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Covert Entry in Electronic Surveillance: The Fourth Amendment Requirements

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NOTES

COVERT ENTRY IN ELECTRONIC SURVEILLANCE: THE FOURTH AMENDMENT REQUIREMENTS

INTRODUCTION

More than a decade ago, the Supreme Court in *Berger v. New York*[1] and *Katz v. United States*[2] set forth stringent fourth amendment requirements for government-conducted electronic surveillance of conversation.[3] Neither decision indicated, however, whether additional requirements must be met when government agents, instead of confining themselves to surveillance techniques like wiretaps that can be conducted from outside of the search premises,[4] covertly enter[5] private premises to install and maintain surveillance equip-

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1. 388 U.S. 41 (1967).

2. 389 U.S. 347 (1967).

3. In *Berger*, the Court held that the then existing New York electronic surveillance statute was offensive to the fourth amendment for a myriad of reasons: (1) the statute did not compel the government to show that a specific crime had been or was being committed; (2) although it required an express mention of the persons whose conversations were to be overheard in the warrant, the statute did not demand a particular description of the conversations to be obtained; (3) it did not require prompt execution; (4) it allowed authorization of surveillance for an excessively lengthy and continuous period; (5) it permitted renewal of the surveillance on less than probable cause after the lapse of the original order; (6) it did not mandate that the surveillance must be terminated upon accomplishment of its goals; (7) it did not require the government to show exigency in order to conduct surveillance; and (8) it did not require a return on the surveillance order. 388 U.S. at 58-60. Whereas *Berger* set down guidelines for electronic surveillance in a case that arose from a surveillance implemented by a physical intrusion, *see id.* at 45, the Court in *Katz* held that surveillance without physical intrusion also constituted a search within the meaning of the fourth amendment. 389 U.S. at 353. In so doing, the Court applied the *Berger* standards to surveillances not implemented by entry. *See id.* at 354-56.

The federal statute controlling government-conducted surveillance, 18 U.S.C. §§ 2510-2520 (1976), is the codification of the major portion of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 802, 82 Stat. 212 (1969). The drafters of the statute strove to comply with the *Berger* and *Katz* fourth amendment standards without unduly hindering law enforcement. Scott v. United States, 436 U.S. 128, 130 (1978); United States v. United States Dist. Court, 407 U.S. 297, 302 (1972); S. Rep. No. 1097, 90th Cong., 2d Sess. 75, *reprinted in* [1968] U.S. Code & Ad. News 2112, 2163. The federal statute is preemptive of state legislation to the extent that state law is less restrictive of surveillance practices. United States v. Curreri, 388 F. Supp. 607, 613 (D. Md. 1974); People v. Conklin, 12 Cal. 3d 259, 272, 522 P.2d 1049, 1057, 114 Cal. Rptr. 241, 250 (1974). *See generally* J. Carr, The Law of Electronic Surveillance § 2.04[1] (1977).

4. *See* United States v. Finazzo, No. 77-5186, slip op. at 9 n.13 (6th Cir. Aug. 28, 1978).

5. As used in this Note, covert entry will refer to the physical presence, without consent, of government agents in private premises which: (1) if occurring in a seizure of tangibles, as opposed to an interception of conversations, would constitute a search within the meaning of the fourth amendment; and (2) was established by breaking-and-entering or by deceit.

This definition applies to at least one of the police maneuvers at issue in each of the cases that have examined the fourth amendment standards for covert entry in surveillance. The entries in question were executed by means of either deceit or by breaking-and-entering and invaded a residence or a nonpublic area of a commercial building. *See, e.g.*, United States v. Dalia, 575

ment.[6] When confronted with this question of whether additional fourth amendment requirements exist for the covert entry itself, lower courts have reached conflicting results.[7]

F.2d 1344, 1345 (3d Cir.), *cert. granted,* 99 S. Ct. 78 (1978) (No. 77-1722). Moreover, entries without consent into residences or nonpublic commercial areas most always constitute searches. *See* United States v. United States Dist. Court, 407 U.S. 297, 313 (1972) (homes); See v. City of Seattle, 387 U.S. 541, 545 (1967) (commercial building areas not open to the public); United States v. Barker, 546 F.2d 940, 953 (D.C. Cir. 1976) (homes); Amsterdam, *Perspectives on the Fourth Amendment,* 58 Minn. L. Rev. 349, 442 n.74 (1974) (commercial building areas not open to the public). The sole exception to this rule is the so-called technical trespass which invades areas lacking the obviously private character of the apartments, after-business-hour offices, and backrooms that have been the target of surveillance in the cases at issue. *See generally* Note, *The Relationship Between Trespasses and Fourth Amendment Protection After* Katz v. United States, 38 Ohio St. L.J. 709 (1977).

