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JUDICIAL INTERPRETATION OF TITLE III — SHOULD PRIVACY INTERESTS YIELD IN THE WAKE OF CONGRESSIONAL SILENCE ON ENTRIES TO INSTALL BUGS?

In 1968 Congress enacted an elaborate statute[1] regulating law enforcement officials' use of electronic surveillance to overhear conversations of those suspected of crimes.[2] Title III of the Omnibus Crime Control and Safe Streets Act of 1968[3] details precisely the officials who may apply for[4] and issue[5] an eavesdropping[6] warrant, the factual circumstances in which a warrant may be issued,[7] the contents of the application[8] and warrant,[9] the manner in which intercepted conversations[10] are to be recorded and preserved,[11] and the manner in which suppression issues are to be liti-

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1. 18 U.S.C. §§ 2510-2520 (1976).

2. Electronic surveillance and eavesdropping are used in this paper to refer to the interception of conversations by wiretapping ("the interception of telephone calls") or bugging ("the use of hidden microphones to pick up all conversations in a given area") without the consent of one party to the conversation. *See Controlling Crime Through More Effective Law Enforcement: Hearings on S. 2050 Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess. 983 (1967) [hereinafter cited as *Hearings*] (quoting N.Y. Times, Nov. 23, 1966, § A, at 24, col. 7).

Berger v. New York, 388 U.S. 41 (1967), and Katz v. United States, 389 U.S. 347 (1967), were guides for Title III which was intended to provide law enforcement officials with tools to fight organized crime. S. REP. NO. 1097, 90th Cong., 2d Sess. 66-76, *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 2112, 2153-63.

3. 18 U.S.C. §§ 2510-2520 (1976).

4. *Id.* § 2516.

5. *Id.* §§ 2510, 2516.

6. *See* note 2 *supra*.

7. 18 U.S.C. § 2518(3) (1976).

8. *Id.* § 2518(1).

9. *Id.* § 2518(4).

10. Seizure and interception are used interchangeably in this paper to refer to the "aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device." 18 U.S.C. § 2510(4) (1976). For a definition of oral and wire communications, see note 14 *infra*. There may be, however, a real difference between a search and an interception of conversations. As distinguished from a conventional search and seizure, where all items in a premises are not brought into an officer's custody, electronic surveillance may require officers to overhear all conversations. *See* note 2 *supra*. In Spease v. State, 275 Md. 88, 101, 338 A.2d 284, 291-92 (1975), the Maryland Court of Appeals held that listening to but not recording a conversation does not constitute an interception. *See generally* C. FISHMAN, WIRETAPPING AND EAVESDROPPING §§ 6, 7 (1978).

11. 18 U.S.C. § 2518(8) (1976).

gated.[12] However, Title III is silent on: whether law enforcement officials may enter to install eavesdropping devices which have been authorized; whether such entry must be authorized by the judge authorizing the interceptions; whether the application must set forth the need for such entry; and whether the judge must authorize the number, time, and manner of such entries. This statutory silence and the sparse commentary in the legislative debates on the entry problem inevitably resulted in judicial confusion and disagreement.

Title III has been variously interpreted by seven United States courts of appeals. Not only has there been disagreement on whether entries to install are permitted but also, assuming entries are permitted, on whether such entries must be expressly authorized by court order. Recently, the United States Supreme Court, in *Dalia v. United States*,[13] resolved this conflict among the circuits by ruling that authorization for the interception of oral communications[14] implicitly authorizes, without further scrutiny, entries necessary to effectuate a bug. This Note will analyze the Court's opinion in *Dalia* and its potential impact on individual liberties and on law enforcement procedures.

I. TITLE III AND THE FOURTH AMENDMENT

The fourth amendment prohibition against unreasonable searches and seizures strikes a balance between individual liberties and societal protection.[15] All searches and seizures must be reasonable, and search warrants generally must be obtained prior to the intrusion. Warrants are only is-

12. *Id.* §§ 2515, 2518.

13. 441 U.S. 238 (1979).

14. Oral communication is defined as "any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation." 18 U.S.C. § 2510(2) (1976). Oral communications are distinct from wire communications which are made using transmission facilities aided by "wire, cable, or other like connection between the point of origin and the point of reception." *Id.* § 2510(1).

15. *See, e.g.*, Camara v. Municipal Court, 387 U.S. 523, 534-35 (1967) (fourth amendment requires a balancing of the need to search or seize against the invasion which such search or seizure entails). The fourth amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

The fourth amendment protects an individual's right to be let alone and to be free from general searches. *See* Hufstedler, *Indivisible Searches For Tangible Things: Regulation Of Governmental Information Gathering*, 127 U. PA. L. REV. 1483, 1512-14, 1516-23 (1979) (electronic surveillance, by its nature, is most intrusive, and the costs of allowing this investigative technique may outweigh any benefits derived). For a discussion of individual rights

sued by a judge after the judge concludes there is probable cause to believe that the search will uncover fruits or instrumentalities of a crime.[16] Furthermore, law enforcement officials seeking a warrant must particularly describe the place to be searched and the people or things to be seized.[17] There are, however, a number of exceptions to the warrant requirement.[18] For example, evidence found in plain view during a lawful search of the premises may be seized even though the warrant does not specifically describe the evidence.[19]

Historically, the interception of oral communications when unaccompanied by a physical trespass was excluded from fourth amendment protection.[20] However, in 1967, the Supreme Court, in *Berger v. New York*,[21] held a New York electronic surveillance statute unconstitutional because it lacked fourth amendment particularity requirements. Subsequently, in

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and eavesdropping, see Note, *Eavesdropping Orders and the Fourth Amendment*, 66 COLUM. L. REV. 355, 372 (1966).

