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Casenotes: Constitutional Law — Criminal Procedure — Eavesdropping — Title III of the Omnibus Crime Control and Safe Streets Act of 1968: A Search without a Warrant? Dalia v. United States, 441 U.S. 238 (1979)

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CONSTITUTIONAL LAW — CRIMINAL PROCEDURE — EAVESDROPPING — TITLE III OF THE OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968: A SEARCH WITHOUT A WARRANT? *DALIA v. UNITED STATES*, 441 U.S. 238 (1979).

In *Dalia v. United States*,[1] the United States Supreme Court held that Congress, in enacting Title III of the Omnibus Crime Control and Safe Streets Act of 1968,[2] gave the courts authority to approve covert entries of private premises for purposes of installing eavesdropping devices. In addition, the Court held that law enforcement agents who obtain Title III authorization to conduct electronic surveillance have implicit authority to enter the target premises surreptitiously to install the necessary devices. This casenote surveys the history of eavesdropping law as developed by the Supreme Court, focusing on *Dalia* and the federal legislation under which it was decided.

I. INTRODUCTION

Protection against invasion of "the sanctity of a man's home and the privacies of life" was specifically provided in the fourth and fifth amendments.[3] Since the adoption of the Constitution, subtler and more intrusive means of invading privacy have become available as technological advances have made it possible for the government to disclose in the courtroom what is whispered in the bedroom.[4] In response, the courts have interpreted the Constitution as providing protection for spoken words which were intended to remain private.

The myriad devices used to eavesdrop[5] may be divided into two categories. The first includes devices capable of intercepting oral

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1. 441 U.S. 238 (1979).
2. 18 U.S.C. §§ 2510–2520 (1970) [hereinafter referred to as Title III].
3. Boyd v. United States, 116 U.S. 616, 630 (1886).
4. Technological developments in electronics allow virtually indetectable eavesdropping to be conducted via such diverse mechanisms as transitors, microcircuits, and lasers. This new electronic technology is able to break through physical barriers and provide a sophisticated means for intercepting oral communications. Developments in miniaturization electronics allow such devices, many of which are smaller and thinner than a postage stamp, to be concealed in such unobtrusive places as behind wallpaper, within playing cards, or within light bulbs. *See generally* E. LONG, THE INTRUDERS 5–20 (1967) [hereinafter cited as LONG]; Scoular, *Wiretapping and Eavesdropping Constitutional Development from Olmstead to Katz*, 12 ST. LOUIS U.L.J. 513, 514 (1968).
5. Sir William Blackstone defined "eavesdroppers," as persons who
   > listen under walls or windows, or the eaves of a house, to hearken after discourse, and thereupon to frame slanderous and mischievous tales, [and] are a common nuisance, and presentable at the court-leet, or are indictable at the sessions, and punishable by fine and finding sureties for their good behavior.

   4 W. BLACKSTONE, COMMENTARIES *168 (footnotes omitted).

communications without physical entry of the premises on which the conversations are taking place. The most widely used device within this group is the wiretap.[6] Wiretaps are capable of intercepting only telegraphic and telephonic communications. The second category of eavesdropping devices includes those which must be physically installed on the target premises. Representative of this type are "bugs," tiny microphones capable of picking up whispers within a room and broadcasting them to listeners a half-mile away.[7]

While Title III undoubtedly authorizes the use of both categories of devices,[8] it left unresolved two issues regarding the legality of an agent's entry of the target premises to install the devices. These issues, which were finally resolved in *Dalia*, were whether Congress intended to permit secret entries of private premises to install eavesdropping devices, and if so, whether law enforcement agents who obtain a valid Title III order have implied permission to enter the target premises to install the devices necessary to effectuate that order.[9] An understanding of *Dalia's* import for these issues is facilitated by a review of Supreme Court decisions on eavesdropping.

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6. Wiretapping is the interception of telephone communications. It normally involves a physical entry into a telephone circuit, but not into the premises where the telephone to be tapped is located. Because law enforcement officers must know the cable number before they can tap a telephone line, it is usually necessary for them to seek assistance from the telephone company. E. LAPIDUS, EAVESDROPPING ON TRIAL 3–5, 123–24 (1974) [hereinafter cited as LAPIDUS]. *See generally* M. PAULSEN, THE PROBLEMS OF ELECTRONIC EAVESDROPPING (1977); C. FISHMAN, WIRETAPPING AND EAVESDROPPING (1978). For a discussion of the continuing need for wiretapping, see Rogers, *The Case for Wiretapping*, 63 YALE L. J. 792 (1954).
7. "Bugging" is the overhearing of conversations emanating from a defined area by means of electronic devices without the necessity of penetrating a wire. LAPIDUS, *supra* note 6, at 4. *See generally* S. DASH, R. SCHWARTZ & R. KNOWLTON, THE EAVESDROPPERS (1959) [hereinafter cited as DASH].
8. 18 U.S.C. § 2518(3) (1970). Title III prohibits the interception of oral and wire communications with the exception of interceptions by duly authorized law enforcement officials. *Id.* at § 2511. Congress clearly evinced the intent to ensure that Title III authority would be used with restraint and that surveillance requiring the interception of communications would not be used routinely as the initial step in criminal investigation. United States v. Giordano, 416 U.S. 505 (1974). Title III has repeatedly been held to be constitutional. *See, e.g.*, United States v. Bobo, 477 F.2d 974 (4th Cir. 1973) (withstood constitutional attack based on fourth amendment); State v. Siegel, 266 Md. 256, 292 A.2d 86 (1972) (same).

   Maryland has enacted a statute providing for the procedures to be followed for the interception of oral and wire communications by state officials. MD. CTS. & JUD. PROC. CODE ANN., §§ 10–401 to –412 (1980). For an excellent comparison of Title III and Maryland's corresponding legislation, see Gilbert, *A Diagnosis, Dissection, and Prognosis of Maryland's New Wiretap and Electronic Surveillance Law*, 8 U. BALT. L. REV. 183 (1979).
9. Congress' silence on the issue of covert entries to install eavesdropping devices has been repeatedly noted. *E.g.*, United States v. Santora, 583 F.2d 453, 456–57 (9th Cir. 1978). For a thorough discussion of the question of whether Congress intended to authorize entries, 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) [hereinafter cited as McNamara].

II. HISTORICAL BACKGROUND

The Supreme Court first discussed the constitutionality of eavesdropping in *Olmstead v. United States*.[10] Telephone conversations between Olmstead and others had been intercepted by law enforcement agents who were subsequently permitted to testify to the conversations at trial. Despite the officers' failure to obtain a search warrant, the Court held that the defendant's fourth amendment rights had not been violated because wiretapping did not constitute a "search and seizure."[11] It reasoned that the fourth amendment was intended to apply only to material things, and thus did not protect oral communications. The Court did note, however, that if the interception of the conversations had been accompanied by a physical trespass on the defendant's premises, those conversations would have been constitutionally protected.

Subsequent to *Olmstead*, Congress enacted the Federal Communications Act of 1934 which provided that "no person not being authorized by the sender shall intercept any communication."[12] The Act was first applied in *Nardone v. United States*.[13] In *Nardone*, the primary evidence used to convict the defendant consisted of testimony by federal agents who had intercepted his telephone conversations. The Government contended that Congress, in enacting the Federal Communications Act, did not intend to prohibit wiretapping for the purpose of obtaining evidence. In rejecting this argument, the Court looked to the plain wording of the Act which prohibited all interceptions. The Court reversed Nardone's conviction, holding that

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10. 277 U.S. 438 (1928).
11. The fourth amendment provides that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but 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.

Chief Justice Taft, speaking for the majority in *Olmstead*, stated that "[t]he reasonable view is that one who installs in his house a telephone instrument with connecting wires intends to project his voice to those quite outside, and that the wires beyond his house and messages while passing over them are not within the protection of the Fourth Amendment." 277 U.S. 438, 466 (1928). Justice Brandeis, dissenting, thought the Court construed the fourth amendment too strictly. In his view that amendment applied to all governmental invasions of privacy.

12. 47 U.S.C. § 605 (1934) (current version at 47 U.S.C. § 605 (Supp. 1979)). For a discussion of wiretapping under § 605 and the development of case law decided under that provision, see DASH, *supra* note 7, at 386–406, 411–16.
13. 302 U.S. 379 (1937).

when evidence is obtained in violation of statute the proper remedy is exclusion of the evidence at trial.[14]

In 1940, in *Goldman v. United States*,[15] the Court further addressed the constitutionality of eavesdropping. Federal agents had installed a detectaphone[16] on the outer wall of an office enabling them to overhear incriminating statements made by the defendant. At trial the agents were permitted to testify concerning those statements. The Supreme Court noted initially that the Federal Communications Act[17] was inapplicable because there was no "interception" within the meaning of the Act. Affirming the conviction, the Court held that the use of a detectaphone does not violate the fourth amendment because such a device does not require a trespass or illegal entry.[18]

In *On Lee v. United States*,[19] the Court again refused to find that oral communications were protected by the fourth amendment. In

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14. On remand, the court of appeals affirmed the ruling of the trial court denying petitioner's request to question the prosecution as to its use of the information obtained as a result of the illegal wiretap. Nardone v. United States, 106 F.2d 41 (2d Cir. 1939). The Supreme Court again reversed petitioner's conviction, holding that to exclude the exact words of petitioner's conversations while admitting evidence derived therefrom would frustrate the policy announced in the original opinion. Nardone v. United States, 308 U.S. 338 (1939). The Court further ruled that the trial court must give petitioner the opportunity to prove that a substantial portion of the evidence against him was the fruit of a poisonous tree. *Id.* at 341.

    In Benanti v. United States, 355 U.S. 96 (1957), the Court extended *Nardone* to exclude from a federal trial evidence obtained by state police in violation of the Federal Communications Act. This result was reached despite the fact that the state police had acted pursuant to a state statute authorizing wiretapping. The Court found that Congress did not intend to permit state legislation to contradict the terms of the Federal Act. *Cf.* Schwartz v. Texas, 344 U.S. 199 (1952) (evidence obtained in violation of the Federal Communications Act is admissible in a state criminal trial).
15. 316 U.S. 128 (1940).
16. A detectaphone is a device with a receiver so delicate that when placed against a partition wall it is capable of picking up sound waves emanating from the other side. *Id.* at 131. The sound waves are amplified to enable the user to overhear the conversations taking place on the other side of the wall.
17. 47 U.S.C. § 605 (1934) (current version at 47 U.S.C. § 605 (Supp. 1979)).
18. In a dissenting opinion, Justice Murphy argued that the fourth amendment should not be given such a literal interpretation and that the use of a detectaphone was an unreasonable search and seizure. Justice Murphy was concerned that the innovation of new intercepting devices required increased protection from intrusive governmental action. The fourth amendment should therefore receive a construction sufficiently elastic to enable it to serve the needs of modern life. For a discussion of the development of new electronic devices capable of intercepting communications, see LONG, *supra* note 4, at 5–20.
19. 343 U.S. 747 (1951) (5–4 decision).

that case, narcotics agents instructed a former employee of the defendant to engage the latter in a conversation likely to result in incriminating statements. The agents were able to overhear the ensuing conversation by planting a microphone on the former employee. The Court held that the fourth amendment was no more violated than if the agents had merely been eavesdropping through an open window. The dissent, however, thought the conversations should have been excluded at trial. The fundamental principle espoused in the dissent was that fourth amendment protections are not limited to the seizure of tangible items, but extend to intangibles such as spoken words.[20]

