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Constitutional Law--Criminal Procedure--Covert Entry to Plant Bugs: Who Decides?

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CASE COMMENT

CONSTITUTIONAL LAW – CRIMINAL PROCEDURE – COVERT ENTRY TO PLANT BUGS: WHO DECIDES?

Dalia v. United States, 99 S. Ct. 1682 (1979)*

Petitioner[1] was convicted in the United States District Court for New Jersey of conspiracy to transport, receive and possess stolen goods[2] and receiving stolen goods while in interstate commerce.[3] Evidence introduced at trial[4] included conversations intercepted pursuant to an electronic surveillance order issued in accordance with the Omnibus Crime Control and Safe Streets Act.[5] Petitioner moved to suppress[6] that evidence on the ground that the covert entries by FBI agents to install and remove the device were not expressly authorized in the surveillance order.[7] The district court denied the motion[8]

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1. Lawrence Dalia was originally indicted on November 6, 1975 with a codefendant, Daniel Rizzo. Immediately prior to commencement of trial, Rizzo entered a plea of guilty. Brief for Petitioner at 2, Dalia v. United States, 99 S. Ct. 1682 (1979). Five other persons named in the indictment as unindicted coconspirators had previously been prosecuted in a different action for their involvement in the alleged criminal transaction; all pleaded guilty approximately two years before petitioner's trial. *Id.* at 3.

2. 18 U.S.C. §371 (1976) (general conspiracy charge).

3. 18 U.S.C. §§2, 2315 (1976).

4. United States v. Dalia, 426 F. Supp. 862, 863 (D.N.J. 1977), *aff'd*, 575 F.2d 1344 (3d Cir. 1978), *aff'd*, 99 S. Ct. 1682 (1979).

5. 18 U.S.C. §§2510-2520 (1976 & Supp. II 1978) [hereinafter cited as Title III]. Title III regulates any interception of wire or oral communications, encompassing therefore both telephonic wiretapping and electronic eavesdropping. "Wire communication" is defined at 18 U.S.C. §2510(1) (1976) as any communication made with the aid of facilities furnished or operated by a common carrier. "Oral communication" is defined at 18 U.S.C. §2510(2) (1976) as any oral utterance by a person exhibiting an expectation that such utterance is not subject to interception. The Title III order in the instant case was issued by a federal district judge. *See* 18 U.S.C. §2518(3) (1976) (allowing any judge of competent jurisdiction to issue orders when properly applied for). The Supreme Court has never directly considered the facial validity of Title III. Lower federal courts considering the Act's constitutionality have unanimously agreed that it is valid. *See, e.g.*, United States v. Feldman, 535 F.2d 1175, 1181 (9th Cir.), *cert. denied*, 429 U.S. 940 (1976).

6. Appropriate motions to suppress had been made before trial; however, at a pretrial hearing the court decided to hear these motions at the trial's conclusion. Brief for Petitioner at 4-5, Dalia v. United States, 99 S. Ct. 1682 (1979). *See also* FED. R. CRIM. P. 12(e). At the suppression hearing it was apparent that the issuing judge had no knowledge of the covert entries either before or after the bugging. United States v. Dalia, 575 F.2d 1344, 1346 n.3 (3d Cir. 1978), *aff'd*, 99 S. Ct. 1682 (1979).

7. The district court judge had originally issued a Title III order on March 27, 1973, authorizing the interception of telephonic communications emanating from petitioner's business premises in Linden, New Jersey. Brief for Petitioner at 3, Dalia v. United States, 99 S. Ct. 1682 (1979). The order provided that two separate telephones were to be tapped. *Id.* After 20 days of wiretapping, the Government applied for an order permitting continued

holding that explicit authorization is not required under Title III for a covert entry to install electronic eavesdropping equipment.[9] This decision was affirmed by the United States Court of Appeals for the Third Circuit.[10] On certiorari,[11] the Supreme Court affirmed and HELD, the fourth amendment does not require a Title III electronic surveillance order to include an express authorization to covertly enter the described premises.[12]

The Bill of Rights was drafted to guard against the menace of general warrants and searches.[13] Thus, the fourth amendment requires that before a

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monitoring of the telephones as well as the right to intercept oral communications taking place in petitioner's office. *Id.* After their requests were granted, FBI agents covertly entered petitioner's business to install the eavesdropping devices. After 20 days of eavesdropping, a 20-day extension was granted; at the end of this period, agents again entered petitioner's premises and removed the device. *Id.* at 4.

8. The trial judge in the instant case also issued the surveillance orders. United States v. Dalia, 426 F. Supp. 862 (D.N.J. 1977), *aff'd*, 575 F.2d 1344 (3d Cir. 1978), *aff'd*, 99 S. Ct. 1682 (1979).

9. *Id.* at 866. The judge reasoned that specific authorization is not required because authority to covertly enter is necessarily implicit in a Title III order. *Id.* Although the district court recognized the existence of contrary authority, it determined that the manner of executing a surveillance order should be left to those charged with carrying it out, once probable cause is shown and a warrant is issued. *Id.*

Title III does not have specific provisions regarding covert entries to install, repair, or maintain electronic eavesdropping devices. *But cf.* Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, §§2524(a)(8), 2525(b)(1)(D), 92 Stat. 1783 (1978) (to be codified at 50 U.S.C. §§1804(a)(8), 1805(b)(1)(D)) (application for and authorization of electronic eavesdropping must contain statement whether physical entry will be required to install device).

10. United States v. Dalia, 575 F.2d 1344, 1346 (3d Cir. 1978), *aff'd*, 99 S. Ct. 1682 (1979). The circuit court relied on the district judge's finding that authorization to covertly enter was implicit in the surveillance order. *Id.* The court however declined to hold that specific authorization would never be needed and noted that the more preferable approach would be to include the authorization because of the fourth amendment considerations that could be raised later. *Id.* at 1346-47.

11. The Supreme Court's grant of certiorari restricted their consideration to a single issue: "May government agents commit an otherwise illegal breaking and entry in order to install, maintain and remove electronic listening devices when lawful authority to intercept oral communications has been granted pursuant to 18 U.S.C. §2510 *et seq.*, but when no authority to commit a breaking and entry has been sought or obtained and the supervising court has not been advised of the manner of the proposed entry of installation?" Dalia v. United States, 99 S. Ct. 78, 78 (1978); Brief for Petitioner at 2, Dalia v. United States, 99 S. Ct. 1682 (1979).

12. 99 S. Ct. at 1692-94. The Court also held that the fourth amendment does not prohibit, *per se*, covert entry for the purpose of installing otherwise legal electronic bugging equipment, and that Congress meant to authorize courts to approve electronic surveillance without limiting the means necessary to accomplish it, so long as the means chosen are reasonable under the circumstances. *Id.* at 1688-92.

13. *See* Berger v. New York, 388 U.S. 41, 58 (1967). The fourth amendment "makes general searches . . . impossible . . . ." Marron v. United States, 275 U.S. 192, 196 (1927). *See also* Lo-Ji Sales, Inc. v. New York, 99 S. Ct. 2319 (1979) where the Court struck down as invalid a search conducted pursuant to a warrant, which the issuing magistrate had left incomplete to be filled in after the search's conclusion, because it was analogous to a general warrant. *Id.* at 2324. The dangers inherent in a general search were first condemned in the leading English case of Entick v. Carrington, 95 Eng. Rep. 807 (C.P. 1765). The practice of furnishing customs officials with general warrants granting blanket authority to conduct

search warrant is issued, three requirements must be fulfilled:[14] all searches must be justified by a showing of probable cause,[15] all warrants must be issued by a neutral magistrate,[16] and warrants must describe with particularity the location and objects of the search.[17] These prerequisites minimize the exercise

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general searches for goods imported in violation of tax laws led, in part, to the Declaration of Independence. The fourth amendment with its particularity requirements was written as a safeguard against the general search. 388 U.S. at 38.

