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COMMENT

THE PROBLEM OF SURREPTITIOUS ENTRY TO IMPLEMENT A TITLE III INTERCEPT ORDER: AN ARGUMENT IN FAVOR OF EXPRESS JUDICIAL AUTHORIZATION

I. INTRODUCTION

In 1968, Congress passed Title III of the Omnibus Crime Control and Safe Streets Act,[1] which established an elaborate procedure for judicial authorization of electronic surveillance for specified crimes.[2] The essential scheme of the Act is to prohibit all interceptions of wire and oral communications except as authorized by the Act itself. Though carefully circumscribed, Title III confers authority upon the Attorney General of the United States or his specially designated assistant to sanction wiretaps and oral on-premise interceptions after a finding of probable cause and approval by a federal judge.[3]

The Act represents an attempt by Congress to establish a limited system of electronic surveillance within the guidelines of the United States Supreme Court's decisions in *Berger v. New York*[4] and *Katz v. United States*.[5] Prior to those decisions, oral communications had not been afforded fourth amendment protection. In enacting Title III, Congress recognized the potential law enforcement value of such surveillance in the fight against organized crime.[6] At the same time, however, Congress was seriously concerned with protecting the privacy of individual thought and expression.[7] Consequently, Title III reflects a tension between the effective detection and prosecution of organized crime and the right of personal privacy against arbitrary intrusion by law enforcement officials.[8] Nonetheless, it would appear that "although Title III authorizes invasions of individual privacy under certain circumstances, the protection of privacy was an overriding congressional concern."[9]

Despite its comprehensive nature, Title III is strangely silent as regards the implementation of judicially authorized electronic surveillance.[10] As a result, the circuit courts of appeal have divided in their interpretation of the statute regarding the manner and method of its implementation. In essence, the question they confronted was whether, and to what extent, district courts were required to explicitly authorize breaking and entering as a means of implementing electronic eavesdropping authorization. Whereas some circuits took the position that express authorization was unnecessary as it was implicit in the Title III intercept order itself,[11] one circuit held that Title III implicitly authorized break-ins, but only with specific judicial approval.[12] In addition, one circuit held that the

[1] 18 U.S.C. §§ 2510–2520 (1976) [hereinafter referred to as Title III].

[2] 18 U.S.C. § 2516(1)(a)-(g) (1976).

[3] 18 U.S.C. §§ 2516, 2518 (1976).

[4] 388 U.S. 41 (1967).

[5] 389 U.S. 347 (1967).

[6] *See* § 801(c), 82 Stat. 211. *See also* PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY (1967).

[7] *See* § 801(d), 82 Stat. 211. *See also* S. REP. NO. 1097, 90th Cong., 2d Sess. 66, *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 2112. "The need for comprehensive, fair and effective reform setting uniform standards is obvious. *New protections for privacy must be enacted.* Guidance and supervision must be given to State and Federal law enforcement officers. This can only be accomplished through national legislation. This the subcommittee proposes." *Id.* at 69, *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 2156 (emphasis added).

[8] United States v. Vento, 533 F.2d 838, 844 (3d Cir. 1976).

[9] Gelbard v. United States, 408 U.S. 41, 48 (1972) (footnote omitted).

[10] At this point it is necessary to note a distinction between electronic eavesdropping and wiretapping. Wiretapping refers to the interception of telephone conversations and usually does not require surreptitious entry to implement. On the other hand, electronic eavesdropping refers to interception of oral communications not transmitted by wire. Planting "bugs" usually requires surreptitious entry into the place or places where surveillance is to occur as a means of implementation. *See* NATIONAL COMM'N FOR THE REVIEW OF FEDERAL AND STATE LAWS RELATING TO ELECTRONIC SURVEILLANCE 43–44 (1976). This comment will only be concerned with electronic eavesdropping and the problems arising from surreptitious entry.

[11] *See* United States v. Dalia, 575 F.2d 1344 (3d Cir. 1978), *aff'd*, 99 S. Ct. 1682 (1979); United States v. Scafidi, 564 F.2d 633 (2d Cir. 1977), *cert. denied*, 436 U.S. 903 (1978).

[12] Application of United States, 563 F.2d 637 (4th Cir. 1977).

fourth amendment required separate consideration of covert entry to plant a "bugging" device in the warrant procedure.[13] Two other circuits held that neither Title III, nor any other federal statute, empowered district courts to authorize break-ins.[14]

Finally, on April 18, 1979, the issue was settled by the United States Supreme Court in *Dalia v. United States*.[15] Deciding three separate questions, the Court first ruled unanimously that the fourth amendment ban on unreasonable search and seizure is not an absolute prohibition against covert entry under any circumstances. Next, by a six-to-three vote, it held that although Title III does not explicitly authorize breaking and entering, it gives the courts the inherent power to do so. Lastly, dividing five to four, the Court held that the fourth amendment does not require that a Title III intercept order include a specific authorization to covertly enter the premises described in the order. In other words, the Court took the position that breaking and entering to install the surveillance device was implicitly countenanced by the intercept order.

The purpose of this comment is to examine the *Dalia* decision in terms of general fourth amendment requirements. In particular, in examining the constitutional, judicial, and statutory bases for the Court's decision, the focus will be upon the historical antecedents to the enactment of the fourth amendment. Furthermore, the interface between the fourth amendment and electronic surveillance in general will be considered.

Despite the *Dalia* decision, requiring a judicial officer to expressly evaluate the necessity for covert entry seems to be consistent with the basic fourth amendment emphasis upon placing a neutral and detached magistrate between law enforcement officials and the public. Moreover, such supervision would best ensure minimal intrusion upon protected fourth amendment interests. This is of considerable importance because such entry implicates serious constitutional interests distinct from that of protecting the privacy of one's oral communications. These additional interests include recognition of one's sense of personal security as well as the prevention of the possibility of physical destruction of one's property resulting from a forcible entry. Furthermore, the existence of the "plain view" doctrine weighs heavily toward the policy of specific judicial approval of break-ins. This doctrine suggests that "objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence."[16]

Ultimately, this comment will conclude that the Supreme Court should not have read Title III to countenance surreptitious entry absent express judicial authorization. In addition, this comment will suggest that the Court gave short shrift to the feasibility of alternative methods of intercepting on-premise oral communications.[17] Such a consideration would reflect the statute's general emphasis upon the minimization of the intrusion and would appear to be consistent, in particular, with the requirement that normal investigative procedures have failed or appear likely to fail before an intercept order may be granted initially.[18]

II. The Fourth Amendment Framework

The fourth amendment[19] of the United States Constitution protects the right of people against unreasonable searches and seizures. It provides that a search will be reasonable only where there is probable cause to search.[20] Generally, "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions."[21] The central concern of this amendment is to protect an individual's liberty and privacy from arbitrary and oppressive interference by government officials.[22] Consequently, a judicial officer must balance the need for a search against the right of personal security, personal liberty, and private property implicated by such an invasion.[23]

In examining the applicability of the fourth

[13] United States v. Ford, 553 F.2d 146 (D.C. Cir. 1977).

[14] United States v. Santora, 583 F.2d 453 (9th Cir. 1978); United States v. Finazzo, 583 F.2d 837 (6th Cir. 1978).

[15] 99 S. Ct. 1682 (1979).

[16] Harris v. United States, 390 U.S. 234, 236 (1968).

[17] *See* text accompanying notes 205–07 *infra*. *See also* A. Westin, Privacy and Freedom 73–78 (1967).

[18] *See* 18 U.S.C. § 2518(1)(c), (3)(c)(1976).

[19] 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 person or thing to be seized.

U.S. Const. amend. IV.

[20] *Id. See also* Fed. R. Crim. P. 41.

[21] Katz v. United States, 389 U.S. 347, 357 (1967). *See also* United States v. Lefkowitz, 285 U.S. 452, 464 (1932).

[22] *See, e.g.*, Camara v. Municipal Court, 387 U.S. 523, 528 (1967); Wolf v. Colorado, 338 U.S. 25, 27 (1949); United States v. Ford, 553 F.2d 146, 153 n.30 (D.C. Cir. 1970).

[23] United States v. United States Dist. Court, 407 U.S. 297, 314–15 (1972).

amendment to the issue of whether breaking and entering must receive express judicial approval, the "proscription of 'unreasonable searches and seizures' must be read in light of 'the history that gave rise to the words'—a history of 'abuses so deeply felt by the Colonies as to be one of the potent causes of the Revolution.'"[24] This history shows that the basic purpose of the amendment was to put an end to the general warrants[25] and writs of assistance under which officers of the Crown had been empowered to conduct general searches and seizures.[26] "Since no showing of 'probable cause' before a magistrate was required,"[27] these writs were issued by executive rather than judicial officers.[28] Pursuant to such writs, customs officials and other agents of the King were granted authority to invade the homes and privacy of citizens in their search for smuggled goods.[29] Moreover, agents were permitted to seize personal papers to support "charges, real or imaginary, made against them."[30] At the time, James Otis denounced such writs as "'the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was found in an English law book;' since they placed 'the liberty of every man in the hands of every petty officer.'"[31]

To a large extent, the abuses inherent in the general writ system must necessarily have influenced the framing of the fourth amendment.[32] Perhaps the perspective of the Framers was even more influenced by the position taken by Lord Camden in the famous case of *Entick v. Carrington*.[33] In declaring the general warrant for the seizure of papers contrary to the common law, Lord Camden paid particular attention to the "unrestricted discretion" exercised by those who executed the warrants.[34] He stated:

> This power so assumed by the secretary of state is an execution upon all the party's papers, in the first instance. His house is rifled; his most valuable secrets are taken out of his possession, before the paper for which he is charged is found to be criminal by any competent jurisdiction, and before he is convicted either of writing, publishing, or being concerned in the paper.[35]

To correct the abuses of such indiscriminate authority, the scheme of the fourth amendment provides the general safeguard of reasonableness as well as the more particular requirement of the warrant clause.[36] By its terms, all searches and seizures, even if authorized by a warrant, must be reasonable. At the least, there also must be some showing of probable cause. In addition to providing the detailed scrutiny of a neutral magistrate, "a warrant assures the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search."[37] Consequently, with the exception of a few, narrowly drawn situations, one's person, home, papers, and effects may not be searched without a warrant.[38]

In terms of the relevance of the fourth amend-

[24] Chimel v. California, 395 U.S. 752, 761 (1968) (citing United States v. Rabinowitz, 339 U.S. 56, 70 (1950) (Frankfurter, J., with whom Jackson, J., joined, dissenting)).