Beginning in 1954, the Court indicated that a police trespass on private premises without a warrant for the purpose of installing listening devices violates the fourth amendment. In *Irvine v. California*,[21] state police officers surreptitiously entered defendant's home to install listening devices. Incriminating statements were intercepted and subsequently admitted at trial. The Supreme Court, relying exclusively on the police trespass, found that "few police measures have come to our attention that more flagrantly, deliberately, and persistently violate the fundamental principle declared by the Fourth Amendment."[22] The Court thereby rejected its previous position that the fourth amendment protects only "tangible" objects. The conviction was nevertheless affirmed because the exclusionary rule was not then binding upon the states.[23]

Subsequently, in *Silverman v. United States*,[24] the Court reversed a conviction based upon evidence obtained by the use of a

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20. Justice Frankfurter, dissenting, expressed the same concern over technological advances in eavesdropping devices as did Justice Brandeis in *Olmstead* and Justice Murphy in *Goldman*. Justice Frankfurter noted that "[t]he circumstances of the present case show how the rapid advances of science are made available for that police intrusion into our private lives against which the Fourth Amendment of the Constitution was set on guard." *Id.* at 759.
21. 347 U.S. 128 (1954) (5–4 decision).
22. *Id.* at 132.
23. The exclusionary rule, announced in Weeks v. United States, 232 U.S. 383 (1914), mandates that evidence obtained in violation of the Constitution be excluded at trial. The Court, however, at first refused to apply the rule to the states. Wolf v. Colorado, 338 U.S. 25 (1949) (in a prosecution in state court for a state crime the fourth amendment does not forbid admission of evidence obtained by unreasonable search and seizure). In *Irvine*, the Court specifically declined to overrule *Wolf*. *Cf.* Rochin v. California, 342 U.S. 165 (1952) (in a state court for a state crime evidence obtained as a result of an illegal search of defendant's person, accompanied by physical force, must be excluded under the fourth and fourteenth amendments). The holding in *Wolf* was finally overruled in Mapp v. Ohio, 367 U.S. 643 (1961), in which the Court held that "all evidence obtained by searches and seizures in violation of the Constitution is . . . inadmissible in a state court." *Id.* at 655. Thus, there is no question that *Irvine* would be decided differently today.
24. 365 U.S. 505 (1961).

"spike-mike."[25] Employing this device, which made physical contact with a heating duct serving the premises occupied by petitioner, law enforcement officers were able to overhear incriminating statements relating to an illegal gambling operation. The defendant urged the Court to reconsider *Olmstead, Goldman*, and *Lee*. The Court found it unnecessary, however, to reconsider its prior decisions. It reversed on the ground that the eavesdropping was accomplished by an actual intrusion into a constitutionally protected area — the spike-mike touched the heating duct. The Court held that "[e]avesdropping accomplished by means of such physical intrusion is beyond the pale of even those decisions in which a closely divided court has held that eavesdropping accomplished by other electronic means did not amount to an invasion of Fourth Amendment rights."[26] Although the *Silverman* Court found it unnecessary to reconsider the *Olmstead* doctrine that the fourth amendment does not protect oral communications,[27] that doctrine was explicitly rejected the following year in *Wong Sun v. United States*.[28] In that case the Court explained that "[i]t follows from our holding in *Silverman* that the Fourth Amendment may protect against the overhearing of verbal statements as well as against the more traditional seizure of 'papers and effects.' "[29] Thus, the protection granted by the fourth amendment was finally extended to include spoken words.

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25. A "spike-mike" is a microphone with a footlong spike attached to an amplifier and earphones. *Id.* at 506. In *Silverman*, the spike was inserted into a crevice in a wall until it made contact with a heating duct which acted as a sounding board.
26. Silverman v. United States, 365 U.S. 505, 509–10 (1961). The Court was referring to On Lee v. United States, 343 U.S. 747 (1951), and Goldman v. United States, 316 U.S. 128 (1940).
27. Although *Olmstead* was not expressly rejected, the Court in *Silverman* used broad language indicating a change in position from the early eavesdropping cases. For example, the Court proclaimed that the fourth amendment stands for "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." Silverman v. United States, 365 U.S. 505, 511 (1961). *See also* Boyd v. United States, 116 U.S. 616, 626–30 (1886).
    Justice Douglas, concurring in *Silverman*, suggested that the majority's distinction between *Goldman* and *Silverman* was artificial. That the latter involved a physical trespass and the former did not should make no difference because the invasion of privacy in both cases was the same. Agreeing with the Court that local trespass law was of no significance, Justice Douglas further stated that there should be no distinctions based on the type of electronic surveillance employed. The sole concern was whether the privacy of the individual was invaded. Because it was, and no search warrant was issued, the conviction must be set aside.
28. 371 U.S. 471 (1963). *Accord*, Lopez v. United States, 373 U.S. 427 (1963), where Justice Brennan noted that "[w]e have held that the fruits of electronic surveillance, though intangible, nevertheless are within the reach of the Fourth Amendment." *Id.* at 460 (dissenting opinion) (citing *Irvine* and *Silverman*).
29. Wong Sun v. United States, 371 U.S. 471, 485 (1963).

In *Berger v. New York*,[30] the Court invalidated New York's eavesdropping statute[31] by holding that it failed to comply with fourth amendment standards.[32] In striking down the New York statute, the Court set forth exacting guidelines to be followed if a wiretap statute were to pass constitutional muster. Among the *Berger* requirements were: (1) a neutral and detached magistrate must approve the application for authority to wiretap and issue the order for surveillance; (2) the application must show probable cause that an offense has been or is being committed; (3) the warrant must state with particularity the offense being investigated; (4) the authorization period must be less than sixty days; (5) the surveillance must not continue beyond the seizure of the conversations sought; and (6) there must be a return of the warrant and all seized materials to the issuing magistrate.[33] Although the significance of *Berger* lies in the Court's strong language, which indicated its disfavor and concern over the use of eavesdropping devices,[34] the Court did state that under specific conditions and circumstances the use of such devices would be constitutional.[35]

Several months later, the Supreme Court decided the landmark case of *Katz v. United States*.[36] In *Katz*, the Government was permitted to introduce into evidence the defendant's end of telephone

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30. 388 U.S. 41 (1967).
31. N.Y. CODE CRIM. PROC. § 813(a) (Supp. 1967).
32. At the time *Berger* was decided it was firmly established that the fourth amendment was enforceable against the states through the due process clause of the fourteenth amendment. Mapp v. Ohio, 367 U.S. 643 (1961). Further, the standards of reasonableness required under the fourth amendment are the same under the fourteenth. Ker v. California, 374 U.S. 23, 33 (1963).
33. Congress carefully followed the guidelines enunciated in *Berger* when it enacted Title III. *See* Note, *The 1977 Maryland Wiretapping and Electronic Surveillance Act*, 7 U. BALT. L. REV. 374, 374–75 (1978). *See also* Note, *Electronic Eavesdropping Under the Fourth Amendment — After Berger and Katz*, 17 BUFFALO L. REV. 455, 460–61 (1968).
34. The language used by the Court illustrates a complete departure from the position taken in *Olmstead* which was finally overruled in *Berger*. In particular, the Court emphasized that eavesdropping "involves an intrusion on privacy that is broad in scope," and that the Court cannot "forgive the requirements of the fourth amendment in the name of law enforcement." 388 U.S. 41, 56, 62 (1967). *See also* Camera v. Municipal Court, 387 U.S. 523 (1967) (the basic purpose of the fourth amendment is to safeguard the privacy and security of individuals against arbitrary invasions by the government).
35. The Government argued that the Court's holding rendered it impossible to draft an eavesdropping statute that would meet the requirements of the fourth amendment. The Court stated, however, that eavesdropping may be constitutional under precise and discriminate guidelines. Specifically, it noted that "[t]he Fourth Amendment does not make the 'precincts of the home or the office . . . sanctuaries where the law can never reach . . . .'" Berger v. New York, 388 U.S. 41, 63 (1967) (quoting Warden v. Hayden, 387 U.S. 294, 321 (1967) (Douglas, J., dissenting)).
36. 389 U.S. 347 (1967).

calls that were overheard by FBI agents who had attached an electronic listening device to the outside of the public telephone booth from which he made his calls. The defendant was convicted of transmitting wagering information. The court of appeals affirmed because "there was no physical entrance into the area occupied by [Katz]."[37] The Supreme Court reversed, holding that the evidence was obtained in violation of the fourth amendment and that the "trespass" standard was no longer controlling.[38] In discarding the idea that the fourth amendment applies only to "constitutionally protected areas," Justice Stewart held that "the Fourth Amendment protects people, not places" and that "the reach of the Fourth Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure."[39] Once it was established that there had been a "search and seizure," the Court addressed the issue of whether the search and seizure complied with constitutional standards. The Government contended that its agents acted in a defensible manner.[40] The agents did not begin surveillance until there was a strong probability that the defendant was using the telephone for illegal purposes, and the surveillance was limited to obtaining defendant's unlawful conversations. This argument was rejected by the Court on the grounds that any restraint exercised by

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37. *Id.* at 349 (quoting Katz v. United States, 369 F.2d 130, 134 (9th Cir. 1966)). The court of appeals relied on Silverman v. United States, 365 U.S. 505 (1961). See notes 25-30 and accompanying text *supra*. Essential to the decision in *Silverman* was that the police invaded a "constitutionally protected area." Because the public phone booth involved in *Katz* was not a "constitutionally protected area," the court of appeals concluded that petitioner's fourth amendment rights had not been violated.
38. In reversing the conviction, the Supreme Court held that regardless of whether the police intrude on private premises, if they violate "the privacy upon which [the defendant] justifiably relied . . . ." 389 U.S. at 353, there is a search and seizure within the meaning of the fourth amendment. The fact that the electronic device attached to the phone booth by the FBI did not penetrate the walls of the booth has no constitutional significance. This determination is a clear departure from *Silverman*, in which the Court relied exclusively on the fact that the "spike-mike" made contact with defendant's premises. The rejection of the trespass standard entirely overruled Goldman v. United States, 316 U.S. 128 (1940). See note 15–18 and accompanying text *supra*. *See also* Warden v. Hayden, 387 U.S. 294, 304 (1967) (property interests do not control the right of the government to search and seize); Note, *Electronic Eavesdropping Under the Fourth Amendment — After Berger and Katz*, 17 BUFFALO L. REV. 455 (1968). *See generally* Note, *The Reasonable Expectation of Privacy — Katz v. United States, A Postscription*, 9 IND. L. REV. 468 (1976).
39. Katz v. United States, 389 U.S. 347, 351 (1967).
40. *Id.* at 354. The Government argued that the decision should not be tested by fourth amendment standards because the surveillance technique employed required no trespass onto petitioner's premises. In rejecting that contention the Court explained that "the Fourth Amendment governs not only the seizure of tangible items, but extends as well to the recording of oral statements, overheard without any 'technical tresspass under . . . local property laws.'" *Id.* at 353 (quoting Silverman v. United States, 365 U.S. 505, 511 (1961)).

the FBI was self-imposed. Refusing to depart from the strict requirements set out in *Berger*, the Court found that "searches conducted outside the judicial process without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment."[41]

III. TITLE III OF THE OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968

In response to *Katz* and *Berger*, Congress enacted Title III,[42] establishing a comprehensive scheme for the regulation of wiretapping and electronic surveillance. Title III represents "an attempt by Congress to protect privacy of the individual while promoting a more effective control of crime."[43] Although Title III generally proscribes the interception of oral and wire communications,[44] it does provide for a highly particularized procedure whereby law enforcement agencies may obtain authorization to conduct wiretapping and electronic surveillance. Title III also provides that no evidence obtained in violation of its provisions may be received in evidence in any trial.[45]

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41. Katz v. United States, 389 U.S. 347, 357 (1967) (emphasis in original). *See also* Wong Sun v. United States, 371 U.S. 471, 481–82 (1963) (the Constitution requires that the deliberate, impartial judgment of a judicial officer be interposed between the citizen and the police). For a thorough discussion of *Berger* and *Katz*, see Note, *Electronic Eavesdropping Under The Fourth Amendment — After Berger and Katz*, 17 BUFFALO L. REV. 455, 455–66 (1968).
42. 18 U.S.C. §§ 2510–2520 (1970). For a background discussion of Title III, see Fishman, *The Interception of Communications Without a Court Order — Title III, Consent, and The Expectation of Privacy*, 51 ST. JOHN'S L. REV. 41, 52–66 (1976).
43. United States v. Kahn, 415 U.S. 143, 151 (1974). *Accord*, Gelbard v. United States, 408 U.S. 41, 46–48 (1972).

