Maryland Law Review

Volume 39 | Issue 4 Article 5

Breaking and Entering into Private Premises to Effect Electronic Surveillance: Dalia v. United States

BREAKING AND ENTERING INTO PRIVATE PREMISES TO EFFECT ELECTRONIC SURVEILLANCE:
Dalia v. United States

INTRODUCTION

In the past several years federal courts have been faced with the controversial issue whether law enforcement officials may covertly enter private premises to effect an electronic surveillance order.[1] This broad inquiry comprises three separate issues. The initial issue is whether authorization covertly to enter[2] the home or office of the surveillance target to install or remove eavesdropping devices can be implicitly derived from any source. Three potential sources of authority have been suggested: the federal electronics surveillance statute,[3] some other statute, or an inherent judicial authority independent of statute. If authorization for covert entry does in fact exist in any of these sources, the second issue is whether such entry is reasonable under the fourth amendment. Finally, if covert entry is indeed reasonable under the fourth amendment, the third issue is whether the court-authorized surveillance order must give explicit permission for such secret entry, or whether the permission for covert entry is implicit in the court's sanction of the surveillance itself.[4]

---

1. Surveillance may be accomplished by either wiretapping or eavesdropping. "Wiretapping" refers to the interception of telephone conversations. "Eavesdropping" or "bugging" involves intercepting conversations not transmitted by wire. The tapping of a telephone wire can be accomplished without physical penetration of the premises, but planting an eavesdropping device typically requires actual intrusion into private premises. *See generally* NATIONAL COMMISSION FOR THE REVIEW OF FEDERAL AND STATE LAWS RELATING TO WIRETAPPING AND ELECTRONIC SURVEILLANCE, 1 COMMISSION HEARINGS 43–44 (1976) [hereinafter NATIONAL WIRETAP COMMISSION].

2. As used in this Comment, covert or surreptitious entry will include entry achieved by force (such as breaking and entering), by ruse, or by strategem.

3. Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510–2520 (1976 & Supp. II 1978) [hereinafter referred to as Title III]. The courts have given conflicting answers to the question whether Title III implicitly authorizes covert entry. *Compare* United States v. Finazzo, 583 F.2d 837 (6th Cir. 1978), *vacated*, 441 U.S. 929 (1979) (remanded for further consideration in light of Dalia v. United States, 441 U.S. 238 (1979)) (Title III does not give judges the power to authorize breaking and entering, and in the absence of specific statutory power judges do not have that power under the fourth amendment) *and* United States v. Santora, 583 F.2d 453 (9th Cir. 1978), *vacated*, 441 U.S. 939 (remanded for further consideration in light of Dalia v. United States, 441 U.S. 238 (1979)), *rev'd*, 600 F.2d 1317 (1979) (Title III does not permit courts to authorize break-ins to plant eavesdropping devices) *with* Application of the United States, 563 F.2d 637 (4th Cir. 1977) (Title III implicitly authorizes covert entry, but the entry must be specifically sanctioned by the court issuing the surveillance order).

4. *Compare* United States v. Ford, 553 F.2d 146 (D.C. Cir. 1977) (surreptitious entry must be authorized expressly and particularly to ensure compliance with the commands of the fourth amendment) *and* Application of the United States, 563 F.2d 637 (4th Cir. 1977) (covert entry must be specifically sanctioned by the court) *with* United States v. Scafidi, 564 F.2d 633 (2d Cir. 1977), *cert. denied*, 436 U.S. 903 (1978) (express authorization of

The Supreme Court examined these issues in *Dalia v. United States*[5] and held that Title III implicitly gives federal agents authority for breaking and entering into private premises to carry out an electronic surveillance order; that the fourth amendment does not per se prohibit such covert entry; and that a surveillance order need not include specific permission for covert entry. This Comment analyzes the Supreme Court's decision in *Dalia* in light of the three issues presented above. The arguments made in the Circuit Courts of Appeal prior to *Dalia* and earlier Supreme Court decisions will be presented to show that the *Dalia* decision represents a serious erosion of traditional fourth amendment protections.

I. *DALIA V. UNITED STATES*

A. *Facts*

In 1973 Justice Department officials, pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (Title III), sought a court order authorizing them to intercept conversation taking place in petitioner Lawrence Dalia's business office.[6] After finding that there was probable cause to believe that the petitioner was participating in a conspiracy to steal goods being shipped in interstate commerce,[7] the district court issued the surveillance order.[8] In 1975 Dalia was indicted on five counts charging that he had been involved in a conspiracy to steal an interstate shipment of fabric. Before trial, Dalia moved to suppress any evidence obtained from the electronic surveillance of his conversations. At the suppression hearing he proved that FBI agents had executed the surveillance order by secretly entering his office through a window and installing an electronic listening device in the ceiling. The petitioner contended that the court order authorizing the electronic surveillance did not explicitly authorize the covert entry. Petitioner's motion to suppress was denied. The district court concluded that a secret entry to install surveillance equipment was not unlawful under Title III merely because the court issuing the order did not explicitly authorize such covert entry. Rather, the district court stated, authority to enter the premises covertly was implicit in the court's order to conduct the surveillance.

---

covert entry is unnecessary) *and* United States v. London, 424 F. Supp. 556 (D. Md. 1976) *aff'd on other grounds sub nom.* United States v. Clerkley, 556 F.2d 709 (4th Cir. 1977), *cert. denied*, 436 U.S. 930 (1978) (court's express sanction of covert entry is not required).

5. 441 U.S. 238 (1979).

6. *Id.* at 241.

7. Such a conspiracy is a violation of 18 U.S.C. § 659 (1976).

8. The district court also found reason to believe that Dalia was using his business telephones to further the conspiracy and that it would be difficult and dangerous to investigate the conspiracy by any means other than electronic surveillance. 441 U.S. at 241–42. At the end of the time covered by the original order, the court granted the government's request for an extension of the wiretap. *Id.* at 242. At the same time, the court acceded to the government's request that it be allowed to intercept all communications taking place in Dalia's office, including those not involving the telephone.

Consequently, at Dalia's trial the government was permitted to introduce into evidence the numerous conversations that had been intercepted pursuant to the surveillance order. The Third Circuit Court of Appeals upheld the petitioner's conviction and affirmed the district court's conclusion that no explicit authorization of covert entry is necessary to carry out a surveillance order.[9]

B. *The Supreme Court Decision*

The Supreme Court, in a five-to-four decision affirmed the decision of the court of appeals. The majority, in an opinion written by Justice Powell, held that: the fourth amendment does not per se prohibit surreptitious entry made for the purpose of placing or removing electronic surveillance equipment,[10] Title III gives courts the authority to approve the surreptitious entry of a suspect's premises, and the fourth amendment does not mandate that a Title III electronic surveillance order include express authorization to break and enter the premises described in the order.

The Court first considered whether the fourth amendment proscribes all covert entries of private premises. The majority found no basis for a constitutional rule forbidding all covert entries.[11] In fact, the majority noted, it is well established that law enforcement officials constitutionally may break and enter private premises to execute a search warrant where such entry is the only means to carry out the warrant.[12] Furthermore, Powell observed that the Supreme Court had implied in several previous cases that covert entry into a suspect's premises to install surveillance equipment pursuant to a search warrant would be constitutionally permissible in some circumstances.[13] Justice Powell characterized as "frivolous" the argument that covert entries are unconstitutional for their lack of notice, observing that the Court had stated earlier that "officers need not announce their purpose before conducting an otherwise [duly] authorized search if such an announcement would provoke the escape of the suspect or the destruction of critical evidence."[14]

The majority then considered whether Congress, in passing Title III, had given the courts the statutory power to approve covert entries. Petitioner Dalia argued that Title III, which provides a comprehensive scheme for law officials' use of surveillance, does not indicate that surreptitious entry is ever permissible. In rejecting this argument, the majority found that the language, structure, and history of Title III indicate that Congress had not intended to limit the

---

9. United States v. Dalia, 575 F.2d 1344 (3d Cir. 1978), *aff'd,* 441 U.S. 238 (1979).

10. 441 U.S. at 248.

11. *Id.* at 247.

12. *Id.* (citing Payne v. United States, 508 F.2d 1391, 1394 (5th Cir.), *cert. denied,* 423 U.S. 933 (1975)).

13. *See, e.g.,* Irvine v. California, 347 U.S. 128, 132 (1954), in which the Court condemned state police officers who had installed bugging equipment in the defendant's home by means of a covert entry "without a search warrant or other process."

14. 441 U.S. at 247–48 (quoting Katz v. United States, 389 U.S. 347, 355 n.16 (1967)).

means by which court-authorized surveillance could be accomplished, provided that the means are reasonable under the circumstances.[15] Powell interpreted congressional silence in Title III with respect to covert entry as a conscious decision not to limit the means available to law enforcement officials, rather than as an indication that Congress had failed to extend statutory authority to covert entry. Moreover, the Court found that the legislative history of Title III negates the assumption that Congress wished to except from the authorization of Title III any electronic surveillance requiring covert entries. Rather, the majority noted that testimony before subcommittees considering Title III indicates that secret entries are an essential element of most electronic bugging operations.[16] The majority concluded that Congress "clearly understood that it was conferring power upon courts to authorize covert entries ancillary to their responsibility to review and approve surveillance applications under the statute."[17]

Assuming that Title III does in fact give statutory authority for covert entries, the Court's final consideration was whether the electronic surveillance order must explicitly approve such entries. The majority concluded that the fourth amendment does not require an express statement of the means by which the surveillance equipment may be placed or removed.[18] This conclusion was premised upon the warrant clause of the fourth amendment. Justice Powell noted that the warrant clause contains three requirements: that a warrant be issued by a neutral, detached magistrate; that officials seeking a warrant demonstrate to the magistrate probable cause to believe that the evidence sought will assist in apprehending or convicting a criminal; and that a warrant describe with particularity the place to be searched and the things to be seized. Because the warrant in the instant case complied fully with these requirements, the majority stated that no additional language was needed in the surveillance order. The majority found nothing in the language of the Constitution itself nor in past Court decisions interpreting that language to imply that search warrants also must contain a specification of the precise manner in which they should be executed. To the contrary, searching officers generally are given broad discretion to determine the details of how to proceed with the search, subject to the general fourth amendment constraint that searches and seizures be reasonable.

Petitioner Dalia's final contention was that although the fourth amendment ordinarily does not extend to the manner in which search warrants are carried out, warrants for electronic surveillance are exceptional because they frequently impinge upon two different fourth amendment interests. First, the surveillance itself interferes with the right to hold private conversations. Additionally, a covert entry into the premises followed by electronic surveillance subjects the

---

15. 441 U.S. at 249–54.
16. *See* note 192 *infra*.
17. 441 U.S. at 254.
18. *Id.* at 258–59.

suspect's property to possible damage and his personal effects to unauthorized examination. Justice Powell rejected this argument with the observation that officers executing warrants often find it necessary to interfere with privacy rights that the judge who issued the warrant had not considered. He noted, moreover, that the warrant clause would be stretched "to the extreme" if the Court were to command magistrates issuing warrants to detail precisely the procedures that searching officers must follow whenever fourth amendment rights might be affected in more than one way.[19] The majority concluded that they would merely be promoting "empty formalism"[20] if they required lower courts to state explicitly what is implicit in bugging operations — that a covert entry may be necessary in order to install the surveillance equipment.

In a vigorous dissent, Justice Brennan argued that the Constitution requires that government officials who wish to place electronic listening devices in a suspect's premises by means of a covert entry first must receive specific authorization from the court issuing the surveillance order. Justice Brennan stated that breaking and entering into private premises to plant a bug entails an invasion of privacy of constitutional significance distinct from that accompanying non-trespassory surveillance.[21] He noted that there are three factors unique to trespassory surveillance which mandate that covert entry be described as an independent search and seizure which requires specific judicial authorization. First, bugging may be accomplished without having to resort to surreptitious entry and physical invasion of private property. Second, covert entry breaches both conversational and physical privacy. Finally, because possessions which are usually beyond the reach of simple eavesdropping are accessible to the hands and eyes of government agents, the practice is especially intrusive and prone to abuse.

Noting that the fourth amendment forbids an officer executing a search warrant from exceeding the bounds set by the warrant, Justice Brennan determined that a warrant describing only the seizure of conversations cannot be read broadly to include authorization for a constitutionally separate invasion of physical privacy by means of a covert entry at the discretion of the executing officer. Indeed, the Constitution requires that the necessity of a physical invasion be determined by a neutral and detached magistrate, not by the official seeking evidence of a crime.

Justice Brennan disagreed with the majority's conclusion that the requirement of explicit court authorization would be tantamount to requiring "'specification of the precise manner'" in which surveillance orders are executed.[22] He contended, rather, that a warrant constitutionally can leave the details of the manner of conducting the entry to the discretion of the executing officers, provided that the warrant explicitly states that the officers may use surreptitious entry to accomplish the electronic surveillance.

---

19. *Id.* at 258.

20. *Id.*

21. Justice Brennan further characterized a covert entry as "tantamount to an independent search and seizure." *Id.* at 260 (Brennan, J., dissenting).

22. *Id.* at 261 (quoting the majority opinion, 441 U.S. at 257).

Justice Brennan also chided the majority for stating that specific authorization for covert entry would amount to "empty formalism." Rather, he observed that requiring agents to secure authorization might prevent unnecessary and improper entries and limit the surveillance to methods less drastic than home invasion.[23]

In a separate dissent, Justice Stevens carefully examined the majority's conclusion that Congress had given courts statutory authority in Title III to permit federal agents to commit a criminal trespass. He questioned whether such power should be read into a statute that did not expressly grant it, and stated three reasons for refusing to do so. First, he noted that until Congress spoke to the contrary, the Court's duty in protecting the rights of the individual should have priority over the interest in more effective law enforcement. Second, Title III itself precluded reading its silence on the issue of covert entry as an unqualified approval. Finally, Justice Stevens concluded that the legislative history of Title III proved that Congress had never intended that law enforcement officials be given authority pursuant to Title III to break and enter a surveillance target's home or office.[24]

Justice Stevens found the majority's conclusions particularly curious in light of the statute's otherwise exhaustive and explicit discussion of electronic surveillance.[25] In his view, one could not assume that the same Congress that had devised exacting procedural requirements to be met before a surveillance order could be issued, would then leave the means of executing that order to the sole discretion of the federal agents conducting the surveillance.

This same reasoning, Justice Stevens argued, also militated against the Court's determination that the legislative history of Title III demonstrated congressional intent to authorize the breaking and entering of private premises. He observed that the meager and isolated remarks relied upon by the members of the majority were insufficient evidence of congressional endorsement of covert entry. Justice Stevens' paramount fear was that the Court's holding could be interpreted as giving federal officers power to execute a surveillance order by whatever means are necessary. He contended that the opposite conclusion is true: congressional silence should not be interpreted to authorize the officer to violate state criminal laws nor to violate constitutionally protected privacy interests.

II. LEGAL BACKGROUND

A. *Constitutional Framework*

In the 1928 case of *Olmstead v. United States*,[26] the Supreme Court considered for the first time whether the electronic interception of a suspect's conversations by law enforcement officials is proscribed by the fourth amend-

23. *Id.*

24. *Id.* at 271 (Stevens, J., dissenting).

25. *Id.* at 266–67.

26. 277 U.S. 438 (1928), *overruled*, 389 U.S. 347, 352 (1967). *See* notes 47 & 48 and accompanying text *infra*. The petitioners were convicted of a conspiracy to violate the National Prohibition Act. Government agents obtained evidence of the conspiracy by

ment. The Court held that the language of the fourth amendment[27] does not apply to wiretapping when wires are tapped or conversations are intercepted from outside the home.[28] The Court, in an opinion written by Chief Justice Taft, relied on property concepts in stating that the words of the fourth amendment should not be enlarged beyond the possible practical meaning of houses, persons, papers, and effects, nor be employed so that search and seizure could be applied to forbid hearing and sight.[29] In effect, the decision established a two-prong doctrine. First, only material items would be protected under the fourth amendment. Second, a physical trespass was necessary before the interception of conversation would be deemed to violate the fourth amendment.[30]

The Court extended the application of the *Olmstead* doctrine beyond wiretaps to all cases of electronic surveillance in *Goldman v. United States*.[31] In *Goldman*, police officers had obtained permission from the building superintendent to be in the room adjoining an office where incriminating conversations would take place. The police officers then placed a detectaphone against the wall to overhear the conversations.[32] The Supreme Court stated that evidence obtained by bugging without physical trespass[33] did not violate the fourth amendment and was, therefore, admissible in federal courts.[34]

---

secretly tapping telephones used by the conspirators. The tapping connections were made in a large office building and on public streets.

27. The fourth amendment provides:

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

U.S. CONST. amend. IV.

28. Olmstead v. United States, 277 U. S. 438, 465 (1928), *overruled*, 389 U.S. 347, 352 (1967). *See* notes 47 & 48 and accompanying text *infra*.

29. 277 U.S. at 470. Justices Holmes and Brandeis authored dissents which are now considered landmarks. Justice Holmes stated that he preferred "that some criminals should escape than that the government should play an ignoble part" by ignoring the fourth amendment. *Id.* Justice Brandeis found that the fourth amendment protects privacy and thus applies to eavesdropping whether or not there is a physical invasion of the premises. *Id.* at 478–79.

30. For a discussion of the *Olmstead* doctrine, see, Decker & Handler, *Electronic Surveillance: Standards, Restrictions and Remedies*, 12 CAL. W.L. REV. 60, 62–66 (1975); Scoular, *Wiretapping and Eavesdropping, Constitutional Development From Olmstead to Katz*, 12 ST. LOUIS U.L.J. 513, 515–16 (1968).

31. 316 U.S. 129 (1942), *overruled*, 389 U.S. 347, 352 (1967). *See* notes 47 & 48 and accompanying text *infra*.

32. 316 U.S. at 131–32.

33. The agents had committed a prior trespass to install listening apparatus, but the device malfunctioned, and the agents then used the detectaphone. *Id.* at 131. The Court concluded that the trespass was irrelevant to the evidence later obtained from the intercepted conversations. Since there was no trespass related to the actual interceptions, the Court expressly refused to distinguish *Goldman* from *Olmstead* on the basis of a difference between eavesdropping and wiretapping. *Id.* at 134–35.