16. *See* Brinegar v. United States, 338 U.S. 160, 175-78 (1949) (probable cause constitutes sufficient circumstances to convince a reasonable person that an offense is being committed and that a search is necessary to uncover evidence of the crime).

Electronic surveillance applications should be carefully drafted, setting forth sufficient facts to establish probable cause. For an example of an application which failed to establish probable cause, see People v. Brown, 80 Misc. 2d 777, 779-81, 364 N.Y.S.2d 364, 367-69 (Sup. Ct. 1975).

17. See 1 J. VARON, SEARCHES, SEIZURES AND IMMUNITIES 393-408 (2d ed. 1974), for a discussion of the particularity requirement.

18. *See* Katz v. United States, 389 U.S. 347, 357 (1967).

19. *See* Coolidge v. New Hampshire, 403 U.S. 443, 464-72 (1971) (car in plain view seized without a warrant; evidence suppressed for lack of inadvertence). For plain view evidence to be admitted, the officers must be lawfully on the premises, the evidence must have been in plain view, and the officers must have come upon the evidence inadvertently. *Id.* The inadvertence requirement, however, is open to interpretation. In United States v. Hare, 589 F.2d 1291, 1294 (6th Cir. 1979), the court ruled that officers have inadvertently seized objects when they do not have probable cause to believe that the seized evidence would be found. However, in *In re* 2029 Hering Street, Bronx, N.Y., 464 F. Supp. 164, 168-69 (S.D.N.Y. 1979), the court held the seizure was not inadvertent where officials had a strong belief that items other than those mentioned in the warrant would be found and were found.

In addition to plain view, exceptions to the warrant requirement have been granted under a variety of circumstances. *See, e.g.*, United States v. Martinez-Fuerte, 428 U.S. 543 (1976) (border search); United States v. Santana, 427 U.S. 38 (1976) (search during hot pursuit); Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (consent search); Chimel v. California, 395 U.S. 752 (1969) (search incident to an arrest); Terry v. Ohio, 392 U.S. 1 (1968) (search during a stop and frisk).

20. For a discussion of the trespass doctrine, see notes 33-36 and accompanying text *infra*.

21. 388 U.S. 41 (1967). For a discussion of *Berger*, see notes 40-43 and accompanying text *infra*.

Katz v. United States,[22] the Supreme Court, in a broad decision, ruled that conversations are protected by the fourth amendment even if their seizure is unaccompanied by a physical trespass.

Responding to *Berger* and *Katz*, Congress enacted Title III of the Omnibus Crime Control and Safe Streets Act of 1968 to regulate electronic surveillance by the government for law enforcement purposes. To obtain an eavesdropping warrant, Title III requires law enforcement officials to particularly describe: the place to be bugged or the telephone to be tapped; the person(s), if known, whose communications are to be seized; the type of communication to be seized; and the offense which has been, is being, or will be committed.[23]

The standard of probable cause required for eavesdropping warrants is identical to that required for other search warrants.[24] This standard, however, is applied for different purposes resulting in important differences in the application processes and in the warrants themselves.[25] For example, probable cause to eavesdrop does not indicate a corresponding probable cause to search.[26] Thus, one may have probable cause to believe that a telephone is being used to further a crime but lack probable cause to believe that physical evidence will be found on the premises. Additionally, while a showing of probable cause must be made for each search, an eavesdropping warrant may authorize repeated searches for up to thirty days.[27] A further difference lies in the application process: whereas many law enforcement officials may request a search warrant[28] only an attorney general, a specially designated assistant attorney general, or the principal attorney of a state or subdivision thereof may authorize an application for an eavesdropping warrant.[29] This process centralizes responsibility in a designated public official.[30] Moreover, whereas any neutral magistrate

22. 389 U.S. 347 (1967). For a discussion of *Katz*, see notes 37-39 and accompanying text *infra*.

23. 18 U.S.C. § 2518(1) (1976). *Berger* has been cited as a "constitutional blueprint" of what an electronic surveillance statute should look like. *See Hearings, supra* note 2, at 973-78.

24. *See* United States v. Fury, 554 F.2d 522 (2d Cir. 1977), *cert. denied*, 436 U.S. 931 (1978). For sample descriptions of places, persons, types of communications to be seized, and crimes alleged, see FISHMAN, *supra* note 10, §§ 51, 58, 61, 66, 67.

25. *See* United States v. Falcone, 505 F.2d 478, 481 (3d Cir. 1974), *cert. denied*, 420 U.S. 955 (1975).

26. *See* United States v. Fino, 478 F.2d 35, 37 (2d Cir. 1973), *cert. denied*, 417 U.S. 918 (1974).

27. 18 U.S.C. § 2518(5) (1976). *See generally* C. FISHMAN, *supra* note 10, § 6.

28. FED. R. CRIM. P. 41(a).

29. *See* 18 U.S.C. § 2516 (1976).

30. *See* United States v. Giordano, 416 U.S. 505, 515-20 (1974).

may issue a search warrant,[31] only judges of competent jurisdiction may authorize an eavesdropping warrant.[32]

Although Title III details precisely the limits of government interception, neither the statutory language nor its legislative history specify whether officials may enter to install bugging equipment and, if so, whether such entries must receive prior judicial approval.