    The Senate Judiciary Committee Report accompanying Title III underscores the congressional policy as follows:

    > Title III has as its dual purpose (1) protecting the privacy of wire and oral communications, and (2) delineating on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized. 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, 90th Cong., 2d Sess. 66 (1968).
44. 18 U.S.C. § 2511(1) (1970). This section provides that one who wilfully intercepts any wire or oral communication in violation of Title III shall be fined not more than $10,000 or imprisoned not more than five years, or both.
45. 18 U.S.C. § 2515 (1970). That section provides:

    > Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the

The procedure mandated by Title III for obtaining authorization to conduct surveillance begins with an application by a law enforcement agent, authorized by the Attorney General,[46] to a federal judge.[47] Each application must contain a statement of facts which justifies the agent's belief that an order should be issued. This statement must include details of the particular offense the agent believes is being committed,[48] the location at which the communications sought to be intercepted are taking place, the type of communications involved, and the identity of the person thought to be committing the offense. The application must also state whether other investigative procedures have been attempted, how long the agent believes the interception should be maintained,[49] and whether any previous applications have been made to intercept communications either of the same person or emanating from the same place.[50]

United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

The purpose of § 2515, like the exclusionary rule of the fourth amendment, is to deter privacy-invading misconduct by denying government officials the fruit of that misconduct. *In re* Proceedings to Enforce Guard Jury Subpoenas, 430 F. Supp. 1071, 1072–73 (E.D. Pa. 1977). It is clear, however, that § 2515 provides a protection independent of the fourth amendment exclusionary rule in that it affords special safeguards against the unique problems posed by unauthorized electronic surveillance. *See* United States v. Calandra, 414 U.S. 338, 355 n.11 (1974). The Supreme Court has held that § 2515 can be invoked by a grand jury witness in defending a contempt charge for refusal to answer questions based on information obtained from the witness' communications alleged to have been obtained in violation of Title III. Gelbard v. United States, 408 U.S. 41 (1972).

46. 18 U.S.C. § 2516(1) (1970). This section also provides that any Assistant Attorney General specially designated by the Attorney General may authorize an application. This provision has been rigidly applied to invalidate an application authorized by the Attorney General's Executive Assistant. United States v. Giordano, 416 U.S. 505 (1974) (proper remedy for invalid application is suppression of all evidence procured from wiretap even though there may have been no constitutional violation in obtaining the evidence).
47. 18 U.S.C. § 2516(1) (1970). Although this subsection applies only to applications submitted to a federal court, § 2516(2) provides that the principle prosecuting attorney for any state, if authorized by state statute, may apply to a state court judge for an order authorizing the interception of wire or oral communications. In State v. Siegel, 266 Md. 256, 292 A.2d 86 (1972), the Court of Appeals of Maryland held that a state must enact its own wiretap statute before a judge of that state can issue an order pursuant to Title III, and the state statute must be no less restrictive than its federal counterpart. *Id.* at 271, 292 A.2d at 94. See note 8 *supra*.
48. 18 U.S.C. § 2518(1)(b) (1970). A federal court may issue an order only if there is probable cause to believe that the interception will provide evidence concerning one of the offenses enumerated in § 2516(1)(a)–(g). In a state court, the interception of communications may only be authorized if there is probable cause for belief that particular communications concerning a crime enumerated in § 2516(2) will be obtained through such interception.
49. No Title III order may authorize the interception of communications for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. 18 U.S.C. § 2518(5) (1970).
50. 18 U.S.C. § 2518(1)(c)–(e) (1970).

Upon compliance with the above requirements, the judge may enter an ex parte order authorizing the interception of communications if he determines that there is probable cause to believe a particular offense is being committed, that communications concerning the offense will be obtained, that normal investigative procedures are inadequate, and that the place where the communications are to be intercepted is being used in connection with the offense.[51] Finally, Title III provides that any "aggrieved person" may move to suppress the contents of any unlawfully intercepted communication.[52]

IV. THE ENTRY DILEMMA

Since the enactment of Title III more than half of the federal courts of appeals have confronted cases involving surreptitious entries by law enforcement officials for the purpose of installing eavesdropping devices.[53] Two issues have arisen in these cases as a result of Title III's silence on the question of entries. The first is whether Title III empowers courts, upon issuing an order to intercept communications, to authorize an entry of the target premises in order to install eavesdropping devices. The second issue, assuming the first is answered in the affirmative, is whether law enforcement officials who obtain a valid Title III order have implicit authority to conduct entries without express approval from the issuing judge.[54] The conflicting results reached by the courts of appeals regarding these issues have turned on the courts' interpretations of congressional intent in enacting Title III. Three different positions have been adopted by the circuits with respect to these entry issues.

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51. *Id.* at § 2518(3).
52. *Id.* at § 2518(10)(a). An "aggrieved person" is one whose conversations have been intercepted. United States v. Fury, 554 F.2d 522 (2d Cir. 1977), *cert. denied*, 436 U.S. 931 (1978). A person may move to suppress the fruits of a wiretap only if his privacy was actually invaded, that is, if he was a participant in intercepted conversations or if such conversations occurred on his premises. United States v. King, 478 F.2d 494 (9th Cir. 1973), *cert. denied*, 417 U.S. 920 (1974). Congress was more specific in delineating the right of the United States to appeal from an order granting a motion to suppress. Section 2518(10)(b) provides that the United States shall have the right to appeal an order granting a motion to suppress or the denial of an application for an order of approval. *See, e.g.*, Application of United States, 563 F.2d 637 (4th Cir. 1977).
53. *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. Ford, 553 F.2d 146 (D.C. Cir. 1977). Several methods of eavesdropping require a physical entry of the target premises to install, repair, and remove the monitoring devices which pick up and transmit the intercepted conversations. See notes 4–7 and accompanying text *supra*.
54. For a complete discussion of the authority to enter private premises once a Title III order is obtained, see McNamara, *supra* note 9. The author concludes that Congress intended to permit courts to approve covert entries, and that police have implicit authority to enter private premises to install necessary eavesdropping devices upon obtaining a valid Title III order, regardless of whether the issuing judge grants specific approval of such entry.

At one extreme, the Sixth[55] and Ninth[56] Circuits have held that entries are never permissible under Title III. Under this view, therefore, it is immaterial if the judge who issues a Title III order also expressly authorizes an entry. The rationale supporting this position is that Congress' attempt to circumscribe carefully invasions of privacy through enactment of Title III precludes the possibility that Congress intended to legalize "break-ins."[57] In light of Congress' meticulous treatment of the procedure by which Title III authorization may be secured, the Ninth Circuit believed that the omission of a provision dealing with authorization of entries must have been purposeful, and that congressional silence could not be filled by implication.[58]

At the other extreme, the Second[59] and Third[60] Circuits have held not only that Congress intended to authorize entries, but also that once a law enforcement official obtains a valid Title III order he has implicit authority to enter the target premises to install eavesdropping devices. Under this view it is also irrelevant whether the issuing judge authorizes an entry. The rationale adopted by these courts is that any order authorizing electronic surveillance must, to be effective, carry its own authority to make such reasonable entries as are necessary to effectuate the order.[61] Once a judicial officer has

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55. United States v. Finazzo, 583 F.2d 837 (6th Cir. 1978).
56. United States v. Santora, 583 F.2d 453 (9th Cir. 1978).
57. *Id.* at 457. The court noted that the majority of Title III's provisions are efforts to restrict the use of electronic surveillance to safeguard privacy. *Id.* at 458. *Accord,* United States v. Finazzo, 583 F.2d 837 (6th Cir. 1978). In *Finazzo* the court held that:

> it 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.

Id. at 841.

58. United States v. Santora, 583 F.2d 453, 458 (9th Cir. 1978).

> Congress was certainly aware of the entry problem. The congressional debate on Title III reveals that the issue of bugging a private home was frequently discussed. *See, e.g.,* 114 CONG. REC. 12989 (1968). The Senate Reports also indicate an awareness of the entry problems. *See, e.g.,* S. REP. NO. 1097, 90th Cong., 2d Sess. 103 (1968).

59. United States v. Scafidi, 564 F.2d 633 (2d Cir. 1977), *cert. denied,* 436 U.S. 903 (1978).
60. United States v. Dalia, 575 F.2d 1344 (3d Cir. 1978), *aff'd,* 441 U.S. 238 (1979). *Accord,* United States v. London, 424 F. Supp. 556, 560 (D. Md. 1976) (the intrusion accompanying the entry is no greater than the interception itself, which is judicially authorized after a finding of probable cause), *aff'd sub nom.* United States v. Clerkley, 556 F.2d 709 (4th Cir. 1977), *cert. denied,* 436 U.S. 930 (1978).
61. United States v. Scafidi, 564 F.2d 633, 640 (2d Cir. 1977), *cert. denied,* 436 U.S. 903 (1978). The court further held that once the electronic equipment is installed, the police have implied authority to re-enter to repair or recharge the devices. It reasoned that subsequent entries to maintain equipment do not result in any greater invasion into the occupant's privacy than that resulting from the original entries. *Id.* at 640.

decided that the requisite probable cause exists,[62] and a Title III order is issued, these circuits found that it is within the discretion of the law enforcement agency to determine the precise mechanical means necessary to effectuate the order.[63]

Two circuits have adopted a middle ground. The Fourth Circuit[64] and the District of Columbia Circuit[65] have taken the position that because Congress clearly desired to arm federal investigators with the power to conduct electronic surveillance, it could not have intended to forbid surreptitious entries which are vital to the effective exercise of that power.[66] Therefore, in enacting Title III, Congress intended to empower judges to authorize entries.[67] These two circuits also held, however, that permission to enter private premises cannot be implied from a Title III order sanctioning only the interception of oral communications.[68] The rationale behind this position is that a secret trespass upon private premises to plant bugs entails an invasion of privacy of constitutional significance distinct from the interception of communications.[69] In so holding, these circuits have applied a bifurcated analysis under which the eavesdropping and the entry are subjected to separate fourth amendment

