CRIMINAL PROCEDURE—SEARCH AND SEIZURE—COVERT ENTRY TO INSTALL ELECTRONIC EAVESDROPPING DEVICES IS SUBSUMED IN A VALID TITLE III EAVESDROPPING ORDER, *Dalia v. United States*, 99 S. Ct. 1682 (1979).

Lawrence Dalia was found guilty of two counts of transporting, receiving, and possessing stolen goods in violation of 18 U.S.C. § 371 and 18 U.S.C. § 2315.[1] Evidence obtained by interception of oral communications in Dalia's private office pursuant to a valid court authorization was introduced.[2] The installation of the requisite electronic listening device was accomplished by means of a forcible, surreptitious entry.[3]

The events leading to Dalia's conviction began on March 14, 1973, when United States District Court Judge Frederick B. Lacey authorized the interception of calls from two telephones at Mr. Dalia's place of business for a period of twenty days.[4] Upon expiration of this period, the government requested an extension of the wiretap order[5] and authorization to intercept all oral communications.[6] On April 5, 1973, the order authorizing interception of oral communications within the business premises of Lawrence Dalia was granted.[7] There was no reference to the method of interception to

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

[2] Dalia v. United States, 99 S. Ct. at 1687. Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510–2520 (1976), authorizes interception of "oral communications" pursuant to court order.

Professor Westin, writing for Columbia Law Review, summarized the various techniques, both currently available and under development, which may be utilized to intercept oral communications. Westin, *Science, Privacy, and Freedom: Issues and Proposals for the 1970's*, 66 COLUM. L. REV. 1003, 1006–07 (1966). These techniques include "building sub-miniature radio transmitters into . . . clothing or personal effects," "[m]icrophones the size of a sugar cube" which can be activated by remote control, "contact microphones," "[d]irectional microphones," "ultrasonic waves," and "windowpanes . . . coated with a transparent radar-reflecting coating which allows sensitive radar equipment to monitor from considerable distances the vibrations caused by conversations." *Id.* at 1006–08.

[3] 99 S. Ct. at 1687. Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510–2520, is silent regarding both the manner of installation and the degree of court supervision required when carrying out the court order.

[4] 99 S. Ct. at 1685. Judge Lacey granted the original wiretap authorization, the authorization to intercept oral communications, and all of the extensions. 426 F. Supp. at 865. He also presided at the trial and the hearing on the motion to suppress. *Id.* at 863, 872.

[5] 99 S. Ct. at 1685–86. The federal wiretap statute provides for extensions of wiretap orders upon a showing that probable cause still exists. 18 U.S.C. § 2518(5).

[6] 99 S. Ct. at 1686.

[7] *Id.* Reports concerning all intercepted conversations were required to be submitted to the court every five days. *Id.* Title III authorizes the judge to require periodic progress reports. 18 U.S.C. § 2518(6).

be utilized nor was there specific authorization for surreptitious entry to effect placement of the listening devices.[8]

Shortly after issuance of the order, special agents of the Federal Bureau of Investigation (FBI) broke into the office of Lawrence Dalia.[9] They placed a microphone in the ceiling of the office,[10] enabling the FBI to listen to all conversations in the office. There was no court supervision of the method of installation.[11] At the end of the twenty day period, the government again requested and obtained an extension of the court order.[12] On May 16, 1973, agents re-entered Lawrence Dalia's office and removed the electronic listening device.[13]

Prior to trial a motion to suppress the results of the electronic surveillance was made.[14] The defendant contended that the breaking and entering was a violation of the fourth amendment of the United States Constitution.[15] His basic theory was that specific and prior

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[8] 575 F.2d at 1345. The order to intercept oral communications authorized FBI agents to:

> Intercept oral communications of Larry Dalia, and others as yet unknown, concerning the above-described offenses at the business office of Larry Dalia, . . . situated in the north westernly corner of a one-story building housing Wrap-O-Matic Machinery Company, Ltd., and Precise Packaging, and located at 1105 West St. George Avenue, Linden, New Jersey.

99 S. Ct. at 1686 n.4.

A review of the case law in this area reveals a distinct split of authority regarding the necessity for such judicial authorization. *See* 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. Scafidi, 564 F.2d 633 (2d Cir. 1977), *cert. denied*, 435 U.S. 903 (1978); Application of the United States, 563 F.2d 637 (4th Cir. 1977); United States v. Ford, 553 F.2d 146 (D.C. Cir. 1977); United States v. Agrusa, 541 F.2d 690 (8th Cir. 1976), *cert. denied*, 429 U.S. 1045 (1977).

[9] 99 S. Ct. at 1687. The initial break-in was accomplished by three agents entering through a window. *Id.* at 1696 (Stevens, J., dissenting). They were in the building for two or three hours and spent a considerable portion of this time conducting a search of the "entire building for 'safety' reasons." Brief for Petitioner at 7, Dalia v. United States, 99 S. Ct. 1682 (1979) [hereinafter cited as Brief for Petitioner].

[10] 99 S. Ct. at 1687.

[11] *Id.* at 1696 (Stevens, J., dissenting). Notwithstanding the lack of supervision, the trial court held that a surreptitious entry to effect the installation of the listening device was within contemplation when the order authorizing the interception was issued. 426 F. Supp. at 866.

[12] 99 S. Ct. at 1686.

[13] *Id.* at 1687. At the post-trial hearing to suppress the results of the electronic surveillance, one of the agents who had participated in the entries admitted that no reports had been prepared concerning his activities and that there had been no direct supervision of his mode of operation by the court, the Department of Justice, or the United States Attorney's Office. Brief for Petitioner, *supra* note 9, at 7.

[14] 99 S. Ct. at 1687.

[15] 575 F.2d at 1345.

The fourth amendment of the United States Constitution reads:

> 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

judicial authorization was necessary to effect a surreptitious entry.[16] This motion was not heard until after the conclusion of the trial.[17] At that time the motion was denied.[18]

The defendant appealed his conviction to the Court of Appeals for the Third Circuit asserting a violation of the fourth amendment.[19] The Third Circuit affirmed the decision, holding, without dissent, that authorization to break and enter is subsumed in a warrant for interception of oral communications.[20]

In affirming the lower court decision, the Supreme Court of the United States held that breaking and entering to execute an otherwise valid Title III eavesdropping order does not violate the fourth amendment[21] and that the method of execution of the order is within the province of law enforcement officials, subject only to a sub-

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shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

Conversations have not always been viewed as falling within the purview of the fourth amendment. Prior to Katz v. United States, 389 U.S. 347 (1967), the fourth amendment was considered to be inapplicable to conversations. United States v. Santora, 583 F.2d at 458–59. In Olmstead v. United States, 277 U.S. 438 (1928), the Supreme Court held that the fourth amendment was to be read literally and, therefore, its protection applied only to physical objects. *Id.* at 464–65. Accordingly, absent physical invasion, wiretapping could not result in a violation of the fourth amendment. *Id.* at 466.

In Goldman v. United States, 316 U.S. 129 (1940), the Supreme Court affirmed its holding in *Olmstead* that speech was not protected by the fourth amendment where there has been no physical trespass. *Id.* at 135.

[16] 575 F.2d at 1345.

[17] 99 S. Ct. at 1687. A jury verdict was returned on June 18, 1976 and the evidentiary hearing was not held until July 29, 1976. 426 F. Supp. at 863.

[18] 99 S.Ct. at 1687. Judge Lacey found that surreptitious entry was within the contemplation of the court. 426 F. Supp. at 866. In reaching this conclusion, the trial judge stated:

> On this set of facts, I find that the safest and most successful methods of accomplishing the installation of the wiretapping device was through breaking and entering the premises in question. Dalia in fact stated that, to the best of his knowledge, it would be impossible to install such a device in that location without gaining access to the building forcibly. . . . In most cases the only form of installing such devices is through breaking and entering. The nature of the act is such that entry must be surreptitious and must not arouse suspicion, and the installation must be done without the knowledge of the residents or occupants.