14. The fourth amendment requires that: "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 [1] upon probable cause, [2] supported by Oath or affirmation, and [3] particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV. For a reaffirmation of these requirements, see Zurcher v. Stanford Daily, 436 U.S. 547, 555 (1978). See also Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 358 (1974) for a historical overview of the amendment's requirements. *See generally* 2 W. LAFAVE, SEARCH AND SEIZURE §§4.1-4.13 (1978).

15. Warden v. Hayden, 387 U.S. 294, 307 (1967); Carroll v. United States, 267 U.S. 132, 162 (1925); Amsterdam, *supra* note 14, at 358. *See generally* 1 W. LAFAVE, *supra* note 14, §§3.1-3.7. The traditional justification required is that the government show a reasonable belief that the objects of the search are related to the crime and are in the place to be explored. 387 U.S. at 307; Amsterdam, *supra* note 14, at 358. *See* United States v. Boyd, 422 F.2d 791 (6th Cir. 1970) (warrant invalid where event establishing reasonable belief not attested to by oath or affirmation).

In Camara v. Municipal Court, 387 U.S. 523 (1967), the Supreme Court recognized the need to adapt the traditional approaches regarding constitutional mandates to modern day situations. The Court said that administrative warrants could be issued on the basis of a flexible probable cause test which balanced "the need to [conduct administrative searches] against the invasion which the search entails," 387 U.S. at 537. *See also* Matter of Carlson, 580 F.2d 1365, 1377 (10th Cir. 1978) (quantum of probable cause to issue administrative warrant less than that for traditional criminal warrant). Thus, the Court allowed issuance of a warrant on a showing that building code defects existed within a certain area without identifying a particular building. In contrast, however, the Court in Zurcher v. Stanford Daily, 436 U.S. 547, 562 (1978), although allowing the issuance of a warrant for evidence contained in a newsroom, said that the magistrate would have to apply the warrant requirements with "particular exactitude" when a search invaded first amendment interests. *See generally* Note, *Covert Entry in Electronic Surveillance: The Fourth Amendment Requirements*, 47 FORDHAM L. REV. 203, 210-13 (1978).

16. Connally v. Georgia, 429 U.S. 245, 250-51 (1977) (per curiam) (striking down as unconstitutional the practice of paying the issuing judge on a number of warrants issued basis); Shadwick v. City of Tampa, 407 U.S. 345, 350 (1972) (holding city clerks may constitutionally issue arrest warrants for violations of municipal ordinances). *See also* Lo-Ji Sales, Inc. v. New York, 99 S. Ct. 2319 (1979) (search of bookstore for obscene materials struck down, in part, because issuing judge took part in search).

17. Stanford v. Texas, 379 U.S. 476, 485 (1965) (requirement that warrants must particularly describe the "things to be seized" is to be accorded scrupulous exactitude when the "things" are books); United States v. Johnson, 541 F.2d 1311, 1313 (8th Cir. 1976) (search warrant constitutionally valid although it listed "paraphernalia" as objects to be seized rather than specifically listing apparatus used with marijuana). Traditionally, the Court has literally interpreted the particularity requirement, see note 14 *supra*, which has been characterized as "precise and clear," 379 U.S. at 481. Literal interpretations of this requirement prior to Berger v. New York, 388 U.S. 41 (1967), created a problem when the Court was confronted with electronic eavesdropping and wiretapping. In Olmstead v. United States, 277 U.S. 438 (1928), members of a smuggling conspiracy were convicted of prohibition violations after a federal prosecution in which the government introduced evidence obtained through extensive illegal wiretapping. The *Olmstead* Court held that the evidence was ad-

of official discretion and reduce the danger of specific and lawful searches becoming general ones.

An additional check on official searches is the fourth amendment requirement that all searches be reasonable.[18] The test of reasonableness balances the intrusiveness of the search against the government interest involved.[19] While a reasonable belief that tangible items related to criminal activity are present in a certain area is usually sufficient to satisfy this requirement,[20] an excep-

missible because the fourth amendment's protection extended only to tangible items and did not encompass conversations intercepted through electronic means absent physical trespass. *Id.* at 466. After *Olmstead*, the Court had several occasions to consider the question of whether the fourth amendment required a warrant for electronic surveillance. In Goldman v. United States, 316 U.S. 129, 134 (1942), the Court held that the warrantless use of a "detectaphone" did not violate the fourth amendment. The device was placed against a common wall and picked up conversations in an adjoining office. The Court, however, reached a different result in Silverman v. United States, 365 U.S. 505 (1961). Federal agents had driven a "spike mike" through a party wall, made contact with a heating duct, and picked up every conversation in the house. *Id.* at 506-07. Confronted with a trespass, the Court held that the evidence was obtained in violation of the fourth amendment. *Id.* at 509. One justice, however, relied on his finding that the agents' actions invaded the privacy of the defendant's home to exclude the evidence. *Id.* at 513 (Douglas, J., concurring). Nevertheless, the clause was broadly interpreted in *Berger* where the Court criticized a New York surveillance statute for allowing the authorization of eavesdropping at length, without prompt execution, and without termination upon obtaining the desired conversations. 388 U.S. at 59-60. The federal surveillance statute, 18 U.S.C. §§2510-2520 (1976 & Supp. II 1978), was drawn to comply with *Berger* without unduly hindering law enforcement. United States v. Scott, 436 U.S. 128, 130 (1978). Based on *Berger*, it requires that surveillance orders specify temporal limitations. 18 U.S.C. §2518(4)(c), (5) (1976 & Supp. II 1978). See note 9 *supra*.

18. See note 14 *supra*. Katz v. United States, 389 U.S. 347, 353 (1967), applied the reasonableness requirement to electronic surveillance. In 1950, the Supreme Court adopted a strict view of the phrase "unreasonable searches and seizures." *See* United States v. Rabinowitz, 339 U.S. 56, 63 (1950) (determine the reasonableness of a search not by a fixed formula but by reference to the specific facts of each case). *See also* Almeida-Sanchez v. United States, 413 U.S. 266, 289 (1973) (White, J., dissenting) (border searches should be judged under the totality of circumstances); Wyman v. James, 400 U.S. 309, 318 (1971) (welfare worker visit to client home possessing some characteristics of a traditional search is not unreasonable, notwithstanding the absence of a warrant, because of state interest in serving the needs of dependent children). *See generally* 3 W. LAFAVE, *supra* note 14, §§9.1-9.6. The traditional view of the reasonableness requirement, on the other hand, is reflected by an adherence to the specific commands of the warrant clause. See note 14 *supra*. Under this view the Court has held warrantless searches *per se* unreasonable, subject only to a few carefully delineated exceptions. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973) (neither warrant nor probable cause required if search conducted pursuant to consent); Coolidge v. New Hampshire, 403 U.S. 443, 454-55, 458-64, 478-82 (1971) (holding warrantless seizure and search of automobile not justified under Carroll v. United States, 267 U.S. 132 (1925), nor Chambers v. Maroney, 399 U.S. 402 (1970), because at time of search car was not being driven but was located on the private property of defendant and possibility of flight was non-existent).