[25] Under the general warrant, "the name of the person to be arrested was left blank." Henry v. United States, 361 U.S. 98, 100 (1959).

[26] *See, e.g.*, Chimel v. California, 395 U.S. 752 (1968); Weeks v. United States, 232 U.S. 383, 389-91 (1913); Boyd v. United States, 116 U.S. 616, 624-25 (1886).

[27] Henry v. United States, 361 U.S. 98, 100 (1959).

[28] *See* United States v. Chadwick, 433 U.S. 1, 8 (1977).

[29] *Id.*

[30] Weeks v. United States, 232 U.S. at 390.

[31] Boyd v. United States, 116 U.S. at 623.

[32] *Id.* at 627.

[33] 19 How. St. Tr. 1029 (1765).

[34] United States v. Gervato, 474 F.2d 40, 43 (3d Cir. 1972), *cert. denied*, 414 U.S. 864 (1973).

[35] 474 F.2d at 43 (citing Entick v. Carrington, 19 How. St. Tr. at 1064).

[36] *See, e.g.*, McDonald v. United States, 335 U.S. 451 (1948); Johnson v. United States, 333 U.S. 10 (1948).

"Power is a heady thing; and history shows that the police acting on their own cannot be trusted. And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home." McDonald v. United States, 335 U.S. at 456.

"When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent." Johnson v. United States, 333 U.S. at 14.

[37] United States v. Chadwick, 433 U.S. 1, 9 (1977).

[38] Among the exceptions to the warrant requirement are the following:

An automobile may be searched without a warrant to prevent the movement of contraband out of the locality when there is insufficient opportunity to obtain a warrant and probable cause exists. *E.g.*, Carroll v. United States, 267 U.S. 132 (1925). A police officer may search a person without a warrant as an incident to an otherwise lawful arrest as a means of preventing the possible destruction of evidence, protecting himself, and preventing escape from custody. *E.g.*, United States v. Robinson, 414 U.S. 218 (1973); Harris v. United States, 331 U.S. 145 (1947). Following an arrest, an officer may also search the place in which the arrest was made and seize things used to carry on the criminal activity, which are in the immediate possession and control of the accused. Marron v. United States, 275 U.S. 192 (1927). In addition, even absent probable cause to arrest, an officer may "frisk" a person he has properly detained for questioning if he believes that the person may be armed and dangerous. Terry v. Ohio, 392 U.S. 1 (1968).

ment to the issue of breaking and entering to implement a Title III intercept order, it is significant to recognize the amendment's respect for the sanctity and privacy of the home. Essentially, the fourth amendment adopted the principle "that a man's house [is] his castle. . . ."[39] Recently, this core protection against physical entry of private premises has been extended to protect private communications.[40] To the extent that Title III fails to address the question of implementation and thus, according to the United States Supreme Court, is seen as implicitly countenancing breaking and entering, the historical significance of the fourth amendment is undermined. The failure of a detached magistrate to evaluate the need for such entry, followed by covert entry at the discretion of law enforcement personnel, may be seen as analogous to a return to the discredited, unrestrained general warrant system. The experience of history demonstrates that "power is a heady thing; and . . . that the police acting on their own cannot be trusted."[41] Thus, prior to the *Dalia* decision, it would have seemed that any invasion of the otherwise inviolability of the home, as distinguished from the privacy of oral communications within the home, must be expressly authorized by a judicial officer to vindicate the protections of the fourth amendment.[42] That the Court chose to discount the significance of this separate interest is at the very least surprising in light of the potential for significant abuse.

III. The Development of Electronic Surveillance Law

In *Olmstead v. United States*,[43] the United States Supreme Court was confronted with its first case involving electronic surveillance. Facing the question of whether the interception of private telephone conversations by means of wiretapping violated the fourth amendment, the Court held that since Olmstead's telephone line was intercepted without entry upon his premises, the wiretap did not violate the fourth amendment. Chief Justice Taft, speaking for the majority, reasoned that communications over a telephone line did not come within the fourth amendment's protections of "persons, houses, papers and effects." The Chief Justice also stated: "The Amendment does not forbid what was done here. . . . There was no seizure. The evidence was secured by the use of the sense of hearing and that only. There was no entry of the houses or office of the defendants."[44] Justices Holmes, Brandeis, Stone, and Butler dissented strongly.[45] The majority's position has subsequently become known as the "trespass doctrine."

Responding to *Olmstead*, Congress enacted the Federal Communications Act of 1934,[46] the first federal statute dealing with electronic surveillance. Section 605 stated that "[n]o person not being authorized by the sender shall intercept any radio communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person."[47] In *Nardone v. United States*[48] the Court interpreted "any person" as used in the statute to include federal officers, thereby extending the prohibition against wiretapping to them.[49] In the second *Nardone* case,[50] the Court applied the "fruit of the poisonous tree" doctrine[51] and ruled that the

[39] Weeks v. United States, 232 U.S. 383, 390 (1913). Earlier, James Otis had stated: "Now one of the most essential branches of English liberty is the freedom of one's house. A man's house is his castle; and whilst he is quiet he is as well guarded as a prince in his castle." Ker v. California, 374 U.S. 23, 51–52 (1963).

[40] *See* text accompaning notes 54–70 *infra*.

[41] McDonald v. United States, 335 U.S. at 456.

[42] Such authorization would be satisfied by express approvâl for surreptitious entry in the intercept order itself. The point is that a neutral and detached magistrate has considered the necessity for the entry as well as the serious interests involved in permitting such. It should be recognized that the circumstances underlying the issuance of an intercept order are analogous to the issuance of a traditional search warrant. Both the intercept order and the search warrant serve to sanction intrusions otherwise constitutionally prohibited.

[43] 277 U.S. 438 (1928).

[44] *Id.* at 464.

[45] The progress of science in furnishing the Government with means of espionage is not likely to stop with wire-tapping. Ways may some day be developed by which the Government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home. . . . Can it be that the Constitution affords no protection against such invasions of individual security?

. . . .

To protect [the right to be let alone] every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.

Id. at 474, 478 (Brandeis, J., dissenting).

[46] 47 U.S.C. § 605 (1976).

[47] *Id.*

[48] 302 U.S. 379 (1937).

[49] The Court stated: "Congress may have thought it less important that some offenders should go unwhipped of justice than that officers should resort to methods deemed inconsistent with ethical standards and destructive of personal liberty." *Id.* at 383.

[50] 308 U.S. 338 (1939).

[51] *See* Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).

government might not make use of information obtained by means of an illegal wiretap.

In *Goldman v. United States*,[52] the Court held that the action of federal agents in placing a detectaphone[53] on the outer wall of the defendant's hotel room, and thereby overhearing conversations held within the room, did not violate the fourth amendment. Although the agents had earlier committed a trespass to install a listening device within the room itself, the "bug" failed to work. Consequently, the Court expressly reserved a decision as to the fourth amendment overtones of such a trespass. Since the intrusion of a detectaphone was not trespassory, the Court applied the *Olmstead* rationale and found that electronic surveillance, conducted without a physical trespass, was outside the protection of the fourth amendment.

In *Silverman v. United States*,[54] the "trespass doctrine" was taken to its logical conclusion. There, police officers had inserted a microphone with a foot long spike attached to it into the wall of the defendant's house. The "spike-mike" made contact with the home's heating duct and thus converted it into a huge microphone running throughout the entire house. The Court found that such action constituted a trespass and was a violation of the fourth amendment.

> At the very core [of the fourth amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.... This Court has never held that a federal officer may without warrant without consent physically entrench into a man's office or home, there secretly observe or listen, and relate ... what was seen or heard.... [The] decision here does not turn upon the technicality of a trespass upon a party wall as a matter of local law. It is based upon the reality of an actual intrusion into a constitutionally protected area.[55]

Once again, the Court distinguished between the trespass and the surveillance. Expressly refusing to reexamine the rationale of *Olmstead* and *Goldman*, the Court indicated that the surveillance itself was not violative of the fourth amendment. Rather, the emphasis was upon the right to be secure in one's home against unauthorized physical intrusion.

Substantial inroads into the application of the "trespass doctrine" to electronic surveillance began in 1966 with *Berger v. New York*.[56] There, the Court considered the validity of New York's statutory authorization scheme for electronic surveillance.[57] Carefully analyzing the statute's provisions, the Court held the statute unconstitutional on its face because it permitted the seizure of conversations without sufficiently narrow warrant procedures. Although it interposed a neutral and detached magistrate between the police and the public, the statute was found void because electronic surveillance authorization could be obtained without the particularity[58] and limited scope[59] constitutionally required for search warrants. These requirements are essential "to prevent unauthorized invasions of 'the sanctity of a man's home and the privacies of life.'"[60] However, although the Court was unwilling to go so far as to find electronic surveillance per se unconstitutional, it did set forth in great detail specific standards that any constitutional electronic surveillance statute would have to meet.[61]

[52] 316 U.S. 129 (1942).

[53] This device was placed against an office wall in order to hear conversations in the office next door.

[54] 365 U.S. 505 (1961).

[55] *Id.* at 511-12 (citations omitted).

[56] 388 U.S. 41 (1967).

[57] N.Y. CODE CRIM. PROC. LAW § 813-a (McKinney 1958). On the basis of a complaint alleging the demand of a $10,000 payment of a bribe for a liquor license, as well as recorded evidence obtained under the direction of the attorney general, a New York judge, pursuant to the New York statute, issued an order permitting the installation of a recording device in an attorney's office for a period of 60 days. Later, another eavesdrop order was issued for another individual's office. After a two-week period of eavesdropping, law enforcement officials obtained evidence linking the defendant to a bribery conspiracy. Despite defendant's objections, the trial court admitted relevant portions of the recordings.

[58] The Fourth Amendment commands that a warrant issue not only upon probable cause supported by oath or affirmation, but also "particularly describing the place to be searched, and the persons or things to be seized." New York's statute lacks this particularization. It merely says that a warrant may issue on reasonable ground to believe that evidence of crime may be obtained by the eavesdrop. It lays down no requirement for particularity in the warrant as to what specific crime has been or is being committed, nor "the place to be searched," or "the persons or things to be seized" as specifically required by the Fourth Amendment.
388 U.S. at 55-56.