A. Pre-Title III Eavesdropping

In the years preceeding the enactment of Title III, warrantless interceptions accomplished without physical intrusion did not violate an individual's fourth amendment rights. This rule, termed the "trespass" doctrine,[33] was announced in *Olmstead v. United States*,[34] a wiretapping case, and later applied in *Goldman v. United States*,[35] a bugging case. In *Olmstead* and *Goldman*, the Supreme Court held that the fourth amendment was not violated because there were no "physical" intrusions in the course of performing the surveillances. As recently as 1961, the Court adhered to the trespass doctrine, ruling evidence inadmissible where a warrantless entry was made to install a bugging device.[36]

Forty years after *Olmstead*, the Supreme Court, in *Katz v. United States*,[37] expressly rejected the trespass doctrine. In *Katz*, federal agents

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31. FED. R. CRIM. P. 41(a).

32. A judge of competent jurisdiction is defined as "a judge of a United States district court or a United States court of appeals; and a judge of any court of general criminal jurisdiction of a State who is authorized by a statute of that State to enter orders authorizing interceptions of wire or oral communications." 18 U.S.C. § 2510(9) (1976).

33. Under the trespass doctrine, a person's fourth amendment rights are not violated "unless there has been an official search and seizure of his person, or such a seizure of his papers or his tangible material effects, or an actual physical invasion of his house 'or curtilage' for the purpose of making a seizure." Olmstead v. United States, 277 U.S. 438, 466 (1928). There are two distinct intrusions referred to in *Olmstead*: seizure of tangible evidence; and physical trespass. The seizure problem was at issue in Wong Sun v. United States, 371 U.S. 471, 485 (1963), where the Court ruled that the fourth amendment protects against overhearing oral conversations resulting from an unlawful trespass. In Katz v. United States, 389 U.S. 347 (1967), the Court rejected the rule that there must be a physical trespass. For a discussion of *Katz*, see notes 37-39 and accompanying text *infra*.

34. 277 U.S. 438, 466 (1928).

35. 316 U.S. 129 (1942).

36. *See* Silverman v. United States, 365 U.S. 505, 506-12 (1961). In *Silverman*, agents, without obtaining a warrant to enter or to bug, drove a spike mike into a wall the petitioner shared with an adjoining house and monitored his conversations. In suppressing the evidence, the Supreme Court focused on the warrantless physical intrusion rather than the warrantless seizure of conversations. *Id.* Implicit in *Silverman* is recognition that intangible conversations can be seized. *See* NATIONAL WIRETAP COMM'N, ELECTRONIC SURVEILLANCE REPORT 37 (1976).

37. 389 U.S. 347 (1967). The *Katz* decision was foreshadowed by Justice Brandeis' dissent in *Olmstead*, where he identified the invasion of an individual's right to personal secur-

proceeding without a warrant placed a bug on the outside of a phone booth frequently used by the petitioner to transmit wagering information.[38] The Supreme Court ruled that even though there had been no trespass, the failure to obtain judicial authorization to intercept the communications required suppression of the evidence, notwithstanding the fact that there was probable cause to bug and that the bugging was reasonably effectuated. Thus, *Katz* established that a person's oral communications are protected from unreasonable searches and seizures.[39]

In a narrowly circumscribed decision, the Supreme Court, in *Berger v. New York*,[40] struck down a New York eavesdropping statute because it lacked the fourth amendment's particularity requirements. In a six-to-three decision, the Court found the statute unconstitutional because it failed to require applicants to state the alleged crime, the place to be searched, and the type of conversation to be seized.[41] In *Berger*, the Supreme Court set out criteria necessary to bring the New York statute in line with constitutional requirements.[42] Absent from these criteria, however, is a requirement for specific judicial authorization to enter and install bugging devices.[43]

B. Judicial Response to Title III

Title III's legislative history indicates congressional awareness of the need for entry. Congressional debates, however, never directly addressed

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ity as the essence of the fourth amendment violation. 277 U.S. at 474-75. Between *Olmstead* and the *Berger* and *Katz* decisions came Osborn v. United States, 385 U.S. 323 (1966). In *Osborn* upon the informer's consent to the recording of his conversation with petitioner, the agents, after showing probable cause, received judicial authorization to record the informer's conversation. The *Katz* Court reiterated that the *Osborn* procedure would satisfy the fourth amendment requirements. 389 U.S. at 355. Confusion may result from the Court's reliance on *Osborn* which involved consensual recording. *See* Dash, *Katz — Variations on a Theme by Berger*, 17 CATH. U.L. REV. 296, 310-13 (1968).

38. 389 U.S. at 348, 354 n.14. Law enforcement officials overheard only Katz's part of the conversations. *Id.* at 354.

39. *Id.* at 351. *Katz* was the perfect vehicle for the Supreme Court to announce unequivocally that it is the person, not the area, which receives constitutional protection. In *Katz*, the Court did not have to deal with physical invasions into an area since the bug was placed on the outside of the phone booth. Furthermore, the Court noted that the surveillance was reasonably executed. But the failure to obtain a warrant necessitated suppression of the evidence. *Id.* at 354-59.

40. 388 U.S. 41 (1967).

41. *Id.* at 54-59.

42. For a comparison of the *Berger* requirements and the corresponding Title III sections, see McNamara, *The Problem Of Surreptitious Entry To Effectuate Electronic Eavesdrops: How Do You Proceed After The Court Says "Yes"?*, 15 AM. CRIM. L. REV. 1, 6 (1977).

