*, *with Patel*, 579 F. App'x at 463–64.

117. *See generally* 18 U.S.C. § 3103a.

118. *See, e.g.*, *Cleveland Man*, *supra* note 26.

conduct long-term investigations into criminal conspiracies: drug conspiracies, terrorism conspiracies, human trafficking rings, and so on.[119] Far from being naïve about the dangers posed by the targets of their investigations, these law enforcement agencies are keenly aware of their targets' potential for violence.[120]

Accordingly, careful law enforcement agencies should deliberately plan covert seizure operations with safeguards and procedures to mitigate the risks of harm to third parties. That said, several related problems remain.

First, the decision to engage in this high-risk (and potentially high reward) investigative tactic is made by law enforcement officers actively engaged in the criminal investigation, rather than by a neutral third party who might more objectively weigh the risks and benefits.[121]

Second, because the dangers of a covert seizure are not part of the warrant application process, there is no uniform national standard that law enforcement agencies are required to meet.[122] Some agencies or local offices may do an entirely responsible job of evaluating risks to third parties and deploying this tactic only when necessary in a truly important investigation. Other agencies or local offices may have looser practices.

Third, the danger created by covert seizures calls into question the actual purpose of this tactic. If law enforcement agencies know that a staged burglary will predictably give rise to violent retribution, they will likely be compelled to intervene and arrest suspects within hours of a covert seizure.[123] This means, in turn, that even when a covert seizure is successful, police will

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119. For example, the Ohio meth lab raid described above was conducted by an Organized Crime Drug Enforcement Task Force including agents from the DEA, the Lake County Narcotics Agency, Cuyahoga County Sheriff's Office, Euclid Police Department, Aurora Police Department, Summit County Sheriff's Office, Boston Heights Police Department, Cleveland Heights Police Department, Cleveland Division of Police, Ashtabula County Sheriff's Office, Ohio State Highway Patrol, Ohio BCI, and U.S. Border Patrol. *See id.* Similarly, the Oregon marijuana raid described above was part of a months-long investigation into marijuana trafficking involving the DEA, Homeland Security Investigations, the FBI, Port of Portland police, and the Multnomah County Sheriff's Office. Bernstein, *supra* note 67.

120. *See* Bernstein, *supra* note 67.

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

122. *See generally* 18 U.S.C. § 3103a.

123. *See Cleveland Man*, *supra* note 26.

not be able to continue their investigation for an extended period of time.[124] The ability to continue the investigation (while seizing contraband or evidence) is, supposedly, the key benefit of a covert seizure.[125] But if this benefit is regularly short-circuited, then why conduct the covert seizure in the first place? Part III now turns to address this question.

III. JUSTIFICATIONS FOR COVERT SEIZURES: EXTENDING A COMPLEX INVESTIGATION OR POKING THE HORNET'S NEST?

Government officials defending delayed notice search warrants ordinarily explain the tactic as follows: in some cases, the government has a very strong interest in being able to acquire important information or evidence while continuing the investigation without tipping off the suspect.[126] Ordinarily, law enforcement officers must choose one of two options: (1) conduct a search and seizure, thereby securing evidence and contraband, but at the cost of notifying the suspects of the investigation; or (2) continue the investigation covertly, thereby risking the loss of evidence or contraband.[127] A covert search and seizure gives police a way out of this dilemma—a chance to have their cake and eat it too.[128]

The DOJ has argued that covert searching is a "vital aspect" of its counterterrorism and criminal law enforcement efforts.[129] In a 2004 White Paper, the DOJ explained that the difficulty of choosing between conducting a search and continuing an investigation "is especially acute in terrorism investigations, where the slightest indication of government interest can lead a loosely connected cell to dissolve, only to re-form at some other time and place in pursuit of some other plot."[130]

The DOJ asked the following:

> Should investigators who receive a tip of an imminent attack decline to search the suspected terrorist's residence for evidence of when and where the attack will occur because notice of the search would

124. *See id.*
125. *See* discussion *infra* Part III.
126. *See* DNSW White Paper, *supra* note 111.
127. *See id.*
128. *See id.*
129. *Id.*
130. *Id.*

> prevent law enforcement agents from learning the identities of the remainder of the terrorist's cell, leaving it free to plan future attacks?[131]

Covert search and seizure is not limited to the counter-terrorism context, however, and in fact is much more commonly used in drug investigations.[132] In that context, the DOJ has justified the need for covert search and seizure with the following example:

