DePaul Law Review

Volume 29
Issue 1 *Fall 1979*

Article 7

No Requirement of Prior Judicial Approval for Covert Entry to Effect Electronic Surveillance - Dalia v. United States

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NO REQUIREMENT OF PRIOR JUDICIAL APPROVAL FOR COVERT ENTRY TO EFFECT ELECTRONIC SURVEILLANCE— *DALIA V. UNITED STATES*

The fourth amendment was drafted to ensure freedom from uncontrolled governmental invasion of privacy.[1] It protects, however, only against unreasonable search and seizure and has not been interpreted to state a general right of privacy against police intrusion.[2] Consequently, the amendment has been held to allow a police search of private property after judicial scrutiny has established that the invasion contemplated is necessary and a warrant has been issued.[3]

In *Dalia v. United States*,[4] the Supreme Court ruled that covert entry[5] by federal agents to effect electronic surveillance by bugging[6] does not violate

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1. The fourth amendment states:

> 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.

2. Katz v. United States, 389 U.S. 347, 350 (1967).

3. *See* Shadwick v. City of Tampa, 407 U.S. 345, 350 (1972); Coolidge v. New Hampshire, 403 U.S. 443, 449-53 (1971); Schmerber v. California, 384 U.S. 757, 767 (1966). *See generally* E. GRISWOLD, SEARCH AND SEIZURE (1975); W. LAFAVE, SEARCH AND SEIZURE, A TREATISE ON THE FOURTH AMENDMENT (1978) [hereinafter cited as LAFAVE]; Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1974) [hereinafter cited as Amsterdam].

4. 441 U.S. 238 (1979).

5. The Supreme Court, in *Dalia*, defined covert entry as "the physical entry by a law enforcement officer into private premises without the owner's permission or knowledge in order to install bugging equipment." 441 U.S. at 241 n.2. Defined in this way, covert entry is not necessarily the same as forcible entry, although, as the Court noted, force is usually required in a covert entry. *Id.* at 246, *citing* United States v. Dalia, 426 F. Supp. 862, 866 (D.N.J. 1977).

Forcible entry denotes physical breaking and entering, such as battering down a door, either with the knowledge or in the presence of, the owner or possessor or alternatively a physical breaking and entering of abandoned premises. In either case the fact of forcible entry provides notice.

6. The term electronic surveillance is often used indiscriminately. At times, it is synonymous with wiretapping and at others it includes the whole range of eavesdropping by means of electronics. In this Note, electronic surveillance refers to any electronic eavesdropping. When a distinction is desired, the term "wiretapping," or "bugging," or "overhearing" will be used.

As used in this Note, a "bug" refers to a listening device that must be placed within a room. The process of bugging is the act of listening to a conversation through the use of a bug. Listening devices are generally of two types: those that require placement in the enclosed location of the target conversations and those that can be employed from outside the space. The first type of device consists of a microphone, power source, and transmitter. The second category of listening devices includes such equipment as laser beams that can monitor vibrations of a window pane resulting from speech within a room and recreate the communication, parabolic and shotgun microphones that can be used from a distance, and even older devices such as the

the fourth amendment. Neither, the Court ruled, does it violate Title III of the Omnibus Crime Control and Safe Streets Act (Title III), which regulates electronic surveillance.[7] Although the bugging was achieved pursuant to a surveillance order authorized by Title III, the order did not grant express authority to enter secretly. Nor did the agent seek a separate warrant authorizing the entry. By validating the agent's action, the Supreme Court has freed the practice of covert entry from the judicial scrutiny usually attendant upon instances of trespassory invasion. As a result, *Dalia* effectively removes secret entry in bugging cases from the warrant requirement of the fourth amendment.

This Note reviews the development of fourth amendment law in eavesdropping cases. It examines the *Dalia* Court's constitutional and statutory construction and evaluates its premises and resultant reasoning. It is argued that covert entry involves a search distinct from the search involved in electronic surveillance; as such, the entry should be subject to the fourth amendment requirement of prior judicial authorization.[8] Finally, *Dalia*'s impact on future fourth amendment interpretation is discussed.

HISTORICAL BACKGROUND

In *Olmstead v. United States*,[9] the Supreme Court first considered the question of whether electronic surveillance, specifically wiretapping, violated

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detectaphone made famous in Goldman v. United States, 316 U.S. 114 (1942). These devices do not necessitate entry into a room for their use. As no question of entry is involved in the use of these rather fantastic devices, they are largely outside the scope of this discussion. For a discussion of the technological characteristics of both types of listening devices, see NATIONAL LAWYER'S GUILD, RAISING AND LITIGATING ELECTRONIC SURVEILLANCE CLAIMS IN CRIMINAL CASES, §§ 2.1-2.4 (1974) [hereinafter cited as NATIONAL LAWYER'S GUILD].

7. 18 U.S.C. §§ 2510-2520 (1976). The Omnibus Crime Control and Safe Streets Act of 1968 is a collection of eleven titles. Each concerns differing areas of crime control and law enforcement. The overall goal of the Act is to reduce crime and to increase the effectiveness of law enforcement. Omnibus Crime Control and Safe Streets Act, Pub. L. No. 90-351, 82 Stat. 197 (1968) (codified in scattered sections of 18 U.S.C.). Title III of the Act authorizes, for the first time, wiretapping and bugging by federal and state agents under circumstances set out in the Act. As enacted the Title reflects the dual purposes of (1) protecting the privacy of wire and oral communications, and (2) outlining the circumstances under which communications can be intercepted. Under Title III interception of communications by private persons is outlawed. 18 U.S.C. § 2511(1) (1976). The requirement and procedures mandated by Title III are set out in note 28 *infra*. *See also* 18 U.S.C. § 2518(8), (9) (1976) (controls the manner in which material intercepted must be handled to protect rights and privacy); *id.* at (10) (statutory provision for motion to suppress).

8. Of the four dissenting justices, only Justices Brennan and Stewart argue that covert entry is of constitutional significance. 441 U.S. at 259-62 (Brennan, J., dissenting; Stewart, J., dissenting and concurring). The other two dissenting justices take issue only with the Court's method of statutory analysis, and Brennan concurred with this dissent. *Id.* at 262-80 (Stevens, Brennan, and Marshall, JJ., dissenting).

9. 277 U.S. 438 (1928). Olmstead, a former police officer, was convicted of conspiring to violate the Volstead Act. Information used to convict him was gathered by means of nontrespassory wiretap that revealed details of the conspiracy. For a discussion of the development

the fourth amendment's prohibition against unreasonable search and seizure. It held that no violation existed because no tangible item had been seized and no intrusion into the defendant's constitutionally protected area had occurred. Essentially, *Olmstead* held that, because speech could not be the subject of a search, trespassory intrusion was necessary to invalidate wiretapping.[10] That doctrine was extended to other forms of electronic surveillance fourteen years later in *Goldman v. United States*.[11] In *Goldman*, police used a "detectaphone," which, when placed against a wall, could record conversations in an adjoining room. The Court held that, because no trespass had occurred, the police activity was exempt from the strictures of the fourth amendment.[12]

Silverman v. United States[13] modified the *Olmstead* doctrine. In *Silverman*, police used a "spike mike," which took advantage of the sound conductivity of heating ducts. Although the Court noted that the eavesdrop was effected by an unauthorized penetration of the defendant's premises, it based its ruling on the theory that regardless of the trespass, converting the heating system into a sound system constituted an intrusion of constitutional dimension.[14] *Silverman* thus implied that, absent a warrant, the act of overhearing violates the fourth amendment.[15] That implication was made explicit in *Wong Sun v. United States*,[16] where the Court cited *Silverman* for the proposition that fourth amendment protections extend to police overhearing of verbal statements.[17] *Wong Sun*, however, limited the application of this protection to cases of illegal entry.[18]

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of eavesdrop law, see 1 LAFAVE, *supra* note 3, at 223-29; Note, *Court Split on Necessity of Separate Authorization for a Covert Entry Under Title III of the Omnibus Crime Control and Safe Streets Act of 1968*, 31 VAND. L. REV. 1055, 1056-60 (1978) [hereinafter cited as Note].

10. 277 U.S. at 457, 465.

11. 316 U.S. 129 (1942).

12. *Id.* at 134.

13. 365 U.S. 505 (1961).

14. *Id.* at 512. *See* note 15 *infra*. Berger v. New York, 388 U.S. 41 (1966), characterized *Silverman* as holding that overhearing itself was a search. *Id.* at 52, *citing* Wong Sun v. United States, 371 U.S. 471 (1963).

15. 365 U.S. 505 (1961). The *Silverman* case involved only a technical intrusion. The Court ruled that although no physical entry was involved by the means used, the overhearing was a search warranting fourth amendment protection. *Id.* at 509-10. Prior to *Silverman*, the presence of a trespass was the key to fourth amendment protection, as overhearing itself was not a search. The degree to which *Silverman* modified the trespass doctrine is unclear, however. The Court stated that it need not pass on the question of trespass, 365 U.S. at 512, but also noted that the overhearing was achieved by trespass. Clinton v. Virginia, 377 U.S. 158 (1964), seemed to indicate that trespass would no longer be necessarily determinative on the question of a search. In that case, the Court barred the use of a microphone that penetrated a wall to the depth of a thumbtack. Thus, it appears that trespass is no longer the sole test of the validity of surveillance. *Accord*, Katz v. United States, 389 U.S. 347 (1967). *See* 1 LAFAVE, *supra* note 3, at 223-29; Note, *supra* note 9, at 1057-58. The question remains, however, whether a trespass will invalidate an overhearing.