43. In *Berger*, the Supreme Court was aware that entries had been made in effectuating the bug, but it did not address this issue. *See* 388 U.S. at 45.

whether entry to install with or without specific judicial authorization would be permissible.[44] In the wake of litigation on the entry issue under Title III, three conflicting theories have been advanced by the federal courts of appeals: entries are not permitted;[45] entries are permitted provided there is prior "express" judicial approval to enter;[46] and entries are "implicitly" authorized in an order to bug.[47]

The Sixth and Ninth Circuits are the most recent federal appellate courts to address the entry issue. In *United v. Finazzo*[48] and *United States v. Santora*,[49] these circuits held that, absent express authorization in Title III, no entries are permissible.[50] In *Finazzo*, agents neither sought nor received judicial permission to enter the defendant's offices to install microphones.[51] The Sixth Circuit held that the entry violated property and privacy interests distinct from those affected by the search and seizure of communications.[52] A more complex situation was addressed by the Ninth

44. 114 CONG. REC. 14,484 (1968). Senator McClellan remarked that "[w]e tried to pattern this legislation after what the Supreme Court said in the *Berger* and *Katz* decisions." *Id. See also* S. REP. NO. 1097, 90th Cong., 2d Sess. 66, 224-25, *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 2112, 2153, 2274.

During the debates, Senator Tydings stated that Title III would not result in wholesale use of electronic surveillance for a number of reasons. One such reason being that "[b]ugs are difficult to install in many places since surreptitious entry is often impossible. Often, more than one entry is necessary to adjust equipment." 114 CONG. REC. 12,989 (1968). Senator Morse stated that bugging, as distinguished from wiretapping, requires an intrusion upon private premises to install. 114 CONG. REC. 11,598 (1968). *See also* 114 CONG. REC. 14,732 (1968) (remarks of Senator Yarborough).

45. *See* notes 48-54 and accompanying text *infra*.

46. *See* notes 55-58 and accompanying text *infra*. Where there has been express authorization for the entries, courts have looked to sources in addition to Title III to justify the entries. *See, e.g.*, United States v. Agrusa, 541 F.2d 690, 698-701 (8th Cir. 1976) (the "No Knock" Statute, 18 U.S.C. § 3109 (1976), allows entries). *Agrusa* involved entries into a business premise to install a bug and was specifically limited to its facts. Although § 3109 requires a knock and announcement prior to entry, the court stated that the need for secretive entry presented an exigent circumstance, allowing agents to enter without the prescribed knock and announcement. *See also* United States v. Finazzo, 583 F.2d 837, 851-52 (6th Cir. 1978) (Celebrezze, J., concurring) (FED. R. CRIM. P. 41 and the All Writs Act, 28 U.S.C. § 1651(a) (1976), should be used to empower judges to authorize entries).

47. *See* notes 59-62 and accompanying text *infra*.

48. 583 F.2d 837 (6th Cir. 1978), *vacated and remanded*, 441 U.S. 929 (1979) (vacated in light of *Dalia*).

49. 583 F.2d 453 (9th Cir. 1978), *vacated and remanded*, 441 U.S. 939 (1979) (vacated in light of *Dalia*), *rev'd* 600 F.2d 1317 (9th Cir. 1979).

50. If the *Dalia* Court had followed the reasoning of the Sixth and Ninth Circuits or Justice Stevens' dissent in *Dalia*, criminals might safely conduct their affairs in buildings not susceptible to nontrespassory eavesdropping. *See* notes 63-74 and accompanying text *infra*. *See also In re* United States, 563 F.2d 637, 643 (4th Cir. 1977).

51. However, a diagram indicating where the microphones were to be hidden was attached to the application for the interception order. 583 F.2d at 840.

52. *Id.* The court rejected the government's contention that the interception order im-

Circuit in a case involving an interception order which expressly authorized entry.[53] However, the court, in *United States v. Santora*, refused to interpret Title III's silence as evidence of congressional intent to permit surreptitious entry. The court noted that the precise language in Title III precluded a holding that surreptitious entries to install were permitted by implication.[54]

An alternative to the *Finazzo* and *Santora* approach was taken by the Fourth Circuit in *In re United States*.[55] There, the court ruled that entry was contemplated by Congress under Title III, but that entry will be valid only if pursuant to specific judicial authorization to enter.[56] Adhering to this approach, the District of Columbia Circuit, in *United States v. Ford*,[57] held that a judge must authorize the installation entry and specify the manner of entry, leaving little to the executing agent's discretion.[58]

Expanding upon the rulings of other circuits, the Second and Third Circuits, in *United States v. Scafidi*[59] and *United States v. Dalia*[60] respectively, held that an interception order complying with Title III implicitly authorizes entry. The *Scafidi* court ruled that once the authorizing judge is convinced that the oral interceptions are necessary, the agents have the

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plicitly authorized the entries, finding that, since the power to break and enter was not defined by the statute, it would be unwise implicitly to create a new exception to general search and seizure principles. *Id.* at 840-46.

53. *See* United States v. Santora, 583 F.2d at 454. The court discounted references by Senators Tydings and Morse, indicating congressional awareness that entries to install might be necessary. *Id.* at 461-62. Instead, in support of its holding the court quoted Senator McClellan's statement that "a bill as controversial as this . . . requires close attention to the dotting of every 'i' and the crossing of every 't' . . . ." *Id.* at 457 (quoting 114 CONG. REC. 14,751 (1968)).

54. 583 F.2d at 458.

55. 563 F.2d 637 (4th Cir. 1977).

56. *Id.* at 642-45. The court also rejected the lower court ruling that compelling or paramount justification is required before the entries may be authorized. *Id.* at 644.

57. 553 F.2d 146, 152-55 (D.C. Cir. 1977).