> Consider, for example, a case in which law enforcement received a tip that a large shipment of heroin was about to be distributed and obtained a warrant to seize the drugs. To preserve the investigation's confidentiality and yet prevent the drug's distribution, investigators would prefer to make the seizure appear to be a theft by rival drug traffickers. Should investigators be forced to let the drugs hit the streets because notice of a seizure would disclose the investigation and destroy any chance of identifying the drug ring's leaders and dismantling the operation—or to make the alternative choice to sacrifice the investigation to keep dangerous drugs out of the community?[133]

Thus, the core justification for covert search and seizure authority is this premise: in some cases, law enforcement has a sufficiently compelling need to both seize evidence (e.g., to prevent large amounts of drugs from entering a community) and also continue an investigation (e.g., to detect and disrupt the entire conspiracy rather than only the immediate suspects).

Focusing on the particular context of covert seizures (staged burglaries), it is not clear whether this justification actually makes sense in all cases. As noted above, law enforcement officers conducting these investigations are not naïve, and they are generally aware of the risk of harm to others created by a staged burglary.[134]

This means that law enforcement officials are also often aware that once they conduct a covert seizure, it is unlikely that they will be able to continue an investigation for any substantial period of time.[135] When violent retaliation is a likely response, police will not be able to keep the

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131. *Id.*

132. *See* Witmer-Rich, *The Rapid Rise*, *supra* note 52, at 534–36 figs. 2 & 3 (showing that "most delayed notice search warrants—about 75%—are used for drug investigations").

133. DNSW White Paper, *supra* note 111.

134. *See, e.g.*, *Cleveland Man*, *supra* note 26.

135. *See id.*

investigation going for weeks or months after a covert seizure. Instead, they are likely to have only hours or days before they will need to step in and ensure they prevent any harm to third parties.[136] The cases discussed above illustrate this dynamic.[137]

Stated differently: the more responsible law enforcement is about preventing violence following a covert seizure, the less useful a covert seizure becomes as a tool to permit the investigation to continue.[138] Once police hear or see suspects discussing retaliation for the drug theft, police will need to move in promptly to arrest the suspects.[139] Even if police do not detect evidence of retaliation, they nevertheless are aware that violent retaliation is a very real danger—and the longer they wait to arrest the suspects, the greater the risk of harm.[140]

The upshot is that in many cases covert seizures which are properly monitored to protect third parties will not enable law enforcement to both seize the drugs and continue their investigation for any substantial period of time.[141] The danger created by the covert seizure means that the investigation will be able to continue only for an additional period of hours or a few days.[142]

If this is the case, then why are law enforcement officers conducting high-risk covert search and seizures in the first place? What do law enforcement officials hope to accomplish in such a short time?

Here it is worth clearly separating two different, but related, potential law enforcement objectives when it comes to covert seizures. Consider a drug investigation: First, investigators may seek to keep drugs off the street while allowing the investigation to remain secret and thus to continue for some additional period of time, in the hopes of developing more evidence or identifying more participants.[143] Second, investigators may simply seek to provoke the drug dealers into additional criminal activity—at a time when

136. *See id.*
137. *See* discussion *supra* Part II.
138. *See, e.g.*, Bernstein, *supra* note 67.
139. *See Cleveland Man*, *supra* note 26.
140. *See id.*
141. *See id.*
142. *See id.*
143. *See* DNSW White Paper, *supra* note 111.

they are under close police surveillance that will garner highly effective evidence.[144]

Starting with the first justification: Law enforcement officials investigating complex criminal organizations, such as drug conspiracies, face a serious challenge in identifying and gathering evidence against persons higher up in the organization who do not directly handle drugs.[145] Law enforcement officials thus resort to a variety of investigative techniques to try to reach higher into an organization.[146] They install wiretaps in the hopes of capturing communications with upper-level conspirators.[147] They try to "flip" low-level conspirators, pressuring them to wear a wire or otherwise testify against higher-level members of the conspiracy in exchange for reduced or dismissed charges.[148]

A covert search or seizure is another possible tool. As described by the DOJ, the benefit of a covert seizure is to permit investigators to prevent drugs from reaching users—by seizing them—while the investigation is ongoing.[149] Without the benefit of a covert seizure, police investigating a

144. *See* United States v. Miranda, 425 F.3d 953, 956 (11th Cir. 2005).