6. Although *Berger* involved surveillance implemented by intrusion into private premises, *see* note 3 *supra,* both the proponents and opponents of additional fourth amendment requirements for covert entry in implementation of surveillance agree that the *Berger* guidelines were aimed solely at the intrusion represented by the overhearing of conversation. *Compare* United States v. Scafidi, 564 F.2d 633, 644 (2d Cir. 1977) (Gurfein, J., concurring), *cert. denied,* 436 U.S. 903 (1978) *with* United States v. Ford, 553 F.2d 146, 157 (D.C. Cir. 1977).

7. *See* United States v. Dalia, 575 F.2d 1344, 1344-46 (3d Cir.), *cert. granted,* 99 S. Ct. 78 (1978) (No. 77-1722) (covert entry reasonable when executed in a reasonable manner and when there is probable cause for the underlying surveillance); United States v. Scafidi, 564 F.2d 633, 639-40 (2d Cir. 1977), *cert. denied,* 436 U.S. 903 (1978) (express authorization of covert entry unnecessary); *In re* United States, 563 F.2d 637, 644-46 (4th Cir. 1977) (covert entry must be only effective means of conducting investigation and must be expressly authorized); United States v. Ford, 553 F.2d 146, 152-70 (D.C. Cir. 1977) (covert entry must be necessary to conduct surveillance and must be expressly authorized); United States v. Finazzo, 429 F. Supp. 803, 807 (E.D. Mich. 1977) (covert entry must be expressly authorized), *aff'd,* No. 77-5186 (6th Cir. Aug. 28, 1978); United States v. Volpe, 430 F. Supp. 931, 942-43 (D. Conn. 1977) (covert entry reasonable when there is probable cause for underlying surveillance); United States v. London, 424 F. Supp. 556, 560 (D. Md. 1976) (express authorization of covert entry unnecessary), *aff'd on other grounds sub nom.* United States v. Clerkley, 556 F.2d 709 (4th Cir. 1977).

The question of whether covert entry in surveillance is per se unreasonable, *i.e.,* violative of the fourth amendment irrespective of the judicial procedures controlling the entry and the public interest at stake, will not be discussed. This Note will assume, as have most courts, that covert entry is not per se unreasonable. Those courts implicitly deciding that covert entry is not per se unreasonable are: United States v. Dalia, 575 F.2d at 1346; United States v. Scafidi, 564 F.2d at 640; *In re* United States, 563 F.2d at 644; United States v. Volpe, 430 F. Supp. at 942-43; United States v. Ford, 414 F. Supp. 879, 883 (D.D.C. 1976), *aff'd on other grounds,* 553 F.2d 146 (D.C. Cir. 1977); United States v. London, 424 F. Supp. at 560. Two courts have expressly reserved the issue of whether covert entry is per se unreasonable. *See* United States v. Finazzo, No. 77-5186, slip op. at 26 (6th Cir. Aug. 28, 1978); United States v. Ford, 553 F.2d at 170. One court has expressly decided that covert entry is not per se unreasonable. United States v. Agrusa, 541 F.2d 690, 695-98 (8th Cir. 1976), *cert. denied,* 429 U.S. 1045 (1977). Sitting en banc, the Eighth Circuit split evenly in refusing to grant a rehearing in *Agrusa. Id.* at 704. The four judges who wished to grant a rehearing expressed the view that covert entry in implementation of surveillance is per se unreasonable. *Id.* The view that covert entry is not per se unreasonable has recently been reiterated by the Eighth Circuit in United States v. Costanza, 549 F.2d 1126, 1135 (8th Cir. 1977).

This Note will also presume: (1) that there is some sort of inherent or statutory power vested in federal judges to grant authority to government officials to enter covertly so long as an adequate showing of justification under the fourth amendment has been made; and (2) that federal law

This Note will contend that there are three fourth amendment requirements for covert entry in addition to those for the surveillance itself. Part I will show that electronic surveillance implemented by covert entry satisfies the fourth amendment's reasonableness requirement only if surveillance without covert entry is inadequate. As Part II will demonstrate, the government must make this showing of reasonableness prior to obtaining a warrant, or, as it is commonly referred to in electronic surveillance operations, a surveillance order. Part III will submit that the particularity clause of the fourth amendment requires that covert entry must be expressly authorized in the surveillance order.

I. THE REASONABLENESS REQUIREMENT

The fourth amendment requires that all government searches and seizures, including electronic surveillance operations, must be reasonable.[8] The test of reasonableness mandates that the government interest outweigh the intrusiveness of the search or seizure.[9] A reasonable belief that criminally related objects are to be found in the area of the search is usually a sufficient government interest to satisfy the reasonableness test.[10]

Exceptionally intrusive searches are reasonable, however, only if justified by an additional government interest.[11] Thus, for example, body intrusions are reasonable only when there is a clear indication, as opposed to a mere reasonable belief, that the objects of the search will be found within the body.[12] Furthermore, even if a clear indication is present in the case of a body

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officers have sufficient power to enter covertly so long as the substantive and procedural requirements of the fourth amendment are satisfied. *See* United States v. Dalia, 575 F.2d at 1346; United States v. Scafidi, 564 F.2d at 640; *In re* United States, 563 F.2d at 642; United States v. Agrusa, 541 F.2d at 701; *cf.* United States v. Ford, 553 F.2d at 151 n.20 (reserves question of judicial power to authorize and proceeds to discussion of substantive and procedural requirements for entry). *But see* United States v. Finazzo, No. 77-5186, slip op. at 2.