[59] *Id.* at 59-60.

[60] *Id.* at 58 (citing Boyd v. United States, 116 U.S. 616 (1886)).

[61] These standards include:
1. A showing of facts sufficient to establish probable cause to believe that a particular offense has been or is being committed.
2. A description of the particular conversations or communications to be intercepted.
3. A limitation on the duration of the intrusion. The Court emphasized that the intrusion shall not be so

Implicit in the *Berger* decision was the notion that the fourth amendment's protection applied not only to physical trespass but also to covert interception of conversations. By holding that the New York statute was to be considered on its face rather than as applied, the Court seemed to overrule the *Olmstead* rationale sub silentio.[62] Thus, a warrant issued pursuant to the statute, as then in effect, never could have satisfied the requirements of the fourth amendment.[63]

The process of burying the *Olmstead* "trespass doctrine," begun in *Berger*, was concluded in the leading case of *Katz v. United States*,[64] in which the Court held that "the fourth amendment protects people, not places."[65] In *Katz*, evidence obtained by a warrantless, nontrespassory "bug" placed on the outside wall of a public telephone booth was held inadmissible as evidence. Essentially, the Court reversed its longstanding position and decided that a trespass was not a condition precedent to a violation of an individual's fourth amendment rights in actions involving electronic surveillance. Regardless of whether a public telephone booth could be characterized as a constitutionally protected area, an individual speaking to someone over the telephone has a "reasonable expectation of privacy" with respect to the contents of those conversations.[66] The Court declared that "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.... But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."[67]

As in *Berger*, the *Katz* Court did not suggest that electronic surveillance never could pass constitutional muster. Rather, the Court merely recognized that electronic eavesdropping is a search within the meaning of the fourth amendment and cannot be conducted in the absence of carefully circumscribed procedures—particularly, an "antecedent justification" before a neutral magistrate "that is central to the Fourth Amendment."[68] Finally, although the *Katz* decision "refused to lock the Fourth Amendment into instances of actual physical trespass,"[69] it was not intended to undermine the protection afforded against such intrusions.[70]

IV. Title III of the Omnibus Crime Control and Safe Streets Act of 1968

A. The Statutory Provisions

In response to *Berger* and *Katz*, Congress enacted Title III of the Omnibus Crime Control and Safe Streets Act of 1968.[71] The statute purports to overcome the constitutional problems of eavesdropping and electronic surveillance by incorporating the procedures and standards outlined in the two decisions. Basically, Title III assimilates the strict requirements applicable to search and seizure of tangible physical objects to the area of electronic surveillance. At the threshold, the statute forbids nonconsensual[72] interception of wire or oral com-

long as to be "the equivalent of a series of intrusions, searches, and seizures pursuant to a single showing of probable cause."

4. Extensions may only be granted upon a showing both that the extension is in the public interest and that there is present probable cause for the continuation of the eavesdrop.

5. A requirement that the electronic surveillance be terminated once the conversation sought is seized, even though it be prior to the expiration date of the order.

6. A requirement of either notice to the person whose conversations were to be intercepted or a showing of special facts or exigent circumstances necessitating the withholding of notice.

Id. at 58-60.

[62] At least Justice Douglas expressly took this position, joining the Court's opinion "because at long last it overrules *sub silentio* Olmstead v. United States...." *Id.* at 64 (Douglas, J., concurring).

[63] By its terms, the statute seemed to permit general searches, which had been forbidden by the adoption of the fourth amendment.

[64] 389 U.S. 347 (1967).

[65] *Id.* at 351.

[66] A person possesses a reasonable expectation of privacy if that person exhibits an actual, subjective expectation of privacy and more importantly, the expectation is one society is generally willing to recognize as reasonable. *Id.* at 361 (Harlan, J., concurring).

[67] 389 U.S. at 351 (citations omitted).

[68] *Id.* at 359.

[69] United States v. United States Dist. Court, 407 U.S. at 313.

[70] According to the court in United States v. Ford, 553 F.2d 146, 157 (D.C. Cir. 1970), "*Berger* certainly did not reject the then established premise that surreptitious entry for the purpose of installing electronic surveillance devices was within the ambit of the Fourth Amendment.... Rather, the Court extended particularity protections formerly applicable only to the trespass to the overhearing...." (citations omitted).

[71] 18 U.S.C. §§ 2510-2520 (1976). For Congressional background, see S. Rep. No. 1097, 90th Cong., 2d Sess. 66, *reprinted in* [1968] U.S. Code Cong. & Ad. News 2112. Part of Title III, § 2518(8)(d), was declared constitutional by the United States Supreme Court in United States v. Donovan, 429 U.S. 413 (1977).

[72] 18 U.S.C. § 2511(2)(c), (d) (1976). By allowing electronic surveillance with consent of one party, the statute undermines its own attempt to limit the offenses for which surveillance devices can be employed. Moreover, the entire system of antecedent justification before a neutral and detached magistrate is circumvented.

munications by federal law enforcement officers[73] except by court order.[74] An order may be issued only for the investigation of specified crimes[75] upon a sworn application by the attorney general or a specially designated assistant attorney general.[76] Moreover, the application must contain a "full and complete statement of the facts relied upon by the applicant to justify his belief that an order should be issued."[77] It should include details of the particular offense suspected, a particular description of the facilities from which communications are to be intercepted, a particular description of the type of communications sought to be intercepted, and the identity of the person or persons suspected.

Importantly, the application must contain a complete statement as to why normal investigative procedures are not being used.[78] Sections 2518(1)(c) and 2518(3)(c) require that these normal investigative techniques be employed unless they have already been tried and have failed or else "reasonably appear to be unlikely to succeed if tried or to be too dangerous."[79] These sections are designed to insure that electronic surveillance is "not to be routinely employed as the initial step in a criminal investigation"[80] and "to insure that wiretapping [or eavesdropping] is not resorted to in situations where traditional investigative techniques would suffice to expose the crime."[81] This is consistent with the statute's overall emphasis upon particularization and minimization[82] of the intrusiveness engendered by the employment of electronic surveillance techniques.

Upon receiving the application, the judge then must determine that there is probable cause to believe that the named individual is committing or is about to commit one of the crimes enumerated in the statute, that particular communications concerning this offense will be obtained by the interception, and that the facilities or premises named will be used by the suspected individual.[83] If the judge approves the order, he must specify the persons, if known, and places subject to the order, the type of communications to be intercepted and the offense to which it relates, the identity of the applicant, the person authorizing it, the agency authorized to execute it, and the period for which it is effective.[84] The order must terminate the surveillance when the objective is attained and may extend in no event longer than thirty days.[85] However, provision is made for extensions by subsequent application and court order.

The statute also establishes elaborate record-keeping and reporting procedures, and requires that within ninety days after the termination of a court-ordered interception, the persons named in the order, and such other persons overheard as the judge designates "in the interest of justice,"[86] shall be informed of the order and interception[87]—unless the judge, for "good cause," decides to postpone such notice.[88] Finally, the statute imposes certain limitations and conditions on the uses of evidence obtained through interception of wire or oral communications.[89]

In light of the substantial degree of specificity of Title III, it is most significant to note its failure to address the problem of implementation. Neither the provisions of Title III nor the congressional debates contain express authority for breaking and entering to install listening devices.[90] Nonetheless, those advocating the position that Title III authorizes surreptitious entry have attempted to support their position by relying upon both specific statutory language and legislative history. As mentioned above, the statute does require that the application for an intercept order describe "the facilities from which or the place where the communication is to be intercepted."[91] However, this hardly can be interpreted as express authority permitting surreptitious entry. At best it fulfills the fourth amendment requirement of particularity necessary to ensure the minimization of the intrusion. At the least, it serves as a safeguard against abuse due to the exercise of unsupervised discretion by police officers. Moreover, this language might be considered to be directed to situations such as that which arose in *Katz* involving public places rather than unauthorized physical entry.

[73] 18 U.S.C. § 2511 (1976).

[74] 18 U.S.C. §§ 2516–2518 (1976) set forth the procedure for acquiring judicial authorization.

[75] 18 U.S.C. § 2516(1)(a)-(g) (1976).

[76] 18 U.S.C. § 2518(1)(1976).

[77] 18 U.S.C. § 2518(1)(b) (1976).

[78] 18 U.S.C. § 2518(1)(c) (1976).

[79] 18 U.S.C. § 2518(1)(c), (3)(c) (1976).

[80] United States v. Giordano, 416 U.S. 505, 515 (1974).

[81] United States v. Kahn, 415 U.S. 143, 153 n.12 1974).

[82] 18 U.S.C. § 2518(5) (1976).

[83] 18 U.S.C. § 2518(3)(a)-(d) (1976).

[84] 18 U.S.C. § 2518(4)(a)-(e) (1976).

[85] 18 U.S.C. § 2518(5) (1976). For a discussion of this provision, see United States v. Cafero, 473 F.2d 489, 496 (3d Cir. 1973).

[86] 18 U.S.C. § 2518(8)(d) (1976).

[87] *Id.*

[88] *Id.*

[89] 18 U.S.C. § 2518(9) (1976).

[90] United States v. Santora, 583 F.2d 453, 461–62 (9th Cir. 1978).

[91] 18 U.S.C. § 2518(1)(b)(ii) (1976).