145. Neal Kumar Katyal, *Conspiracy Theory*, 112 YALE L.J. 1307, 1326 (2003) (noting that a key economic advantage of forming a large conspiracy is that "[t]hey can reduce the probability of detection," including through specialization of roles, "where the responsibility for a single crime is spread over many persons"; moreover, "those insulated will be leaders, who orchestrate actions to maintain plausible deniability"); NORMAN W. PHILCOX, AN INTRODUCTION TO ORGANIZED CRIME 79 (1978) ("It is difficult to obtain proof of organized crime violations insofar as the top command is concerned. If and when they are identified it is often impossible to obtain documentary evidence which can be used in court.").

146. *See* Katyal, *supra* note 145, at 1326.

147. In fact, under Title III one statutory requirement for obtaining a wiretap order is demonstrating that other "procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried," 18 U.S.C. § 2518(1)(c), a requirement commonly referred to as Title III's "necessity" requirement. *See, e.g.*, United States v. Bennett, 219 F.3d 1117, 1121 (9th Cir. 2000); United States v. Zapata, 546 F.3d 1179, 1186 (10th Cir. 2008).

148. *See, e.g.*, Katyal, *supra* note 145, at 1329–32, 1339–40 (describing how conspiracy law is used to flip co-conspirators and thereby extract information against other conspirators); Mark J. Kadish, Rosalyn Suna Kadish & Alan J. Baverman, *The Continuing Criminal Enterprise Statute: A Powerful Weapon for Federal Prosecutors*, 19 TRIAL 66, 68 (1983) (describing how drug task forces use the Continuing Criminal Enterprise statute "for leverage against mid-range defendants in a typical drug conspiracy, in hopes of getting these defendants to 'flip' against others in the 'organization'").

149. *See* DNSW White Paper, *supra* note 111.

complex drug conspiracy might be forced to permit known drug stashes to be sold to consumers in order to allow the investigation to continue.[150]

Now consider the second justification: A covert seizure will often lead the conspirators to plan, attempt, or carry out some type of violent retribution. As seen in the examples above, they might agree to kill the suspected thief or kidnap the storage warehouse manager.[151] That violent retribution itself can then form the basis of additional, possibly more serious, criminal charges against the suspect.[152] Instead of conducting a covert seizure to keep the investigation ongoing, law enforcement may sometimes use covert seizures to "poke the hornet's nest"—create alarm and panic among the conspirators to provoke them into additional criminal conduct.[153] Moreover, this provoked criminal activity happens at a time known to the police, and thus police are in a strong position to set up surveillance and gather strong evidence of this criminal conduct.[154]

This pattern is evident is some of the cases discussed earlier.[155] In the Oregon case, for example, the defendants were never charged with the underlying marijuana distribution offenses that motivated the initial investigation and covert seizure.[156] Instead, they were only charged with offenses related to their retaliation—kidnapping and brandishing a firearm during a drug trafficking offense.[157] The firearm charges were particularly damaging to the defendants, as they carry either a five-year or seven-year mandatory minimum that must be imposed consecutively—in addition to whatever punishment is given for the kidnapping.[158]

The first tactic—permitting an investigation to continue in order to discover more co-conspirators—has repeatedly been proffered by the

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150. *See id.*

151. *See Cleveland Man*, *supra* note 26; United States v. Miranda, 425 F.3d 953, 956 (11th Cir. 2005).

152. *See Miranda*, 425 F.3d at 956.

153. *See id.*

154. *See id.*

155. *See* discussion *supra* Part II.

156. *See* United States v. Wafer, Docket No. 3:17-cr-00435 (D. Or. Dec. 05, 2017), Court Docket (each defendant facing charges of (1) kidnapping, (2) using a firearm during and in relation to a crime of violence, (3) conspiracy to use a firearm during and in relation to a crime of violence, and (4) kidnapping and use of a firearm during and in relation to a crime of violence).

157. *See id.*

158. *See* 18 U.S.C. § 924(c)(1)(A)(i) (use); *id.* § 924(c)(1)(A)(ii) (brandishing).

government in defense of the practice of covert searching.[159] The second tactic—triggering violent retaliation, in order to obtain more serious charges—has not been mentioned in DOJ defenses of delayed notice search warrants.[160] It is a hidden—but perhaps more common—reason to conduct a covert seizure.