*Id.* (citation omitted).

[19] 575 F.2d at 1345.

[20] *Id.* at 1346. The court did, however, recognize the desirability of prior judicial authorization by stating that "[i]n the future, 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." *Id.* at 1346–47. The Supreme Court decision in *Dalia* explicitly agreed with this suggestion. 99 S. Ct. at 1694 n.22.

[21] 99 S. Ct. at 1689.

sequent judicial determination of reasonableness.[22] The decision was based on the legislative history of Title III[23] and on an interpretation of the fourth amendment's requirement of reasonableness.[24]

Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (Title III) authorizes the interception of oral communications by law enforcement personnel pursuant to a valid court order.[25] The procedure mandated by the statute includes the identity of the officer empowered to seek authorization,[26] the contents of the application,[27] the criteria to be applied by the judge,[28] the requirement of particu-

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[22] *Id.* at 1694. In his dissenting opinion, Justice Stevens criticized this part of the holding. *Id.* at 1696 (Stevens, J., dissenting). He contended that law enforcement officials are required by the fourth amendment to obtain prior legislative or judicial authorization in order to meet the standard of reasonableness.

> I feel that the Court's holding may reflect an unarticulated presumption that national police officers have the power to carry out a surveillance order by whatever means may be necessary unless explicitly prohibited by the statute or by the Constitution.

*Id.* at 1704–05 (Stevens, J., dissenting).

The majority opinion considered a determination of reasonableness subsequent to the entry to be sufficient to satisfy the constitutional requirements. *Id.* at 1694.

[23] *Id.* at 1689.

[24] *Id.* at 1694.

[25] Title III was enacted as a direct response to the Supreme Court decisions in Berger v. New York, 388 U.S. 41 (1967), and Katz v. United States, 389 U.S. 347 (1967). S. REP. NO. 1097, 90th Cong., 2d Sess. 66, *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 2112. For a detailed discussion of these cases, see note 36 *infra*.

The constitutionality of Title III has never been directly decided by the Supreme Court. *See* United States v. Kahn, 415 U.S. 143, 150 (1974) (question of constitutionality specifically excluded from consideration); United States v. United States Dist. Court, 407 U.S. 297, 308 (1972) (no constitutional challenge). However, the Court has allowed the admission of evidence obtained under Title III. *See* United States v. Donovan, 429 U.S. 413 (1977); United States v. Kahn, 415 U.S. 143 (1974). In addition, there are several lower court cases which have held that the statute complies with the standards set forth in *Berger* and is, therefore, constitutional. *See, e.g.*, United States v. Tortorello, 480 F.2d 764 (2d Cir.), *cert. denied*, 414 U.S. 866 (1973); United States v. Cafero, 473 F.2d 489 (3d Cir. 1973), *cert. denied*, 417 U.S. 918 (1974); United States v. Cox, 462 F.2d 1293 (8th Cir. 1972); United States v. Cox, 449 F.2d 679 (10th Cir. 1971).

[26] 18 U.S.C. § 2516. Application must be made by "[t]he Attorney General, or any Assistant Attorney General specially designated by the Attorney General" or by "[t]he principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof," provided such prosecuting attorney would qualify under the local statute. *Id.* § 2516(1), (2).

[27] *Id.* § 2518. The application must disclose the identity of the officer applying for the court order, *id.* § 2518(1)(a), the particular details relating to the offense, location and type of communication, *id.* § 2518(1)(b), the prior history of the investigation, *id.* § 2518(1)(c), and the relevant time frame, *id.* § 2518(1)(d).

[28] *Id.* § 2518(3). In order to authorize electronic surveillance, the judge must determine the existence of probable cause for belief that a specific enumerated offense is involved, *id.* § 2518(3)(a), and that the interception will yield information concerning that offense, *id.* § 2518(3)(b).

larity,[29] the time limitations on the authorization,[30] the procedure for obtaining extensions,[31] the comprehensive reporting requirements,[32] the standards for attack,[33] and the sanctions to be applied in the event of non-compliance.[34] In addition, Title III prohibits the "manufacture, distribution, possession, and advertising of wire or oral communication intercepting devices" to members of the general public.[35]

Title III was enacted in response to judicial decisions declaring speech to be an area protected by the fourth amendment,[36] and a

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[29] *Id.* § 2518(4).

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

(a) the identity of the person . . .;

(b) the nature and location of the communications facilities . . .;

(c) a particular description of the type of communication . . .;

(d) the identity of the agency authorized . . .;

(e) the period of time . . . .

*Id.*

[30] *Id.* § 2518(5). Both authorizations and extensions are limited to a maximum of thirty days. *Id.*

[31] *Id.* Extensions must meet the same standards as the original order. *Id. See* notes 27 and 28 *supra*.

[32] 18 U.S.C. § 2519. Three separate reports are required: 1) from the issuing judge to the Administrative Office of the United States Courts, 2) from the Attorney General or the "principal prosecuting attorney of a State" or "any political subdivision of a State" to the Administrative Office of the United States Courts, and 3) from the Director of the Administrative Office of the United States Courts to the Congress. *Id.* The contents of these reports is specifically described in the statute. *Id.*

[33] The statute not only provides for a motion to suppress evidence acquired by interception of wire or oral communications, *id.* § 2518(10) but also allows the recovery of civil damages, *id.* § 2520.

[34] Evidence obtained as a result of an illegal interception of wire or oral communications must be suppressed. *Id.* § 2515.

[35] *Id.*

[36] In *Berger v. New York*, the defendant was convicted of conspiracy to bribe the Chairman of the New York State Liquor Authority. 388 U.S. at 44. Evidence had been obtained by planting a bug in a lawyer's office in compliance with the state wiretapping statute, N.Y. CODE CRIM. PROC. § 813-a (McKinney 1942). 388 U.S. at 45. The central issue in *Berger* was whether the state statute complied with the mandates of the fourth amendment. *Id.* at 54, 62–63. The Court first reaffirmed the fact that the fourth amendment is applicable to the states through the due process clause of the fourteenth amendment. *Id.* at 53. Next the Court analyzed the statute in light of the requirements of the fourth amendment, resulting in the determination that the statute was overly broad, *id.* at 54, and did not meet the constitutionally mandated standard of particularity, *id.* at 55–56. This lack of particularity required a holding that the statute was invalid. *Id.*

The most important aspect of the decision in *Berger* is the careful exposition of the factors which the Court will examine in determining the validity of an electronic surveillance statute. In order to comply with the fourth amendment there must be a "neutral and detached" magistrate, *id.* at 54, *see* 18 U.S.C. §§ 2510(9), 2516, a determination of probable cause, 388 U.S. at 55, *see* 18 U.S.C. § 2518(3)(a),(b), and particularity, 388 U.S. at 55–56, *see* 18 U.S.C.

sentiment among the general population that more aggressive forms of crime control were necessary to combat crime in a modern society.[37] The drafters of the Act were attempting to accomplish two purposes: "(1) [to] protect the privacy of wire and oral communications, and (2) [to] delineat[e] on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized."[38] Moreover, Congress specifically attempted to draft this legislation in conformance with the protections afforded by the fourth amendment,[39] while permitting law enforcement agencies to utilize the technology available in the electronic surveillance area.

The legislative history clearly indicates that the resultant statute was intended to be a comprehensive scheme for control of wiretapping and eavesdropping.[40] Further evidence of this legislative intent

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§ 2518(1)(b)(i), (ii), (iii). Moreover, the time period must not be excessive, 388 U.S. at 59, *see* 18 U.S.C. § 2518(1)(d), (4)(e), (5), extensions must be grounded on probable cause, 388 U.S. at 59, *see* 18 U.S.C. § 2518(5), and notice must be given, 388 U.S. at 60, *see* 18 U.S.C. § 2518(8)(d). These were the standards that Congress used as guidelines in enacting Title III. S. REP. NO. 1097, *supra* note 25, at 2161–63.