19. United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975) (balancing interest of government in patrolling national borders and citizens' right to be free from unreasonable searches); Terry v. Ohio, 392 U.S. 1, 21 (1968) (police may stop and frisk on less than probable cause because of state interest in protecting police during street encounters).

20. Fisher v. United States, 425 U.S. 391, 400 (1976) (probable cause showing necessary to protect constitutional right to privacy); Camara v. Municipal Court, 387 U.S. 523, 534-35 (1967) (belief that municipal code violations exist in a particular area of the city as opposed to a

tionally intrusive search requires the showing of an additional government interest.[21] Electronic surveillance under Title III is expressly placed in the latter category of searches.[22] Search warrants generally require that notice be given to the parties involved stating that those conducting the search possess the requisite authority.[23] In instances of electronic surveillance, however, advance notice of anticipated surreptitious recording of conversations would prevent successful surveillance. Hence, electronic surveillance must usually be conducted, without any warning, through clandestine surveillance or by actual covert entry to install eavesdropping equipment.[24] Because notice must be foregone for surveillance to succeed, the United States Supreme Court has required that exigent circumstances be shown before electronic eavesdropping will be approved.[25]

In *Berger v. New York*[26] the Court set stringent requirements for the conduct of electronic surveillance after examining the constitutional validity of a New York statute authorizing court-approved electronic eavesdropping.[27] The petitioner had been convicted of a bribery conspiracy[28] upon evidence obtained by long-term electronic surveillance.[29] The Court held that since the authorizing statute failed to require particularity in the warrant's de-

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particular residence is constitutionally sufficient showing of probable cause for administrative search).

21. The gravity of the intrusion will always be measured against the sufficiency of the public interest in conducting the search. Camara v. Municipal Court, 387 U.S. 523, 536-37 (1967). *Cf.* United States v. Ortiz, 422 U.S. 891, 895 (1975) (reasonableness requirement held to limit unnecessarily frightening or offensive methods of surveillance and investigation).

22. Electronic surveillance of conversation is only reasonable when normal investigative means of gathering evidence have failed, are likely to fail, or appear too dangerous. *See* 18 U.S.C. §2518(1)(c) (1976) (application for Title III order must include statement to this effect); *id.* §2518(3)(c) (Title III order itself must include statement to this effect). This standard is a codification of the exigency standard established in Berger v. New York, 388 U.S. 41 (1967). *See* United States v. Tortorello, 480 F.2d 764, 774 (2d Cir.), *cert. denied*, 414 U.S. 866 (1973) ("Electronic surveillance cannot be justified unless other methods of investigation are not practicable"); Note, *Electronic Surveillance, Title III, and the Requirement of Necessity*, 2 HASTINGS CONST. L.Q. 571, 577-86 (1975).

23. *See* Berger v. New York, 388 U.S. 41, 60 (1967). *See generally Controlling Crime Through More Effective Law Enforcement: Hearings on S. 300, S. 552, S. 580, S. 674, S. 675, S. 678, S. 798, S. 824, S. 916, S. 917, S. 992, S. 1007, S. 1094, S. 1194, S. 1333, & S. 2050 Before the Subcomm. on Criminal Laws & Procedures of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess. 1 (1967); Note, *supra* note 22, at 577-86.

24. *See* Katz v. United States, 389 U.S. 347, 355 n.16 (1967); Berger v. New York, 388 U.S. 41, 60 (1967); United States v. Martinez, 498 F.2d 464, 468 (6th Cir.), *cert. denied*, 419 U.S. 1056 (1974). *See also* N.Y. CRIM. PROC. LAW §700.30(8) (McKinney 1971) (specific authorization for covert entry to install eavesdropping devices only required if entry is necessary to execute the warrant).

25. *See* Berger v. New York, 388 U.S. 41, 58-60 (1967). See note 22 *supra*.

26. 388 U.S. 41 (1967).

27. *Id.* at 43 n.1, 55 (holding as unconstitutional N.Y. CRIM. PROC. LAW §813-a (McKinney 1958)).

28. 388 U.S. at 44. The petitioner had attempted to bribe the chairman of the New York State Liquor Authority in order to obtain liquor licenses for his night clubs.

29. *Id.* at 45. It was stipulated at trial that the only way the Attorney General could prosecute petitioner was by use of the evidence obtained. *Id.*

scription of the conversations sought, impending crimes, and places to be searched, it posed a threat equivalent to a general search.[30] By making this particularity the constitutional minimum, the Court sought to demarcate the borders of fourth amendment protection against trespassory invasions.[31]

This emphasis on protection from trespass, however, received scant attention in *Katz v. United States*,[32] an electronic surveillance opinion issued six months later. In *Katz* the Court found unconstitutional an electronic eavesdropping which breached the defendant's expectation of privacy.[33] The petitioner sought to overturn his conviction for interstate gambling, because the prosecution had been bolstered by evidence of criminal conversations obtained by an electronic eavesdropping device attached to the exterior of a public telephone booth.[34] The Court found that the lack of antecedent judicial authorization was *per se* unreasonable and thus violated the fourth amendment.[35] The Court however prefaced its holding by noting the absence of exigent circumstances.[36]

Despite the Supreme Court's concern with warrant particularity and prior judicial authorization of electronic surveillance in *Berger* and *Katz*,[37] neither decision discussed whether the fourth amendment required specific court approval for covert entries by law enforcement officials to install surveillance devices.[38] Congress' response to *Berger* and *Katz* in Title III of the Omnibus

30. *Id.* at 58-60. *See also* 18 U.S.C. §2516(1)(a)-(g) (1976 & Supp. II 1978) (listing crimes for which Title III electronic surveillance orders may be issued).

31. *See* Note, *Federal Decisions on the Constitutionality of Electronic Surveillance Legislation*, 11 AM. CRIM. L. REV. 639, 652 (1973). The fourteenth amendment's due process clause imposed on the states the duty of meeting such rigid requirements and necessarily accorded the individual the companion right to enforce this obligation. Berger v. New York, 388 U.S. at 53.

32. 389 U.S. 347 (1967).

33. *Id.* While the majority opinion did not mention the concept of "reasonable expectation of privacy," the term received its first articulation in Justice Harlan's concurring opinion. *Id.* at 360-62 (Harlan, J., concurring). Since that decision, the Court has used the phrase, "reasonable expectation of privacy" in a variety of contexts. *Compare* Chadwick v. United States, 433 U.S. 1 (1977) *with* Rakas v. Illinois, 99 S. Ct. 421 (1978). *See generally* 1 W. LAFAVE, *supra* note 14, §2.1.

34. 389 U.S. at 348.

35. *Id.* at 357.

36. *Id.* at 357 n.19. See note 54 *infra*. The *Katz* majority determined that the rationale supporting warrantless searches incident to arrest and hot pursuit would not be found in electronic surveillance situations. *Id.* at 357.