In some cases, it does appear that covert seizures can be conducted in a manner that mirrors the DOJ's claims—allowing investigators to seize evidence while continuing a complex investigation.[161] The *Patel* case, discussed above, is one such example: the covert search and seizure occurred in April 2011 and the conspirators were not arrested until August 2011.[162] But in other cases, such as the Oregon marijuana seizure and the Ohio methamphetamine seizure, the danger of violent retaliation prompted law enforcement to intervene and end the investigation very quickly.[163]

In sum, covert seizures of physical evidence raise several interrelated concerns. First, they give rise to the predictable danger that the targets of the covert seizure will retaliate violently against innocent third parties.[164] Law enforcement officers are well aware of this risk, and that in turn gives rise to the second and related concern over covert seizures—that law enforcement officers are not using covert seizures as a way to prolong an ongoing investigation, but as a way to provoke suspects into violent criminal conduct.[165] Part IV turns to consider what limitations the Fourth Amendment might place on this practice.

IV. FOURTH AMENDMENT LIMITATIONS ON COVERT SEIZURES

The Fourth Amendment does not speak directly to the question of whether police should be permitted to covertly enter a home, seize evidence

159. *See* DNSW White Paper, *supra* note 111; *Counterterrorism Legislative Review: Hearing Before the S. Comm. on the Judiciary,* 108th Cong. (2004) (statement of James Comey, Deputy Att'y Gen. of the United States) (testifying that without delayed notice search warrants, in some cases agents would be "forced to reveal the existence of the investigation prematurely," which would result in "the flight of many of the targets" of an investigation).

160. *See* DNSW White Paper, *supra* note 111.

161. *See* United States v. Patel, 579 F. App'x 449, 463–64 (6th Cir. 2014).

162. *Id.*

163. *Cleveland Man*, *supra* note 26; Bernstein, *supra* note 67.

164. *See, e.g.*, *Cleveland Man*, *supra* note 26.

165. *See, e.g.*, United States v. Miranda, 425 F.3d 953, 956 (11th Cir. 2005).

or contraband, and then stage the scene to look like a burglary.[166] Likewise, the Supreme Court has never directly assessed the constitutionality of covert seizures.[167] Evaluating whether this practice is constitutionally permissible—and if so, what Fourth Amendment limitations may exist—requires considering the Fourth Amendment's history and first principles, including the limited Supreme Court precedent that sets forth principles bearing on this practice.

Delayed notice search warrants—warrants expressly authorizing covert searches and seizures—are a relatively recent phenomenon.[168] There is no evidence of this practice in the eighteenth century,[169] and as recently as 1966 an internal Federal Bureau of Investigation (FBI) memorandum explained that covert search and seizure "involves trespass and is clearly illegal; therefore, it would be impossible to obtain any legal sanction for it."[170] The earliest reported judicial decision involving a delayed notice warrant is from 1985.[171]

One aspect of the fundamental structure of the warrant clause of the Fourth Amendment is to interpose a neutral magistrate between the government's investigative arm and its citizenry.[172] The warrant clause enumerates several requirements—probable cause, oath or affirmation, and particularity as to place searched and items seized.[173] In addition, however, the Supreme Court has held that the "reasonableness" requirement of the first clause of the amendment also imposes certain requirements for the warrant process beyond those articulated in the second clause.[174] Most

166. *See* U.S. CONST. amend. IV.

167. *See infra* notes 186–89.

168. *See generally* 18 U.S.C. § 3103a.

169. *See* Witmer-Rich, *The Rapid Rise*, *supra* note 52, at 559–70 (reviewing historical record).

170. RONALD KESSLER, THE FBI 80 (1994) (reprinted in HENRY M. HOLDEN, FBI 100 YEARS: AN UNOFFICIAL HISTORY 215 (2008)).

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

172. *See* McDonald v. United States, 335 U.S. 451, 455 (1948) ("Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done . . . so that an objective mind might weigh the need to invade that privacy in order to enforce the law.").