The Senate Report on Title III does include the following language: "A wiretapping can take up to several days or longer to install. Other forms or devices may take even longer."[92] Again this language can hardly be deemed determinative. Although the statement is ambiguous, it appears to refer to the duration and not the method of installation. Thus, it could be acknowledging the envisioned "difficulty in gaining consensual entry to premises that the Government wanted to bug. The mechanics of installing a bugging device can be performed quickly; the difficulty encountered [is] in gaining entry by legal means."[93]

An additional argument that Congress intended Title III to authorize surreptitious entry to install "bugs" is based upon the language of 18 U.S.C. § 2518(4), which provides in part:

> An order authorizing the interception of a wire or oral communication shall, upon request of applicant, direct that a communication common carrier, landlord, custodian or other person shall furnish the applicant forthwith all information, facilities, and technical assistance necessary to accomplish the intercepting *unobtrusively* and with a minimum of interference with such services that such carriers, landlord, custodian, or person is according the person whose communications are to be intercepted.[94]

This language is inconclusive. Since the effectiveness of an intercept depends upon the ability to keep the fact of surveillance secret, the use of "unobtrusively" may merely reflect the reality of the situation. It cannot be read by itself to condone forcible breaking and entering. Furthermore, there is some indication that this language, which was part of a 1970 amendment, was a direct Congressional reaction to the decision of the Court of Appeals for the Ninth Circuit in *Application of United States*,[95] in which the court held that Title III did not authorize ordering a local telephone company to provide facilities, services, and technical assistance for a wiretap. Nonetheless, although the case dealt specifically with wiretapping that does not involve surreptitious entry, as enacted, the statutory amendment makes no distinction between the two forms of electronic surveillance.

In summary, it seems clear that neither the provisions of Title III nor its legislative history contain any express authorization for surreptitious entry as a means of implementing a Title III intercept order.

B. INTERPRETATION OF TITLE III

1. The Split among the Circuits

Prior to the United States Supreme Court's decision in *Dalia v. United States*,[96] the circuit courts of appeal had been sharply divided on the question of whether surreptitious entry of a home for the purpose of installing, maintaining, or removing electronic surveillance devices, absent valid consent or express prior judicial approval, was a violation of the fourth amendment. Some circuits took the position that express authorization was unnecessary as it was implicit in the Title III intercept order itself. While one circuit held that Title III implicitly authorized break-ins but only with specific judicial approval, another decided that the fourth amendment required separate consideration of covert entry to plant a "bugging" device in the warrant procedure. Finally, two circuits held that neither Title III, nor any other federal statute, empowered district courts to authorize break-ins.

The Second[97] and Third[98] Circuits took the implicit authorization approach. The issue arose in the Second Circuit in *United States v. Scafidi*,[99] in which the defendants were convicted of illegally operating gambling businesses.[100] Three court orders had been issued authorizing the use of eavesdropping devices at an apartment. An additional three court orders had authorized interceptions at a local night spot. In the course of the investigation several covert entries were made to install the devices, to change their location, and to replace their batteries. Although the warrant lacked specific authorization for breaking and entering, the Second Circuit was willing to imply such authority from the intercept order itself. The court held that "when an order has been made upon adequate proof as to probable cause for the installation of a device in particular premises, a separate order authorizing entry for installation purposes is not re-

[92] S. REP. No. 1097, 90th Cong., 2d Sess. 66, 103 (1968).

[93] United States v. Santora, 583 F.2d at 461.

[94] 18 U.S.C. § 2518(4) (1976).

[95] 427 F.2d 639 (9th Cir. 1970).

[96] 99 S. Ct. 1682 (1979).

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

[98] United States v. Dalia, 575 F.2d 1344 (3d Cir. 1978), *aff'd*, 99 S. Ct. 1682 (1979).

[99] 564 F.2d 633 (2d Cir. 1977), *cert. denied*, 436 U.S. 903, (1978).

[100] This count was later dismissed and was "relevant on appeal only to the extent that the evidence presented for [the] Count might have 'spilled over' to affect other counts." *Id.* at 637.

quired."[101] The court suggested that any other position would be "naive."[102] Furthermore, it noted that judicial supervision over the method or implementation of an intercept order would be impractical. "It would be most unseemly for the courts to invade the province of law enforcement agencies by assuming that their competence was greater than that of the agencies presumably skilled in their field."[103]

Unfortunately, this argument proves too much. The fourth amendment does not require that judges be specialists before authorizing warrants for particular types of searches and seizures. However, a neutral and detached magistrate must be interposed between the public and the government as a means of deterring abuses of police discretion.[104]

In *United States v. Dalia*,[105] the defendant was convicted of conspiring to transport, receive, and possess stolen goods and of receiving stolen goods while in interstate commerce. Following an initial intercept order limited only to wire communications, a second order was issued authorizing the interception of both wire and oral communications. Later extended, these orders did not expressly authorize surreptitious entry as a means of installing the necessary equipment. However, such entry was made onto the defendant's business premises. Without any independent analysis, the Third Circuit embraced the *Scafidi* rationale, finding that an order authorizing the interception of oral communications implicitly authorizes surreptitious entry. However, the court did suggest that

> the more prudent or preferable approach for government agents would be to include a statement regarding the need of a surreptitious entry in a request for the interception of oral communications when a break-in is contemplated. This burden is minimal in light of the fourth amendment considerations that could be later raised.[106]

Adopting a somewhat different approach, in *Application of United States*,[107] the Fourth Circuit held that government agents could covertly enter private premises to plant eavesdropping devices, but an express entry provision would have to be included in the intercept order. In this case, the FBI had concluded that the successful investigation of a suspected gambling operation required the use of electronic surveillance. The district court rejected the government's application which sought both authorization to intercept oral communications and express authority for one or more surreptitious entries.[108] On appeal, this decision was reversed. Focusing on Title III's legislative history and, in particular, finding statutory concern about the control of organized crime to be "paramount," the court stated:

> [T]he fact that Title III does not expressly limit the manner of installing listening devices is, in light of the announced legislative intent, consistent with the conclusion that Congress implicitly commended the question of surreptitious entry to the informed discretion of the district judge, subject to the commands of the Constitution.[109]

Importantly, the court noted the fact that, under *Katz*, there are two constitutionally protected privacy interests involved in a covert entry upon private premises. On the one hand, there is the privacy interest in the actual communications. On the other hand, there is the interest in the privacy of the premises. Moreover, "when agents of the Government physically enter business premises, as to which an individual has a legitimate expectation of privacy ... more than just his conversation is subjected to the government's scrutiny. Intruding officers are capable of seeing and touching items which would not be disclosed by the nontrespassory surveillance."[110]

The approach taken by this court appears more sensible than that of the Second and Third Circuits. At the least, it is more consistent with the history of the fourth amendment and its typical requirements. Obviously, by its own terms, the fourth amendment is not absolute. It forbids only unreasonable searches and seizures. The safeguard against unreasonableness historically has been interposing judicial supervision of the scope of intrusions. The decision in *Application of United States* attempted to establish a means of balancing the different interests at stake in a covert entry to plant "bugs": individual privacy and security found in the sanctity of one's home and the requirements of efficient law enforcement. In requiring express ju-

[101] *Id.* at 640.
[102] *Id.*
[103] *Id.*
[104] *See, e.g.*, Coolidge v. New Hampshire, 403 U. S. 443, 449 (1971) (plurality opinion).
[105] 575 F.2d 1344 (3d Cir. 1978), *aff'd*, 99 S. Ct. 1682 (1979). The Supreme Court disposition of this case is discussed in text accompanying notes 149-207 *infra*.
[106] 575 F.2d. at 1346-47.
[107] 563 F.2d 637 (4th Cir. 1977).
[108] *Id.* at 639.
[109] *Id.* at 643.
[110] *Id.* at 643 n.6 (citations omitted).

dicial authorization for surreptitious entry, this circuit was attempting to ensure that the intrusion into constitutionally protected rights was no greater than minimally necessary.

In *United States v. Agrusa*,[111] while refusing to find implicit authorization for breaking and entering in the language of Title III, the Eighth Circuit held a surreptitious entry into unoccupied business premises, effected under an express court order, to be constitutionally permissible.[112] The surveillance order authorized both the interception of oral and wire communications and the covert entry necessary to install and subsequently remove them. Determining that any announcement prior to entry would have been self-defeating in that it would have resulted in the avoidance of any incriminating conversations, the court also relied upon language in the *Katz* decision for guidance.

> In omitting any requirement of advance notice, the federal court that authorized electronic surveillance ... 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.[113]

The court found no constitutional infirmity in the forcible entry.

The court then proceeded to a comprehensive examination of 18 U.S.C. § 3109, the only federal statute addressing forcible entry.[114] Concluding that noncompliance with this knock and announcement statute was justified by "exigent circumstances," the court held that "law enforcement officials may, pursuant to express court authorization to do so, forcibly and without knock or announcement break and enter business premises which are vacant at time of entry in order to install an electronic surveillance device."[115] According to the *Agrusa* court, "exigent circumstances" were present because any announcement prior to entry would result in the ceasing of potentially incriminating conversations—a situation analogous to the destruction of evidence.[116]

In a strong dissent, Judge Lay was unconvinced that "the effective enforcement of our criminal laws requires government agents to break and enter private premises, like common burglars, to plant eavesdropping devices."[117] Moreover, he concluded that the circumstances were not sufficiently exigent as to vindicate the substantial intrusion that surreptitious entry entails.[118] "When interception is authorized, the means to invade zones of privacy must be no greater than necessary."[119] Consequently, in light of the existence of such alternative means of accomplishing the same result as the use of confidential informants and placing wiretaps on defendant's telephones, Judge Lay was unwilling to countenance the use of surreptitious entry here.[120] His dissent further argued that even in the absence of any alternative methods of surveillance, forcible entry to install listening devices is unreasonable per se. Law enforcement interests do "not outweigh the citizen's justifiable expectations that government officials will not, under the cloak of authority, surreptitiously break into his home or office."[121] Judge Lay further "hope[d] there still exists 'a private enclave where [a person] may lead a private life' without fear of stealthy encroachment by government officials."[122]

Though the *Agrusa* court refused to accept the argument that Title III implicitly authorizes breakins, the majority focus was upon the legality of such entry in the context of electronic surveillance. In other words, the court assumed that express judicial authorization was required and then proceeded to examine whether such entry to plant a "bug" violated federal statutory law or the Constitution. In light of the substantial invasion of privacy and threat to security involved in breaking and entering, the court's position was that the fourth amendment required express court author-

[111] 541 F.2d 690 (8th Cir. 1976) (opinion by divided court), *rehearing en banc denied* (over a four-judge dissent), 541 F.2d 704 (8th Cir.), *cert. denied*, 429 U.S. 1045 (1977).

[112] It should be noted that the court did "not decide what result obtains if the officers act without express court authorization to break and enter (although with court authorization to intercept)." *Id.* at 696 n.13.

