CONSTITUTIONAL LAW—SEARCH AND SEIZURE—PERMISSIBILITY
OF SURREPTITIOUS ENTRIES TO INSTALL ELECTRONIC EAVES-
DROPPING EQUIPMENT UNDER TITLE III—Dalia v. United States,

INTRODUCTION

Congress enacted Title III of the Omnibus Crime Control and
Safe Streets Act to regulate the interception of oral communica-
tions by setting forth strict requirements governing the issuance of
a warrant authorizing electronic eavesdropping. Despite its me-
ticulous detail, however, Title III failed to address the problems of
how law enforcement officials were to install electronic listening
devices on private premises without being detected. As a result of
this statutory silence, many occasions have arisen where federal
agents, with or without court authorization, have surreptitiously
entered private premises to install eavesdropping devices.

Defendants in criminal trials have frequently challenged the
validity of these entries in an effort to secure the suppression of evi-
dence obtained with listening devices. The challenges enjoyed
limited success as the lower federal courts took diverse ap-
proaches to the analysis of covert entry.

Covert entry to implant listening equipment raised three is-
ssues. At the threshold was whether the fourth amendment permit-
eted even statutorily authorized warrants to secretly enter private
premises. Additionally, the permissibility of covert entry under
Title III and the necessity of express prior judicial authorization
were at issue in the cases.

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3. See note 119 and accompanying text infra.
4. In re United States, 563 F.2d 637, 645 (4th Cir. 1978); United States v. Volpe,
430 F. Supp. 931, 943 (D. Conn. 1977), aff'd, 528 F.2d 1372 (1978); United States v.
5. United States v. Finazzo, 583 F.2d 837 (6th Cir. 1978), vacated, 99 S. Ct. 2047
(1979); United States v. Santora, 583 F.2d 453 (9th Cir. 1978); United States v. Dalia,
575 F.2d 1344 (3d Cir. 1978), aff'd, Dalia v. United States, 99 S. Ct. 1882 (1979); In re
United States, 563 F.2d 637 (4th Cir. 1977); United States v. Scafidi, 564 F.2d 633 (2d
Cir. 1977), cert. denied, 98 S. Ct. 2231 (1978); United States v. Ford, 553 F.2d 146 (D.C.
Cir. 1977) (the court held the warrant to be overly broad but did not reach the issue
of the permissibility of surreptitious entry per se); United States v. Agrusa, 541 F.2d
6. See note 3 supra.
8. Id. at 1689, 1692.
The Supreme Court addressed these issues in *Dalia v. United States*\(^9\). In *Dalia* a defendant who was indicted for criminal conspiracy to steal goods in interstate commerce sought suppression of damaging evidence obtained through listening devices.\(^10\) The devices were installed under a warrant authorizing eavesdropping but which did not discuss or sanction covert entry onto Dalia's private premises.\(^11\) Lower federal courts had denied Dalia's motion to suppress.

In affirming denial of Dalia's motion, the Supreme Court made three important rulings on the issues raised by covert entry to install eavesdropping equipment. The Court held that the fourth amendment does not prohibit all covert entry;\(^12\) that Congress, aware of the need for such entry to install listening equipment,\(^13\) implicitly authorized lower court approval of covert entry;\(^14\) and that no express authorization of secret entry must be included in the warrant which grants court approval to implant bugging equipment.\(^15\)

Dissenting justices argued that Title III did not empower judges to permit covert entry\(^16\) and, even if Title III was a grant of power, judicial authorization must be expressly set-forth in the warrant.\(^17\)

This casenote will analyze the *Dalia* decision in light of the background of divergent lower court opinion, the history of Title III, and the judicial development of restrictions on unauthorized entries onto private premises.

**HISTORICAL DEVELOPMENT OF RESTRICTIONS ON ENTRY ONTO PRIVATE PREMISES**

The fourth amendment's prohibition against unreasonable search and seizure\(^18\) provides the touchstone for examining the legality of surreptitious entry by law enforcement officers. To engage in a search and seizure, a warrant must be issued based upon

\(^10\) Id. at 1687.
\(^11\) Id. at 1685-90.
\(^12\) Id. at 1694. The court extracted from a number of decisions the idea that surreptitious entries are constitutional in some situations when made pursuant to an eavesdropping warrant. Id. at 1688. It also found that the lack of notice would not render these entries unconstitutional. Id. at 1688-89.
\(^13\) Id. at 1691.
\(^14\) Id.
\(^15\) Id. at 1694.
\(^16\) Id. at 1697-1705.
\(^17\) Id. at 1695.
\(^18\) U.S. CONST. amend. IV.
probable cause and upon an oath describing what is to be searched and seized with particularity.\textsuperscript{19} Forcible entries of a person's home or office were one of the chief evils which the fourth amendment originally sought to eliminate.\textsuperscript{20} Constitutional protection against such entries extends even where no actual physical force is used to effectuate the entry;\textsuperscript{21} where the entry involves business premises rather than a private dwelling;\textsuperscript{22} and where the premises are vacant at the time of the intrusion.\textsuperscript{23} But only unreasonable searches and seizures are prohibited by this amendment.\textsuperscript{24}

Prior to the adoption of the fourth amendment, search warrants had not been known at the common law of England\textsuperscript{25} except as a tool for the recovery of stolen property.\textsuperscript{26} The decision of \textit{Entick v. Carrington}\textsuperscript{27} involved the issuance of a general warrant ordering the search of the plaintiff's residence and seizure of all his books and papers.\textsuperscript{28} Lord Camden's opinion in \textit{Entick} held that a general warrant could not be used to justify a trespass on the plaintiff's property\textsuperscript{29} if the actions could not be specifically justified by any law "found in our books,"\textsuperscript{30} thus judgement was entered for the plaintiff.\textsuperscript{31} The decision firmly established the principle in English law that search warrants could not be issued without express statutory authorization.\textsuperscript{32}

