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Constitutional Law - Fourth Amendment - Search and Seizure - Title III of the Omnibus Crime Control and Safe Streets Act of 1968 - Electronic Surveillance - Covert Entry

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CONSTITUTIONAL LAW—FOURTH AMENDMENT—SEARCH AND SEIZURE—TITLE III OF THE OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968—ELECTRONIC SURVEILLANCE—COVERT ENTRY—The United States Supreme Court has held that the fourth amendment does not require that a Title III electronic surveillance order include a specific authorization for law enforcement officers to covertly enter the premises described in the order to install a listening device.

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

Pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (Crime Control Act),[1] federal agents, investigating a conspiracy to steal an interstate shipment of fabric, requested authorization to intercept all oral communications[2] taking place in the office of Larry Dalia.[3] The federal district court approved the application after finding probable cause to believe that Dalia was involved in the commission of various offenses,[4] that particular oral communications could be obtained through the use of electronic surveillance, that normal investigative procedures appeared unlikely to succeed, and that the business office of Larry Dalia was being used by him in connection with the commission of the alleged offenses.[5] The court's order expressly authorized special agents of the Federal Bureau of Investigation to intercept Dalia's conversations at his business office concerning the alleged offenses for a period not longer than twenty days from the date of the order.[6]

Although the surveillance order made no mention of the manner of implementing the interception,[7] the federal agents secretly entered Dalia's office at midnight on April 5, and spent several hours on the

1. 18 U.S.C. §§ 2510-2520 (1976).

2. This request also sought an extension of a prior authorization to intercept telephone conversations on two telephones in petitioner's business office. Dalia v. United States, 441 U.S. 238, 242 (1979).

3. *Id.* at 242.

4. *Id.* at 241-42. The petitioner was eventually indicted on five counts including: conspiring to transport, receive, and possess stolen goods; conspiring to obstruct interstate commerce; transporting stolen goods; receiving stolen goods; and possession of stolen goods. *Id.* at 244 n.5.

5. *Id.* at 242-44 n.4. These findings must be made prior to the issuance of any surveillance authorization. 18 U.S.C. § 2518(3) (1976).

6. 441 U.S. at 242-44 n.4. The order conformed to the requirements specified in 18 U.S.C. § 2518(4) (1976) for the interception of any wire or oral conversation. *See* 441 U.S. at 255-58.

7. *See* notes 5 & 6 and accompanying text *supra*.

premises installing the bug.[8] All electronic surveillance ended on May 16, 1973[9] at which time the federal agents reentered Dalia's office and removed the listening device.[10] Dalia was indicted based upon the evidence obtained from the intercepted communications.[11]

Prior to trial, Dalia moved to suppress all evidence procured through the use of the listening device installed in his office.[12] The court denied the motion without prejudice to its renewal following trial.[13] The petitioner was subsequently convicted,[14] and his motion to suppress the evidence was again denied at a post-trial evidentiary hearing.[15] The district court noted that since the warrant was based upon probable cause, the question was whether or not the manner of executing the warrant was unreasonable.[16] In determining that the manner of execution was not unreasonable, the district court found that surreptitious entry was the safest and most successful method of accomplishing the installation.[17] The court reasoned that in most cases, breaking and entering was the only way a listening device could be installed. Moreover, the authorization for covert entry was implicit in the wiretapping since entry to install bugging devices was a condition precedent that must necessarily have been satisfied if the purpose of the intercept order was to be effectuated.[18] The district court thus found that the surveillance order did not have to contain express authorization for the covert entry.[19]

On review, the United States Court of Appeals for the Third Circuit affirmed the decision of the district court.[20] Although the court of appeals agreed that separate authorization for the entry was not required, it noted that the preferable approach for surveillance applicants was to include a statement of the need for a surreptitious entry in the

8. 441 U.S. at 245.

9. The electronic surveillance order of April 5th was extended by court order on April 27, 1973. *Id.* at 242.

10. *Id.* at 245.

11. *Id. See also* note 4 *supra.*

12. 441 U.S. at 245.

13. *Id.*

14. *Id.* at 246. Petitioner was convicted of receiving stolen goods and of conspiring to transport, receive, and possess stolen goods. *Id.* at 245 n.6.

15. *Id.* at 246. The district court rejected the petitioner's assertion that an applicant for an interception order must request court approval to break and enter for the purpose of installing a bug. The petitioner argued that the authorizing court should ascertain if the authorized surveillance could be accomplished in a less intrusive manner. United States v. Dalia, 426 F. Supp. 862, 865-66 (D.N.J. 1977).