[113] *Id.* at 698 (citing Katz v. United States, 389 U.S. 347, 355 n.16 (1967))(citations omitted)(emphasis added).

[114] The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.
18 U.S.C. § 3109 (1976); *see* text accompanying notes 169-88 *infra*.

[115] 541 F.2d at 701.

[116] *Id.* at 700-01.

[117] *Id.* at 702 (Lay, J., dissenting).

[118] *Id.* at 703.

[119] *Id.* at 702.

[120] *Id.*

[121] *Id.* at 703.

[122] *Id.* (footnote omitted).

ization.[123] This position seems well supported by the history and purpose of the fourth amendment.

In *United States v. Ford*,[124] the District of Columbia Circuit also rejected interpreting Title III as implicitly authorizing breaking and entering.[125] As in *Agrusa*, the court felt that where covert entry to plant eavesdrop equipment is involved, a "bifurcated analysis" is required "in which each aspect—trespass and overhearing—is subjected to an independent Fourth Amendment analysis."[126] In this case, after conventional surveillance techniques had been unsuccessful, the Washington Metropolitan Police sought a court order authorizing electronic surveillance of a store suspected of being the center of narcotic activity. The intercept order included a provision authorizing police "to enter and re-enter . . . in any manner."[127] No limitations were placed on the manner of entry or on the number of entries permitted.

In an opinion by Judge Skelly Wright, the court held that the fourth amendment required valid consent or "sufficiently particularized judicial authorization"[128]—a warrant—before government agents could surreptitiously enter to install electronic eavesdropping devices. Here, the district court's order authorizing such entry had been too broad and was thus found invalid. According to the court, "[a] person whose physical privacy is to be invaded has a right to expect the judicial officer issuing an intercept order will authorize only those entries and those means of entry necessary to satisfy the demonstrated and cognizable needs of the applicant."[129] Furthermore, in view of the fact that the Supreme Court had earlier concluded that "physical entry of the home is the chief evil against which the wording of the fourth amendment is directed,"[130] the court suggested that physical entry should only be sought after alternative means of interception had been attempted.[131] "[T]he least intrusive means rationale implicit in *Katz* . . . requires that, where possible, such evidence should be gathered without entering private premises and that where entry is required the judicial authorization therefore should circumscribe that entry to the need shown."[132]

As with the decision in *Application of United States* and *United States v. Agrusa*, the decision in *United States v. Ford*[133] attempted to vindicate fourth amendment interests by specifically addressing Title III's failure to establish guidelines and procedures for implementation. By requiring prior, express judicial approval of breaking and entering when necessary to successfully implement an intercept order, these courts recognized the historical tradition of the fourth amendment and its basic purpose of safeguarding individual privacy and security against arbitrary governmental intrusions.[134] Since the trespass inherent in surreptitious entry violates one's "reasonable expectations of privacy," the citizen should have the right to expect that the intrusion was authorized by a neutral and detached magistrate. This would help ensure that a prior determination of necessity had been made. In addition, the scope of authority must be particularized so as to avoid the abuses of the general warrant.

Finally, the Sixth[135] and Ninth[136] Circuits have taken the position that Title III does not permit courts to authorize break-ins for the purpose of installing listening devices. In *United States v. Finazzo*,[137] the defendants had been indicted for bribery of a public official on the basis of evidence obtained through conversations intercepted in accordance with the requirements of Title III. However, the "bugs" had been installed through unauthorized breaking and entering. Significantly, the court rejected the reasoning of all the other federal circuit courts that had held either that Title III implicitly authorizes such entries or that such entries must receive prior, express judicial approval. Rather, the court held

> that judges do not have power under the . . . wiretapping statute to authorize breaking and entering

[123] It should be noted that the court was "not concerned with the fact that the same document served to authorize both the interceptions and the breaking or that the document was not in terms denominated a 'warrant.'" *Id.* at 695 n.11.

[124] 553 F.2d 146 (D.C. Cir. 1977).

[125] The intercept order was not issued pursuant to Title III, but to a District of Columbia statute, 23 D.C. CODE ANN. §§ 541-556 (1973). The court stated that the D.C. statute was "very similar to and . . . based on the corresponding sections of Title III." 553 F.2d at 148 n.4.

[126] 553 F.2d at 149 n.12.

[127] *Id.* at 149-50.

[128] *Id.* at 154.

[129] *Id.* at 170.

[130] United States v. United States Dist. Court, 407 U.S. 297, 313 (1972).

[131] *See* text accompanying notes 208-10 *infra*.

[132] United States v. Ford, 553 F.2d at 158.

[133] 553 F.2d 146 (D.C. Cir. 1977).

[134] *See* text accompanying notes 19-42 *supra*.

[135] United States v. Finazzo, 583 F.2d 837 (6th Cir. 1978).

[136] United States v. Santora, 583 F.2d 453 (9th Cir. 1978).

[137] 583 F.2d 837 (6th Cir. 1978).

> in order to install electronic devices; and in the absence of specific statutory authority, they do not have the power under the Fourth Amendment... [and] that federal law enforcement agents do not have independent statutory or constitutional authority to engage in break-ins to install eavesdropping devices.... [and that] the judiciary does not have inherent power to delegate this authority to police officers.... [138]

Strongly emphasizing the invasion of privacy, the possibility of property damage, and the threat to personal security that breaking and entering entails, the court felt that

> [i]t simply does not make sense to imply Congressional authority for official break-ins when not a single line or word of the statute even mentions the possibility, much less limits or defines the scope of the power or describes the circumstances under which such conduct, normally unlawful, may take place.[139]

Equating an intercept order with a search warrant for fourth amendment purposes,[140] the *Finazzo* court extensively examined the source of the power of federal judges to issue warrants. The court scrutinized the English common-law precedents as well as early American court decisions—particularly *Boyd v. United States*.[141] On the basis of its own historical analysis, the court concluded that the power of federal courts could not exceed the scope of their creation. In other words, "courts which are created by written law, and whose jurisidiction is defined by written law, cannot transcend that jurisdiction."[142] Thus, in the absence of explicit statutory authorization, the court felt powerless to authorize any means of surreptitious entry to implement an intercept order.

In *United States v. Santora*,[143] the Ninth Circuit took a position very similar to that of the *Finazzo* court. In this case, the defendants were convicted on charges relating to stolen airline tickets and trafficking in controlled substances. In addition to sanctioning the use of wiretapping and "bugging," the district court had expressly authorized members of the FBI to forcibly "enter ... install, maintain, and subsequently remove"[144] such devices at defendant's business premises. On appeal, the Ninth Circuit reversed and remanded. Although finding the introduction into evidence of incriminating conversations intercepted through wiretapping to be legal, the court found eavesdropping accomplished through the use of surreptitious entry to be impermissible under Title III. The court carefully analyzed the legislative history of Title III and concluded "that the overriding concern was the protection of privacy."[145] The court was unwilling to interpret legislative silence on the question of implementation as implicit authority for physical intrusion into the privacy and sanctity of the home, particularly, since "Congress was fully aware that not all bugging required trespasses, let alone break-ins. The most common form of electronic eavesdropping is 'participant electronic surveillance,' in which an informant equipped with hidden recording devices gains access to the home or office by non-trespassory means and surreptitiously records conversations."[146] As far as this court was concerned, more explicit statutory authority was required before it would countenance breaking and entering under Title III.

In summary, both the Sixth and Ninth Circuits took a much narrower approach to the question of Title III's silence regarding implementation than did the other circuits. *Finazzo* and *Santora* reflect an unwillingness to read beyond the explicit language of the federal statute. This position unnecessarily constricts the efficient operation of Title III. Legislative history demonstrates two purposes motivating the enactment of the statute: 1) a desire to provide a means of aiding the difficult fight against organized crime and 2) protection of the privacy of wire and oral communications.[147] Finding the protection of privacy to be of overriding importance, the *Finazzo* and *Santora* courts refused to balance these two considerations. Rather, these courts took the absolutist position that federal district courts are to be strictly circumscribed in the exercise of an otherwise traditional power—the issuance of court orders or warrants.[148]

[138] *Id.* at 838.
[139] *Id.* at 841.
[140] *Id.* at 845–48.
[141] 116 U.S. 616 (1886).
[142] United States v. Finazzo, 583 F.2d at 844 (quoting *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 93 (1807)).
[143] 583 F.2d 453 (9th Cir. 1978).
[144] *Id.* at 454.
[145] *Id.* at 463.
[146] *Id.* at 460 (citations omitted).
[147] *See* notes 6–7 and accompanying text *supra*.
[148] The *Santora* court's unwillingness to equate an electronic surveillance intercept order with a search warrant should be recognized. The court considered the only similarity to be the utilization of a neutral magistrate

> Search warrants are not executed surreptitiously, and they are always limited to things in being which the officers have probable cause to believe are contraband.... Warrant procedure permits the person subjected to the search to have notice of the fact of

2. The Supreme Court Response: Dalia v. United States

The contours of this difficult issue of interpreting Title III's silence on the matter of implementation were delineated for consideration by the United States Supreme Court when it finally agreed to confront the problem in *Dalia v. United States*.[149]

In this case, on an application by the Justice Department, the United States District Court for the District of New Jersey found probable cause to believe that petitioner was a member of a conspiracy involved in the interstate shipment of stolen goods.[150] Further finding that there was reason to believe that petitioner's business telephones were being used to further the conspiracy and that means of investigating the conspiracy other than through electronic surveillance would be dangerous and unlikely to succeed, the district court granted the government a twenty-day authorization to intercept certain telephone conversations taking place in petitioner's business office. Following this initial twenty-day period, an extension was granted. This time, however, the court order allowed the government to "intercept all oral conversations taking place in petitioner's office, including those not involving the telephone."[151] As it later developed, FBI agents covertly entered petitioner's business office to install an electronic bug in the ceiling.