8. The fourth amendment's reasonableness requirement reads: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. Const. amend. IV. In Katz v. United States, 389 U.S. 347, 353 (1967), the Court applied this general proscription to electronic surveillance.

9. United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975); Terry v. Ohio, 392 U.S. 1, 21 (1968); Camara v. Municipal Court, 387 U.S. 523, 536-37 (1967); *see* United States v. Martinez-Fuerte, 428 U.S. 543, 555 (1976); United States v. United States Dist. Court, 407 U.S. 297, 322-23 (1972).

10. Fisher v. United States, 425 U.S. 391, 400 (1976); Camara v. Municipal Court, 387 U.S. 523, 534-35 (1967).

11. The Court has repeatedly stated that the sufficiency of the public interest must parallel the gravity of an intrusion. *See* cases cited note 9 *supra*. The Court has also stated that "[t]he Fourth Amendment's requirement that searches and seizures be reasonable also may limit police use of unnecessarily frightening or offensive methods of surveillance and investigation." United States v. Ortiz, 422 U.S. 891, 895 (1975).

12. *See* Schmerber v. California, 384 U.S. 757 (1966). The Court decided that, although searches incidental to arrest ordinarily can be conducted upon probable cause for the arrest itself, an intrusion into the body, such as a blood test for alcohol, could only be conducted when there is a clear indication that evidence is present. *Id.* at 769-70. The California Supreme Court has viewed *Schmerber* as imposing a more stringent test. People v. Bracamonte, 15 Cal. 3d 394, 403, 540 P.2d 624, 630, 124 Cal. Rptr. 528, 534 (1975); People v. Hawkins, 6 Cal. 3d 757, 763, 493 P.2d 1145, 1148, 100 Cal. Rptr. 281, 284 (1972); *accord,* Amsterdam, *supra* note 5, at 390;

intrusion, the search is not reasonable if it brutalizes or endangers the suspect.[13] A second class of exceptionally intrusive searches, no-knock entries, which are unannounced entries into occupied premises,[14] is justifiable only under exigent circumstances.[15] Finally, the electronic surveillance of conversation is reasonable only when the normal investigative means of gathering evidence have failed, are likely to fail, or appear to be too dangerous.[16]

Just as electronic surveillance is more burdensome upon the search subject than normal investigatory means, electronic surveillance implemented by covert entry is appreciably more intrusive than electronic surveillance that is

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McKenna, *The Constitutional Protection of Private Papers: The Role of a Hierarchical Fourth Amendment,* 53 Ind. L.J. 55, 75-76 (1977); Note, *Constitutional Law: Supreme Court Delineates the Relationship Between the Fourth and Fifth Amendments,* 1967 Duke L.J. 366, 385 & n.110, 386; 55 Texas L. Rev. 147, 156 (1976).

The only contrary interpretation of the *Schmerber* clear indication rule appears in border search cases. *E.g.,* Rivas v. United States, 368 F.2d 703, 710 (9th Cir. 1966) (probe of rectal cavity in search for narcotics), *cert. denied,* 386 U.S 945 (1967). These cases appear to be a concession to the compelling policy considerations that allow other types of border searches without any suspicion whatsoever. *See* United States v. Himmelwright, 551 F.2d 991, 994 (5th Cir. 1977), *cert. denied,* 434 U.S. 902 (1977); J. Cook, Constitutional Rights of the Accused—Pretrial Rights § 55, at 352 (1972).

13. Schmerber v. California, 384 U.S. 757, 771-72 (1966) (dictum); *see* United States v. Crowder, 543 F.2d 312, 316 (D.C. Cir. 1976) (removal of bullet from thigh unreasonable) *cert. denied,* 429 U.S. 1062 (1977); United States v. Cameron, 538 F.2d 254, 258 (9th Cir. 1976) (body search must minimize discomfort and anxiety in addition to meeting "usual procedural requirements"); Huguez v. United States, 406 F.2d 366, 378-79 (9th Cir. 1968) (excessive force and lack of clear indication violative of fourth amendment); Adams v. State, 260 Ind. 663, 668, 299 N.E.2d 834, 836-38 (1973) (surgery absolutely prohibited by fourth amendment), *cert. denied,* 415 U.S. 935 (1974).

14. An unannounced entry into occupied premises is distinct from a covert entry in surveillance. The entry into occupied premises anticipates the alarm and embarrassment of the occupants. