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Covert Entry, Electronic Surveillance, and the Fourth Amendment: Dalia v. United States

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COVERT ENTRY, ELECTRONIC SURVEILLANCE, AND THE FOURTH AMENDMENT: *Dalia v. United States*

Petitioner, convicted on two counts of conspiracy to steal an interstate shipment of fabric, moved to suppress evidence obtained by means of a "bugging" device installed in his office by FBI officials for a period of forty days. At an evidentiary hearing concerning the method by which the "bug" had been installed, the federal district court ruled that under Title III of the Omnibus Crime Control and Safe Streets Act of 1968[1] a covert entry to install otherwise legal electronic eavesdropping equipment was not unlawful. The Supreme Court, affirming the court of appeals decision, *held* that the fourth amendment does not prohibit *per se* a covert entry for the purpose of installing otherwise legal electronic bugging equipment and that Title III impliedly authorizes such entry. *Dalia v. United States*, 441 U.S. 238 (1979).

Citizens are protected under the fourth amendment to the United States Constitution against "unreasonable searches and seizures," and searches are permitted only under authority of warrants issued "upon probable cause."[2] These protections developed in the common law as a reaction to the evils of the general warrant,[3] and, in the American colonies, to the writs of assistance which gave customs officials blanket authority to conduct general searches for goods imported in violation of the tax laws.[4] Reports from the Constitutional Convention indicate that the purpose of the fourth amendment was prevention of the use of such general warrants or writs of assistance in the newly formed United States.[5]

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1. 18 U.S.C. §§ 2510-20 (1976).

2. U.S. CONST. amend. IV provides:

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

3. Such warrants were declared illegal in England by the much celebrated case of *Entick v. Carrington*, 95 Eng. Rep. 807 (K.B. 1765), in which Lord Camden declared searches pursuant to general warrants issued in connection with seditious libel as subversive of "all the comforts of society." *Id.* at 817.

4. N. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 51 (1937). Official use of these writs is felt by many to have been a direct cause leading to the American revolution and independence. *Id.* at 60-66.

5. *Id.* at 93-95. For an historical account of the fourth amendment, *see* Boyd v. United States, 116 U.S. 616, 630 (1886); Fraenkel, *Concerning Searches and Seizures*, 34 HARV. L. REV. 361, 362 (1921).

The Supreme Court has found the fourth amendment's second provision, or "warrant clause,"[6] to contain three requirements: (1) that a search warrant be issued by a neutral, detached magistrate; (2) that it issue only upon probable cause to believe the evidence will aid in a particular apprehension or conviction of crime; and (3) that warrants particularly describe the things to be seized, as well as the place to be searched.[7] Additionally, the first clause of the fourth amendment generally prohibits "unreasonable searches and seizures."[8] Thus, a reasonableness standard must be applied to every search, whether conducted with or without the authorization of a warrant.[9]

While the Supreme Court, in *Katz v. United States*,[10] stated "the Fourth Amendment cannot be translated into a general constitutional 'right to privacy,'"[11] the Court on other occasions found privacy to be a fundamental right, along with other rights specifically enumerated in the Constitution.[12] In *Boyd v. United States*[13] the Court described the fourth amendment as a protection against all governmental invasions "of the sanctity of a man's home and the privacies of life."[14] Later, in *Mapp v. Ohio*,[15] the fourth amendment was interpreted as creating a "right to privacy, no less important than any other right carefully and particularly reserved to the people."[16]

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6. See note 2, *supra*.

7. Dalia v. United States, 441 U.S. 238, 255 (1979); Warden v. Hayden, 387 U.S. 294, 309-10 (1967).

8. See note 2, *supra*.

9. In original draft the fourth amendment contained only one clause, providing that the "right of the people to be secure . . . against unreasonable searches and seizures, shall not be violated *by warrants issuing* without probable cause." N. LASSON, *supra* note 4, at 101 (emphasis added). However, the fourth amendment was enacted as two clauses. *See id.* at 101-03.

10. 389 U.S. 347 (1967).

11. *Id.* at 350. However, the Court recognized the protection against governmental intrusion and declared "its protections go further, and often have nothing to do with privacy at all." *Id.*

12. Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

13. 116 U.S. 616 (1886).

14. *Id.* at 630.

15. 367 U.S. 643 (1961).