34. *Id.* at 135.

The *Goldman* decision was upheld in *On Lee v. United States*[35] in which the Court found that the facts of the case did not show a violation of the fourth amendment's search and seizure provisions.[36] A conversation On Lee held in his office with a police agent, who was carrying a microphone in his coat pocket, was overheard by a policeman on the street outside.[37] The Court concluded that because the agent had entered the petitioner's place of business with consent,[38] no trespass had been committed; moreover, the Court found the presence of the radio set insufficient to treat the case as a wiretapping. Although the petitioner was overheard in conversation with the aid of a transmitter and receiver, the effect on his privacy was the same as if the policeman had been eavesdropping outside an open window.[39]

In 1961 the Supreme Court, in *Silverman v. United States,*[40] undermined both prongs of the *Olmstead* doctrine. In *Silverman,* police officers pushed a spike microphone through the party wall of an adjoining house. The spike made contact with a heating duct in the petitioner's home, which allowed the policemen listening next door to hear conversations taking place all over the house.[41] In contrast to the circumstances in the preceding cases, the eavesdropping in *Silverman* was accomplished by means of an unauthorized physical penetration into premises occupied by the petitioner. In both *Goldman* and *On Lee* the Court had explicitly noted that eavesdropping had not been accomplished by means of unsanctioned physical invasion within a constitutionally protected area.[42] Similarly, the absence of a physical encroachment had been an essential factor in the *Olmstead* decision; the Court had observed that "the insertions were made without trespass upon any property of the defendant. They were made in the basement of a large office building. The taps from house lines were made in the streets near the house."[43]

Justice Stewart, writing for the Court in *Silverman,* noted that at the core of the fourth amendment stands the right of an individual to be free from unreasonable governmental intrusion into his own home.[44] The Court further stated that it "has never held that a federal officer may without warrant and without consent physically entrench into a man's office or home, there secretly

---

35. 343 U.S. 747 (1952).
36. *Id.* at 750–53.
37. *Id.* at 749.
38. *Id.* at 751–52.
39. *Id.* at 753–54.
40. 365 U.S. 505 (1961).
41. *Id.* at 506–07.
42. *See* note 33 and text accompanying note 38 *supra.*
43. Olmstead v. United States, 277 U.S. 438, 457 (1928), *overruled,* 389 U.S. 347, 352 (1967). *See* notes 47 & 48 and accompanying text *infra.* The Court also noted that "[t]here was no entry of the houses or offices of the defendants." 277 U.S. at 464. These facts led the Court to find that "[t]he intervening wires are not part of [the defendant's] house or office any more than are the highways along which they are stretched." *Id.* at 465. (quoted in Silverman v. United States, 365 U.S. 505, 510–11 (1961)).
44. Silverman v. United States, 365 U.S. 505, 511 (1961).

observe and listen, and relate at the man's subsequent criminal trial what was seen or heard."[45]

In holding that the fourth amendment may protect against the overhearing of oral statements as well as against the more traditional seizure of material objects, the Court swept away the first prong of the *Olmstead* doctrine. The Court also disclaimed the *Olmstead* technicality of physical trespass. Rather, the decision in *Silverman* was based "upon the reality of actual intrusion into a constitutionally protected area."[46] The Court noted that a physical trespass need no longer accompany electronic surveillance as a prerequisite to fourth amendment protection.

Several years later, in *Katz v. United States*,[47] the *Olmstead* decision was formally overruled.[48] *Katz* was the third in a trilogy of cases decided by the Court in the late 1960's which set forth the present standards for constitutionally permissible electronic surveillance. The petitioner in *Katz* had been convicted of interstate gambling offenses. The prosecution's case had been furthered substantially by evidence obtained from an electronic eavesdropping device attached to the exterior of a public phone booth used frequently by the petitioner.[49] At the outset of its decision the majority announced that it was discarding the traditional analysis expressed in *Olmstead,* which had necessitated a determination of whether police had invaded a "constitutionally protected area."[50] The Court noted that efforts to determine whether a given "area" is "constitutionally protected" misdirects attention from the proper issue. Indeed, the Court emphasized the fourth amendment protects people, not places.[51] What one seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.[52] The Court concluded that the fourth amendment governs not only the seizure of tangible objects but extends to the recording of oral statements overheard without any "'technical trespass . . . under local property law.'"[53]

The Court then evaluated the actions of the law enforcement officials. The surveillance had been so narrowly circumscribed,[54] Justice Stewart noted, that

---

45. *Id.* at 512.

46. *Id.* In *Olmstead* the Court, by stressing an actual physical invasion, had implicitly found that the fourth amendment protections extend to material items and certain defined physical areas.

47. 389 U.S. 347 (1967).

48. The Court stated that the fourth amendment protects people, not merely areas, against unreasonable searches and seizures; thus, the reach of the amendment cannot turn upon the absence or presence of a physical invasion. The Court concluded that the trespass doctrine of *Olmstead* was no longer controlling. *Id.* at 353.

49. *Id.* at 348.

50. *Id.* at 350–51.

51. *Id.* at 351.

52. *Id.* at 351–52.

53. *Id.* at 353 (quoting Silverman v. United States, 365 U.S. 505, 511 (1961)).

54. The government agents did not begin their electronic surveillance until they had established that the petitioner was using the telephone in furtherance of his criminal activities. The surveillance itself was limited in both scope and duration to the particular

if an authorized magistrate had been properly notified of the need for surveillance, informed of the basis on which it was to proceed, and clearly told of the precise intrusion the surveillance was to entail, he could have authorized the limited search and seizure that had taken place.[55] A valid warrant, however, had not been obtained. Therefore, the lack of antecedent judicial authorization in the absence of exigent circumstances[56] was a constitutional defect so grave that the search was unreasonable and violative of the petitioner's fourth amendment rights.[57]

The first case in the trilogy was *Osborn v. United States*.[58] In *Osborn*, law enforcement officials were informed that the petitioner, an attorney, sought to bribe a juror.[59] After securing judicial authorization to conduct electronic surveillance, the law officers concealed a recording device on an undercover informant prior to the informant's conversation with the petitioner.[60] The Court considered the permissibility of using such a device "under the most precise and discriminate circumstances."[61] The majority concluded that the use of the recorder was permissible in light of the secrecy required and the questions that had been raised regarding the integrity of the court. The "antecedent justification before a magistrate" and the particularity surrounding the surveillance procedures were the significant factors in the Court's decision that the evidence obtained from the search and seizure by the concealed recorder was constitutionally admissible.[62]

The second and most definitive opinion in the trilogy was *Berger v. New York*.[63] In *Berger* the petitioner, who had been convicted of participating in a conspiracy to bribe the chairman of the New York State Liquor Authority, had been the subject of a lengthy electronic surveillance. The original eavesdropping order permitted installation of a recording device in the petitioner's office for a sixty-day period; a second order for the same duration was obtained from the

---

purpose of establishing the content of the petitioner's illegal telephone communications. The agents conducted their surveillance only when the petitioner was using the phone booth, and they listened only to his conversations. 389 U.S. at 354. The Court's approval of "narrowly circumscribed" surveillance arises from the fact that the surveillance was a limited intrusion within the standards for permissible searches established in Osborn v. United States, 385 U.S. 323 (1966) and Berger v. New York, 388 U.S. 41 (1967). *See* notes 61, 65 to 68, and accompanying text *infra*.

55. Katz v. United States, 389 U.S. 347, 354 (1967).

56. *See* text accompanying note 226 *infra*.

57. 389 U.S. at 359.

58. 385 U.S. 323 (1966).

59. *Id.* at 325–26.

60. *Id.* at 327.

61. *Id.* at 329. The Court contrasted this with the "'indiscriminate use of [surveillance] devices in law enforcement'" which the Court had found would raise "'grave constitutional questions under the Fourth and Fifth Amendments. . . .'" *Id.* at 329 n.7 (quoting Lopez v. United States, 373 U.S. 427, 441 (1963) (Warren, C.J., concurring)).

62. 385 U.S. at 330–31.

63. 388 U.S. 41 (1967).

court when the first one expired.[64] Following a careful examination of the New York electronic surveillance statute, the Court concluded that the statute was too broad in its sweep. Because the statute allowed a court to authorize a warrant under an extremely wide range of circumstances,[65] the Supreme Court found that the statute violated the fourth amendment's command that warrants particularly describe the place to be searched and the people and things to be seized.[66]

After stressing the general need for particularity, the Court described the specific requirements of particularity that a surveillance order must possess in order to be constitutionally valid.[67] Without these requirements, the Court observed, surveillance orders would lack adequate judicial supervision and protective procedures and would result, therefore, in the issuance and licensing of general searches by electronic devices.[68]

Taken together, these three opinions stress the need for proper judicial authorization and particularity so as to prevent illegitimate vesting of unrestrained and excessive discretion in the hands of those law enforcement officials who conduct the electronic surveillance.[69] Interceptions of oral evidence must meet the same constitutional requirements imposed on traditional searches and seizures of tangible evidence, which generally can be conducted only pursuant to a warrant.[70] This requirement was applied by the Court in *Katz*.[71] *Berger* took this requirement one step further by holding that the

---

64. *Id.* at 44–45.

65. *Id.* at 55–56.

66. *Id.* at 54–55.

67. The Court discussed the deficiencies in the New York statute, 388 U.S. at 55–58, then reviewed and summarized them, *id.* at 58–60. The specificity requirements for a valid surveillance order include:

(1) particularity in the description of the place to be searched and the persons or objects to be seized;

(2) particularity in the description of the type of communication or conversation sought;

(3) particularity in the description of the crime that has been, is being, or will be committed;

(4) limitations on the officer executing the surveillance order to prevent him from searching unauthorized areas or conducting further searches once the conversation sought has been seized;

(5) particularity in showing sufficient probable cause to justify an extension of the surveillance order;

(6) a termination date for the order and a requirement that the officer executing the surveillance make a return on the termination of the order showing what was seized;

(7) a demonstration of exigent circumstances to justify allowing an unconsented entry and to overcome the defect of not giving notice prior to the search and seizure.

68. The Court noted that the ultimate danger posed by electronic surveillance devices easily could be compared to the danger in general warrants that was a catalyst to the adoption of the fourth amendment. *Id.* at 65 (Douglas, J., concurring).

69. *See* notes 273 to 278 and accompanying text *infra*.

70. *See* notes 251 to 254 and accompanying text *infra*.

71. *See* text accompanying notes 56 & 57 *supra*.

particularity standards of search warrants apply to electronic surveillance orders as well, and that intrusions must be minimized to the greatest extent possible.[72]

B. *Statutory Framework*

1. Section 605 of the Federal Communications Act

The first statute to provide for the regulation of wiretapping was passed in 1934.[73] Section 605 of the Federal Communications Act proscribed the "interception," "divulgence," and "use" of the contents of wire communications by unauthorized persons.[74]

Shortly after the passage of this act the Supreme Court interpreted these words as prohibitions against wiretapping practices by federal agents. In *Nardone v. United States*[75] the Court established that the Federal Communications Act bars the use in federal courts of evidence obtained by federal agents by wiretapping in violation of the statute.[76] The decision was not founded upon constitutional grounds, but upon the Court's supervisory powers over federal courts and officers. The second *Nardone* case[77] extended this exclusionary ban to include not only evidence obtained directly from wiretapping but also evidence indirectly acquired from such surveillance.

Concurrently decided, however, were several cases in which the Court found limited instances when evidence obtained from wiretapping could be admitted at trial. In *Lopez v. United States,*[78] for example, the Court held that consent to police surveillance by one party to the conversation would assure admission at trial of any evidence procured from surveillance.[79]

Furthermore, despite the broad exclusionary principle that the Court had attached to section 605, the method of surveillance was often outside the reach of the statute, and thus the evidence arising from the surveillance was

---

72. *See* notes 66 & 67 and accompanying text *supra.*

73. Communications Act of 1934, ch. 652, tit. VI, § 605, 48 Stat. 1103 (codified at 47 U.S.C. § 605 (1976)).

74. 47 U.S.C. § 605 (1976 & Supp. III 1979). The blanket prohibitions of § 605 have been modified by the authorization procedures of Title III. *See* 18 U.S.C. §§ 2516–2517 (1976 & Supp. III 1979).

75. Nardone v. United States, 302 U.S. 379 (1937).

76. The Court found the plain mandate of the statute prevented government agents from wiretapping even though explicit proscriptions of wiretapping had been introduced previously in Congress and had not gained legislative approval. It has been suggested that Justice Roberts, who wrote the majority opinion, personally disapproved of wiretapping and was influenced by this in his analysis. Note, *Federal Decisions on the Constitutionality of Electronic Surveillance Legislation,* 11 AM. CRIM. L. REV. 639, 648 n.35 (1973).

77. Nardone v. United States, 308 U.S. 339 (1939).

78. 373 U.S. 427 (1963).

79. For a discussion of the consent doctrine, see Greenwalt, *The Consent Problem in Wiretapping and Eavesdropping: Surreptitious Monitoring With the Consent of a Participant in a Conversation,* 68 COLUM. L. REV. 189 (1968).

admissible at trial.[80] Until the late 1960's, unless there was an interception covered by section 605 or an intrusion of the type condemned by the Court in *Silverman,* there was no other constitutional or statutory provision preventing the seizure of a third party's communications or the disclosure of their contents. The *Katz, Osborn,* and *Berger* decisions, as previously described, and the enactment of Title III by Congress significantly changed the laws of electronic surveillance.

2. Title III

In 1968, Congress passed the Omnibus Crime Control and Safe Streets Act[81] in order to meet the constitutional requirements enunciated in the Supreme Court's decisions in *Berger* and *Katz.* The Act prohibits all wiretapping and electronic surveillance unless conducted by authorized local, state, and federal law enforcement officers engaged in the investigation or prevention of enumerated serious crimes.[82] Even then the surveillance is permissible only if a

---

80. *See, e.g.,* Silverman v. United States, 365 U.S. 505, 507–08 (1961) (although much of what officers heard with the aid of a spike microphone consisted of the petitioners' parts in telephone conversations the officers did not intercept these conversations within the meaning of § 605); Irvine v. California, 347 U.S. 128, 131 (1954) (police who had overheard conversations with the aid of a microphone hidden in the petitioner's house did not interfere with a communications system or intercept any message in violation of the statute); Goldman v. United States, 316 U.S. 129, 134 (1942) (listening in the next room to the petitioner's words as he talked into the telephone did not constitute an interception of a wire communication). Although the Supreme Court has never held that Title III is constitutional on its face, *see* United States v. Kahn, 415 U.S. 143, 150 (1974); United States v. United States District Court, 407 U.S. 297, 308 (1972), it has upheld the admission of evidence obtained under authority of Title III in the face of constitutional challenge. *See, e.g.,* Scott v. United States, 436 U.S. 128 (1978); United States v. Donovan, 429 U.S. 413 (1977). Every court of appeals that has ruled on the issue has found Title III constitutional. *See, e.g.,* United States v. Turner, 528 F.2d 143, 158–59 (9th Cir.), *cert. denied,* 423 U.S. 996 (1975), 429 U.S. 837 (1976); United States v. Sklaroff, 506 F.2d 837, 840 (5th Cir.), *cert. denied,* 423 U.S. 874 (1975); United States v. Ramsey, 503 F.2d 524, 526 (7th Cir. 1974), *cert. denied,* 420 U.S. 932 (1975); United States v. O'Neill, 497 F.2d 1020, 1026 (6th Cir. 1974); United States v. James, 494 F.2d 1007, 1013 (D.C. Cir.), *cert. denied,* 419 U.S. 1020 (1974); United States v. Tortorello, 480 F.2d 764, 775 (2d Cir.), *cert. denied,* 414 U.S. 866 (1973); United States v. Bobo, 477 F.2d 974, 981 (4th Cir. 1973), *cert. denied,* 421 U.S. 909 (1975); United States v. Whitaker, 474 F.2d 1246 (3d Cir.), *rev'g* 343 F. Supp. 358 (1972), *cert. denied,* 412 U.S. 950 (1973); United States v. Cafero, 473 F.2d 489, 495–500 (3d Cir. 1973), *cert. denied,* 417 U.S. 918 (1974); United States v. Cox, 462 F.2d 1293 (8th Cir. 1972), *cert. denied,* 417 U.S. 918 (1974); United States v. Cox, 449 F.2d 679 (10th Cir. 1971), *cert. denied,* 435 U.S. 927 (1972).

81. Pub. L. No. 90–351, 82 Stat. 212 (codified at 18 U.S.C. §§ 2510–2520 (1976 & Supp. III 1979)).

82. These restrictions demonstrate congressional intent to protect individual privacy. That concern is also seen in one of the findings that Congress inserted in the statute prior to the text:

> To safeguard the privacy of innocent persons, the interception of wire or oral communications where none of the parties to the communication has consented to the interception should be allowed only when authorized by a court of competent

detailed procedure is followed.[83] Title III of the Act was passed for the primary purpose of combating organized crime[84] by "allowing police to conduct constitutionally inoffensive, yet effective, electronic surveillance,"[85] while "protecting the privacy of wire and oral communications, and . . . delineating on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized."[86] The Supreme Court has referred to Title III as a "comprehensive scheme for the regulation of wiretapping and electronic surveillance."[87]

Congress styled certain provisions of the Act to parallel the Supreme Court's analysis in *Berger,* in an effort to overcome the constitutional defects that the Court had pinpointed in the New York electronic surveillance statute. Title III requires officers who seek judicial authorization for surveillance to provide a statement of the facts relied upon to justify the belief that an offense is being committed. This statement must include a description of the nature and locations of the facilities from which or the place where the communications will be intercepted, a description of the type of communication sought to be intercepted, and the identity of the person whose communications are to be intercepted.[88] The application for a surveillance order must also include the investigative reasons for the need of electronic surveillance, with a statement of whether other investigative procedures have been tried and have failed or appear unlikely to be successful.[89] Finally, it must also provide a statement of the time period for which the interception will be maintained.[90]

On the basis of these facts the judge may enter an order authorizing interception of wire or oral communications. However, the judge first must determine that there is probable cause to believe that an individual is

---

jurisdiction and should remain under the control and supervision of the authorizing court.