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62. The probable cause determinations which must be established before a Title III order may be issued are enumerated in 18 U.S.C. § 2518(3) (1970). See text accompanying note 51 *supra*.
63. This rationale was subsequently adopted by the Supreme Court. Dalia v. United States, 441 U.S. 238, 257 (1979). See notes 106–112 and accompanying text *infra*.
64. Application of United States, 563 F.2d 637 (4th Cir. 1977).
65. United States v. Ford, 553 F.2d 146 (D.C. Cir. 1977). See also United States v. Agrusa, 541 F.2d 690 (8th Cir. 1976) (courts issuing Title III orders have power to authorize entries, but the Court found it unnecessary to decide whether police have implied authority to enter without first apprising the judge of the planned entry), *cert. denied*, 429 U.S. 1045 (1977).
66. Application of United States, 563 F.2d 637, 643 (4th Cir. 1977).
67. The Fourth Circuit found that "Congress implicitly commended the question of surreptitious entry to the informed discretion of the district judge." Application of United States, 563 F.2d 637, 643 (4th Cir. 1977). The court reasoned that if entries were prohibited, criminals could avoid apprehension by conducting their conversations upon premises which are insusceptible to eavesdropping by non-trespassory means. Such a tactic by criminals would not be difficult because the police cannot ordinarily bug a private home without entering it. As long as criminals avoid telephone conversations it would be difficult to intercept their conversations. The court in *Application* could "discern no congressional intent to open such a loophole in Title III." *Id.* at 643.
68. *Id.* at 643–44; United States v. Ford, 553 F.2d 146, 154–55 (D.C. Cir. 1977).
69. Application of United States, 563 F.2d 637, 643 (4th Cir. 1977). The court in *Application* would countenance covert entries only when the issuing judge is apprised of the entry, finds that the device and the surreptitious entry incident to its installation provide the only effective means to conduct the investigation, and specifically sanctions such an entry in a manner which does not offend the fourth amendment. *Id.* at 644.

scrutiny.[70] Therefore, even if a valid Title III order is obtained, any subsequent entry of the target premises is unconstitutional absent a particularized judicial authorization to enter.[71] Any entry authorized, of course, must be reasonable.[72]

Despite the substantial constitutional questions presented by covert entries to install eavesdropping devices, the Supreme Court initially declined to address the validity of such entries.[73] Once the conflict developed among the circuits, however, the Court granted certiorari in *Dalia v. United States*.[74]

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70. United States v. Ford, 553 F.2d 146, 152 (D.C. Cir. 1977). In applying a bifurcated analysis, the court explained that the basic purpose of the fourth amendment is to safeguard the privacy of individuals against arbitrary invasions by the government. *Id.* at 153. *See* Camera v. Municipal Court, 387 U.S. 523, 528 (1967). Because a surreptitious entry is undoubtedly an invasion of privacy a prior warrant is required because that right is too precious to entrust to the police. *See* McDonald v. United States, 335 U.S. 451, 455–56 (1948). The holdings in *Ford* and *Application* that covert entry requires prior warrant, receive support from the language in Irvine v. California, 347 U.S. 128 (1954). The Court in *Irvine*, upon expressing its concern over the effect of modern surveillance devices on individual privacy, made the following statement:

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

Id. at 132.

71. Application of United States, 563 F.2d 637, 644 (4th Cir. 1977); United States v. Ford, 553 F.2d 146, 154–55 (D.C. Cir. 1977).
72. *See id.* In *Ford* the police obtained a Title III order to install bugs inside a shoe store which the police suspected was a locus for the distribution of narcotics. The judge was informed that the police intended to effect an entry into the store by means of a bomb-scare. The order authorized the police to enter and re-enter the premises to install eavesdropping equipment, and that such entries may be accomplished in any manner, including breaking and entering. Posing as a bomb squad the police evacuated and entered the store to install the bugs. When the devices failed to transmit, the police again conducted a bomb-scare ruse in order to re-enter the store. The court initially found that covert entries for the purpose of installing eavesdropping devices were subject to the warrant requirement of the fourth amendment. It then turned its attention to the sufficiency of the entry provision in that case. The court held that the provision was unconstitutional because it was over-broad in that it permitted the police to conduct multiple entries, at any time of day or night, and by any means they deemed necessary.
73. The Supreme Court denied certiorari in United States v. Scafidi, 564 F.2d 633 (2d Cir. 1977), *cert. denied*, 436 U.S. 903 (1978); and United States v. Agrusa, 541 F.2d 690 (8th Cir. 1976), *cert. denied*, 429 U.S. 1045 (1977).
74. 575 F.2d 1344 (3d Cir. 1978), *cert. granted*, 439 U.S. 817 (1978), *aff'd*, 441 U.S. 238 (1979).

V. *DALIA v. UNITED STATES*

Testimony at the trial of Lawrence Dalia established that on March 14, 1973, Justice Department officials obtained authorization to intercept telephone conversations at his business office for a period of twenty days.[75] The district court found probable cause to believe that Dalia was engaged in a conspiracy to steal goods being shipped in interstate commerce.[76] On April 5th, the end of the twenty-day period, the Government was granted a twenty-day extension and additionally was authorized to intercept all oral communications, including those not involving the telephone.[77] Although the extension order did not explicitly authorize the FBI to enter Dalia's business premises, agents assigned to implement the order secretly entered the office at midnight on April 5th and spent several hours installing an electronic bug in the ceiling.[78] Dalia was subsequently indicted for conspiracy to steal an interstate shipment of fabric. The Government introduced into evidence conversations of defendant that had been intercepted pursuant to the March 14th wiretap order and the April 5th bugging order.[79] The unmistakable inference to be drawn from the conversations was that Dalia was an active participant in a scheme to steal a truckload of fabric.[80]

Prior to trial, Dalia moved to suppress the evidence obtained through the bugging device on the grounds that the FBI had not received judicial approval to enter his office. The trial court denied the motion, ruling that under Title III a surreptitious entry to install eavesdropping devices is not unlawful merely because the court approving the surveillance did not expressly authorize the entry. The

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75. Dalia v. United States, 441 U.S. 238, 241 (1979).
76. *Id. See* 18 U.S.C. § 2518(3) (1970); text accompanying note 51 *supra.*
77. Because the first intercept order authorized only the interception of wire communications (telephone conversations) and the extension authorized the interception of wire and oral communications, it is reasonable to assume that the issuing judge was aware that the FBI intended to bug Dalia's business premises and that an entry may be required. Indeed, the district court specifically noted that its order had implicitly authorized secret entry. Dalia v. United States, 441 U.S. 238, 258 n.21 (1979). See 18 U.S.C. § 2510(1)–(2) (1970) (defining "wire communication" and "oral communication").
78. The fact that the FBI entered Dalia's office rather than his home is of no constitutional significance. That business premises as well as private residences are protected by the fourth amendment is beyond question. *See, e.g.*, G.M. Leasing Corp. v. United States, 429 U.S. 338 (1977); See v. City of Seattle, 387 U.S. 541 (1967).
79. Dalia v. United States, 441 U.S. 238, 245 (1979).
80. *Id.* at 244–45. Intercepted telephone conversations revealed that Dalia had arranged for the storage of a truckload of fabric worth $250,000 that had been stolen and transported in interstate commerce. Intercepted communications resulting from the bugging showed that Dalia discussed with participants in the robbery how to proceed after other members of the alleged conspiracy had been arrested.

trial court's view was 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."[81] The Third Circuit affirmed the conviction, holding that when law enforcement agents obtain Title III authorization to bug private premises a separate order authorizing an entry is not required.[82] In a five-to-four decision the Supreme Court affirmed, holding that Congress, in enacting Title III, intended to empower courts to authorize secret entries onto private premises for purposes of installing eavesdropping devices.[83] The Court further held that law enforcement officers who obtain Title III authorization to conduct electronic surveillance have implicit authority to enter the target premises surreptitiously to install the necessary devices.

VI. THE COURT'S ANALYSIS

The defendant Dalia made three contentions on appeal to the Supreme Court. He argued that covert entry of private premises was unconstitutional in all cases, that Congress did not give the courts statutory authority to approve covert entries even if constitutionally it could have done so, and that even if Congress did intend to permit secret entries, the authorizing court must expressly approve of such entries before they are accomplished.

A. The Constitutionality of Entries

In response to Dalia's argument that the fourth amendment prohibits all covert entries of private premises, the Court noted that in several prior cases it had intimated that in certain circumstances covert entry to install eavesdropping devices would be constitutional

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81. United States v. Dalia, 426 F. Supp. 862, 866 (D.N.J. 1977), *aff'd*, 575 F.2d 1344 (3d Cir. 1978), *aff'd*, 441 U.S. 238 (1979). The district court specifically declined to adopt the reasoning or holding of United States v. Ford, 553 F.2d 146 (D.C. Cir. 1977). See discussion at notes 64–72 and accompanying text *supra*.

82. United States v. Dalia, 575 F.2d 1344 (3d Cir. 1978), *aff'd*, 441 U.S. 238 (1979). *Accord*, United States v. Scafidi, 564 F.2d 633 (2d Cir. 1977), *cert. denied*, 436 U.S. 903 (1978). *Contra*, United States v. Ford, 553 F.2d 146 (D.C. Cir. 1977); Application of United States, 563 F.2d 637 (4th Cir. 1977). *But cf.* United States v. Finazzo, 583 F.2d 837 (6th Cir. 1978) (judges have no power under Title III to authorize covert entries); United States v. Santora, 583 F.2d 453 (9th Cir. 1978) (same). For a discussion of these cases, see notes 55–72 and accompanying text *supra*. *See generally* McNamara, *supra* note 9.

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

if conducted pursuant to a search warrant.[84] Additionally, the Court observed that it is well established that law enforcement officers may break and enter private premises to execute a search warrant when such entry is necessary to execute the warrant effectively.[85] The fourth amendment, therefore, "does not prohibit *per se* a covert entry performed for the purpose of installing otherwise legal electronic bugging equipment."[86]

B. Congressional Intent to Authorize Entries

The defendant Dalia's second contention was that Congress did not empower courts issuing a Title III order to approve surreptitious entries.[87] Recognizing that Title III is silent on the question of entries, the majority nevertheless found that:

> [t]he language, structure, and history of the statute, however, demonstrate that Congress meant to authorize courts — in certain specified circumstances — to approve electronic surveillance without limitation on the means necessary to its accomplishment so long as they are reasonable under the circumstances.[88]

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84. *See, e.g.*, Irvine v. California, 347 U.S. 128 (1954) (conducting electronic surveillance without a search warrant or other process violates fourth amendment); Silverman v. United States, 365 U.S. 505 (1961) (federal agents may not enter private premises to eavesdrop without a warrant); Berger v. New York, 388 U.S. 41 (1967) (the fourth amendment does not make the home or office sanctuaries where the law can never reach, but it is not asking too much to require police to obtain a warrant before the innermost secrets of one's home or office are invaded).

85. *See, e.g.*, United States v. Gervato, 474 F.2d 40 (3d Cir. 1973), *cert. denied*, 414 U.S. 864 (1973). *Cf.* Payne v. United States, 508 F.2d 1391 (5th Cir. 1975) (forcible entry into unoccupied premises pursuant to search warrant does not violate fourth amendment).