16. 426 F. Supp. at 865.

17. *Id.* at 866.

18. *Id.*

19. *Id.*

20. United States v. Dalia, 575 F.2d 1344 (3d Cir. 1978).

initial request whenever such break-in was contemplated.[21] The United States Supreme Court granted certiorari[22] to decide whether courts can authorize electronic surveillance that requires covert entry for installation of a listening device and whether such an order must specifically authorize a covert entry.[23] The Court held that the fourth amendment did not prohibit per se covert entries,[24] and that no explicit authorization for such an entry was required. Therefore, the decision of the court of appeals was affirmed.[25]

Justice Powell, writing the opinion for the majority,[26] initially dismissed the petitioner's contention that the fourth amendment[27] prohibits covert entry of private premises in all cases.[28] Relying on its previous decisions in *Irvine v. California*[29] and *Silverman v. United*

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21. *Id.* at 1346-47.

22. 439 U.S. 817 (1978).

23. 441 U.S. at 240-41.

24. *Id.* at 248.

25. *Id.* at 259.

26. Chief Justice Burger and Justices White, Blackmun, and Rehnquist joined in the majority opinion. Justice Brennan, in a separate opinion, concurred in the majority result that covert entries are not prohibited per se by the Constitution but dissented from that portion of the majority opinion which held that covert entries are authorized by Title III and that no express authorization is required for the covert entry. *Id.* at 259 (Brennan, J., concurring in part and dissenting in part). Justice Stewart joined with Justice Brennan except for Brennan's concurrence in the facts. *Id.* Justice Stevens, joined by Justice Brennan and Marshall, dissented from the majority's holding that Title III authorizes covert entries. *Id.* at 262 (Stevens, J., dissenting).

27. U.S. CONST. amend. IV 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.

28. 441 U.S. at 246-48. Dalia argued that Title III was unconstitutional insofar as it enabled courts to authorize covert entry for the installation of bugging devices. *Id.*

29. 347 U.S. 128 (1954). *Irvine* involved a covert entry by police officers into a home without a warrant to install a bug. The Court held that the covert entry into the private residence of an individual without a search warrant was a trespass and was, therefore, unconstitutional. *Id.* at 132. The trespass doctrine had originated with Olmstead v. United States, 277 U.S. 438 (1928), which was the Court's first wiretap case. The Court in *Olmstead* held that wiretaps were not prohibited by the fourth amendment unless there was an actual physical intrusion onto the premises. Congress responded to this ruling by enacting the Federal Communications Act of 1934, § 605, 47 U.S.C. § 605 (1976) which prohibited the unauthorized interception of private conversations carried by wire or radio. The first bugging case to reach the Court was Goldman v. United States, 316 U.S. 129 (1942). Applying the *Olmstead* rationale, the Court found that the placing of a device against a wall to hear conversations in the next room did not violate the fourth amendment since there was no physical trespass. In Katz v. United States, 389 U.S. 347 (1967), the Court finally discarded the trespass doctrine. *See* notes 75-77 and accompanying text *infra*.

States,[30] the Court reasoned that it had previously implied that in some circumstances covert entry to install electronic bugging devices would be constitutionally acceptable if done pursuant to a search warrant.[31] Additionally, the Court found no basis for a constitutional rule proscribing all covert entries since it was well established that officers can constitutionally break and enter to execute a search warrant if such an entry is the only means to execute the warrant.[32] The petitioner's argument that a property owner's lack of prior notice of the entry made a covert entry unconstitutional was likewise dismissed by the majority[33] based upon the Court's decision in *Katz v. United States*.[34] Moreover, the Court found that post-search notice to those subject to surveillance[35] was a constitutionally adequate substitute for advance notice.[36] Thus, the *Dalia* Court held that the fourth amendment does not prohibit per se a covert entry performed for the purpose of installing otherwise legal electronic bugging equipment.[37]

Justice Powell next addressed the issue of whether Title III was intended by Congress to confer upon the courts the authority to approve covert entries for the purpose of implementing a surveillance order.[38] The majority conceded that Title III did not refer explicitly to covert entry. However, Justice Powell believed the language, structure, and history of the statute led to the conclusion that Congress did intend to give courts the authority to approve covert entries.[39] The Court

30. 365 U.S. 505 (1961). In *Silverman*, police officers had inserted a "spike mike" several inches into a party wall in order to intercept oral conversations. The Court applied the *Olmstead* trespass doctrine in finding this conduct to be a search subject to the warrant clause. The *Silverman* Court noted that the Court had never held that a federal officer may without warrant and without consent, physically entrench in a man's office or home and subsequently relate what was seen or heard. *Id.* at 511-12.