Subsequently, petitioner was convicted of receiving stolen fabric. At trial, the government had introduced several intercepted telephone conversations demonstrating petitioner's complicity in the conspiracy. Prior to trial, petitioner had unsuccessfully moved to suppress evidence obtained by means of the eavesdropping devices installed in his office. Following trial, another motion to suppress was denied on the basis that "implicit in the court's order [authorizing electronic surveillance] is concomitant authorization for agents to covertly enter the premises in question and install the necessary equipment."[152] Furthermore, the court took the position that in this particular instance such entry was the "safest and most successful method of accomplishing the installation."[153]

The Court of Appeals for the Third Circuit affirmed petitioner's conviction.[154] The court did suggest, however, that "the more prudent or preferable approach for government agents would be to include a statement regarding the need of a surreptitious entry in a request for the interception of oral communications when a break-in is contemplated."[155]

Initially, the Supreme Court confronted Dalia's broad claim that the fourth amendment per se prohibits all surreptitious entries. Petitioner's argument was that "legislative authority for law enforcement officers to commit otherwise illegal breakings and entries into the home or office of a suspect is inherently unreasonable."[156] The Supreme Court quickly dismissed this argument, "mak[ing] explicit ... what ha[d] long been implicit in [its] decisions dealing with this subject: The Fourth Amendment does not prohibit *per se* a covert entry performed for the purpose of installing otherwise legal electronic bugging equipment."[157]

Having decided that covert entries are not per se violative of the fourth amendment, the *Dalia* Court was prepared to meet petitioner's next contention: "that Congress has not given the courts statutory authority to approve covert entries for the purpose of installing electronic surveillance equipment."[158] Basically, petitioner emphasized the general comprehensive nature of Title III and noted that "[n]owhere in Title III may there be found authorization for a court to permit an otherwise illegal breaking and entering."[159] Citing the

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the search, and it also provides him with an opportunity to move to quash the warrant, to demand return of whatever has been seized. and otherwise to challenge the validity of the warrant.... These protections are either non-existent or irrelevant in respect of court-authorized orders for electronic surveillance, even absent a break-in. Unlike an arrest warrant, or a search warrant, a court order authorizing an electronic surveillance with or without a break-in, is not a step in an adversary process, but rather a step in an ongoing investigation which may never lead to nor permit adversary challenge.

583 F.2d 462–63 n.6.

[149] 99 S. Ct. 1682 (1979). The Supreme Court held that the fourth amendment ban on unreasonable search and seizure is not an absolute prohibition against covert entry under any circumstances. The Court next held that although Title III does not explicitly authorize breaking and entering, it gives the courts the inherent power to do so. Finally, dividing five to four, the Court held that the fourth amendment does not require that a Title III intercept order include a specific authorization to covertly enter the premises described in the order.

[150] United States v. Dalia, 426 F. Supp. 862, 867 (D. N.J. 1977).

[151] 99 S. Ct. at 1686.

[152] 426 F. Supp. 862, 866 (D.N.J. 1977).

[153] *Id.*

[154] 575 F.2d 1344 (3d Cir. 1978); *see* text accompanying notes 101–02 *supra.*

[155] 575 F.2d at 1346–47.

[156] Brief for Petitioner at 20, Dalia v. United States, 99 S. Ct. 1682 (1979).

[157] 99 S. Ct. at 1689.

[158] *Id.*

[159] Brief for Petitioner at 17.

availability of alternative methods of accomplishing an electronic eavesdrop, petitioner argued that "it does not follow as a matter of logical necessity that the Legislature's permission to conduct electronic surveillance also implies its permission to commit breakings and entries."[160] Finally, according to petitioner, "[t]he far more likely explanation for the absence of any explicit authorization in Title III is that there was no consensus to permit breakings and entries."[161]

The Supreme Court, however, was not persuaded. Rather, refusing to eviscerate the law enforcement purpose behind the statute, the Court found that "the language, structure, and history of the statute ... demonstrate that Congress meant to authorize courts ... to approve electronic surveillance without limitation on the means necessary to its accomplishment, so long as they are reasonable under the circumstances."[162] Adopting a policy approach, the Court was more than willing to construe statutory silence and legislative ambiguity to support limited breaking and entering. By assuming that Congress was "aware that most bugging requires covert entry," the Supreme Court felt compelled to conclude that "[t]hose considering the surveillance legislation understood that, by authorizing electronic interception of oral communications in addition to wire communications, they were necessarily authorizing surreptitious entries."[163]

Unfortunately, the Supreme Court seems to have reached this conclusion by interpreting the congressional debates as demonstrating that "[m]embers of Congress simply saw no distinction between electronic surveillance which required covert entry and that which required covert tapping of one's telephone [since] [t]he invasion or the privacy of conversations is the same in both situations."[164] At the threshold, this is a difficult proposition to sustain in the light of ambiguous congressional debates.

> The utter absence of any legislative history that can be pointed to indicating a conscious decision to permit surreptitious entries is powerful evidence that Congress did not intend to confer such authority upon law enforcement officers or the courts. Certainly an issue with such enormous public interest and political consequences would have been the subject of specific debate had it been the intent to confer such authority through Title III.[165]

Furthermore, in light of the other substantial fourth amendment interests at stake, such as the protection of the possibility of physical destruction of property occurring in the course of a forcible entry, more explicit congressional authority for such entries should have been required.

Finally, even assuming congressional authorization for surreptitious entry under Title III, the question of whether the fourth amendment required express judicial approval of such entry still remained. As indicated above, this is the issue which had split the circuits. Petitioner, relying on *United States v. Ford*[166] and *Application of the United States*,[167] had maintained that "a warrant must be particular and specific if it is to stand constitutional attack."[168] Given the significance of the constitutional rights involved, rather than allowing law enforcement officials to carry out a Title III intercept order by whatever means desired, petitioner argued that approval by a neutral and detached magistrate be interposed.

In response, the Supreme Court took the position that petitioner's "view of the warrant clause parses too finely the interests protected by the Fourth Amendment."[169] Applying a three-pronged analysis, the Court found that the fourth amendment only required that search warrants describe with particularity the place to be searched and the persons or things to be seized and that a judge authorizing the issuance of a warrant have probable cause to believe that "'the evidence sought will aid in a particular apprehension or conviction' for a particular offense."[170] Satisfied that the court order authorizing the interception in this case had been issued in full compliance with these traditional fourth amendment requirements, the Court was unwilling to require express judicial authorization for surreptitious entry. "It would extend the warrant clause to the extreme to require that, whenever it is reasonably likely that Fourth Amendment rights may be affected in more than one way, the Court must set forth precisely the procedures to be followed by the executing officers."[171]

[160] Brief for Petitioner at 18.
[161] *Id.*
[162] 99 S. Ct. at 1689.
[163] *Id.* at 1691.
[164] *Id.* at 1690 n.12.
[165] Brief for Petitioner at 18–19.
[166] 553 F.2d 146 (D.C. Cir. 1977).
[167] 427 F.2d 639 (9th Cir. 1970).
[168] Brief for Petitioner at 25.
[169] 99 S. Ct. at 1693–94.
[170] *Id.* at 1692 (citation omitted).
[171] *Id.* at 1694.

In approaching the *Dalia* decision, it is helpful to keep in mind that although the Supreme Court has recently stated that "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed,"[172] the fourth amendment, by its terms, is not absolute. The Framers established the warrant procedure to determine when the privacy of the home must give way to legitimate interests of law enforcement. Nonetheless, once issued, warrants are not self-executing. Under English common law, an officer could not break into a home to execute service unless he first stated his purpose and requested admittance.[173] This requirement of prior notice of authority and purpose as a condition precedent to forcible entry was later adopted by early American courts.[174]

The common law requirements have been codified in 18 U.S.C. § 3109,[175] which forbids forcible entry into a home to execute a search warrant unless, after giving notice of his authority and purpose, an officer is refused admittance or is in need of liberation. Since this is the only federal statute dealing with forcible entry into the home, several of the circuits[176] dealing with implementation under Title III had sought guidance from its language and prior applications. Yet, as the Eighth Circuit recognized in *United States v. Agrusa*, "Section 3109 is not a statute to be woodenly applied without regard to the particular circumstances at hand, it is instead . . . subject to such exceptions as were . . . recognized"[177] at common law.

At least three separate purposes are fulfilled by meeting the specific requirements of section 3109. For one thing, it decreases the potential for violence to both officers and the occupants of the house in which the entry is sought. It safeguards "officers, who might be mistaken, upon an unannounced intrusion into a home, for someone with no right to be there."[178] Secondly, the "knock and notice" requirement reflects "the reverence of the law for the individual's right of privacy in his house"[179] and helps prevent the embarrassment that the unexpected exposure of private activities of the occupants of a home might entail.[180] Finally, this statute guards against the needless destruction of private property.[181] Such destruction may be the inevitable result of a forcible entry.

Given the significant nature of these interests, the procedure outlined in section 3109 has been held to apply to arrests on probable cause without warrants[182] and to arrests with warrants.[183] However, the requirements of section 3109 are completely incompatible with any form of electronic surveillance. Since the effectiveness of eavesdropping depends upon the suspect's lack of notice,[184] fulfilling the explicit mandates of the statute would be self-defeating. In *Dalia*, this position was reaffirmed. Finding petitioner's argument for notice to be "frivolous," the Court cited *Katz* for the proposition 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."[185] In other words, an alternative to the notice requirement under the fourth amendment might be a showing of exigent circumstances. According to *Berger*, "[s]uch 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."[186]

It should be noted that over the years courts have carved out a number of exceptions to the requirements of section 3109. For instance, the Supreme Court stated in *Miller v. United States*[187] that a failure to give an express announcement of purpose could be excused if "the facts known to officers could justify them in being virtually certain that the [occupant] already knows their purpose so that announcement would be a useless gesture."[188]

[172] United States v. United States Dist. Court, 407 U.S. 297, 313 (1972).

[173] *See* Semayne's Case, 77 Eng. Rep. 194, 195 (K.B. 1603).

[174] *See* Miller v. United States, 357 U.S. 301, 313 (1958) (discussing early American law).

[175] 18 U.S.C. § 3109 (1976). This statute is reprinted at note 114 *supra*.

[176] *See, e.g.*, United States v. Finazzo, 583 F.2d 837 (6th Cir. 1978); United States v. Santora, 583 F.2d 453 (9th Cir. 1978); United States v. Agrusa, 541 F.2d 690 (8th Cir. 1976), *cert. denied*, 429 U.S. 1045 (1977).

[177] 541 F.2d at 699.

[178] Sabbath v. United States, 391 U.S. 585, 589 (1968).

[179] Miller v. United States, 357 U.S. 301, 313 (1958).