As America progressed through the nineteenth century, Lord

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  \item \textsuperscript{19} \textit{Id.} Certain exceptions have been recognized which permit search and seizure under exigent circumstances. \textit{See, e.g., United States v. Goldenstein, 456 F.2d 1006 (8th Cir. 1972).}
  \item \textsuperscript{20} \textit{United States v. United States Dist. Ct., 407 U.S. 297, 313 (1972).}
  \item \textsuperscript{21} \textit{See Sabbath v. United States, 391 U.S. 585, 590-91 (1968).}
  \item \textsuperscript{22} \textbf{1 W. LAFAYE, SEARCH AND SEIZURE, A TREATISE ON THE FOURTH AMENDMENT} \textsection 2.4(b), at 338 (1978); \textit{57 B.U.L. REV.} 587, 595-98 (1978).
  \item \textsuperscript{23} \textit{57 B.U.L. REV.} 587, 598-99 (1978).
  \item \textsuperscript{24} \textit{Amsterdam, Perspectives on the Fourth Amendment, 58 MINN. L. REV. 349, 358 (1974).}
  \item \textsuperscript{25} \textit{Id.} at 338 (1978).
  \item \textsuperscript{26} \textit{Id.} at 587-59.
  \item \textsuperscript{27} \textit{95 Eng. Rep. 807 (K.B. 1765).}
  \item \textsuperscript{28} \textit{Id.} at 807-08. The warrant had been issued solely on the basis of allegations that the plaintiff was the author of a libelous article against the King and Parliament. \textit{Id.} at 808.
  \item \textsuperscript{29} \textit{Id.} at 817-18.
  \item \textsuperscript{30} \textit{Lord Camden stated that until the legislature specifically authorizes such a search and seizure, judges could not uphold its validity. Id. at 818.
  \item \textsuperscript{31} \textit{Id.}
  \item \textsuperscript{32} \textit{See id. at 817-18; 9 HALSIBURY, THE LAWS OF ENGLAND, § 625 n.(e) (1976); A. LANDEVER, supra note 26, at 186-87; J. SCHUSTER, supra note 26, at 7-8.}
Camden's opinion in *Entick* and the fourth amendment remained the legal background against which courts determined the validity of search warrants. In 1816 a Massachusetts court echoed the English precedent by finding it impermissible to undertake a search or seizure by entering a dwelling house by force, "unless for purposes especially provided for by law."

In *Boyd v. United States* the United States Supreme Court discussed searches and seizures in a decision which incorporated into the fourth amendment substantial portions of the *Entick* opinion. The case arose when a district attorney, prosecuting a charge of fraud against Boyd and others for nonpayment of certain import duties, sought an order requiring the defendants to produce invoices covering questioned items. The court found that the compulsory production of Boyd's papers amounted to a search and seizure within the scope of the fourth amendment.

In determining the reasonableness of the lower court's order, *Boyd* declared that the landmark decision in *Entick* provided a definitive explanation of the meaning of unreasonable searches and seizures under the fourth amendment. The *Boyd* Court thought the English case enunciated principles which, "... affect the very essence of constitutional liberty and security. ... It is the invasion of [the] indefeasible right of personal security, personal liberty and private property which underlies and constitutes the essence of [the *Entick*] opinion." *Boyd* considered it a fundamental principle that the law must justify trespasses which occur when a warrant is executed and that the judicial power to issue such a trespassory warrant must be expressly authorized by statutory law.

The development of wiretapping and electronic surveillance in the twentieth century presented courts with new issues regarding

33. See note 21 supra.
35. 116 U.S. 616 (1886).
36. Id. at 627-29.
37. Id. at 618.
38. Id. at 622.
39. Id. at 626-27.
40. Id.
41. In a recent decision, the United States Supreme Court stated that "[s]everal of *Boyds* express or implicit declarations have not stood the test of time." Fisher v. United States, 425 U.S. 391, 407 (1976). Fisher dealt with *Boyd's* discussion of the fifth amendment's prohibition against self-incrimination, finding that the *Boyd* Court interpreted the fifth amendment improperly. *Id.* at 408. Thus *Boyd's* discussion of Lord Camden's opinion in *Entick* and the court's finding that authorization for a warrant must be found in statutory law were not disturbed.
42. 116 U.S. at 627.
43. *Id.* at 628.
search and seizure. The issue of search and seizure in this context was addressed in *Olmstead v. United States*, a case dealing with the wiretapping of a telephone by government officials. The Court confronted the question of whether the nontrespassory wiretap violated the fourth amendment and concluded that absent a physical violation of one's home by those undertaking to tap a phone, there is no illegal search or seizure. In later years the Court perpetuated the distinction drawn by *Olmstead* between trespassory and nontrespassory installation of listening devices. The conduct of an official who trespassed upon private property to install a wiretap or plant a bug was illegal. In contrast, the actions of an official who overheard a conversation through the use of a machine without technically trespassing upon another's property were legal.

In *Katz v. United States* the Court overruled *Olmstead* and extended constitutional protection to nontrespassory installations of eavesdropping devices. Recognizing "that the Fourth Amendment protects people—and not simply 'areas'—against unreasonable searches and seizures," the Court stated "[it is] clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure." The Court held that prior judicial authorization for eavesdropping is necessary in order to guarantee fourth amendment protection, regardless of whether there was any physical intrusion. Although it rejected *Olmstead's* trespassory-nontrespassory distinction, *Katz* did not diminish or otherwise affect preexisting constitutional safeguards against unwarranted physical intrusion.