16. *Id.* at 656. Though only impliedly recognized by the fourth amendment, the right to privacy is given express protection in the Louisiana Constitution of 1974, which provides:

> Every person shall be secure in his person, property, communications, houses, papers, and effects against unreasonable searches, seizures, or invasions of privacy. No warrant shall issue without probable cause supported by oath or affirmation, and particularly describing the place to be searched, the persons or things to be seized, and the lawful purpose or reason for the search. Any person adversely affected by a search or seizure conducted in violation of this Section

As the protections embodied in the fourth amendment arise from various individual liberties protected at common law, many cases have recognized a special common law protection of privacy within the home.[17] One such recognition of the protection afforded individuals was the "knock and announce" requirement that searches be conducted only when an officer had announced his authority and purpose *prior* to entering.[18] This common law protection was made statutory in the federal law under 18 U.S.C. § 3109.[19] In *Ker v. California*[20] the Supreme Court dealt with the constitutionality of a warrantless search following an unannounced entry pursuant to a state statute very similar to the federal law.[21] The dissenting opinion of Justice Brennan has been widely quoted as delineating three major exceptions to the constitutional prohibition of unannounced entries into a private home, with or without a warrant, which arise

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shall have standing to raise its illegality in the appropriate court.

LA. CONST. art. I, § 5.

17. 116 U.S. at 626-30. "[T]he Fourth Amendment did but embody a principle of English history, . . . that finds another expression in the maxim 'every man's home is his castle.' " Fraenkel, *supra* note 5, at 365, *quoting* T. COOLEY, CONSTITUTIONAL LIMITATIONS 425 (7th ed. 1903).

18. For a comprehensive history of the "knock and announce" rule, *see* Sonnenreich & Ebner, *No-Knock and Nonsense, an Alleged Constitutional Problem*, 44 ST. JOHN'S L. REV. 626 (1970); Note, *Announcement in Police Entries*, 80 YALE L.J. 139 (1970). The purposes of notice provided by the rule have been recognized as (1) the prevention of violence to police and occupants, (2) protection from property damage due to forced entry, and (3) protection from exposure of private activities. United States v. Bustamante-Gamez, 488 F.2d 4, 9 (9th Cir. 1973).

19. 18 U.S.C. § 3109 (1976) provides:

> The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

Similarly, LA. CODE CRIM. P. art. 224 provides:

> In order to make an arrest, a peace officer, who has announced his authority and purpose, may break open an outer or inner door or window of any . . . dwelling . . . where the person to be arrested is or is reasonably believed to be, if he is refused or otherwise obstructed from admittance. The peace officer need not announce his authority and purpose when to do so would imperil the arrest.

LA. CODE CRIM. P. art. 164 provides that "[i]n order to execute a search warrant a peace officer may use such means and force as are authorized for arrest." For an illustrative list of citations to state statutes requirng announcement of authority and purpose before a forced entry to execute a warrant, *see* Sonnenreich & Ebner, *supra* note 18, at 654-59.

20. 374 U.S. 23 (1963). For a discussion of the *Ker* privacy basis, *see* Sonnenreich & Ebner, *supra* note 18.

21. Though *Ker* was a four-one-four decision, both the opinion of Justice Clark and that of Justice Brennan express the view that state searches must be judged by a constitutional standard. Only Justice Harlan, in a concurring opinion, disapproved of this view.

when the need for evidence, the danger of its destruction, or the danger of bodily harm overrides the interest in the inviolability of the home.[22]

The law historically provided few protections unless the search actually intruded into private territory. At common law the offense of eavesdropping was punishable only as a misdemeanor.[23] As early as 1862 state statutes prohibiting the wiretapping of telegraph wires were enacted,[24] but there were no Supreme Court cases dealing with electronic surveillance until 1928[25] and no federal statutes in the area until 1934.[26] Moreover, unless an illegal physical entry was involved, the courts did not find the fourth amendment protection to be invoked.[27] But technological advances in electronic eavesdropping or surveillance equipment were allowing "the physical limits that once guarded individual and group privacy"[28] to be overcome. Early in the 1960's the Court in *Silverman v. United States*[29] excluded evidence obtained by a "spike mike" because its use through defendant's wall constituted a physical intrusion. However, by this time the Court had entered a transitional period. Though the trespass alone was a violation of the fourth amendment,

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22. The exceptions delineated by Justice Brennan include: (1) useless gesture—the person knows of the officers' authority and purpose; (2) apprehension of peril—the officers are justified in a belief that persons within are in imminent peril of bodily harm; and (3) possible destruction of evidence—persons are engaged in an activity which justifies the officers' belief that an escape, or the destruction of evidence, would be attempted if the persons are made aware of the presence of the officers. 374 U.S. at 46-47 (Brennan, J., dissenting).