16. 371 U.S. 471 (1963).

17. *Id.* at 485.

18. *Id.* at 482-84.

Despite bringing electronic surveillance under the ambit of the fourth amendment, the *Silverman* and *Wong Sun* decisions left unsettled the question of the exact procedure police must follow in order constitutionally to overhear. That issue was addressed in *Berger v. New York*.[19] In *Berger*, the Court struck down a New York eavesdropping statute because it failed to embody constitutionally acceptable fourth amendment protections.[20] *Berger* stated that electronic surveillance, while permissible, is subject to the warrant requirement of the fourth amendment, just as is any other search. Although eavesdropping poses some special problems for the police in meeting these requirements, the Court refused to sacrifice traditional warrant protection to accommodate police investigation.

Once overhearing was brought fully under the fourth amendment's protection, there remained the question of whether the *Olmstead* requirement of trespass retained any force.[21] The issue was finally resolved in *Katz v. United States*,[22] where the Court expressly overruled the trespass doctrine of *Olmstead*.[23] Katz was suspected of transmitting wagering information over the telephone. Federal agents placed a listening device on the outside of a public phone booth habitually used by Katz and secured evidence to gain a conviction.[24] Although there was no trespass at all, the Court ruled that the reach of the fourth amendment does not turn on the presence of physical intrusion into an enclosure.[25] Surveillance could be made constitutionally permissible, but a warrant must issue, even if no trespass is contemplated.[26]

Katz and *Berger* established the requirements for constitutionally acceptable electronic surveillance. In *Katz* the Court mandated that a warrant issue, and in *Berger* it formulated the requirements of a valid warrant. Addition-

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19. 388 U.S. 41 (1967).

20. Specifically, the *Berger* decision found the statute, N.Y. CODE. CRIM. PROC. § 813 (McKinney 1958) (recodified 1971 as N.Y. CRIM. PROC. LAW art. 700 (McKinney 1971)), defective because it: (1) failed to require probable cause that eavesdropping would yield evidence of a crime, *id.* at 54; (2) failed to particularize either the crime involved, *id.* at 55-56, or the conversation to be seized, *id.* at 58-59; and, (3) failed to minimize the invasion of privacy by requiring termination of the eavesdrop once the conversations sought were seized, *id.* at 59. Additionally, the Court criticized the Act because it failed to include a notice requirement or to demand a showing of exigent circumstances in lieu of notice. *Id.* at 60. Finally, the Court concluded a surveillance order should require a return to the authorizing magistrate. *Id.* Based on these findings, the Court held that the New York statute permitted the creation of a prohibited general warrant. *Id.* at 64. *See* note 110 *infra*.

21. The *Wong Sun* limitation on fourth amendment coverage, 371 U.S. at 482-84, implied that some life might still be found in the requirement that trespass be present to invalidate surveillance. *Silverman* had been equivocal on this question, 365 U.S. at 509, 511, and *Berger* did not consider it, 388 U.S. at 43-44.

22. 389 U.S. 347 (1967).

23. *Id.* at 353.

24. *Id.* at 348.

25. *Id.* at 353.

26. *Id.* at 354-57.

ally, *Katz* expanded fourth amendment protection to nontrespassory surveillance. These two rulings wove the fabric from which Congress fashioned the first comprehensive law permitting governmental electronic surveillance.[27] Title III[28] was formulated to meet what Congress perceived as the Court's

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27. Following the *Olmstead* decision, Congress enacted § 605 of the Federal Communications Act, which provided that "no person not being authorized by the sender shall intercept . . . and divulge the . . . contents . . . of such communication." 47 U.S.C. § 605 (1934). The Justice Department interpreted the Act's conjunctive wording to mean that interception was permissible, but divulgence was not. Decker & Handler, *Electronic Surveillance: Standards, Restrictions and Remedies*, 12 CAL. WEST. L. REV. 60, 63-64 (1975), *citing* Brownell, *The Public Security and Wire Tapping*, 39 Cornell L.Q. 195, 197-99 (1954). There seems to have been no judicial review of that doctrine, but the Court did hold in a series of cases that evidence obtained by wiretap was generally inadmissible in federal courts. *See* Nardone v. United States, 308 U.S. 338 (1939) (evidence obtained by leads from wiretapping excluded); Weiss v. United States, 308 U.S. 321 (1939) (prohibition of evidence obtained by tapping intrastate calls); Nardone v. United States, 302 U.S. 379 (1937) (creating statutory exclusionary rule by holding that § 605 forbids divulgence of wiretap data).

Such rulings did not put an end to wiretapping, however. The Court continued to allow wiretap evidence in state courts. *See* Schwartz v. Texas, 344 U.S. 199 (1952) (evidence gained by wiretapping which is excluded by § 605 in federal courts is admissible in state courts). *See, e.g.*, Rathburn v. United States, 355 U.S. 107 (1957) (telephone conversations overheard with consent are not interceptions proscribed by § 605); Goldstein v. United States, 316 U.S. 114 (1942) (a person not a party to the tapped conversations has no standing to object). Based upon these rulings and the Justice Department's construction of § 605, wiretapping remained in the arsenal of police techniques. Title III is not, therefore, the first law to countenance electronic surveillance. Nevertheless, Title III is the first law expressly providing for legal surveillance and use in court of the information seized.

28. The pertinent sections of Title III are §§ 2516 and 2518. Section 2516 provides:

> (1) The Attorney General . . . may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant . . ., an order authorizing . . . the intercepion of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of—
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> . . .
>
> (c) any offense which is punishable under the following sections of this title: . . . or sections 2314 and 2315 (interstate transportation of stolen property)
>
> . . .
>
> (g) any conspiracy to commit any of the foregoing offenses.

18 U.S.C. § 2516(1) (1976). Section 2518 provides:

> (1) Each application . . . shall include the following information:
>
> (a) the identity of the . . . law enforcement officer making the application, and the officer authorizing the application;
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> (b) a full and complete statement of the facts and circumstances relied upon by the applicant, . . . including (i) details as to the particular offenses . . ., (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications . . . to be intercepted, (iv) the identity of the person, if known, . . . whose communications are to be intercepted;
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> (c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely

requirements for constitutional surveillance as set forth in *Berger* and *Katz*.[29]

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to succeed if tried or to be too dangerous;

(d) a statement of the period of time for which the interception is required to be maintained. . . .

(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, . . . and the action taken by the judge on each application.

. . . .

(3) Upon such application the judge may enter an ex parte order . . . authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court . . . if the judge determines on the basis of the facts submitted by the applicant that—

(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous . . .;

(d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense. . . .

(4) Each order authorizing or approving the interception of any wire or oral communication shall specify—

(a) the identity of the person, if known, whose communications are to be intercepted;

(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

(e) the period of time during which such interception is authorized. . . .

(5) No order entered under this section may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section. The period of extension shall be no longer than [deemed] necessary to achieve the purposes for which it was granted and in no event for longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event, in thirty days.

(6) Whenever an order authorizing interception is entered pursuant to the chapter, the order may require reports to be made to the judge who issued the order. . . . Such reports shall be made at such intervals as the judge may require.

Id. § 2518.

29. S. REP. NO. 1097, OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968: REPORT OF THE JUDICIARY COMMITTEE, 90th Cong., 2d Sess. 66 (1967) [hereinafter cited as S.

Unfortunately, Title III suffers from its reliance on these two rulings, especially from its reliance on *Katz*. While *Katz* held that a trespass was not necessary to bring surveillance within constitutional purview, it was silent on the parallel question of what protections, if any, the constitution requires when trespass is present. This silence is reflected in Title III.[30] As bugging is often implemented by covert entry, the question is a significant one. Legislative silence has led to conflicting interpretations among the courts of appeal.[31] The cases to date have revolved around three issues: (1) whether breaking and entering is constitutionally permissible in any case; (2) whether courts have the power to issue warrants permitting covert entry; and (3) if so, what, if any, specific judicial process is necessary to validate a covert entry.[32] The Court, in *Dalia*, granted certiorari[33] to determine the answers to these questions and to resolve the conflict in the courts of appeal.[34]

THE *DALIA* DECISION

Factual Background

Dalia was convicted in federal district court of conspiracy to transport, possess, and receive stolen goods in interstate commerce.[35] The evidence

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REP. NO. 1097]. In final form, Title III is a combination of two bills: S. 675, 90th Cong., 1st Sess. (1967), The Federal Wire Interception Act sponsored by Senator McClellan and S. 2050, 90th Cong., 1st Sess. (1967), The Electronic Surveillance Control Act of 1967 sponsored by Senator Hruska.

30. 441 U.S. at 249. *See* note 28 *supra*.

