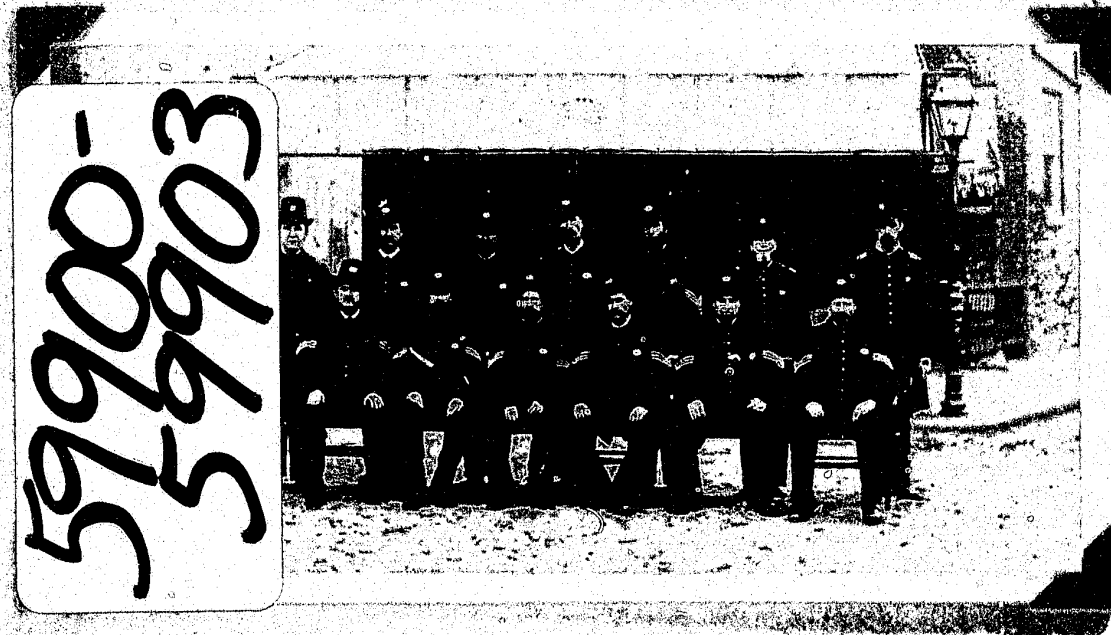
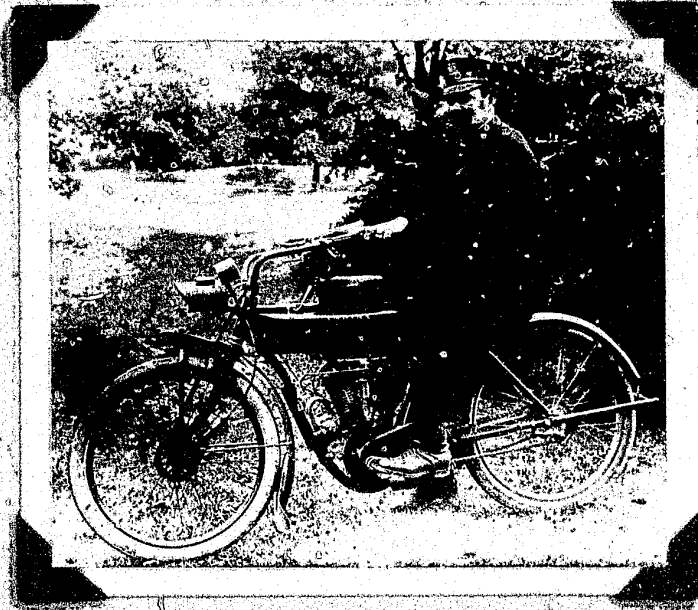


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Covert Entry To Install Court-ordered Listening Devices

By WILLIAM E. COLOMBELL

*Special Agent
Legal Counsel Division
Federal Bureau of Investigation
Washington, D.C.*

Law enforcement officers of other than Federal jurisdiction who are interested in any legal issue discussed in this article should consult their legal adviser. Some police procedures ruled permissible under Federal constitutional law are of questionable legality under State law or are not permitted at all.

Under the editorial caption, "Whose Privacy Matters Most," a large metropolitan newspaper recently decried decisions by the U.S. Supreme Court that, in the opinion of the editor, represented a steady erosion of individual privacy rights guaranteed under the fourth amendment. The author stated, "Why the Court so denigrates the right to privacy is not clear. Perhaps in its anxiety to make the job of the police easier, the majority has forgotten the idea of the sanctity of a citizen's home."¹ The editorial was prompted by the Supreme Court's recent decision in *United States v. Dalia*,² decided April 19, 1979, sanctioning covert entries into private areas for the purpose of installing court-ordered electronic listening devices.