In regard to the necessity of the FBI entry in *Dalia*, the Supreme Court gave deference to the district court's finding that normal investigative procedures were unlikely to succeed in obtaining evidence of the conspiracy, that the bugging was therefore necessary, and that the safest method of installing the device was through breaking and entering. Dalia v. United States, 441 U.S. 238, 248 n.8 (1979).

86. *Id.* at 248 (emphasis in original). The dissenters agreed that the fourth amendment does not prohibit covert entry in all cases, but argued that in the absence of legislative or judicial sanction, the FBI entries in the instant case were "unreasonable" and therefore violative of the fourth amendment. *Id.* at 262 (Stevens, J., dissenting). *Cf.* United States v. United States District Court, 407 U.S. 297 (1972) (the fourth amendment requires prior judicial approval for electronic surveillance in domestic security cases).

87. *Accord,* United States v. Santora, 583 F.2d 453 (9th Cir. 1978); United States v. Finazzo, 583 F.2d 837 (6th Cir. 1978). See notes 55–58 and accompanying text *supra.*

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

The Court reasoned that the detailed restrictions contained in Title III were sufficient to guarantee that eavesdropping will occur only when there is a genuine need for it, and that once these restrictions are satisfied the courts have broad power to authorize interceptions of both wire and oral communications.[89] Further, the majority found no indication in Title III that Congress intended that courts be limited to approving only those eavesdropping methods which do not require secret entries for installation.[90]

Examining the history of Title III, the *Dalia* majority was convinced that Congress intended to empower courts to authorize entries.[91] The majority believed that congressional silence was understandable because Congress did not perceive surveillance methods that require entry to differ from methods that do not. Moreover, testimony before subcommittees considering Title III indicated that surreptitious entries were necessary to accomplish

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89. *Id.* at 250. Although Title III ensures that eavesdropping will be utilized only when necessary, see 18 U.S.C. § 2518(3) (1970), there is nothing in its provisions to guarantee that covert entries will be executed only when needed.

90. The dissent approached the question of whether entries could be authorized from a different perspective. Instead of examining Title III to see if it imposed a limitation on secret entries, Justice Stevens looked to the statute to see whether it authorized such entries at all. In his view, no deference should be given to intrusions on privacy that are not expressly authorized by Congress. Dalia v. United States, 441 U.S. 238, 264 (1979) (Stevens, J., dissenting).

91. The majority noted that the Senate Reports on Title III contained repeated reference to the type of surveillance involved in Berger v. New York, 388 U.S. 41 (1967), where police entered private premises to install a bugging device. *See, e.g.*, S. REP. No. 1097, 90th Cong., 2d Sess. 74–75 (1968). The Court opined that committee members, as well as the full Senate, must not have found a significant difference between the type of surveillance used in *Berger* and the type employed in Katz v. United States, 389 U.S. 347 (1967), where a bugging device was attached to a public telephone booth. The Court also found that members of Congress who referred to covert entries thought that such entries would necessarily be a part of the surveillance authorized by Title III. To illustrate, the Court cited a remark made by Senator Tydings that "[b]ugs are difficult to install in many places since surreptitious entry is often impossible. Often, more than one entry is necessary to adjust the equipment." Dalia v. United States, 441 U.S. 238, 252 (1979) (quoting 114 CONG. REC. 12989 (1968)). Based on these and similar remarks the majority concluded that Congress, by authorizing the interception of oral communications as well as wire communications, necessarily intended to authorize surreptitious entries.

The dissent, however, had a different interpretation of the congressional remarks. Justice Stevens noted that one senator who referred to *Berger* was an opponent of Title III who believed that the secret entry in that case had been ruled illegal. United States v. Dalia, 441 U.S. 238, 272 (1979) (Stevens, J., dissenting). See 114 CONG. REC. 14708 (1968). Justice Stevens also found the remarks of Senator Tydings, quoted above, to be inconsistent with a congressional intent to authorize break-ins and that Senator Tydings only meant that secret entries are often impossible because police may not be able to enter without violating the law. Dalia v. United States, 441 U.S. at 273 (Stevens, J., dissenting).

most electronic bugging operations.[92] Because Congress was aware of the necessity of entry, the majority would not assume that the legislature nevertheless intended to restrict the scope of Title III to surveillance methods which do not require covert entry.[93]

Finally, the *Dalia* Court explained that Congress' purpose in enacting Title III would be thwarted were the courts to read a limitation prohibiting covert entries into the statute.[94] The Court reasoned that Title III permitted wiretapping *and* bugging because Congress concluded that both forms of surveillance were necessary to combat successfully certain forms of crime. Because electronic bugging is virtually impossible absent covert entry, the Court refused to deny the "respect for the policy of Congress [that] must save us from imputing to it a self-defeating, if not disingenuous purpose."[95]

It was on this issue of congressional intent that Justice Stevens, in his dissenting opinion, launched an attack on the majority

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92. *Id.* at 251. *See, e.g., Anti-Crime Program, Hearings on H.R. 5037 Before Subcomm. No. 5 of the House Comm. on the Judiciary,* 90th Cong., 1st Sess. 1031 (1967). The Court assumed from this that the entire Congress was aware that most bugging operations require covert entry. *See also* United States v. Ford, 414 F. Supp. 879, 882 (D.D.C. 1976), *aff'd,* 553 F.2d 146 (D.C. Cir. 1977); McNamara, *supra* note 9, at 3. Justice Stevens, dissenting, acknowledged that in some circumstances the installation of a bugging device may not be possible without forcible breaking and entering, but this is not convincing evidence that Congress intended to authorize entries. Dalia v. United States, 441 U.S. 238, 267 n.13 (1979).

93. *Id.* at 252. The Court found support for this conclusion in 18 U.S.C. § 2518(4)(e) (1970), which provides that:

> An order authorizing the interception of a wire or oral communication shall, upon request of the 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 interception unobtrusively and with a minimum of interference with the services that such carrier, landlord, custodian, or person is according the person whose communications are to be intercepted.

The majority viewed this provision as evidence that Congress anticipated that landlords and custodians would be called upon to aid law enforcement officers to covertly enter private premises to install eavesdropping equipment. Dalia v. United States, 441 U.S. 238, 250 n.10 (1979). The dissent, however, interpreted this provision as yet another example that Congress intended to withhold authority to trespass on private property. Focusing on the word "unobtrusively," Justice Stevens concluded that Congress could not have intended to condone unlimited and unauthorized breaking and entering by police with the aid of nothing but burglar's tools. *Id.* at 271 n.21 (Stevens, J., dissenting).

94. The Senate Report on Title III unequivocally states that "[t]he major purpose of Title III is to combat organized crime." S. REP. NO. 1097, 90th Cong., 2d Sess. 75 (1968).

95. Dalia v. United States, 441 U.S. 238, 254 (1979) (quoting Nardone v. United States, 308 U.S. 338, 341 (1939)). *Accord,* Application of United States, 563 F.2d 637, 642 (4th Cir. 1977) (a finding that Congress did not intend to permit covert entries would run counter to the principle that courts should attempt to effectuate the purpose of federal legislation and avoid interpretations which produce absurd results).

opinion.[96] While acknowledging that Title III is silent on the entry issue, he vigorously asserted that the power to authorize entries should not be read into a statute that does not expressly grant it. Justice Stevens reasoned that the Court's duty to protect individual rights takes precedence over the interest in more effective law enforcement.[97] He also argued that the structural detail of Title III precludes a reading that converts silence into executive power[98] and that Congress never contemplated that it was authorizing the type of surveillance employed in *Dalia*.[99]

C. Implied Entries

Dalia's final contention before the Court was that even if Congress empowered courts to authorize secret entries, the authorizing court must explicitly approve such entries before they are accomplished.[100] He argued that because the Title III order in his case

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96. Justice Stevens' dissenting opinion, in which Justices Brennan and Marshall joined, was devoted to the question of legislative intent. Although he did not reach the issue of whether authority to enter could be implied from a Title III order, Justice Stevens did state that he would not uphold a covert entry unless Congress clearly authorized the courts to approve of such entries. Justice Brennan, joined in part by Justice Stewart, filed a separate dissenting opinion in which he attacked the majority's holding that authority to enter private premises surreptitiously could be implied from a Title III order.

97. Dalia v. United States, 441 U.S. 238, 263 (1979) (Stevens, J., dissenting). Justice Stevens recognized that it is appropriate to accord deference to Congress when it has balanced the need for a new investigative technique against the unfavorable consequences of intrusions on privacy rights. He was unwilling, however, to give comparable deference to invasions of privacy that are not expressly authorized by Congress. *Id.* at 264 (Stevens, J., dissenting).

98. *Id.* at 266–70. The dissent pointed out that the majority's holding that Title III implicitly authorized covert entries was especially anomalous because the statutory scheme in all other respects is exhaustive and explicit. It is not sensible to conclude that Congress, having minutely detailed the entire procedure to be followed for obtaining authorization to intercept communications, *see* United States v. United States District Court, 407 U.S. 297, 302 (1972); 18 U.S.C. § 2518 (1970), intended to give police unbounded authority to carry out Title III orders in any unspecified and obstrusive manner they choose. *Id.* at 267–70 (Stevens, J., dissenting).

99. Justice Stevens noted that the opponents of Title III, while informing Congress of the invasions of privacy which would accompany the enactment of Title III, never mentioned the breaking and entering of private premises. *See e.g.*, 114 CONG. REC 14711 (1968). That the opponents complained of far less aggravated invasions of privacy without mentioning entries was evidence that they never contemplated that they were authorizing covert entries. And because the supporters of Title III stated that they had specified "every possible constitutional safeguard for the rights of individual privacy," Dalia v. United States, 441 U.S. 238, 274 (1979) (Stevens, J., dissenting) (quoting 114 CONG. REC. 14469 (1968)), there is no indication that they considered the issue of covert entries either. Justice Stevens further opined that had Congress contemplated the issue it would not have granted the executive branch the authority to break and enter private premises. *Id.* at 274 n.25 (Stevens, J., dissenting).

100. *Accord,* Application of United States, 563 F.2d 637 (4th Cir. 1977); United States v. Ford, 553 F.2d 146 (D.C. Cir. 1977).

did not expressly authorize the FBI to enter his office, that entry violated his privacy rights under the fourth amendment.[101] In rejecting this contention, the Court pointed out that there are only three requirements for a valid search warrant: the warrant must be issued by a disinterested magistrate,[102] there must be probable cause to believe that the evidence sought will aid in the apprehension or conviction of one suspected of committing a particular offense,[103] and the warrant must particularly describe the place to be searched and the things to be seized.[104] Finding that these requirements had been satisfied, the majority concluded that the April 5th order authorizing the interception of oral communications emanating from Dalia's office was issued in full compliance with the fourth amendment.[105]

In answer to Dalia's contention that the April 5th order was insufficient because it failed to specify that it could be executed by covert entry, the majority found nothing in the Constitution requiring a search warrant to state the precise manner in which it is to be executed.[106] The majority noted that the police have discretion in determining the details of how best to execute a warrant and may resort to forcible breaking and entering if necessary to effectuate a search warrant.[107] Dalia argued that the entry into his office was a

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101. The majority noted that Title III does not require that express authorization for covert entries be set forth in the issuing court's order to intercept communications. Therefore, if there is a requirement of express judicial authorization for secret entry it must come from the fourth amendment alone. Dalia v. United States, 441 U.S. 238, 255 n.17 (1979).