31. 441 U.S. at 247.

32. *Id.* at 247-48.

33. *Id.* at 248.

34. 389 U.S. 347 (1967). In *Katz*, the Court had noted that such an announcement was not required if it would result in the escape of the suspect or the destruction of evidence. *Id.* at 355 n.16.

35. 18 U.S.C. § 2518(8)(d) (1976).

36. 441 U.S. at 248.

37. *Id.*

38. The federal courts of appeals were in conflict on the resolution of this issue. For decisions that Title III authorized court approved covert entries, see United States v. Scafidi, 564 F.2d 633 (2d Cir. 1977), *cert. denied*, 436 U.S. 903 (1978); Application of United States, 563 F.2d 637 (4th Cir. 1977); United States v. Ford, 553 F.2d 146 (D.C. Cir. 1977). For decisions to the contrary, see United States v. Finazzo, 583 F.2d 837 (6th Cir. 1978), *vacated and remanded mem.*, 99 S. Ct. 2047 (1979); United States v. Santora, 583 F.2d 453 (9th Cir. 1978), *vacated and remanded mem.*, 99 S. Ct. 2155 (1979); United States v. Agrusa, 541 F.2d 690 (8th Cir. 1976), *cert. denied*, 429 U.S. 1045 (1977).

39. 441 U.S. at 249.

reviewed the comprehensive nature of Title III and noted that the detailed restrictions of section 802 of the Crime Control Act[40] insure that bugging occurs only after a judicial determination that the electronic surveillance is needed.[41] The *Dalia* Court emphasized that once the requisite need was found, the courts were granted broad authority to approve electronic surveillance.[42] The only express limitation upon this authority was that the order must provide that it is to be executed as soon as practicable and in a manner that minimizes the interception of irrelevant conversations.[43] The Court also stated that the legislative history of Title III indicated that Congress realized that most bugging requires covert entry.[44] In light of this congressional awareness, the Court decided that it would be erroneous to assume that Congress attempted to exclude covert entries simply by remaining silent on the issue.[45] Furthermore, the Court stated that if covert entries were not within the scope of Title III, the congressional purpose in enacting the statute would be largely thwarted. The Court reasoned that limited surveillance was permitted by Congress to enable law enforcement authorities to successfully combat certain forms of crime, but absent covert entry almost all electronic bugging would be impossible.[46]

After concluding that Congress had conferred upon the courts the power to authorize covert entries, the majority considered the petitioner's contention that the fourth amendment required explicit judicial authorization of the entry before it took place.[47] The Court stated that the fourth amendment, when read literally, set forth three requirements. These guidelines were that warrants must be issued by a neutral disinterested magistrate;[48] those seeking the warrant must demonstrate to the magistrate that probable cause exists to believe that the evidence sought will aid in a particular apprehension or conviction for a particular offense;[49] and that warrants must particularly

40. 18 U.S.C. § 2518 (1976). *See* notes 5-6 and accompanying text *supra*.

41. 441 U.S. at 249. The Court noted that not only must the issuing magistrate determine that there is a likelihood that the interception will disclose the needed evidence, but he must also specify the exact scope of the surveillance to be undertaken, enumerating the parties whose conversations are to be seized, the place to be bugged, and the agency that will implement the order. *Id.* at 249-50.

42. *Id.* at 250.

43. *Id.* at 250-51 n.11. *See* 18 U.S.C. § 2518(5) (1976).

44. 441 U.S. at 251. The Court cited testimony before congressional subcommittees which established that a covert entry was required in most bugging operations.

45. *Id.* at 251-52.

46. *Id.* at 252-54.

47. *Id.* at 254-55.

48. *Id. See* Connally v. Georgia, 429 U.S. 245, 250-51 (1977); Shadwick v. City of Tampa, 407 U.S. 345, 350 (1972); Coolidge v. New Hampshire, 403 U.S. 443, 449-50 (1971).