173. U.S. CONST. amend. IV.

174. *See, e.g.*, Johnson v. United States, 333 U.S. 10, 14 (1948) (finding that to be reasonable, inferences supporting a warrant must be "drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive

notably for present purposes, the Court in *Wilson v. Arkansas* held that officers must notify the occupants of their presence and authority before breaking open the door, absent a good reason to dispense with that requirement.[175] Covert searches directly circumvent this general notice requirement, and I have evaluated the constitutionality of covert searching generally in earlier articles.[176]

Focusing on covert seizures specifically, there is even less guidance from the Court than exists for covert searches. *Wilson* did not involve a covert search or seizure.[177] In *Dalia v. United States*, a case involving the covert installation of a bugging device, the Court held "The Fourth Amendment does not prohibit *per se* a covert entry performed for the purpose of installing otherwise legal electronic bugging equipment."[178] The Court called the defendant's argument to the contrary "frivolous," noting it had earlier stated that "officers need not announce their purpose before conducting an otherwise [duly] authorized search if such an announcement would provoke the escape of the suspect or the destruction of critical evidence."[179] But *Dalia* did not involve a covert seizure and said nothing about the unique risks involved in that practice.[180]

While neither *Wilson* nor *Dalia* addressed covert seizures, the Court's decision in *Wilson* set forth fundamental groundwork that bears on the constitutionality of this practice.[181] *Wilson* articulated a variety of purposes served by the common law requirement that officers executing warrants announce their presence (give notice) and request admission before breaking the door.[182] The Court quoted *Semayne's Case*, from 1603, for the following "important qualification":

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enterprise of ferreting out crime").

175. Wilson v. Arkansas, 514 U.S. 927, 931 (1995) ("An 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.").

176. *See generally* Witmer-Rich, *The Rapid Rise*, *supra* note 52; Jonathan Witmer-Rich, *The Fatal Flaws of the "Sneak and Peek" Statute and How to Fix It*, 65 CASE W. RES. L. REV. 121 (2014) [hereinafter Witmer-Rich, *The Fatal Flaws*].

177. *See generally Wilson*, 514 U.S. at 930.

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

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

180. *See Dalia*, 441 U.S. at 247–48.

181. *See Wilson*, 514 U.S. at 929.

182. *Id.* at 935–36.

> 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 . . .[183]

The Supreme Court, in *Wilson*, thus recognized that the common law "notice" requirement for executing warrants is designed in part to prevent several types of harm.[184] The first is the simple physical damage to the home caused by an unnecessary break-in.[185] Second, officers who break in without prior notice cause "fear and dismay" to the occupants of the home.[186] Third, an unannounced entry could provoke violent resistance from those surprised occupants.[187]

Wilson thus establishes several fundamental points. It makes clear that the "reasonableness" of a search depends not only on whether a warrant is issued properly, but also on the manner in which the search is carried out.[188] It also recognizes certain harms that can be created by unreasonable search practices, and that reasonableness will be judged in part with an eye toward avoiding those harms.[189]

As noted above, covert seizures similarly create risks of unnecessary harm, albeit through somewhat different mechanisms. First, the practice of covert seizure usually involves the police deliberately damaging property to

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183. *Id.* at 931–32 (quoting Semayne's Case (1604) 77 Eng. Rep. 194, 195–96 (KB); 5 Co. Rep. 91 a, 91 b).

184. *Wilson*, 514 U.S. at 935–36.

185. *Semayne's Case*, 77 Eng. Rep. at 195–96 ("[G]reat damage and inconvenience might ensue to the party" who, had he known of the process, might have obeyed it); *see also* Hudson v. Michigan, 547 U.S. 586, 594 (2006).

186. Ratcliffe v. Burton (1802) 127 Eng. Rep. 123, 126 (KB) ("The law of England, which is founded on reason, never authorizes 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.").

187. Launock v. Brown (1819) 106 Eng. Rep. 482, 483 (KB) ("[H]ow is it possible for a party to know what the object of the person breaking open the door may be? He has a right to consider it as an aggression on his private property, which he will be justified in resisting to the utmost."); *Hudson*, 547 U.S. at 594.

188. *See Wilson*, 514 U.S. at 934.

189. *See id.* at 935–36.

leave the appearance of a burglary.[190] This is very similar to the unnecessary property damage that *Wilson*'s "notice" rule is designed to prevent.[191]

Unlike a regular no-knock search, police executing a covert search and seizure are unlikely to startle the occupants or provoke an immediate reaction to their unannounced entry, as police deliberately choose a time when they have very good reason to believe no occupant will be present.[192] But there is nonetheless a serious risk of harm created by the police desire to bypass the conventional search approach—the harm that covert seizures will incite the targets into violent retribution against others.[193]

At a basic level, as *Wilson* recognizes, the Fourth Amendment "notice" requirement is designed in part to prevent unnecessary violence.[194] The practice of covert seizures, using a delayed notice warrant that expressly authorizes covert entry and seizure, deviates from the ordinary notice requirement, and in so doing gives rise to a risk of violence.[195] As such, the core principles underlying the Fourth Amendment have direct bearing on

190. *See, e.g.*, DeArmon v. Burgess, 388 F.3d 609, 611 (8th Cir. 2004) ("According to appellants, the officers broke entry doors and locks on interior doors, damaged drywall and furniture, and seized a firearm, doorknobs and locks, photographs, personal papers, and jewelry."); United States v. Howard, 489 F.3d 484, 488 (2d Cir. 2007) (finding officers "conduct[ed] the search of the vehicle to make it appear as though the vehicle had been vandalized while it was left unattended on the side of the Thruway. They broke a pool cue found in the back of the car, presumably belonging to the vehicle's occupants, and used it to pry open the glove compartment, damaging the glove compartment and making it appear as if there had been an attempted break-in."); United States v. Miranda, 425 F.3d 953, 956 (11th Cir. 2005) ("By staging a burglary, the agents hoped to precipitate activity within the Cuevas conspiracy that would provide additional evidence of criminal conduct.").

191. *See Wilson*, 514 U.S. at 935–36.

192. This danger of no-knock searches is well-documented and has resulted in the deaths of many unsuspecting innocent persons, including Breonna Taylor. *See, e.g.*, Radley Balko, *The No-Knock Warrant for Breonna Taylor Was Illegal*, WASH. POST (June 3, 2020), https://www.washingtonpost.com/opinions/2020/06/03/no-knock-warrant-breonna-taylor-was-illegal/; Brian Dolan, Note, *To Knock or Not to Knock? No-Knock Warrants and Confrontational Policing*, 93 ST. JOHN'S L. REV. 201, 203–04 (2019) ("Between 2010 and 2016, at least ninety-four people died during the execution of no-knock search warrants, thirteen of whom were police officers.") (citing Kevin Sack, *Door-Busting Drug Raids Leave a Trail of Blood*, N.Y. TIMES (Mar. 18, 2017), https://www.nytimes.com/interactive/2017/03/18/us/forced-entry-warrant-drug-raid.html).

193. *See, e.g.*, *Cleveland Man*, *supra* note 26.

194. *Wilson*, 514 U.S. at 935–36.

195. *See Cleveland Man*, *supra* note 26.

covert seizures with delayed notice warrants, and courts should evaluate whether and under what circumstances such seizures are "reasonable."[196]

These basic Fourth Amendment principles suggest that for covert seizures of physical property to be reasonable under the Fourth Amendment, several things should be true.

First, law enforcement officers must consider whether and how the covert seizure may lead to a risk of harm to other persons and have a plan for how they will mitigate that risk.

Second, a technique that predictably gives rise to a serious risk of harm to innocent third parties should be justified by very weighty government interests, and not used anytime it seems that a covert seizure might be convenient or turn something up. In particular, law enforcement desire to provoke the defendant into threatening violent crime is not a sufficiently weighty government interest to justify use of an exceptional type of warrant—a delayed notice warrant—that risks the safety of innocent third parties. The courts should recognize that a desire to provoke criminals into a violent retaliation is not a permissible justification for obtaining warrant authority for a covert seizure.

Finally, all of these additional considerations should be reviewed by the judge issuing the delayed notice warrant, rather than simply left to law enforcement with no judicial oversight or supervision.

One possible objection is that these requirements did not exist at the time of the Founding and are not expressly written into the Fourth Amendment.[197] That objection has little force, for the very practice of covert search and seizure is itself a recent innovation.[198] There is no evidence of lawfully recognized covert search and seizure—by warrant or otherwise—at the time of the Founding or in decades after.[199] Thus, it could equally be argued that because covert search and seizure was unknown in the 1790s, this practice should be viewed as categorically "unreasonable" and prohibited by the Fourth Amendment.[200]

Both views are lacking. The fact that a search or seizure practice did not exist in 1790 does not mean that it is categorically forbidden by the

196. *See Wilson*, 514 U.S. at 935–36.
197. *See generally* U.S. CONST. amend. IV.
198. *See* Witmer-Rich, *The Rapid Rise*, *supra* note 52, at 561–70.
199. *Id.*
200. *See id.*