In *Katz v. United States*, the FBI had attached a recording device to the exterior of a public telephone booth. 389 U.S. at 348. There was no physical trespass. *Id.* at 349. The petitioner's conversations were recorded and used as evidence. *Id.* at 348. The Court declined to decide this case on the notion of "'constitutionally protected area,'" *id.* at 350, and instead held that

> the Fourth Amendment protects people, not places. What 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.

*Id.* at 351. The test is not based on property concepts but rather on a reasonable expectation of privacy. *Id.* at 352–53. Moreover, the Court specifically rejected the trespass rationale enunciated in *Olmstead* and *Goldman*. 389 U.S. at 353. For a discussion of this rationale, see note 15 *supra*.

[37] S. REP. NO. 1097, *supra* note 25, at 2154. For a discussion of the social forces which were acting on the members of Congress, see Note, *Federal Decisions On The Constitutionality Of Electronic Surveillance Legislation*, 11 AM. CRIM. L. REV. 639 (1973).

[38] S. REP. NO. 1097, *supra* note 25, at 2153; 114 CONG. REC. 11613 (1968) (remarks of Sen. Thurmond); *id.* at 14470 (exchange between Sen. Lausche and Sen. McClellan).

[39] In discussing the purposes of Title III, Senate Report Number 1097 states:

> To assure the privacy of oral and wire communications, title III prohibits all wiretapping and electronic surveillance by persons other than duly authorized law enforcement officers engaged in the investigation or prevention of specified types of serious crimes, and only after authorization of a court order obtained after a showing and finding of probable cause.

S. REP. NO. 1097, *supra* note 25, at 2153. For a discussion of the competing interests necessitating a federal wiretapping statute, see Greenawalt, *Wiretapping and Bugging: Striking a Balance Between Privacy and Law Enforcement*, 50 JUDICATURE 303 (1967).

[40] S. REP. NO. 1097, *supra* note 25, at 2153–54. For cases acknowledging this congressional intent, see United States v. Donovan, 429 U.S. at 441 (Burger, C.J., concurring in part and

is the detailed statutory procedure governing authorization and supervision for this type of surveillance.[41] However, both the legislative history and the statute itself are silent as to acceptable methods of installation of electronic listening devices and the requisite degree of court supervision.[42]

There has been one amendment to Title III which has been interpreted as an acknowledgment by Congress of the necessity for covert entry in order to install electronic listening devices.[43] This provision states that "[a]n order authorizing the interception of . . . oral communication shall . . . direct that a communication common carrier, landlord, custodian or other person shall furnish the applicant . . . all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively."[44] This amendment imposes no requirement for separate authorization for entry. Accordingly, some courts have reasoned that Congress, recognizing that the nature of electronic eavesdropping requires covert installations, was aware of, made provision for, and assumed the constitutionality of surreptitious, forcible entry to carry out a court order authorizing surveillance of oral communications.[45]

The adoption of Title III has resulted in conflicting judicial decisions as to whether the statute permits covert and surreptitious entry by law enforcement officials to carry out a surveillance order. In order to appreciate the importance of *Dalia*, the conflicting case law in this area must be understood.

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concurring in the judgment); Gelbard v. United States, 408 U.S. 41, 46 (1972); United States v. United States District Court, 407 U.S. at 302; United States v. Santora, 583 F.2d at 457–58.

[41] *See* notes 27 and 28 *supra*.

[42] While methodology and supervisory responsibility are not directly addressed, there are some indications in the legislative history that Congress was aware of the need for surreptitious entry to install electronic listening devices. *See* 114 CONG. REC. 11598, 12989 (1968) (remarks of Mr. Morse & Mr. Tydings).

[43] In *Dalia v. United States*, the Court interpreted this amendment as an explicit confirmation of the legislative grant of power to authorize covert entry. 99 S. Ct. at 1690 n.10.

The district court in *United States v. Ford* interpreted this amendment as implying judicial competence to authorize surreptitious entry. 414 F. Supp. at 883. However, the court of appeals refused to accept this interpretation and specifically declined to determine whether a court could authorize surreptitious entry to install bugs. 553 F.2d at 151 n.20.

A contrary view was enunciated in *Application of the United States* where the court stated:

> We cannot accept the suggestion that Congress, so clearly desirous of arming federal investigators with the power to eavesdrop, intended, without saying so, to forbid the surreptitious placement of devices which might be vital to the effective exercise of that power.

563 F.2d at 643.

[44] 18 U.S.C. § 2518(4).

[45] Dalia v. United States, 99 S. Ct. at 1690 n.1; United States v. Scafidi, 564 F.2d at 643 (Gurfein, C.J., concurring); United States v. Ford, 414 F. Supp. at 883.

In *United States v. Ford*[46] the defendant had been indicted for various narcotics offenses.[47] Evidence had been procured by installing an electronic listening device inside the Meljerveen Ltd. Shoe Circus.[48] Placement of the device was effected by means of a bomb scare ruse.[49] When the original device did not function properly, a bomb scare ruse was again employed to re-enter and install additional devices.[50] Although the judge had been apprised informally of the means to be employed in entering the store,[51] the authorization did not specify the method of entry nor limit the number of entries allowable. Instead, a blanket authorization to enter in any manner, including breaking and entering, was contained in the court order.[52] The government contended that the authorization to enter was merely surplusage[53] and that Title III implies authority to enter to install electronic listening devices which have been authorized by court order.[54]

The lower court decided that 18 U.S.C. § 2518(4) implies judicial competence to authorize covert entry.[55] However, the provision in the instant court order was considered overly broad and therefore must fail, regardless of the actual supervision exercised by the court.[56]

In affirming the lower court decision, the Court of Appeals for the District of Columbia declined to decide whether the judiciary was

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[46] 553 F.2d 146 (D.C. Cir. 1977).

[47] *Id.* at 150.

[48] *Id.* A court order authorizing electronic eavesdropping was obtained in accord with 23 D.C. Code §§ 541–556 (1973), which parallels 18 U.S.C. §§ 2510–2520. This court treated the two statutes as one for purposes of legislative history. 553 F.2d at 148 n.4.

[49] 553 F.2d at 148–49. The court held that for purposes of the fourth amendment there is no distinction between breaking and entering and a ruse entry. *Id.* at 154 n.32.

[50] *Id.* at 150.

[51] *Id.* at 148–50.

[52] *Id.* at 149–50. The relevant portion of the court order read:

> (d) Members of the Metropolitan Police Department are hereby authorized to *enter and re-enter* the Meljerveen Ltd. Shoe Circus . . . for the purpose of installing, maintaining and removing the electronic eavesdropping devices. *Entry and re-entry may be accomplished in any manner, including, but not limited to, breaking and entering or other surreptitious entry, or entry and re-entry by ruse and stratagem.*

*Id.* (emphasis in original).

The court order issued in *United States v. Agrusa* would appear to be equally broad. 541 F.2d at 693. However, the *Agrusa* court affirmed the validity of the provision. *Id.* at 693.

[53] 553 F.2d at 153.

[54] *Id.* at 158–59; *accord*, Dalia v. United States, 99 S. Ct. 1682 (1979); United States v. Scafidi, 564 F.2d 633 (2d Cir. 1977), *cert. denied*, 435 U.S. 903 (1978). *Contra*, United States v. Santora, 583 F.2d 453 (9th Cir. 1978); United States v. Finazzo, 583 F.2d 837 (6th Cir. 1978).

[55] 553 F.2d at 151 n.20; *see* note 43 *supra*.