58. *Ford* has been criticized as requiring the judge to specify the exact time and manner of entry, thereby depriving law enforcement officials of necessary flexibility. *See* McNamara, *supra* note 42, at 14-15. However, while *Ford* requires specificity in the warrant, the court did not take away all of the agents' discretion. The court implied that agents might be given freedom to make multiple entries at any time, in any manner, if affidavits supporting the application indicate that such freedom is necessary. *See* 553 F.2d at 169-70. Furthermore, under Title III, agents may, in exceptional circumstances, perform the surveillance and then obtain judicial authorization after the fact. *See* 18 U.S.C. § 2518(7) (1976).

59. 564 F.2d 633 (2d Cir. 1977), *cert. denied*, 436 U.S. 903 (1978). In the court's view, it would have been "highly naive" to impute to the issuing judge a belief that the bugging authorization did not include authorization to enter and install. *Id.* at 640. Such a conclusion does not necessarily follow, however, since bugs may be effectuated without entering. *See* note 91 and accompanying text *infra*.

60. 575 F.2d 1344 (3d Cir. 1978), *aff'd*, 441 U.S. 238 (1979).

authority to carry out the "mechanics" of the operation.[61] The Third Circuit also adhered to the "mechanics" theory in its analysis of *Dalia*,[62] a case involving a covert entry to install bugging equipment.

II. *DALIA V. UNITED STATES*: THE MECHANICS THEORY PREVAILS

In April, 1973, at the request of federal agents, Federal District Court Judge Frederick Lacey authorized the interception of oral communications at the business office of Lawrence Dalia. The order did not expressly authorize the agents to enter and implant a bugging device, nor did the agents apprise Judge Lacey of the contemplated entries.[63] Pursuant to the interception order, federal agents surreptitiously entered the petitioner's office and implanted the bug.[64] In the subsequent trial, Judge Lacey admitted evidence from this bug over the petitioner's objection that the entry to implant the bug was an unlawful search and seizure in violation of his fourth amendment rights.[65] Judge Lacey ruled that the entry to install was merely a mechanical aspect of the surveillance, implicitly authorized in the Title III order to bug.[66] Thus, once probable cause in support of an order authorizing the surveillance is shown, entries may be made. The Third Circuit upheld the conviction, following the lower court's rationale. But the appellate court indicated that, in the future, the preferred approach would be for agents to state in their application that entries, if contemplated, are necessary.[67]

The Supreme Court granted certiorari to resolve the questions of whether Title III permits installation entries and whether a bugging order

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61. *See* 564 F.2d at 639-40.

62. *See* 575 F.2d at 1346. *See also* United States v. London, 424 F. Supp. 556, 560 (D. Md. 1976), *aff'd sub nom. on other grounds*, United States v. Clerkley, 556 F.2d 709 (4th Cir. 1977), *cert. denied*, 436 U.S. 930 (1978) (entries of business premises without authorization to install a bug resulted in no greater intrusion than the interceptions themselves).

63. Judge Lacey never discussed installation of the bug with the agents or the supervising attorney. 575 F.2d at 1346 n.3.

64. *Id.* at 1345.

65. United States v. Dalia, 426 F. Supp. 862, 863-64 (D.N.J. 1977). Petitioner, Lawrence Dalia, was convicted of crimes relating to theft and possession of an interstate shipment of textiles.

66. Judge Lacey, who issued the order to bug and conducted the subsequent trial in which evidence obtained from the bug was admitted, found that "the safest and most successful method of accomplishing the installation of the wiretapping [*sic*] device was through breaking and entering the premises in question." 426 F. Supp. at 866. The court apparently confused wiretapping with bugging, since in *Dalia* the surveillance technique used was bugging. For a comparison of bugging and wiretapping, see note 2 *supra*.

67. 575 F.2d at 1346-47.

implicitly authorizes such entries.[68] Affirming the rulings below, the Supreme Court held that an order authorizing the interception of oral communications implicitly authorizes entries to install the bug.[69] The Court's analysis began with a review of Title III's legislative history to determine whether the Act empowered judges to authorize entries to install bugging equipment. Noting that Title III was enacted to meet the *Berger* and *Katz* requirements and that there were few remarks in the legislative debates concerning entries, the Court concluded that Congress must not have viewed such entries as significant.[70] Justice Powell, writing for the majority, found installation entry to be simply a matter which can be left to the executing agents' discretion. The Court reasoned that since the government had satisfied the express requirements of the fourth amendment — that the interception order be based on probable cause "supported by an Oath or affirmation" and particularly describing the petitioner's office and the conversations to be seized — entries to install were thereby authorized.[71]

Justice Stevens dissented, arguing that no entries to install should be allowed absent express judicial or legislative sanction.[72] In the instant situation, he noted that, although the order sanctioned the bugging, it did not describe the "kind" of equipment to be used or the entry. Justice Stevens reasoned that until Congress grants authorization to enter, the courts should protect individual liberties by proscribing general warrants which allow trespass on private property without legislative or judicial sanction.[73] Writing a separate dissenting opinion, Justice Brennan argued that entries involve constitutional rights to privacy distinct from nontrespassory inter-

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68. *See* Petitioner's Brief for Certiorari at 2, Dalia v. United States, 439 U.S. 817 (1979) (opinion granting certiorari).

69. 441 U.S. 238, 258 (1979).

70. *Id.* at 251. Also, the Court relied on congressional comments indicating an awareness that entries to install might be necessary. *Id.* at 250-52. According to Professor Blakey, one of the drafters of Title III, the Court properly interpreted Title III. *See* Wash. Post, Apr. 19, 1979, § A, at 18, col. 4.

71. 441 U.S. at 254-59. For a discussion of the standards of review for bugging and for other searches, see notes 24-32 and accompanying text *supra*.