37. This concern manifests the Court's awareness of the dangers unparticularized searches could engender, such as uncontrolled ransacking by government agents. For example, the *Berger* Court discussed the inherent dangers of uncontrolled police discretion permitted by the New York statute, 388 U.S. at 59-60, as well as the need for particularity regarding persons named in the order, the duration of the intercept, and the termination of the surveillance. *Id.* The *Katz* opinion concentrated on the absence of mandatory pre-search justification, 389 U.S. at 358-59, and stated that bypassing a neutral predetermination of the scope of a search leaves individuals secure from fourth amendment violations "only in the discretion of the police." *Id.*

38. Covert entry refers to the physical presence of government agents in private premises which: "(1) if occurring in a seizure of tangibles . . . would constitute a search within the meaning of the fourth amendment, and (2) was established by breaking and entering or by deceit." Note, *supra* note 15, at 203 n.5. The Court has generally held that nonconsensual

Crime Control and Safe Streets Act of 1968[39] also failed to address the issue of covert entry. Title III regulates the inherently intrusive nature of electronic surveillance by specifying safeguards designed to protect individual privacy.[40] The statute establishes these safeguards and requires specific identification of the conversations to be surveilled[41] and narrowly limits the types of crimes for which an order can be issued.[42] Exigent circumstances must be shown to obtain the order,[43] and strict limits are placed on its duration.[44] Prompt execution of the order is required[45] and an inventory must be served on those named in the order subsequent to the completion of surveillance.[46] Despite such specificity, the statute was surprisingly silent regarding covert entries to install electronic surveillance devices.[47]

The Supreme Court has also addressed the analogous issue of when police officers may without notice forcibly enter a private home or business.[48] In *Coolidge v. New Hampshire*[49] the Court evidenced a strong desire to require

entries are searches. *See, e.g.*, United States v. United States Dist. Court, 407 U.S. 297, 313 (1972) (entry into homes); Colonnade Corp. v. United States, 397 U.S. 72, 77 (1969) (entry onto business premises).

39. 18 U.S.C. §2510-2520 (1976 & Supp. II 1978).

40. S. REP. No. 1097, 90th Cong., 2d Sess. 1, *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 2112, 2153.

41. 18 U.S.C. §2518(1)(b)(iii), (4)(c) (1976 & Supp. II 1978).

42. *Id.* §2516(1)(a)-(g).

43. *Id.* §2518(1)(c). See note 22 *supra.*

44. *Id.* §2518(5).

45. *Id.*

46. *Id.* §2518(8)(d). In addition to those named in the order the issuing judge may order copies of the inventory served on other parties to the intercepted communications. The inventory must include "notice of—(1) the fact of the entry of the order or the application; (2) the date of the entry and the period of authorized, approved, or disapproved interception, or the denial of the application; and (3) the fact that during the period wire or oral communications were or were not intercepted." *Id.* Additionally, the judge may in his discretion make available to those parties or their counsel, for example, "portions of the intercepted communications, applications, and orders as the judge determines to be in the interests of justice." *Id.*

47. The question of covert entries usually arises when the court authorizes an electronic eavesdropping device to be used instead of a wiretap. A tap can be connected to wires far removed from the targeted telephones. Eavesdropping may, however, depend on the ability to plant a device inside the place where the conversations are to take place. *See* Lopez v. United States, 373 U.S. 427, 467-68 (1963) (Brennan, J., dissenting) (covert entry not always required to electronically eavesdrop). *See also* S. DASH, R. SCHWARTZ & R. KNOWLTON, THE EAVESDROPPERS 357-58 (1959) (micro-wave device that can pick up conversations at 1000 feet or more and penetrate through almost any obstacle); A. WESTIN, PRIVACY AND FREEDOM 73-78 (1967). Such instances are rare, however. Telephone taps apparently account for most instances of electronic surveillance. According to the final report of the National Commission for Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance, only 26 out of some 1220 electronic surveillance orders executed between 1968 and 1973 involved a trespassory invasion. NATIONAL WIRETAP COMMISSION, ELECTRONIC SURVEILLANCE 15 (1976). *See also* United States v. Ford, 553 F.2d 146, 149 n.12 (D.C. Cir. 1977).

48. *See, e.g.*, United States v. Jeffers, 342 U.S. 48 (1951) (hotel room); United States v. Rabinowitz, 339 U.S. 56 (1950) (office); Agnello v. United States, 269 U.S. 20 (1925) (home). *See generally* 2 W. LAFAVE, *supra* note 14, §§6.1-6.7.

49. 403 U.S. 443 (1971). Coolidge was convicted of first degree murder on the basis of evidence seized during a search conducted pursuant to a warrantless arrest. *Id.* at 448.

prior authorization for physical entry to carry out an otherwise valid arrest.[50] Unannounced, forcible entry pursuant to the execution of a search warrant is similarly prohibited.[51] However, entry requirements of announcement and notice[52] have been held inapplicable when the building is unoccupied[53] or

50. *Id.* at 477-78. In *Coolidge* the petitioner was suspected of committing a murder, however, the Court felt that since the state had not shown that Coolidge might escape if further delay were to occur there was not sufficient justification to enter without a warrant. *Id.* at 478. Before *Coolidge* a line of lower court cases had held such entries authorized when the officer had reasonable belief that the person sought was inside. *See, e.g.*, Jackson v. United States, 354 F.2d 980 (1st Cir. 1965). This doctrine has come under increasing criticism in the courts and no longer seems viable. *See, e.g.*, United States v. Houle, 603 F.2d 1297, 1300 (8th Cir. 1979); United States v. Davis, 461 F.2d 1026, 1030 (3d Cir. 1972). *See also* Dorman v. United States, 435 F.2d 385 (D.C. Cir. 1970) (*en banc*); Amsterdam, *supra* note 14, at 447 n.133; Note, *Announcement in Police Entries*, 80 YALE L.J. 139, 170-71 (1970) (author argues that police should never have the authority to decide to enter unannounced). The Supreme Court has, however, never directly ruled on the validity of warrantless arrests in private homes absent exigent circumstances despite a number of opportunities since *Coolidge* to do so. *See* United States v. Santana, 427 U.S. 38 (1976) (holding that under *Watson* police could attempt a warrantless arrest of defendant when she was standing in doorway of her home and that under *Warden v. Hayden* they could pursue her without a warrant when she sought refuge within); United States v. Watson, 423 U.S. 411 (1976) (holding warrantless arrest in public place constitutional notwithstanding absence of exigent circumstances); Johnson v. Louisiana, 406 U.S. 356 (1972) (declining to examine constitutionality of arrest and subsequent search and seizure of evidence as none used at trial was the product of an illegal arrest). The issue is before the Supreme Court and should be decided this term. *See* Payton v. New York, 45 N.Y.2d 300, 380 N.E.2d 224, 408 N.Y.S.2d 395, *prob. juris. noted*, 439 U.S. 1045 (1978). Although the case was argued March 26, 1979, 47 U.S.L.W. 3651 (Apr. 3, 1979), submission to the Court was vacated on April 30th, the case restored to the calendar for reargument, 47 U.S.L.W. 3714 (May 1, 1979), and the case was reargued at the beginning of the October 1979 Term. 48 U.S.L.W. 3251-52 (Oct. 16, 1979).

51. "Knock-and-announce" or forcible entry statutes, which require police officers to announce their identity and purpose before making a forcible entry, have been enacted in most states and at the federal level. Blakey, *Announcement and Unlawful Entry:* Miller v. United States *and* Ker v. California, 112 U. PA. L. REV. 499, 560-61 (1964). *e.g.*, FLA. STAT. §901.19(1) (1977). See note 52 *infra* for the text of the federal statute. *See also* Note, *supra* note 50, at 170-71.