49. 441 U.S. at 255. *See* Wamden v. Hayden, 387 U.S. 294, 307 (1967).

describe the things to be seized.[50] The Court stated that beyond these three requirements, nothing in the language of the fourth amendment nor in the Court's decisions interpreting that language suggested that a warrant must specify the precise manner in which a search and seizure is to be executed.[51] The Court ruled that nothing in its prior decisions indicated that officers requesting a warrant were constitutionally required to set forth the anticipated means for executing the warrant, even in cases where the officer knows beforehand that forced entry would be necessary.[52]

Finally, the Court rejected petitioner's argument that warrants executed by covert entry were unique since they entailed two distinct invasions of privacy—the entry itself and the subsequent overhearing of the conversations.[53] The majority noted that police often find it necessary to interfere with privacy rights which were not explicitly considered by the magistrate. The Court stated that it would extend the warrant clause to the extreme if the courts were required to specify methods of execution any time that fourth amendment rights were likely to be affected in more than one way. Moreover, such an interpretation is unnecessary since the manner in which a warrant is executed is subject to later judicial review as to its reasonableness. The Court concluded that nothing would be gained by requiring a magistrate to expressly authorize a covert entry when it is unquestionably implicit that a surreptitious entry may be necessary for the installation of the bug. Thus, the Court held that the fourth amendment does not require that a surveillance order contain an explicit authorization for a covert entry.[54]

Justice Brennan dissented.[55] He contended that breaking and entering for the purpose of installing an electronic surveillance device was an invasion of privacy of constitutional significance distinct from that which attends nontrespassory surveillance.[56] In support of this position, he stated that surveillance may be executed without a covert entry and that when such an entry occurs it impinges upon both the physical and conversational privacy of the occupant. Moreover, the practice of breaking and entering to install surveillance equipment was particularly intrusive and subject to police abuse. To Justice Brennan, these additional intrusions mandated that the surveillance order also contain explicit authorization for the covert entry. This would not amount to a

50. 441 U.S. at 255. *See* Stanford v. Texas, 379 U.S. 476, 485 (1965).
51. 441 U.S. at 257.
52. *Id.* at 257 n.19.
53. *Id.* at 257-58. *See also* Brief For Petitioner at 25.
54. 441 U.S. at 258-59.
55. *Id.* at 259 (Brennan, J., concurring in part and dissenting in part).
56. *Id.* at 259-62 (Brennan, J., concurring in part and dissenting in part).

requirement that the precise means of implementing the order be specified, as the warrant need only state that a covert entry may be utilized.[57] He contended that this requirement would not amount to mere formalism since unnecessary and improper intrusions may be prevented.[58]

Justice Stevens dissented from the majority's conclusion that Title III was intended to authorize covert entries, and rejected the majority's finding of such authority since the statute did not expressly grant it.[59] He emphasized that until Congress stated otherwise, the Court's duty to protect the rights of individuals should take precedence over the interest in more effective law enforcement.[60] In addition, Justice Stevens viewed the structural detail of the statute as precluding the majority's reading that silence on the issue implied authorization of covert entry. Finally, he noted that the legislative history of Title III affirmatively demonstrated that Congress never contemplated the *Dalia* situation.[61] Thus, Justice Stevens concluded that absent an express grant of authority, it should be presumed that covert entries were prohibited.[62]

The United States Supreme Court has frequently recognized that the basic purpose behind the fourth amendment is to protect individuals from arbitrary governmental intrusions,[63] and it has been said that physical entry into the home is the primary intrusion against which the language of the fourth amendment is directed.[64] It is a historical fact that for nearly forty years prior to the Court's decision in *Katz v. United States*,[65] the distinction between legal and illegal electronic seizure turned upon whether an officer, acting without warrant, had either physically entered the premises or placed a mechanical device in a manner that physically intruded onto private premises.[66] Thus, prior to *Katz*, electronic surveillance was constitutional provided it was not accomplished by an unauthorized physical intrusion.[67]

In *Irvine v. California*,[68] the first pre-*Katz* bugging case to reach the Court involving an actual warrantless physical trespass[69] by an officer

57. *Id.* at 260-61 (Brennan, J., concurring in part and dissenting in part).
58. *Id.* at 261-62 (Brennan, J., concurring in part and dissenting in part).
59. *Id.* at 263-65 (Stevens, J., dissenting).
60. *Id.* at 264-66 (Stevens, J., dissenting).
61. *Id.* at 267-71 (Stevens, J., dissenting).
62. *Id.* at 278-79 (Stevens, J., dissenting).
63. United States v. Ortiz, 422 U.S. 891, 895 (1975); Camara v. Municipal Court, 387 U.S. 523, 528 (1967).
64. United States v. United States Dist. Court, 407 U.S. 297, 313 (1972).
65. 389 U.S. 347 (1967).
66. *See* J. CARR, THE LAW OF ELECTRONIC SURVEILLANCE 13 (1978).
67. *See* notes 29 & 30 *supra*.
68. 347 U.S. 128 (1954).
69. *See* note 30 *supra*.