Pub. L. No. 90–351, § 801, 82 Stat. 211 (1968).

83. The only exceptions to these prohibitions and requirements apply to the power of the President of the United States to obtain information to protect the country from threats to its internal security and from external attack, to Federal Communications Commission employees in the discharge of the Commission's monitoring responsibilities, and to employees of a communications common carrier while engaged in an activity necessary to providing service or in protection of the rights or property of the carrier. S. REP. No. 1097, 90th Cong., 2d Sess. 66–67, *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 2112, 2153–54.

84. S. REP. No. 1097, 90th Cong., 2d Sess. 66, *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 2112, 2153.

85. Application of the United States, 563 F.2d 637, 642 (4th Cir. 1977).

86. S. REP. No. 1097, 90th Cong., 2d Sess. 66, *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 2112, 2153.

87. Gelbard v. United States, 408 U.S. 41, 46 (1972).

88. 18 U.S.C. § 2518(1) (1976).

89. *Id.* The legislative history of Title III indicates that this requirement is to be read in a "practical and commonsense fashion." S. REP. No. 1097, 90th Cong., 2d Sess. 101, *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 2112, 2190.

90. 18 U.S.C. § 2518(1) (1976).

committing or has committed one of the enumerated offenses,[91] that particular communications concerning that offense will be obtained through the interception, that normal investigative procedures have failed or appear unlikely to be successful, and that the place where or facilities from which the communications will be intercepted are commonly used by the individual under surveillance or are used in connection with the commission of the crime.[92]

If an interception order is issued, the statute requires that it specify the identity of the agency that authorized the interception, the person whose conversations will be intercepted, the nature and location of the place where the interception will occur, a description of the type of communication to be intercepted, and, finally, the duration of the authorization.[93] The statute also requires that the interception be maintained for only a limited period of time,[94] that the order be exercised promptly,[95] and that the agents make a timely return on the order showing what has been seized.[96] Finally, the statute provides that within a reasonable time after the interception is terminated, the persons named in the interception order must be served with an inventory which gives notice of the order or application, and indicates whether communications were intercepted.[97]

Although Title III carefully delineates the procedures that both the law officers and the authorizing magistrate must follow for a valid surveillance order to be issued, it is curiously silent regarding the means by which the law officers may execute the surveillance order. It is this silence which has been the source of much controversy in the past few years as courts have grappled with the question whether law enforcement officials, who have followed the procedures mandated by Title III and procured an order for electronic surveillance, may covertly break and enter the premises of the individual who is the target of the surveillance to install, repair, or remove the eavesdrop devices.

---

91. These offenses are enumerated in 18 U.S.C. § 2516(1) (1976 & Supp. III 1979). A similar provision in § 2516(2) (1976 & Supp. III 1979) lists the offenses that enable a state officer to seek a surveillance order from a state court.

92. 18 U.S.C. § 2518(3) (1976). These probable cause requirements were added to meet the Supreme Court's finding in *Berger* that the New York surveillance statute's "reasonable cause" standard was too lax. *See* Berger v. New York, 388 U.S. 41, 54–55 (1967).

93. 18 U.S.C. § 2518(4) (1976). The provisions regarding specification of the place from which the interception is taking place and the type of communication sought to be intercepted were added in response to the Supreme Court's exceptions in *Berger* that the New York statute did not require that the place to be searched and the items to be seized be described with particularity. *See* Berger v. New York, 388 U.S. 41, 56–59 (1967).

94. 18 U.S.C. § 2518(5) (1976).

95. *Id.* § 2518(8).

96. *Id.* The Court had criticized the New York statute for its lack of limitations on period of execution and its failure to require the officers to make a return showing the products of the surveillance. Berger v. New York, 388 U.S. 41, 59–60 (1967).

97. 18 U.S.C. § 2518(8)(d) (1976). The New York statute analyzed in *Berger* had contained no provision for notice. *See* Berger v. New York, 388 U.S. 41, 60 (1967). For a discussion of the notice provision of Title III, see, United States v. Donovan, 429 U.S. 413, 428–32 (1977).

III. POTENTIAL SOURCES OF AUTHORITY FOR COVERT ENTRY

A. *Implicit Authority Under Title III*

The Supreme Court in *Dalia* looked to both the language and the legislative history of Title III in an effort to determine whether authority for covert breaking and entering is implicit in the statute. The legislative history of Title III does not deal directly with the problem of entry collateral to electronic surveillance. Nevertheless, it is apparent that members of Congress were aware of the entry problem from their references to it in hearings and debates on the interception of oral communications. Senator Morse, an opponent of Title III, and Senator Tydings, one of the Act's supporters, stated during Senate debates on the statute's provisions that break-ins might be necessary in order to install eavesdropping devices.[98] If, however, Congress did intend to allow such conduct under a surveillance order, the members did not find it necessary to write their intent into the statute. There is no mention of authorization of breaking and entering in the Committee reports, and neither house of Congress publicly considered, confronted, or debated that issue.

Nevertheless, some district and circuit courts and some commentators have construed congressional silence in Title III on the issue of covert entry as implicit authority to break and enter.[99] After the passage of Title III the majority of early court decisions adhered to this view. Only those lower court decisions most immediately preceding *Dalia* rejected this view and argued adamantly that whatever power had not been bestowed explicitly by the statute could not be inferred legitimately.[100] The Supreme Court, like other courts which have concluded that implicit authority to break and enter can be found in Title III, relied upon oblique references in the statute and its legislative history. If Congress had not intended to sanction surreptitious entry as a means of executing surveillance orders, the Court asserted, it would have specifically prohibited such activity in the statute.

---

98. 114 CONG. REC. 11598, 12989 (1968). *See* text accompanying notes 127 & 128 *infra*.

99. *See, e.g.*, Application of the United States, 563 F.2d 637 (4th Cir. 1977); United States v. Ford, 414 F. Supp. 879 (D.D.C. 1976), *aff'd*, 553 F.2d 146 (D.C. Cir. 1977). *See* McNamara, *The Problem of Surreptitious Entry to Effectuate Electronic Surveillance: How Do You Proceed After the Court Says "Yes"?*, 15 AM. CRIM. L. REV. 1, 7–10 (1977).

Some courts have failed to address the issue at all, but implicitly assumed that the power to break and enter existed, and went directly to the issue of whether the court granting the surveillance order must explicitly authorize surreptitious entry into private premises to install the bugging device. *See, e.g.*, United States v. Dalia, 575 F.2d 1344 (3d Cir. 1978), *aff'd*, 441 U.S. 238 (1979); United States v. Rowland, 448 F. Supp. 22 (N.D. Tex. 1977); United States v. London, 424 F. Supp. 556 (D. Md. 1976), *aff'd on other grounds sub nom.* United States v. Clerkley, 556 F.2d 709 (4th Cir. 1977), *cert. denied*, 436 U.S. 930 (1978).

100. United States v. Finazzo, 583 F.2d 837 (6th Cir. 1978), *vacated*, 441 U.S. 929 (1979); United States v. Santora, 583 F.2d 453 (9th Cir. 1978), *vacated*, 441 U.S. 939, *rev'd*, 600 F.2d 1317 (1979).

1. Statutory Language

The *Dalia* majority, as well as other courts and commentators who have concluded that Congress has implicitly given magistrates the power to sanction surreptitious entries, have found a number of indications in the language of certain provisions of Title III to support their conclusion. One such provision is section 2518 (1), which discusses surveillance in terms of the interception of both "wire" and "oral" communications.[101] Interception of oral communication frequently entails the placement of a bug. In addition, Congress defined "electronic, mechanical, or other device"[102] broadly to mean "*any* device or apparatus which can be used to intercept a wire or oral communication,"[103] thus including in the definition those listening devices which frequently require covert installation.[104] Congress also required that both the application for and the court order granting authority to conduct electronic surveillance describe with particularity the "nature and location of the facilities from which or the *place where* the communication is to be intercepted."[105] This requirement was included specifically to comply with the constitutional command of particularity that the Supreme Court had enunciated in both *Berger* and *Katz*.[106]

The *Dalia* majority found that these provisions reflect congressional understanding that law enforcement officials would have to place listening devices inside buildings and thus would have to enter those buildings surreptitiously.[107] "Nowhere in Title III," wrote Justice Powell, "is there any indication that the authority of courts under § 2518 is to be limited to approving those methods . . . that do not require covert entry for installation of intercepting equipment."[108]

The Court then cited the 1970 amendment to section 2518(4) as a final indication of congressional intent to authorize covert entry. That section now provides in relevant part that:

> [a]n order authorizing the interception . . . shall, upon the request of the applicant, direct that a communication common carrier, landlord, or other person shall furnish the applicant forthwith all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively . . . .[109]

---

101. 18 U.S.C. § 2511(a) (1976). The first bill introduced in Congress following the *Berger* and *Katz* decisions on electronic surveillance had covered only wiretapping. *See* text accompanying note 142 *infra*.

102. 18 U.S.C. § 2511(1)(b) (1976).

103. 18 U.S.C. § 2510(5) (1976) (emphasis added).

104. It is possible, however, to conduct electronic surveillance without entering the target's private premises surreptitiously. *See, e.g.*, On Lee v. United States, 343 U.S. 747 (1952).

105. 18 U.S.C. § 2518(1)(b)(ii) (1976) (emphasis added). *See also id.* § 2518(4)(b).

106. S. REP. No. 1097, 90th Cong., 2d Sess. 101, *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 2112, 2190.

107. 441 U.S. at 249–50.

108. *Id.* at 250.

109. 18 U.S.C. § 2518(4) (1976).

Similarly, the Fourth Circuit noted in *Application of the United States* that this provision, "at least inferentially, supports the . . . position that Congress intended to approve covert entry as a permissible concomitant of judicially-sanctioned eavesdropping. . . ."[110] The district court in *United States v. Ford*[111] agreed with this interpretation. Although recognizing that the amendment could suggest a lack of authority to break and enter, the court nevertheless found that it was apparent from the amendment that Congress was aware that some bugging devices require surreptitious entry for installation. The *Ford* court observed further that Congress expressly had granted to courts the power to order landlords and custodians to assist law enforcement officials so that such installations could be made unobtrusively.[112] Since the statute did not prohibit the use of such devices by police or federal agents, Congress must have at least implicitly recognized that courts have a general power[113] to authorize, in some circumstances, a covert, and possibly otherwise illegal, entry to install, maintain, or remove a bugging mechanism.[114]

Justices Stevens, Marshall, and Brennan found these arguments unconvincing and refused to confer such broad power upon courts without more explicit authority to do so from Congress. They argued that if authority for covert entry has not been given explicitly by Congress, it legitimately cannot be inferred. The majority of Title III's provisions are efforts to circumscribe narrowly the use of electronic surveillance in order to safeguard privacy. Furthermore, Congress drafted the statute with "exacting precision . . . 'requir[ing] close attention to the dotting of every "i" and the crossing of every "t". . . .' Under these circumstances the exact words of the statute provide the surest guide to determining Congress' intent, and we would do well to confine ourselves to that area."[115]

In light of these restrictions and the care with which the statute was drawn, Justice Stevens, dissenting in *Dalia,* found that it was "unrealistic" to assume that Congress, without making its intention "unmistakably plain," had

---

110. Application of the United States, 563 F.2d 637, 642 (4th Cir. 1977). *Accord,* United States v. Scafidi, 564 F.2d 633, 643 (2d Cir. 1977), *cert. denied,* 436 U.S. 903 (1978); United States v. Ford, 414 F. Supp. 879, 883 (D.D.C. 1976), *aff'd,* 553 F.2d 146 (D.C. Cir. 1977); United States v. Volpe, 430 F. Supp. 931, 932–34 (D. Conn. 1977), *aff'd,* 578 F.2d 1372 (2d Cir. 1978), *cert. denied,* 441 U.S. 930 (1979).

111. 414 F. Supp. 879 (D.D.C. 1976), *aff'd,* 553 F.2d 146 (D.C. Cir. 1977). The surveillance in *Ford* was undertaken pursuant to authority given by provisions of the District of Columbia Code relating to electronic surveillance. These provisions are contained in 23 D.C. CODE ANN. §§ 541–556 (1973 & Supp. IV 1977) and are based on the corresponding sections in Title III. *See* 115 CONG. REC. 19268 (1969) (summary by Sen. Hruska). In light of the similarity of the statutes and their common origin, the court relied on the history of Title III and cases interpreting the statutes where relevant.

112. 414 F. Supp. at 883.

113. *But see* text accompanying notes 208 to 219 *infra.*

114. 414 F. Supp. at 883.

115. United States v. Donovan, 429 U.S. 413, 441 (1977) (Burger, C.J., concurring in part) (citations omitted) (quoting Sen. McClellan's remarks at 114 CONG. REC. 14751 (1968)).

authorized federal agents implementing a surveillance order to break into private premises in violation of state law. He criticized the majority's finding of open-ended authorization to make such illegal entries in the absence of any express judicial authorization to do so. He echoed the reasoning of the Sixth Circuit that it did not make sense to infer congressional sanction of break-ins when "not a single word or line of the statute"[116] so much as mentions such a possibility, "much less limits or defines the scope of this power or describes the circumstances under which such conduct, normally unlawful, may take place."[117]

Furthermore, Justice Stevens contended, any reliance upon the 1970 amendments to Title III is misplaced. Since Congress had been careful to amend Title III to provide for "unobtrusive" entry through the assistance of custodians and landlords who already had some access to the target property, it would not have condoned unrestrained and unauthorized breaking and entering by law enforcement agents.

Similarly, in *United States v. Santora,*[118] the Ninth Circuit did not find authorization for covert entry by law enforcement officers in either the language of Title III itself or the 1970 amendments to Title III. The *Santora* court directly attacked the argument that implicit authority for break-ins could be found in section 2518(1)(b)(ii) of the statute. The court pointed out that the "place where the communication is to be intercepted" could mean only a telephone booth, some other public place, or the outside of a house or office building.[119] The language does not, the court emphasized, compel an interpretation that the law enforcement officer seeking the court order may place the eavesdropping device within a private building.

The *Santora* court also found the 1970 amendments to Title III inapplicable as a source of authority for covert entry.[120] The court observed that the purposes of the amendments were twofold. First, the amendments were designed merely to express congressional intent that the general ban on electronic surveillance would not render unlawful the cooperation of landlords and custodians with law enforcement officials in the interception of communications. Further, the amendments permitted a surveillance order to direct such people to assist the officers so that the interception could be accomplished unobtrusively and with as little interference as possible with the usual services that the landlords and custodians provide for the surveillance target.[121] Second, the 1970 amendments

---

116. United States v. Finazzo, 583 F.2d 837, 841 (6th Cir. 1978), *vacated,* 441 U.S. 929 (1979).

117. *Id.*

118. United States v. Santora, 583 F.2d 453 (9th Cir. 1978), *vacated,* 441 U.S. 939, *rev'd,* 600 F.2d 1317 (1979).

119. *Id.* at 461.

120. *Id.* at 464 n.10. In addition to the amendment of § 2518(4), two other sections of Title III were amended in 1970, §§ 2511(2)(a)(ii) and 2520.

121. *See* Senator McClellan's explanation of the amendment, 115 CONG. REC. 37192 (1969).

also included a provision that good faith reliance on a court order or legislative sanction was a "complete defense to any civil or criminal action brought under this chapter or under any other law."[122] As the legislative history indicates, the *Santora* court stated, the purpose of this amendment was not to insulate from liability those who participated in a covert break-in. Rather, this amendment was to protect telephone companies and other agencies cooperating with the government from liability for assisting in the tapping of their customers' telephones.[123]

The Sixth Circuit in *United States v. Finazzo*,[124] considered what the consequences would be if Title III were interpreted as the source of authority for covert breaking and entering. A federal statute, the court noted, is also an enabling act for state and local judges.[125] Therefore, once the state has passed a statute "authorizing interception of wire and oral communications,"[126] the statute permits eavesdropping by local police under the same standards as apply to federal agents. If Title III is interpreted to authorize federal agents covertly to break and enter a suspect's private premises, the statute also would require the courts to vest such power in the hands of the state and local police as well. The *Finazzo* court stated that "Orwell's image of 1984 is no longer fiction if we should hold that hundreds of police officers . . . have the power to break into homes and offices to plant electronic monitoring devices if they can obtain permission from a local magistrate in a secret hearing."[127] The sentiments are expressed more dramatically, perhaps, than is necessary. The statement does illustrate, however, the dangers that would accompany granting agents the power to enter private premises surreptitiously, especially if the power is not tempered by a requirement that it exist only when expressly authorized by a court in the surveillance order.[128]

2. Legislative History

The *Dalia* majority relied on the legislative history of Title III to support their conclusion that Title III was meant to authorize covert entry of a suspect's private premises. In many ways, however, the legislative history of Title III is as unenlightening as is the language of the statute itself.

The statements cited by the *Dalia* majority, as well as other courts, as evidence of authorization for covert entry are of questionable value. For example, the following excerpt from the Title III debates has been deemed to imply congressional authorization of surreptitious entry. Senator Morse, an opponent of Title III, argued:

---

122. 18 U.S.C. § 2520 (1970).
123. 115 CONG. REC. 37192 (1969) (explanation by Sen. McClellan).
124. 583 F.2d 837 (6th Cir. 1978), *vacated*, 441 U.S. 929 (1979).
125. *Id.* at 842.
126. 18 U.S.C. § 2510(9)(b) (1976).
127. 583 F.2d at 841.
128. *See* text accompanying notes 261 to 332 *infra*.

