COMMENTS

Covert Police Break-ins Create Conflict Among U.S. Circuit Courts

I. INTRODUCTION

George Orwell's *1984* predicts an authoritarian police state, monitoring the thoughts and actions of its citizens with a concommitant loss of personal liberties.[1] Only five years before 1984, five[2] of America's circuit courts of appeals have authorized police break-ins into privately owned premises for the purpose of installing electronic eavesdropping devices. This comment reviews the decided trend towards judicial authorization and the differing justifications for otherwise illegal police entries. The comment also examines a recent decision that has created an irreconcilable conflict among the circuit courts of appeal as to whether covert police entries are constitutionally permissible regardless of prior or later judicial authorization.[3]

The conflict centers on a congressional attempt to thwart organized crime—Title III of the Omnibus Crime Control and Safe Streets Act of 1968.[4] Section 2518 of the Act provides procedural requirements for obtaining court orders to intercept wire and oral communications.[5] What the Act does not provide, however, are guidelines for police execution of these wire and oral intercept orders once the orders are obtained from a judge. From the Act's silence on this point spring the divergent court opinions. The issue is whether judicial authority exists to authorize police break-ins. The tension in the area is between law enforcement investigatory needs and the Fourth Amendment's protection of privacy and freedom from unreasona-

1. "It was starting, it was starting at last! . . . The picture had fallen to the floor, uncovering the telescreen behind it. . . . 'Now we can see you said the voice.'" G. ORWELL, 1984 at 222-23 (1949).

2. The Second, Third, Fourth, Eighth and D.C. Circuits have approved judicial authorization of surreptitious entries. United States v. Dalia, 575 F.2d 1344 (3d Cir. 1978), *cert. granted*, ___ U.S. ___, 99 S. Ct. 78, 58 L. Ed. 2d 108 (1978); 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); United States v. Agrusa, 541 F.2d 690 (8th Cir. 1976), *cert. denied*, 429 U.S. 1045 (1977).

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

4. 18 U.S.C.A. §§2510-2520 (1970 & Supp. 1978).

5. 18 U.S.C.A. §2518 (1970 & Supp. 1978). Wiretaps are installed on telephone lines outside the "target." However, in order to tape record conversations within a room, an eavesdropping device must be placed in the room. Herein lies the problem—how can a bug be planted without the target individual knowing of its placement?

ble searches and seizures.[6] A conflict exists between these goals in today's society, and the cases fall on different points depending upon which goal the particular court primarily focuses.

II. Courts Authorize Police Break-ins On Different Theories

A. *Implied Authorization*

In *United States v. Scafidi*,[7] court-ordered listening devices in the Hiway Lounge revealed that the manager and six codefendants were operating a massive numbers game. Two bugs placed in a back room by FBI agents pursuant to two court orders authorizing interceptions for 15 days each, excluding Sundays, resulted in taped conversations which were primarily responsible for the convictions. Although there was no separate order providing for surreptitious entry, the agents entered the premises at night after it closed to install the devices.[8] The agents later entered the premises again to replace batteries in the bugs, this time under an order which explicitly authorized a break-in. And, on a later date, agents re-entered the building to replace batteries, this time without a court order.[9]

The Second Circuit Court of Appeals saw the issue as being whether a separate court order was required for the illegal break-in, apart from the order authorizing the interception of private conversations. Answering in the negative, the court held that an order granting authorization to bug a private premises *implied* approval for secret entry.[10] By reasoning that electronic surveillance "will aid in the detection of crime," the court said that "no self-respecting police officer would openly seek permission from the person to be surveilled to install a 'bug' to intercept his conversations," and that it would be "highly naive" to say that an intercept authorization did not include surreptitious entry to install the listening device.[11]

The court, in one sentence, disposed of the argument that the Fourth Amendment prohibits all surreptitious police entries to install eavesdropping devices. "[I]t is clear from the legislative history of the Bill as well as the language of the statute, that Congress intended to empower courts to permit such entries in proper cases and under proper procedures."[12] To support this statement, the court cited the district court opinion in *United States v. Ford*.[13] However, the District of Columbia Court of Appeals, which later reviewed the *Ford* opinion, expressed doubts and explicitly

6. The conversation is "seized." Katz v. United States, 389 U.S. 347 (1967).

7. 564 F.2d 633 (2d Cir. 1977), *cert. denied*, 436 U.S. 903 (1978).