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44. 277 U.S. 438 (1928).
45. *Id.* at 456-57. In *Olmstead*, "[t]he insertions were made without trespass upon any property of the defendants." *Id.*
46. *Id.* at 463-64; see 1 W. LAFAVE, supra note 22, § 2.2(3) at 271.
47. Silverman v. United States, 365 U.S. 505, 512 (1960) (a spike mike pushed through the wall of petitioner's home until it touched the heating ducts so that conversation in the home could be overheard).
50. *Id.* at 353.
51. *Id.* The Court held that the electronic surveillance was narrowly circumscribed, such that a magistrate could have constitutionally authorized the limited intrusion that took place. *Id.* at 354. However, since the agents failed to obtain this judicial approval, their actions were not constitutionally permissible and the evidence obtained through this bugging was suppressed. *Id.* at 358-59.
52. *Katz* is commonly misinterpreted as completely overruling *Olmstead's* extension of fourth amendment protection to physical intrusions incident to electronic surveillance. *See*, e.g., United States v. Ford, 553 F.2d 146, 156-58 (D.C. Cir. 1977). On the contrary, *Katz* modified *Olmstead* and its progeny only insofar as it no longer required trespass incidental to an eavesdrop as a precondition to the find-
principle of Entick that no entry is permissible unless expressly authorized by statute remained firm.53

Prior to Katz, the Court in Berger v. New York54 invalidated a New York Statute authorizing electronic eavesdropping on the ground that its overbreadth violated the fourth and fourteenth amendments.55 The statutes lack of specificity enabled judges to grant what were in effect general warrants.56 Since electronic eavesdropping constituted a search within the meaning of the fourth amendment,57 this insufficient judicial supervision was constitutionally fatal.58

TITLE III: CONGRESSIONAL ACTION AND LOWER COURT ANALYSIS

Despite these court decisions, the law in this area remained unsettled,59 especially at the state level.60 With Berger and Katz in the background, Congress enacted Title III of the Omnibus Crime Control and Safe Streets Act of 196861 to control wiretapping and electronic surveillance.62 The Title was drafted to meet the requirements set down by both the Berger and Katz decisions and to protect the privacy of oral and wire communication.63 Title III prohibits all interceptions and disclosures of wire and

ings of an unreasonable search and seizure. 43 N.Y.U. L. Rev. 968, 975 (1968); 1 W. LaFave, supra note 22, § 2.1(b) at 225-26.
55. Id. at 44.
56. Id. at 58.
57. 1 W. LaFave, supra note 22, § 2.2(e) at 270-71.
58. 388 U.S. at 60.
60. Id. at 69, reprinted in [1968] U.S. Code Cong. & Ad. News at 2156. As noted in the Senate Report on the Omnibus Crime Control and Safe Street Act, states had not uniformly or adequately dealt with the problem of wiretapping and the efforts that had been undertaken by them must be re-examined in light of both Berger and Katz. Id.
oral communications unless specifically provided for in the Act. Courts can issue orders authorizing such surveillance only if certain requirements are met. An application for the order must be made to the court, stating: the facts relied on by the applicant; whether other investigative procedures were attempted; how long interception must continue; and a list of all other applications, if any, involving the same person. A judge can issue an intercept order if he has probable cause to believe: that a crime is being, has been, or is about to be committed; that communications concerning the offense will be intercepted; and that normal investigative procedures have been or would be unsuccessful. The order itself must state the identity, if known, of the individual whose conversations are to be intercepted; the identity of the place where the interceptions are to occur; description of the type of communications to be intercepted and the crime to which it relates; the identity of the agency authorized to intercept the communications; the period of time for which the interception will last; and whether the interception will automatically end when the desired conversations have been intercepted.

Since Title III's adoption, and before Dalia, questions about surreptitious entry had been before seven circuit courts of appeals. The decisions by these courts reveal some inconsistency in both the analysis and application of Title III in the context of covert entry. The analysis of the five circuits agreed on one point, that the fourth amendment contains no per se prohibition of covert entries to plant bugs. From here the analysis diversifies. Two circuits found that no explicit statutory authorization was needed before agents could enter the premises to install the eavesdropping devices. Further, the Second Circuit Court of Appeals reasoned that the judicial order authorizing the eavesdropping carried with it implied authority for federal agents to break and enter to execute the order. Thus, no separate authorization in the warrant

64. 18 U.S.C. § 2511(1) (1976); 1 W. LAFAVE, supra note 22, § 2.2(e) at 276.
66. Id. at § 2518(3)(a)-(c).
67. Id. at § 2518(4)(a)-(e).
68. See note 8 supra.
69. Id.
70. See United States v. Dalia, 575 F.2d 1344, 1345-46 (3d Cir. 1978); United States v. Scafidi, 564 F.2d 633, 643-44 (2d Cir. 1977); In re United States, 563 F.2d 637, 642-43 (4th Cir. 1977); United States v. Ford, 553 F.2d 146, 170 (D.C. Cir. 1977); United States v. Agrusa, 541 F.2d 690, 696-98 (8th Cir. 1976).
72. United States v. Scafidi, 564 F.2d 633, 640 (2d Cir. 1977). The Scafidi court
was required.\textsuperscript{73} The Eight and Fourth Circuit Courts of Appeals disagreed on this point, holding that before federal agents could surreptitiously enter, express judicial approval in the warrant for both the eavesdropping and surreptitious entry must be obtained.\textsuperscript{74} Similarly, the District of Columbia Court of Appeals, though not directly confronting the validity of surreptitious entries, held, assuming such entries were permissible, a warrant must exist for the surreptitious entry.\textsuperscript{75} The circuits which granted the defendant's motion to suppress evidence obtained through the use of surreptitious entries to install listening devices reached these conclusions by differing analysis. In \textit{United States v. Finazzo}\textsuperscript{76} the Court did not find that the fourth amendment prohibited per se all surreptitious entries to install eavesdropping devices, only that in the situation before them a surreptitious entry to install eavesdropping equipment was unreasonable.\textsuperscript{77} In \textit{United States v. Santora}\textsuperscript{78} the Ninth Circuit Court of Appeals read Title III very narrowly, finding that what Title III did not authorize was therefore illegal and the fruits of illegal interception must be suppressed.\textsuperscript{79}
Finally, the circuits did agree that Title III does not expressly authorize surreptitious entries to install listening devices.\textsuperscript{80}