> I know that elaborate efforts are made to distinguish between a real wiretap, or bug, which requires someone to intrude upon private premises to install. That kind of invasion is truly a search, requiring a warrant under conditions set forth in article 4. But electronic surveillance, whereby conversations can be picked up from scores of feet away, without any physical intrusion upon the premises involved, is a far more invidious invasion of privacy, and one which I do not believe should be tolerated at all.[129]

Senator Tydings, a proponent of the bill, responded, contending that traditional investigative techniques would not be dispensed completely with in favor of electronic surveillance because "[electronic] surveillance is very difficult to use. Tape [sic] must be installed on the 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."[130]

The argument that these statements authorize covert entries is unconvincing. As Justice Stevens noted in his dissent, the comments must be read in context.[131] Senator Tydings' emphasis on the technological limitations of "taps" and "bugs" were intended to show that frequent use, and therefore, abuse of electronic surveillance would be difficult.[132] Justice Stevens interpreted Senator Tydings' remark as nothing more than an expression that authorized electronic surveillance would be sparingly used and carefully controlled and circumscribed.

The Ninth Circuit in *Santora* also found fault with arguments that the comments of Senators Tydings and Morse were indicative of implicit authority by Congress to allow covert breaking and entering. Rejecting the argument that Senator Morse's comment indicated a congressional belief that break-ins are essential, the court fittingly interpreted the statement as an indication of the Senator's objections to electronic surveillance, his contentions that a search

---

129. 114 CONG. REC. 11598 (1968).

130. *Id.* at 12989.

131. A more complete version of the text of Senator Tydings' comments is as follows:

> 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 reason[s] for such sparing use are simple. First, electronic surveillance is really useful only in conspiratorial activities . . . .
>
> Second, surveillance is very 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 enforcement's time. . . .

114 CONG. REC. 12988–89 (1968).

132. Surreptitious entry often is possible only by violating the law, but it is "hardly 'difficult'" if it may be effected by whatever means the law enforcement officials can utilize without being constrained by the provisions of criminal law. Dalia v. United States, 441 U.S. 238, 273 (1979) (Stevens, J., dissenting).

warrant must be issued before there can be physical intrusion upon private premises, and his understanding that the bill before Congress would authorize only non-trespassory surveillance.[133]

In addition, the court determined that when Senator Tydings' comments were read in context it was apparent that he had not intended "surreptitious entry" to be synonymous with burglary or breaking and entering. Instead, the Senator had been indicating reasons why there had been so few bugs and wiretaps authorized under the New York statute, which later had been invalidated by the Supreme Court in *Berger*.[134] Rather than arguing in favor of authorization of trespasses and break-ins, Senator Tydings had been arguing that Title III would minimize invasions of privacy because it included numerous safeguards of privacy rights and because legitimate entries were difficult.[135]

Other statements that refer less directly to the problem of covert entry also have been used to buttress the conclusion that Congress did intend to authorize covert break-ins. The district court in *United States v. Ford,* for example, noted one such comment: "'A wiretap can take up to several days to install. Other forms or devices may take even longer'."[136] The *Ford* court found that this statement, when read in conjunction with the 1970 amendment to section 2518(4) and Congress' failure to place any limits or restrictions upon the manner of executing the surveillance order, established congressional intent to allow covert entry.[137]

As the *Santora* court pointed out, however, any reliance placed upon this excerpt is misplaced; if any inference concerning trespass could appropriately be drawn from the passage, it is only that Congress recognized the difficulty of gaining consensual entry to those premises the government seeks to bug. The difficulty in conducting surveillance by means of a bug, the court noted, is not in the mechanics of installation but in gaining entry by legal means.[138]

Another statement that has been relied upon as an indication of implicit authorization of covert entry is a comment made by a member of the Senate Judiciary Committee that special protection must be given to private conversations.[139] One commentator suggested that this statement presumes

---

133. United States v. Santora, 583 F.2d 453, 461–62 (9th Cir. 1978), *vacated,* 441 U.S. 939, *rev'd,* 600 F.2d 1317 (1979).

134. *Id.* at 461. *See* 114 CONG. REC. 12988–89 (1968).

135. During debate on Title III Senator McClellan had told the Senate, "The proposal . . . is more strict, there are more requirements, and it is more difficult to meet the test to get the order than it was in New York." 114 CONG. REC. 11231 (1968).

136. United States v. Ford, 414 F. Supp. 879, 883 (D.D.C. 1976), *aff'd,* 553 F.2d 146 (D.C. Cir. 1977) (quoting S. REP. NO. 1097, 90th Cong., 2d Sess. 103, *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 2112, 2192).

137. 414 F. Supp. at 883.

138. United States v. Santora, 583 F.2d 453, 461–62 (9th Cir. 1978), *vacated, 441 U.S. 939, rev'd,*600 F.2d 1317 (1979).

139. S. REP. NO. 1097, 90th Cong., 2d. Sess. 89–90, *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 2112, 2177–78.

surreptitious entry into and surveillance of a home or office.[140] An equally compelling argument, however, is that the statement, similar to others incorporated in the legislative history of Title III, demonstrates nothing more than congressional concern that safeguards be placed upon electronic surveillance methods to ensure compliance with the requirements of the fourth amendment.[141]

The Supreme Court's decisions in *Berger* and *Katz* also have been cited as sources of permission for covert entry into private premises. Early in 1967, Senator McClellan introduced Senate bill 675, the forerunner of Title III.[142] When the bill was introduced, neither the *Berger* nor the *Katz* decision had been announced by the Supreme Court. Thus, wiretapping was prohibited by the Federal Communications Act of 1934,[143] but bugging was legal so long as it was not accomplished by an unauthorized physical intrusion.[144] The original bill, therefore, left undisturbed the pre-*Berger* law that permitted only a non-trespassory bugging.

The Supreme Court decided *Berger* shortly after the introduction of Senate bill 675. In response to this decision and in an attempt to meet the constitutional requirements the Court had imposed, a new bill, Senate bill 2050,[145] was introduced by Senator Hruska.[146] Although this bill allowed law enforcement officials to conduct surveillance by eavesdropping, it, like its eventual successor, contained no provision authorizing break-ins or trespasses to install, maintain, or remove the bugging devices. Senate bill 2050 expanded the scope of Senate bill 675 by extending strict controls on the authorization and use of eavesdropping by law enforcement agents, and by banning private use of bugging devices altogether.[147] It is apparent from Senator Hruska's comments that his bill was intended to comply with all the Supreme Court decisions on the

---

140. McNamara, *supra* note 99, at 8. McNamara found the validity of this presumption supported by the fact that two years after Title III was enacted Congress passed a nearly identical statute for the District of Columbia. The D.C. statute also contains no provisions governing surreptitious entry but does contain specific references to homes and offices and provides particular requirements for wiretapping and bugging in these situations. 23 D.C. CODE ANN. § 547(a) (1973 & Supp. IV 1977). McNamara stated that if a requirement for entry was necessary, it was reasonable to assume that it would have been included. McNamara, *supra* note 99, at 8–9.

141. *See* notes 92, 93, 96 & 97 and accompanying text *supra*.

142. S. REP. NO. 1097, 90th Cong., 2d Sess. 225, *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 2112, 2274.

143. *See* text accompanying notes 74 to 76 *supra*.

144. *See* text accompanying notes 40 to 46 *supra*. There was no federal statute prohibiting bugging.

145. Also known as the Electronic Surveillance Act of 1967.

146. S. REP. NO. 1097, 90th Cong., 2d Sess. 225, *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 2112, 2274.

147. *See Controlling Crime Through More Effective Law Enforcement: Hearings Before the Subcommittee on Criminal Law and Procedure of the Senate Judiciary Committee*, 90th Cong., 1st Sess. 958 (1967).

issue of electronic surveillance, including the then recently announced *Berger* and *Katz* decisions.[148]

As it was finally enacted, Title III contained a number of provisions that were included in an attempt to comply with the Supreme Court decisions in *Berger* and *Katz*.[149] It has been argued that these and other Supreme Court decisions implicitly permit trespasses for placing eavesdropping devices if the surveillance has been sanctioned by a court order.[150] *Berger* and *Katz*, however, proscribed unwarranted eavesdropping even when conducted by non-trespassory methods. As has been discussed herein, these decisions extended the fourth amendment's protections to include not only the seizure of tangibles but also the seizure of communications, whether or not the seizure was made possible by a breaking and entering.[151]

Neither of these cases overruled the *Silverman* doctrine, which prohibited electronic surveillance accompanied by an unauthorized physical intrusion. This was noted by the Court a year after the *Katz* decision:

> Nor do we believe that *Katz*, by holding that the Fourth Amendment protects persons and their private conversations, was intended to withdraw any of the protection which the Amendment extends to the home or to overrule the existing doctrine, recognized at least since *Silverman*, that conversations as well as property are excludable from the criminal trial when they are found to be the fruits of an illegal invasion of the home.[152]

Some courts seemingly have interpreted *Berger* as implicitly overruling *Silverman*, finding significant the fact that in *Berger* surveillance had been conducted by means of eavesdropping equipment installed in the petitioner's office following a covert break-in by agents.[153] These authorities have found that since the Supreme Court did not order the suppression of the evidence obtained pursuant to the break-in, but decided the case on other grounds, the decision suggests the constitutional permissibility of trespassory entry to place eavesdropping devices. Support for this conclusion, it has been argued, can be derived from the Court's awareness of the nature of the entry in *Berger*. The majority spoke of a "trespassory intrusion into a constitutionally protected area;"[154] the concurring and dissenting justices noted the manner of entry;[155]

---

148. S. REP. No. 1097, 90th Cong., 2d Sess. 225, *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 2112, 2274.

149. Members of Congress carefully considered these two cases. Analyses of these opinions are part of the congressional record, 114 CONG. REC. 12986–88 (1968), and the entire text of *Katz* was read into the record, *id.* at 14725–28.

150. United States v. Santora, 583 F.2d 453, 460 (9th Cir. 1978), *vacated*, 441 U.S. 939, *rev'd*, 600 F.2d 1317 (1979).

151. *See* text accompanying note 53 *supra*.

152. Alderman v. United States, 394 U.S. 165, 180 (1969).

153. Application of the United States, 563 F.2d 637, 643 (4th Cir. 1977). *See* McNamara, *supra* note 99, at 5–7.

154. Berger v. New York, 388 U.S. 41, 44 (1967).

155. *Id.* at 64–65, 67 (Douglas, J., concurring) ("surreptitious methods" were utilized); *id.* at 70, 81 (Black, J., dissenting).

and the Court could have assumed a covert break-in occurred, because the installation of listening devices by such means was not a novel police procedure.[156] In light of this awareness, and the fact that Congress did not require that a valid surveillance statute contain a section narrowly circumscribing the time, manner, and method of entry necessary to be constitutional or that a judicially-authorized surveillance order contain such limitations, it is arguable that the court in *Berger* did not find such provisions necessary to authorize a surveillance order.

These arguments, however, overlook several important points. First, because the *Berger* majority found that the New York surveillance statute was unconstitutional on its face,[157] the Court never had to reach the issue of permissible means of implanting a surveillance device. The Court's holding was sufficient to make inadmissible at trial evidence obtained from the eavesdropping.

Second, the Court's awareness of the manner of entry employed by the police and of the usefulness of obtaining evidence of crimes in this fashion does not necessarily imply constitutionality or the Court's approval. A study of case law, in fact, demonstrates that the contrary is true. In *Irvine v. California,*[158] for example, police officers sent a locksmith to the home of the petitioner to make a door key. They later entered the home on several occasions to install and reposition a concealed microphone. Members of the Court, offended by this conduct, stated:

> That officers of the law would break and enter a home, secrete such a device, even in a bedroom, and listen to the conversation of the occupants for over a month would be almost incredible if it were not admitted. Few police measures have come to our attention that more flagrantly, deliberately, and persistently violated the fundamental principle declared by the Fourth Amendment.[159]

Although it is true, as the *Dalia* Court noted, that four justices of the *Irvine* Court alluded to the policemen's failure to obtain a warrant for the entry, it is also true that no justice sanctioned the entry in the absence of a court order expressly granting authority for physical entry of the target premises. The case cannot be interpreted as condoning an unauthorized official trespass. Furth-

---

156. McNamara, *supra* note 99, at 7 (footnote omitted).

157. Berger v. New York, 388 U.S. 41, 44, 64 (1967). This was emphasized in United States v. Ramsey, 503 F.2d 524, 528–30 (7th Cir. 1974), *cert. denied,* 420 U.S. 932 (1975).

158. 347 U.S. 128 (1954).

159. *Id.* at 132. The Court, however, affirmed the lower court which had allowed the testimony by officers of conversations they had heard through the listening installations. The Court found that the holding of Wolf v. Colorado, 338 U.S. 25 (1949), *overruled,* 367 U.S. 643, 655 (1961) was controlling. In *Wolf* the Court had first established the principle that the concept of due process found in the fourteenth amendment embodied the "security of one's privacy against arbitrary intrustion by the police." *Id.* at 27. The Court, however, had then held that in a prosecution in a state court for a state crime the admission of evidence obtained by an unreasonable search and seizure was not forbidden by the fourteenth amendment. *Id.* at 33.

ermore, Congress' mention of the case during the Title III debates, without explanation or interpretation, cannot in good conscience be relied upon as support of the police behavior that the *Irvine* Court had condemned.

As Justice Stevens noted, congressional references during the Title III debates to the various types of surveillance that the Court had reviewed in prior cases should not be construed as authorization of all of those methods. Not only *Irvine,* but other Supreme Court cases as well, condemned the conduct of the law enforcement officials involved. Far from advocating all of those surveillance techniques, Congress was making an effort to avoid the unconstitutional aspects of those cases.

Furthermore, the fact that a surveillance order can be valid even though it lacks time, manner, and method of entry provisions might indicate that installation by means of a trespass is absolutely forbidden. If a covert, trespassory entry is not one of the options considered when determining the best means of effectuating the surveillance order, then time, manner, and method of surveillance provisions would be unnecessary.

For the *Dalia* majority, as well as for those lower federal courts that ruled in favor of implicit authorization for covert entry in Title III, the final argument was that Congress sought to arm federal investigators with the power to eavesdrop. That intention would preclude prohibiting surreptitious installation of devices, which might be necessary to exercise that power effectively.[160] Indeed, it is argued, because section 2518 of Title III does not explicitly limit the manner of placement of electronic surveillance equipment, surreptitious entry is a statutorily viable technique. To hold otherwise, these courts have contended, would run counter to the principles that courts are obligated to "attempt to effectuate the purpose of federal legislation and to avoid interpretations which produce absurd or nugatory results."[161] The most logical assumption to be made from congressional silence is that the normal methods of effectuating electronic surveillance were already authorized and would continue. As one judge recognized:

> Our courts regularly authorize and approve wire tapping, eavesdropping, and surreptitious entries. . . . [C]ourt orders . . . authorize government agents to "Intercept wire communications . . . [and to] install and maintain an electronic eavesdropping device within the [room of building at a specific address] to intercept [certain specified] oral communications . . . concerning [certain] described offenses. Installations . . . may be accomplished by any reasonable means, *including, surreptitious entry or entry by ruse.* . . ."[162]

These arguments cannot be definitively countered, just as the assertions of Justice Stevens, dissenting in *Dalia,* and those circuits that agree with his

---

160. *See, e.g.,* Application of the United States, 563 F.2d 637, 643 (4th Cir. 1977).

161. *Id.* at 642.

162. United States v. Barker, 514 F.2d 208, 241–42 (D.C. Cir.) (en banc) (MacKinnon, J., dissenting), *cert. denied,* 421 U.S. 1013 (1975).

interpretations cannot be proven incorrect. It is at least equally logical to conclude that if Congress had intended to authorize breaking and entering to effectuate a surveillance order, it would have explicitly so stated. This conclusion is buttressed by the fact that in 1978, when Congress chose to authorize trespassory eavesdropping in national security cases, it required that both application and intercept orders state explicity that "physical entry is required to effect the surveillance."[163] In view of this explicit recognition and the careful delineation of the powers and duties of both courts and government agents in other aspects of surveillance, it appears unwarranted to infer the same recognition in Title III without an express statement by Congress.

It is impossible to determine positively whether Congress intended Title III implicitly to authorize courts to grant law enforcement officials permission to break and enter when conducting electronic surveillance. An examination of the lower federal court cases during the period of 1976 to 1979 discloses a trend toward either of two conclusions. Some courts held that surreptitious entry was not permissible under any circumstances.[164] Others held that surreptitious entry could be justified only in carefully circumscribed situations.[165] The Supreme Court's opinion in *Dalia* was a sharp departure from this trend. In its consideration of surreptitious entry, the Court seems to have disregarded implications of earlier Court decisions as well as important points raised by the lower courts.

Because a majority of the Supreme Court found sufficient authority in Title III and its legislative history for breaking and entering, the Court did not have to consider other possible sources of authority. Given the rather questionable basis for the Court's conclusion that Title III implicitly authorizes covert entry, however, an examination of the other potential sources of authority seems warranted.

B. *Other Possible Statutory Sources of Authority*

1. 18 U.S.C. Section 3109

At least one court[166] has found that 18 U.S.C. section 3109 can be applied to provide authority for the execution of a surveillance order by means of surreptitious entry. This law, the only federal statute on the subject of forcible entry, forbids forcible entry into a home to execute a search warrant unless an officer who has given notice of both his authority and purpose is refused

---

163. Foreign Intelligence Surveillance Act of 1978, §§ 104(a)(8), 105(b)(1)(D), 50 U.S.C. §§ 1804(a)(8), 1805(b)(1)(D) (Supp. II 1978).

164. *See, e.g.*, United States v. Finazzo, 583 F.2d 837 (6th Cir. 1978), *vacated*, 441 U.S. 929 (1979); United States v. Santora, 583 F.2d 453 (9th Cir. 1978), *vacated*, 441 U.S. 939, *rev'd*, 600 F.2d 1317 (1979).

165. *See, e.g.*, Application of the United States, 563 F.2d 637 (4th Cir. 1977); United States v. Ford, 553 F.2d 146 (D.C. Cir. 1977).