[56] 553 F.2d at 152.

competent to authorize covert entry.[57] The court then determined that the fourth amendment required a bifurcated analysis,[58] subjecting both the overhearing and the entry to separate constitutional scrutiny.[59] Judge Skelly Wright, speaking for the court, reasoned that the Constitution mandates prior judicial authorization for surreptitious entry onto private premises.[60] Historically, eavesdropping had been permitted absent a physical trespass.[61] The trespass had been considered to be the greater intrusion.[62] "Exclusion of verbal evidence obtained by trespass vindicated only the right to be secure from illegal governmental invasion of private premises."[63] The decisions of the United States Supreme Court in *Berger* and *Katz* extended the protections of the fourth amendment to conversations.[64]

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[57] *Id.* at 151 n.20. However, the court did note that the statutory language is susceptible to the interpretation that, while merely technical trespasses such as a spike mike, *see* Silverman v. United States, 365 U.S. 505 (1961), may be authorized, surreptitious entry is not allowable. 553 F.2d at 151 n.20.

In order to accomplish the purposes of electronic surveillance, it is necessary that oral communications listening devices be positioned unobtrusively. In *Application of the United States*, the court held that to deny the courts the power to authorize surreptitious entry would frustrate the underlying purposes of Title III. 563 F.2d at 642. Therefore, the judiciary was considered competent to authorize entry, but the court order must nonetheless comport with the requirements of the fourth amendment. *Id.* at 644; *accord*, United States v. Scafidi, 564 F.2d 633 (2d Cir. 1977), *cert. denied*, 435 U.S. 903 (1978); United States v. Agrusa, 541 F.2d 690 (8th Cir. 1976), *cert. denied*, 429 U.S. 1045 (1977). *Contra*, United States v. Santora, 583 F.2d 453 (9th Cir. 1978); United States v. Finazzo, 583 F.2d 837 (6th Cir. 1978).

In *United States v. Santora*, the court disagreed with the interpretation of the legislative purpose relied on in *Application of the United States*. 583 F.2d at 458. *Application of the United States* held that the dominant congressional purpose was crime control. 563 F.2d at 642. *Santora* held that protection of privacy dominated. 583 F.2d at 458.

This question was ultimately resolved by the Supreme Court of the United States in *Dalia v. United States*. The analysis employed in *Application of the United States* was endorsed by the majority opinion. 99 S. Ct. at 1690–91. Four Justices dissented from this part of the opinion. *Id.* at 1694, 1696. In contrast to the majority, the dissenting Justices did not consider the crime detection policy underlying Title III sufficient to justify the conclusion that the judiciary has authority to authorize covert entry. *Id.* at 1704 n.33 (Stevens, J., dissenting). A specific legislative grant of power was considered necessary and its lack should be considered fatal. *Id.* at 1704–05.

[58] 553 F.2d at 152. In *Application of the United States*, the Fourth Circuit also recognized two separate privacy interests. "Secretive physical trespass upon private premises for the purpose of planting a bug entails an invasion of privacy of constitutional significance distinct from, though collateral to, that which attends the act of overhearing private conversations." 563 F.2d at 643; *accord*, United States v. Agrusa, 541 F.2d at 696.

[59] 553 F.2d at 152–53.

[60] *Id.* at 153–55.

[61] *Id.* at 153; *see* note 15 *supra*.

[62] Camara v. Municipal Court, 387 U.S. 523, 528–29 (1967); Jones v. United States, 357 U.S. 493, 498 (1958); United States v. Ford, 553 F.2d at 153.

[63] 553 F.2d at 153–54.

[64] Katz v. United States, 389 U.S. at 353; Berger v. New York, 388 U.S. at 62–63. *See* note 36 *supra*.

However, in so doing, the rule requiring judicial authorization for physical invasion was not altered.[65] Therefore, separate and *particular* authorization was necessary for entry and the provision in the court order was not surplusage.[66]

The court then focused on the issue of reasonableness[67] in light of the fourth amendment which prohibits "unreasonable searches and seizures."[68] The government argued that the entry was reasonable because it was made pursuant to a court order which complied with Title III.[69] However, the court determined that covert entry necessarily involved a substantial incremental invasion of privacy and that prior judicial authorization involved a relatively small burden on the

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[65] 553 F.2d at 156–57; *accord*, United States v. Santora, 583 F.2d at 460.

[66] 553 F.2d at 154–55; *accord*, Application of the United States, 563 F.2d 637 (4th Cir. 1977); United States v. Agrusa, 541 F.2d 690 (8th Cir. 1976), *cert. denied*, 429 U.S. 1045 (1977). *Contra*, United States v. Scafidi, 564 F.2d 633 (2d Cir. 1977), *cert. denied*, 435 U.S. 903 (1978). One commentator has argued strenuously against the necessity for separate and particular authorization for covert entry. *See* McNamara, *The Problem Of Surreptitious Entry To Effectuate Electronic Eavesdrops: How Do You Proceed After The Court Says "Yes"?*, 15 AM. CRIM. L. REV. 1 (1977).

[67] 553 F.2d at 158. Reasonableness alone is not sufficient to validate a search. *Id.* at 159 n.45. A warrant based on probable cause and issued by a "neutral and detached magistrate" is an additional requirement of constitutional magnitude. United States v. United States District Court, 407 U.S. at 315; Chambers v. Maroney, 399 U.S. 42, 51 (1970); Chimel v. California, 395 U.S. 752, 764–65 (1969).

Exceptions to the warrant requirement, absent consent, require exigent circumstances. Analogy to entry onto private premises to execute an arrest warrant will not withstand analysis. Arrest cases have usually been considered to involve exigent circumstances because of the possibility of flight or destruction of evidence. United States v. Watson, 423 U.S. 411, 426–33 (1976) (Powell, J., concurring); Warden v. Hayden, 387 U.S. 294, 299 (1967). However, the Third Circuit has required a showing of exigency in addition to probable cause to validate entry onto private premises for the purpose of arrest. Government of the Virgin Islands v. Gereau, 502 F.2d 914, 928–29 (3d Cir. 1974), *cert. denied*, 420 U.S. 909 (1975). Consequently, since exigent circumstances are unlikely in an eavesdropping situation, the analogy to arrest cases must collapse. 553 F.2d at 159 n.45.

However, in *United States v. Agrusa*, the court reached a contrary conclusion. 541 F.2d at 696. In a somewhat tortured decision, unannounced entry to arrest was analogized to entry to install electronic eavesdropping devices. *Id.* at 696–97. Although the court recognized the necessity for a bifurcated analysis and separate authorization for covert entry, *id.* at 696, it failed to subject the entry provision to a separate determination of reasonableness. *See id.* at 696–98. Ultimately, the decision was based on both a lessened expectation of privacy in business premises and a direct analogy to arrest cases. *Id.* at 700. Somehow the particularity required by *Berger* and Title III failed to capture the attention of the court and no distinction was perceived between the destruction of existing evidence (arrest) and the creation of future evidence (eavesdropping). *Id.* at 701; *see* note 36 *supra*.

[68] U.S. CONST. amend. IV.

[69] 553 F.2d at 158–60. The court pointed out that, if this argument were to prevail, the entry provision in the court order would again be surplusage. *Id.* at 160.

law enforcement official.[70] The interposition of a "neutral and detached magistrate" was, therefore, necessary for each entry.[71]

Finally, the sufficiency of the court order was examined.[72] The appellate court found that the showing of probable cause was insufficient to support the entry provision.[73] In reaching this conclusion, Judge Skelly Wright was cognizant of the particularity required by both *Berger* and Title III.[74] Consequently, the provision was held to be overbroad[75] and the results of the covert entry were suppressed as mandated by statute.[76]

The two most recent circuit court opinions in this area, *United States v. Santora*[77] and *United States v. Finazzo*,[78] have held that Title III does not include, either expressly or impliedly, a grant of authority to the courts to issue orders for surreptitious entry to install electronic listening devices.[79] Therefore, any such entry violates the

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[70] *Id.* at 163–65.