**DALIA AND RESTRAINTS ON COVERT ENTRY**

Since *Entick v. Carrington*,\textsuperscript{81} entry by government officers onto private premises has been limited by the principle that authority for the entry must be traceable to a specific statutory grant of power.\textsuperscript{82} Additionally, a line of Supreme Court decisions has recognized and applied the *Entick* principle to fourth amendment analysis.\textsuperscript{83} Title III's provisions explicitly authorizing and limiting electronic surveillance,\textsuperscript{84} were enacted by a Congress aware of the case law background.\textsuperscript{85} But Title III provides no guidance on the difficult questions raised by surreptitious entry to install authorized listening devices.\textsuperscript{86}

The Supreme Court's resolution of matters left unresolved by Title III raises fundamental question about the impact of covert entry on individual rights and the continuing vitality of *Entick* in fourth amendment analysis. In this light a reexamination of the *Dalía* decision seems desirable.

Surreptitious entry to install eavesdropping devices raises four questions: does the fourth amendment prohibit covert entry even if expressly authorized by statute; is statutory authority for surreptitious entry required under the fourth amendment; does Title III expressly or impliedly authorize surreptitious entry; and must a covert entry be expressly authorized in a warrant?

**IS COVERT ENTRY UNCONSTITUTIONAL PER SE?**

Relying on prior cases,\textsuperscript{87} the *Dalía* majority found that under some circumstances, if there is a warrant for electronic eavesdrop-
ping, covert entry to install these devices is permissible.88

Although general warrants were considered unreasonable under the principle of Entick, the common law permitted government officers to execute specific warrants through forceful entry.89 This power was limited, however, by a notice rule which required the sheriff to announce his coming and request that the doors be opened.90

The fourth amendment incorporates both this common-law exception to Entick and its limits.91 Officers may forcibly enter private premises in the execution of a search warrant but only after giving notice and getting a refusal,92 unless entry is justified by certain exigent circumstances.93 This notice requirement creates a problem when applied to electronic eavesdropping, however, since secrecy—the absence of notice—is required to make the surveillance effective.94 The overall effectiveness of electronic eavesdropping equipment turns on the suspect not receiving prior notice of either the entry or the equipment.95

In Dalia the Court held that the absence of prior notice of a covert entry does not render it unreasonable per se.96 This holding is supported by considerable precedent in lower court decisions and the Berger and Katz decisions.97 One circuit court even argued that the loss of evidence which might result if notice of an electronic eavesdropping were required creates an exigency which permits dispensing with the notice requirement.98 Both the Berger and Katz discussions concerning the notice issue in the electronic eavesdropping situation support this exigency argument. In Berger the Court recognized that effective eavesdropping necessarily requires secrecy.99 Although a greater showing of exigency was necessary to avoid notice in eavesdropping cases than in ordinary

90. Id.
92. Id.
96. 99 S. Ct. at 1688-89.
99. 388 U.S. at 60.
searches,\textsuperscript{100} Berger did not hold that the absence of notice in eavesdropping would be unreasonable in all cases.\textsuperscript{101}

Katz affirmatively stated that where prior judicial authorization for eavesdropping is present, the subjects of surveillance need not be given advance notice of the intrusion.\textsuperscript{102} The Katz Court considered the "critical loss of evidence" an exigency which justifies noncompliance with the notice requirement, even where the subjects of surveillance are unaware of any police intrusion.\textsuperscript{103}

In addition to case law support, Title III's requirement of post-termination notice of electronic surveillance also supports the idea of limited, but constitutional notice of covert entry.\textsuperscript{104} If post-termination notice is sufficient where eavesdropping is accomplished without entry, it ought to suffice when entry is required.\textsuperscript{105}

Together, these statutory and historical precedents support a determination that the absence of preentry notice does not render covert entries unconstitutional per se.\textsuperscript{106} This does not, of course, justify abrogating other fourth amendment protections.

\textbf{IS STATUTORY AUTHORITY REQUIRED?}

Whether specific statutory authority is required for covert entry raises an even more fundamental question: Do judges have inherent power to authorize covert entry to install eavesdropping

\textsuperscript{100} Id.
\textsuperscript{101} Compare 388 U.S. at 60, 63 with 19 SYRACUSE L. REV. 133, 137 (1967). The Berger Court cited as constitutionally permissible a number of eavesdropping decisions in which the absence of notice did not prevent the use of the evidence so obtained. 388 U.S. at 63 (citing Osborn v. United States, 385 U.S. 323 (1966); Lopez v. United States, 373 U.S. 427 (1963); On Lee v. United States, 343 U.S. 747 (1952); Goldman v. United States, 316 U.S. 129 (1942)).
\textsuperscript{103} Katz v. United States, 389 U.S. 347, 355 n.16 (1967). Compare id. with United States v. Finazzo, 383 F.2d 837, 846 (6th Cir. 1978). This conclusion is supported by Ker v. California, 374 U.S. 23 (1963). In his widely cited dissenting opinion Justice Brennan identified three circumstances where police intrusion without notice is permissible: imminent peril of bodily harm; imminent escape or destruction of evidence; and preexisting knowledge of the officer's authority and purpose. Id. at 47 (Brennan, J., dissenting). These exceptions to the notice requirement were cited with approval in Sabbath v. United States, 391 U.S. 585, 591 n.8 (1968), which expanded authority of law enforcement officers under the Federal Forcible Entry Statute, 18 U.S.C. § 3109. 391 U.S. at 591 n.8. The destruction of evidence exception would encompass entry without notice to implant listening devices. See United States v. Agrusa, 541 F.2d 690, 699-700 (8th Cir. 1976).
\textsuperscript{106} Id.
equipment? Although the Dalia majority did not directly address this question, the Court’s search for implicit authority in Title III implies that judges in fact do not have inherent power. Again, the seminal case is Entick.

Prior to the adoption of the fourth amendment, Entick held that with the exception of common-law warrants to recover stolen property, a judge’s power to issue a search warrant must derive from some statutory authority. Entick was read into the fourth amendment in Boyd v. United States, which incorporated Entick’s proposition that forcible invasions of private property pursuant to a judicial warrant issued without statutory justification are not sanctioned by law. Thus, under the fourth amendment, a judge has no inherent power to issue search warrants involving a forcible entry in the absence of statutory authorization. Further, the criminal jurisdiction of federal courts is confined to statutory crimes. It follows that federal judges have no inherent power to authorize forcible entries unless expressly or implicitly authorized by federal statute.

Unless Title III or some other statute empowers judges to au-

107. Id. at 1689-92.
108. These warrants were themselves attacked by Lord Coke who argued that their lack of parliamentary authorization made them illegal. Boyd v. United States, 116 U.S. 616, 628 (1886).
110. 116 U.S. 616 (1886).
111. See id. at 627-30.
112. Id. See also United States v. New York Tel. Co., 98 S. Ct. 364, 376-77 (1977) (Stevens, J., dissenting): Beginning with the Act of July 31, 1789, 1 Stat. 29, 43, and concluding with the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 197, 219, 238, Congress has enacted a series of over 35 different statutes granting federal judges the power to issue search warrants of one form or another. [These statutes reflect] a concern for the abuses that attend . . . broad delegation of power to issue search warrants. . . . This same [concern] motivated the adoption of the Fourth Amendment and the contemporaneous, specific legislation limiting judicial authority to issue search warrants. . . . [This background] makes it abundantly clear that federal judges were not intended to have any roving commission to issue search warrants. . . . Federal courts have no such inherent power.

Id. (citations omitted).
114. See note 112 supra; cf. United States v. New York Tel. Co., 98 S. Ct. 364 (1977) (because pen registers are not expressly covered by Title III, the statute does not implicitly empower federal judges to issue search warrants authorizing their installation). Compare Boyd v. United States, 116 U.S. 616, 627-28 (1886) with Ex Parte Bollman, 8 U.S. (4 Cranch) 46, 58 (1807) (since federal jurisdiction is confined to statutory crimes, federal courts’ power to issue writs of habeas corpus is not inherent but must be authorized by federal statute); 98 S. Ct. at 368-69 with 98 S. Ct. at 377-79 (Stevens, J., dissenting). By analogy, since Title III does not explicitly authorize surreptitious entries to install eavesdropping equipment, federal courts have no inherent or implied power to issue warrants authorizing such entries.
thorize covert entry, warrants authorizing surreptitious entry are constitutionally invalid.

**DOES TITLE III GRANT JUDICIAL POWER TO AUTHORIZE COVERT ENTRY?**

Title III is a comprehensive scheme for the regulation of the interception of wire and oral communications. In effect, it is an effort to narrowly restrict the use of electronic surveillance to safeguard the privacy of the individual. Examination of the legislative history of this Title indicates that the protection of an individual's privacy of communication was a central purpose of Congress in enacting Title III. To facilitate the attainment of this purpose, the provisions of Title III must be strictly construed in favor of privacy interests.

Title III contains neither approval nor disapproval of surreptitious entry. This congressional silence was read by the *Dalia* majority as placing no limitations on the methods used for electronic interception. The *Dalia* majority felt that once the explicit requirements of Title III are met, courts have broad authority to approve the interception of oral or wire communications.

To analyze this holding one must look beyond the words of Title III to its basic purposes. An examination of the floor debates,

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115. Gelbard v. United States, 408 U.S. 41, 46 (1972); see 92 HARV. L. REV. 919, 919 (1979). Language used by Chief Justice Burger in his partial concurrence in United States v. Donovan, 429 U.S. 413 (1977), is in contradiction to the *Dalia* majority finding, a finding he concurred in, that Congressional silence on the matter of surreptitious entry authorizes the use of such entries to install eavesdropping devices. Compare 429 U.S. 413, 441 (Burger, C.J., partial concurrence) with 99 S. Ct. at 1690. 116. United States v. United States Dist. Ct., 407 U.S. 297, 301-02 (1972); S. REP. No. 1097, 90th Cong. 2d Sess. 69, reprinted in [1968], U.S. CODE CONG. & AD. NEWS 2112, 2156. 117. Gelbard v. United States, 408 U.S. 41, 48 (1972). A second purpose was "de-lineating on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized." S. REP. No. 1097, 90th Cong. 2d Sess. 66, reprinted in [1968] U.S. CODE CONG. & AD. NEWS 2112, 2153. 118. J. CARR, supra note 95, § 2.05(4) at 49-50. 119. *Dalia* v. United States, 99 S. Ct. 1682, 1689 (1979); accord, The National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance, Electronic Surveillance 83 (1976). Most state statutes also do not provide specific requirements which regulate the method by which eavesdropping devices are installed in private premises. J. CARR, supra note 95, § 407(2)(b) at 198. 120. 99 S. Ct. at 1690. 121. *Id.* 122. *Contra*, *id.* at 1696-97 (Stevens, J., dissenting). Mr. Justice Stevens reasoned that protection of individual rights should hold sway over the desire for better law enforcement, the comprehensive nature of the Title prevents such a reading, and Title III history shows that Congress did not consider surreptitious entries to install electronic eavesdropping equipment. *Id.*
extant case law of which Congress was aware, and earlier federal statutes provide only tenuous support for the Court's conclusion that congressional silence was an implied grant of power.\textsuperscript{123}

The Senate floor debates on Title III leave doubt whether the Senators gave any serious consideration to the problem of covert entry to install eavesdropping equipment.\textsuperscript{124} Remarks by Senator Tydings, a proponent of the bill, have been cited as supporting the contention that Congress knew surreptitious entry was necessary to install eavesdropping equipment and, in effect, authorized them.\textsuperscript{125} But Senator Tydings's discussion of surreptitious entries, if read in context, appears to simply explain why there had not been nor would be widespread use of eavesdropping equipment. He was not advocating the use of surreptitious entry to install listening devices.\textsuperscript{126} The Congressional debate, other than remarks by Senator Tydings, is void of any discussion that would support the Court's conclusion that the absence of a covert entry provision was an implicit grant of power.\textsuperscript{127} Indeed the floor manager, Senator McClellan emphasized Title III's all inclusive, comprehensive scheme establishing strict prerequisites for authorization of eavesdropping.\textsuperscript{128} More natural inferences may be that Congress either had no intent, in which case it extended no power, or that Congress intended to exclude covert entry from Title III.\textsuperscript{129} Again, this would mean no power, rather than the broad power asserted by

\textsuperscript{123} See notes 125-146 and accompanying text infra.
\textsuperscript{124} United States v. Santora, 583 F.2d 453, 461 (9th Cir. 1978). Upon the reading of the Congressional debate on Title III, one finds infrequent mention of surreptitious entries to install eavesdropping devices with no discussion on whether the Title should authorize them or in fact would authorize them. Id.
\textsuperscript{126} United States v. Santora, 583 F.2d 453, 461 (9th Cir. 1978); accord, Dalia v. United States, 99 S. Ct. 1682, 1702 (1979) (Stevens, J., dissenting).
\textsuperscript{127} The congressional debate concerning Title III indicates a general belief that authorized electronic surveillance would be "carefully circumscribed," and "rigidly controlled." The opponents attacking this bill out of concern for individual privacy did not decry that Title III would allow surreptitious entries. Dalia v. United States, 99 S. Ct. 1682, 1702 (1979) (Stevens, J., dissenting). In all probability the opponents did not attack the permissibility of surreptitious entries under Title III because it did not enter their minds, nor the minds of the bill's proponents.
\textsuperscript{128} 114 CONG. REC. 14745 (1968). One exchange between Senators McClellan and Gore emphasized the comprehensive nature of the act. Senator McClellan, floor manager of the bill, assured members of the Senate that Title III provided a legal framework for the use of electronic surveillance. Id. The Ninth Circuit stated that: "Senator McClellan repeatedly told the senate how much tighter the Title III scheme was than New York's legislation." United States v. Santora, 583 F.2d 453, 461 (9th Cir. 1978); see, e.g., 114 CONG. REC. 11231 (1968).
\textsuperscript{129} See United States v. Santora, 583 F.2d 453, 457-62 (9th Cir. 1978).
the Court.\textsuperscript{130}

Beyond the debate, isolated implications in the Senate Report\textsuperscript{131} and the Act itself\textsuperscript{132} could be interpreted as allowing serrepetitious entry into a building to install eavesdropping equipment. But the inferences are weak and provide no solid indication of congressional intent.\textsuperscript{133}

Also significant is the case law background of which Congress was cognizant when formulating the provisions of Title III.\textsuperscript{134} Congress drafted Title III with the express purpose of meeting the constitutional standards established by \emph{Berger v. New York}\textsuperscript{135} and \emph{Katz v. United States}.\textsuperscript{136} With respect to the question of clearly delineated statutory authority, both \emph{Berger} and \emph{Katz} emphasized the importance of prior judicial supervisions where fourth amendment notice requirements were relaxed.\textsuperscript{137} \emph{Berger} emphasized the need for a "precise and discriminate" statutory scheme restricting judicial authorizations of eavesdropping warrants to the bounds of the search and seizure clause.\textsuperscript{138} A Congress aware of the Court's concern with prior judicial supervision and precise statutes would, arguably, have authorized covert entry, if at all, in a "precise and discriminate matter."\textsuperscript{139} Again, either Congress had no intent or intended to exclude it. In either case there is, contrary to the Court's analysis, no grant of power.

Additional support for a no power thesis can be found in the law prior to \emph{Berger} and \emph{Katz}. A statute\textsuperscript{140} and case law\textsuperscript{141} dealing

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\textsuperscript{130} Id. at 464.