166. *See* United States v. Agrusa, 541 F.2d 690 (8th Cir. 1976), *cert. denied*, U.S. 1045 (1977).

admittance or is in need of liberation.[167] The statute is a codification of common law and is subject to any exceptions recognized at common law.[168]

On its face section 3109 appears to convey no authority to agents to break and enter private premises in the execution of an intercept order. Indeed, the statute specifically applies to homes but makes no mention of commercial premises. This reflects the common law tradition that afforded greater protection from unannounced, forcible entry to homes than to non-dwellings.[169] Some courts have nevertheless extended the applicability of the statute, in limited circumstances, to include commercial premises. One such case was *United States v. Phillips*,[170] in which the Ninth Circuit found that a locked commercial establishment, occupied by the defendant at night, was a "house" as that word is used in section 3109.[171] In addition, because section 3109 requires police to give notice before they forcibly enter a building, covert breaking and entering in the execution of a surveillance is apparently not within the purview of this statute.[172] Both the Supreme Court and Congress have recognized that in the context of electronic surveillance police need not announce their presence and purpose before conducting an otherwise authorized search.[173] To require an announcement would obviously defeat the purpose of the surveillance.

---

167. 18 U.S.C. § 3109 (1976) provides:

> 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 a warrant.

Although originally enacted to govern the execution of search warrants, the Supreme Court has expanded the scope of the statute to include covert entries made to effectuate an arrest, with or without a warrant. Sabbath v. United States, 391 U.S. 585, 588 (1968); Miller v. United States, 357 U.S. 301, 308 (1958). Several courts have found, at least implicitly, that surveillance orders and search warrants are equivalent. *See, e.g.*, United States v. Finazzo, 583 F.2d 837, 845 (6th Cir. 1978) ("eavesdropping warrant"), *vacated*, 441 U.S. 929 (1979); United States v. Agrusa, 541 F.2d 690 (8th Cir. 1976), *cert. denied*, 429 U.S. 1045 (1977). The Ninth Circuit expressly rejected this position in United States v. Santora, 583 F.2d 453, 462 n.6 (9th Cir. 1978), *vacated*, 441 U.S. 939, *rev'd*, 600 F.2d 1317 (1979). This Comment will presume that the two court orders are equivalent.

168. *See* Sabbath v. United States, 391 U.S. 585, 588–90 (1968).

169. *See* Comment, *The Permissibility of Forcible Entries By Police In Electronic Surveillance*, 57 B.U.L. REV. 587, 595–99 (1977) [hereinafter cited as *Permissibility of Forced Entries*].

170. 497 F.2d 1131 (9th Cir. 1974).

171. *Id.* at 1133. *See also* Wong Sun v. United States, 371 U.S. 471, 479–84 (1963) (Defendant was arrested at his place of business which was linked by a hallway to his home. The Court held that because the government had not cited exigent circumstances justifying noncompliance with § 3109 the arrest was invalid.); United States v. Case, 435 F.2d 766, 770 n.1 (7th Cir. 1970) (Section 3109 has been held to include commercial premises, just as has the fourth amendment.).

172. Opening a closed but unlocked door or using a passkey is an "unannounced intrustion" as that term is used in § 3109. Sabbath v. United States, 391 U.S. 585, 590 (1968).

173. Katz v. United States, 389 U.S. 351, 355 n.16 (1967); Berger v. New York, 388 U.S. 41, 60 (1967); Osborn v. United States, 385 U.S. 323, 328–30 (1966). 114 CONG. REC. 13208 (1968).

In *Agrusa v. United States*,[174] the Eighth Circuit, however, apparently extended section 3109 to include forcible entry by agents to install an electronic surveillance device. The *Agrusa* court noted that there are exceptions to section 3109, and implied that covert entry to install surveillance equipment might be one such exception to the notice requirement of section 3109.[175] The court concluded that the statute "is not . . . to be woodenly applied without regard to the particular circumstances at hand. . . ."[176] In reaching this conclusion the court relied upon language in *Sabbath v. United States*:[177]

> Exceptions to any possible constitutional rule relating to announcement and entry have been recognized, see *Ker v. California*, [374 U.S.] at 47, (opinion of Brennan, J.) and there is little reason why those limited exceptions might not also apply to § 3109, since thev existed at common law, of which the statute is a codification.[178]

Several courts of appeals have supported this view, finding that "when exigent circumstances exist, failure to comply with [section 3109] does not render the entry upon the premises unlawful."[179]

If, indeed, exigent circumstances justify failure to comply with the notice requirement of section 3109,[180] the circumstances sufficient to qualify as an exigency must be determined. In *Agrusa* the Eighth Circuit concluded that an exigency existed in that case based upon two criteria. First, the intrusion occurred on unoccupied business premises. This mitigated the privacy consideration. Second, compliance with the notice requirement would have been self-defeating.[181]

Both of these grounds are doubtful authority to substantiate the proposition that the statute permits law enforcement officers to break and enter private premises to install eavesdropping devices. In *Payne v. United States*,[182] the Fifth Circuit found that section 3109 has no application to the situation of an unoccupied dwelling. The court noted that three interests are protected by requiring an announcement and refusal of admittance prior to allowing a

---

174. 541 F.2d 690 (8th Cir. 1976), *cert. denied*, 429 U.S. 1045 (1977).

175. *Id.* at 699.

176. *Id.*

177. 391 U.S. 585 (1968).

178. *Id.* at 591 n.8.

179. Salvador v. United States, 505 F.2d 1348, 1352 (8th Cir. 1974). *See also* Rodriguez v. Jones, 473 F.2d 599, 607 (5th Cir. 1973); United States v. Bustamante-Gamez, 488 F.2d 4, 9 (9th Cir. 1973), *cert. denied*, 416 U.S. 970 (1974).

180. The Supreme Court has not yet decided whether and what exigent circumstances would justify noncompliance with the statute. *See* Ker v. California, 374 U.S. 23, 40 n.11 (1963); Wong Sun v. United States, 371 U.S. 471, 483–84 (1963); Miller v. United States, 357 U.S. 301, 309 (1958).

181. Agrusa v. United States, 541 F.2d 690, 700 (8th Cir. 1976), *cert. denied*, 429 U.S. 1045 (1977).

182. 508 F.2d 1391 (5th Cir.), *cert. denied*, 423 U.S. 933 (1975)

breaking and entering: prevention of violence and physical injury to police and the occupants of the building, unexpected exposure of private activities, and property damage from forced entry.[183] Since only the third interest, and in the court's view, the least significant interest in terms of privacy, can be involved when the occupant is absent, it is futile to require police to wait for refusal of admittance when no one is home. The court found that logically, therefore, the statute applies only when someone is present.[184]

The majority in *Finazzo* supported the Fifth Circuit's conclusion, finding that the statute contemplates that officers will only attempt to serve search warrants when occupants are present and that only a "life-endangering situation or other perilous circumstance" excuses giving notice.[185] Allowing agents to break and enter an abandoned, unoccupied building if it is necessary to execute a search warrant[186] is quite different from permitting them to wait until the occupants or users of a building are away so that they can forcibly enter it to execute an electronic surveillance order.

Justification for noncompliance with section 3109 on the ground that requiring agents to give prior notice would be self-defeating is also questionable. The *Agrusa* majority relied upon *Ker v. California,*[187] in which the Supreme Court had found that under the particular facts of that case forcible entry could be justified by exigent circumstances. The *Agrusa* court, although acknowledging that none of the exigencies cited by Justice Brennan in *Ker*[188] fit the facts of the case before it, made an analogy to the destruction of evidence exigency cited by the Court in *Ker.*[189] The constitutional principle in *Ker,* however, was that forcible entry could be justified only in an exigency, not that forcible entry could be justified when notice would be self-defeating.[190] Furthermore, the fact that notice need not be given prior to surveillance provides authority only for the

---

183. *Id.* at 1393–94.

184. *Id.* at 1394.

185. United States v. Finazzo, 583 F.2d 837, 847 (6th Cir. 1978), *vacated,* 441 U.S. 929 (1979).

186. *See* text accompanying notes 238 to 241 *infra.*

187. 374 U.S. 23 (1963).

188. Justice Brennan, in a dissenting opinion, attempted to specifically define the uniqueness concept the majority had recognized in its discussion of exigency. Brennan found three circumstances when unannounced entry would be appropriate:

(1) persons already know of police authority and purpose;

(2) police reasonably believe persons within are in imminent danger of bodily harm;

(3) persons within, aware of the presence of someone outside, engage in activity to justify a belief by police that an escape or destruction of evidence is being attempted.

Id. at 47.

Brennan's categorization was not directly disputed in Clark's plurality opinion. The two justices differed on the question how much deference should be given to police assessment of the potential dangers and destruction of evidence.

189. The majority in *Ker* equated the imminent destruction of existing evidence with the non-creation of incriminating evidence in the future. *Id.* at 40.

190. *See* text accompanying notes 231 to 237 *infra.*

incursion on conversational privacy, not for the invasion of physical privacy that a trespassory entry entails.[191]

Thus, it is doubtful whether section 3109 has any relevance to electronic surveillance cases. The conclusion that the statute is inapplicable to the issue of entry to effect surveillance is supported by the legislative history of Title III. During the debates on Title III, Senator Hugh Scott explicitly cited section 3109.[192] Nevertheless, section 3109 was not amended to authorize surreptitious entry to install eavesdropping devices. The requirements of the statute prohibit such entry; it is only if compliance with those requirements can be excused under the concept of exigency that covert entry could be permitted. If an exigency does exist, the government should be required to establish this fact, and the court authorizing the surveillance should state both the exigency and its permission for forcible entry explicitly in the surveillance order.[193]

2. Rule 41 of the Federal Rules of Criminal Procedure

A final possible statutory source of authority for covert entry is rule 41 of the Federal Rules of Criminal Procedure. Rule 41(b) empowers a district court to issue law enforcement officials warrants for entering private premises to conduct a search and seizure of property.[194] Rule 41(h) defines property "to include documents, books, papers and any other tangible objects." Both of the sections of the rule have been interpreted flexibly. In *Katz* the Court stated in dicta that rule 41 is not limited to tangible items but can be given a flexible interpretation to include electronic intrusions authorized by a judicial finding of probable cause.[195] This position was reiterated and extended in *United States v. New York Telephone Co.*,[196] in which the Court found that the authority of rule 41(b) was broad enough to include a "search" made by installing a pen register device on a suspect's telephone line and that rule 41(h) "does not restrict or exhaustively enumerate all the items which may be seized pursuant to Rule 41."[197]

---

191. The Supreme Court has recognized that the exceptions to the search warrant requirement would rarely be applicable to electronic surveillance cases. Katz v. United States, 389 U.S. 351, 357–58 (1967).

192. 114 CONG. REC. 13200 (1968).

193. *See* text accompanying notes 261 to 332 *infra*.

194. Rule 41(b) states:

> A warrant may be issued under this rule to search for and seize any (1) property that constitutes evidence of the commission of a criminal offense; or (2) contraband, the fruits of crime, or things otherwise criminally possessed; or (3) property designed or intended for use or which is or has been used as the means of committing a criminal offense; or (4) person for whose arrest there is a probable cause, or who is unlawfully restrained.

195. 389 U.S. 351, 354–56 (1967). In a footnote the Court stated that the notice requirement of rule 41(a) is not so inflexible as to require that notice always be given the person "searched" prior to the search. *Id.* at 355 n.16.

196. 434 U.S. 159 (1977).

197. *Id.* at 169. A pen register is a mechanical device used to monitor and record the numbers dialed on a telephone. It does not intercept oral communications, nor does it indicate whether the calls dialed are completed. *Id.* at 161 n.1.

No court that has been faced with the issue whether surreptitious entry is permissible in eavesdropping cases has found that rule 41 would allow the issuance of a warrant authorizing covert entry. The suggestion, however, has been made on several occasions. In *Silverman v. United States*,[198] Justice Douglas stated in a concurring opinion that the petitioner's conviction must be reversed "[s]ince [the privacy of the home] was invaded here, and since no search warrant was obtained as required by the Fourth Amendment and Rule 41. . . ."[199]

Rule 41 has been contemplated as a statutory source of authority in only three cases since the enactment of Title III. In *United States v. Volpe*,[200] the district court stated that the first issue to be resolved was whether rule 41 and 18 U.S.C. section 2518 "confer upon the Court the discretion to order a wiretap and/or oral interception necessitating a covert entry. . . ."[201] The court, however, failed to mention rule 41 further and confined its discussion to the permissibility of such an order under Title III.[202]

The Sixth Circuit in *Finazzo* failed to consider the applicability of rule 41 when it reached the conclusion that courts are without statutory power to authorize an entry. In a concurring opinion, however, Judge Celebrezze argued that "federal district courts gain sufficient ancillary power from Rule 41 and the All Writs Act to order surreptitious entry to implement such interceptions wholly apart from the power to authorize such entry which exists in Title III itself."[203]

The Ninth Circuit in *United States v. Santora* specifically concluded that rule 41 was irrelevant to the issuance of Title III intercept orders. Nothing in rule 41, the court emphasized, indicates that break-ins are permissible "absent the full panoply of protections of the search warrant."[204] The *Santora* court indicated that pen registers, on the other hand, were permissible pursuant to Title III. Indeed, the court noted, because pen registers do not capture any conversation, the interception of electrical impulses by pen registers is much less intrusive than electronic surveillance of oral communication.[205]

The Ninth Circuit's conclusion has been countered by the argument that rule 41 may permit a court to authorize a search that does not itself intercept a communication, such as an entry to place a listening device, even if the rule does not authorize the eavesdropping itself [206] The fundamental flaw in this

198. 365 U.S. 505 (1961).

199. *Id.* at 513.

200. 430 F. Supp. 931 (D. Conn. 1977), *aff'd*, 578 F.2d 1372 (2d Cir. 1978), *cert. denied*, 441 U.S. 930 (1979).

201. 430 F. Supp. at 940.

202. *Id.* at 940–43.

203. United States v. Finazzo, 583 F.2d 837, 852 (6th Cir. 1978), *vacated*, 441 U.S. 929 (1979). *See* United States v. New York Telephone Co., 434 U.S. 159, 168–70, 172–74 (1977).

204. United States v. Santora, 583 F.2d 453, 464 n.10 (9th Cir. 1978), *vacated*, 441 U.S. 939, *rev'd*, 600 F.2d 1317 (1979).

205. *Id.*

206. Brief for Respondent, Dalia v. United States, 441 U.S. 238 (1979).

argument is that there is a significant difference between entries made prior to conducting electronic surveillance and entries made prior to a search and seizure of tangible objects. Indeed, the former entry is far more intrusive than is the latter. The search for tangible evidence cannot be made without entering the premises where the objects are located, but frequently electronic surveillance of conversation can be conducted without having to enter private premises surreptitiously. The added element of a physical intrusion aggravates the privacy invasion occasioned by the act of listening to private conversations.[207] It is thus doubtful whether any presently existing statute implicitly empowers courts to sanction surreptitious entries.

C. *Judicial Power To Authorize Break-Ins Independent of Statute*

If no statute empowers judges to authorize surreptitious entry, the next consideration is whether judges possess such a power inherently or at common law under the fourth amendment. There are several cases involving warrantless electronic surveillance in which an assumption seems to have been made that courts do have non-statutory authority to issue search warrants. Such an assumption was made by the Supreme Court in both the *Katz* and *Osborn* decisions. The District of Columbia Circuit appears to have followed the Supreme Court's lead in *United States v. Ford.*[208] In *Ford* the court held that police are required to obtain two warrants, one to conduct the surveillance and one to break and enter. Each warrant application must be tested by traditional fourth amendment standards of probable cause, reasonableness, and particularity.[209] Title III provides statutory authority for the issuance of a warrant to conduct electronic surveillance, but the court found no statutory authority for the issuance of a warrant authorizing breaking and entering. The *Ford* court nevertheless indicated, without fully discussing the issue, that judges have an inherent power, independent of any statute, to issue surveillance warrants permitting forcible entry.[210]

The existence of an inherent judicial power, however, has never been clearly established. In *Finazzo,* the Sixth Circuit, after tracing the history of judicial power to issue warrants, strongly urged that courts do not possess any inherent power to issue search warrants.[211] In 1765, an English search and seizure case, *Entick v. Carrington and Three Other King's Messengers,*[212] first established the principle that, except in the case of a search to recover stolen

---

207. *See* text accompanying note 245 *infra.*

208. 553 F.2d 146 (D.C. Cir. 1977).

209. *Id.*

210. *Cf.* Application of the United States, 563 F.2d 637 (4th Cir. 1977) (Title III provides statutory authority for breaking and entering and contains an implicit requirement that every such entry be approved by the judge or magistrate issuing the surveillance order).

211. United States v. Finazzo, 583 F.2d 837, 842–44 (6th Cir. 1978), *vacated,* 441 U.S. 929 (1979).

212. 2 Wils. K.B. 275, 95 Eng. Rep. 807 (1765). *See also* 583 F.2d at 842–43.

goods, the judicial power to issue a search warrant is wholly statutory.[213] The Supreme Court adopted the reasoning of *Entick* in *Boyd v. United States.*[214] In *Boyd,* the Court pointed out that the English case, which condemned the search and seizure of private papers under a general warrant unauthorized by Parliament, provides the original meaning and purpose of the fourth amendment.[215]

The *Boyd* opinion was consistent with an existing rule, adopted by the Supreme Court in the early nineteenth century, which limited the relation of federal judicial power to the common law. In *United States v. Hudson and Goodwin,*[216] the Court was presented with the issue whether federal circuit courts had the power to exercise common law jurisdiction in criminal cases in addition to their jurisdiction as defined by statute. The Court concluded that no such common law jurisdiction existed.[217] From these and similar authorities, the *Finazzo* court concluded that there is no inherent judicial power to issue search warrants or to authorize law enforcement officers to break and enter in the execution of search warrants when such means of execution have not been authorized by statute.