31. *See, e.g.*, United States v. Santora, 583 F.2d 453 (9th Cir. 1978) (Title III does not confer judicial power to authorize covert entry); United States v. Finazzo, 583 F.2d 837 (6th Cir. 1978) (absent statutory power, a judge has no authority to permit covert entry for bugging); United States v. Scafidi, 564 F.2d 633 (2d Cir. 1977), *cert. denied*, 436 U.S. 903 (1978) (Title III implies approval of covert entry); United States v. Ford, 553 F.2d 146 (D.C. Cir. 1977) (covert entry requires separate fourth amendment analysis); United States v. Agrusa, 541 F.2d 690 (8th Cir. 1976), *cert. denied*, 429 U.S. 1045 (1977) (covert entry is constitutional if done pursuant to a warrant).

32. *See* note 31 *supra*.

33. Dalia v. United States, 439 U.S. 817 (1978).

34. 441 U.S. at 240-41.

35. Dalia was approached by several men and asked to store a quantity of stolen fabric. He refused because he was not satisfied with the payment received from them for previous services of the same nature. Dalia did, however, contact Higgins who agreed to store the goods and split the $1,500 fee with Dalia. Brief for Appellee at 8.

Dalia was prosecuted under 18 U.S.C. §§ 371, 2314, and 2315 (1976). Section 371 provides in pertinent part:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof . . . and one or more of the persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years or both.

Section 2314 provides in pertinent part:

> Whoever transports in interstate or foreign commerce any goods . . . knowing the same to have been stolen . . . shall be fined not more than $10,000 or imprisoned not more than ten years or both.

for conviction came from a telephone tap of Dalia's office and a listening device planted in the office by federal agents.[36] These intrusions were authorized by a federal judge pursuant to Title III. At trial Dalia unsuccessfully moved for suppression[37] of the evidence derived from the bugging.[38] On

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Section 2315 provides in pertinent part:

> Whoever receives, conceals, stores, barters, sells, or disposes of any goods, wares, or merchandise . . . of value of $5,000 or more . . . which are part of, or which constitute interstate or foreign commerce, knowing the same to have been stolen . . . shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

36. The surveillance was made pursuant to a wiretap order issued March 14, 1973, under 18 U.S.C. §§ 2516, 2518 (1976). 441 U.S. at 241. This order was twice extended on April 5, 1973, and April 27, 1973. For the text of § 2518(5), see note 28 *supra*. At the time of the first extension, permission to institute bugging of Dalia's office was also given. *Id.* at 242. The April 5 order provided in part:

> [T]he Court finds:
>
> (a) There is probable cause to believe that Larry Dalia and others as yet unkown, have committed and are committing offenses involving theft from interstate shipments . . . in violation of Section 371 of Title 18 United States Code.
>
> (b) There is probable cause to believe that particular wire and oral communications concerning these offenses will be obtained through these interceptions. . . .
>
> (c) Normal investigative procedures reasonably appear to be unlikely to succeed and are too dangerous to be used.
>
> . . . .
>
> (e) There is probable cause to believe that the business office of Larry Dalia, consisting of an enclosed room, approximately fifteen (15) by eighteen (18) feet in dimension, . . . and located at 1105 West St. George Avenue, Linden, New Jersey, has been used, and is being used by Larry Dalia and others as yet unknown in connection with the commission of the above-described offenses.
>
> WHEREFORE, it is hereby ordered that: Special Agents of the Federal Bureau of Investigation, United States Department of Justice, are authorized . . . to:
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> . . . .
>
> (b) Intercept oral communications of Larry Dalia, and others as yet unknown, concerning the above-described offenses at the business office of Larry Dalia. . . .
>
> PROVIDING THAT, this authorization to intercept oral and wire communications shall be executed as soon as practicable . . . and shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception . . . and must terminate upon attainment of the authorized objective, or in any event at the end of twenty (20) days from the date of this Order.
>
> PROVIDING ALSO, that Special Attorney James H. Deichert shall provide the Court with a report on the fifth, tenth, and fifteenth day following the date of this Order showing what progress has been made . . . and the need for continued interception.

441 U.S. at 242-44.

37. Dalia v. United States, 426 F. Supp. 862 (D.N.J. 1977). The court refused to suppress before trial but without prejudice to a renewal of the motion after trial. Petitioner did renew and the court again refused to suppress. *Id.* at 872.

38. The exclusionary rule, formulated in Weeks v. United States, 232 U.S. 383 (1914), and under which Dalia moved for suppression, bars the use of illegally seized evidence at trial. The purpose of the rule is to restrain police abuse of fourth amendment rights. Mapp v. Ohio, 367 U.S. 643 (1961), extended the rule to the states through the due process clause of the fourteenth amendment. The rule has been further extended to bar the use of illegally seized evi-

appeal Dalia claimed, *inter alia*,[39] that the fourth amendment proscribes covert entry used to place a bug, and that even if the constitution did authorize covert entry, express court authorization was required to satisfy the fourth amendment's reasonableness requirement.[40] Both the trial court and the court of appeals[41] rejected Dalia's arguments, and the conviction was upheld.

Examination of the Court's Opinion

The Court framed the issues in *Dalia* as: (1) whether electronic surveillance that necessitates covert entry can be authorized;[42] and, (2) if so, whether a separate judicial authorization is required to validate the entry.[43] To determine the first issue, the Court examined two of the three arguments posed by the petitioner. Dalia contended, *inter alia*, that covert entry is barred absolutely by the constitution, and that no statutory authorization exists in Title III for covert entry.[44]

In addressing the petitioner's first argument, the Court sought to define the boundary between impermissible and permissible entries as established by the constitution. First, two cases involving impermissible entry, *Irvine v.*

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dence against third persons unless police can show an independent source of the evidence that relieves the taint of illegality. Wong Sun v. United States, 371 U.S. 471 (1963). In the instant case, the defendant argued *inter alia* that the covert entry used by the federal agents was an illegal search. Thus, the evidence gained from the bugging should be excluded. For a general discussion of the development of the exclusionary rule, see 1 LAFAVE, *supra* note 3, at 3-211.

39. Dalia originally presented other claims, among them that the government had falsified its progress reports to the judge and had failed to minimize the interception of conversations as required by § 2518(5). *See* note 28 *supra*. These contentions were disposed of by the appeals court. United States v. Dalia, 575 F.2d 1344, 1345 n.1 (3d Cir. 1978).

40. *Id.* at 1345.

41. *See* notes 37 & 38 *supra*.

42. 441 U.S. at 241.

43. *Id.*

44. Brief for Appellant at 8-9. In interpreting the fourth amendment, the Supreme Court has ruled that any searches, except those undertaken under a few exceptions, are per se unreasonable without a warrant. Katz v. United States, 389 U.S. 347, 357 (1967). *See* Stoner v. California, 376 U.S. 483, 486-87 (1964); Jones v. United States, 357 U.S. 493, 497-99 (1958). Examples of exceptions to the warrant requirement are searches incident to arrest, Agnello v. United States, 269 U.S. 20, 30 (1925), and searches carried out by consent, Zap v. United States, 328 U.S. 624, 628 (1946). Congress, however, has the authority and duty to fashion standards for the issuance of warrants. United States v. New York Tel. Co., 434 U.S. 159, 172-73 (1977); Collonade Catering Corp. v. United States, 397 U.S. 72, 77 (1970); Davis v. United States, 328 U.S. 582, 606 (1946). *See* note 79 *infra*. Thus, the Court, in deciding the first issue, had to determine the interrelated demands of the fourth amendment and the statutory provisions of Title III.

California[45] and *Silverman v. United States*,[46] were examined. Both required a determination of the extent of invasion constitutionally allowable. In each, the invasion was perpetrated to effect a bugging and, in each, an indefensible intrusion into a person's protected premises was found. The *Dalia* Court stressed that the displeasure of the Court in those cases stemmed from the warrantless, nonconsensual nature of the intrusion. From this, it reasoned that implied in the decisions was the belief that covert entries are allowable in certain circumstances "if made pursuant to a warrant."[47]

The Court next considered types of entry that do not offend the constitution. Statutory authority to enter was found in 18 U.S.C. § 3109,[48] which grants federal agents the power to break and enter when compliance with a valid search warrant is refused or when an officer is in danger.[49] Tacitly recognizing that section 3109 is applicable only "after notice" to the individual of the search, the Court discussed instances where entry was permissible without notice. It began with *Katz v. United States*,[50] where the Court acknowledged that certain exigent circumstances mitigate the need to give notice before entry.[51] The Court concluded its notice discussion with refer-

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45. 347 U.S. 128 (1954). In *Irvine*, police entered a home with a duplicate key and planted a bug. The home was entered several times to replace and relocate the bug. The Court was outraged by this behavior, but refused to suppress the evidence because the exclusionary rule had not yet been extended to the states. *Id.* at 132-33. Although the Court was urged to extend the rule to the states, it did not do so. Rather, it retained the distinction in Rochin v. California, 342 U.S. 165 (1952), that evidence would be suppressed only if obtained by means of coercion which shocked the sensibilities of the Court. *Id.* at 172. 347 U.S. 128, 133. The events in *Irvine*, the Court held, lacked the necessary element of coercion.

46. 365 U.S. 505 (1961). *See* note 15 *supra*.

47. 441 U.S. at 247.