[180] Payne v. United States, 508 F.2d 1391 (5th Cir.), *cert. denied*, 423 U.S. 933 (1975).

[181] United States v. Phillips, 497 F.2d 1131, 1133 (9th Cir. 1974).

[182] *See* Miller v. United States, 357 U.S. 301 (1958).

[183] *See id. See also* Vanella v. United States, 371 F.2d 50 (9th Cir. 1966), *cert. denied*, 386 U.S. 920 (1967).

[184] Lopez v. United States, 373 U.S. 427, 463 (1963) (Brennan, J., dissenting).

[185] 99 S. Ct. at 1688 (citing Katz v. United States, 389 U.S. 347, 355 n.18 (1967)).

[186] 388 U.S. at 60.

[187] 357 U.S. 301 (1958).

[188] *Id.* at 310. *See also* United States v. Seelig, 498 F.2d 109, 113-14 (5th Cir. 1974).

In *Sabbath v. United States*,[189] the Supreme Court cited with approval three exceptions[190] to the announcement requirement that Justice Brennan had earlier noted in his dissent in *Ker v. California*.[191] In that case, police officers gained entry to an apartment by the use of a passkey and conducted a search incident to an arrest. Narcotics which were seized in the course of this search were introduced at trial. Upholding the validity of the arrests, the plurality opinion[192] recognized that exigent circumstances excuse compliance with the notice requirement of section 844 of the California Penal Code.[193] The decision seemed to focus on the fact that the evidence would have been "quickly and easily destroyed" and that petitioner "might well have been expecting the police."[194] In his dissent, Mr. Justice Brennan set forth three exceptions to the announcement requirement:

> 1) where the persons within already know of the officer's authority and purpose, or 2) where the officers are justified in the belief that persons within are in imminent peril of bodily harm, or 3) where those within made aware of the presence of someone outside . . . are then engaged in activity which justifies the officers in the belief that an escape or the destruction of evidence is being attempted.[195]

In addition, the requirements have been waived where an announcement would create "palpable peril to the life or limb of the arresting officers."[196]

As with the explicit language of section 3109, it would appear that the above exceptions are inapplicable to the situation of breaking and entering to install electronic eavesdropping equipment. At least this seems to have been the position of the *Finazzo* court. "The doctrine of 'exigent circumstances' . . . has no application to an entry for the purpose of installing an eavesdrop device, an entry planned in advance to take place when a home or office is unattended and the regular occupants are unaware of the officer's presence."[197]

Nonetheless, in a cursory manner, the *Dalia* Court took a different view of the matter. As in *Agrusa*,[198] the self-defeating nature of an announcement was considered to be an exigent circumstance justifying the failure to give notice. Perhaps the fact that entry took place at unoccupied business premises and not at home weighed in favor of the Court's interpretation of the exigency exception.

Despite their facial dissimilarity, it is interesting to note the underlying parallelism of the Supreme Court's *Dalia* decision and the position of the *Finazzo* Court. At the heart of each decision lies the recognition that the announcement requirement of section 3109 is inapplicable to the area of electronic surveillance. The disagreement centers on the applicability of the "exigency" exceptions and particularly the "destruction of evidence" analogy. For the *Finazzo* court, the exceptions are inapposite. The implementation of an intercept order, an operation planned in advance and usually executed intentionally when the premises are vacant, does not fit the framework of "exigent circumstances." Moreover, the court felt the "threatened destruction of evidence" circumstance was only an issue when "the person inside is aware of the presence and purpose of the officer."[199] On the other hand, the *Dalia* decision seemed to find the "destruction of evidence" analogy to be the very epitome of an exigent circumstance.

Given the intrusive nature of breaking and entering and the fact that implementation of an intercept order will ordinarily occur when the premises are vacant, the position taken by the Sixth Circuit in *Finazzo* seems preferable to that of the United States Supreme Court. Recognizing the privacy and sanctity of the home, as well as the other constitutional interests previously discussed, section 3109 attempts to establish safeguards to prevent secret, forcible entries into private premises. If the announcement of one's identity and

[189] 391 U.S. 585 (1968).

[190] *Id.* at 591 n.8. Note that § 844 of the California Penal Code rather than 18 U.S.C. § 3109 (1976) was applicable. This state statute which permits police officers to break into dwellings for the purpose of arrest after demanding admittance and explaining their purpose is essentially analogous to the federal statute. *See* note 193 *infra*.

[191] 374 U.S. 23, 47 (1963) (Brennan, J., dissenting).

[192] Mr. Justice Harlan, unwilling to apply the fourth amendment directly to the states, voted to affirm conviction on the basis of the "fundamental fairness" standard of the due process clause of the fourteenth amendment.

[193] This statute reads:

> To make an arrest ... a peace officer, may break open the door or window of the house in which the person to be arrested is, or in which they have reasonable grounds for believing him to be, after having demanded admittance and explained the purpose for which admittance is desired.

CAL. PENAL CODE § 844 (West 1956).

[194] Ker v. California, 374 U.S. at 40.

[195] *Id.* at 47 (Brennan, J., dissenting).

[196] United States v. Harris, 435 F.2d 74, 83 (D.C. Cir. 1970), *cert. denied*, 402 U.S. 986 (1971) (quoting Gilbert v. United States, 366 F.2d 923, 932 (1966)).

[197] United States v. Finazzo, 583 F.2d at 846.

[198] *See* text accompanying notes 111–13 *supra*.

[199] 583 F.2d at 846.

purpose can be avoided because such information would lead occupants to avoid incriminating statements to begin with, this "destruction of evidence" exception could swallow the rule. Since an announcement would certainly lead to the avoidance of incriminating conversations within a home subject to judicially authorized electronic surveillance, the result is that announcements would never be necessary. The point is that there are limits to the extent that even the Supreme Court should stretch the exception of "exigent circumstances." It would seem that such a limit is reached in the area of electronic eavesdropping. Consequently, the better position simply would have been to find the statute and its exceptions inapplicable to the implementation of an intercept order. Physical intrusions into the sanctity of the home then would be tested generally by the reasonableness standard of the fourth amendment and particularly by the express approval of the judge issuing the intercept order rather than by recourse to judicially created exceptions to section 3109.

According to Justice Brennan, dissenting in *Dalia*, "breaking and entering into private premises for the purpose of planting a bug cannot be characterized as a mere mode of warrant execution to be left to the discretion of the executing officer."[200] Both this dissent and that of Justice Stevens recognized the grave fourth amendment risks the majority's position entailed: "[I]t is tantamount to an independent search and seizure."[201] As far as the dissenters were concerned, although "the warrant could, consistent with the command of the Fourth Amendment, leave the details of how best to proceed with the covert entry to the discretion of the executing officers,"[202] the initial authorization for breaking and entering must originate with a judicial officer.

By following the approach of the dissent, a number of serious deficiencies in the position of the majority would be avoided. To begin with, express judicial approval more closely comports with the literal language of the fourth amendment. The inclusion of an express provision in the warrant better serves the requirements of the particularity clause. Specifically, "it will fulfill the particularity clause function of clearly informing the officer whether or not the entry has been approved."[203] In the words of one commentator,

> In the same way that express authorization of the target premises and the conversations to be seized minimizes possible official misunderstanding as to the justifiable scope of surveillance, express authorization of covert entry protects the individual from an unjustifiable entry. To deny the individual this added margin of protection is to interpret the particularity clause too narrowly in the light of both the breadth with which fourth amendment language has been usually interpreted and the need to keep the particularity clause abreast of the recent changes in the probable cause standard.[204]

In light of the historical emphasis upon minimization of official intrusiveness into individual privacy, the position of the majority is difficult to understand. As noted earlier, the framing of the fourth amendment was influenced by the early American experience with general warrants and writs of assistance. To interpret any intercept order as authorizing breaking and entering by implication is to undermine a very substantial constitutional right. To do so on the basis of unclear legislative guidance is to invite abuse of our precious right of privacy.

The approach taken by the majority also is inconsistent with the overall emphasis of Title III—an emphasis upon minimizing the intrusiveness of an intercept order. According to sections 2518(1)(c) and 2518(3)(c), electronic surveillance is "not to be routinely employed as the initial step in a criminal investigation." Additionally, such methods are not to be "resorted to in situations where traditional investigative techniques would suffice to expose the crime."[205] As such, the application must contain a complete statement as to why normal investigative procedures are not being used. Such techniques apparently are to be employed unless they have been tried and have failed or else "reasonably appear to be unlikely to succeed if tried or to be too dangerous."[206] This language clearly demonstrates that it was the desire of Congress in passing Title III to minimize the intrusiveness of electronic surveillance. Consequently, a more consistent approach for the Supreme Court to have taken would have been to have required initial consideration of alternative methods of accomplishing the interception of oral communications occurring within the home or upon business premises. Given the possible usefulness of a parabolic microphone, for example, the sanctity of the home against physical invasion might be preserved.

[200] 99 S. Ct. at 1694–95 (Brennan, J., dissenting).
[201] *Id.* at 1695.
[202] *Id.*
[203] Note, *Covert Entry In Electronic Surveillance: The Fourth Amendment Requirements*, 47 FORDHAM L. REV. 203, 219 (1978).
[204] *Id.*
[205] United States v. Kahn, 415 U.S. 143, 153 n.12 (1974).
[206] 18 U.S.C. § 2518(1)(c), (3)(c) (1976).

In addition, there is a possible safety factor to consider. In the event that law enforcement officials mistakenly attempt to enter an occupied home or business, there is at least the possibility that an injury may result as the home owner attempts to protect his premises against a forcible intrusion.

By construing the statutory language—or the absence thereof—so as to require that breaking and entering be employed only when alternative means have been tried and have failed or else reasonably appear to be unlikely to succeed if tried, the Supreme Court would merely have been extending the express requirements of sections 2518(1)(c) and 2518(3)(c). Moreover, such a position would have substantially minimized the potential for abuse, the threat to personal security, and the invasion of personal privacy offered by the fourth amendment. Only when efforts to minimize the intrusion have proven unacceptable would breaking and entering to plant listening devices be authorized. While "[t]he additional burden on the government of providing prior justification for a covert entry does not appear significant,"[207] the additional protection it offers may very likely be appreciable. By interposing the neutral and detached magistrate between the citizen's rights and the demands of law enforcement officials, the fourth amendment requires that a balance must be struck in each case. To interpret an intercept order as automatically implicitly countenancing surreptitious entry at the discretion of those involved in the daily pursuit of illegal activities is to abandon this carefully crafted balance.