Further support for this conclusion can be found in the Supreme Court's recent decision in *United States v. New York Telephone Co.*[218] In that case the members of the Court unanimously agreed that the federal judicial power to issue search warrants is not inherent but, rather, must be found in a specific grant of legislative authority:

> The principle of limited federal jurisdiction is fundamental; never is it more important than when a federal court purports to authorize and implement the secret invasion of an individual's privacy. . . . [T]he history and consistent interpretation of the federal court's power to issue search warrants conclusively show that, in these areas, the Court's rush to achieve a logical result must await congressional deliberation.[219]

Justice Stevens, dissenting in part, noted that the assumption of an inherent non-statutory power was not necessary to the Supreme Court's decisions in *Katz* or *Osborn.*[220] He stated that the Court's decision in *Katz* may have rested upon an interpretation of rule 41.[221] Although *Osborn* appears to rely in part on a non-statutory order permitting the secret recording of a

---

213. 2 Wils. K.B. 275, 95 Eng. Rep. 807 (1765).
214. 116 U.S. 616 (1886).
215. *Id.* at 630.
216. 11 U.S. 21, 7 Cranch 32 (1812).
217. *Id.* at 34.
218. 434 U.S. 159 (1977).
219. *Id.* at 179 (Stevens, J., dissenting in part). Justice Stevens and the majority were in accord on this principle. Their disagreement revolved around whether FED. R. CRIM. P. 41 could be interpreted to authorize the use of pen registers.
220. *Id.* at 181 n.8.
221. *Id. See* text accompanying notes 194 to 197 *supra.*

conversation by one who was a party to it, Justice Stevens noted the Court subsequently made clear in *United States v. White*[222] that prior judicial authority was not a necessary element in the *Osborn* case. Such consensual overhearing would not qualify as an interception under Title III. Justice Stevens also pointed out that since the court issuing the surveillance order in *Osborn* was presented with the possibility that an attorney was attempting to bribe a witness, and thus was faced with a threat to the integrity of its own procedures, the argument that it possessed an inherent power to authorize a non-statutory investigation was more compelling than in the context of an ordinary criminal investigation.[223] There thus seems to be a firm foundation for the conclusion that courts have no authority, except pursuant to statute, to permit law enforcement officers to break and enter a suspect's private premises to plant an eavesdropping device.

IV. THE REASONABLENESS OF FORCIBLE ENTRY UNDER THE FOURTH AMENDMENT

The fourth amendment requires that all government searches and seizures be "reasonable,"[224] including "searches" conducted pursuant to an electronic surveillance order.[225] In *Dalia* the Supreme Court expressly held that the fourth amendment does not prohibit per se a covert entry performed for the purpose of planting otherwise legal electronic surveillance equipment.[226] The lower federal courts were divided on this issue.[227]

A. *The Argument That Surreptitious Entry is Inherently Unreasonable*

Under the general principles of fourth amendment search and seizure procedures, forcible or covert entry in the execution of a warrant is carefully circumscribed. Forcible entry is permissible only after a law enforcement officer has announced his presence and those within the premises have refused to allow his entry.[228] There are, however, a few exceptions to this proscription. Break-ins

---

222. 401 U.S. 745 (1971).

223. 434 U.S. at 181–82 n.8.

224. *See* note 27 *supra*.

225. Katz v. United States, 389 U.S. 341, 353 (1967).

226. 441 U.S. at 248.

227. *Compare* United States v. Dalia, 575 F.2d 1344, 1346 (3d Cir. 1978), *aff'd*, 441 U.S. 238 (1979); United States v. Scafidi, 564 F.2d 633, 640 (2d Cir. 1977), *cert. denied*, 436 U.S. 903 (1978); United States v. Agrusa, 541 F.2d 690, 695–98 (8th Cir. 1976)) *cert. denied*, 429 U.S. 1045 (1977); United tates v. Volpe, 430 F. Supp. 931, 942–43 (D. Conn. 1977), *aff'd*, 578 F.2d 1372 (2d Cir. 1978), *cert. denied*, 441 U.S. 930 (1979); *and* United States v. London, 424 F. Supp. 556, 560 (D. Md. 1976), *with* United States v. Finazzo, 583 F.2d 837, 845 (6th Cir. 1978), *vacated*, 441 U.S. 929 (1979); Application of the United States, 563 F.2d 637, 644 (4th Cir. 1977); United States v. Rowland, 448 F. Supp. 22, 24 (N.D. Tex. 1977); United States v. Ford, 414 F. Supp. 879, 883 (D.D.C. 1976), *aff'd*, 553 F.2d 146 (D.C. Cir. 1977).

228. *See* discussion of § 3109 in text accompanying notes 166 to 193 *supra*. This principle has its roots in English common law. At early common law judges had no authority to issue search warrants. Although the need to return stolen goods and to prosecute thievery was recognized, this recognition did not extend to enabling judges to

are permitted in a limited set of exigent circumstances when police officers are faced with these dangers: the threat of imminent bodily harm to themselves or those within the premises, a fleeing felon, or the threatened destruction of evidence.[229] Entry also may be forced when the premises are vacant or abandoned.[230] Covert entry to execute a surveillance order is inherently unreasonable because none of these existing exceptions provide sufficient justification for noncompliance with the general search and seizure principles. Furthermore, no new exceptions should be created.

1. Exigent Circumstances

The doctrine of exigent circumstances developed to provide law enforcement officials with on-the-spot discretion to make quick decisions and enter premises forcibly to protect themselves or persons inside, to prevent a felon from fleeing, or to prevent the possible destruction of evidence. It seems unlikely that the doctrine would have any application to an entry made pursuant to an electronic surveillance order, an entry which is not made in an emergency but planned in advance to take place when the building is unattended and the regular occupants are not aware of the officer's presence. The Eighth Circuit, however, found that sufficient exigencies existed in an electronic surveillance case to justify the break-in.[231] In *United States v. Agrusa,* the Eighth Circuit made an analogy to the destruction of evidence exigency cited in *Ker v. California,* noting that "whatever the likelihood might have been that Ker would have destroyed evidence had an announcement preceded the officer's entry, it is a virtual certainty that the defendant here would have avoided any incriminating statement had he been told in advance that his conversations would be intercepted."[232]

---

provide a writ to search for stolen goods which could be used as evidence in a criminal trial. Eventually, however, a common law power to issue search warrants for stolen property arose out of the need to ensure the return of stolen goods and the arrest and sentencing of a thief. *See* Entick v. Carrington, 2 Wils. K.B. 275, 95 Eng. Rep. 807 (1765). Whether officers could forcibly enter the subject's home in the execution of these warrants is questionable; if such entry were permissible it could occur only after the officers had given notice and had been refused admittance. *See* 2 M. HALE, HISTORY OF THE PLEAS OF THE CROWN 114, 151 (1847). Unless otherwise authorized by statute, breaking and entering was prohibited in other circumstances.

229. *See, e.g.,* Ker v. California, 374 U. S. 23, 40–41 (1963) (opinion of Clark, J.); *id.* at 47 (opinion of Brennan, J.); Miller v. United States, 357 U.S. 301, 309 (1958); Dorman V. United States, 435 F.2d 385 (D.C. Cir. 1970); People v. Maddox, 46 Cal. 2d 301, 294 P.2d 6 (1956).

230. *See, e.g.,* Payne v. United States, 508 F.2d 1391 (5th Cir.), *cert. denied,* 423 U.S. 933 (1975); United States v. Gervato, 474 F.2d 40 (3rd Cir. 1973), *vacating* 340 F. Supp. 454 (E.D. Pa. 1972), *cert. denied,* 414 U.S. 864 (1973).

231. United States v. Agrusa, 541 F.2d 690 (8th Cir. 1976), *cert. denied,* 429 U.S. 1045 (1977). *See* notes 181, 187 to 191 and accompanying text *supra.*

232. 541 F.2d at 697.

The *Agrusa* court viewed *Ker* as constitutionally permitting unannounced entries any time evidence might be destroyed if notice were to be given. The court further relied upon and interperted dictum in *Katz v. United States*[233] to conclude that requiring notice prior to conducting electronic surveillance would be tantamount to the destruction of evidence. If this conclusion is valid, then *Ker* is dispositive.

There are several flaws, however, with this line of reasoning. The *Agrusa* court found that the legitimacy of both the search and the covert entry rested upon the same factor — justification for dispensing with the announcement requirement. The court noted that if surveillance was permissible, any announcement requirement was excused by the language in *Katz,* and the additional element of forcible entry was therefore immaterial. The court found that, for purposes of the fourth amendment, the addition of forcible entry to electronic surveillance was merely a difference in the degree rather than in the kind of intrusion.[234] Under the majority's analysis, the government would never be required to forego forcible entry, for announcement would always be self-defeating. A warning prior to the installation of any device would satisfy the "destruction of evidence" exigency, thereby providing a basis for permitting an intrusion. From this conclusion it becomes apparent that the "element of uniqueness inherent in the exigency requirement,"[235] emphasized in *Ker* would no longer have any significance, for a forcible entry could always be made, even when the same evidence could be acquired by a less intrusive method of surveillance.

The rationale of the *Agrusa* majority fails to recognize the particularly intrusive nature of the eavesdrop warrant.[236] Search warrants by their very nature authorize law enforcement officials to commit a trespass. Immunity is accorded them only because conventional searches and seizures demand physical trespass to search for those tangible objects which are the subject of the warrant. In some circumstances, however, electronic surveillance can be conducted without resorting to physical trespass. For this reason, judges should not have the power to allow a trespassory intrusion in addition to the

---

233. 389 U.S. 347 (1967).

> A conventional warrant ordinarily serves to notify the suspect of an intended search. But if Osborn [Osborn v. United States, 385 U.S. 323 (1966)] had been told in advance that federal officers intended to record his conversations, the point of making such recordings would obviously have been lost; the evidence in question could not have been obtained. In omitting any requirement of advance notice, the federal court that authorized electronic surveillance in *Osborn* simply recognized, as has this Court, that officers need not announce their purpose before conducting an otherwise authorized search if such an announcement would provoke the escape of the suspect or the destruction of critical evidence.

Id. at 355 n.16, citing Ker v. California, 374 U.S. 23, 37–41 (1963).

234. United States v. Agrusa, 541 F.2d 690, 698 (8th Cir. 1976), *cert. denied,* 429 U.S. 1045 (1977). *See* Comment, *supra* note 169 at 591.

235. Comment, *supra* note 169, at 595.

236. *See* 24 WAYNE L. REV. 135, 142–43 (1977).

surveillance unless there is a showing of strict necessity. The privacy interests of the surveillance target that would be invaded by a physical entry must be balanced against the necessity of entry. Upholding the "exigent circumstances" analysis put forth by the *Agrusa* majority would ignore this balancing process and assume that a covert entry is necessary per se. To make such an assumption is to look only to the notice requirement of the fourth amendment. The realization that giving notice prior to conducting surveillance would be self-defeating, however, provides justification only for conducting the eavesdropping without giving contemporaneous notice, not for committing a covert breaking and entering for purposes of implementing that surveillance.[237]

2. Abandoned or Vacant Building

Forcible or covert entry under an eavesdropping order is more analogous to a break and entry into a vacant building to execute a conventional search warrant than it is to forcible entry under exigent circumstances. Forcible entries into vacant buildings are permitted by law.[238] It has been argued, therefore, that vacant premises are less protected constitutionally than are premises which are occupied at the time of the search;[239] that "unannounced and forcible entries into vacant premises, even homes, in order to conduct a search, are constitutional in the absence of exigent circumstances. . . ."[240]

---

237. This argument is supported by the very dictum in *Katz* upon which the *Agrusa* majority relied. *See* note 214, *supra*, and 24 WAYNE L. REV. 135, 143–44 (1977). In *Katz* the Court, in a footnote, referred to *Osborn*. In *Osborn* the Court was primarily concerned with notice prior to surveillance in examining the validity of the judicially authorized surveillance method used in that case. Furthermore, in Berger v. New York, 388 U.S. 41 (1967), decided shortly before *Katz*, the Court invalidated a New York surveillance statute and stated:

> [T]he statute's procedure . . . has no requirement for notice . . ., nor does it overcome this defect by requiring some showing of special facts. On the contrary, it permits unconsented entry without any showing of exigent circumstances. Such a showing of exigency, in order to avoid notice, would appear more important in eavesdropping, with its inherent dangers, than that required when conventional procedures of search and seizure are utilized.

Id. at 60. The *Katz* footnote has been interpreted as dispelling any fear caused by the Court's statement in *Berger* that all surveillance effectively would be barred. *The Supreme Court, 1967 Term*, 82 HARV. L. REV. 63, 194–95 (1968). These factors lead to the conclusion that in *Katz* the Court was concerned only with the issue of notice of the surveillance prior to the surveillance.

This conclusion in turn bolsters the contention that reliance on the *Ker* exigency rationale is inappropriate when considering whether police may use forcible entry to plant a bugging device. In light of the absence of any emergency situation requiring an immediate police response and the irrelevance of the language in *Katz*, *supra* note 233, there is no basis for applying the doctrine of exigent circumstances.

238. Payne v. United States, 508 F.2d 1391 (5th Cir.) *cert. denied*, 423 U.S. 933 (1975)). The Supreme Court has never expressly held that entry into unoccupied premises is constitutional.

239. United States v. Agrusa, 541 F.2d 690, 697 (8th Cir. 1976), *cert. denied*, 429 U.S. 1045 (1977).

240. *Id.* at 697–98.

The holding that an otherwise permissible search need not be postponed because the owner is absent, however, does not lead one to the broader proposition that government agents may wait to enter secretly once the premises have been temporarily left unoccupied and unattended. The federal decisions holding that vacancy need not frustrate a search were decided in the context of conventional searches for tangible evidence which would have been completely inaccessible without an entry.[241] Absent a showing that other, less intrusive means of surveillance either have not been or will not be successful, however, the argument that there is no alternative method of seizure cannot be made in the eavesdropping cases.

3. The Possibility of a New Exception

Since the existing exceptions to general search and seizure principles do not justify breaking and entering in the execution of a surveillance order, the argument has been made that the courts should create a new exception.[242] This suggestion is premised upon language found in several surveillance cases in which the Supreme Court stated that the fourth amendment principally guards individual privacy.[243] Thus, the protections of the fourth amendment are limited only to privacy, and once police have obtained a warrant to invade a suspect's privacy through electronic surveillance no other fourth amendment rights exist which warrant independent constitutional protection. If this proposition is valid,

---

241. The argument has been made that there is a constitutional difference between the privacy intrusion resulting from a forced entry into vacant premises and a forced entry into occupied premises. *See* notes 238 to 240 and accompanying text *supra*. A similar contention is that commercial premises are given less protection by the Constitution than all homes. United State v. Agrusa, 541 F.2d 690, 697 (8th Cir. 1976), *cert. denied,* 429 U.S. 1045 (1977). Case law, however, does not support this distinction, but demonstrates that the constitutionality of a search is not dependent upon whether it took place in a home or office. *See, e.g.,* Chambers v. Maroney, 399 U.S. 42, 48 (1970) (distinguished between a home and office on one hand and a car on the other in terms of the circumstances justifying a warrantless search); See v. Seattle, 387 U.S. 541 (1967) (held that the warrant requirement of the fourth amendment applies to administrative searches of both offices and homes). In *United States v. Ford,* the District of Columbia Circuit rejected the *Agrusa* majority's conclusion that business premises are given less constitutional protection than is a home. 553 F.2d 146, 154 n.32 (D.C. Cir. 1977).

Moreover, the *Katz* decision is as applicable here as it is to any theoretical constitutional distinction between occupied and vacant premises. Although in *Katz* the intercepted conversation took place in a public phone booth, the Court declared the conversation was constitutionally protected because the petitioner had justifiably relied on the privacy of the booth. 389 U.S. at 353. An individual's subjective privacy expectations may be less in commercial premises than in a home, but such a finding should be made by a court based upon the facts of the particular case before it. In light of the *Katz* decision, which seems to require that the privacy considerations of the target of the surveillance be taken into account, no blanket distinction can be made. Comment, *supra* note 169, at 595–98.

242. United States v. Finazzo, 583 F.2d 837, 847 (6th Cir. 1978), *vacated,* 441 U.S. 929 (1979).

243. *See, e.g.,* United States v. Katz, 389 U.S. 347, 351 (1967) ("[T]he Fourth Amendment protects people not places.").

the conclusion is that police can surreptitiously enter the suspect's premises to carry out the warrant.

This argument misinterprets the significance of *Katz* and *Berger*. In these two cases the Court extended the protections of the fourth amendment to shield confidential speech from unreasonable surveillance as well as to safeguard the security of homes and other buildings from physical entry.[244] If the government's analysis were to be accepted, the traditional fourth amendment protections would have no meaning when the entry is made to enable police to seize conversations rather than tangible objects. Quite the opposite, however, is true. The intrusions upon one's property and privacy occasioned by an unobserved entry to plant an eavesdropping device aggravate the privacy intrusion caused by the surveillance itself, for "[b]reaking and entering . . . intrudes upon property and privacy interests . . . which have independent social value unrelated to confidential speech."[245] As the Sixth Circuit has recognized:

> The difference between the invasion of privacy by electronic eavesdropping and the threat to life and property caused by the secret forcible entrance of a live policeman are not hard to appreciate. The policeman interferes with property which is private, he may also interfere with people who wish to be private or their papers and effects; he may even shoot someone or be shot himself. None of these concerns is directly related to private conversation. All fall within the Amendment's protection.[246]

If surreptitious entry infringed only upon conversational privacy it might be reasonable to create a new exception to the standard rules governing search and seizure. Since other protected interests are also involved, such an exception cannot be justified.

B. *The Supreme Court's Decision that Covert Entry is Not Per Se Unreasonable*

In holding that the fourth amendment does not prohibit covert entries of private premises in all cases, the Supreme Court in *Dalia* relied upon implications from previous Court decisions and from the absence of any constitutional rule proscribing all covert entries. Justice Powell began the discussion by citing the Court's decisions in *Irvine v. California*[247] and *Silverman v. United States*.[248] In both cases, because there was no search warrant, the Court had condemned police use of electronic surveillance devices

---

244. *See* United States v. United States District Court, 407 U.S. 297, 313 (1972) and text accompanying notes 70 to 72 *supra*.

245. United States v. Finazzo, 583 F.2d 837, 841–42 (6th Cir. 1978), *vacated*, 441 U.S. 929 (1979).

246. *Id.* at 847–48 (footnote omitted).

247. 347 U.S. 128 (1954).