onto private premises, the Court held that few police measures more flagrantly, deliberately, and persistently violated the fundamental principle declared by the fourth amendment.[70] Subsequently in *Silverman v. United States*,[71] although no physical entry by the police was involved, the Court held that the insertion of a "spike mike" into an adjoining wall of the subject premises intruded upon fourth amendment protections.[72] Additionally, the *Silverman* Court noted that it had never held that an officer may, without warrant and without consent, physically intrude into a person's office or home and secretly observe their private life or listen to their conversations.[73] Thus, in both the *Silverman* and *Irvine* decisions, the Court recognized that physical entry into the sanctity of one's home is a particularly intrusive activity and that the chief concern of the fourth amendment is the prevention of such an intrusion. This line of cases exemplifies the judicial perspective prior to 1967 that only physical intrusions required authorization and that the seizure of oral conversations was not unconstitutional absent unwarranted physical entry.[74]

In *Katz*, the Court overruled the "trespass" doctrine[75] and held that the constitutionality of a search and seizure does not depend solely upon the presence or absence of physical intrusion into a given enclosure.[76] Instead, the scope of the fourth amendment was read to preclude intrusions into the privacy upon which an individual justifiably relies.[77] Thus, electronically listening to and recording an individual's conversation, irrespective of the occurrence of a physical entry into a given area, required court authorization if the particular intrusion violated the conversational privacy upon which the individual had justifiably relied. However, there was no indication in *Katz* that the decision was intended to diminish the fourth amendment protection consistently afforded an individual's home. The intent of the Court was to ensure that the fourth amendment protected a person's private conversations *as well as* his private premises.[78] After *Katz*, an unwar-

70. 347 U.S. at 132.

71. 365 U.S. 505 (1961). *See* note 31 *supra*.

72. 365 U.S. at 511-12.

73. *Id.* at 512.

74. *See* notes 29 & 30 *supra*.

75. *See* note 29 *supra*.

76. 389 U.S. at 353.

77. *Id.* at 352-53.

78. In *Katz*, the Court stated that "the Fourth Amendment protects people, not places." 389 U.S. at 351. This choice of words led one commentator to observe:

> The only merit in this comment is in its brevity. Of course the amendment is *for the benefit* of the people, not places. But it may protect peoples' places and properties—"houses, papers, and effects," in the language of the amendment—even when people are not in them or in immediate possession of them, and it may pro-

ranted physical intrusion onto private premises or an unwarranted invasion of conversational privacy upon which an individual justifiably relied were unconstitutional.

An analysis of the Supreme Court precedents and of the underlying policies[79] of the fourth amendment leaves little doubt that the covert entry involved in *Dalia* should not have been viewed simply as a mode of executing a valid surveillance order.[80] The surreptitious entry into Dalia's office was an invasion of privacy of constitutional significance separate and distinct from that which attends electronic surveillance. The eavesdrop in *Dalia* did more than compromise personal privacy, as the surreptitious entry created the additional risk of injury, violent confrontation, and police abuse, all of which the fourth amendment was designed to prevent.[81]

As a constitutionally distinct invasion of privacy, a covert entry to install listening devices should require separate judicial authorization and should not be implied from the surveillance order. The fourth amendment requires that searches be as limited as possible.[82] Furthermore, the limits of those searches which are found necessary must be set forth in the warrant[83] so that the officer executing the warrant can determine the exact scope of his authority.[84] This specification prevents a general rummaging about in the private premises.[85] It follows then that a warrant expressly authorizing only the interception of oral conversations should not be read to authorize a covert entry at the discretion of the executing officer. Rather, the fourth amendment requires that the necessity for the covert entry of the home be decided by a neutral and detached magistrate,[86] properly notified of the need for such intrusion,[87] and clearly apprised of the *precise* intrusion contemplated.[88]

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tect people themselves—i.e., "persons"—more fully when they are in one place than another.

T. TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 112-13 (1969). In Alderman v. United States, 394 U.S. 165 (1969), the Court rejected the argument that *Katz*, by holding that the fourth amendment protected persons and their private conversations, withdrew any of the protection the amendment extended to the home. *Id.* at 180.

79. *See* notes 63 & 64 and accompanying text *supra*.