48. 18 U.S.C. § 3109 (1976) reads in pertinent part:

> The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

49. The Court cited Payne v. United States, 508 F.2d 1391 (5th Cir. 1975), as an illustration of the scope of § 3109. *Payne* held that officers need not necessarily wait for refusal to enter if it is obvious that no one is at home. *Payne* addressed forcible entry which is notice itself of police presence. Obviously a broken door alerts a person that someone has been in the premises. *Payne* cannot be extended to covert entry, the essence of which is secrecy so that the owner or occupier of the premises is unaware of the entry. The Court seemed to recognize this problem, as it immediately moved to a discussion of notice.

50. 389 U.S. 347 (1967).

51. *Id.* at 357. In this part of the *Dalia* opinion, the Court argued that if notice were given in cases of electronic surveillance, the conversations would never occur. Thus, notice would provoke destruction of evidence. Thus, application for electronic surveillance could trigger a recognized exception to both the warrant requirement and the need to give notice of authority to enter. 441 U.S. at 247-48. These exceptions to the warrant requirement are generally labeled exigent circumstances. They mitigate, when present, the need for officers to serve notice of their authority to enter the premises. There are three reasons generally given for the need to announce: (1) prevention of violence or injury to both parties, (2) unexpected exposure of the

ence to *United States v. Donovan*.[52] In that case, several defendants argued for suppression of evidence because they were not served with notice of electronic surveillance. The Court, in deciding the issue, ruled that the subsequent notice provisions of section 2518(8)(d) of Title III were constitutionally adequate.[53] Relying on *Donovan*, the *Dalia* Court ruled that there was no reason why the same subsequent notice of entry would not also be adequate under the circumstances of this case,[54] and concluded that no per se bar to covert entry exists if performed to carry out an otherwise legal placement of bugging equipment.[55]

Before disposing of the threshold issue, however, the Court also addressed Dalia's argument that Title III does not contain authority to effect electronic surveillance by means of covert entry.[56] As Title III is silent on the topic, the Court looked for the congressional intent as expressed in both the "language and structure" of the Act, and its legislative history.[57] An examination of the Act as written indicated to the Court that Title III treats bugging and wiretapping identically and provides a detailed and comprehensive scheme for ensuring adequate supervision of both types of eavesdropping.[58] The Act mandates antecedent judicial approval based upon probable cause that evidence of a crime will be forthcoming from the interception.[59] Surveillance can only proceed within limits as set by a magistrate, circumscribing the scope of the interception, the persons overheard, and the location of the communications intercepted, as well as a stipulation of the agency authorized to intercept.[60] From these observations, the majority concluded that Title

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private activities of the occupant, and (3) avoidance of property damage. Payne v. United States, 508 F.2d 1391, 1393-94 (5th Cir. 1975). Certain circumstances overshadow the need for notice, however. In arrest situations there are three traditional exigent circumstances. Ker v. California, 374 U.S. 23 (1963) (Brennan, J., dissenting). They are: (1) persons already have notice of the officers' authority, (2) the officers are justified in believing that someone is in imminent peril, or (3) persons are alerted and then engage in activity that leads officers to believe that escape or destruction of evidence is likely. *Id.* at 47. *See generally* 1 LAFAVE, *supra* note 3, at 122-40; Amsterdam, *supra* note 3, at 349.

The Supreme Court has never expressly applied the exigent-circumstances doctrine to a search. At least one commentator believes, however, that the *Ker* doctrine is equally applicable to arrests and searches. 2 LAFAVE, *supra* note 3, at 123-24. Additionally, the Court, in *Dalia*, proceeded from an assumption that if notice is required, subsequent rather than prior notice is sufficient in cases of electronic surveillance. 441 U.S. at 248.

52. 429 U.S. 413 (1977).

53. *Id.* at 429 n.19.

54. 441 U.S. at 248.

55. *Id.*

56. Brief for Appellant at 8.

57. *Id.*

58. *Id. See* notes 7 & 28 *supra*.

59. 18 U.S.C. § 2518(3)(b) (1976). *See* note 28 *supra*.

60. 18 U.S.C. § 2518(4) (1976). *See* note 28 *supra*. These requirements and others were written into Title III in order to insure that the Act met the constitutional tests of probable cause—judicial authorization by a neutral magistrate and particularity in the specification of the items to be searched for and seized. *See* text accompanying notes 68-74 and cases cited in notes

III restricts surveillance to those cases where a genuine need exists and where the extent of interception is proscribed.[61] Therefore, the Court reasoned that once the need to overhear is demonstrated, Title III gives "broad authority" to authorize interception, regardless of whether the interception requires covert entry, subject only to a general constitutional prohibition on unreasonable entries.[62]

An exploration of the legislative history of the Act served to buttress the majority's conclusion that Title III does not proscribe covert entry. The Court noted that testimony before subcommittees[63] on the subject of electronic surveillance made Congress aware that covert entries were often needed to plant a bug. As a result, references in congressional debates to covert entry were made with the knowledge that such practices were a necessary part of bugging.[64] The majority reasoned that Congress, aware of this relationship, would have expressly denied the power to authorize these practices and that silence was an indication that covert entry was not prohibited.[65] Additionally, the majority reasoned that because covert entry is so often a part of bugging, Congress intended to authorize it because failure to do so would frustrate the purpose of legislation clearly intended to permit bugging.[66] The majority, therefore, concluded that Congress understood

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70-72 *infra*. Electronic surveillance, however, creates special problems in these areas, especially in the case of particularity. It is difficult to particularize evidence that does not yet exist. Additionally, surveillance is indiscriminate. It intercepts any conversation over a tapped telephone or in a bugged room. Obviously, this situation could lead to police interception to an extent that is constitutionally impermissible. For this reason in the past the Court has closely examined schemes for electronic surveillance.

The leading case is Berger v. New York, 388 U.S. 41 (1967), in which the Court struck down an eavesdropping statute, because it failed to meet fourth amendment standards. *See* note 20 and accompanying text *supra*.

Berger was decided during the consideration of the Omnibus Crime Control and Safe Streets Act, and Congress construed it to provide a guideline for constitutionally permissible statute. S. REP. NO. 1097, *supra* note 29, at 66. This belief was furthered when the Court in *Katz* held that a warrant to seize conversations could be constitutional. 389 U.S. 347, 353 (1967). The Congress reacted to these decisions by combining two eavesdropping bills under consideration and modelling the finished product on its reading of permissible practices outlined in *Berger*. S. REP. NO. 1097, *supra* note 29, at 69.

61. 441 U.S. at 250.

62. *Id.* Here the Court reached a conclusion based on a premise that it voiced in a later section of the opinion: that covert entry is not of constitutional significance itself in cases of electronic surveillance. *See* text accompanying notes 81-110 *infra*. Although unvoiced at this point, the premise pervades the opinion. It was clearly implied in the Court's treatment of the covert entry issue in answer to the petitioner's argument that such entry is unconstitutional.

63. *See, e.g., Hearings on S. 928 Before the Subcommittee on Administrative Practice and Procedure of the Committee of the Judiciary*, 90th Cong., 1st Sess. (1967) [hereinafter cited as *Hearings on S. 928*]; *Hearings on H. 5037 Before Subcommittee No. 5 of the House Committee on the Judiciary*, 90th Cong., 1st Sess. (1967) [hereinafter cited as *Hearings on H. 5037*].

64. *See generally* 114 CONG. REC. S12,988-89 *passim* (1968).

65. 441 U.S. at 252.

66. *Id.* at 252-53. The Court seemed to assume that covert entry will nearly universally attend bugging. It cited McNamara, *The Problem of Surreptitious Entry to Effectuate Elec-*

that Title III, as written, gave ancillary power to authorize covert entries.[67] This conclusion completed the Court's discussion of the first issue.

To resolve the second issue, the Court examined two claims subsumed in the final argument of the petitioner: that the surveillance order was faulty because it failed to state particularly that covert entry would be used to plant the bug;[68] and that surveillance orders impinge upon two protected rights, privacy of speech and of property.[69] In response to the claim that the surveillance order was faulty, the Court analyzed the fourth amendment search warrant requirements: issuance by a detached and neutral magistrate,[70] a showing of probable cause,[71] and particularity of the place to be searched and the items sought.[72] It noted that the surveillance order had met all the tests.[73] Further, the Court noted that no requirement or specification as to the mode of execution of a warrant is suggested by the language of the amendment or prior decisions.[74]

In answer to the claim that electronic surveillance orders violate two protected rights, the Court expressed its belief that the execution of a warrant often necessarily interferes with privacy rights not formally authorized by the issuing magistrate.[75] The Court reasoned from its earlier reference to permissible forcible entry[76] and concluded that in bugging cases covert entry is a means of warrant execution rather than a separate search.[77] Finally,

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tronic Eavesdrops: How Do You Proceed After the Court Says "Yes"?, 15 AM. CRIM. L. REV. 1 (1977), in which the author puts forward such a theory. *Id.* at 3. *See also* NATIONAL LAWYER'S GUILD, *supra* note 6, at § 2.4(a). This belief may not be warranted. Admittedly, some of the devices used for nonintrusive overhearing are not always reliable or practical. Rapid advances in technology, however, promise to eventually place in the hands of police reliable devices that do not require entry. *See, e.g.*, A. WESTIN, PRIVACY AND FREEDOM 80-89 (1970). In any case, parabolic and shotgun microphones do exist, and it is a fact as old as Goldman v. United States, 316 U.S. 129 (1942), that interception of oral communications need not be accompanied by covert entry. *See* note 11 and accompanying text *supra*.