Law enforcement officers should justifiably be concerned by such commentaries and should strive to examine objectively the police procedures and court decisions that prompt such harsh criticism.

The purpose of this article is threefold: First, to examine the facts of the *Dalia* case and provide an analysis of the constitutional issues involved and the rationale employed by the majority in upholding such covert entries; second, to recommend that due to the significant privacy interests embraced in this area, law enforcement agencies afford consideration to implementation of administrative safeguards that surpass the constitutional requirements set forth in the *Dalia* case; and third, to examine the possible detrimental effects on the successful prosecution of a case, when a police agency adopts more restrictive administrative rules, only to find that the conduct of the officer measures up to the constitutional standard but falls short of the more restrictive rules established by the department.

“. . . in the area of electronic listening devices and installation thereof, extraordinary safeguards are appropriate.”

Any discussion of covert entries to install court-ordered “bugging” devices should be preceded by a quick review of the conflicting views that prevailed in the Federal appellate courts prior to the *Dalia* decision. It should be noted at the outset that the Federal statute authorizing electronic surveillance³ (hereafter referred to as title III) makes no mention of covert entry procedures to install monitoring devices. As a result, controversy developed as to whether such entries were permissible at all, and if so, under what circumstances. The second circuit⁴ adopted the more permissive view that title III implicitly authorized break-ins without prior specific judicial approval. The eighth circuit⁵ held that conducting a surreptitious entry to install a court-ordered listening device could be “reasonable” within fourth amendment standards, provided specific judicial approval was first obtained. The District of Columbia Circuit⁶ also permitted such entries to install court-ordered listening devices, but required careful judicial control of the method, time, duration, and number of entries required to accomplish the task. By contrast, the sixth⁷ and ninth⁸ circuits recently held that no statutory authority exists (implicit in title III or any other statute) empowering district courts to authorize covert break-ins. As a result, all technical coverage by Federal officers in the sixth and ninth circuits involving court-ordered listening devices installed by covert entries had to be terminated and future coverage involving such entries could not be contemplated. An impasse had been reached; the stage was set for review by the Supreme Court.

Analysis of the *Dalia* Decision

The *Dalia* case involved a criminal investigation by FBI Agents using court-ordered wiretaps of the defendant's business telephone, followed by a court-ordered listening device installed in the same business office by means of a surreptitious entry. The method of installation was not mentioned in the court order for the listening device and was left to the discretion of the agency.⁹ Two covert entries were made in the early morning hours by prying a window. The first was for installation and lasted approximately 3 hours. The second was for removal of the equipment.

In a 5-to-4 decision affirming the conviction, the Supreme Court held that there is no basis for a constitutional rule proscribing all covert entries, stating that police frequently make forcible entries to execute search warrants provided such a procedure is reasonable under the circumstances.¹⁰ While noting that covert entries are unique in that they must be carried out without any prior notice, the majority expressed the view that title III provides a constitutionally adequate substitute for notice by requiring the notification be given to certain classes of people upon completion of the operation.¹¹

Having decided that covert entries for otherwise lawful purposes are not unconstitutional *per se*, the Court held that title III implicitly contained statutory authority enabling Federal courts to approve covert entries in such cases. Though recognizing that title III does not refer explicitly to covert entries, the Court cited a variety of factors¹² supporting the majority view of implied authority, not the least of which was the observation that to read the statute otherwise would impute to Congress a “self-defeating if not disingenuous purpose.”¹³

The third issue addressed by the Court involved the necessity for explicit judicial approval as a condition precedent to any covert entry. The Court held that prior approval was not constitutionally required. Details regarding entry and manner of execution are generally left to the discretion of the officer, subject to later review by the courts to insure that the “reasonableness” standard of the fourth amendment is followed. Refusing to treat warrants for electronic surveillance as unique, the majority stated that it would be engaging in empty formalism to require a statute to make explicit what is unquestionably implied in the monitoring authorization; namely, that a covert entry may be needed for installation of surveillance equipment.¹⁴

Adoption of Administrative Guidelines

While the Supreme Court in the *Dalia* case concluded that prior judicial notification of an approval for the covert entry is not constitutionally required, the majority did suggest its preference for such an approach.¹⁵ It can be argued that law enforcement would be well-served to seize upon such a suggestion and unilaterally establish departmental rules in this area that surpass constitutional requirements. Although it is understandable that additional administrative requirements would possibly have a demoralizing effect on many officers who subscribe to the view that their crime-fighting efforts are already too encumbered with constitutional and procedural safeguards, it is the contention of this article that in the area of electronic listening devices and installation thereof, extraordinary safeguards are appropriate.

"The Court encourages law enforcement agencies . . . to establish unilaterally additional safeguards in the form of internal regulations and procedures."