52. Forcible entry pursuant to otherwise valid arrests and searches is governed by federal statute and requires announcement of purpose and notice before entry. *See* 18 U.S.C. §3109 (1976): "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." *Id. See* Sabbath v. United States, 391 U.S. 585 (1969) (recognizing purpose of section was codification of common law requirement of prior notice by officers of authority and purpose of search before forcing entry, and to safeguard officers who might be mistaken, upon unannounced intrusion into house, for an illegal intruder); Miller v. United States, 357 U.S. 301 (1958) (noting section also protects officers as well as occupants from physical harm, preserves occupants' right to privacy in their homes, and prevents needless disruption of private property). *See also* United States v. Covington, 385 A.2d 164 (D.C. App. 1978).

53. *See* United States v. Gervato, 474 F.2d 40, 44 (3d Cir.), *cert. denied*, 414 U.S. 864 (1973) (search conducted pursuant to valid warrant in absence of occupant not unreasonable); United States v. LaMonte, 455 F. Supp. 952, 966-67 (E.D. Pa. 1978) (FBI agents acting pursuant to a search warrant forcibly and without notice entered defendant's warehouse to

exigent circumstances exist.[54]

In electronic surveillance situations, the absence of Supreme Court or congressional determination of whether surveillance orders need explicitly authorize entry without notice[55] precipitated conflict in lower courts. As some courts noted, the use of surveillance devices on private premises involved two distinct aspects of the fourth amendment: protection of places and the preservation of conversational privacy.[56] Therefore, it had been held that covert entry to install a device must be preceded by a specific directive.[57] In *United States v. Ford*[58] the United States Court of Appeals for the District of Columbia held that specific judicial authorization was required to covertly enter the premises described in a Title III eavesdropping order.[59] This court examined pre-

seize illegal sound recordings after determining business was empty). However, the facts of these two cases vary from the instant case to the extent that use of them is inapposite. In *Gervato*, for example, agents had determined ahead of time whether the premises to be entered were empty. 474 F.2d at 40. If however this fact was not ascertainable beforehand, the requirements of 18 U.S.C. §3109 (1976) would come into play. *See* Payne v. United States, 508 F.2d 1391, 1393-94 (5th Cir.), *cert. denied*, 423 U.S. 933 (1975) (three interests served by requiring announcement and refusal prior to breaking are: "1) prevention of violence and physical injury to police and the occupants; 2) unexpected exposure of private activities of the occupants; and 3) the property damage resulting from forced entry"). To require announcement and refusal before forcible entry in electronic surveillance situations, would however serve to nullify the all important secrecy needed to successfully carry out these operations. See notes 23-25 *supra* and accompanying text.

54. In Ker v. California, 374 U.S. 23 (1963), the Court authorized unannounced forcible entry by policemen because of exigent circumstances. Defendant had narcotics in his room which could have been quickly destroyed. This, and his furtive conduct shortly before the police entered, constituted reasonable grounds for the belief that he might have been expecting the authorities. *Id.* at 40-41. If similar circumstances are present, adherence to the statute's procedural requirements are excused. *See, e.g.*, United States v. Flores, 540 F.2d 432 (9th Cir. 1976) (hot pursuit); United States v. White, 514 F.2d 205 (D.C. Cir. 1975) (officers need not knock and announce if the announcement would be a useless gesture or would create peril to life or limb of the arresting officer); People v. Sciacca, 45 N.Y.2d 122, 124-25, 379 N.E.2d 1153, 1155-56, 408 N.Y.S.2d 22, 24-25 (1978) (forcible entry into garage to search for contraband listed in warrant *per se* unreasonable absent exigent circumstances). *Cf.* Wittner v. United States, 406 F.2d 1165, 1166 (5th Cir. 1969) (procedural requirements excused because defendant knew he was being arrested, knew why he was being arrested, and knew why he and officers were going inside house).

55. The Court had dealt with physical trespass incident to electronic surveillance prior to *Katz*. See note 17 *supra*.

56. Application of the United States, 563 F.2d 637, 643 (4th Cir. 1977); United States v. Ford, 553 F.2d 146, 158 (D.C. Cir. 1977); United States v. Agrusa, 541 F.2d 690, 698 (8th Cir. 1976), *cert. denied*, 429 U.S. 1029 (1977).

57. Application of the United States, 563 F.2d 637, 644 (4th Cir. 1977); United States v. Ford, 553 F.2d 146, 165 (D.C. Cir. 1977); United States v. Finazzo, 429 F. Supp. 803, 808 (E.D. Mich. 1977), *aff'd*, 583 F.2d 837 (6th Cir. 1978), *vacated and remanded*, 99 S. Ct. 2047 (1979) (for further consideration in light of the Court's decision in the instant case). *Contra*, United States v. Scafidi, 564 F.2d 633, 640 (2d Cir. 1977), *cert. denied*, 436 U.S. 903 (1978). See notes 58-61 *infra* and accompanying text.

58. 553 F.2d 146 (D.C. Cir. 1977).

59. *Id.* at 152. Members of the Narcotics Branch of the Washington, D.C. Metropolitan Police Department planted an electronic device by means of a bomb scare ruse pursuant to a Title III order authorizing the eavesdropping device to be installed "in any manner." *Id.* at 150. The circuit court held the authorization overly broad and invalid. *Id.* at 165.

Katz Supreme Court cases respecting trespass to install electronic eavesdropping equipment and concluded that the Court had, by only emphasizing privacy in *Katz*,[60] not intended to lessen the prohibitions on trespass. Following the general rule that a warrant must be obtained before a fourth amendment privacy interest is invaded, the circuit court concluded that no exception to the warrant requirement should be created for covert entries incident to electronic surveillance.[61]

Other lower courts, however, disagreed that a specific directive in a Title III order was necessary. According to this line of decisions, authority to install a surveillance device is implicit in the order and a specific additional order relating to covert entry is unnecessary.[62] The United States Court of Appeals for the Second Circuit, in *Scafidi v. United States*,[63] held that authorization for a covert entry is implicit in a Title III order.[64] The *Scafidi* court examined the legislative history of the Act and concluded that Congress clearly intended to permit covert entries in proper cases and under proper procedures.[65] Although recognizing Congress' failure to specifically provide for surreptitious entries,[66] the court felt that the issuing judge's unfamiliarity, with both the installation techniques and the target premises, would make specificity difficult.[67] The court thus determined that judges should leave the manner of execution to the discretion of law enforcement officers.[68]

60. The circuit court examined Goldman v. United States, 316 U.S. 129 (1942), and determined that the rule proscribing physical trespass absent a warrant was still valid. *Id.* at 157. It found that although implicitly overruling *Goldman* and *Olmstead*, *Katz* had extended fourth amendment protection to encompass a citizen's right to privacy as well as to physical security. 553 F.2d at 157.

61. 553 F.2d at 159 n.45, 160 n.47, 160-62. The court rejected a single standard of reasonableness by which to judge all searches and seizures. *See, e.g.*, United States v. United States Dist. Court, 407 U.S. 297, 306 n.6 (1972). 553 F.2d at 159 n.45. See note 18 *supra* for a history of the reasonableness standard versus one that requires a rigid adherence to the warrant clause's demands. The court also distinguished those cases involving entry to effect an arrest. *See, e.g.*, Dorman v. United States, 435 F.2d 385, 391 (D.C. Cir. 1970) (en banc) ("The Courts have always recognized the case of arrest as a case involving its own considerations.")