8. 564 F.2d at 638. The court makes no mention of what means were used by the agents to enter the building, except that they were covert.

9. *Id.*

10. *Id.* at 639.

11. *Id.* at 640.

12. *Id.* at 639. *See* note 16 and accompanying text, *infra*.

13. 414 F. Supp. 879 (D.D.C. 1976).

refused to answer the question of whether police are to be permitted to enter private premises to conceal eavesdropping devices.[14] The dissent in *Scafidi* was quick to pick up on this point. Noting first that the agents' actions had made a "mockery of the promise that the 'dirty business' of electronic eavesdropping authorized by [Title III] would be strictly supervised and controlled," the dissent argued that a separate court order should be obtained if an illegal break-in was needed "in light of the obvious dangers of injury and death to occupants and officers in the course of such gross invasions of privacy."[15]

The *Scafidi* court did not address the threshold fourth amendment issues, assuming, a fortiori, that express judicial approval of such illegal entry was possible. This is a dangerous practice in a judicial system based on stare decisis, because it sets a precedent for future courts which will consider the problem, and "[i]f all records told the same tale—then the lie passe[s] into history and be[comes] truth."[16]

B. *The Separate Order Approach*

The separate order approach suggested by the dissent in *Scafidi* for electronic surveillance under Title III was approved in *United States v. Dalia*,[17] a case close to *Scafidi* on the continuum of judicial authorization of breaches of personal liberties. In *Dalia*, government agents surreptitiously entered Dalia's business premises and installed a hidden microphone.[18] The taped conversations led to Dalia's conviction for conspiracy to transport, receive and possess stolen goods, and for receiving stolen goods. As in *Scafidi*, the *Dalia* court order under Title III did not contain language authorizing a forcible, surreptitious entry into the target's business office. The unanimous court cited *Scafidi* and held that authorization to make an illegal entry was to be implied from a Title III intercept order. The court went on to say that "[i]n the future, the more prudent or preferable approach . . . would be to include a statement regarding the need of a surreptitious entry in a request for the interception of oral communications when a break-in is contemplated."[19] Like *Scafidi*, the *Dalia* court overlooked the fourth amendment problems created by forcibly and

14. United States v. Ford, 553 F.2d 146, 170 (D.C. Cir. 1977).

15. 564 F.2d at 645 (Smith, J., dissenting). The dissent recognized that the dangers varied greatly concerning the methods used to plant a bug, *e.g.*, a plant made by a restaurant patron as opposed to a plant made by an agent by breaking and entering. Also, dangers vary with the particular type of bug used, *e.g.*, a martini olive transmitter as opposed to a spike-mike, which is drilled into a room. The interesting question of liability for injury or death to the government agents or the occupants of the surveilled premises is beyond the scope of this comment.

16. G. ORWELL, 1984 at 32 (1949).

17. 575 F.2d 1344 (3d Cir. 1978), *cert. granted*, ___ U.S. ___, 99 S. Ct. 78, 58 L. Ed. 2d 108 (1978).

18. No mention is made in the court's opinion of how the agents gained entry.

19. 575 F.2d at 1346-47.

surreptitiously entering the target's premises to install the listening devices.[20]

C. *The Separate Determination Approach*

Next on the continuum of judicial authorization of police break-ins to install listening devices is *United States v. Ford*.[21] More sensitive to the problems caused by surreptitious entry, the District of Columbia Circuit Court of Appeals chose not to follow the "implied authority" reasoning of *Scafidi* and *Dalia*, and, instead, required first, a judicial finding for probable cause to permit the interception of oral communications, and then, a separate determination on the need for surreptitious entry. In *Ford*, defendants had been convicted of conspiring to distribute, and of possession with intent to distribute, narcotic drugs. Taped conversations obtained from a bug planted in the business office of the Meljerveen Ltd. Shoe Circus were primarily responsible for the convictions. The government agents who applied for the intercept order, informally and not as part of the affidavit, told the judge of their plan to use a bomb scare ruse to plant the bugs. The intercept order ultimately provided that *"[e]ntry and re-entry may be accomplished in any manner, including, but not limited to, breaking and entering or other surreptitious entry, or entry and re-entry by ruse and strategem."*[22] Government agents then posed as a bomb squad and evacuated the store in order to plant several bugs. The bugs malfunctioned and another bomb squad ruse was used to plant operational ones. The court of appeals agreed with the lower court's ruling that, because the above intercept order was impermissibly overbroad, the taped conversations could not be admitted into evidence, and that defendants were entitled to a new trial.

The court held that a Title III intercept order must contain express judicial authorization for both the interception of private conversations and a surreptitious entry if one was planned,[23] because a secondary finding authorizing surreptitious entry was necessary to interpose fourth amendment safeguards between law enforcement officers and the persons whose privacy was to be invaded.[24] Even though there was express authorization in the order for a break-in, the court decided that the probable cause showing simply did not justify the sweeping authority to make multiple entries at any time and by any means granted by the order. The order was therefore invalid for being overbroad.[25] The court disposed of the fourth

20. *See* note 16 and accompanying text, *supra*.

21. 553 F.2d 146 (D.C. Cir. 1977).

22. *Id.* at 150 (emphasis in the original).

23. *Id.* at 152.

24. *Id.* at 153.

25. *Id.* at 175 n.78, *citing* Dorman v. United States, 435 F.2d 385, 389 (1970). The court reiterated the Fourth Amendment's provisions as a "core protection safeguarding all citizens against unwarranted intrusions by police and other government officials." 553 F.2d at 153 n.29.

amendment issue by "[a]ssuming that such entries are sometimes constitutional," and then limited its scope of inquiry to whether the warrant adequately limited the intrusive activity. The court concluded that it did not.[26]

D. The Exigency Approach

Further along the continuum is *United States v. Agrusa*,[27] in which the Eighth Circuit Court of Appeals upheld a specific judicial authorization of surreptitious entry to plant eavesdropping devices. The opinion, which has been criticized for poor reasoning,[28] fitted the surreptitious entry problem into traditional physical search and seizure guidelines. Government agents had suspected Agrusa of fencing stolen goods from his body shop, but were unable to gain satisfactory evidence because informants would not testify out of fear of reprisal, and because Agrusa's status in the local criminal community made him a well-informed and not easily apprehended target.[29] A Title III intercept order was issued, which allowed government agents

> to make secret and, if necessary, forcible entry any time of day or night which is least likely to jeopardize the security of this investigation, upon the premises . . . , in order to install and subsequently remove whatever electronic equipment is necessary to conduct the interception of oral communications in the business office of said premises.[30]

Pursuant to this order, a government agent broke into defendant's locked body shop and planted a bug, which produced tapes that led to Agrusa's conviction of dealing in firearms without a license.[31]

The court "commend[ed] the procedures employed here to law enforcement officials in the future,"[32] declaring the breaking and entering proper

26. 553 F.2d at 170. At the district court level, this assumption of constitutionality was based on references to the legislative history of Title III, particularly 18 U.S.C.A. §2518(4), which requires landlords to assist officers in accomplishing the interception. 414 F. Supp. at 883. *See* note 16 and accompanying text, *supra*.

27. 541 F.2d 690 (8th Cir. 1976), *cert. denied*, 429 U.S. 1045 (1977).

28. Comment, *The Permissibility of Forcible Entries by Police in Electronic Surveillance*, 57 B. U. L. REV. 587 (1977). Note, *Constitutional Law—Criminal Procedure—Judicial Authorization of a Forcible and Surreptitious Break-in to Install Electronic Surveillance Equipment*, 24 WAYNE ST. L. REV. 135 (1977).