102. *See, e.g.*, Connally v. Georgia, 429 U.S. 245, 250–51 (1977).

103. *See, e.g.*, Warden v. Hayden, 387 U.S. 294, 307 (1967).

104. *See, e.g.*, Stanford v. Texas, 379 U.S. 476, 485 (1965).

105. The Court broadly stated that "[b]ecause of the strict requirements of Title III all of the indicia of a warrant necessarily are present whenever an order under Title III is issued." Dalia v. United States, 441 U.S. 238, 256 n.18 (1979).

106. *Id.* at 256. Justice Brennan vigorously objected to the majority's assertion that covert entries to install eavesdropping devices are a mere mode of warrant execution. *Id.* at 260 (Brennan, J., dissenting). *Accord,* Application of United States, 563 F.2d 634, 643 (4th Cir. 1977). *See also* Silverman v. United States, 365 U.S. 505 (1961). *But cf.* McNamara, *supra* note 9, at 9 (without flexibility in the time, place, manner, and method of entry, police would be hamstrung in their efforts to successfully execute an order to intercept communications).

107. In support of this rationale the Court cited United States v. Gervato, 474 F.2d 40 (3d Cir. 1973), *cert. denied,* 414 U.S. 864 (1973). In *Gervato* the police obtained a warrant to search petitioner's apartment. Upon arriving at the apartment, and aware that petitioner was not home, the police forcibly opened the door to execute the warrant. The Third Circuit held that the fourth amendment does not require that the suspect be present before his home can be searched under a valid warrant. Therefore, the search was "reasonable" and the fruits thereof were properly admitted at trial. The majority in *Dalia* buttressed this argument by noting that officers requesting a warrant are not constitutionally required to set forth the anticipated means of executing that warrant. Dalia v. United States, 441 U.S. 238, 257 n.19 (1979).

Justice Brennan thought that the majority's reliance on *Gervato* was misplaced because in that case police could not have anticipated, at the time the warrant was issued, that it would be necessary to forcibly enter petitioner's

distinct infringement of his privacy rights because it went beyond the interception of communications authorized by the Title III order by subjecting his personal papers and effects to unauthorized examination.[108] The Court found that this view of the warrant clause "parses too finely the interests protected by the Fourth Amendment,"[109] and that it would push the warrant clause to the extreme if courts were required to specify the precise procedures to be followed in executing a warrant whenever it is likely that fourth amendment rights may be affected in more than one way.[110] The majority reasoned that it would promote "empty formalism" if the Court were to require judges to make explicit what is unquestionably implicit in a bugging authorization — that a covert entry may be needed for the installation of electronic surveillance equipment.[111] It therefore

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home. Moreover, *Gervato* involved a mere mode of warrant execution whereas *Dalia* involved an invasion of two separate expectations of privacy. *Id.* at 261 (Brennan, J., dissenting). For a discussion of the problems of anticipating when covert entries will be necessary, see Note, *Covert Entry In Electronic Surveillance: The Fourth Amendment Requirements,* 47 FORDHAM L. REV. 203 (1978).

108. Dalia was urging the Court to adopt the holding and rationale of United States v. Ford, 553 F.2d 146, 152–55 (D.C. Cir. 1977). See notes 64–72 and accompanying text *supra.*

109. Dalia v. United States, 441 U.S. 238, 257 (1979).

110. *Id.* at 258. Justice Powell, speaking for the majority, reasoned that police executing a warrant often find it necessary to interfere with privacy rights not explicitly considered by the magistrate who issued the warrant. For example, the Court referred to the common situation where police executing an arrest warrant find it necessary to enter the suspect's home to take him into custody, and thereby impinge on both privacy and freedom of movement. *See, e.g.,* United States v. Cravero, 545 F.2d 406 (5th Cir. 1976).

Justice Brennan, dissenting, thought the Court's reliance on *Cravero* was misplaced. In *Cravero,* the police could not have anticipated when the arrest warrant to specify a home arrest. In contrast, the entry into Dalia's office order to arrest him. Therefore, it would have been unreasonable to require the warrant to specify a home arrest. In contrast, the entry into petitioner's office was easily foreseeable, and the FBI could have informed the magistrate who issued the Title III order that it contemplated covert entry. Dalia v. United States, 441 U.S. 238, 260–61 (1979) (Brennan, J., dissenting).

111. *Id.* at 258. The majority noted that the district court specifically stated that its order had implicitly authorized covert entry. *Id.* at 258 n.21. *Cf.* United States v. Finazzo, 583 F.2d 837, 842–45 (6th Cir. 1978) (judge issuing Title III order was aware that secret, forcible entry would be necessary to install equipment, but had no power to authorize such entry).

The Court further justified its conclusion by noting that the manner in which a warrant is executed is subject to later judicial scrutiny as to its reasonableness. Dalia v. United States, 441 U.S. 238, 258 (1979). *See* Zurcher v. Stanford Daily, 436 U.S. 547, 559–60 (1978). The majority then noted that the covert entries into Dalia's office were reasonable. The FBI had entered only twice — once to install the eavesdropping equipment and once to remove it. There was no evidence that the FBI intrusion went beyond what was necessary to accomplish the surveillance. *Cf.* United States v. Scafidi, 564 F.2d 633 (2d Cir. 1977) (entries for the placement repair, and removal of bugs are not invalid provided the police adhere to the sole authorized purpose of seizing conversations), *cert. denied,* 436 U.S. 903 (1978).

concluded that the fourth amendment does not require a Title III order to contain specific authorization to enter the premises described in the order. The Court did note, however, that the preferable approach would be for law enforcement agents to obtain express permission for an entry from the judge who authorizes the surveillance.[112]

Justice Brennan, in his dissent, stated that obtaining explicit authorization to enter covertly is not only preferable, but also constitutionally required.[113] In his opinion, the breaking and entering of private premises for the purpose of installing eavesdropping devices cannot be characterized as a mere mode of executing a warrant to be left to the discretion of the police. Agreeing with several of the circuits,[114] Justice Brennan found that covert entries entail an invasion of privacy of constitutional significance distinct from that which attends the mere interception of oral communications.[115] Because such entries breach physical as well as conversational privacy, a warrant that describes only the seizure of conversations cannot be read expansively to authorize physical invasions of privacy at the discretion of the police.[116] Justice Brennan concluded

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112. Dalia v. United States, 441 U.S. 238, 259 n.22 (1979). It was also noted that the Department of Justice adopted a policy to include in Title III applications a request that the judge explicitly authorize surreptitious entry for the purpose of installing and removing electronic eavesdropping devices. *Id.; see* Brief for Appellee at 56, Dalia v. United States, 441 U.S. 238 (1979).

113. *Id.* at 259 (Brennan, J., dissenting). Justice Brennan adamantly objected to the majority's rationale that requiring a warrant to enter in a bugging case would "promote empty formalism." In his opinion, adherence to the strictures of the warrant and particularity clauses of the fourth amendment would never constitute "empty formalism." Moreover, Justice Brennan was not convinced that private premises could not be bugged without the need for surreptitious entry. *See* Lopez v. United States, 373 U.S. 427, 467–68 (1963) (Brennan, J., dissenting). Because covert entries are not always needed, requiring the police to secure prior approval to conduct such entries may prevent unnecessary and improper intrusions.

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

115. Dalia v. United States, 441 U.S. 238, 259–60 (1979) (Brennan, J., dissenting). Because surreptitious entries amount to an additional intrusion, Justice Brennan concluded that such entries are "tantamount to an independent search and seizure." *Id.* at 260.

116. Justice Brennan did not suggest that courts must authorize every movement of the police in executing a warrant. He recognized that police may be forced to adjust their plans if they encounter changed circumstances. The details of how best to proceed with a covert entry could be left to the discretion of the police. However, the warrant must at least state that covert entry will be utilized in accomplishing the interception of communications. *Id.* at 261.

Justice Brennan also pointed out that the fourth amendment limits an officer executing a search warrant within the bounds set by the warrant, Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 394 n.7 (1971), in order to ensure that those searches remain as limited as possible. Coolidge v. New Hampshire, 403 U.S. 443, 467 (1971). This limitation is necessary because the Constitution demands that the necessity for invasion of private premises be decided by "a neutral and detached magistrate instead of being judged by the

that, because of these additional instrusions, the Constitution requires that law enforcement agents who wish to break and enter private premises first secure explicit judicial approval. Therefore, Justice Brennan would hold that authority for the entry cannot be derived from a Title III order authorizing only electronic surveillance.

VII. EVALUATION OF *DALIA*

A. *The Constitutionality of Surreptitious Entries*

There was no dissent from the holding in *Dalia* that the fourth amendment does not per se prohibit covert entries.[117] This holding is a logical extension of prior decisions in which the Court intimated that secret entries to install eavesdropping devices would be constitutionally acceptable in certain circumstances. For example, in *Silverman v. United States*,[118] the Court stated that "[t]his Court has never held that a federal officer may *without warrant* and without consent physically entrench into a man's office or home, there secretly observe or listen, and relate at the man's subsequent criminal trial what was seen or heard."[119] Implicit in *Silverman* is the view that surreptitious entries could be constitutional if made pursuant to a search warrant. Moreover, in *Berger v. New York*,[120] the Court specifically stated that "[w]hile '[t]he requirements of the Fourth Amendment are not inflexible, or unobtusely unyielding to the legitimate needs of law enforcement,' it is not asking too much that officers be required to comply with the basic command of the Fourth Amendment before the innermost secrets of one's home or office are invaded."[121] The decision in *Dalia* is consistent with these cases only to the extent that the Court limited the constitutionality of covert entries to those conducted pursuant to a valid Title III order. In reaching this conclusion, the Court struck a delicate balance between providing sufficient protection of individual privacy and making available to law enforcement agencies a valuable investigative technique.

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officer engaged in the often competitive enterprise of ferreting out crime." Johnson v. United States, 333 U.S. 10, 14 (1948).

117. The dissenters agreed that a covert entry would not violate the fourth amendment if Congress expressly authorized courts to approve entries and if a court explicitly approved that particular entry. See note 86 *supra*.

118. 365 U.S. 505 (1961). See notes 24–29 and accompanying text *supra*.

119. *Id.* at 511–12 (emphasis added). *See also* Irvine v. California, 347 U.S. 128 (1954) (covert entry to install eavesdropping devices without a search warrant is violative of the fourth amendment).

120. 388 U.S. 41 (1967). See notes 30–35 and accompanying text *supra*.

121. *Id.* at 63 (quoting Lopez v. United States, 373 U.S. 427, 464 (1933) (Brennan, J., dissenting)). *See also* T. TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 114 (1969), where the author concludes that the constitutional validity of covert entries to install bugs is a natural consequence of the reasoning in Katz v. United States, 389 U.S. 347 (1967).