Fourth Amendment. Likewise, the fact that the Fourth Amendment does not expressly forbid a particular search practice does not mean it is wholly unregulated. The text of the Fourth Amendment is focused on whether searches and seizures are "unreasonable"—a capacious standard that the Court has repeatedly relied upon to craft both limitations and permissions related to search and seizure.[201]

Of course, the Fourth Amendment is not a general regulation of all police investigative conduct. In particular, courts ordinarily defer to the police on questions of tactics or strategy, so long as the execution of those plans stays within the bounds of the Fourth Amendment.[202] Thus, for example, police are free to "manufacture" exigent circumstances—approach a drug house and announce the police presence, with hopes of triggering an evasive response inside and thereby giving rise to an exigency that allows them to enter without a warrant.[203] This is permissible so long as the police do "not violate the Fourth Amendment or threaten to do so."[204]

The mere fact that a particular investigative tactic creates risks or seems unwise is not enough to render it a proper target of Fourth Amendment regulation. There are circumstances in which it may be unwise to use an undercover informant in a particular investigation, or unwise to follow one lead rather than another. So long as none of those strategic and tactical decisions constitute an unreasonable search or seizure, however, the

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201. *See, e.g.*, Kathryn R. Urbonya, *Rhetorically Reasonable Police Practices: Viewing the Supreme Court's Multiple Discourse Paths*, 40 AM. CRIM. L. REV. 1387, 1388–89 (2003) (identifying the multiple "discourse paths" employed by the Supreme Court "to construct an evolving reasonableness standard," including a shift from a warrant presumption to an "open-ended balancing standard"); I. Bennett Capers, *Rethinking the Fourth Amendment: Race, Citizenship, and the Equality Principle*, 46 HARV. C.R.-C.L. L. REV. 1, 44 (2011) ("The Fourth Amendment is capacious enough, certainly under its reasonableness clause, to permit limited intrusions and non-discretionary searches even where the primary goal is law enforcement oriented."); Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 201, 229 (1993) (criticizing the Supreme Court for using an "ad hoc reasonableness standard" and arguing that "the broad principle embodied in the Reasonableness Clause is that discretionary police power implicating Fourth Amendment interests cannot be trusted").

202. *See, e.g.*, Kentucky v. King, 563 U.S. 452, 466 (2011) (criticizing lower court rulings that "unjustifiably interfere[] with legitimate law enforcement strategies").

203. *See id.* at 465–66.

204. *Id.* at 455.

Fourth Amendment leaves those decisions to law enforcement, not the courts.[205]

In the case of covert seizures, however, the police are using the warrant itself—which is very clearly regulated by the Fourth Amendment—to trigger the dangerous reaction from the targets.[206] Moreover, the police are seeking judicial approval for a separate, special type of authority: the authority to conduct a covert entry and then secretly seize evidence.[207] It is clear that Fourth Amendment "reasonableness" depends in part on how officers execute a warrant, including the ordinary requirement that officers announce their authority and give notice of their search, absent some good reason to depart from that practice.[208] Given that police are asking judges to authorize a deviation from the constitutional norm—giving notice at the time of a search and seizure—it is both appropriate and necessary for courts to evaluate the reasons being given for that deviation, and to determine whether this practice creates some of the very types of harms the Fourth Amendment is designed to prevent.[209] In light of the centrality of the warrant to this process, courts should not shirk their obligation to ensure that the search and seizure process with delayed notice warrants is "reasonable."

In light of the danger posed by covert seizures with delayed notice warrants, a strong case can be made that the unfettered practice of covert seizures would be an "unreasonable" search and seizure practice and would violate the Fourth Amendment.[210] Part V turns to consider whether those dangers can be sufficiently minimized so as to render the practice constitutionally permissible in some cases.

V. USING THE WARRANT PROCESS TO REGULATE COVERT SEARCHING

The warrant process can serve to address some of the potential risks of covert seizures. Currently, police seeking a delayed notice search warrant must—of course—satisfy the regular warrant requirements, such as showing probable cause.[211] In addition, police must satisfy a statutory standard if they

205. *See generally id.*

206. Witmer-Rich, *When Cops 'Steal,' supra* note 1; *see* Shumate, *supra* note 1, at 232.

207. *See* 18 U.S.C. § 3103a(b)(2); Shumate, *supra* note 1, at 203.

208. Wilson v. Arkansas, 514 U.S. 927, 931 (1995).

209. *See id.*

210. *See* discussion *supra* Part IV.