72. 441 U.S. at 263 (Stevens, J., dissenting). Justices Brennan and Marshall joined in Justice Stevens' dissent. Justice Stevens stated that because Title III was carefully drafted, congressional silence on the entry issue should not be read as granting authority to enter. *Id.* at 264-66. This interpretation of the statute recognizes that Congress may well have intended to permit law enforcement officials to install bugging devices only in situations not requiring actual entry as in Katz v. United States, 389 U.S. 347 (1967) (bug on outside of telephone booth), and Goldman v. United States, 316 U.S. 129 (1942) (detectaphone placed on exterior of wall).

73. 441 U.S. at 267-71 (Stevens, J., dissenting). Justice Stevens maintained that Congress, not the courts, should legislate, particularly when liberties are involved. *Id.*

ceptions. In his view, intrusions should be limited to those set forth in the warrant. Although details of the surveillance may be left to the executing agents' discretion, entries which involve distinct constitutional privacy rights should not be equated with the mere mechanics of the operation.[74]

Thus, it is clear that the majority in *Dalia* views a bugging order as implicitly authorizing entry. Nevertheless, by failing to require specific judicial authorization for entries, the Supreme Court has created another exception to the warrant requirement.

III. *DALIA*'S IMPACT ON FOURTH AMENDMENT SAFEGUARDS

A. The Fourth Amendment Warrant Requirement

The Supreme Court's holding in *Dalia* closely parallels its earlier decisions in *Berger* and *Katz* delineating the limits of electronic surveillance by the government.[75] Like the *Katz* and *Berger* Courts, the majority in *Dalia* focused on the reasonableness of the search and seizure of conversations, rather than the unauthorized physical trespass.[76] Viewing Title III to be Congress' response to *Berger* and *Katz*, the Court interpreted the statute to emphasize the object of the search rather than the method of effectuating the search because Congress apparently "did not find it significant that *Berger* involved a covert entry, whereas *Katz* did not."[77] Thus, the Court construed Title III as implicitly authorizing entries to install.

After determining that Title III permitted entries to install, the Court then considered whether express authorization to enter was constitutionally mandated. The Court reasoned that the fourth amendment's probable cause and particularity requirements, as well as judicial authorization for the entries, were fulfilled by the judge issuing the bugging order; to require separate judicial review of the entries would be an "empty formalism."[78] Thus, separate evaluations of the need for the surveillance and the entry are no longer necessary; the issuing judge's evaluation of the need[79] for the

74. *Id.* at 260 (Brennan, J., dissenting). Additionally, Justice Brennan argued that an impartial judge should decide whether invasion of a distinct constitutional right is permissible. *Id.* at 261.

75. *See* notes 37-43 and accompanying text *supra*.

76. *See* 441 U.S. at 257-58.

77. *Id.* at 251.

78. *Id.* at 258. *But see id.* at 259-62 (Brennan, J., dissenting). Justice Brennan argued that requiring express judicial authorization prevents unreasonable government intrusions. *Id.* For a discussion of the standards of review for bugging and for other searches, see notes 24-32 and accompanying text *supra*.

79. Necessity to enter does not refer to absolute necessity, but rather to necessity in the practical sense. *See In re* United States, 563 F.2d 637, 644-45 (4th Cir. 1977) (necessity requirement is flexible, requiring only a showing that the entries are reasonably necessary). *Compare* United States v. Clerkley, 556 F.2d 709, 715 (4th Cir. 1977), *cert. denied*, 436 U.S.

surveillance will suffice.[80] However, the Court acknowledged that, although entries are not subject to prior specific authorization, they would be subject to a post hoc review for reasonableness.[81] Such a test, however, does not prevent unreasonable entries, it only requires after-the-fact suppression of evidence obtained through unreasonable entries. Thus, the majority in *Dalia* overlooks the fourth amendment protection of an individual's "right to be let alone"[82] and allows warrantless entries onto private premises to install bugging devices.

Apart from its impact as an exception to the warrant requirement, *Dalia* has a number of significant practical consequences for fourth amendment rights. Potentially, entries to bug may bring law enforcement officials into contact with plain view evidence.[83] Recognizing this possibility, Judge

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930 (1978) (although agents failed to eliminate the possibility of physical surveillance, the court ruled that all conceivable techniques need not be eliminated before applying for wiretap) *and* United States v. Robertson, 504 F.2d 289, 292-93 (5th Cir. 1974), *cert. denied*, 421 U.S. 913 (1975) (necessity requirement met where alternative physical surveillance techniques would have been costly and inconvenient) *with* United States v. Kalustian, 529 F.2d 585, 589-90 (9th Cir. 1975) (affidavits inadequate for failure to allege facts showing why particular case necessitated wiretap). This lesser showing of necessity corresponds to the Title III alternative technique provisions. *See* 18 U.S.C. § 2518(1)(c), (3)(c) (1976) (application must show, and judge must determine, that normal investigative procedures reasonably appear to be unlikely to succeed).

The *Dalia* Court did not accept petitioner's argument that the entry was unnecessary and therefore unreasonable. The Court noted that the lower court judge had found normal investigative procedures unlikely to succeed. 441 U.S. at 248 n.8. *See also* notes 89-91 and accompanying text *infra*.

80. 441 U.S. at 258. The Fourth Circuit in *In re United States* adopted a bifurcated test for reviewing the entries and the interceptions. *See* 563 F.2d at 644; notes 55-56 and accompanying text *supra*. The *Dalia* Court rejected bifurcation, ruling that once the surveillance is authorized, the entries used to effectuate the surveillance are implicitly authorized. 441 U.S. at 258. *See generally* 24 WAYNE L. REV. 135, 142-43 (1977).