It is imperative that law enforcement officers recognize that while many States and the Federal Government have enacted wiretap statutes, a large percentage of citizens and judges in the post-Watergate era look upon wiretapping and covert entries as a very serious, if not "dirty," business.¹⁶ Many have expressed the fear that wiretapping and eavesdropping by Federal and local police could spread and become routine. Such investigative procedures delve into the most guarded and sensitive areas of privacy and should be used only in significant cases, where all other investigative methods have failed. Concern for potential abuse is heightened where covert entries are used to install "bugging" devices, since more than one privacy interest is involved—the protection of one's speech and communications and the trespass and intrusion upon property interests. Such a view was recently expressed by the U.S. Court of Appeals for the Sixth Circuit when it stated, "The breaking and entering aggravates the search, and it intrudes upon property and privacy interests not weighed in the statutory scheme, interests which have independent social value unrelated to confidential speech."¹⁷

Accordingly, it is recommended that in those States that have enabling statutes permitting court-ordered electronic listening devices, the following departmental policies be considered in all cases where a covert entry is anticipated: (1) The probable cause affidavit should include a statement by the affiant justifying the need for a covert

entry; and (2) the application for the court order should include a request that the court order for the listening device also specifically authorize covert entry for the purpose of installing, servicing, and removing the equipment.

In drafting the statement justifying the covert entry, consideration should be afforded the following factors: (1) Furnish a description of the particular area of the premises where the listening device is to be installed; (2) establish that a less intrusive means of installation is not available because access to the area is limited to a certain class of people; (3) articulate why entry by means of a ruse is not feasible and would jeopardize the secrecy of the operation or not afford sufficient time or access to permit proper installation; and (4) include an assertion that officers were instructed beforehand that entry will be limited in scope to installation purposes only, and of course, insure this is accomplished.

Due to the many variables that could be encountered and the need for confidentiality to insure the success of future covert entries, officers need not include detailed accounts regarding the anticipated techniques and methods used to accomplish entry.¹⁸

The *Dalia* decision specifically interprets the Federal Wiretap Statute and offers guidance in establishing Federal constitutional standards. As most State wiretap laws are modeled after the Federal statute, *Dalia* also should offer substantial assistance in interpreting requirements of the State statutes. However, it should be recognized that if the State enabling statute or State court decisions interpreting the statute establish higher standards, such State standards must be complied with.

Effect of Violation of Administrative Guidelines

Having stated the recommendations regarding prior judicial approval, one remaining area of concern merits examination. Suppose that a department adopts the recommended procedures. What are the consequences if one of its officers, in making a covert entry to install a court-ordered listening device, follows the constitutional mandates of the *Dalia* case, but inadvertently fails to follow the more restrictive departmental rules? What penalties would be appropriate in order to deter such conduct and insure future compliance? The department could certainly take internal administrative action to discipline the derelict officer. Defense attorneys could capitalize on the officer's failure to comport with department guidelines by seeking damaging admissions in the presence of the jury. It has even been argued that application of the Exclusionary Rule would be an appropriate remedy in such a case.¹⁹

In *United States v. Caceres*,²⁰ decided April 2, 1979, the Supreme Court dealt with just such an issue. Factually, the case involved a consensual monitoring²¹ operation by Internal Revenue agents in violation of their own administrative guidelines.²² Suspecting that a taxpayer who was under investigation would attempt bribery, the auditing agent was "wired," and incriminating remarks made by the taxpayer were recorded. The monitoring procedure was a violation of agency policy, which required prior approval of the Depart-

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ment of Justice. The lower Federal courts suppressed recorded statements obtained in violation of agency rules.²³ The Supreme Court, in reversing, held that the consensual monitoring did not violate any procedural or constitutional rights regarding privacy, “due process” of law, or “equal protection” under the law.²⁴ The Court quickly disposed of the defendant’s equal protection claim by stating that even if the monitoring of other taxpayers in a similar position was conducted with prior Department of Justice approval, the fact that the defendant’s was not “does not even arguably amount to a denial of equal protection.”²⁵ Directing its attention to the alleged violation of due process, the Court held that the defendant “cannot reasonably contend that he relied on the regulation, or that its breach had any effect on his conduct.”²⁶

The Court refused to endorse a rigid rule requiring exclusion of evidence obtained as a result of a violation of an administrative regulation. Recognizing the hidden dangers inherent in such a policy, the Court noted, “. . . we cannot ignore the possibility that a rigid application of an exclusionary rule to every regulatory violation could have a serious deterrent impact on the formulation of additional standards to govern prosecutorial and police procedures. . . . In the long run it is far better to have rules like those contained in the IRS Manual, and to tolerate occasional erroneous administration . . . than either to have no rules except those mandated by statute, or to have them framed in a mere precautionary form.”²⁷ Based on the *Caceres* decision, it would appear that violation of internal department regulations such as those proposed in this article should not result in application of the Exclusionary Rule.

Conclusion

The *Dalia* decision endorses the view that not every investigative procedure or search and seizure technique had to be founded on specific statutory authority or preceded by prior judicial approval. On the contrary, when executing a search warrant, it is generally left to the discretion of the officers to determine the best way to proceed, provided their actions are deemed “reasonable” under the fourth amendment. The Court encourages law enforcement agencies, especially in highly sensitive areas involving electronic surveillance and covert entry, to establish unilaterally additional safeguards in the form of internal regulations and procedures.²⁸ The *Caceres* decision ensures that when a police agency implements such policies, it will not suffer application of the Exclusionary Rule merely because one of its officers, acting in good faith, fails to comply with the regulation. The procedures highlighted in this article surpass the Federal constitutional standard established in the *Dalia* decision and represent the current policy of the Federal Bureau of Investigation. However, it is important to note that State courts, in interpreting their own State constitutions and wiretap laws, are free to set higher standards of reasonableness.

Accordingly, State law enforcement officers should carefully review the law in their particular States to insure that covert entry procedures are judicially sanctioned and that the manner in which the procedure is implemented conforms to State requirements.

FBI

Footnotes

- ¹ Washington Post, April 22, 1979, § C (Editorial), p. 6.
- ² 60 L. Ed. 2d 177 (1979).
- ³ Omnibus Crime Control and Safe Streets Act of 1968, Title III, 18 U.S.C. 2510-2520 (1970).
- ⁴ *United States v. Scafioli*, 564 F. 2d 633 (2d Cir. 1977), cert. denied 436 U.S. 903 (1978).
- ⁵ *United States v. Agrusa*, 541 F. 2d 690 (8th Cir. 1976), cert. denied 429 U.S. 1045 (1977).
- ⁶ *United States v. Ford*, 553 F. 2d 146 (D.C. Cir. 1977).
- ⁷ *United States v. Finazzo*, 583 F. 2d 837 (6th Cir. 1978).
- ⁸ *United States v. Santora*, 583 F. 2d 453 (9th Cir. 1978).
- ⁹ The affidavit setting forth probable cause did not include facts justifying the entry procedure and the application for the court order made no mention of covert entry.
- ¹⁰ *Supra* note 2, at 186.
- ¹¹ *United States v. Donovan*, 429 U.S. 413 at 431, holding that title III provided a constitutionally adequate substitute for advance notice by requiring that once the surveillance operation is completed the authorizing judge must cause notice to be served on those subject to surveillance.
- ¹² *Supra* note 2, at 189, 190, noting congressional awareness that most “bugging” requires covert entry, and that the congressional purpose in enacting the statute would be largely thwarted, since most cases involving electronic listening devices cannot be performed without covert entry into the premises being monitored.
- ¹³ *Supra* note 2, at 191.
- ¹⁴ *Supra* note 2, at 193.
- ¹⁵ *Supra* note 2, at 193, n. 22, wherein the Court expresses a preference for government agents in the future to make explicit to the authorizing court that some form of covert entry will be required to carry out the surveillance.
- ¹⁶ *Olmstead v. United States*, 277 U.S. 438 (1928). In dissenting, Justice Holmes expressed such a view, characterizing wiretapping as a “dirty business.”
- ¹⁷ *Supra* note 7, at 841.
- ¹⁸ *Supra* note 2, at 192. The Court states that nothing in the Constitution or decisions interpreting it suggests that search warrants must include a specification of the precise manner in which the warrant is to be executed.
- ¹⁹ *Mapp v. Ohio*, 367 U.S. 643 (1961), the rule provides for the exclusion from a criminal prosecution of evidence obtained in violation of the Constitution.
- ²⁰ 59 L. Ed. 2d 733 (1979).
- ²¹ 18 U.S.C. 2511(2)(d) provides that it shall not be unlawful under title III for a person to intercept a wire or oral communication with such a person is a party to the communication or where one of the parties to the communication has given prior consent to the interception.
- ²² *Supra* note 20, at 738, n. 3, reflecting that IRS rules were drafted to conform to the requirements of the Attorney General, requiring Justice Department approval for all consensual monitoring of nontelephone conversations by Federal agents.
- ²³ *United States v. Caceres*, 545 F. 2d 1182 (1976).
- ²⁴ U.S. Const. amend. XIV states: “. . . nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.” These concepts have been interpreted to mean that the Government must use fair, legal methods when attempting to take away an individual’s liberty or property and whatever rights are created or recognized must be the same for everyone.
- ²⁵ *Supra* note 20, at 743.
- ²⁶ *Supra* note 20, at 744.
- ²⁷ *Supra* note 20, at 746.
- ²⁸ *Supra* note 15.

END