Certain other exceptions minimizing the requirement of notice have been recognized: (1) entry for arrests and "no-knock" entry, allowed by statute in some states, *see* Sonnenreich & Ebner, *supra* note 18, at 629-39; (2) entry into unoccupied dwellings, Payne v. United States, 508 F.2d 1391 (5th Cir.), *cert. denied*, 423 U.S. 933 (1975); United States v. Gervato, 474 F.2d 40 (3d Cir.), *cert. denied*, 414 U.S. 864 (1973); and (3) subsequent notice on completion of surveillance operations, United States v. Donovan, 429 U.S. 413, 429 n.19 (1977). *But see* Sabbath v. United States, 391 U.S. 585 (1968) (entry into a closed, but unlocked apartment, was held to violate 18 U.S.C. § 3109). In the instant case, lack of notice was dismissed as a "frivolous" argument. 441 U.S. at 247.

23. 4 W. BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 168 (Lewis ed. 1902).

24. Berger v. New York, 388 U.S. 41, 45 (1967).

25. Olmstead v. United States, 277 U.S. 438 (1928).

26. Federal Communications Act of 1934, 47 U.S.C. § 605 (1976) (enacted in response to *Olmstead v. United States*, 277 U.S. 438 (1928)). For a history of wiretap and bugging cases, *see* Berger v. New York, 388 U.S. 41, 45-53 (1967).

27. Goldman v. United States, 316 U.S. 129 (1942) (use of detectaphone on adjoining party wall not unlawful); Olmstead v. United States, 277 U.S. 438 (1928) (wiretap not violative of fourth amendment because no physical entry involved).

28. Westin, *Science, Privacy, and Freedom: Issues and Proposals for the 1970's*, 66 COLUM. L. REV. 1003, 1017 (1966).

29. 365 U.S. 505 (1961).

the Court acknowledged that the decision also rested on the "actual intrusion into a constitutionally protected area."[30] Two years later, relying on *Silverman*, the Court, in *Wong Sun v. United States*,[31] granted an additional individual protection equally important in its use against eavesdropping. In that case, the Court specifically held for the first time that verbal statements, as well as physical evidence, are protected by the fourth amendment.

By the mid-sixties, concern and interest in federal electronic surveillance legislation developed.[32] The Supreme Court set forth stringent fourth amendment requirements for electronic surveillance in *Berger v. New York*,[33] which involved a challenge to "the validity of New York's permissive eavesdropping statute."[34] Justice Clark declared for the majority that the statute authorized surveillance involving "trespassory intrusion into a constitutionally protected area and [was], therefore, violative of the Fourth and Fourteenth Amendments."[35] In overruling the decisions of the lower courts, the Supreme Court held the statute to be overly broad in its sweep by entrusting too much discretion to the executing officer in a manner reminiscent of the general warrants;[36] the Court stressed the need for warrants particularly describing the place to be searched and information to be seized[37] and showing "exigent circumstances" to overcome the lack of notice for such an "uncontested entry."[38] The Court emphasized the highly egregious nature of electronic surveillance, when the "innermost secrets of one's home or office are invaded. Few threats to liberty exist which are greater than that posed by the use of eavesdropping devices."[39]

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30. *Id.* at 512.

31. 371 U.S. 471, 485 (1963).

32. R. VEGA, THE CONTROVERSY OVER THE CONSTITUTIONAL AUTHORITY OF GOVERNMENT EAVESDROPPING 166-75 (1974).

33. 388 U.S. 41 (1967). The *Berger* Court held the New York electronic surveillance statute invalid as overbroad and equal to a trespassory intrusion into a constitutionally protected area. Although *Berger* involved a physical entry into private premises, in *Dalia* both proponents and opponents of additional fourth amendment requirements for covert entry agreed that *Berger* guidelines were aimed at invasion of the privacy of the conversation.

34. *Id.* at 43. Berger was convicted on two counts of conspiracy to bribe the state liquor authority. Petitioner contended that verbal evidence obtained via a recording device installed pursuant to section 813-a of the New York Code of Criminal Procedure (ex parte order for eavesdropping) violated the fourth, fifth, ninth, and fourteenth amendments.

35. 388 U.S. at 44.

36. *Id.* at 59.

37. *Id.* at 55-56.

38. *Id.* at 60.

39. *Id.* at 62-63.

With *Katz*[40] the Supreme Court dramatically departed from past jurisprudence and its approach towards protection of verbal communications by recognizing that the "Fourth Amendment protects people, not places."[41] No longer did the Court look merely to where the statements were made; in fact, it may have considered only the expectation of the speaker. The Court recognized that the problem is not solved by the phrase "constitutionally protected area."[42] Rather, protection is required for all communication which one "*seeks* to preserve as *private*, even in an area accessible to the public."[43] However, "[w]hat a person *knowingly* exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."[44] While the decision in *Katz* greatly increased individual protection under the fourth amendment, the opinion has been viewed as representing a *switch* in emphasis from places to persons.[45] Serving to bury the trespass theory of earlier decisions[46] and to abandon the protected area concept, the opinion signalled the adoption of a new tack by the Court. Indicative of this new approach is the Court's statement that "the reach of [the Fourth] Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure."[47]

Using procedural and substantive guidelines provided by the *Berger* and *Katz* decisions, Congress in 1968 enacted Title III of the Omnibus Crime Control and Safe Streets Act. This wiretap title was added in response to public sentiment against a rising crime rate.[48] Congress attempted to protect the privacy of communications while, on balance, promoting more effective control of crime.[49] Thus, Title III was drafted to have 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."[50] The desire was to circumscribe carefully the situations in which a

40. 389 U.S. 347 (1967).

41. *Id.* at 351.

42. *Id.* at 350.

43. *Id.* at 351-52 (emphasis added).

44. *Id.* (Emphasis added.)

45. T. TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 114 (1969).

46. See text at notes 28-31, *supra.*

47. 389 U.S. at 353.

48. S. REP. NO. 1097, 90TH CONG., 2D SESS., *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 2112, 2113 & 2115 [hereinafter cited as SENATE REPORT]. The legislation was controversial when enacted and remains so. *See id.* at 2222 (views of Mr. Long of Missouri and Mr. Hart); *id.* at 2227 (view of Mr. Hart); *id.* at 2238 (view of Mr. Burdick); *id.* at 2238 & 2241 (view of Mr. Fong); *id.* at 2245-46 (view of Mr. Bayh).

49. *Id.* at 2153-63.

50. *Id.* at 2153.

surveillance order could be issued[51] so as effectively to minimize, if not eliminate, the danger of "unreasonable searches." To this end, the statute lists explicit procedures to be followed and information to be provided in the application for such an order,[52] as well as in the reports regarding such intercepted communications.[53] Yet nowhere in this otherwise explicit procedure does the legislation authorize covert entry to install a wiretap or a bug.[54] Moreover, a minority opinion in the Senate committee report reflects the concern of several congressional members that authorization to wiretap might ostensibly open the legislative door to the Orwellian society of *1984*.[55]

In the instant case, after a probable cause hearing, Justice Department officials received court authorization under 18 U.S.C. § 2518 to intercept telephone conversations on two telephones in the business office of Lawrence Dalia.[56] At the end of an initial twenty-day surveillance period an extension of the order was granted, coupled with permission to intercept all oral conversation taking place in the petitioner's office. Although no explicit authority was granted by the court to effect a physical entry of defendant's office,[57] FBI agents secretly broke and entered Dalia's office at midnight, spending three hours installing in the ceiling an electronic "bug" which remained for forty days.[58] Two years later Dalia was indicted on five counts of conspiracy to steal an interstate shipment of fabric.[59] A pre-trial motion to suppress the evidence obtained with the bug was denied, and Dalia was subsequently convicted on two counts. After conviction the motion was renewed, and an evidentiary hearing was held concerning the *method* (*i.e.*, the forcible entry) by which the electronic device had been installed.[60] The

51. *Id.* at 2177-97. *See* 18 U.S.C. §§ 2516 & 2518 (1976).

52. 18 U.S.C. § 2518 (1976).

53. 18 U.S.C. § 2519 (1976).