62. United States v. Scafidi, 564 F.2d 633, 640 (2d Cir. 1977), *cert. denied*, 436 U.S. 903 (1978); United States v. London, 424 F. Supp. 556 (D. Md. 1976), *aff'd on other grounds sub nom.* United States v. Clerkey, 556 F.2d 709 (4th Cir. 1977), *cert. denied*, 436 U.S. 930 (1978). Commentator support for this view includes McNamara, *The Problem of Surreptitious Entry to Effectuate Eavesdrops: How Do You Proceed After the Court Says "Yes"?*, 15 AM. CRIM. L. REV. 1, 8-10 (1977) in which author argues that the practical realities of the eavesdropping operation necessitates police discretion during installation.

63. 564 F.2d 633 (2d Cir. 1977), *cert. denied*, 436 U.S. 903 (1978). Defendants were convicted of operating illegal gambling businesses on the basis of evidence obtained from electronic eavesdropping devices planted in their apartments and businesses. *Id.* at 636-38.

64. *Id.* at 639-40. "But the most reasonable interpretation of the orders in this case, granting authorization to bug private premises, is that they implied approval for secret entry." *Id.* at 639.

65. *Id.*

66. *Id.* at 640.

67. *Id. Contra*, United States v. Ford, 553 F.2d 146, 162 (D.C. Cir. 1977). This court reasoned that to accept the argument that judges do not possess sufficient expertise would abrogate the warrant requirement. *Id.*

68. 564 F.2d at 640.

In the instant case, the Supreme Court resolved the conflict existing in the lower courts.[69] The majority first considered whether the fourth amendment prohibits covert entry regardless of the reasonableness of the entry. In determining that covert entry was not invalid *per se*, the Court in the instant case relied on precedent[70] which had held that officers might break and enter if it were the only means of effective warrant execution.[71]

The majority next sought to ascertain whether Congress had intended to authorize covert entry in enacting Title III.[72] They first noted that clandestine entries are not expressly prohibited by the statute[73] and that the statute's legislative history revealed an implicit congressional authorization for these entries.[74] The majority stated that Congress' efforts to fight organized crime

69. When confronted in the instant case with the issue of whether specific authorization would be required, the United States Court of Appeals for the Third Circuit agreed that authorization to covertly enter is implied in the Title III order. United States v. Dalia, 575 F.2d 1344 (3d Cir. 1978). In a short opinion affirming the district judge, the court merely adopted the position taken by the Second Circuit in United States v. Scafidi, 564 F.2d 633 (2d Cir. 1977), *cert. denied*, 436 U.S. 903 (1978). 575 F.2d at 1346. Although the Third Circuit held that specific authorization was not required on the instant facts, it noted that this might not always be the case and that express authorization might be required. *Id.* at 1346-47. The court viewed this as a minimal burden in light of fourth amendment considerations. *Id.* at 1347. Other lower federal courts which have considered whether or not express authorization for covert entry is required include United States v. Santora, 583 F.2d 453 (9th Cir. 1978), *vacated and remanded*, 99 S. Ct. 2155 (1979) (for further consideration in light of the Court's decision in the instant case) (express authorization required); Application of the United States, 563 F.2d 637, 644-46 (4th Cir. 1977) (covert entry must be only effective means of conducting investigation and must be expressly authorized); United States v. Costanza, 549 F.2d 1126, 1134 (8th Cir. 1976) (express authorization required); United States v. Agruca, 541 F.2d 690, 698 (8th Cir. 1976), *cert. denied*, 429 U.S. 1045 (1977) (express authorization required); United States v. Giacalone, 455 F. Supp. 26 (E.D. Mich. 1977) (express authorization required by implication), *aff'd on other grounds*, 588 F.2d 1158 (6th Cir. 1978); United States v. Rowland, 448 F. Supp. 22 (N.D. Tex. 1977) (express authorization required for covert entry to plant electronic beeper in airplane); United States v. Finazzo, 429 F. Supp. 803, 808 (E.D. Mich. 1977), *aff'd*, 583 F.2d 837 (6th Cir. 1978), *vacated and remanded*, 99 S. Ct. 2047 (1979) (express authorization required). *But see* United States v. London, 424 F. Supp. 556 (D. Md. 1976), *aff'd on other grounds sub nom.* United States v. Clerkey, 556 F.2d 709 (4th Cir. 1977), *cert. denied*, 436 U.S. 930 (1978) (express authorization of covert entry unnecessary). For post-*Dalia* treatment by two circuit courts, see Providence Journal Co. v. FBI, 602 F.2d 1010, 1014 n.9 (1st Cir. 1979); United States v. Cuesta, 597 F.2d 903, 912-13 (5th Cir. 1979). See also J. CARR, THE LAW OF ELECTRONIC SURVEILLANCE §4.07(2)(b) (Supp. 1978).

70. 99 S. Ct. at 1688. The majority relied on Ker v. California, 374 U.S. 23 (1963), and Payne v. United States, 508 F.2d 1391 (5th Cir. 1975), as well as the federal breaking and entering statute, 18 U.S.C. §3109 (1976), to support its conclusion. See note 52 *supra*.

71. 99 S. Ct. at 1688.

72. *Id.* at 1689-92.

73. *Id.* at 1689. To dilute the significance of this congressional omission, the majority relied in part on a 1970 amendment to Title III, District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, §211(b), 84 Stat. 654 (amending 18 U.S.C. §2518(4) (1976)). This amendment authorizes courts to direct custodians and landlords to assist officers in the installation of equipment if necessary. The majority reasoned that Congress enacted this section to facilitate covert entries. 99 S. Ct. at 1690 n.10.

74. For a complete legislative history of Title III consideration *see* H.R. REP. No. 488, 90th Cong., 1st Sess. 1 (1967); S. REP. No. 1097, 90th Cong., 2d Sess. 68, *reprinted in* [1968]

would be thwarted if Title III were limited in this manner.[75] The practical impossibility of generally effectuating electronic eavesdropping in some situations without covert entry bolstered this conclusion.[76]

The Court also questioned whether the express authorization of covert entries was constitutionally required.[77] The majority again made reference to the fact that Title III did not require express authorization.[78] Furthermore, the Court concluded that under traditional interpretations of the fourth amendment's particularity clause requirements,[79] the specifics of an arrest or search warrant's execution have generally been left to the discretion of the executing officers.[80]

The majority finally considered the claim that express authorization was crucial because covert entry in electronic surveillance situations implicates two fourth amendment interests: conversational privacy and physical security.[81] Although agreeing that two interests could be violated at once, the Court nevertheless noted that the execution of arrest and search warrants, at times, incidentally infringes on multiple interests protected by the fourth amendment.[82] Thus, the majority concluded that to require express authorization for covert entries would construe the warrant clause too finely,[83] and that after-the-fact judicial review of a search's reasonableness would *a fortiori* suffice to protect constitutional interests.[84]

U.S. CODE CONG. & AD. NEWS 2112. The Court felt that Congress' failure to consider covert entries merely indicated that their necessity was taken for granted. 99 S. Ct. at 1690. The majority also noted that certain remarks made on the floors of both houses during debate indicated a clear understanding of the usefulness of covert entries to the legislative scheme. *Id.* at 1690 n.12, 1691 n.13.

75. 99 S. Ct. at 1691.

76. *Id.* at 1691. Justice Stevens, however, argued that even though covert entries were sometimes necessary, it did not follow that authorization should never be required. *Id.* at 1701 & n.21 (Stevens, J., dissenting).

77. 99 S. Ct. at 1692-94.

78. *Id.* at 1692 n.17. The majority read the requirement of judicial supervision embodied in Title III as merely requiring that periodic progress reports be submitted to the issuing judges during the surveillance. *See* 18 U.S.C. §2518(6) (1976).