29. 541 F.2d at 694. 18 U.S.C.A. §2518(1)(c) demands "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous. . . ."

30. *Id.* at 693.

31. The original intercept order did not include the firearms charge. The offense is also not included among the only Title III offenses (§2516) for which wire and oral interceptions are permitted in the first place. The district court granted a supplemental charge to include this offense and the court of appeals upheld its inclusion by saying that it was evidence properly obtained from appropriately minimized activity. 541 F.2d at 693, 695.

32. *Id.* at 696 n.13.

on the basis of a strained analogy with the exigency exceptions for unannounced police intrusion into a private home laid down by the Supreme Court in *Ker v. California*.[33] After a review of the *Ker* decision, the court admitted that none of the exigency exceptions actually applied to the facts of the instant case, but that prior announcement of the bugging would be tantamount to *Ker's* destruction of the evidence exception, *i.e.*, defendant would not talk knowing that a bug had been planted.[34] The court reasoned further that no constitutional violation occurred because it felt that Agrusa's closed business office was less protected by the Constitution than Ker's private home.[35]

The court's analytical error is obvious. First, there was no basis to apply any of *Ker's* exigency exceptions and, second, the court improperly read *Ker* as allowing unannounced forcible entry whenever notice to occupants would be self-defeating. Viewed in its proper context, *Ker* requires more than dispensing with notice only when it would defeat the purposes of entry. On the contrary, the *Ker* exceptions are emergency situations which demand immediate action and which were not contemplated by the police until the moment of acting (upon hearing screams of victims, sounds of escape, etc.). The government agents' entry in *Agrusa* did not result from an emergency, but unfolded exactly as planned, negating any possible use of the *Ker* exigency exceptions.

Uneasy with its creation, the *Agrusa* court attempted to limit its extension of the exigency exceptions to vacant business premises by interpreting dicta in *See v. Seattle*[36] as saying that business premises are afforded less fourth amendment protection than individual homes, and that vacant

33. 374 U.S. 23 (1963). In *Ker*, the police, suspecting Ker of possessing marijuana, followed him in his automobile, but lost him as a result of elusive driving. The police went to Ker's apartment and entered without knocking, with a passkey, and without a warrant. The evidence seized from the search was admitted at trial and the U.S. Supreme Court upheld Ker's conviction, stating that "[e]ven if probable cause exists for the arrest of a person within, the Fourth Amendment is violated by an unannounced police intrusion into a private home, with or without an arrest warrant, except (1) when the persons within already know of the officers' authority and purpose, or (2) where the officers are justified in the belief that persons within are in imminent peril of bodily harm, or (3) where those within, made aware of the presence of someone outside (because, for example, there has been a knock at the door), are then engaged in activity which justifies the officers in the belief that an escape or the destruction of evidence is being attempted." 374 U.S. at 47 (Brennan, J., concurring in part and dissenting in part).

34. 541 F.2d at 697. The court tersely dismissed the basic fourth amendment question of surreptitious entry by a single, unsupported conclusion, buried in a footnote: "[T]he determination [was made] . . . that there was probable cause to believe that specified crimes had been, were being, or would be committed and sufficient reason for the Government both to break and enter and to intercept. This is precisely and, in respects here material, all that the Fourth Amendment and sound reason require." 541 F.2d 695 n.11.

35. *Id.* at 697.