54. Though Title III is silent on the issue of entry, at least one authority has suggested that "the prudent approach would be to include a statement in the application explaining why secret entry is necessary." C. FISHMAN, WIRETAPPING AND EAVESDROPPING §§ 104 & 117 (1978).

55. SENATE REPORT, *supra* note 48, at 2223 & 2238.

56. 441 U.S. at 241.

57. *Id.* at 242-44.

58. On March 14, 1973, a wiretap order was authorized under 18 U.S.C. § 2518 for Dalia's business phones. At the end of the twenty-day period covered by the warrant, the government applied for a twenty-day extension and, in addition, permission to intercept all oral conversations in the office. The order issued April 5, when FBI agents broke and entered at midnight, spending three hours installing a bug in the ceiling. The order was extended on April 27, and the agents re-entered petitioner's office on May 16 to remove the bug. 441 U.S. at 241-42 & 245.

59. 441 U.S. at 243.

60. 426 F. Supp. 862 (D.N.J. 1977).

Supreme Court, in affirming the appellate court decision,[61] held that a covert entry performed for the purpose of installing otherwise legal electronic bugging equipment is not prohibited *per se* by the fourth amendment.[62] The Court further held that the fourth amendment does not require specific authorization for covert entry to be described in a surveillance order[63] as the authorization is provided by the statute itself.[64] Three members of the Court dissented from the entire majority opinion,[65] while a fourth member joined in dissenting from the latter holding.[66]

The main question in *Dalia* concerned the reasonableness of the *method* of execution by the officers.[67] So long as a warrant complying with the three warrant requirements is issued,[68] the Court found nothing in the Constitution or prior decisions to suggest that "warrants also must include a specification of the precise manner in which they are to be executed,"[69] the method being left to the executing officer. In *Dalia*, the Court, in a seemingly pragmatic decision, found covert entry to be the "safest and most successful method" of execution under the circumstances.[70]

The Supreme Court in *Dalia* resolved a conflict among appellate court rulings regarding the permissibility of covert entry for the purpose of executing electronic surveillance orders.[71] The result reached depends in part upon a finding that Title III impliedly authorizes such entry, though this legislation contains no specific statement as to the method of execution. Justice Powell concluded for the majority that Congress had not addressed this issue only because it saw no problem with the method of execution.[72] Rather, in authorizing electronic surveillance, Congress impliedly authorized covert entry as essential for the installation of devices used to conduct such surveillance.[73]

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61. 575 F.2d 1344 (3d Cir. 1978).

62. 441 U.S. at 248.

63. *Id.* at 258-59.

64. *Id.* at 254.

65. Justices Stevens, Brennan, and Marshall. 441 U.S. at 262.

66. Justice Stewart. 441 U.S. at 259.

67. 441 U.S. at 246.

68. *Id.* at 255. See text at note 7, *supra*.

69. 441 U.S. at 257.

70. *Id.* at 248 n.8, *citing* 426 F. Supp. at 866. *But see* 441 U.S. at 270 n.20 (Stevens, J., dissenting).

71. 441 U.S. at 241 n.3. *See also* Note, *Covert Entry in Electronic Surveillance: The Fourth Amendment Requirements*, 47 FORDHAM L. REV. 203 (1978).

72. 441 U.S. at 251-52.

73. The majority in *Dalia* relied heavily on legislative history for the proposition that such authorization was implied in the statute and that the statute was constitutional. *Id.* at 249-54. *See* SENATE REPORT, *supra* note 48.

However, Congress may not have intended to sanction this method of execution. Title III's particularity in other areas seems to refute the implication that by remaining silent on the issue of covert entry, Congress intended to authorize it.[74] Instead, Congress may have intended that Title III receive a narrow construction. Moreover, the Senate committee's report stated that "electronic surveillance techniques [would] be used only under the most precise and discriminate circumstances."[75] Justice Stevens argued in his dissent that the majority has turned the "silence into thunder,"[76] interpreting congressional silence an "open-ended authorization to effect such illegal entries without an explicit judicial determination."[77]