81. *See* 441 U.S. at 258. Once surveillance is completed, a judge reviews the operation to determine whether the techniques used satisfy the fourth amendment's reasonableness requirements. Whether an operation is reasonable may turn on whether only reasonably necessary intrusions were employed. In United States v. Volpe, 430 F. Supp. 931, 947 (D. Conn. 1977), *aff'd mem.*, 578 F.2d 1372 (2d Cir. 1978), agents had entered premises to install a bug although installation could have been effectuated without entering by placing the bug on a telephone pole. The district court rejected the defendant's argument that the surveillance could have been effectuated without an entry as merely a speculative hindsight argument since it relied on facts not present when the application was made. For a discussion of the post hoc reasonableness test, see notes 89-94 and accompanying text *infra*.

82. *See* Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

83. The Title III provision allowing conversations relating to crimes other than those mentioned in the interception order to be seized is analogous to the plain view doctrine. *See* 18 U.S.C. § 2517(5) (1976). *See also* United States v. Cox, 449 F.2d 679, 680-81 (10th Cir. 1971), *cert. denied*, 406 U.S. 934 (1972) (interception application related to narcotics violations; conversations relating to a bank robbery were admitted in evidence). For a critical analysis of the "plain view" doctrine as applied to intangibles, see Project, *Subsequent Use*

Gurfein, concurring in *United States v. Scafidi*,[84] indicated that if any plain view evidence is uncovered while the bug is being installed, such evidence must be suppressed. In contrast, the District of Columbia Circuit, in *United States v. Ford*,[85] indicated that the plain view doctrine may allow agents to seize evidence discovered during the installation entry. However, because seizure of tangible property may reveal the surveillance, such seizures are likely to be rare so long as the value of the evidence sought by the bug outweighs the value of the tangible plain view evidence. Yet, it is not inconceivable that agents without probable cause for a conventional search warrant might apply for and receive a warrant to bug.[86] Following *Dalia*, such agents would be authorized to enter and, in the course of installation, might stumble upon tangible evidence. All that is necessary for such tangible evidence to be admissible is a lawful entry and an inadvertent seizure of property in plain view.[87]

A more disturbing possibility arises when agents do not have probable cause to obtain a warrant to seize tangible evidence but enter under a bugging order with the knowledge that tangible evidence is likely to be seen. Failing to seize under the plain view doctrine, agents might carry out the electronic surveillance and later apply for a conventional search warrant. Probable cause to support the warrant originally lacking might then be satisfied with knowledge acquired during the installation entry.[88] In this way, both the tangible and intangible evidence could be seized.

B. Post Hoc Assessment of Reasonableness

The *Dalia* Court ruled that in keeping with fourth amendment safeguards, execution of an eavesdropping warrant is subject to post hoc judicial review for reasonableness. The Court, however, provided little

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Of Electronic Surveillance Interceptions And The Plain View Doctrine: Fourth Amendment Limitations On The Omnibus Crime Control Act, 9 U. MICH. J.L. REF. 529 (1976).

84. 564 F.2d 633, 643 (2d Cir. 1977) (Gurfein, J., concurring).

85. 553 F.2d 146, 158 (D.C. Cir. 1977).

86. See notes 24-32 and accompanying text *supra* for a comparison of the probable cause requirement for a search warrant with that for an eavesdropping warrant.

87. See note 19 *supra* for a discussion of the plain view requirements.

88. *See* Irvine v. California, 347 U.S. 128 (1954); United States v. Ford, 553 F.2d at 158, 165 n.58. In *Ford*, the surveillance and the entries were both expressly authorized. However, the issuing judge neither limited the time nor the manner of the entries. Pursuant to this unlimited authorization, agents entered twice by using bomb scare ruses and implanted the bugs. The court ruled that the entries aggravated the surveillance. 553 F.2d at 153-55. In *Irvine*, overzealous police entered the petitioner's premises and implanted microphones in the bedroom and later in the bedroom closet. The Court viewed this surveillance as particularly intrusive. 347 U.S. at 132. Both *Irvine* and *Ford* illustrate the problems associated with leaving the entries to an agent's discretion.

guidance on the proper standard to be applied. The majority merely indicated that the fourth amendment reasonableness requirement may be satisfied if the bug effectuated by entry is the safest and most successful investigative method available.[89] Title III, however, does offer courts some guidance on the reasonableness of using electronic surveillance in lieu of less intrusive investigative methods that, by analogy, may prove helpful. Pursuant to sections 2518(1)(c) and (3)(c) of Title III, electronic surveillance techniques may be used when other investigative techniques reasonably appear unlikely to succeed or too dangerous to attempt.[90] Thus, courts might deem eavesdropping warrant executions that include surreptitious entries to install to be reasonable when other methods of eavesdropping would be ineffective or dangerous.

Technological advances in electronic surveillance pose additional difficulties in applying the post hoc reasonableness test suggested in *Dalia*. Today, law enforcement officials have numerous tools available to perform electronic surveillance without entering,[91] although not all law enforcement agencies own the most technologically advanced equipment. Where equipment permitting the execution of the warrant without entry is available but expensive, the question may arise as to whether the post hoc test of reasonableness requires law enforcement agencies to purchase such equipment in order to protect an individual's right to be let alone.[92]

Prior to *Dalia*, the Justice Department, addressing the issue of the reasonableness of entry, implemented procedures requiring officials to notify the issuing judge of any entries contemplated when they apply for the warrant.[93] However, since the Justice Department procedure is supported

89. *See* 441 U.S. at 248 n.8, 258.

90. 18 U.S.C. § 2518(1)(c), (3)(c) (1976). *See* note 79 *supra*.