36. 387 U.S. 541 (1967). The Supreme Court's holding in *See* appears to be contra because a warrant was required to effect unconsented administrative inspections of commercial premises.

premises receive less protection than those which are occupied. Judge Lay's stinging dissent in *Agrusa*[37] noted that informants had already produced enough evidence to convict Agrusa, that government agents had already placed wiretaps, and that known stolen property had been purchased from Agrusa one month before the break-in order was issued. Moreover, the dissent observed that the vacant business premises limitation of the Fourth Amendment was not supportable because the Fourth Amendment protects people and not places.[38] Therefore, "the privacy of a person within business premises deserves the same consideration. Rather than draw artificial distinctions, I would hold searches such as this to be unreasonable per se."[39] Judge Lay concluded: "My deepest feelings against giving legal sanction to such 'dirty business' as the record in this case discloses is that it makes for lazy and not alert law enforcement. It puts a premium on force and fraud, not on imagination and enterprise and professional training."[40]

E. The Exigency Approach Refined

A decision somewhat more sensitive to traditional fourth amendment values than the decision in *Argusa* is *Application of United States*.[41] The FBI had concluded that the only way to break up a suspected gambling ring in Maryland was to plant an eavesdropping device,[42] and that the only feasible method of doing so would entail surreptitious entry into the building where the suspected activity was taking place. The application for a Title III intercept order proposed that three listening devices be installed, one in a private office and two in public areas of the building. The latter two were to be activated only when that part of the building was closed to the public and when one or more of the target individuals were present. An *in camera* hearing was held on the application. The district court denied the order application because the Government had not shown a "paramount or compelling interest" that would justify judicial authorization of covert entry in violation of the Fourth Amendment.[43] The appellate court reversed, holding that a dual judicial determination is applicable to the problem—that is, a court order for the break-in must be given

37. 541 F.2d at 702 (Lay, J., dissenting).

38. 541 F.2d at 702, *citing* Katz v. United States, 389 U.S. 347, 355 (1967).

39. *Id.* at 704.

40. Id., *quoting* On Lee v. United States, 343 U.S. 747, 761 (1952) (Frankfurter, J., dissenting).

41. 563 F.2d 637 (4th Cir. 1977).

42. The district court found "that confidential informants were unwilling to testify; that some of the principal suspects avoided the telephone which local authorities had tapped; that a search for incriminating records would prove fruitless; that infiltration of the gambling operation would be impossible; and that physical surveillance would be of limited value." *Id.* at 640 n.3.

43. *Id.* at 640.

separate fourth amendment scrutiny apart from whether a Title III intercept order should be issued. The fact that covert entry by police officers was congressionally authorized by Title III was obvious to the court because "in our opinion, any other conclusion would run counter to the principle that we should attempt to effectuate the purpose of federal legislation and avoid interpretations which produce absurd or nugatory results."[44] The court then met the fourth amendment surreptitious entry problem by noting that, in the absence of exigent circumstances, the Fourth Amendment commands a judicially authorized warrant to make a search and seizure reasonable. The court order for a secret entry by police to install a listening device should be issued only when: (1) the district judge is apprised of the entry; (2) the judge finds that the surreptitious entry is the only effective means available to conduct the investigation; and, (3) the judge specifically sanctions the entry in a way that will not offend the substantive commands of the Fourth Amendment.[45] The court felt that this test was flexible, yielding to the legitimate needs of law enforcement, and that there was room in the Fourth Amendment to accomodate both the valid goals of law enforcement and the individual's right of privacy in the area of electronic surveillance.[46] In remanding the case, the court stated that if the showing of the government for the need of a Title III intercept order and a covert entry order to place the devices was substantially the same as that demonstrated at the time of application, then the order should be issued.[47]

III. Fourth Amendment Values Are Revitalized By The Sixth Circuit

The preceding discussion exposes the confusion among the five circuits that have ruled on the issue of judicial authorization of surreptitious entry by police. The theories advanced in support of the decisions vary, but the ultimate result in each case is the same—the government, with a valid Title III intercept order, may covertly break into private premises to install an eavesdropping device. There seemed to be no question that some fourth amendment rights, once treasured constitutional protections of personal liberty, had been rendered extinct by the statutory scheme of Title III.

The most recent decision in this area, however, has breathed new life

44. *Id.* at 642. *See* note 16 and accompanying text, *supra*.