67. 441 U.S. at 254.

68. *Id.* at 254-55.

69. *Id.* at 257.

70. Connally v. Georgia, 429 U.S. 245, 250-51 (1977); Coolidge v. New Hampshire, 403 U.S. 443, 449-53 (1971); Mancusi v. DeForte, 392 U.S. 364, 371 (1968); Johnson v. United States, 333 U.S. 10, 14-15 (1948).

71. Warden v. Hayden, 387 U.S. 294, 307 (1967); Aguilar v. Texas, 378 U.S. 108, 111-12 (1964).

72. Berger v. New York, 388 U.S. 41, 55-60 (1966); Stanford v. Texas, 379 U.S. 476, 485-86 (1965). Additionally, a warrant usually requires notice of the search to the owner or occupier of the premises searched. Berger v. New York, 388 U.S. 41, 60 (1966). *See* note 20 *supra*. Finally, a search warrant usually requires a return to the issuing magistrate. Katz v. United States, 389 U.S. 347, 356 (1967). *See* Amsterdam, *supra* note 3, at 349; Note, *Covert Entry and Electronic Surveillance: The Fourth Amendment Requirements*, 47 FORDHAM L. REV. 203 (1978).

73. 441 U.S. at 256.

74. *Id.* at 270 n.19.

75. *Id.* at 257-58.

76. *Id.* at 247-48.

77. *Id.* at 256-57. Following this characterization of covert entry, the Court noted that nothing in the Constitution or in prior case law requires a magistrate to specify the exact means of

reasoning that only "empty formalism" would result from a requirement that antecedent justification be secured for a practice that is implicit in bugging authorizations, the Court held that the fourth amendment does not require such justification.[78]

CRITIQUE OF THE COURT'S OPINION

The *Dalia* decision results from three premises. Two of these bear upon the constitutional questions raised by the defendant, and one speaks to the necessary legislative grant of judicial authority to issue warrants.[79] They are: (1) that covert entry to effect surveillance is constitutional if done pursuant to a warrant, (2) that a surveillance order is a sufficient warrant in covert entry cases, and (3) that Congress meant to grant power to the courts to authorize all forms of electronic surveillance, even those requiring covert entries.[80] These assumptions are not, however, founded on a firm line of prior case law, and the Court's acceptance of them impairs the cogency of its conclusions.

Constitutionality of Covert Entries

Implicit in the Court's first two assumptions is a desire to subject covert entry to some fourth amendment scrutiny without imposing a warrant requirement on the practice. The Court relied on the *Irvine*[81] and *Silverman*[82] decisions in its attempt partially to invoke the mantle of the warrant

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warrant execution. Thus, in the Court's view, the fourth amendment's reasonableness requirement is satisfied if the breaking and entering is "reasonable." *Id.*

78. *Id.* at 258-59.

79. In order to settle the arguments raised by Dalia, the Court had to find constitutional and statutory authorization for a magistrate to issue a surveillance order that necessitates covert entry. Obviously, if covert entry is found unconstitutional per se, no statute can authorize the practice. At the same time, if covert entry is constitutional, it must be carried out reasonably under the statutory authority of a warrant. *See* United States v. United States Dist. Court, 407 U.S. 297, 316-18 (1972). Without specific enabling legislation, magistrates are powerless to issue warrants, even if the contemplated warrant is constitutionally permissible. The requirement of a legislative grant of power has its roots in the case of Entick v. Carrington & Three Other King's Messengers, 19 How's St. Tr. 1029, 2 Wils. 275 (1765). This case was decided in England and is generally accepted as the model from which the fourth amendment was fashioned. Boyd v. United States, 116 U.S. 616, 626-30 (1886). In *Entick*, Lord Camden successfully argued that magistrates have no common law power to issue warrants, except one for recovery of stolen goods. Rather, Parliament must grant the power to issue any specific warrant. *See, e.g.*, Boyd v. United States, 116 U.S. 616 (1886) (the principle of *Etrick* was adopted by Justice Bradley in this case); United States v. Finazzo, 583 F.2d 837 (6th Cir. 1978) (excellent discussion of the evolution of the legislative power to authorize issuance of warrants). Thus, the Court, in *Dalia*, had to find in Title III the authority to issue the surveillance order in question.

80. The premises as stated overlap the Court's formulation of the issues. The first issue subsumes both general statutory authority to issue the warrant and also the constitutional permissibility of covert entry. Similarly, the second issue also speaks to general constitutional requirements of judicial process.

81. *See* note 45 *supra*.

82. *See* note 15 *supra*.

clause, and it concluded from them that covert entry is permissible if done "pursuant to a warrant." It is reliance on these decisions, especially *Irvine*, that flaws the opinion.[83]

The *Irvine* Court[84] applied the *Olmstead* doctrine that trespass (entry) is a search, at least in cases of electronic surveillance.[85] Thus, the warrant requirement of *Irvine* follows from the premise that entry absent a warrant is an illegal search.[86] Further, in discussing the problem of entry, the Court ignored a line of cases that has equated entry and search.[87] Some of these cases even extend the rule to administrative searches.[88] Thus, the Court predicated its discussion on the notion that a search requires a warrant, specifically citing a case which holds that entry is a search. The Court's assumption "that covert entries are constitutional . . . if they are made pursuant to a warrant"[89] states that entry is not a search requiring separate constitutional analysis and can be engaged in as an adjunct to some other warrant. The Court's reasoning should, by its own reliance on *Irvine*, lead to a conclusion that entry is itself a search for which a warrant should issue. This is especially true in light of the additional case law supporting such a conclusion. The *Dalia* Court was, however, unwilling to so define covert entry.

The Court's second premise further illustrates its unwillingness to extend concrete constitutional protection to subjects of covert entry. For the surveillance order to be sufficient, covert entry must be defined as something less than a search. The Court achieved this desired result by characterizing both

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83. The Court's reliance on *Silverman*, 365 U.S. 505 (1961), does not hamper the decision to the same degree or in the same way as its use of *Irvine*. *Silverman* is equivocal on the question of entry. *See* note 15 *supra*. Nevertheless, it certainly requires that a search must be reasonable, *id.* at 511, which in that case meant a warranted search. The Court, however, used a semantic ploy when it stated that *Silverman* only requires that covert entry be "pursuant to a warrant." Such a statement is ambiguous at best. The Court's reliance on *Irvine*, 347 U.S. 128 (1954), aside from the problems mentioned in the text, is also susceptible to this criticism.

84. The question of the permissibility of bugging did not arise in *Irvine*. Section 605 of the Federal Communications Act, the controlling statute at that time, did not regulate bugging. 47 U.S.C. § 605 (1934). Bugging was not regulated until the passage of Title III. *See* note 28 *supra*.

85. *See* text accompanying notes 9-12 *supra*.

86. 347 U.S. at 132.

87. *See* United States v. United States Dist. Court, 407 U.S. 297, 313 (1972) (physical entry is the chief evil against which the fourth amendment protects); Johnson v. United States, 333 U.S. 10 (1948) (entry of home is the beginning of the search); Olmstead v. United States, 287 U.S. 438 (1928) (eavesdropping with trespass is a search); United States v. Hufford, 539 F.2d 32 (9th Cir. 1976) (entry into a garage to plant a beeper is a search).

88. The Court has also classified administrative entries into businesses as searches subject to a warrant requirement although the Court has not required probable cause for the issuance of such a warrant. Collonade Catering Corp. v. United States, 397 U.S. 72 (1970) (forcible entries are barred without a warrant in searching for liquor violations); See v. Seattle, 387 U.S. 541 (1967) (private areas of public business cannot be searched without a warrant).

89. 441 U.S. at 247.

forcible entry and covert entry as means of warrant execution.[90] This approach has some appeal, but the analogy is faulty because it ignores the concept of notice, which is central to warrant execution.[91] Forcible entry, unlike covert entry, is not secret. It does not, absent exigent circumstances,[92] obviate the need for notice of authority to enter. Even if the exigent circumstances doctrine were extended to searches as well as arrests,[93] the events triggering it do not completely abandon the concept of notice. Rather, the doctrine largely presupposes some degree of prior notice.[94]

Nevertheless, the Court tried to bolster its analogy by citing 18 U.S.C. § 3109[95] for the proposition that police may, by means of forcible entry, execute a warrant. This analysis disregards, however, the very language of section 3109, which permits breaking and entering only after officers have given notice and been refused entry.[96] Perhaps recognizing the fault in its argument, the Court cited *United States v. Donovan*,[97] which held that in Title III surveillances, subsequent, rather than contemporaneous, notice is acceptable. However that may be, *Donovan* is inapposite because it speaks only to notice of the surveillance that is admittedly a search, not to the question of whether subsequent notice is permissible for a covert means of

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90. *Id.*

91. *See* note 72 *supra*.

92. *See* note 51 *supra*.