In *Agrusa*, the court reached the opposite conclusion in evaluating the significance of the interests involved. 541 F.2d at 697. The premises invaded were business premises which, the court felt, were entitled to less fourth amendment protection than a home. *Id.* at 697. In addition, the court found exigent circumstances of dimensions at least as substantial as those obtaining in an arrest situation. *Id.*

Judge Skelly Wright in *fact* seemed particularly displeased with the government's contention that the "courts do not have the expertise necessary to weigh adequately the desirability and feasibility of various methods of entry . . . ." 553 F.2d at 162; *but see* McNamara, *supra* note 66.

[71] 553 F.2d at 165. Judicially created exceptions to the warrant requirement are usually based on an overriding public interest. *Id.* at 162. The rationale for this requirement

> rests primarily on the conception that *it is for a judicial officer*, and not the prosecutor or police, *to determine whether* the security of our society, which is essential to the maintenance of a rule of law, requires that the *right of privacy yield to a right of entry*, search and seizure, *and what limitation and specification of entry may be appropriate and reasonable*.

*Id.* at 163 (quoting Dorman v. United States, 140 U.S. App. D.C. 313, 317, 435 F.2d 385, 389 (1970)) (emphasis in original). The "convenience of the executing officers" is not sufficient justification for an exception to the warrant requirement. 553 F.2d at 163.

[72] 553 F.2d at 165.

[73] *Id.* at 169. While the affidavits were sufficient to support a finding of probable cause warranting covert entry, the breadth of the entry provision required a showing of probable cause relating to the necessity for a grant of discretion to the law enforcement officers. *Id.*

[74] *Id.* at 167–68.

[75] *Id.* at 170.

[76] *Id.* at 170–71; 18 U.S.C. § 2515 (1976).

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

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

[79] United States v. Santora, 583 F.2d at 455; United States v. Finazzo, 583 F.2d at 838. In *Finazzo*, the court stated:

> We hold that judges do not have the power under the 1968 wiretapping statute to authorize breaking and entering 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 evidence obtained in this manner must be suppressed.[80]

*United States v. Finazzo*[81] was an appeal from a lower court decision suppressing the fruits of electronic eavesdropping.[82] A valid Title III order had been obtained and the listening devices were installed by means of breaking and entering.[83] In *Finazzo*, the Sixth Circuit briefly reviewed the legislative history of Title III and noted the congressional silence on the subject of installation of eavesdropping devices.[84] Considering the stated legislative purpose of protection of privacy, the court concluded 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"[85] the parameters of this authority.[86] In addition, the *Finazzo* court believed that the difficulties inherent in the unobtrusive installation of the electronic listening devices did not raise an inference that authority to break and enter is subsumed in the eavesdropping order.[87] Consequently, court-authorized surreptitious entry was not implicit in the statutory scheme.[88]

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> Fourth Amendment. We also hold that federal law enforcement agents do not have independent statutory or constitutional authority to engage in break-ins to install eavesdropping devices. No statute gives federal judges the power to authorize break-ins to plant eavesdrops; the judiciary does not have inherent power to delegate this authority to police officers; and police officers do not have that authority independently.

583 F.2d at 838. *Contra*, Dalia v. United States, 99 S. Ct. at 1689–92.

[80] United States v. Finazzo, 583 F.2d at 838; United States v. Santora, 583 F.2d at 466.

[81] 583 F.2d 837.

[82] *Id.* at 838.

[83] *Id.*

[84] *Id.* at 839. In *Finazzo*, the court order did not specify the method of installation. *Id.* at 840. However, the government contended that the issuing judge was aware that forcible, surreptitious entry would be necessary. *Id.*

[85] *Id.* at 841. This language was quoted with approval in Justice Stevens' dissent in *Dalia v. United States*, 99 S. Ct. at 1698 n.13 (Stevens, J., dissenting).

[86] United States v. Finazzo, 583 F.2d at 841.

[87] *Id.* The Second and Third Circuits seem to have reached an opposite conclusion on this point. United States v. Dalia, 575 F.2d at 1346; United States v. Scafidi, 564 F.2d at 640. Essentially, the court in *Finazzo* is utilizing a bifurcated analysis, *see* note 58 *supra*, which requires independent compliance with the requirements of the fourth amendment for each invasion of privacy. 583 F.2d at 841. A determination by the court that one privacy interest may be invaded does not imply authority to invade independent but collateral privacy interests. *Id.* at 841–42.

[88] 583 F.2d at 840–42. In a separate concurrence, Judge Celebrezze disagreed with this statutory interpretation. *Id.* at 850–51 (Celebrezze, J., concurring). He concluded that the majority's reading of the statute was hypertechnical and that judicial competence to authorize surreptitious entry exists. *Id.* However, Judge Celebrezze concurred in the decision because he felt that the court order must contain express approval for entry. *Id.* at 850 (Celebrezze, J., concurring).

The court then examined possible alternative sources of judicial power to authorize break-ins.[89] An examination of the fourth amendment and its history resulted in a holding that the judiciary is not competent to issue orders authorizing break-ins in the absence of a statute.[90] The court similarly rejected the contention that law enforcement officials can justify entry either under the exception for exigent circumstances or by analogy to arrest cases.[91] Moreover, the court declined the invitation to create an additional exception to the warrant requirement in cases of Title III eavesdrops.[92]

In *Santora*, the interception order contained a provision authorizing covert entry.[93] Bugs had been installed in business premises resulting in convictions for stolen airline ticket offenses.[94] The Ninth Circuit recognized that Congress was aware of the problems of entry associated with eavesdropping orders.[95] Accordingly, Judge Hufstedler held that congressional silence on surreptitious entry must be construed as a deliberate and knowing denial of power to the courts to authorize covert entry.[96] Therefore, the entry provision in the eavesdropping order was held to be invalid and the evidence thus obtained was suppressed.[97] The *Santora* court did not find it neces-

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[89] *Id.* at 842–48.

[90] *Id.* at 844. The only statute that authorizes break-ins is 18 U.S.C. § 3109 (1970). Several of the cases dealing with entry to install electronic listening devices have examined the applicability of this statutory authority. In *Agrusa*, the court concluded that 18 U.S.C. § 3109 applied in all cases in which prior or contemporaneous announcement would defeat the purposes for the entry. United States v. Agrusa, 541 F.2d at 699. However, this construction has been criticized as inconsistent with the wording of the statute and with the exigent circumstances envisioned by the statute. United States v. Santora, 583 F.2d at 464; United States v. Finazzo, 583 F.2d at 847. *See also*, United States v. Ford, 553 F.2d at 151 n.21.

Judge Lay, dissenting in *Agrusa*, argued vehemently against the majority's characterization of surreptitious entry as equivalent to exigent circumstances in arrest situations. 541 F.2d at 703 (Lay, J., dissenting). Apparently, three other judges in the Eighth Circuit agreed with Judge Lay. *See id.* at 704 (Lay, J., dissenting).

[91] 583 F.2d at 846–47. *Contra*, United States v. Agrusa, 541 F.2d 690 (8th Cir. 1976), *cert. denied*, 429 U.S. 1045 (1977). Exigent circumstances are generally recognized "in the case of the fleeing felon, the hostage and other life-endangering situations, and the threatened destruction of evidence." 583 F.2d at 846. *See* note 67 *supra*.

[92] 583 F.2d at 847–48. The argument that covert entry was a reasonable means of executing an eavesdropping order and, therefore, in compliance with the fourth amendment, was again rejected. *Id.* The court felt that the entry itself must be subjected to separate fourth amendment scrutiny because it involves invasion of a separate privacy interest. *Id.* at 848.

[93] 583 F.2d at 454.

[94] *Id.*

[95] *Id.* at 461.

[96] *Id.* This position has not been adopted by any other circuit.