248. 365 U.S. 505 (1961).

installed after physical trespass into private premises. Powell reasoned that these cases lead to the conclusion that "covert entries are constitutional in some circumstances" so long as they are made pursuant to a warrant.[249] From the succeeding sections of the majority's opinion it becomes apparent that those "circumstances" are deemed present whenever a magistrate has issued a surveillance order to law enforcement officials pursuant to Title III.

The Court had determined earlier that the Title III provisions requiring notice of the surveillance to be served on the surveillance target after the eavesdropping had been completed was a constitutionally adequate substitute for the typical fourth amendment requirement that advance notice of a search be given.[250] In *Dalia* the Court found this provision was equally sufficient with respect to surveillance requiring a covert entry. From that determination and the fact that law enforcement officials may break and enter when no other effective means to execute a warrant exist, the Court established that there can be no constitutional basis for a rule prohibiting all covert entries in the execution of a surveillance order.

This finding, however, does not justify the second conclusion reached by the majority that a covert entry is reasonable any time law enforcement officials have obtained a Title III surveillance order from a court. Breaking and entering and other forms of covert entry are reasonable only if the surveillance cannot be conducted without such an entry into the suspect's premises.

In conventional searches and seizures the police ordinarily can satisfy the reasonableness requirement of the fourth amendment by demonstrating a reasonable belief that objects related to a crime can be found in the area to be searched.[251] If a search is especially intrusive, however, the government must present an additional interest to satisfy the reasonableness requirement and to justify the increased intrusion.[252] Unannounced entries into occupied premises, for instance, are permissible only when there are exigent circumstances.[253] Similarly, intrusions on a person's body may be conducted only when the police have a clear indication, in contrast to merely a reasonable belief, that evidence is present.[254] Finally, the requirements of Title III make electronic surveillance reasonable only when the law enforcement officials seeking the court order can establish that normal investigative techniques either have failed, appear likely to fail, or are too dangerous.[255]

The increased privacy intrusion occasioned by electronic surveillance is further heightened by the addition of forcible or covert, nonconsensual entry preparatory to or during the surveillance. A surreptitious entry violates the

---

249. Dalia v. United States, 441 U.S. 238, 247 (1979).

250. *See* United States v. Donovan, 429 U.S. 413, 429 n.19 (1977).

251. Camara v. Municipal Court, 387 U.S. 523, 534–35 (1967).

252. *See* Note, *Covert Entry in Electronic Surveillance: The Fourth Amendment Requirements,* 47 FORDHAM L. REV. 203, 205–06 (1978).

253. *See* Ker v. California, 374 U.S. 23 (1963).

254. Schmerber v. California, 384 U.S. 757, 769–70 (1966).

255. *See* 18 U.S.C. § 2518(1)(c), (3)(c) (1976 & Supp. III 1979).

property and personal security interests of the property owner and any other persons who share the premises.[256] Privacy also is invaded if the police inspect the premises searching for a satisfactory place to install or relocate the listening device, or if personnel need to search for previously installed devices in order to repair or remove them.[257] Moreover, once police or federal agents have gained entry, they not only may inspect any personal papers and effects they find within plain view,[258] but they are also provided with an opportunity to expand the limits of the search. With their presence in the building or room unobserved, officers are free to make a thorough search and examine any object they find, whether or not it is in plain view.[259] They may wander around the premises, stay for an indefinite period of time, and do whatever they find necessary to implement the surveillance.[260]

Thus, unobserved and unconsented entry adds significantly to the intrusion caused by electronic surveillance. For this reason, covert entry by law enforcement officials should be considered reasonable and permissible only when less intrusive methods of surveillance are inadequate.

V. EXPRESS AUTHORIZATION FOR COVERT ENTRY

Having determined that Title III authorizes covert entry by law enforcement officials to place, maintain, and remove eavesdropping devices, and that such entry is not inherently unreasonable under the fourth amendment, the remaining issue addressed by the Court in *Dalia* was whether the surveillance order had to authorize such entry explicitly. The majority concluded that a surveillance order implicitly includes authorization to put the surveillance into effect by any means, including covert entry. An examination of the requirements of Title III and the fourth amendment, however, reveals that explicit authorization is mandated, although the authorization need not be delineated precisely.

---

256. *See* notes 244 to 246 and accompanying text *supra*.

257. United States v. Ford, 553 F.2d 146, 158 (D.C. Cir. 1977).

258. *Id.* Once government agents have authority to enter private premises they may seize books, papers, and other objects that are within their plain view, assuming their entry was reasonable and the discovery of the evidence was inadvertent. *See* Coolidge v. New Hampshire, 403 U.S. 443, 465–70 (1971).

259. Although any evidence seized that was not discovered within plain view would be inadmissible at trial under the exclusionary rule, Stone v. Powell, 428 U.S. 465 (1976); Mapp v. Ohio, 367 U.S. 643 (1961), it has been noted that it would be difficult for a criminal defendant to sustain his burden of establishing that unobserved government agents were engaged in illegal activities when the agents only examined forbidden objects to obtain untraceable leads to other evidence rather than actually seizing and removing the property from the premises. Due to this difficulty in excluding evidence, agents have reason to extend illegally the scope of their search to papers and belongings not within plain view. Note, *supra* note 252, at 208.

260. Brief for Petitioner at 20, Dalia v. United States, 441 U.S. 238 (1979).

A. *The Need for Express Authorization*

Several courts are in agreement with the *Dalia* majority's decision that the magistrate approving a government application for surveillance need not include a surreptitious entry provision in the eavesdropping order.[261] One argument in support of this position is that surreptitious entry for the limited purpose of placing bugging equipment is not independently within the protections of the fourth amendment and, therefore, any entry provision is surplusage.[262]

This rationale ignores the property and security interests at the heart of the fourth amendment. The basic purpose of the amendment is "to safeguard the privacy and security of individuals against arbitrary invasions by government officials."[263] The amendment protects people by protecting their reasonable privacy expectations relating to both conversations and physical areas.[264]

It is true, as the majority in *Dalia* recognized, that requiring express authorization for covert entry is inconsistent with the warrant procedure as it is applied in other contexts. Traditionally, the intrusion incurred by the execution of conventional warrants is considered a single intrusion of privacy for purposes of the fourth amendment, even though the search infringes upon the target's interests in both the uninterrupted and private enjoyment of the property seized and in the privacy of the premises which had contained the seized property. Almost one hundred years ago the Supreme Court recognized that entries made in the execution of search warrants are but "aggravating incidents of actual search and seizure."[265] Similarly, when an officer has a valid arrest warrant and

---

261. *See* United States v. Scafidi, 564 F.2d 633, 639–40 (2d Cir. 1977), *cert. denied*, 436 U.S. 903 (1978) ("[T]he most reasonable interpretation of the orders . . . is that they implied approval for secret entry. Any order . . . must, to be effective, carry its own authority to make such reasonable entry as may be necessary. . . ."); United States v. Dalia, 426 F. Supp. 862, 866 (D.N.J. 1977), *aff'd*, 575 F.2d 1344 (3d Cir. 1978), *aff'd*, 441 U.S. 238 (1979) ("[I]mplicit in the court's order is concomitant authorization for agents to covertly enter the premises in question. . . ."); United States v. London, 424 F. Supp. 556, 560 (D. Md. 1976) ("Necessarily concomitant to and envisioned in the court order . . . was the covert installation. . . ."). *But see* Application of the United States, 563 F.2d 637, 644 (4th Cir. 1977) (permission to enter surreptitiously cannot be inferred from an order sanctioning only surveillance); United States v. Ford, 553 F.2d 146, 154–55 (D.C. Cir. 1977) (surreptitious entry must be separately authorized and the provision must be particularized to comply with the fourth amendment); United States v. Finazzo, 429 F. Supp. 803, 806–08 (E.D. Mich. 1977), *aff'd*, 583 F.2d 837 (6th Cir. 1978), *vacated*, 441 U.S. 929 (1979) (a separate order is required); United States v. Rowland, 448 F. Supp. 22, 24–25 (N.D. Tex. 1977) (decision whether covert entry needed should not be left to law enforcement agencies).

262. United States v. Ford, 553 F.2d 146, 153 (D.C. Cir. 1977). The court rejected this argument by the Government. *Id.* at 154–55.

263. Camara v. Municipal Court, 387 U.S. 523, 528 n.27 (1967), *quoted with approval in* Berger v. New York, 388 U.S. 41, 53 (1967) and United States v. Ford, 553 F.2d 146, 153 (D.C. Cir. 1977).

264. *See* United States v. Miller, 425 U.S. 435, 440–43 (1976).

265. Boyd v. United States, 116 U.S. 616, 622 (1886).

probable cause to believe the person he seeks is at home, he may enter that person's home to make the arrest without also possessing a search warrant or other authorization to enter.[266]

The majority found no distinctions between the conventional warrant and the surveillance order sufficient to justify a requirement that the latter contain express authorization for a covert entry. In dissent, Justice Brennan argued that an entry made pursuant to carrying out a conventional warrant, however, cannot properly be analogized to one made in order to place or to remove a surveillance device, for the entry in the latter situation constitutes a greater intrusion than one made in the former instance and changes the nature of the search. The additional element of secretive physical trespass upon premises to implement the electronic surveillance "entails an invasion of privacy of constitutional significance distinct from, although collateral to, that which attends the act of overhearing private conversations."[267] Indeed, such an entry is tantamount to an independent search and seizure because bugging can be accomplished without surreptitious entry. Eavesdropping by non-trespassory means penetrates only the target's reasonable privacy expectations with regard to his spoken words. However, when officers physically enter private premises in which the target of the surveillance also has a reasonable privacy expectation, the officers can scrutinize physical objects which would not be disclosed to them by non-trespassory means of surveillance. Finally, because the entry is made surreptitiously and the activities of the officers once inside the premises are unmonitored, the intrusion in surveillance cases is more severe than that which occurs in conventional cases.

B. *Fourth Amendment Requirements for a Valid Warrant*

With only a few limited exceptions, the fourth amendment requires that searches be conducted only after officers have obtained a search warrant. Three elements of the warrant requirement — that warrants be issued by a neutral magistrate, be particular, and be issued only upon probable cause[268] — are important in determining whether the fourth amendment mandates the inclusion in an eavesdropping warrant of explicit authority to break and enter.[269]

---

266. *See, e.g.*, United States v. Cravero, 545 F.2d 406, 421 (5th Cir. 1976), *cert. denied*, 429 U.S. 1100 (1977).

267. Application of the United States, 563 F.2d 637, 643 (4th Cir. 1977).

268. See note 27 *supra*.

269. *See* notes 258 to 260 and accompanying text *supra*. The argument has been made that even if breaking and entering requires specific authorization, trick entries do not. United States v. Ford, 553 F.2d 146 (D.C. Cir. 1977). In United States v. Phillips, 497 F.2d 1131 (9th Cir. 1974), the court found that entries gained by ruse, even if undertaken without notice of authority and purpose, do not violate § 3109 because such entries do not constitute a breaking and entering. From this, the government in *Ford* argued that a trick entry can be likened to a consented entry, which is not subject to the warrant requirement

In *Dalia* the majority held that an order to intercept conversations could be in full compliance with these requirements without expressly noting that the surveillance was to be accomplished by means of clandestine entry to place the listening devices.[270] The justices found nothing in either the language of the fourth amendment or the Court's interpretations of that language requiring that warrants contain a "specification of the precise manner" of their execution.[271] Characterizing covert entry as merely the "mode of execution" rather than as an invasion of a separately protected privacy expectation, the justices concluded that holding the warrant clause of the fourth amendment to require distinct authorization of such an entry would "extend the warrant clause to the extreme."[272] A close look at the three elements of the warrant requirement of the fourth amendment reveals otherwise.

1. Issuance by a Neutral and Detached Magistrate

The Supreme Court has frequently emphasized that the directive of the fourth amendment requires adherence to judicial processes.[273] Searches conducted outside the judicial process, without prior approval by a judge or magistrate, are with few exceptions unreasonable per se under the fourth amendment.[274] The warrant requirement of prior judicial approval was included so that an objective mind could determine the law enforcement officials' need to invade the right of privacy and security protected by the fourth amendment.[275] The amendment directs that whenever practical, a "government search and seizure should represent both the efforts of the officer to gather evidence . . . and the judgment of the magistrate that the collected evidence is sufficient to

---

of the fourth amendment. *See* Schneckloth v. Bustamonte, 412 U.S. 218 (1973). This proposition, however, was rejected by the *Phillips* court:

> To be valid, a consent must be intelligently and knowingly given. Before a person can be deemed to have "knowingly" consented, he must be aware of the purpose for which the agent is seeking entry. . . . A ruse entry, by its very nature, runs contra to the concept of an intelligent consent of waiver.

497 F.2d at 1135 n.4.

270. In *Dalia*, the court order was based upon a neutral magistrate's independent finding of probable cause to believe that Dalia was committing specifically enumerated federal crimes, that his office was being used in connection with the commission of those crimes, and that bugging the office would intercept oral communications relating to those offenses. The order also set forth the exact location and dimensions of Dalia's office, and the surveillance was restricted to the interception of oral communications of Dalia and others concerning the enumerated offenses at Dalia's business office. 441 U.S. at 256.

271. *Id.*

272. *Id.* at 257–58.

273. United States v. Jeffers, 342 U.S. 48, 51 (1951), *cited in* United States v. Katz, 389 U.S. 347, 357 (1967).

274. *See, e.g.*, Warden v. Hayden, 387 U.S. 294, 298–300 (1967); McDonald v. United States, 335 U.S. 451, 454–56 (1948); Carroll v. United States, 267 U.S. 132, 153, 156 (1925). *See also* note 210 *supra*.

275. McDonald v. United States, 335 U.S. 451, 455 (1948).

justify invasion of a citizen's private premises or conversation."[276] The aim of this requirement is to eliminate those searches where the weight and credibility of the information presented by the complaining officer and assessed by the magistrate is insufficient to establish probable cause to justify a search. Justice Brennan observed that the fourth amendment tightly restricts the executing officer within the bounds established by the warrant in order to be certain that those searches considered necessary remain as circumscribed as possible. Because any intrusion caused by a search and seizure is an evil, "no intrusion at all is justified without a careful prior determination of necessity."[277]

Furthermore, the *particular* intrusion to be made must be justified. The police officer must possess "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant *that intrusion*."[278]

From this, the ostensible conclusion is that the fourth amendment requires not only that law enforcement officials obtain authorization from a magistrate to conduct electronic surveillance, but also that they obtain authorization for entering and trespassing upon those premises. Surveillance accompanied by forcible entry or entry by ruse involves intrusions upon the target's privacy expectations regarding both his spoken words and the physical premises of his home or office. The control that the fourth amendment requires the authorizing court to exercise exists only by having the court use its independent discretion as to the need for covert entry after that need has been established to the court's satisfaction by the complaining officer under oath.

This control also is mandated by Title III, even though the statute does not explicitly require that a court separately approve an entry in addition to sanctioning the surveillance. The argument has been made that although the statute requires general supervision by courts, there is not even an implied imposition upon them to supervise the practical steps of enforcement. This, it is argued, follows from the fact that Title III, a highly detailed statute, makes no mention of the need for a separate, explicit authorization of entry.[279] The statute requires only a particular description of the place where the communication is to be intercepted,[280] not a specification by the judge issuing the order of the installation method.[281]

This argument overlooks several important considerations. First, if Congress did not intend for Title III to authorize forcible entry implicitly, there was no need to include in the statute a requirement that such entry be explicitly authorized by the magistrate or judge issuing the surveillance order. In addition, in light of the highly intrusive nature of an electronic surveillance

276. United States v. United States District Court, 407 U.S. 297, 316 (1972).

277. Coolidge v. New Hampshire, 403 U.S. 443, 467 (1971).

278. Terry v. Ohio, 392 U.S. 1, 21 (1968) (emphasis added, footnotes omitted).

279. United States v. Scafidi, 564 F.2d 633, 640 (2d Cir. 1977), *cert. denied,* 436 U.S. 903 (1978).

280. 18 U.S.C. § 2518(4)(b) (1976 & Supp. III 1979). Similarly, *id.* § 2518(1)(b).

281. United States v. Scafidi, 564 F.2d 633, 643 (2d Cir. 1977), *cert. denied,* 436 U.S. 903 (1978) (Gurfein, J., concurring).

search and seizure, the court should be able to establish some controls upon the methods by which law enforcement officers carry out the surveillance orders. This was recognized in the congressional findings on electronic surveillance:

> To safeguard the privacy of innocent persons, the interception of wire or oral communications where none of the parties to the communication has consented to the interception should be allowed only when authorized by a court of competent jurisdiction and should remain under the control and supervision of the authorizing court.[282]

Thus, unless an exception to the warrant requirement can be found to be present in surveillance cases, the fourth amendment requirement of a neutral predetermination[283] of the scope of a search mandates explicit judicial authorization for forcible entry. In *United States v. Scafidi*,[284] the Second Circuit created a new exception to the fourth amendment provisions, reasoning that the judge or magistrate issuing the surveillance order lacks the requisite expertise to specify what manner of execution would be appropriate in a particular set of circumstances.[285] The court found that it would be naive to impute to a district judge the familiarity with the installation of bugging devices or the premises in which they are to be installed that would be necessary for him to be able to specify a method of entry, the proper location of the bug, and the steps necessary to be certain it would function properly.[286] Once a court is convinced of the need for electronic surveillance, the appropriate law enforcement agency should dictate the precise means for carrying out the judge's order. It would be an invasion of the province of law enforcement agencies for a court to make such a decision. The court would be assuming its competence to be greater than that of

---

282. Pub. L. No. 90–351, § 801, 82 Stat. 211 (1968).

283. In *Ford*, the D.C. Circuit concluded that post-entry review would be inappropriate, finding the logic of the Supreme Court when it rejected post-surveillance review applicable to the trespassory aspect of surveillance. The Court had stated that "post-surveillance review would never reach the surveillances which failed to result in prosecutions. Prior review by a neutral and detached magistrate is the time-tested means of effectuating Fourth Amendment rights." United States v. United States District Court, 407 U.S. 297, 318 (1972) (citations omitted), *quoted in* United States v. Ford, 553 F.2d 146, 161 n.47 (D.C. Cir. 1977).