91. Parabolic, shotgun, and other directional microphones focus on sound vibrations coming from a single direction. Contact, spike and pneumatic microphones, as well as lasers, convert window and wall vibrations into electronic signals. Although these devices are useful in a variety of applications, they cannot be used to intercept conversations in an inner room of a building. Furthermore, transmission problems caused by the layout of the premises and background interference may make the use of such devices impractical. For these reasons, law enforcement officials may prefer a trespassory bug for optimum service and reception. *See* NATIONAL WIRETAP COMM'N, COMM'N STUDIES 171-72, 179-83 (1976). *See also* A. WESTIN, PRIVACY AND FREEDOM 75-77, 132 (1970).

92. *But see* United States v. Robertson, 504 F.2d 289, 292-93 (5th Cir. 1974), *cert. denied*, 421 U.S. 913 (1975). In *Robertson*, the court ruled that a wiretap was not unnecessary even though less intrusive physical surveillance was viable. The rationale behind the holding was that the physical surveillance would have been costly and inconvenient. Thus, it is questionable whether courts will require law enforcement agencies to purchase advanced equipment.

93. *See* Brief for the United States in Opposition to Petition for Certiorari at 6, Dalia v. United States, 439 U.S. 817 (1979) (opinion granting certiorari).

neither by case law nor by statute, *Dalia* may encourage officials to overlook the procedures. In addition, although several states have enacted legislation requiring a judge to expressly authorize entries to install,[94] in those states where no express authorization is required only the post hoc test for reasonableness protects individual rights. Consequently, subsequent to *Dalia*, this post hoc standard has become the first line of defense against unreasonable entries.

IV. THE NEED FOR LEGISLATIVE REFORM

Because entries to install eavesdropping equipment involve serious intrusions into an individual's privacy, the federal and state governments should enact legislation similar to that already enacted in several states to fill the vacuum in Title III regarding entries to install. Such legislation should require officials to show that a particular surveillance plus entry is reasonable and necessary. Officials should not be required to show an absolute necessity to enter,[95] however, as such an approach might seriously hamper effective law enforcement by requiring all other investigative techniques to be tried before a trespassory bug is authorized.[96]

New legislation regulating entry to install should contain a number of provisions to protect individual privacy interests. First, the time and manner of each entry should be approved by a judge who may authorize both the bug and the entry in the same document.[97] Where prior approval for the entries is impracticable, a report on the need for the entry should be submitted to the judge within forty-eight hours of the entry for a determination of necessity and reasonableness.[98] In such cases, the judge should

94. *See, e.g.*, CONN. GEN. STAT. § 54-41e(10) (1979); MASS. GEN. LAWS ANN. ch. 272, § 99(F)(2)(g) (West 1968); N.Y. CRIM. PROC. LAW § 700.30(8) (McKinney 1971). The New York statute requires "express authorization to make a secret entry upon a private place or premises to install an eavesdropping device, if such entry is necessary to execute the warrant." *Id.*

95. For a discussion advocating the least intrusive method, see 57 B.U.L. REV. 587, 600-06 (1977). For a discussion of the "practical and commonsense" test mentioned in Title III's legislative history regarding the interceptions, see S. REP. NO. 1097, 90th Cong., 2d Sess., *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 2112, 2190.

96. The "least intrusive method" test may result in a more intrusive surveillance in some situations since, for example, wiretaps, nontrespassory bugs, and trespassory bugs would have to be attempted in that order. Thus, surveillance for a period longer than necessary using a trespassory bug may result. Senator Morse argued that electronic surveillance which does not require a physical intrusion is the most insidious and should not be tolerated at all. *See* 114 CONG. REC. 11,598 (1968).

97. *See* United States v. Agrusa, 541 F.2d 690, 695-96 n.11 (8th Cir. 1976).

98. This requirement would parallel the Title III provision allowing agents to use electronic surveillance in exigent circumstances, but requiring agents to report its use to the judge within 48 hours of execution. *See* 18 U.S.C. § 2518(7) (1976).

be empowered to stop the surveillance and to suppress all evidence obtained through the bug if the entry is deemed unreasonable. This procedure will transfer much of the decisionmaking power from the executing agents to the issuing judge yet will allow reasonable emergency entries.

Second, to minimize police-citizen confrontations, entries should be allowed only when premises are empty. Such a practice will not only diminish the potential for physical harm to individuals but will also protect an individual's right to be let alone.

Third, plain view evidence should be admitted only where agents had no knowledge prior to entry that the plain view evidence seized was likely to have been found. This procedure will minimize the possibility that agents might use a trespassory bug when less intrusive techniques could have been used.[99] Also, where agents are aware that the plain view evidence might be found during the installation entry but are unable to obtain a search warrant, knowledge acquired during the entry should not be used to establish probable cause for a subsequent search.[100] If enacted, these measures would provide agents with flexibility in choosing the technique to be used and effectively balance the individual costs of surreptitious entry with the benefits to law enforcement efforts.

V. CONCLUSION

So long as *Dalia* remains law, agents need not obtain express authorization for installation entries when obtaining an eavesdropping warrant. The unfortunate results of *Dalia* are tempered on the federal level by the Justice Department policy requiring officials to state in electronic surveillance applications whether entries are contemplated. However, only a few states have similar policies. Because trespassory bugs intrude upon privacy interests distinct from the interests affected by the interceptions themselves, a procedure requiring express authorization for entry should be required. Legislation calling for prior judicial approval for entries to install will minimize law enforcement officials' incentive to enter with hopes of finding other evidence and will protect personal security.

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99. *See* note 91 *supra*.

100. *See* notes 83-88 and accompanying text *supra*.