[97] *Id.* at 466; 18 U.S.C. § 2515.

sary to address the constitutional issues or to look for any alternative sources of power which would permit the placement of electronic listening devices by forcible surreptitious entry.[98]

In *United States v. Scafidi*,[99] the Second Circuit was confronted with the issue of covert entry to carry out a valid Title III eavesdropping order.[100] Unlike *Santora*, the court order authorizing the interception of oral communications contained no entry provision.[101] Citing *United States v. Ford*[102] and Senate Report No. 1097,[103] the court stated that "it is clear . . . that Congress intended to empower courts to permit such entries . . . ."[104] The remaining question was the necessity for specific authorization.[105] The court held that it was "reasonable" to break and enter to place electronic listening devices.[106] No bifurcated analysis was employed and no independent invasion of privacy was envisioned.[107] The *Scafidi* court held that the method of entry and the number of entries were questions solely within the purview of the law enforcement officials.[108] Although the fourth amendment was not directly considered, the opinion implied that the fourth amendment is satisfied by a valid Title III order and

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[98] 583 F.2d at 463. The entry itself was considered to be a violation of Title III. Suppression is then required. 18 U.S.C. § 2515.

[99] 564 F.2d 633 (2d Cir. 1977), *cert. denied*, 435 U.S. 903 (1978).

[100] *Id.* at 639. *Scafidi* involved multiple defendants convicted for gambling offenses. *Id.* at 636. Bugs were installed in an apartment and at a bar. *Id.* at 637. Before examining the issue of covert entry the court addressed the standing issue. *Id.* at 638–39. Although ultimately the court decided that it was unnecessary to decide the standing issue, *id.* at 639, there is some dictum in this portion of the opinion recognizing a separate privacy interest in the premises bugged. *Id.* at 638.

[101] *Id.* at 639. However, a separate court order authorizing agents to re-enter the bar to replace batteries in the eavesdropping equipment was obtained. *Id.* at 638.

[102] *Id.* at 639. Here the court relied on the district court opinion in *Ford* without noting that the circuit court specifically refused to affirm this portion of the opinion. *See* note 57 *supra* and accompanying text.

[103] *See* notes 36–42 *supra* and accompanying text.

[104] 564 F.2d at 639.

[105] *Id.*

[106] *Id.* Apparently, the court did not address the question of "reasonableness" in the fourth amendment sense, but rather in the everyday sense of logical or justifiable.

[107] Interception of oral communications was considered to be the primary invasion, and entry to place bugs did not constitute a separate invasion. 564 F.2d at 640. *Contra*, United States v. Ford, 553 F.2d at 158. *See* note 67 *supra*.

[108] 564 F.2d at 640. In reaching this conclusion the court commented that:

> [O]nce a judicial officer is convinced by the facts presented to him that electronic surveillance will aid in the detection of crime, his authorization that it be used should then transfer to the appropriate police agency the decision as to the precise mechanical means whereby the order is to be carried out.

*Id.*

that law enforcement personnel are subject to no additional prior restraints upon their actions.[109]

The Third Circuit in *Dalia* agreed with the reasoning in *Scafidi*.[110] Since the circuit court opinion is simply an enthusiastic affirmation of the district court,[111] the opinion of the district court must be scrutinized to determine the analytical basis for the holding in this circuit. In the district court opinion, Judge Lacey stated initially that the silence of Title III regarding judicial supervision of surreptitious entry to install listening devices circumscribes the responsibility of the issuing judge.[112] Thereafter, the method of entry need only be "reasonable."[113] Implicit in this statement is the assumption that Congress was aware of the necessity for covert entry and chose not to impose any prior restraints upon the executing officers.[114] Again a bifurcated analysis was not employed. Judge Lacey held that the breaking and entering was not "unreasonable" as that term is used in the fourth amendment and that the further requirements of antecedent judicial scrutiny and a warrant were satisfied by the Title III order.[115]

*Dalia v. United States* presented the Supreme Court of the United States with an opportunity to resolve a direct conflict in the circuits concerning the interpretation and application of Title III and to provide guidance for law enforcement personnel in a complex area of fourth amendment interests. In affirming the lower court's decision, the Supreme Court addressed the questions of judicial competence to authorize covert entry and the necessity for court approval and supervision of such entry.[116]

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[109] *Id. Accord,* United States v. Dalia, 426 F. Supp. 862 (D.N.J. 1977), *aff'd,* 575 F.2d 1344 (3d Cir. 1978), *aff'd,* 99 S. Ct. 1682 (1979). *Contra,* United States v. Santora, 583 F.2d 453 (9th Cir. 1978); United States v. Finazzo, 583 F.2d 837 (6th Cir. 1978); Application of the United States, 563 F.2d 637 (4th Cir. 1977); United States v. Ford, 553 F.2d 146 (D.C. Cir. 1977).

[110] 575 F.2d at 1346.

[111] United States v. Dalia, 575 F.2d 1344 (3d Cir. 1977), *aff'd,* 99 S. Ct. 1682 (1979).

[112] 426 F. Supp. at 865. Abdication of responsibility for supervision of entry by the judiciary to law enforcement officials has been strongly criticized in other cases. United States v. Ford, 553 F.2d at 154–55; Application of the United States, 563 F.2d at 643–44.

[113] 426 F. Supp. at 865. The term "reasonable" was employed here in the same manner as in *Scafidi*. *See* note 106 *supra* and accompanying text. *Contra,* United States v. Ford, 553 F.2d at 159 n.45; Application of the United States, 563 F.2d at 644–45.

[114] This assumption does not comport with the legislative history of Title III. Such a broad grant of authority to law enforcement personnel would be expected to merit some congressional debate. *See* notes 36–42 and 84–88 *supra* and accompanying text.

[115] 426 F. Supp. at 865–66. Here the terms "reasonable" and "efficient and convenient" seem to become confused. *See* note 71 *supra* and accompanying text.

[116] 99 S. Ct. at 1682.

Initially, a unanimous Court decided that the fourth amendment does not prohibit covert entry to install electronic listening devices pursuant to a valid Title III eavesdropping order.[117] Implicit in this determination was the constitutionality of Title III itself.[118] Surreptitious entry pursuant to a warrant had long been accepted in exigent circumstances, such as arrest or possible destruction of evidence.[119] Recognizing no constitutionally valid distinction between an eavesdropping order and the exigent circumstances situations,[120] the Court held that "[t]he Fourth Amendment does not prohibit *per se* a covert entry performed for the purpose of installing otherwise legal electronic bugging equipment."[121]

While the majority opinion in *Dalia* conceded that there was no explicit statutory authority for covert entry,[122] Justice Powell found that "[t]he language, structure, and history of the statute"[123] all evidenced congressional intent "to approve electronic surveillance without limitation on the means necessary to its accomplishment, so long as they are reasonable under the circumstances."[124] The majority

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[117] *Id.* at 1688–89, 1694, 1696.

[118] Professor Spritzer, writing in the University of Pennsylvania Law Review, argues against electronic eavesdropping on both constitutional and policy grounds. Spritzer, *Electronic Surveillance By Leave Of The Magistrate: The Case In Opposition*, 118 U. PA. L. REV. 169 (1969). This commentator finds that electronic surveillance is inconsistent with the fourth amendment's requirement of particularity. *Id.* at 187–89. Necessarily, many conversations irrelevant to the matter under investigation must be examined. *Id.* at 187. In concluding his article, Professor Spritzer states:

> [N]o warrant procedure can confine an electronic surveillance to the predictable and the relevant.
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> . . . .
>
> Basically, the justification offered by those who would legitimate electronic intrusion is the asserted need of our society to protect itself from lawlessness by the most effective means available. But is it really to be supposed that the weaknesses and deficiencies of a society in which crime and disorder have become rife will be overcome by authorizing the nation's police officers to become insidious spies monitoring the private conversations of the citizenry?
>
> The Supreme Court has laid to rest the concept that the fourth amendment is violated only when there is a physical trespass, but . . . has encouraged the notion . . . that both one's premises and one's privacy of communication may be secretly invaded if only a magistrate nods. . . . [A] decent and civilized society should provide some area in which the privacy of the individual is inviolate and he is free to communicate as he pleases without fear of the state's intrusion.