79. See note 17 *supra* for a discussion of its literal interpretation by the Court.

80. 99 S. Ct. at 1692-93.

81. This argument had been made and considered in lower federal courts previously and resulted in at least one decision that express authorization was required. *See* United States v. Ford, 553 F.2d 146, 158 (D.C. Cir. 1977) (express authorization required because covert entry invades two distinct fourth amendment interests). See notes 58-61 *supra* and accompanying text.

82. 99 S. Ct. at 1694. The majority relied on United States v. Brown, 556 F.2d 304, 305 (5th Cir. 1977); United States v. Cravero, 545 F.2d 406, 421 (5th Cir. 1976); and United States v. Gervato, 474 F.2d 40, 41 (3d Cir.), *cert. denied*, 414 U.S. 864 (1973). As noted by the dissent, this reliance may have been misplaced. Justice Brennan noted that in the cases cited, the need for entry was not known beforehand and it would have been unreasonable to require the warrant to specify that entry was authorized. 99 S. Ct. at 1695 (Brennan, J., dissenting). See note 92 *infra*.

83. 99 S. Ct. at 1693-94.

84. *Id.* at 1694 & n.20. The Court relied on the district court's finding in the instant case that the entries were reasonable, rather than reviewing the facts themselves to determine the entries' reasonableness. *Id.* at 1689 n.8.

Justice Brennan, dissenting, argued that express authorization of covert entries was constitutionally mandated.[85] He stated that covert entries should not be characterized as mere warrant execution because the seriousness of such an intrusion elevates the covert entry to an independent search and seizure.[86] He noted that covert entries had long been condemned by the Court[87] and that they might not be required in every case of electronic eavesdropping.[88] Justice Brennan further noted that the Court has traditionally limited the execution of search warrants to ensure that officers do not violate other constitutionally distinct fourth amendment interests beyond the scope of the warrants,[89] disagreeing with the majority's feeling that specification would unduly restrict surveillance orders and amount to empty formalism.[90]

The instant holding fails to distinguish between those exigencies that justify a forcible, unannounced entry and those that do not.[91] Absent certain exigent circumstances, entry without notice onto private premises, in the execution of arrest and search warrants, has not previously been authorized.[92]

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85. *Id.* at 1694. Justice Brennan concurred in the majority's opinion that covert entries are not *per se* unreasonable but joined the dissent on the issues of whether Congress intended courts to authorize covert entries and whether express authorization need be included on an otherwise valid Title III order. *Id.* (Brennan, J., concurring in part, dissenting in part). Justice Stewart, concurring with Justice Brennan in part, felt that specific authorization was required because Congress had conferred the power to authorize entries pursuant to Title III, but otherwise agreed with the majority. *Id.* at 1696 (Stewart, J., concurring in part, dissenting in part).

86. *Id.* at 1695.

87. Silverman v. United States, 365 U.S. 505 (1961). See note 17 *supra.*

88. *Id. See* Lopez v. United States, 373 U.S. 427, 467-68 (1963) (Brennan, J., dissenting) (electronic eavesdropping may be accomplished using sophisticated instruments without the need to covertly enter to install a bug).

89. 99 S. Ct. at 1695. Justice Brennan cited Coolidge v. New Hampshire, 403 U.S. 443, 467 (1971), and Bivens v. Six Unknown Named Fed. Narcotics Agents, 403 U.S. 388, 394 n.7 (1971), to support this policy.

90. 99 S. Ct. at 1695-96. Justice Stevens's dissent, which was joined by Justices Brennan and Marshall, focused the majority's interpretation of Title III. *Id.* at 1698-1704. Justice Stevens contended that the Court did not afford proper deference to Congress. *Id.* at 1697-98. He compared the instant decision to United States v. New York Tel. Co., 434 U.S. 159 (1977). There the Court held that the All Writs Act, 28 U.S.C. §1651 (1976) and FED. R. CRIM. P. 41(b) conferred power on federal courts to order phone companies to assist in installing pen registers. 434 U.S. at 165-66. Justice Stevens had dissented, arguing that any legislative grant of investigative power should be narrowly construed. *Id.* at 178-90. *See also* United States v. Ramsey, 431 U.S. 606, 612-32 (1977) (Stevens, J., dissenting) (century-old postal statute should not be construed to authorize the opening of international mail with less than probable cause). Thus, Justice Stevens concluded that absent an express congressional mandate, covert entries should not be authorized. 99 S. Ct. at 1705.

91. See note 54 *supra* for a list of the traditional exigencies that justify such entry. Also see Comment, *The Illegality of Eavesdrop-Related Break-Ins*, 92 HARV. L. REV. 919 (1979), reasoning that justifying break-ins under the exigency rationale would be an unwarranted expansion of the doctrine. *Id.* at 929.

92. See notes 48-54 *supra* and accompanying text. Notwithstanding the above analysis, the Court's authority supporting the proposition, that covert entry without express authority is authorized in electronic surveillance situations, is not persuasive. The Court cites United States v. Cravero, 545 F.2d 406 (5th Cir. 1976), *cert. denied*, 430 U.S. 983 (1977), as support for the proposition that when executing a warrant, police often exceed the limits of its

In a search or arrest situation the need to enter a house without notice does not exist until the government officer is faced with the exigent circumstances of hot pursuit or the imminent destruction of evidence.[93] Then, no opportunity to obtain prior authorization exists. However, these exigencies are not present in electronic surveillance situations because the necessity for covert entry is known beforehand.[94] Law enforcement officials are readily able to obtain express judicial authorization.[95] Thus, the instant Court's attempt to analogize electronic surveillance orders to standard arrest or search warrants disregards the uniqueness of eavesdropping situations.

The exceptional intrusiveness of electronic surveillance that inheres from lack of notice[96] highlights the dissimilarity between it and conventional searches. The Court has previously recognized, in *Berger*, that this attendant danger necessitates a showing of exigency before electronic surveillance warrants are issued.[97] The danger, failure or improbability of success of normal investigative procedures must be shown[98] since the normal prerequisite of notice before entry must of necessity be foregone.[99]

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language. 99 S. Ct. at 1694. *Cravero*, however, was limited to unauthorized entry to effect an arrest. 545 F.2d at 421 n.1. The majority also cites United States v. Brown, 556 F.2d 304, 305 (5th Cir. 1977) and United States v. Gervato, 474 F.2d 40, 41 (3d Cir.), *cert. denied*, 414 U.S. 864 (1973), for the same proposition with regard to search warrants. The Court, however, in comparing Title III orders to arrest and search warrants seemed to ignore past cases treating wiretapping and electronic eavesdropping differently from traditional arrests and searches. *See, e.g.*, Berger v. New York, 388 U.S. 41, 58 (1967) (additional showing of exigency constitutionally required for issuance of electronic eavesdropping or wiretapping orders). This different emphasis has resulted in a requirement for antecedent justification and strict specificity in an electronic surveillance order concerning all aspects of the search. See Note, *supra* note 15, at 210-22. Furthermore, while in *Brown* and *Gervato* the evidence sought was tangible and would have been inaccessible without entry, the conversations sought in the instant case might have been obtained by an alternative method. See note 87 *supra* and accompanying text. Therefore, because different objects were sought in the cases cited by the Court, those decisions were grounded on considerations that do not apply to electronic eavesdropping situations. *See* Comment, *The Permissibility of Forcible Entries by Police in Electronic Surveillance*, 57 B.U. L. REV. 587, 598-99 (1977).