In finding "no basis for a *constitutional* rule proscribing all covert entries,"[78] the Court cited cases which may not necessarily support its view. Reliance on two early electronic surveillance cases for the implication that covert entry to install electronic bugging devices would be constitutional if done pursuant to a search warrant[79] appears to be an oversimplification of the issues involved in covert entry, for in neither would the search clearly have been valid if done merely pursuant to a warrant. In *Irvine v. California*,[80] officers entered surreptitiously, without a warrant, to install concealed microphones. The Court found that "[f]ew police measures [had] come to [their] attention that more flagrantly, deliberately, and persistently violated the fundamental principle declared by the Fourth Amendment."[81] The conviction, however, was upheld, but only because the exclusionary rule had not been applied to the states. The implication that merely securing a warrant would have cured the fourth amendment ills of the covert entry does not appear as clear as the *Dalia* opinion implies.[82] *Silverman v. United States*,[83] cited by the *Dalia* Court, concerned an "entry" dramatically different from that of the instant case. There officers merely inserted a listening device through defendant's wall and did not themselves enter the premises, an action which would have exposed more than mere conversation.

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74. 441 U.S. at 266-71 (Stevens, J., dissenting).
75. SENATE REPORT, *supra* note 48, at 2191.
76. 441 U.S. at 263 (Stevens, J., dissenting).
77. *Id.* at 266.
78. 441 U.S. at 247 (emphasis added).
79. *Id.*, *citing* Silverman v. United States, 365 U.S. 505 (1961); Irvine v. California, 347 U.S. 128 (1954). *But see* 441 U.S. at 277-78 (Stevens, J., dissenting).
80. 347 U.S. 128 (1954).
81. *Id.* at 132.
82. 441 U.S. at 277-78 (Stevens, J., dissenting).
83. 365 U.S. 505 (1961).

Additionally, the Court, citing *Ker*,[84] stated that under certain prescribed conditions "[i]t is well established that law officers constitutionally may break and enter to execute a search warrant."[85] However, that decision delineated exceptions only to the "knock and announce" rule. Such exceptions contemplate a dwelling that is occupied; a covert entry requires vacancy. The Court also cited *Payne v. United States*,[86] in which the fifth circuit held in 1975 that a search pursuant to a warrant conducted in the absence of the occupants was valid. However, this does not sanction police invasion of an unoccupied dwelling to search for evidence which might arise, nor sanction an entry or multiple entries of which the occupants are uninformed. Surreptitious entry, as contemplated by electronic surveillance, allows both.

If the opinion in *Dalia* is to be interpreted as establishing a "judicial exception" to the strict statutory requirements for electronic surveillance through implied authorization in the statute, perhaps it is a very limited case. The Court and Congress have recognized that the requirements surrounding electronic surveillance are highly circumscribed. However, by its use of broad language, the Court may have created a larger entry exception than intended. For example, the Court states that the manner in which a search warrant is to be executed is "generally left to the discretion of the executing officers,"[87] rather than to the discretion of a neutral, detached magistrate.[88]

Outside the authorization ascribed to Title III by the Court, no federal statute presently authorizes covert entry for the execution of a search warrant.[89] After *Dalia*, the question arises whether courts will read into other statutes such implied authorization, in cases in which officers determine that such entry is "the safest and most successful method" of conducting a search.[90] If *Dalia* is to be read for this proposition, we may soon see statutes and warrants authorizing breaking and entering for even non-electronic continuing

84. See notes 20-22, *supra*, and accompanying text.

85. 441 U.S. at 247.

86. 508 F.2d 1391 (5th Cir. 1975).

87. 441 U.S. at 257.

88. 441 U.S. at 261 (Brennan, J., concurring in part & dissenting in part), *quoting* Johnson v. United States, 333 U.S. 10, 14 (1948).

89. The most expansive federal statute expressly authorizing entry without notice was section 509 of the Controlled Substances Act of 1970, 21 U.S.C. § 879 (1970) (repealed 1974), envisioning the presence of the occupants. In repealing this statute in 1974, Pub. L. No. 93-481 §§ 3-4, 83 Stat. 1455 (1974), Congress indicated acceptance of judicial exceptions to the rule of knock and announce. CONF. COMM. REP. NO. 1442, 93RD CONG., 2D SESS., *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 5974, 5977.