211. 18 U.S.C. § 3103a(a).

wish to turn that ordinary search warrant into a delayed notice warrant.[212] To convert an ordinary warrant to a delayed notice warrant, police must show that executing the warrant and giving notice to the occupant at the time of the search would have an "adverse result," defined as: (1) endangering some person; (2) flight from prosecution; (3) destruction of evidence; (4) witness intimidation; or (5) otherwise seriously jeopardizing an investigation.[213]

Finally, police seeking to conduct a covert seizure during that covert search must show "reasonable necessity" for the seizure.[214] Unfortunately, this reasonable necessity standard does nothing to mitigate the risks of covert seizures.[215]

Reasonable necessity is an amorphous standard, and the statute provides no further clarification of what type of showing is required.[216] In a covert seizure, police ordinarily seek to seize drugs or some type of dangerous contraband such as weapons.[217] If a covert search is being conducted, it seems relatively easy for police to further demonstrate reasonable necessity for the covert seizure.[218] Without a covert seizure, after all, the drugs or guns might well enter the stream of commerce and cause danger to the community.[219] Thus, the reasonable necessity standard seems very easy for police to meet in most cases.

Of particular concern, nothing in the reasonable necessity standard, or in the rest of the warrant application process, addresses the risk of harm to third parties.[220]

At the very minimum, then, police seeking authority for a covert seizure should be required to state, in the warrant application, whether they

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212. *See id.* § 3103a(b); *id.* § 2705(a).

213. *See id.* § 3103a(b)(1) (permitting a delayed notice warrant if giving notice "may have an adverse result" as defined in 18 U.S.C. § 2705); *id.* § 2705(a)(2) (defining "adverse result" as (A) "endangering the life or physical safety of an individual"; (B) "flight from prosecution;" (C) "destruction of or tampering with evidence"; (D) "intimidation of potential witnesses"; or (E) "otherwise seriously jeopardizing an investigation. . . ."). For criticism of this standard, *see* Witmer-Rich, *The Fatal Flaws*, *supra* note 176, at 150–60.

214. 18 U.S.C. § 3103a(b)(2).

215. Witmer-Rich, *The Fatal Flaws*, *supra* note 176, at 171.

216. *Id.* at 174–75.

217. *See* DNSW White Paper, *supra* note 111.

218. *See id.*

219. *See id.*

220. Witmer-Rich, *The Fatal Flaws, supra* note 176, at 171–74.

have reason to believe that conducting a covert seizure will create a risk of harm to others, through retaliation or otherwise.

Once that danger is brought to the forefront, the second step is for police to describe, in the warrant application, what steps will be taken to mitigate that risk. This will require a law enforcement agency seeking a warrant for a covert seizure to explicitly consider the danger to others and pre-commit to what steps they will take to minimize that risk.

Finally, police should be required to explain why a covert search and seizure is important to the investigation—that is to say, why this risky tactic is being sought rather than simply raiding the location, arresting the suspects, and seizing any evidence. Police thus should explain what particular expected benefit will be gained by using a covert search and seizure rather than the ordinary search and seizure process.

Once presented with this information in the affidavit, the magistrate should then assess:

- Whether the police plan to mitigate harm to others appears to be reasonable in the circumstances, or whether additional measures to protect the public might be necessary; and
- Whether there is a sufficiently important government reason for engaging in a covert search and seizure as opposed to an ordinary search and seizure.

On the latter point, it should be stressed that simply provoking additional criminal activity (in response to the covert seizure) is not a sufficient reason to justify a covert search and seizure. Instead, law enforcement should be required to demonstrate what additional investigative benefit can be derived from a covert search and seizure, beyond simply the chance of provoking more criminal activity.

A fundamental purpose of the warrant requirement is to protect the security of individuals by interposing a neutral and detached magistrate between the government's law enforcement apparatus and its citizenry.[221] Covert seizures with delayed notice search warrants give rise to uniquely serious risks of harm to innocent persons.[222] Without adequate protections, covert seizures appear to be "unreasonable" under the Fourth Amendment, as they create a number of the types of dangers to property and to persons

221. *See* McDonald v. United States, 335 U.S. 451, 455 (1948).
222. *See* discussion *supra* Part III.

that the Fourth Amendment seeks to prevent.[223] The requirements set forth above would serve to mitigate those harms and thereby limit covert seizures in a way that might render them constitutionally reasonable.

223. *See* discussion *supra* Part IV.