45. *Id.* at 644. Contrast this holding with the views of R. McNamara, Jr., who argues for a single, general entry order because crime investigation of this nature needs to be flexible as to time and possible methods of entry. R. McNamara, Jr., *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). Mr. McNamara represented the Government in United States v. Ford, 553 F.2d 146 (D.C. Cir. 1977), in his role as Assistant U.S. Attorney.

46. 563 F.2d at 644-45.

47. *Id.* at 646. *See* note 42, *supra*.

into the Fourth Amendment. In *United States v. Finazzo*,[48] the Sixth Circuit Court of Appeals recognized that "Orwell's image of *1984* is no longer fiction" and held that the Constitution of the United States will not tolerate such abuses of personal rights under the guise of criminal investigation.[49] Specifically, the court held that: (1) a judge does not have the *implied* power under Title III to authorize breaking and entering;[50] (2) in the absence of specific statutory authority, a judge does not have that power under the Fourth Amendment; and, (3) government agents do not have independent statutory or constitutional authority to engage in break-ins to install eavesdropping devices.[51] The pertinent facts in *Finazzo* were mirror images of most other cases in this area. Taped conversations from the listening devices, which were placed by government agents who entered the premises at approximately 1:00 a.m. through an unlocked window, directly led to Finazzo's indictment for bribery of a federal public official.[52] However, in this case, the tapes were suppressed by the district court and the appellate court affirmed.[53] The court noted that the evidence obtained was highly incriminating, and demonstrated the effectiveness of electronic eavesdropping as an investigatory weapon.[54] The court, however, had a distaste for the method of loading the weapon, and said that "[i]t simply [did] not make sense to imply [c]ongressional authority for official break-ins when not a single line or word of [Title III] even mentions the possibility, much less limits or defines the scope of the power or describes the circumstances under which such conduct, normally unlawful, may take place."[55] Citing the separate dissents of Justices Holmes and Brandeis in *Olmstead v. United States*,[56] landmark opinions which later became majority views, the court noted that the recording of private conversations is a "dirty business". Justice Holmes had preferred "that some criminals should escape than that the government should play an ignoble part" by ignoring the Fourth Amendment.[57] Justice Brandeis had remarked that the

48. 583 F.2d 837 (6th Cir. 1978).

49. *Id.* at 842. The court also mentioned the work of Kafka, who, like Orwell, imagined a dehumanized society of the future. *Id.* at 841.

50. *Contra*, United States v. Scafidi, United States v. Dalia, United States v. Agrusa, discussed *supra*.

51. 583 F.2d at 838.

52. It is notable that the application for a Title III eavesdrop alleged only that the government suspected Finazzo of operating a loan shark business. 583 F.2d at 840.

53. *Id.* at 838.

54. *Id.* at 840.

55. *Id.* at 841. The court noted that the recent Supreme Court decision of United States v. New York Tel. Co., 434 U.S. 159 (1977), supported this view that courts should not infer powers from Title III that are not expressly conferred, including the power to break and enter. *Id.* at 848.

56. 277 U.S. 438, 469, 471 (1928) (Holmes, J. and Brandeis, J., dissenting). *Olmstead* was overruled in Berger v. New York, 388 U.S. 41 (1967) and Katz v. United States, 389 U.S. 347 (1967).

57. 583 F.2d at 838, *quoting* 277 U.S. 438, 470 (Holmes, J. dissenting).

government is "the potent, the omnipresent teacher, [and] breeds contempt for law [and] invites anarchy [when it becomes the] law breaker."[58] Viewing privacy as a "purifying agent" in personal relationships, the court in *Finazzo* recognized that it is one thing to overhear words, but quite another to secretly break into a house or office, no matter what the purpose. Moreover, the court noted with disfavor that Title III is an enabling act for state and local judges as well as for federal officials. Therefore, once a state has passed a statute similar to Title III authorizing interceptions of wire and oral communications, state and local law enforcements agents will necessarily gain the power of covert entry from the intercept order. And an eavesdropping order could issue from a local magistrate in a secret hearing.[59]