80. *See* text accompanying notes 32 & 51 *supra*.

81. *See* Ker v. California, 374 U.S. 23, 57-58 (1964) (Brennan, J., dissenting).

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

83. *See* Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 394 n.7 (1971); United States v. Johnson, 541 F.2d 1311, 1315 (8th Cir. 1976).

84. Steele v. United States, 267 U.S. 498, 503 (1925).

85. Marron v. United States, 275 U.S. 192, 196-97 (1927).

86. Connally v. Georgia, 429 U.S. 245, 250-51 (1977); Shadwick v. City of Tampa, 407 U.S. 345, 350 (1972).

87. Katz v. United States, 389 U.S. at 354.

88. *Id. See also* note 92 *infra*, which shows that a covert entry is contemplated well in advance of the actual execution of the surveillance order.

Although it is true that police officers executing a warrant often find it necessary to intrude upon areas of privacy not explicitly considered by the judge issuing the warrant, the Court failed to distinguish the cases relied upon as cases involving situations where there was no preconceived plan to engage in the additional intrusion and the need for the additional intrusions could not have been supported or anticipated with any degree of certainty at the time the warrant was issued.[89] In each case the need for the additional intrusion arose at the time the officer attempted to execute the warrant; thus, it would have been unreasonable to require the officer to seek authorization for the additional intrusion.[90] On the other hand, in a *Dalia* type electronic surveillance operation, the decision to covertly break into a home for the purpose of installing a listening device is made well in advance of the actual execution of the surveillance order and the facts required to show the need[91] for the additional intrusion are available well in advance of the actual execution.[92] Electronic surveillance implemented by covert entry is not a case where "it is *reasonably likely* that Fourth Amendment rights *may* be affected in more than one way."[93] By definition, an electronic surveillance implemented by covert entry is a planned event where the officer engages in conduct which is contemplated well in advance, knowing that the additional intrusion *will* occur. Unlike the factual situations present in the cases relied upon by the majority, there is absolutely no spontaneity involved in a covert entry, and consequently, there is no danger that the search will be frustrated by requiring judicial authorization.

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89. 441 U.S. at 257-58. The Court relied upon United States v. Cravero, 545 F.2d 406 (5th Cir. 1976), *cert. denied*, 430 U.S. 983 (1977), and United States v. Gervato, 474 F.2d 40 (3d Cir.), *cert. denied*, 414 U.S. 864 (1973). In *Cravero*, the officer executing an arrest warrant was forced to enter into a man's home to make the arrest while in *Gervato*, circumstances necessitated that the officer executing a search warrant break the locks of the building to be entered.

90. *See* note 89 *supra*.

91. In Berger v. New York, 388 U.S. 41 (1967), the Court recognized the inherent danger of electronic surveillance activities when accomplished by covert entries. The Court indicated that in order to engage in a covert entry to install a listening device the officer requesting the warrant to seize oral conversations must show that a covert entry is necessary because other surveillance methods are likely to fail. *Id.* at 60.

92. In order that electronic surveillance activities may be successful, law enforcement officials must make extensive internal and external surveys of the target in order to make an informed judgment as to the time and manner of entry. *See* McNamara, *The Problem of Surreptitious Entry to Effectuate Electronic Eavesdrops: How Do You Proceed After the Court Says "Yes"?*, 15 AM. CRIM. L. REV. 1, 3 (1977). The extensive nature of pre-surveillance activities indicates that although the specific manner of entry may not be decided until the last minute the magistrate would have time to make an informed determination whether a covert entry was necessary at all.

93. 441 U.S. at 237 (emphasis added).

The *Dalia* decision raises the fundamental question of the extent to which police practices should be fractionalized in terms of privacy interests that are affected so as to warrant separate judicial consideration. Given the Supreme Court's own distinctions represented by the *Irvine*, *Silverman*, and *Katz* decisions, the interests affected by physical entry are sufficiently separate and distinct from those affected by surveillance as to require separate consideration. Nevertheless, the majority in *Dalia* treats the covert entry merely as a manner of executing a valid surveillance order, thereby concluding that separate consideration by a neutral magistrate is not required. *Dalia* represents a marked departure from the Supreme Court's historical treatment of physical entry into the home and electronic eavesdropping as represented by *Irvine*, *Silverman*, and *Katz*. These prior rulings generously protected the home from physical intrusion, and should have dictated a result contrary to *Dalia*'s sacrifice of individual fourth amendment protection in the name of expedient law enforcement.

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