93. *Id.*

94. *Id.* Only the emergency exception invoked in life-threatening situations is not rooted in notice.

95. (1976). *See* note 48 *supra*.

96. *Id.* The Court also tries to bolster its contention that at times no-knock forcible entries are allowed by citing Payne v. United States, 508 F.2d 1391 (5th Cir. 1975). Use of *Payne* in this instance is inapposite. *See* note 49 *supra*. In that case, the court simply held that the requirement of § 3109 that agents wait for refusal of entry before breaking in had no application in an obviously vacant building. *Payne*, thus, did not obviate the need for knock-and-announce nor did it do away with the requirement that notice of the search be left by the executing officer. *Id.* at 1393.

In drawing the analogy between forcible and covert entry the Court indulged in an unvoiced presumption that a search warrant is analogous to a surveillance order. There are, however, several differences between the two writs that create significant fourth amendment problems. A search warrant issues for a thing already in existence. The items sought can, therefore, be described with particularity. The secret ex parte nature of a warrant is temporary. It ends when the person executes the warrant. Finally, the return to the issuing magistrate assures an individual's right to challenge immediately the sufficiency of the warrant. On the other hand, surveillance orders issue for evidence not yet in existence and so the degree of particularity possible is lessened. Further, notice cannot be given until after the search. Electronic surveillance begins and ends in secret. Also, the lack of a return denies an individual the opportunity for immediate inquiry into the sufficiency of the surveillance order and results in a post hoc determination of reasonableness that may be clouded by hindsight. Arguably, surveillance orders allow much greater invasion of privacy than search warrants. *See* T. TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 79-85 (1969) [hereinafter cited as TAYLOR]. *Accord*, United States v. Santora, 583 F.2d 453, 462-63 n.2 (1978).

97. 429 U.S. 413 (1977).

warrant execution.[98] Thus, the Court's analogy of forcible and covert entry is appropriate only if the problem of notice is overcome. Unfortunately, aside from the inappropriate reference to *Donovan*, the Court refused to address the notice problem.

In a final attempt to legitimate its analogy, the Court rejected Dalia's assertion that bugging infringes two protected rights, privacy of speech and property. It curtly dismissed this argument by stating that such analysis "parses too finely" the fourth amendment.[99] The majority held that secret entry infringes on a privacy interest in much the same way that execution of a search warrant does.[100] This position allowed the Court to continue its characterization of covert entry as merely a means of warrant execution.[101] This position, however, fails to explain how covert entry is exempt from the notice requirement. It simply allows the Court to restate its analogy—perhaps in the hope that repetition will lend validity.

Thus, the Court recognized the applicability of the fourth amendment to covert entry. Its characterization of the practice as a means of warrant execution, however, avoided some of the strictures of that amendment. Consistency requires, rather, that the Court either declare covert entry a search subject to all the protections of the fourth amendment or declare it free from all such protections.[102]

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98. Presumably, if the Court were willing to classify covert entry as a search, the rationale of *Donovan* would apply to the entry. The Court missed the distinction, however, that its ruling denies any notice of entry except that which arises out of an inferential belief that if bugging has been carried out, it probably has been done by means of covert entry.

The Court also calls upon *Katz* for the position that subsequent notice is permissible. 441 U.S. at 247-48. The Court in *Katz* reasoned that if notice were given, the conversations sought would never take place and hence would be "destroyed." 389 U.S. 347, 355 n.16 (1967). This approach leads to the conclusion that evidence not yet in existence can be destroyed and has been labeled by one commentator as an "egregious misuse of authorities." TAYLOR, *supra* note 96, at 113-14. *Accord*, United States v. Santora, 583 F.2d 453, 464 (1978).

99. 441 U.S. at 257.

100. *Id.* at 257-58. This position does not take into account the freedom that agents have once they have entered. Without judicial control or notice to the suspect, they are free to search or explore at will without the limitation on a search provided by a warrant. This fact led Justice Brennan to the conclusion that covert entry must be characterized as a search. *Id.* at 259-60 (Brennan, J., dissenting; Stewart, J., concurring and dissenting).

101. *Id.* at 247, 257-58. Furthermore, the Court's position ignored all but one of the circuit court decisions that have addressed the question of fourth amendment applicability to covert entry. *See* United States v. Finazzo, 583 F.2d 837, 845 (6th Cir. 1978) (breaking and entering to execute a warrant is unreasonable under the fourth amendment); United States v. Ford, 553 F.2d 146 (D.C. Cir. 1977) (covert entry requires a bifurcated analysis of the legislative authority and the fourth amendment); United States v. Agrusa, 541 F.2d 690 (8th Cir. 1976), *cert. denied*, 429 U.S. 1045 (1977) (bugging constitutes a search and seizure of two dimensions each entitled to fourth amendment protection). *But see* United States v. Scafidi, 564 F.2d 683 (2d Cir. 1977), *cert. denied*, 436 U.S. 903 (1978) (Title III implies authority to enter).

102. Bacigal, *Some Observations and Proposals on the Nature of the Fourth Amendment*, 46 GEO. WASH. L. REV. 529, 556-57 (1978) [hereinafter cited as Bacigal].

As noted previously, the Court's characterization of covert entry is at odds with established precedent. *See* note 89 *supra*.

Once the Court stated that covert entry is not an independent search, the question of the sufficiency of the authorizing surveillance order became academic.[103] Title III specifies the procedures that must be followed to obtain a surveillance order[104] and, under the Court's analysis, only a post hoc determination of the reasonableness of covert entry is constitutionally required.[105]

In establishing a reasonableness requirement, the Court was obviously only referring to the mechanics of covert entry, specifically: whether any other means of execution would have been more appropriate, or whether the actual entry was carried out reasonably.[106] Such an after-the-fact analysis does not address several problems of constitutional significance inherent in covert entries. Once officers are in the target premises, absent the requirements of notice and return attached to a search warrant, the individual has no indication that the police have visited. In effect, this situation results in a complete absence of control on police activity. Only the officers know if a search for additional evidence has been carried out.[107] They are completely free to go beyond even the dictates of the plain view doctrine in a search for evidence over which there can be no control.[108]

Under these circumstances it would seem, as Justice Brennan pointed out in his dissent, that covert entry is "particularly . . . susceptible to abuse."[109] The Court, however, failed to consider the possibility that covert entry opens the door to searches that are clearly unconstitutional. Further, the majority seemed unaware that by denying covert entry the status of a search, it has taken a large step toward making surveillance orders, at least in bugging cases, the equivalent of general warrants.[110]

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103. 441 U.S. at 255-56.

104. *See* note 28 *supra*.

105. 441 U.S. at 256-57.

106. *Id.* The Court's position in *Dalia* authorizes, in effect, an exemption to the warrant requirement for the convenience of the executing officer. Such a reason for failure to procure a warrant should never be accepted. *See* Ker v. California, 374 U.S. 23, 41 (1963); Johnson v. United States, 333 U.S. 10, 15 (1948).

107. 441 U.S. at 260 (Brennan, J., dissenting; Stewart, J., concurring and dissenting).

108. In Coolidge v. New Hampshire, 403 U.S. 443 (1971), the Court ruled that items for which a warrant had not been issued can be seized only if inadvertently found in plain view. *Id.* at 467. Thus, a search warrant cannot be used as an excuse for carrying on a generalized dragnet search of a person's property. *Cf.* Katz v. United States, 389 U.S. 347, 353 (1967) (fourth amendment rights should not be entrusted solely to the discretion of police officers). The Court, in *Dalia*, seemed peculiarly insensitive to the possiblity that its ruling paves the way for just such a search. The Court also seemed to depart from its previously announced position that the fourth amendment should be liberally construed. Johnson v. United States, 333 U.S. 10, 17 n.8 (1948) (fourth and fifth amendments should have a liberal construction); Go-Bart Importing Co. v. United States, 282 U.S. 344, 357 (1931) (the fourth amendment should be liberally construed).

109. 441 U.S. at 260.

110. Boyd v. United States, 116 U.S. 616, 624-25 (1886) (general warrant allows search without probable cause), *see* note 79 *supra*; Jackson v. State, 129 Ga. App. 901, 904, 201 S.E.2d 816, 819 (1973) (general warrant insufficiently describes place or person searched); Frey v.

Statutory Authority to Permit Covert Entries

After disposing of the constitutional question, the Court turned to the question of statutory authority to issue surveillance orders entailing covert entry.[111] The Court proceeded from a belief that because Title III provides such a detailed and complete scheme for regulating electronic surveillance, the legislature would have expressly exempted covert entry had it wished to do so.[112] The assertion represents twisted logic, inasmuch as the opposite implication can be drawn without much difficulty. As Justice Stevens pointed out in his dissent, the extensive detail of the statute could as easily be taken to preclude a reading of the Act that "converts silence into thunder."[113] Support for the majority's position arises not from the statute itself, but from the Court's reading of the legislative history of the Act.

In its analysis of the legislative history, the Court proceeded from a belief that the members of Congress understood that covert entries would often be necessary to effect electronic surveillance and therefore meant to authorize them.[114] Admittedly, Congress was aware that buggings would, at times, entail covert entries.[115] The conclusion that it meant to authorize them per se, however, is unfounded. In reaching its conclusion, the Court placed far too much emphasis on the enabling powers of Title III. It failed to consider

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State, 3 Md. App. 38, 46, 237 A.2d 774, 779-80 (1968) (general warrant fails to specify things to be seized and is illegal).