The court traced the historical development of the Fourth Amendment and found the conclusion obvious that, in the absence of specific statutory authority from Congress, federal courts do not have an inherent power to authorize police officers to engage in break-ins in the execution of warrants;[60] nor do law enforcement agents alone have such inherent power.[61] Furthermore, said the court, "[t]he Fourth Amendment is more than a Constitutional right to privacy. It also protects—just as it says in the text 'the right of the people to be secure in their persons, houses, papers, and effects' . . . ."[62]

IV. CONCLUSION

The *Finazzo* decision has created an irreconcilable split among the circuits on the issue of judicial authorization of covert police entry under Title III, which must now be reconciled by the U.S. Supreme Court.[63] This apparent narrowness of the issue belies the importance of the search for its solution. History has shown that laws like Title III and their methods of enforcement may easily be broadened to include any conceivable kind of activity. It is not the law, then, that is of primary importance, but the constitutional bounds within which that law will be allowed to operate. The Burger Court's task demands consideration of a cluttered array of conflicting policies and values that have become confused in today's modern society. It is hoped that the modern Court will be able to cope with the demands of history and the needs of the future by following *Finazzo's* guiding light. This result, however, seems unlikely in view of the present

58. *Id.*, *quoting* 277 U.S. 438, 485 (Brandeis, J., dissenting).

59. By the end of 1977, twenty-three states had enacted such a statute, and state courts in 1977 had issued 524 surveillance orders, as compared to only 77 orders issued by federal courts. *Id.* at 842.

60. *Id.* at 844.

61. *Id.* at 845.

62. *Id.* at 847.

63. United States v. Dalia, 575 F.2d 1344 (3d Cir. 1978), *cert. granted*, ____U.S.____, 99 S. Ct. 78, 58 L. Ed. 2d 108 (1978); Application of United States, 563 F.2d 637 (4th Cir. 1977).

Court's almost predictable contraction of constitutional safeguards for the individual.

V. ADDENDUM

On April 18, 1979, the Supreme Court affirmed *Dalia v. United States*, 47 U.S.L.W. 4423 (April 18, 1979). The final tally was close, and clearly showed a deeply entrenched division within the Court. Justices Powell, Burger, White, Blackmun, and Rehnquist joined in the majority opinion. Justices Brennan and Stewart joined in a concurring in part and dissenting in part opinion. And Justice Stevens wrote a telling dissent, in which Justices Marshall and Brennan joined.

Justice Powell delivered the majority opinion of the Court; he wrote that covert entries, if made pursuant to a warrant, are constitutional in some circumstances. The majority felt that the right of covert entry to install eavesdropping devices under Title III is to be implied from Congress. Finally, the Court held that the Fourth Amendment does not require that a Title III electronic surveillance order include a specific authorization to enter covertly the target premises.

Justice Brennan's separate opinion stated that even assuming covert entry under Title III was constitutional, an intercept order under Title III did require specific authorization to be constitutional.

Justice Stephens' position in the dissent was that neither Title III, nor any other statute, expressly permits covert entry by police, or authorizes a federal judge to enter orders "granting federal agents a license to commit trespass." Furthermore, these powers are not to be implied into Title III because: (1) it is the Supreme Court's duty to hold the rights of the individual over the interests in more effective law enforcement; (2) Title III did not explicitly refer to covert entry of any kind, and the Court should not enlarge the coverage of the statute beyond its plain meaning because to do so in this situation would "convert silence into thunder;" (3) finally, the legislative history of Title III demonstrates that Congress never contemplated tortious and criminal activity to effectuate the statute. Justice Stevens saw a vast difference between merely clandestine detective work, and police work that involves breaking and entering into private property.

Justice Stevens closed the dissent, fearing that the Court's holding may reflect an unarticulated presumption that any law enforcement methods are permissible unless expressly prohibited by statute or the Constitution. Surely, he stated, the presumption should run the other way.

CHARLES R. REDDICK
ROBERT P. WESTIN