93. See note 54 *supra* for a discussion of exigent circumstances and the requirements of 18 U.S.C. §3109 (1976), the "knock-and-announce" statute concerning forcible entry of law officers into a residence or business to execute a warrant. Also see note 36 *supra* for the *Katz* Court's discussion of this issue.

94. *See* Comment, *supra* note 92. The unique circumstances of electronic surveillance appear to mandate a pre-search justification because the need for entry is known beforehand and the traditional exigencies supporting unannounced entry are absent. *Id.* at 605-06.

95. *Id. See also* Note, *The Magistrate's Role in Unannounced Entry*, 26 HASTINGS L.J. 273, 275, 281-84 (1974) for an argument that prior magisterial review of facts supporting an unannounced entry is constitutionally required.

96. See notes 23-25 *supra* and accompanying text. The Court in Berger v. New York, 388 U.S. 41 (1967), referred to electronic surveillance as a more serious invasion of privacy than other types of investigative procedures. *Id.* at 56, 63.

97. *See* Note, *supra* note 22, at 577-86 for a treatment of the meaning of exigencies as a prerequisite to electronic surveillance.

98. 18 U.S.C. §2518(1)(c), (3)(c) (1976). This codifies the exigency standard established in *Berger*. United States v. Tortorello, 480 F.2d 764, 774 (2d Cir.), *cert. denied*, 414 U.S. 866 (1973).

99. *See* Katz v. United States, 389 U.S. 347, 355 n.16 (1967); Berger v. New York, 388

Covert entry necessarily intensifies the invasion inherent in any electronic search.[100] The clandestine presence of government agents also encroaches on the exclusive enjoyment of property, an interest protected by the fourth amendment.[101] Although covert entry is not always required to successfully eavesdrop,[102] it can also be used to conduct a search for other incriminating evidence.[103] This situation provides officials with an opportunity to rummage through a suspect's belongings looking for unauthorized objects.[104] Similar dangers have previously induced in the Court a strong desire to require prior authorization of entry onto private premises, particularly when the invasion may not be necessary. As explained in *Coolidge v. New Hampshire*,[105] the rationale for this requirement is obvious: if executing officers are not required to justify each entry beforehand, general searches may follow.[106] The dissent recognized this possibility in the instant case,[107] nevertheless, the majority held that to require express authorization for covert entries would "parse too finely" the fourth amendment.[108]

The Court, in an attempt to justify this position, may have exaggerated the analytical difficulty of fine parsing. It could have turned to past decisions which established the need for substantial judicial supervision over police searches.[109] A pre-search justification could have been accomplished in electronic eavesdropping situations given, alone, the fact that the need for entry is known beforehand.[110] Furthermore, *Katz*'s goal of strict judicial supervision could be more easily met through prior supervision than post-search scrutiny.[111]

U.S. 41, 60 (1967). *See also* Note, *supra* note 22, at 577, 582-84 for a discussion of congressional debate on this subject. See notes 23-25 *supra* and accompanying text.

100. *See* Note, *supra* note 15, at 206. Because of this additional intrusiveness, prior to judicial authorization, it should be shown that covert entry is the least intrusive means of installation. *Id.* at 207, 222; *see also* Comment, *supra* note 92, at 605-06; Comment, *supra* note 91, at 926-27.

101. *See* Katz v. United States, 389 U.S. at 350 n.4 (fourth amendment protects privacy interests).

102. See note 88 *supra.*

103. *See* Comment, *supra* note 92, at 600-06 (police may use unnecessary covert entry to conduct "pretextual searches" wherein police search for evidence to provide leads to criminal activity).

104. *Id.*

105. 403 U.S. 443 (1971). See notes 49-50 *supra* and accompanying text for a discussion of this case.

106. 403 U.S. at 467. The Court said that the magistrate's scrutiny is intended to eliminate searches not based on probable cause. *Id.* Any search, said the Court, is an evil to be avoided and should be subject to a careful prior determination of necessity. *Id. See also* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 394 n.7 (1971).

107. 99 S. Ct. at 1704-05 (Stevens, J., dissenting). "I fear that the Court's holding may reflect an unarticulated presumption that national police officers have the power to carry out a surveillance order by whatever means may be necessary unless explicitly prohibited by the statute or by the Constitution." *Id.*

108. *Id.* at 1693-94.

109. See notes 105-06 *supra* and accompanying text.

110. *Id.*

111. The lack of antecedent justification was enumerated the foremost constitutional infirmity in *Katz*. 389 U.S. at 357.

An after-the-fact review of the circumstances supporting the necessity for entry and its reasonableness will often be clouded by hindsight.[112] Pre-entry review would also serve to eliminate the discretion exercised by the officer concerning the method and number of entries necessary.[113]

The instant case demonstrates an unjustified literal approach to the particularity clause of the fourth amendment. The Court in *Berger* and *Katz* has broadly construed this clause to require specification of items other than tangible objects that were the objects of police searches.[114] In a covert entry situation, the Title III order should contain a directive detailing the necessity for entry as well as the number of entries authorized.[115] The Court's failure to consistently apply the spirit of the particularity clause increases the possibility of the very type of police misconduct that the fourth amendment seeks to avoid.[116]

Requiring covert entry specificity on a Title III order would limit a potentially wide-ranging search and thus bring electronic surveillance within the parameters of constitutional reasonableness. The Court's failure to do this may not immediately bring about the dangers of general searches, but the problem is one of incremental encroachment.[117] A narrow reading of the fourth amendment should not govern every situation in which the government seeks power to conduct searches and seizures without supervision. Such a construction of the Constitution could well turn an otherwise proper investigation into a general search. To prevent the loss of privacy and physical security, and to preserve those interests which the fourth amendment was designed to protect, the Court should insist upon the greatest possible control of police activities.[118]

RANDOLPH MARKS

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112. *See* United States v. Watson, 423 U.S. 411, 455-56 n.22 (1976) (Marshall, J., dissenting) (purpose of warrant is to prevent hindsight from coloring evaluation of the reasonableness of a search or seizure).

113. The judgment of the magistrate would be substituted for that of overzealous executing officers to prevent unjustified intrusions before they were carried out. United States v. United States Dist. Court, 407 U.S. 297, 314-21 (1972). *See also* Note, *supra* note 15, at 214; *see generally* Note, *supra* note 95.

114. See note 17 *supra* for a discussion of the Court's literal approach to the language of the particularity clause and its subsequent retreat. In *Berger*, for example, the Court did not strictly construe the wording of the clause, but held that the length of a surveillance order must be specified. 388 U.S. at 59-60.

115. *See* Note, *supra* note 15, at 221-22 (express authorization need only specify fact that entry has been authorized).

116. See notes 105-06 *supra* and accompanying text.

117. *See* 99 S. Ct. at 1696 (Brennan, J., dissenting) (quoting Boyd v. United States, 116 U.S. 616, 635 (1886)).

118. *See* Note, Katz *and the Fourth Amendment: A Reasonable Expectation of Privacy or, A Man's Home is His Fort*, 23 CLEV. ST. L. REV. 63, 85-88 (1974) (arguments for strict enforcement of fourth amendment guarantees). *See also* Ingber, *Procedure, Ceremony and Rhetoric: The Minimization of Ideological Conflict in Deviance Control*, 56 B.U. L. REV. 266, 304-05 (1976) (police often may be willing to risk suppression of illegally seized evidence in order to gain evidence usable against defendants without constitutional protection).