\textsuperscript{131} "A wiretap can take up to several days or longer to install. Other forms or devices may take even longer." S. REP. No. 1097, 90th Cong., 2d Sess. 103, \textit{reprinted in} [1968] U.S. CODE CONG. & AD. NEWS 2112, 2192; \textit{see} United States v. Ford, 414 F. Supp. 879, 883 (D.D.C. 1976).


\textsuperscript{133} Dahlia v. United States, 99 S. Ct. 1682, 1701 (1979) (Stevens, J., dissenting); \textit{see} United States v. Finazzo, 583 F.2d 835, 841 (6th Cir. 1978).

\textsuperscript{134} See note 62 and accompanying text \textit{supra}.

\textsuperscript{135} 388 U.S. 41 (1967).

\textsuperscript{136} 389 U.S. 347 (1967).


\textsuperscript{138} 388 U.S. at 58-60. The requirements set forth in \emph{Berger} would insure that a wiretapping law contains adequate \textit{judicial supervision} or protective procedures. \textit{Id.} at 60.

\textsuperscript{139} The Court's decision impressed Congress with the need for legislation containing specific prerequisites for authorizing interceptions of oral or wire communications. This is reflected in Congress's attempt to establish in Title III the specific circumstances and conditions upon which judicial warrants for oral and/or wire interceptions can be issued. \textit{See} 18 U.S.C. \textsection 2518 (1976).

\textsuperscript{140} Communications Act of 1934, 47 U.S.C. \textsection 605 (1976).
with the wire interception of communications before *Berger* stated that wiretapping followed by a "disclosure" of the intercepted communications by either federal or state officials was inadmissible in federal courts. Bugging was permissible, however, if there was no unauthorized physical entry. *Goldman v. United States*, 316 U.S. 129, 134 (1942); *Olmstead v. United States*, 277 U.S. 438, 464 (1928).

Finally Title III's initial formulation let stand Supreme Court rulings that prohibited bugging by trespassory entry, though in light of *Berger*, it was modified by requirements set down for both bugging and wiretapping, none of which mentioned surreptitious entry. *Supreme Court authorization of nontrespassory bugging only was well known to Congress at the time it enacted Title III. Congress' awareness of the state of the law can be seen by the discussion in the Senate Report concerning Title III. S. Rep. No. 1097, 9th Cong., 2d Sess. 67-69, reprinted in [1968] U.S. Code Cong. & Ad. News 2112, 2154-56; cf. President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* 202-03 (1967) (setting forth the law and practice dealing with bugging and wiretapping in existence when the report was published in 1967).*

Detailed examination of the Act and its background does not reveal authority for surreptitious entry. Should silence really imply authority to break and enter? Absent Title III expressly or implicitly authorizing surreptitious entries, the validity of the Court's conclusion is in doubt.

**DOES AUTHORITY FOR THE SURREPTITIOUS ENTRY NEED TO BE LISTED IN A WARRANT?**

An individual's privacy is protected by the fourth amendment's requirements that warrants be issued by a neutral, disinterested magistrate, based on probable cause and particularly describing the things to be seized as well as the place to be

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142. 302 U.S. at 382.
143. 355 U.S. at 100.
146. *United States v. Santora*, 583 F.2d 453, 459 (9th Cir. 1978). Title III's foundation was formed by S. 675, introduced by Senator McClellan, which would have legalized wiretapping under some situations and it would have left the law on bugging unchanged. *Id.* The *Berger* decision was then handed down, so Senator Hruska introduced S. 2050. This bill permitted law enforcement agents to engage in bugging, but it made no provision authorizing break-ins to plant bugs. *Id.* Senator Hruska addressing Senator McClellan's bill stated, "[*h]owever, I feel the ban contained in [McClellan's] bill should also apply to eavesdropping. I now feel it should be prohibited generally with well-defined exceptions with adequate and effective controls on its authorization and use at state and local levels." *Id.*
searched.\textsuperscript{149} This fourth amendment protection governs all intrusions by agents of the public upon the personal privacy and security of an individual.\textsuperscript{150}

Electronic eavesdropping—bugging—involves two issues under the fourth amendment: the uncontested physical entry into private premises; and recording of oral statements.\textsuperscript{151} Each is an intrusion\textsuperscript{152} calling for the protection of the fourth amendment.\textsuperscript{153} To ensure an individual complete protection when electronic eavesdropping is involved, judicial approval for the surreptitious entry should be included in the warrant.\textsuperscript{154}

The United States Supreme Court in the \textit{Katz} decision, upon which Title III is partially based,\textsuperscript{155} found the federal agents' actions unreasonable, absent prior judicial authorization in the form of a warrant.\textsuperscript{156} The Court found that Katz's reasonable expectation of privacy required the prior approval of a judge before his conversation could be overheard.\textsuperscript{157}

The question then is whether one has a reasonable expectation of privacy from officers breaking and entering private premises to install eavesdropping devices.\textsuperscript{158} It is the physical entry of

\textsuperscript{149} Stanford v. Texas, 379 U.S. 476, 485 (1965). The United States Supreme Court holds generally that the fourth amendment requires probable cause, judgment of a magistrate and issuance of a warrant before a search is made. Chambers v. Maroney, 399 U.S. 42, 51 (1970). The D.C. Circuit in the \textit{Ford} decision in effect held that two warrants, one for the eavesdropping and one for the entry had to be issued. United States v. Ford, 553 F.2d 146, 165 (D.C. Cir. 1977); United States v. White, 401 U.S. 741 (1971) (Harlan, J., dissenting). In \textit{White} Justice Harlan stated "... official investigatory action that impinges on privacy must typically in order to be constitutionally permissible, be subjected to the warrant requirement." \textit{Id.} at 781. \textit{See also} See v. City of Seattle, 387 U.S. 541, 546 (1967).