B. Legislative Intent to Authorize Entries

The Court's holding that Congress intended to empower courts to authorize covert entries receives substantial support from the express language of Title III and its legislative history. One convincing provision of Title III reflecting that intention is section 2516.[122] That provision authorizes the interception of both oral and wire communications.[123] Because Congress specifically provided for the use of both forms of surveillance it is obvious that Congress was fully aware of the distinction between wiretapping and bugging,[124] and nevertheless chose to deal with them in the same manner.[125] Inasmuch as Congress was aware that it was authorizing bugging and understood that bugging could rarely be accomplished without secret entry,[126] it follows that Congress realized that by enacting Title III it was authorizing covert entries.[127]

Another provision which indicates that Congress intended to authorize entries is section 2518(4).[128] That subsection provides that a court issuing a Title III order shall direct that a communications common carrier, landlord, custodian, or other person furnish the applicant with information, facilities, and technical assistance necessary to accomplish the interception unobtrusively.[129] Because the aid of landlords and custodians is only required if a covert entry is necessary, Congress must have anticipated that law enforcement agents would have to enter private premises covertly to install equipment.[130] Finally, Congress mandated that both the application and the Title III order describe with particularity the "*facilities from which or the place where*"[131] the communications are to be inter-

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122. 18 U.S.C. § 2516 (1970).
123. *Id.* at § 2516(1).
124. *See, e.g.,* S. REP. No. 1097, 90th Cong., 2d Sess. 68 (1968). For a discussion of the distinction between wiretapping and bugging, *see* LAPIDUS, *supra* note 6. *See also* Berger v. New York, 388 U.S. 41, 46–47 (1967); notes 6–7 *supra.*
125. Title III mandates the identical procedure for the interception of both wire and oral communications. Dalia v. United States, 441 U.S. 238, 249 (1979).
126. See note 92 *supra.*
127. *Accord,* Application of United States, 563 F.2d 637, 643 (4th Cir. 1977); United States v. Scafidi, 564 F.2d 633, 639 (2d Cir. 1977), *cert. denied,* 437 U.S. 903 (1978). *Contra,* United States v. Santora, 583 F.2d 453, 460 (9th Cir. 1978); United States v. Finazzo, 583 F.2d 837, 841 (6th Cir. 1978).
128. 18 U.S.C. § 2518(4) (1970) (quoted at note 93 *supra*) (construed in United States v. Finazzo, 583 F.2d 837, 851 (1978) (concurring opinion)).
129. *See generally* United States v. New York Tel. Co., 434 U.S. 159 (1977) (if authorized by statute, courts may compel a telephone company to render assistance if that company's facilities are being used to facilitate a criminal enterprise).
130. Dalia v. United States, 441 U.S. 238, 250 n.10 (1979). *Accord,* United States v. Ford, 414 F. Supp. 879, 883 (D.D.C. 1976), *aff'd,* 553 F.2d 146 (D.C. Cir. 1977).
131. 18 U.S.C. § 2518(1)(b)(ii) (1970) (emphasis added). *See also id.* at § 2518(4)(b); McNamara, *supra* note 9, at 9.

cepted. It is reasonable to infer that Congress, in requiring a description of the "place where" the communications are to be intercepted, contemplated that some sort of entry into that place would be required if the surveillance were to be effective.

The legislative history of Title III also reveals that Congress intended to authorize covert entries. The congressional debate on Title III shows that the issue of bugging private premises was frequently discussed with the understanding, sometimes express, that entries would be required to install eavesdropping devices. For example, Senator Tydings explained that "[b]ugs are difficult to install in many places since surreptitious entry is often impossible. Often, more than one entry is necessary to adjust equipment."[132] Another Senator commented that "I know that elaborate efforts are made to distinguish between a real wiretap, or bug, which requires someone to intrude upon private premises to install. That kind of invasion is truly a search, requiring a warrant."[133] Moreover, a Senate Report noted that "[a]ll orders and extensions must be executed as soon as practicable. A wiretap can take up to several days to install. *Other forms or devices may take even longer.*"[134] The Senate Reports on Title III also reveal that repeated reference was made to the covert entry involved in *Berger v. New York*.[135] In *Berger* the Court spelled out the provisions that must be contained in a constitutional eavesdropping statute.[136] The Court did not mandate, however, that a provision authorizing covert entry be included. That it failed to require an entry provision is persuasive evidence that no such provision is needed. Arguably, the reason that Congress did not include an entry provision was because a reading of *Berger* indicated that it was unnecessary.[137] Aware of Congress' conscious attempt to conform Title III to the mandates of *Berger*, the majority in *Dalia* properly concluded that the explanation of Congress' failure to address explicitly the question of covert entries was that it did not perceive surveillance requiring such entries to differ in any significant way from the covert tapping of a telephone.

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132. 114 CONG. REC. 12989 (1968).
133. 114 CONG. REC. 11598 (1968) (remarks of Sen. Morse). *But cf.* United States v. Santora, 583 F.2d 453, 461–62 (9th Cir. 1978) (refused to read Senator Morse's comment as indicating that he understood that entries would be authorized).
134. S. REP. No. 1097, 90th Cong., 2d Sess. 103 (1968) (emphasis added). For a discussion of the problems involved in installing and maintaining electronic surveillance equipment, see *National Wiretap Commission Report, Electronic Surveillance* 86 (1976).
135. 388 U.S. 41 (1967). *See, e.g.*, S. REP. No. 1097, 90th Cong., 2d Sess. 74–75, 101–02 (1968).
136. See notes 30–35 and accompanying text *supra*.
137. *See* Dalia v. United States, 441 U.S. 238, 251 n.12 (1979).

C. *Entries Without Prior Judicial Approval*

The Court's conclusion in *Dalia* that the mere issuance of a Title III order gives law enforcement agents implied authority to enter private premises surreptitiously condones a serious invasion of privacy that was not explicitly authorized by statute. In finding that all of the requirements of a valid warrant to enter are present in a Title III order,[138] the majority failed to pay deference to the established principle that the fourth amendment confines an officer executing a warrant within the express bounds set by the warrant.[139] While a Title III order may constitute a valid warrant to seize communications, that warrant should not be read expansively to authorize a constitutionally distinct invasion of privacy at the discretion of the executing officer because the Constitution requires that the necessity for invading one's privacy be decided "by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime."[140] Despite the majority's finding that the issuing judge found probable cause to believe that the evidence sought would aid in Dalia's conviction,[141] there was no judicial determination of probable cause that an entry was needed. The Court's holding is a departure from prior decisions holding that a separate determination of probable cause and reasonableness is required for each intrusion on private premises.[142] Until *Dalia*, the majority of the courts of appeals had assumed that unless a judicially created exception to the warrant clause could be invoked, when a case involves incursions on both private premises and conversational privacy each intrusion requires separate judicial authorization.[143] The warrant clause was included in the fourth amendment so that an objective mind might weigh the need to invade individual privacy in order to enforce the law,[144] and entry of private premises is the traditional focus of the warrant

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138. *Id.* at 256 n.18.
139. *See, e.g.*, Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 394 n.7 (1971); Marron v. United States, 275 U.S. 192, 196 (1927).
140. Dalia v. United States, 441 U.S. 238, 261 (1979) (Brennan, J., dissenting) (quoting Johnson v. United States, 333 U.S. 10, 14 (1948)).
141. *See* Dalia v. United States, 441 U.S. 238, 256 (1979). *See also* 18 U.S.C. § 2518(3) (1970).
142. *See, e.g.*, Chimel v. California, 395 U.S. 752, 767 (1969) (police who lawfully interfere with one aspect of an individual's privacy have no right to conduct further intrusions in the absence of a warrant). *See also* Berger v. New York, 388 U.S. 41, 57 (1967); Osborn v. United States, 385 U.S. 323 (1966).
143. *See, e.g.*, United States v. Ford, 553 F.2d 146, 162 (D.C. Cir. 1977). *See generally* Terry v. Ohio, 392 U.S. 1, 21 (1968) (in justifying a particular intrusion the police must be able to point to facts which reasonably warrant that intrusion).
144. McDonald v. United States, 335 U.S. 451, 455 (1948).

requirement.[145] By excluding the judiciary from the determination of whether covert entries are needed and allowing agents to enter when the issuing judge is not even apprised of the entry,[146] the Court is subjecting an individual's right to privacy to invasion at the discretion of the police.

The *Dalia* majority's rationale that covert entries are a mere form of warrant execution, and that the police have discretion in determining such "details,"[147] disregards the purpose of allowing police any discretion in executing a warrant. While some leeway must be granted to police so that they may conform their conduct to unforeseen situations which may arise during a warrant execution, there is no need to give police that discretion when they plan in advance to intrude on privacy interests not specifically authorized in the warrant. The majority's reliance on prior decisions upholding police conduct that interfered with privacy rights not explicitly considered in the warrant offers no support for the *Dalia* Court's holding.[148] In those cases the police did not encounter the need for additional intrusion until they were in the midst of executing a warrant, while in *Dalia* the FBI planned to break and enter the defendant's office at the time it received authorization to intercept communications. Although it may be reasonable to enter a suspect's home when necessary to effectuate an arrest warrant, a situation not anticipated at the time the warrant is issued, it is unreasonable for police to plan a breaking and entering of private premises and fail to apprise the judge of that intended scheme. Addressing the majority's assertion that covert entries are a mere form of warrant execution, Justice Brennan convincingly refuted the majority's strained reasoning. He argued that covert entry breaches physical as well as

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145. United States v. Ford, 553 F.2d 146, 163 (D.C. Cir. 1977). *See also* United States v. United States District Court, 335 U.S. 297, 313 (1972).

146. *See* Application of United States, 563 F.2d 637, 644 (4th Cir. 1977) (requirement that judge be apprised of entries comports with the scheme of Title III of meticulous judicial supervision of all aspects of electronic surveillance).

147. The majority reasoned that "[i]t 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." Dalia v. United States, 441 U.S. 238, 258 (1979). The Court failed to consider, however, that the additional intrusions posed by covert entry are not only reasonably likely to occur but are inevitable. An entry is not merely a tangential invasion to the interception of communications, but rather an invasion of privacy of constitutional significance. *Id.* at 259–60 (Brennan, J., dissenting). Further, as pointed out by Justice Brennan, there is a middle ground between setting precise guidelines for the police in executing a warrant and failing to set any guidelines at all.

148. The majority relied on United States v. Cravero, 545 F.2d 406 (5th Cir. 1976), and United States v. Gervato, 474 F.2d 40 (3d Cir. 1973), *cert. denied*, 414 U.S. 864 (1973). See notes 107 & 110 *supra*.

conversational privacy. A citizen's home or office, that "inviolate place which is a man's castle," is being invaded.[149]

The majority rejected too quickly Dalia's contention that a bifurcated analysis is required — that the interception of communications and the covert entry should be subjected to separate fourth amendment scrutiny. This analysis, which is based on the assumption that secret entries intrude on privacy interests beyond the mere interception of conversations and thus constitute a separate invasion of privacy, had been applied by several of the circuits. In *United States v. Ford*,[150] the District of Columbia Circuit found that surreptitious entries involve an invasion of privacy distinct from that entailed in the interception of oral communications. The court noted that bugging, unlike wiretapping, involves two separate aspects of the fourth amendment: "protection of private premises and of conversational privacy from unwarranted intrusion."[151] It reasoned that a person whose physical privacy is to be invaded has the right to expect that a judicial officer will be apprised of a planned entry and will authorize only those entries necessary to satisfy the cognizable needs of law enforcement. Because covert entries to install bugs are distinct invasions of privacy, the court concluded that they require separate consideration in the warrant procedure. Similarly, in *Application of United States*,[152] the court held that a Title III order authorizing the interception of conversations does not suspend the operation of the fourth amendment for other purposes. A Title III order cannot, in itself, justify additional governmental incursions into other aspects of private life. In determining whether a Title III application should be approved, any request to enter private premises must therefore be subjected to separate fourth amendment consideration. The only explanation offered by the *Dalia* majority for declining to apply this analysis was that it "parses too finely the interests protected by the Fourth Amendment."[153] The Court's failure to consider this point fully is puzzling, especially in light of the dissent's strong language that covert entries are "tantamount to an independent search and seizure."[154]

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149. Dalia v. United States, 441 U.S. 238, 260 (1979) (Brennan, J., dissenting) (quoting Silverman v. United States, 365 U.S. 505, 512 n.4 (1961)).
150. 553 F.2d 146 (D.C. Cir. 1977).
151. *Id.* at 160. *Accord,* United States v. Agrusa, 541 F.2d 690, 696 (8th Cir. 1976) (surreptitious entries to install eavesdropping devices and the subsequent interception of conversations constitute a search and seizure composed of two distinct aspects, each entitled to protection under the fourth amendment), *cert. denied,* 429 U.S. 1045 (1977).
152. 563 F.2d 637 (4th Cir. 1977).
153. Dalia v. United States, 441 U.S. 238, 257 (1979).
154. *Id.* at 260 (Brennan, J., dissenting).