90. 441 U.S. at 248 n.8. *But see* 441 U.S. at 270 n.20 (Stevens, J., dissenting).

surveillance apart from Title III. Once such statutes and warrants permit entry into a house or office, any evidence in "plain view"[91] would be subject to seizure, and any personal papers and belongings subject to examination. Such a procedure could give officers great freedom to enter offices or homes and to conduct informal physical searches without full warrant authorization.[92]

To place the *Dalia* holding in context, it must be remembered that a magistrate had already authorized the "search" of words spoken in the defendant's office. However, in breaking and entering the defendant's office, police used a method of conducting that "search" which could have resulted in the search and seizure of things not within the warrant. Prior to *Dalia*, protections against such a method seemed to arise from two sources: (1) the *Katz* privacy expectation and (2) the traditional protections afforded private premises. As to the *Katz* protection, the issuance of the warrant removed Dalia's "reasonable" expectation of privacy in his spoken words, the Court apparently ruling that along with that expectation went the expectation of the physical inviolability of his office.[93] The Court's rationale further indicates that the traditional protections afforded places did not apply.

With the decision in *Dalia*, the continuing efficacy of the traditional protections is now open to question. At the least, *Dalia* indicates that *Katz* should be narrowly interpreted in those situations in which the Court is impressed with the need for evidence and the officers' inability to obtain it other than by covert entry, thus requiring a balancing test reminiscent of *Ker*. It is submitted that in the instant case the Court, in balancing the state's interest with the individual's right to privacy, misperceived and underestimated the egregious nature of the unauthorized secret entry and paid insuffi-

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91. The "plain view" doctrine requires the police to (1) be legitimately on the premises, (2) view the evidence inadvertently, and (3) immediately recognize it as evidence. Coolidge v. New Hampshire, 403 U.S. 443, 466 (1971). The defendant in *Dalia* argued that electronic surveillance warrants were unique because the right to hold private conversations is affected in addition to possible damage to property and unauthorized examination of personal effects. The Court felt this view "parses too finely the interests protected by the Fourth Amendment." 441 U.S. at 257.

92. The framers of the Constitution intended by the fourth amendment "to eliminate once and for all the odious practice of searches under general warrant and writs of assistance against which English law had generally left them helpless." Ker v. California, 374 U.S. at 51 (Brennan, J., dissenting).

93. *See* 441 U.S. at 263 n.20 (Stevens, J., dissenting). *Cf.* United States v. United States District Court, 407 U.S. 297, 325 (1972) (Douglas, J., concurring) (use of covert entry should be restricted by the Court because the protections afforded against other governmental intrusions, such as damage actions, political reforms, adverse publicity, are not viable protections when the victims would be unaware of a lawless search).

cient attention to the great constitutional protection of privacy traditionally afforded. Hopefully, methods sanctioned in *Dalia* will be strictly limited to those situations in which resort to the twentieth century technology of electronic surveillance is the only way to provide any measure of adequate law enforcement.[94] The reasonableness clause of the fourth amendment[95] should be the overriding concern, and, in light of the protections historically embodied in the fourth amendment against unreasonable searches and seizures, the Supreme Court should strictly and explicitly limit constitutional authorization for covert entry to highly scrutinized electronic surveillance orders.

Elizabeth Hunter Cobb

Rakas v. Illinois: THE FOURTH AMENDMENT AND STANDING REVISITED

Defendants were convicted of armed robbery in an Illinois state court. At trial the prosecution was allowed to offer into evidence a sawed-off rifle and shells that had been seized without a warrant from under the seat and from the glove compartment of an automobile in which the defendants had been passengers. Neither defendant asserted ownership of the rifle and shells. The Illinois appellate court affirmed the lower court's denial of a motion to suppress the evidence, holding that the defendants lacked standing to object to the alleged unlawful search and seizure.[1] Affirming the convictions, the United States Supreme Court for the first time subsumed standing into the fourth amendment inquiry, determined that the defendants "made no showing that they had . . . [the necessary] legitimate expectation of privacy"[2] in the areas searched and items seized, and thus *held* that the search "did not violate any rights of these petitioners."[3] *Rakas v. Illinois*, 99 S. Ct. 421 (1978).

The fourth amendment expressly guarantees "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." In delineating the pro-

94. 441 U.S. at 270 n.20 (Stevens, J., dissenting).
95. See note 2, *supra*.

1. People v. Rakas, 46 Ill. App. 3d 569, 360 N.E.2d 1252 (1977).
2. Rakas v. Illinois, 99 S. Ct. 421, 433 (1978).
3. *Id.* at 434.