\textsuperscript{150} United States v. White, 401 U.S. 745, 784 (1971) (Harlan, J., dissenting); Terry v. Ohio, 392 U.S. 1, 8-9 (1968); United States v. Ford, 553 F.2d 146, 153 (D.C. Cir. 1977).

\textsuperscript{151} United States v. Ford, 553 F.2d 146, 152-53 (D.C. Cir. 1977); \textit{In re} United States, 563 F.2d 637, 643 (4th Cir. 1977); see United States v. Dalia, 99 S. Ct. 1682, 1695 (1979) (Brennan, J., dissenting); United States v. Agrusa, 541 F.2d 690, 696 (8th Cir. 1976).


\textsuperscript{153} \textit{See} United States v. Ford, 553 F.2d 146, 170 (D.C. Cir. 1977); \textit{In re} United States, 563 F.2d 637, 643-44 (4th Cir. 1977).


\textsuperscript{155} \textit{See} note 62 and accompanying text \textit{supra}.

\textsuperscript{156} \textit{See} note 51 and accompanying text \textit{supra}.

\textsuperscript{157} \textit{Katz} v. United States, 389 U.S. 347, 360-61 (1967) (Harlan, J., concurring).

\textsuperscript{158} The "expectation of privacy will be reasonable if in a given context it is one normally shared by people in the setting and at the same time falls within some
one's home\textsuperscript{159} or business\textsuperscript{160} which is the chief evil against which the fourth amendment is directed. To guard the reasonable expectation of individuals to be free from government breaking and entering, an impartial judicial opinion should be interposed between the interests of law enforcement agencies and the interests of the private citizen.\textsuperscript{161}

The \textit{Dalia} Court held that the fourth amendment does not require a listing of the manner in which the warrant is to be executed.\textsuperscript{162} This stems from a conclusion that the surreptitious entry is not a separate constitutional intrusion needing fourth amendment consideration,\textsuperscript{163} but is merely a means to execute the warrant.\textsuperscript{164} The majority believed that ruling surreptitious entry as a separate "search and seizure" needing fourth amendment consideration "... would extend the warrant clause to the extreme. ..."\textsuperscript{165}

Absent judicial authorization, covert entries are susceptible to abuse. They "leave naked to the hands and eyes of government agents items beyond the reach of simple eavesdropping."\textsuperscript{166} The danger of abuse and the individual's expectation of privacy require that prior judicial authorization in the form of a warrant must be given.\textsuperscript{167}

Requiring prior court approval for surreptitious entries could impose minor time burdens on the police, but these burdens would be insignificant in comparison to the resulting intrusions on the

\textsuperscript{159} United States v. United States Dist. Ct., 407 U.S. 297, 313 (1972). The Court's decision in \textit{Katz} did not dissipate any protection that had been afforded by the \textit{Olmstead} decision prohibiting trespassory eavesdropping. They merely extended this protection to include all forms of electronic surveillance involving trespassory or nontrespassory installation. See note 52 and accompanying text supra.

\textsuperscript{160} \textit{See v. City of Seattle}, 387 U.S. 541, 546 (1967).


\textsuperscript{162} 99 S. Ct. 1682, 1693 (1979).

\textsuperscript{163} \textit{See id.} 1692-93.

\textsuperscript{164} \textit{Id.} at 1693-94.

\textsuperscript{165} \textit{Id.}

\textsuperscript{166} \textit{Id.} at 1695, (Brennan, J., dissenting). The plain view doctrine should not be available to officers installing these devices "otherwise, the surveillance order will be a passkey to a physical search as well as ... electronic search, although the officers have shown justification and received authority for only the electronic search." J. Carr, \textit{supra} note 95, § 4.07[2][b] at 199.

\textsuperscript{167} Johnson v. United States, 333 U.S. 10, 17 (1948). "The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals... And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home." \textit{Chimel v. California}, 395 U.S. 752, 761 (1969).
individual’s right of privacy. 168

CONCLUSION

A close examination of relevant case law of both the United States Supreme Court and early English courts supports the contention made by the Dalia majority that the fourth amendment does not prohibit per se all surreptitious entries to install eavesdropping devices. But upon further examination of relevant case law, Title III, and its legislative history, one concludes that: (1) statutory authority is required before a court may authorize surreptitious entries to install eavesdropping devices; (2) Title III does not expressly or impliedly authorize such entries; and (3) since the entry is in effect a separate search and seizure, the approval for such entries must appear in a warrant.

The United States Supreme Court has on occasion reversed itself by overruling a fairly recent decision. Of recent vintage is the Court’s rejection of Monroe v. Pape169 in Monell v. Department of Social Services. 170 Perhaps some future case will provide a similar opportunity to reconsider the Dalia decision. Congress, in light of its original purposes when enacting Title III, should now include in the Title an express statement authorizing surreptitious entries and specifying what requirements must be met before such entries are allowed. This authorization should be narrow in its scope and should be granted only where these minimal requirements are met: the agents have shown there is no other way to install the devices; there is a specific description of the place(s) to be entered; the entry is limited in time and scope to the installation of the devices or their removal; each entry must be approved by a court of competent jurisdiction; and the courts are required, to the extent possible, to supervise each entry for installation, repair or removal. 171 These requirements would be sufficient to meet the minimal standards of the fourth amendment, Title III, and relevant case law. To the extent that Dalia remains effective, Congressional action is required to insure that the protection afforded an individual by our fourth amendment is not infringed in an effort to combat organized crime.

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