*Id.* at 201.

[119] 99 S. Ct. at 1688. *See* note 67 *supra*.

[120] 99 S. Ct. at 1688–89.

[121] *Id.* at 1689.

[122] *Id.*

[123] *Id.*

[124] *Id.* This would mean that Congress intended to allow law enforcement personnel broad discretion regarding the method of implementation.

contended that the fleeting recognition of the physical difficulties inherent in eavesdrops and the lack of a specific prohibition against covert entry supported this intent.[125] Congressional awareness of the frequent necessity for surreptitious entry to install electronic listening devices,[126] coupled with the enactment of Title III authorizing electronic surveillance, were considered additional strong evidence of this intent.[127] The majority concluded that silence may be equated with congressional approval of covert entry[128] and that, in light of the comprehensive nature of the statutory scheme, this prohibition would have been made explicit.[129] Moreover, a denial of competence to authorize covert entry would undermine the congressional purpose in the enactment of Title III.[130]

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[125] *Id.* at 1690–91. The debate over Title III covers many pages of the Congressional Record. However, in those hours of debate there is no direct reference to the acceptable method of installation of electronic listening devices. Perhaps the most specific mention appears in the remarks of Senator Tydings, 114 CONG. REC. 12988–89 (1968), cited by both the majority and the dissent in *Dalia*. 99 S. Ct. at 1691 (Powell, J., writing for the majority), 1701 (Stevens, J., dissenting). Senator Tydings' remarks were designed to allay the fears of some of the opponents of Title III. It is certainly arguable that his remark concerning the difficulty and, often, impossibility of installing electronic listening devices does not constitute evidence of congressional intent.

[126] 99 S. Ct. at 1690–91. The Court does not cite any congressional remarks, except those of Senator Tydings, *see* note 125 *supra*, to support this statement. Instead, attention is directed to Senate Hearings on other legislation. 99 S. Ct. at 1690.

[127] 99 S. Ct. at 1690–91.

[128] *Id.* at 1691. In rejecting the possibility that Congress did not intend to authorize covert entry, the Court stated:

> the language and history of Title III convey . . . [an] explanation for Congress' failure to distinguish between surveillance that requires covert entry and that which does not. Those considering the surveillance legislation understood that, by authorizing electronic interception of oral communications in addition to wire communications, they were necessarily authorizing surreptitious entries.

*Id.*

[129] *Id.*

[130] *Id.* at 1691–92. The Court states that Title III was enacted to combat crime. *Id.* at 1691. An examination of S. REP. NO. 1097, the source upon which the majority relies, 99 S. Ct. at 1691 n.13, reveals that the purposes of Title III were both crime control and protection of the privacy of conversation. S. REP. NO. 1097, *supra* note 25, at 2153–54; *see also* notes 37–39 *supra* and accompanying text. The report makes special mention of the problems which had resulted from the undisciplined use of electronic surveillance.

> Commercial and employer-labor espionage is becoming widespread. It is becoming increasingly difficult to conduct business meetings in private. Trade secrets are betrayed. Labor and management plans are revealed. No longer is it possible, in short, for each man to retreat into his home and be left alone. Every spoken word relating to each man's personal, marital, religious, political, or commercial concerns can be intercepted by an unseen auditor and turned against the speaker to the auditor's advantage.

In his dissenting opinion, Justice Stevens refused to accept this argument, interpreting silence as evidence of lack of congressional consideration of this aspect of implementation.[131] Indeed, it would appear from the scope of the statute, the legislative history, and the prior case law that the majority's interpretation of this silence lacks a firm foundation.[132]

Having decided that Title III authorized covert entry, the court proceeded to consider the necessity for specific judicial authorization.[133] The majority determined that the instant eavesdropping order complied with the warrant requirement of the fourth amendment.[134] Since the method of execution of a warrant is generally

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S. REP. NO. 1097, *supra* note 25, at 2154.

It is interesting to note that at the time of enactment of Title III there was some debate concerning the effectiveness of eavesdropping as a means of crime control. Note, *supra* note 37, at 657–61. Although the majority of officials and commentators strongly endorsed electronic surveillance, *id.* at 657, former Attorney General Ramsey Clark was among the dissenters. In fact, Clark's argument was based on an invasion of privacy as the following statement illustrates: "Nothing so mocks privacy as the wiretap and electronic surveillance. They are incompatible with a free society." 1968 U.S. CODE CONG. & ADMIN. NEWS 2112, 2232–33.

[131] 99 S. Ct. at 1701 (Stevens, J., dissenting). Justice Stevens began his discussion of this issue by stating:

> Only one relevant conclusion can be drawn from a review of the entire legislative history of Title III. The legislators never even considered the possibility that they were passing a statute that would authorize federal agents to break into private premises without any finding of necessity by a neutral and detached magistrate.

*Id.* (Stevens, J., dissenting).

[132] The majority's position in *Dalia* is based on the concept of one invasion of privacy. 99 S. Ct. at 1693–94. If the interception of conversations and the installation of the necessary equipment violate only one privacy interest, the eavesdropping order should validate breaking and entering absent a specific statutory prohibition.

The dissenting Justices and several of the circuit courts, have disagreed with this view of the fourth amendment. In these opinions the physical invasion of private premises has been considered to be an additional intrusion upon the individual's privacy and, as such, entitled to separate fourth amendment protection. 99 S. Ct. at 1695 (Brennan, J., dissenting). *See* Application of the United States, 563 F.2d at 643; United States v. Ford, 553 F.2d at 157–58; United States v. Agrusa, 541 F.2d at 696.

Justice Stevens' dissent pointed out that, even when conversations were not afforded fourth amendment protection, any physical invasion necessary to capture the conversation was considered violative of the constitutional standard. 99 S. Ct. at 1703 (Stevens, J., dissenting). *See* note 15 *supra*. Breaking and entering violated the fourth amendment while eavesdropping did not. 99 S. Ct. at 1703 (Stevens, J., dissenting). Today, as a result of the decision in *Dalia*, an eavesdropping order is sufficient to cover both areas and no separate legally cognizable invasion of privacy results from the entry. *Id.* at 1694.

[133] 99 S. Ct. at 1692.

[134] *Id.* at 1693. The majority opinion adopted a narrow view of the particularity required by both the fourth amendment and by *Berger*. *Id.* *See* note 36 *supra* and accompanying text.

One commentator, in discussing the constitutionality of Title III and the fourth amendment's particularity requirement has reached the conclusion that "as the techniques for effec-

within the province of law enforcement officials "subject . . . to the general Fourth Amendment protection 'against unreasonable searches and seizures,'"[135] the bifurcated analysis employed in several of the lower court decisions[136] was rejected as too great a refinement of the concept of fourth amendment interests.[137] In substance, the majority considered breaking and entering to implant electronic listening devices pursuant to a valid Title III order to be equivalent to the manner of execution of the eavesdropping order rather than an additional and separate invasion of privacy.[138] This resulted in no requirement of antecedent judicial approval.[139] The only constitutional question was one of reasonableness of execution which may be determined after the entry.[140]

Justice Brennan, concurring in part and dissenting in part, was particularly concerned with the majority's failure to recognize two separate privacy interests.[141] The majority stated that "[o]ften in executing a warrant the police may find it necessary to interfere with privacy rights not explicitly considered by the judge who issued the warrant."[142] The Court made reference to arrest and forcible entry situations;[143] however, these situations are distinguishable. In all of the cases cited by the majority, exigent circumstances, which could not readily be anticipated, existed.[144] In contrast, exigency is not a

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tuating the search becomes more efficient, resulting in a higher probability of innocent objects coming within the ken of police officers, the specificity of what is allowed to be observed and seized must likewise increase." Note, *supra* note 37, at 676. This author finds the opportunity of observation constitutionally repugnant, a position with which the Court in *Dalia* did not agree. *Id.*

[135] 99 S. Ct. at 1693.