The majority's refusal to apply a bifurcated analysis to the unauthorized entry of defendant's premises brings into focus a related issue that divided the Court. While the dissent vigorously argued that physical entries infringe privacy rights not otherwise invaded by the interception of spoken words, the majority failed to confront that issue. Curiously, the majority merely noted that there was no indication that the FBI went beyond what was necessary to install and remove the equipment from Dalia's office.[155] Despite the self-restraint exercised by the FBI, however, the majority should have considered that a secret entry of private premises by the police is an invasion of privacy regardless of what the police do once inside. While non-trespassory eavesdropping penetrates only that expectation of privacy that an individual has with respect to his spoken words, entries enable intruding officers to examine personal papers and effects that would not be disclosed by non-trespassory surveillance. Even if the police exercise self-restraint by adhering to the sole purpose of installing equipment, and consequently conduct a less aggravated invasion than a traditional rummaging search, they nevertheless have intruded on the occupant's privacy. Personal items are likely to come within the plain view of police while they inspect the premises for a suitable place to install eavesdropping devices. As aptly noted by Justice Stevens in his dissent, covert entries aggravate the search and intrude upon property and privacy interests which have independent social value unrelated to confidential speech. The *Dalia* majority's failure to consider this important constitutional issue is disturbing. Instead, it simply ignored the observations discussed above and shrouded the police in a sweeping cloak of authority to enter private premises whenever they deem it necessary to effectuate a Title III order.

The majority supported its position that police need not obtain permission to enter private premises by reasoning that such judicial approval would amount to "empty formalism."[156] Because all magistrates know that when they authorize bugging an entry will be necessary, there is no reason to require them to grant specific

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155. The majority was satisfied with the conduct of the FBI agents in that they entered Dalia's office only twice, once to install the bug and once to remove it. This rationale is misconceived because the issue was not whether the FBI agents acted with restraint upon entering the office, but whether they had the right to be there in the first place in light of the fact that no probable cause determination was made that the entry was necessary to conduct the investigation. *Cf.* Katz v. United States, 389 U.S. 347 (1967) (this Court "has never sustained a search upon the sole ground that officers reasonably expected to find evidence of a particular crime and voluntarily confined their activities to the least intrusive means consistent with that end") *Id.* at 356–57. See text accompanying note 41 *supra*.

156. Dalia v. United States, 441 U.S. 238, 258 (1979).

approval for that entry. The majority failed to consider, however, that when the question of whether a covert entry is necessary is left to the discretion of the police, thereby circumventing the requirement that a neutral magistrate be interposed between the citizen and police,[157] there is no opportunity for the judge to issue a warrant tailored to meet the demands of the situation. Therefore, there is no assurance that the police will conduct the invasion in the least obtrusive manner possible, as specifically required by Title III. The Court failed to recognize that individual privacy can best be protected from unnecessary intrusions if the issuing judge is capable of maintaining supervision over the entry.[158] Because judicial supervision is the only means of ensuring that a covert entry does not exceed its limited purpose of installing necessary devices, that supervision constitutes more than mere "empty formalism."

The majority's decision also creates a grave risk that surreptitious entries will be accomplished when they are not necessary to intercept communications. The police now have unlimited discretion to enter whenever they obtain a Title III authorization to intercept oral communications. This may prompt police to obtain such authorization even when a traditional wiretap will suffice to obtain the needed evidence.[159] If covert entries are to be conducted, there should at least be a requirement that the police make a specific showing that an entry is necessary. As suggested by some courts, the police may have other motives for entering in addition to the seizure of conversations.[160] Entries entail inspection of the premises which often bring personal papers and effects within the plain view of police. To better protect individual privacy from arbitrary intrusions by police, a more appropriate view is that fourth amendment protections against physical trespass do not disappear merely because a probable cause showing has been made for the gathering of oral evidence.

Finally, in holding that law enforcement agents who obtain Title III authorization to intercept communications need not obtain judicial approval for covert entries, the majority failed to consider

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157. *See* Katz v. United States, 389 U.S. 347, 357 (1967); Johnson v. United States, 333 U.S. 10, 14 (1948).

158. *See* Katz v. United States, 389 U.S. 347, 356 (1967) (in conducting a search, police must be compelled to observe precise limits established in advance by a specific court order); Dorman v. United States, 435 F.2d 385 (D.C. Cir. 1970) (judicial officer must determine what limitation and specification of entry may be appropriate and reasonable).

159. That wiretapping is often sufficient to conduct an investigation is evidenced by the fact that telephone taps account for most instances of electronic surveillance. *See National Wiretap Commission Report, Electronic Surveillance* 15 (1976).

160. *See, e.g.*, Application of United States, 563 F.2d 637, 643 (4th Cir. 1977); United States v. Ford, 553 F.2d 146, 158 (D.C. Cir. 1977).

that it would be no great hardship for the police to obtain such approval. Because secret entries must be planned in advance, the police certainly have time to apprise the issuing judge of that plan. In view of the Court's recognition that the preferable approach would be for police to obtain explicit judicial approval, it should have recognized that the burden of obtaining a warrant to enter is not likely to frustrate the governmental interest in effective law enforcement.[161] As noted by the District of Columbia Circuit, "the minor incremental burden involved in obtaining proper judicial authorization for the particular invasions of privacy at issue here is not sufficient justification for dispensing with a fundamental fourth amendment requirement."[162] There is no reason, therefore, why a requirement that police obtain judicial permission prior to entering private premises would not accommodate both the legitimate goals of law enforcement and the individual's right to privacy in the area of electronic surveillance.

The decision in *Dalia* is consistent with a discernable trend in the Supreme Court towards a narrow interpretation of the fourth amendment and a concomitant limitation on the individual's right to privacy. *Dalia* is not the only instance in recent years in which the Court has approved of serious invasions of privacy not expressly authorized by Congress. In *United States v. Ramsey*,[163] the Court upheld the right of postal inspectors to open private mail without probable cause to believe it contained contraband. In *United States v. New York Telephone Co.*,[164] the Court upheld the use of pen register surveillance even though Congress did not authorize the use of such devices in Title III.[165] In *Dalia* the Court went one step further by finding an implicit grant of executive power in Title III.

D. *Impact of* Dalia *on Eavesdropping Orders Issued by Maryland Judges*

While *Dalia* has significant ramifications on interception orders issued by federal courts under Title III, it has substantially less

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161. Application of United States, 563 F.2d 637, 644–45 (4th Cir. 1977). Because law enforcement agents must obtain a Title III order before they begin to intercept communications, it is difficult to imagine how a requirement that they obtain explicit approval to enter at that time would frustrate their investigation.
162. United States v. Ford, 553 F.2d 146, 164–65 (D.C. Cir. 1977).
163. 431 U.S. 606 (1977).
164. 434 U.S. 159 (1977).
165. *See* Smith v. Maryland, 442 U.S. 735 (1979) (use of pen register device, which records the numbers dialed on a telephone but does not intercept conversations, is not a "search" within the meaning of the fourth amendment).

impact on eavesdropping orders issued by Maryland state courts.[166] Unlike Title III, Maryland's statutory law governing wiretaps and electronic surveillance contains a provision that authorizes entries to install eavesdropping equipment.[167] Had *Dalia* held that Title III does not authorize covert entries, Maryland's provision authorizing such entries would have been jeopardized. The Court of Appeals of Maryland has held that "under no circumstances is [a state eavesdropping law] enforceable if it is less restrictive than the federal statute so that it grants the governing power more rights at the expense of its citizens."[168] Therefore, if Title III did not authorize entries, it would follow that Maryland would be powerless to authorize entries as well.

Dalia's further holding that police who obtain Title III authorization to intercept communications have implied permission to conduct entries has no impact on interception orders issued under Maryland law. While Maryland law does authorize entries, it also provides that such entries may not be conducted without a court order.[169] Because a state wiretap law that is more closely circumscribed than Title III in granting eavesdrop authority is certainly permissible,[170] it is clear that despite the Supreme Court's holding in *Dalia,* there can be no entry made pursuant to an order issued by a Maryland state court unless the police obtain prior judicial authorization.

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166. *See* MD. CTS. & JUD. PROC. CODE ANN. §§ 10–401 to –412 (1980). In Maryland a judge of a circuit court or the Supreme Bench of Baltimore City may issue an order authorizing the interception of communications under conditions substantially identical to Title III. *See id.* at §§ 10–408(c), 10–401(8). *See also* 18 U.S.C. § 2516(2) (1970).

167. MD. CTS. & JUD. PROC. CODE ANN. § 10–412 (1980). Although this section does not authorize covert entries directly, it does so by implication in that it punishes only those who enter private premises to install eavesdropping equipment without a court order.

168. State v. Siegel, 266 Md. 256, 271, 292 A.2d 86, 94 (1972).

169. MD. CTS. & JUD. PROC. CODE ANN. § 10–412 (1980). This section provides that any person who breaks and enters any premises with the intent to install or remove eavesdropping equipment, without a court order, is guilty of a felony and may be imprisoned for not more than ten years. Apparently, this section does not exempt police officers from its scope. Gilbert, *A Diagnosis, Dissection, and Prognosis of Maryland's New Wiretap and Electronic Surveillance Law,* 8 U. BALT. L. REV. 183, 217 (1979).

170. State v. Siegel, 266 Md. 256, 272, 292 A.2d 86, 94 (1972).

VIII. CONCLUSION

The Supreme Court's expansive interpretation of Title III means that any person seeking to suppress evidence obtained as a result of a covert entry accomplished under a valid Title III order will have to depend on a legislative amendment prohibiting such entries in order to have that evidence excluded at trial. Because Congress and the states have the authority to ensure greater protection of individual privacy than that provided by the Constitution, they clearly have the power to proscribe secret entries conducted for the purpose of installing eavesdropping devices. In regard to the *Dalia* Court's sanctioning of covert entries achieved without judicial approval, the Court has made a policy decision favoring the governmental interest in law enforcement over the citizen's right to privacy. To paraphrase Justice Brennan, the Court has permitted a search and seizure to be conducted without a warrant.[171] In light of the history of Title III, which evidences a great concern for privacy rights, a legislative amendment prohibiting unauthorized entries can be expected.

Theodore Scott Basik

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171. Dalia v. United States, 441 U.S. 238, 259–60 (1979) (Brennan, J. dissenting).