V. The Relevance of the "Plain View" Doctrine

Given the fact that surreptitious entry to install electronic eavesdropping devices will often expose personal papers and effects to officers participating in the operation, it is necessary to examine the contours of the "plain view" doctrine—an examination absent in the majority's opinion in *Dalia*. Ordinarily, a search warrant must describe with particularity the goods that are to be seized. The general rule is that the officers conducting a search may seize only the property described in the warrant. However, under certain circumstances, it is settled law that certain items not named in the search warrant may be seized if discovered in the course of a lawful search. According to Mr. Justice Stewart in *Coolidge v. New Hampshire*,[208]

> [i]n the vast majority of cases, *any* evidence seized by the police will be in plain view, at least at the moment of seizure. The problem with the 'plain view' doctrine has been to identify the circumstances in which plain view has legal significance rather than being simply the normal concomitant of any search, legal or illegal.[209]

Justice Stewart's opinion[210] stated that there are two prerequisites to the availability of the "plain view" doctrine. First, the police officer must have prior fourth amendment justification for his intrusion as "plain view *alone* is never enough to justify the warrantless seizure of evidence."[211] In other words, the law enforcement official must have "a right to be in the position to have that view."[212] Importantly, the prior justification for the initial intrusion need not be a warrant. Any one of the recognized exceptions to the warrant requirement will suffice, *i.e.*, hot pursuit or limited search incident to an arrest.[213] Second, the discovery of such evidence must have been inadvertent.[214] For, "[i]f the initial intrusion is bottomed upon a warrant that fails to mention a particular object, though the police know its location and intend to seize it, then there is a violation of the express constitutional requirement of 'Warrants ... particularly describing ... [t]he things to be seized."[215] Finally, it should be noted that no object in plain view can be seized, even though these two prerequisites have been met, unless there is probable cause to believe that the item is contraband or constitutes evidence of an offense. The evidence seized must be of a character by which "it is immediately apparent to the police that they have evidence before them."[216]

As a result of the existence of the "plain view" doctrine, additional consequences attach to surreptitious entry. Under the Supreme Court's approach, reading the intercept order itself as implicit authorization for such entry, the first prerequisite of Justice Stewart's *Coolidge* analysis is met. For the presence of the police officers would then be justified. Certain problems arise, however, in regard to the second element of the *Coolidge* test. Given the fact that an intercept order is directed solely at

[207] Note, *Covert Entry In Electronic Surveillance: The Fourth Amendment Requirements*, *supra* note 203, at 214.

[208] 403 U.S. 443 (1971) (plurality opinion).

[209] *Id.* at 465 (emphasis in original).

[210] Justice Stewart was joined by Justices Douglas, Brennan, and Marshall in parts II-A, II-B, and II-C only. However, these sections included the discussion of the "plain view" doctrine.

[211] 403 U.S. at 468 (emphasis in original).

[212] Harris v. United States, 390 U.S. 234, 236 (1968).

[213] 403 U.S. at 463 n.20.

[214] *Id.* at 469–71.

[215] *Id.* at 471.

[216] *Id.* at 466.

wire or oral communications, the express terms of such an order ordinarily anticipate only the seizure of intangible evidence. In other words, there will be no particularized language directed at the search and/or seizure of tangible evidence—for no such activity will be anticipated. Nonetheless, in the course of installing eavesdropping equipment, particularly in the search for suitably discreet places to conceal "bugs," law enforcement officials may very likely inadvertently discover incriminating evidence related, or even unrelated, to the criminal activities being investigated. If the police anticipate discovering such evidence, they most likely would proceed through the ordinary search warrant procedure thus avoiding the additional procedural requirements of Title III. Thus, as a consequence of applying the Stewart prerequisites, law enforcement officials may be allowed to participate in "fishing expeditions" in the course of implementing a Title III intercept order. The intercept order thus becomes a pretext to search for tangible evidence for which there is insufficient evidence to satisfy the threshold probable cause requirement for the issuance of the ordinary search warrant. Unfortunately, the majority failed to recognize this possibility.

It would seem clear that the rationale underlying the inadvertency requirement[217] is completely inconsistent with the execution of intercept orders directed at the seizure of intangible evidence. To limit the possibility of extending the intercept order into a general writ as a result of its interaction with the "plain view" doctrine, the preferable position is to require prior express judicial approval of the breaking and entering. Interposing a neutral and detached magistrate between the government and the people serves to reduce the likelihood of artifice by overzealous police.

In terms of the "plain view" doctrine, express judicial authorization for covert entry satisfies the first *Coolidge* prerequisite in ensuring that the officers have a right to be in the position from which incriminating evidence can be inadvertently spotted. Moreover, if, as suggested, a judge is required to consider alternative means of accomplishing the interception of oral communications in order to satisfy the least intrusive means rationale implicit in *Katz* and explicit in Title III, the potential for abuses of the inadvertency requirement may be severely limited. For, to the extent alternative means are available, private premises will not be entered surreptitiously—at least as a first resort. The possibility of circumventing the probable cause requirement of a search warrant through the concomittant use of an intercept order as a license to engage in searches for tangible evidence would be rendered less likely.

[217] Where once an otherwise lawful search is in progress, the police inadvertently come upon a piece of evidence, it would often be a needless inconvenience, and sometimes dangerous—to the evidence or the police themselves—to require them to ignore it until they have obtained a warrant particularly describing it.
Id. at 467-68.

VI. Conclusion

In conclusion, the point of departure for any consideration of covert physical entry into a citizen's home must be the fourth amendment and particularly the abuses inherent in the general warrant system that gave rise to the amendment. Historical experience teaches that law enforcement officials must not be allowed free rein. As a consequence, the concept of a neutral and detached intermediary balancing of the government's legitimate law enforcement interests against the citizen's right of privacy and security has been the operative safeguard embodied in the fourth amendment warrant requirement. Importantly, warrants substitute the judgment of a magistrate for the judgment of a police officer.

The adoption of Title III, following the decisions in *Berger* and *Katz*, added a substantial weapon to the arsenals of law enforcement officials in their fight against criminal activities. Nonetheless, it is a weapon that lends itself to abuse if not carefully administered. As enacted, Title III establishes a very detailed procedural system that conforms to the suggested minimal fourth amendment requirements of the Supreme Court's decisions in the above cases. For the most part, close scrutiny by a judicial officer during all phases of the actual intercept serves to enhance the protection of individual rights within the context of an otherwise extremely intrusive law enforcement activity. Yet, despite an overall emphasis upon minimization of the intrusion, the statute remains silent on the manner of implementing an eavesdrop. With the decision in *Dalia*, law enforcement officials are free to assume that all intercept orders implicitly authorize breaking and entering.

Although it would have been desirable, primarily in terms of limitations of scope, for Title III to have included language establishing uniform, general guidelines for the implementation of orders authorizing electronic eavesdropping, it would

seem that the better position for the Supreme Court to have taken would have been to follow the approach of the Fourth, Eighth, and District of Columbia Circuit Courts of Appeals. That position implies the authority of judicial officers to balance competing interests and to issue particularized approval of breaking and entering, when necessary, but does not automatically imply such approval. In essence, while the surveillance itself may be legally authorized by an intercept order under Title III, this view holds that the legality of covert entry is entitled to separate fourth amendment scrutiny. This is a more flexible approach and makes more sense in light of the fact that such entry is very often a condition precedent to the execution of an eavesdrop. Moreover, in terms of constitutional safeguards, allowing express judicial authorization serves to vindicate the interests of privacy, personal security, and protection of property implicit in the fourth amendment. Basically, the requisite specificity of such an order serves to reduce the opportunity for abuse in the operation of police discretion.

Finally, judicial evaluation of the need for entry seems consistent with the language of 18 U.S.C. §2518(1)(c), (3)(c). These two provisions require the submission and judicial consideration of a "statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous." Although resort to electronic surveillance need not be a measure of last recourse, it is "not to be routinely employed as the initial step in a criminal investigation."[218] The emphasis is thus upon the least intrusive means of accomplishing the investigative end. Thus, as a matter of logical consistency, the Supreme Court might better have taken the position that a judicial officer should be required to consider the need for allowing breaking and entering. In other words, have less intrusive means of implementing an intercept order authorizing eavesdropping been tried and failed? Or, do such means appear to be unlikely to succeed if tried or to be too dangerous to attempt?

Modern technology offers police a number of devices which may overhear and record conversations transpiring within the most private confines without necessitating a physical entry.[219] These include parabolic microphones, detectaphones, and devices "which [make] use of the vibrations in a window pane as it responds to sound from within."[220] In addition, "portable laser 'mikes' emit an invisible infrared beam no larger than a pencil which may enter the home or office through a closed window. The beam is then reflected back and the conversation decoded."[221] Moreover, there may be a number of other devices available equally capable of intercepting conversations occurring within enclosed areas without recourse to breaking and entering to install "bugs." The point is that there are alternative means of implementing an intercept order authorizing electronic eavesdropping. The language of sections 2518(1)(c) and 2518(3)(c) strongly suggests that these alternatives be considered before surreptitious entry is authorized. The burden then would be upon law enforcement officials to justify a request for permission to break and enter by showing the ineffectiveness or likelihood of failure of these alternative methods. Given the substantial nature of the constitutional interests implicated by forcible entry, this burden does not seem unreasonable.

Jerry M. Peven

[218] United States v. Giordano, 416 U.S. 505, 515 (1974).

[219] *See generally* Westin, *Science, Privacy, and Freedom: Issues and Purposes for the 1970's*, 66 COLUM. L. REV. 1003, 1005–10 (1966).

[220] Note, *Eavesdropping and the Constitution: A Reappraisal of the Fourth Amendment Framework*, 50 MINN. L. REV. 378, 381 (1965). For particular instances in which detectaphones and spike mikes were successfully employed, see *Goldman v. United States* and *Silverman v. United States*, notes 52–55 and accompanying text *supra*.

[221] Note, *The Constitutionality of Electronic Eavesdropping*, 18 S.C.L. REV. 835, 841 (1966).