[136] *See* notes 58–66 *supra* and accompanying text.

[137] 99 S. Ct. at 1693–94.

[138] *Id.* at 1694.

[139] *Id.*

[140] *Id.*

[141] *Id.* at 1694–95 (Brennan, J., dissenting).

[142] *Id.* at 1694 (Brennan, J., dissenting).

[143] *Id.* In fact the obvious implication is that there is no distinction between eavesdropping orders and arrest warrants.

[144] United States v. Cravero, 545 F.2d 406 (5th Cir. 1976), *cert. denied*, 97 U.S. 1123 (1977), involved the arrest pursuant to a warrant of a suspect at the home of another person. 545 F.2d at 412–13. The police agents did not enter the home until the suspect received an oral warning of the presence of the police. *Id.* at 413. This was a situation which was not readily anticipated and constituted exigent circumstances. *Id.*

In United States v. Brown, 556 F.2d 304 (5th Cir. 1977), police officers entered an unoccupied building to execute a search warrant. *Id.* at 305. The scope of the search was not enlarged by this entry.

characterisic of an eavesdropping situation. As a matter of fact, a certain amount of advance planning is necessary to unobtrusively implant electronic listening equipment. Law enforcement personnel are necessarily sufficiently aware of the contemplated method of installation to obtain prior judicial approval. Finally, this would not infringe on the law enforcement officers' freedom in carrying out the order.[145] A general provision authorizing the entry would meet the constitutional standard and the method of effecting the entry would remain within the discretion of the law enforcement personnel.[146]

Justice Stevens filed a dissenting opinion in which Justices Brennan and Marshall joined.[147] The issue considered in this opinion was "whether this kind of power [to break and enter] should be read into a statute that does not expressly grant it."[148] In rejecting this interpretation, Justice Stevens, considering both the structure and history of the statute, found no support for the majority's position.[149] Moreover, the "duty [of the Supreme Court] to protect the rights of the individual"[150] sufficiently outweighed "the interest in more effective law enforcement"[151] to constitute an additional basis for rejecting the government's position.[152] Justice Stevens argued that it is generally the province of Congress to balance privacy interests and law enforcement efficiency.[153] Therefore, when Congress has expressly enacted legislation circumscribing the relationship between an inva-

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United States v. Gervato, 474 F.2d 40 (3d Cir. 1973), was another case in which a search warrant had been executed while the premises were unoccupied. *Id.* at 41. Both *Gervato* and *Brown* involved lack of notice. In breaking and entering to install electronic listening devices the problem is one of the scope of the search.

[145] 99 S. Ct. at 1695 (Brennan, J., dissenting).

[146] *Id.*

[147] *Id.* at 1696 (Stevens, J., dissenting).

[148] *Id.*

[149] *Id.* at 1696–97 (Stevens, J., dissenting). The detailed provisions which Congress included in Title III suggested that Congress did not intend to allow law enforcement officials to exercise discretion in wiretapping or eavesdropping situations. *Id.* at 1700 (Stevens, J., dissenting). The dissent argued that broad discretionary power is inconsistent with the procedural requirements embodied in the statute. *Id.* at 1700–01 (Stevens, J., dissenting).

Justice Stevens found no support for the majority's reading of the legislative history. *Id.* at 1701 (Stevens, J., dissenting). In fact, Justice Stevens did find that the legislative history indicated a concern with strict controls on the process of wiretapping and eavesdropping, a concern which would be inconsistent with authorization of covert entry by silence. *Id.* at 1702 (Stevens, J., dissenting).

[150] *Id.* at 1696 (Stevens, J., dissenting).

[151] *Id.*

[152] *Id.*

[153] *Id.* at 1697 (Stevens, J., dissenting).

sion of privacy and an investigatory technique, the courts ought to respect this determination.[154] Absent specific congressional authorization, however, federal intrusions on privacy deserve no special consideration and are, in fact, illegal.[155] Finally, the dissenting Justices voiced their discomfort with the power which the majority opinion would presumably vest in the national police force.[156] Since Congress did not explicitly grant this power, the dissent concluded that the constitution requires that this authority be denied.[157]

Entry onto the premises of another without consent or judicial authorization is tortious and illegal. The fourth amendment was enacted to prohibit such non-consensual or warrantless entries.[158] The problem in eavesdropping orders involves judicial competence to authorize surreptitious entry and the scope of the order that is issued. In *Dalia*, the Supreme Court decided that congressional silence may signify a grant of authority.[159] Failure to prohibit covert entry is equated with authority to engage in covert entry.[160] However, as the dissent stated, silence may just as readily be construed as denying authority.[161] Physical invasion of one's home or place of business is an intrusion of different dimensions than eavesdropping.[162] Although the Supreme Court has decided that these other dimensions may be protected by a subsequent determination of reasonableness of the method of carrying out the eavesdropping order,[163] Title III itself does not, by its silence, form a firm basis for this holding.

The history of the fourth amendment is replete with instances of judicial disapproval of physical invasions absent authorization.[164] The majority assumes a broad grant of power to law enforcement person-

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[154] *Id.* However, the deference accorded to Congress was not claimed to be absolute. *Id.*

[155] *Id.* at 1697 (Stevens, J., dissenting). The intrusions involved in electronic surveillance would be illegal if no warrant existed. The dissent pointed out that the decision in *Dalia* legitimated an illegal act engaged in pursuant to a warrant. However, no judicial determination of probable cause in relation to the illegal act, covert entry, was required. The only determination of probable cause related to the eavesdropping. *Id.* at 1697–98 (Stevens, J., dissenting).

[156] *Id.* at 1704–05 (Stevens, J., dissenting).

[157] *Id.*

[158] *See, e.g.*, Berger v. New York, 388 U.S. at 53; Camara v. Municipal Court, 387 U.S. at 528.

[159] 99 S. Ct. at 1689–92.

[160] *Id.*

[161] *Id.* at 1697–98 (Stevens, J., dissenting).

[162] This kind of invasion exposed the contents of one's home or business premises to scrutiny. Indeed, in *Dalia*, a search of the entire premises was conducted. *See* note 9 *supra*.

[163] 99 S. Ct. at 1694.

[164] *See, e.g.*, Chimel v. California, 395 U.S. 752 (1969); Katz v. United States, 389 U.S. 347 (1967); Jones v. United States, 357 U.S. 493 (1958).

nel, limited only by the express restraints in Title III.[165] However, Congress may have intended any of several alternatives. First, as the dissent suggests, Congress may simply never have considered the problem of entry.[166] This would seem to argue against the majority's position. The power to legislate should not be assumed by the courts. Secondly, Congress may have intended to permit electronic eavesdropping only in situations where an additional invasion of privacy was not necessary. Thirdly, Congress may have agreed with the majority opinion. Rather than attempting to interpret congressional silence in light of scanty legislative history regarding covert entry, the Court should have refused to enlarge on Title III and awaited congressional action on this matter.

Power to effect entry, pursuant to a valid Title III eavesdropping order, in any reasonable manner vests law enforcement personnel with discretion far in excess of that necessary to perform their function. While the judiciary cannot be expected to oversee every detail of the installation of the electronic equipment, a judicial determination of the necessity for covert entry would seem to be neither unreasonable nor burdensome. Surely the courts are capable of making this determination. To leave this to the discretion of law enforcement personnel seems to be abandoning the judicial function of evaluating the relative desirability of the protection of individual privacy and the public interest in effective law enforcement.

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[165] *See* note 132 *supra* and accompanying text.

[166] 99 S. Ct. at 1701 (Stevens, J., dissenting).