The D.C. Circuit noted that both Title III and the parallel provisions of the D.C. Code allow individual conversations to be seized without a prior determination by a magistrate that they are covered by the order authorizing the surveillance. Upon termination of the surveillance, if it is challenged, a reviewing court decides whether particular conversations were seized illegally. The court found that this procedure was similar to post-search examination of whether police had exceeded the authority of a conventional warrant by seizing items not particularly described, and that it did not dispose of the fourth amendment's requirement that there be prior judicial authorization based on probable cause for an official intrusion on private premises. 553 F.2d at 167.

284. 564 F.2d 633 (2d Cir. 1977), *cert. denied*, 436 U.S. 903 (1978).

285. *Id.* at 640.

286. *Id.*

the agents who presumably are proficient in their field. Furthermore, a court-specified order would carry with it the risk of illegality if there should be any deviations from its specifications.[287]

This argument, however, fails to consider the issue properly. When determining whether a general exception to the warrant requirement is justified, the issue to be resolved is whether authority to enter "should be evidenced by a warrant, which in turn depends in part upon whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search."[288] The contention that courts lack the expertise necessary to assess adequately the various methods of entry and installation leads not only to the conclusion that the warrant requirement should be abandoned, but also to the conclusion that courts are inherently incapable of determining the need for electronic surveillance and the reasonableness of police action taken pursuant to installing or maintaining surveillance devices.[289] Courts repeatedly must face and rule upon the most difficult issues facing society. They are capable of determining the need for surreptitious entry pursuant to planting or maintaining an eavesdropping device, and their authorization acknowledging this method of surveillance need not be drawn with exactitude.[290]

2. Probable Cause

In addition to requiring judicial authorization of the need for electronic surveillance, the warrant clause requires that such authorization be given only upon a showing of probable cause.[291] This requirement is coextensive with the government's responsibility to establish the reasonableness of a search prior to its execution. Under the traditional interpretation of probable cause, the government must demonstrate a reasonable belief that the search will reveal the " 'place of concealment of evidence of [a] crime.' "[292] One commentator has pointed out that this traditional standard imposes no duty upon police to justify in advance the reasonableness of covert entry, for its use affects neither the place nor the criminal relevance of the objects of the eavesdropping.[293] However,

---

287. The court assumed that explicit judicial authorization would have to be highly specific; the judge would have to consult with agents on the best possible method of entry, perhaps visit the premises, and include in the order explicit directions as to how to proceed. *Id.* Officers' need for flexibility in the time, manner, and method of entry was also stressed in McNamara, *supra* note 99, at 2–4, 15.

288. Camara v. Municipal Court, 387 U.S. 523, 533 (1967), *quoted in* United States v. Ford, 553 F.2d 146, 162 (D.C. Cir. 1977).

289. 553 F.2d at 162.

290. *See* text accompanying notes 329 to 331 *infra*.

291. *See* note 37 *supra*.

292. Zurcher v. Stanford Daily, 436 U.S. 547, 558 (1978) (quoting United States v. Manufacturers Nat'l Bank of Detroit, 536 F.2d 699, 703 (6th Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977).

293. Note, *supra* note 252, at 210.

it has been suggested that there also exists a flexible probable cause standard which subjects particularly intrusive searches to a more stringent test.[294]

This flexible probable cause test was first adopted by the Supreme Court in *Camara v. Municipal Court*,[295] a civil case in which the Court approved the balancing of "the need to search against the invasion which the search entails."[296] This analysis was first extended to a criminal search in *Terry v. Ohio*,[297] in which the Court upheld a policeman's search of a person whom he reasonably believed to be armed, dangerous, and engaged in criminal activity. The Court found that although the officer had had less than traditional probable cause for this belief, the protection of third parties and police outweighed the intrusion.[298] Although in *Terry* the Court considered the issue of flexible probable cause in the context of a warrantless search, its dictum in *United States v. United States District Court* [299] extended this balancing approach to surveillance orders issued for criminal cases involving domestic security.

The flexible probable cause test could extend to the evaluation of a warrant obtained in the investigation of an ordinary crime.[300] The Court's requirement in *Berger* that the government must demonstrate exigency before it may obtain an order for electronic surveillance established that the traditional probable cause standard not only can be relaxed as it was in *Camara* and *Terry*, but also can become more rigorous when the search is particularly intrusive.[301]

Some exceptionally intrusive searches, such as those occurring in exigent circumstances, cannot be subjected to standards of pre-search justification more stringent than those traditionally imposed.[302] When prior justification is possible, however, there should be a balancing of "the burden on law enforcement officials against the fulfillment of the functions performed by the process of prior justification."[303]

One such function of the process of prior justification is the imposition of the judgment of a neutral magistrate for that of an interested policeman regarding the justifiability of effectuating the surveillance order by means of a covert entry.[304] Furthermore, the additional burden that prior justification for covert

---

294. *Id.*

295. 387 U.S. 523 (1967).

296. *Id.* at 537.

297. 392 U.S. 1 (1968).

298. *Id.* at 21–22.

299. 407 U.S. 297 (1972).

300. *See* Note, *supra* note 252, at 212.

301. *Id.* There is also evidence of a more restrictive probable cause test in Schmerber v. California, 384 U.S. 757 (1966), in which the Court suggested that before a search could intrude into a body there must be a clear indication of, as opposed to a reasonable belief in, the presence of the objects being sought.

302. Exigent circumstances, by definition, arise only at the moment of search. *See* Note, *supra* note 252, at 214.

303. *Id.*

304. *See id.* at 215–16; notes 265 to 293 and accompanying text *supra*. A second function of prior justification, the avoidance of a post-search determination of reasonableness in which the factual issues are distorted by hindsight, is not served. The after-the-fact

entry would place on the government seems slight. Because officials must always obtain a court order before they can conduct surveillance, the added burden of providing prior justification for a covert entry adds only to the paperwork involved in making an application for a surveillance order. It does not necessitate an additional trip to the magistrate, which would cause a further delay in gathering evidence of a crime.[305]

Even if a more stringent test of probable cause is not required, both *Berger* and Title III mandate that the showing of probable cause to search and the intrusion permitted in the surveillance order be coextensive. A showing of probable cause for an invasion of conversational privacy does not validate the necessity for trespassory entries. As the District of Columbia Circuit has pointed out, when two separate invasions of protected privacy exist, the incursion is greater than from either one alone.[306]

Further support for the proposition that the scope of the intrusion permitted and the demonstration of probable cause must be coextensive can be found in the legislative history of section 2518(4)(b) of Title III.[307] The legislative history of this section, which has been interpreted as an indication of congressional intent to allow surreptitious entries,[308] contains a reference to *Steele v. United States*,[309] in which the Supreme Court established that the probable cause showing determines the scope of privacy invasion to be permitted.[310]

Thus, whether the showing of probable cause is tested by a flexible standard or by the premise that the invasions authorized by the warrant should have the same scope as the probable cause to search justifies, the probable cause requirement of the fourth amendment mandates prior justification to the court of the need to break and enter, and explicit recognition by the court of that need.

3. The Particularity Requirement

The warrant clause of the fourth amendment also contains a requirement that a warrant "particularly describe the place to be searched and the persons or things to be seized."[311] This clause mandates that the language of the warrant be the sole source of authority that the executing officer has for the search.[312]

---

justification of the surreptitious entry may be of a technical nature which is obviously attributable to what was known about the premises or the target of the search before the surveillance order was obtained. Note, *supra* note 252, at 215.

305. *Id.*

306. United States v. Ford, 553 F.2d 146, 168 n.62 (D.C. Cir. 1977).

307. S. REP. No. 1097, 90th Cong., 2d Sess. 103, *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 2112, 2192.

308. *See* text accompanying notes 105 to 107 *supra.*

309. 267 U.S. 498 (1925).

310. The case also has been cited for the proposition that a warrant is overbroad if it allows entries more extensive than can be justified by the demonstrated cause. *See generally* text accompanying notes 326 to 332 *infra.*

311. U.S. CONST. amend. IV. *See* note 37 *supra.*

312. *See* Stanford v. Texas, 379 U.S. 476, 485 (1965); Marron v. United States, 275 U.S. 192, 196 (1927); Mascolo, *Specificity Requirements for Warrants Under the Fourth Amendment Defining the Zone of Privacy*, 73 DICK. L. REV. 1, 10–11 (1968).

Therefore, there must be express authorization in a surveillance order for surreptitious entry into private premises. This rule prevents the officer from overestimating his scope of authority and from looking outside the warrant for indications of the limits of his search. It has been suggested that because the boundaries and scope of the search are changed by the added intrusion of a covert entry to electronic surveillance, the court issuing the eavesdropping order must be given the opportunity to decide whether entry is justified in a particular case.[313] Since the scope of the search is limited to what is authorized in the warrant plus any supplementary information specifically incorporated by reference into it,[314] the fact that the judge or magistrate issuing the surveillance order may have actual knowledge that the surveillance may involve a covert entry[315] is insignificant unless that knowledge is incorporated into the surveillance order.

The argument has been made that if the surveillance order particularly describes the premises where the surveillance will take place, establishes the existence of probable cause to eavesdrop, provides a description of the specific offenses of which evidence is sought, and allows for interceptions to be made for only a limited time, the requirements of both Title III and the fourth amendment have been met.[316] Such a warrant would comply with the traditional interpretation of particularity, for the particularity clause was added to the fourth amendment to prevent general, rummaging searches.[317] If the order is so detailed as to include all of the above information it could not be considered a general warrant, and the search is not a general one if the officers enter solely for the purpose of effectuating the surveillance order.[318]

The flaw in this argument is that traditional approaches to search and seizure questions are not always applicable to searches and seizures conducted by electronic surveillance. With its statement in *Katz* that the fourth amendment applies to people and not places,[319] the Supreme Court expanded the reach of the amendment, and consequently, of the particularity clause. The scope of the amendment cannot turn upon whether or not the police made a rummaging search. "'It is the individual's interest in privacy which the Amendment protects, and that would not appear to fluctuate with the "intent" of the invading officers.'"[320]

---

313. *See* text accompanying notes 273 to 299 *supra*.

314. Mascolo, *supra* note 312, at 12.

315. *See, e.g.*, Dalia v. United States, 575 F.2d 1344, 1346 n.3 (3d Cir. 1978), *aff'd*, 441 U.S. 238 (1979).

316. United States v. Scafidi, 564 F.2d 633, 643 (2d Cir. 1977), *cert. denied*, 436 U.S. 903 (1978) (Gurfein, J., concurring).

317. *See* Andresen v. Maryland, 427 U.S. 463, 478–80 (1976); Coolidge v. New Hampshire, 403 U.S. 443, 467 (1971); Stanford v. Texas, 379 U.S. 476, 481 (1965).

318. United States v. London, 424 F. Supp. 556, 560 (D. Md. 1976).

319. 389 U.S. 347, 351 (1967).

320. Zweibon v. Mitchell, 516 F.2d 594, 649 n.173 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 944 (1976) (quoting Abel v. United States, 362 U.S. 217, 255 (1960) (Brennan, J., dissenting)).

In light of *Katz,* the particularity clause should protect people and their privacy and limit all aspects of a search to what has been justified by a showing of probable cause.[321] Because a covert entry to effectuate electronic surveillance adds appreciably to the intrusiveness of the search, and because interception need not always be implemented by a covert entry,[322] the particularity clause mandates that surreptitious entry be specifically authorized in the surveillance order.

The fourth amendment requirements that a warrant issue only upon probable cause, particularity, and approval by a neutral magistrate demonstrate singularly and collectively that due to the highly intrusive nature of trespassory entry incident to electronic surveillance, such entry must be expressly authorized. A corollary to those requirements, the least intrusive means test,[323] also supports this conclusion. This test, which commands that the issuing court seek to minimize the privacy intrusion caused by a surreptitious entry, frequently results in the court's finding that the surveillance should be accomplished by means of a wiretap rather than by installing a listening device on private premises.[324] If, however, the judge determines that the surveillance should be implemented by means of a surreptitious entry, he must ensure that the invasion occasioned by the entry is the least intrusive one possible. This is impossible when the authorization to enter is implicit, for by definition such an authorization places no limitations upon the number or manner of entries. By contrast, explicit authorization gives citizens the knowledge that the eavesdropping is limited to the "narrowest precise point" necessary for the law enforcement officials to accomplish their purpose, and that the reasons for physical intrusion upon their privacy are included in public records and may be reviewed by a court whenever the surveillance results in a prosecution.[325]

C. *The Form of Express Authorization*

When a magistrate determines that a trespassory entry is warranted, the surveillance order should include separate, express authorization for each surreptitious entry to be made. The order need not specify the manner or time of day of each entry. The fourth amendment commands that an intrusion on private premises have prior valid authorization based upon sufficient probable cause.[326] In *Berger,* the Supreme Court strongly criticized those provisions of the New York Statute that authorized" the equivalent of a series of intrusions, searches and seizures pursuant to a single showing of probable cause."[327] In

---

321. *See* text accompanying notes 291 to 310 *supra.*

322. *See* Note, *supra* note 252, at 219–20.

323. This requirement was expressly addressed in Berger v. New York, 388 U.S. 41, 53–60 (1967).

324. Comment, *supra* note 169, at 605–06. *See also* 31 VAND. L. REV. 1055, 1067–68 (1978).

325. United States v. Ford, 414 F. Supp. 879, 885 (D.D.C. 1976), *aff'd,* 553 F.2d 146 (D.C. Cir. 1977).

326. *See* text accompanying notes 291 to 310 *supra.*

327. Berger v. New York, 388 U.S. at 41, 59 (1967).

accord with the mandate of the fourth amendment as expressed in *Berger,* Title III requires that demonstration of probable cause be coextensive with the intrusion allowed by the court.[328] Affidavits submitted by law enforcement officials in support of their applications for court authorization, therefore, should allege facts, which if true, would demonstrate that non-trespassory methods of electronic surveillance would not be successful and that the conversations can be seized only following trespassory entry into private premises to plant a listening device. Only if that first entry is inadequate for some reason can the government show the need for additional covert entries. Similarly, should the government apply for an extension of the original surveillance order, the court must decide anew if a trespass might be necessary.

Although there must be specific authorization of each trespassory entry, it has been recognized that the manner and time of entry need not be delineated expressly.[329] It is doubtful that one method of entry would be more intrusive than another provided there is no injury to any person who owns or uses the premises and no major damage to the premises.[330] Traditionally, courts have not found that a warrant must specify the time of day of entry.[331] Any indications that conventional searches conducted at night are more intrusive than their daylight counterparts have rested on the offensiveness of rousing the occupants of the premises to be searched in order to provide them with notice of the search.[332] In electronic surveillance, however, where pre-search notice is not a factor, and where entry is usually attempted when the premises are vacant, this consideration becomes irrelevant.

Thus, the *Dalia* majority's fears are unfounded that requiring an express statement in a surveillance order to allow covert entry would be the equivalent of specifying the precise manner of execution. Consistent with the fourth

---

328. This is indicated in the legislative history of Title III:

> Where it is necessary to obtain coverage to only one meeting, the order should not authorize additional surveillance. . . . Where a course of conduct embracing multiple parties and extending over a period of time is involved, the order may properly authorize proportionately longer surveillance, but in no event for longer than 30 days, unless extensions are granted.

S. REP. NO. 1097, 90th Cong., 2d Sess. 101, *reprinted in* [1968[U.S. CODE CONG. & AD. NEWS 2112, 2190. And again: "As with initial orders, extensions must be related in time to the showing of probable cause. . . . Otherwise there is a danger that the showing of probable cause and the additional information in the application will become stale." *Id.* at 103, *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS at 2192.

The D.C. Circuit found that these sections, although dealing with the seizure of conversations rather than entries, rebut any argument that Congress planned to change the traditional fourth amendment rule that the demonstration of probable cause must match the intrusion authorized. United States v. London, 553 F.2d 146, 166–67 n.63 (D.C. Cir. 1977).

329. Note, *supra* note 252, at 221–22.

330. *Id.* The dangers of discovery and confrontation apply to both forcible entry and entry by ruse. *Id.* at 221 n.133.

331. *Id.* at 221–22. *See also* Gooding v. United States, 416 U.S. 430, 454–57 (1974).

332. Gooding v. United States, 416 U.S. 430, 462 (1974) (Marshall, J., dissenting).

amendment's requirements, the warrant must only state that a covert entry to place or remove electronic surveillance equipment can be made; the procedural details can be left to the agents who will be conducting the surveillance.

Finally, to demand that magistrates grant express authority to break and enter would not "promote empty formalism" as the majority argued. Because surveillance may be accomplished by less drastic means than a physical invasion of the target's home or office, requiring law enforcement officials to obtain prior judicial approval of covert entries might serve to prevent unnecessary and improper intrusions.

Conclusion

Prior to the Supreme Court's decision in *Dalia v. United States,* case law on the issue of the permissibility of surreptitious entry incident to electronic surveillance was in disarray, with little common thread of analysis. The Court's decision has put an end to further conflict among the circuits. However, the majority opinion is highly unsatisfactory in that it brushed over several aspects of the basic questions with which the Court was faced and failed to conform to traditional concepts of fourth amendment protections. Notwithstanding the majority's conclusion, it is questionable whether any existing statute implicitly authorizes surreptitious entry to install an eavesdropping device.

If such entries are justifiable, they should be permitted only under limited conditions, for they add an element of intrusion to a method of search and seizure that is already more intrusive than conventional searches and seizures. Forcible entry adds to the intrusion on privacy attendant to eavesdropping by providing additional potential for police abuse, by offending society's sense of security, and by enabling the government to engage in bugging, the most offensive form of electronic surveillance. This increased invasion of privacy becomes constitutionally significant in light of the concern that a search take place by the least intrusive means possible. Surreptitious entry should be allowed only when the judge issuing the surveillance order is apprised of the planned entry, determines that non-trespassory interception has not been or will not be successful, and explicitly authorizes such an entry in a way that does not offend the substantive requirements of the fourth amendment. This approach would accommodate reasonably the enforcement of criminal law and the fourth amendment rights of citizens whose privacy is invaded by electronic surveillance.