111. *See* note 79 *supra*.

112. 441 U.S. at 250. This assumption runs counter to the ruling of United States v. Donovan, 429 U.S. 413 (1977), where Chief Justice Burger stated: "[T]he exact words of the statute provide the surest guide to determining Congress' intent, and we would do well to confine ourselves to that area." *Id.* at 441 (Burger, C.J., concurring). *Accord*, United States v. United States Dist. Court, 407 U.S. 297, 306 (1972) ("[I]t would have been incongruous for Congress to have legislated with respect to the important and complex area of national security in a single and nebulous paragraph."). The assumption also rejects previous decisions in which the Court has impliedly acknowledged a requirement of an affirmative grant of power by the Congress before it will find authority to issue a warrant. 441 U.S. at 263-64 (Stevens, Marshall, and Brennan, JJ., dissenting); *see, e.g.*, United States v. New York Tel. Co., 434 U.S. 159, 170 (1977); Collonade Catering Corp. v. United States, 397 U.S. 72, 77 (1970); Davis v. United States, 328 U.S. 582, 606 (1946).

It is peculiar that the Court would, in this case, so abruptly alter its position on statutory interpretation. Perhaps the Court's willingness to do so indicates a shift among the Justices toward Chief Justice Burger's belief that the exclusionary rule exacts too high a price upon society and should be modified, if not done away with. *See* Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 416, 418-20 (1971) (Burger, C.J., dissenting). Whether such a shift has occurred is unclear. Perhaps the majority felt that Dalia was guilty and should not have his conviction overturned. Such an approach ignores the effect of the *Dalia* opinion on other cases in which the issues of guilt may not be so clear cut to the Justices. *See* 441 U.S. at 261-62 (Brennan, J., dissenting; Stewart, J., concurring and dissenting).

113. *Id.* at 263 (Stevens, Brennan, and Marshall, JJ., dissenting).

114. *Id.* at 251-52, *citing* 114 CONG. REC. S12,989 (1968) (remarks of Sen. Tydings).

115. *See generally Hearings on S. 928*, *supra* note 63, at 14-30; 114 CONG. REC. S12,975-13,000 (1968).

that equally important to Congress was the restriction of wiretapping and bugging to certain specified cases and the total removal of these practices from public use.[116]

Further, the Court appeared to view Title III as an isolated Act, emerging solely from the Court's decisions in *Berger* and *Katz*, and not from the context of the entire legislative history of electronic surveillance.[117] In 1967, Congress considered several bills aimed at protecting a citizen's right of privacy. The Senate was incensed by the prevalence of government bugging[118] and sought to regulate the practice. One Senator characterized the practice of breaking and entering as pure "outlawry" and further stated that the practice could not be justified legally.[119]

It is inconceivable that in the short space of several months Congress forgot its earlier outrage and silently assented to all covert entries as a necessary part of electronic surveillance.[120] It is far more likely that Congress would have felt it unnecessary to reiterate its earlier concern.

In its reading of the relevant history of the Act, the Court found support for its proposition by taking one Senator's statement out of context.[121] The majority quoted the Senator as saying that bugging is difficult because of the

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116. S. REP. NO. 1097, *supra* note 29, at 66.

117. *See* note 27 *supra*. Although 47 U.S.C. § 605 (1934) was ineffective in ending wiretapping, it was enacted with that intent. Over the intervening years, Congress has consistently evinced concern over the potential abuse inherent in electronic surveillance and has sought to control the practice of eavesdropping. *See* note 118 *infra*. Given Congress' consistent attempts at regulation of surveillance, the Court would have been on firmer logical ground had it looked to the legislative history of the entire subject.

118. *Hearings on S. 928*, *supra* note 63, at 18-19 (remarks of Sen. Morse). Part of the Senate's anger was undoubtedly sparked by suspicions that senatorial offices were being bugged. *Id. See* note 120 *infra*.

119. *Id.* This position was shared by the President and the Justice Department at the time. The President's Commission on Law Enforcement had concluded, however, that electronic surveillance was a useful tool. *See* PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY (1967). The Justice Department and Attorney General Ramsey Clark testified to this effect before House Subcommittee No. 5 of the Committee on the Judiciary. *Hearings on H. 5037*, *supra* note 63, at 287-88. He also indicated his belief that electronic surveillance should be confined to the national security area under Presidential direction. *Id.*

120. The Commission Report, the decisions in *Berger* and *Katz*, and rising congressional concern with organized crime led Congress to modify its view that all bugging and wiretapping should be banned. In an effort to solve the problems of crime and to placate state authorities who almost universally claimed electronic surveillance was necessary, Congress passed Title III. *See, e.g.*, S. REP. NO. 1097, *supra* note 29; *Hearings on H. 5037*, *supra* note 64. *See* note 28 *supra*. The Court paid no attention to the antecedents of Title III. Rather, it assumed that Title III was an act to permit surveillance with a few protections to individual privacy added. Title III would be better characterized as a modification of several proposed Right to Privacy Acts that grudgingly grant police the authority to indulge in electronic surveillance under strict controls. *See* S. REP. NO. 1097, *supra* note 29, at 66, 69; note 7 *supra*. *See also* Gelbard v. United States, 408 U.S. 41 (1972) (protection of privacy was an overriding concern in passage of Title III).

121. 441 U.S. at 272-74. (Stevens, Brennan, and Marshall, JJ., dissenting).

problems of covert entry to support the assumption that Congress understood the necessity for covert entry. Whereas Justice Stevens correctly noted that, taken in context, the statement is an expression of belief that the constitutional problems of covert entry would be almost insuperable and that the practice would be little used, if at all.[122]

Beyond taking a quotation out of context, the majority opinion silently conveyed the impression that not a single Senator objected to eavesdropping.[123] In fact, the report of the Judiciary Committee on Title III reveals some strong opposition. Senators Hart and Long added comments to the report that strongly criticize the entire concept of electronic surveillance.[124] Further, Senator Bayh could only reluctantly endorse Title III.[125] The opposition of these Senators to electronic surveillance generally indicates that they would not condone warrantless covert entry to effect such a surveillance.

The plain fact is that Title III, like all such bills, emerged as a compromise.[126] In such a situation, through selective interpretation, the legislative history can be made to reflect almost any viewpoint the Court wishes.[127] In *Dalia*, the Court chose to infer nearly universal support for Title III. This inference bolstered the conclusion that denial of covert entry, absent a warrant, would frustrate the purpose of the legislation. This conclu-

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122. *Id.* As quoted by the majority, Senator Tydings remarks are: "Surveillance is difficult to use. Tape [*sic*] must be installed on telephones, and wires strung. Bugs 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. S12,989 (1968). The thought expressed by Senator Tydings assumes a different meaning when his statement is reproduced in context. As reported, his remarks were:

> Contrary to what we have heard, electronic surveillance is not a lazy way to conduct an investigation. It will not be used wholesale as a substitute for physical investigation . . . .
>
> The reasons for such sparing use are simple. First, electronic surveillance is really useful only in conspiratorial activities. . . .
>
> Second, surveillance is difficult to use. Tape [sic] must be installed on telephones and wires strung. Bugs are difficult to install in many places since surreptitious entry is often impossible. Often, more than one entry is necessary to adjust equipment.
>
> . . . .
>
> Third, monitoring this equipment requires the expenditure of a great amount of law enforcements' time . . . .

Id. at S12,988-89.

123. This impression is created, in part, by the Court's failure to examine the legislative history of the entire subject of electronic surveillance. *See* note 117 *supra*. The impression is furthered by the Court's selective examination of the legislative history of Title III. *See* notes 124 & 125 and accompanying text *infra*.

124. S. REP. NO. 1097, *supra* note 29, at 161-66.

125. *Id.* at 186-87.

126. Perhaps the best reminder of this fact is Senator Bayh's reluctant endorsement of Title III. He made plain his dissatisfaction with the bill but endorsed it because of his recognition of the pressing problems presented by organized crime. *See* note 125 *supra*.

127. *E.g.*, Justice Stevens offered an interpretation of the legislative history directly opposed to that of the majority. 441 U.S. at 271-78 (Stevens, Brennan, and Marshall, JJ., dissenting).

sion, however, suffers under a broader examination of all the relevant legislative history. Such an examination clearly reveals the permissive scope of the Act and uncovers a clear conflict within Congress as to the propriety of that scope. In light of this conflict, Congress could not have intended its silence to sanction what amounts to breaking and entering[128] without the intervention of a detached and neutral magistrate.[129]

An Alternative Solution

The Court should declare covert entry a search.[130] Such a determination would bring the practice logically within the warrant requirement of the fourth amendment and also within the recommendation of the National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance.[131] The resulting procedural requirement would not be a burden on either the courts or the agencies requesting authority.[132] A separate search warrant would not be necessary, as the request for surveillance contains nearly all the required information. The agency need only submit an additional request for permission to enter coupled with a detailed statement of the reasons entry is necessary.[133] In this way, the magistrate could authorize only those entries that meet the demonstrated needs of the applicant.[134]

Further, the Supreme Court should make clear that the issuing magistrate has the power to order a return by the agency. The courts would thus have authority to insure that the danger of unrestricted searches would be largely eliminated.[135] This process would not entail, as the Court seemed to fear, a

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128. As the dissent pointed out, the government's conduct violated a New Jersey statute. *Id.* at 262-63. *See* N.J. STAT. ANN. §§ 2A:94-3, 2A:94-1 (West 1976) (recodified as N.J. STAT. ANN. §§ 2C:5-5, 2C:18-2 (West Supp. 1979)).

129. 441 U.S. at 271 (Stevens, Brennan, and Marshall, JJ., dissenting).

130. *See* notes 87 & 88 *supra*.

131. NATIONAL COMMISSION FOR THE REVIEW OF FEDERAL AND STATE LAWS RELATING TO WIRETAPPING AND ELECTRONIC SURVEILLANCE, ELECTRONIC SURVEILLANCE 18 (1976). A large minority of the Commission recommended that electronic surveillance which requires covert entry be banned except in national security cases. *Id.* at 181.

132. 441 U.S. at 261 (Brennan, J., dissenting; Stewart, J., concurring and dissenting); United States v. Ford, 553 F.2d 146, 163-65 (D.C. Cir. 1977).

Such a holding would hardly affect wiretapping, which almost never entails entry into the premises and which forms the bulk of surveillances. *See* ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, REPORT ON APPLICATIONS FOR ORDERS AUTHORIZING OR APPROVING THE INTERCEPTION OF WIRE OR ORAL COMMUNICATIONS XIV (1978) [hereinafter cited as REPORT ON APPLICATIONS]. Buggings or instances of combined buggings and wiretaps were authorized only twenty times at the federal level in 1977. *Id.*

133. Title III already gives a magistrate authority to require additional evidence in support of the application for surveillance. 18 U.S.C. § 2518(2) (1976). Presumably, a magistrate could presently request agents to specify whether covert entry is contemplated. The effect of *Dalia*, almost certainly, is to insure that this power never will be used.

134. United States v. Ford, 553 F.2d 146, 170 (D.C. Cir. 1977).

135. Justice Brennan argued strongly for a warrant requirement to keep abuses of this type in check. 441 U.S. at 260-61 (Brennan, J., dissenting; Stewart, J., concurring and dissenting).

determination of the exact manner of entry, but rather a determination that entry is appropriate. The Court itself appeared to feel the need for some such specification as it noted that it would be preferable for agencies seeking electronic surveillance authority to apprise the judge that covert entry is contemplated.[136] Had the Court required such a specification, it easily could have rested the decision on firmer logical ground without significantly affecting electronic surveillance.

IMPACT OF THE COURT'S DECISION

The *Dalia* decision greatly expands police power.[137] Once permission to bug is obtained, police are free to enter as often as they wish and stay as long as they please under the guise of installing, repairing, or removing bugs. More importantly, *Dalia* removes from judicial control police activity within the target premises. Once inside, police are free to rummage among the individual's possessions and papers.[138] There can be little argument that such activity is an overbroad search for which no valid warrant could issue.[139] There also can be little argument that the adversarial role of police during investigations encourages such overbroad searches.[140]

From a broader perspective, *Dalia* may confirm a change in the Court's view of the role of the fourth amendment. In *Berger* and *Katz*, the Court viewed the language of the amendment as a limit on the scope of governmental power.[141] More recent decisions, however, hint that the Court might be susceptible to the view that the amendment is, rather, a limitation

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136. *Id.* at 272 n.22. *See* note 133 *supra*.

137. Although bugging and electronic surveillance at the federal level are relatively uncommon, the same cannot be said at the state level. Title III authorizes state officers to carry on surveillance under the same restrictions that are imposed on the federal government. 18 U.S.C. § 2516(2) (1976). The states have been quick to use this power. In 1977, 524 state orders for intercepts were issued, of which 25 were for bugs or combined bugs and wiretaps. REPORT ON APPLICATIONS, *supra* note 132, at XIV. The *Dalia* decision could help increase the number of buggings in two ways. It permits police in jurisdictions which previously refused to allow covert entry to use the practice. Second, alive to the opportunities presented in *Dalia*, police may now seek bugging authorizations more frequently.

138. Justice Brennan was aware of the potential for abuse arising from the majority holding. He noted: "The practice [covert entry] is particularly intrusive and susceptible to abuse since it leaves naked to the hands and eyes of the government agents items beyond the reach of simple eavesdropping." *Id.* at 260. (Brennan, J., dissenting; Stewart, J., concurring and dissenting).

139. *See* note 110 and accompanying text *supra*. *See also* Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 394 n.7 (1971) (officers confined within the bounds set by the warrant); Coolidge v. New Hampshire, 403 U.S. 443, 467 (1971) (necessary searches should be as limited as possible).

140. Johnson v. United States, 333 U.S. 10, 13-14 (1948) (police investigation is competitive, not neutral, enterprise).

141. 389 U.S. at 356-57; 388 U.S. at 49-50. *See* Silverman v. United States, 365 U.S. at 511-12. *See* notes 13-18 and accompanying text *supra*. The decisions in these cases clearly reflect a concern on the part of the Court that police activity be limited within the scope of the fourth amendment. More recent decisions focus on the extent of governmental power rather than limits on that power. *See* note 142 *infra*.

on the extent of individual rights.[142] While at first glance such a change may appear to be only semantic, its effect is far reaching. The latter approach requires the individual to demonstrate not that his rights have been infringed, but that he has any rights at all. Followed to its logical extreme, this approach leads to the conclusion that police have a right to overhear by any method not expressly prohibited.[143]

The *Dalia* decision may also influence future decisions in other search situations. Although the Court touched the question of subsequent notice of entry, it stopped short of requiring any notice at all in this case. Thus, the Court created a rationale for abandoning notice if entry can be classed as a means of warrant execution. There is little to prevent this reasoning from being applied to nonsurveillance situations in the future. One example of a related legal principle that might be affected by *Dalia* is the exigent circumstances doctrine.

As noted above, the exigent circumstances doctrine traditionally implies a degree of prior notice.[144] The *Dalia* Court defined entry, however, as nothing more than a means of warrant execution. Application of the Court's reasoning in *Dalia* could destroy the presently required nexus between police fear of destruction of evidence and an individual's knowledge of police presence.[145] Extension of the *Dalia* reasoning to such a case would allow police to enter anytime they believed evidence would be destroyed. And, as this fear often underlies a request for a search warrant, there would be little to stop the police from simply breaking down a door and searching solely at their discretion.

CONCLUSION

By redefining the extent of fourth amendment protection in cases of electronic surveillance, the Court indicated its belief that in these situations

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142. *See* United States v. New York Tel. Co., 434 U.S. 159, 169-70 (1977) (pen register may be attached to phone lines surreptitiously); United States v. Ramsey, 431 U.S. 606, 612-14 (1977) (letters may be opened without probable cause to believe they contain contraband).

The fourth amendment can be viewed as limiting the conduct of government or as establishing certain rights that a citizen can claim as protected. *See generally* Bacigal, *supra* note 102, at 529. The former viewpoint is reflected in cases such as *Katz* in which the Court emphasizes the boundaries on government action. The latter viewpoint is exemplified by *Dalia*, in which the analysis focuses on the extent of any protection the individual can claim. Perhaps the archetypal example of the individual viewpont is *Olmstead*. *Id.* at 533. While both viewpoints are usually reflected in the Court's decisions, the degree of emphasis upon one or the other may obviously effect the outcome. *See also* Amsterdam, *supra* note 3, at 349.

It is ironic that the decisions setting the framework for Title III are dominated by the limitation viewpoint since the law is evidently to be judged by the individual viewpoint.

143. 441 U.S. at 278-79 (Stevens, Brennan, and Marshall, JJ., dissenting).

144. *See* note 51 *supra*.

145. Support for the idea that the Court may be moving in this direction may be inferred from its acceptance of the concept that bugging itself is an exigent circumstance, obviously, if notice were given, the evidence would be destroyed. As noted, such reasoning is an "egregious misuse of authorities." *See* note 99 *supra*.

police should be given greater latitude to gather information. This goal could be achieved through a less drastic alternative, however, that would keep covert entry under the aegis of the Constitution. In this way there would be no need either for Congress to amend Title III or, more importantly, for the Court to indulge in a crabbed reading of the statute that unwisely enlarges the ambit of Title III. As a result of its analysis, the Court creates a precedent with disturbing implications. The shift in fourth amendment interpretation, combined with the reasoning employed by the Court, could expand police power to search in cases far removed from electronic surveillance. The result in *Dalia* calls to mind one commentator's remark about the *Katz* decision: "The Court's opinion does not say that a clandestine trespass to install a bug may be authorized by an *ex parte* surveillance order, but such is plainly the consequence of its reasoning."[146]

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146. TAYLOR, *supra* note 96, at 114. The Court's opinion reminds one of another of Taylor's statements. Again referring to *Katz* he said: "No doubt it is comforting to be told that one's privacy is as fully protected in a public phone booth as it is at home. But it is less reassuring to realize that [it] is no better protected at home than in a public phone booth." *Id.*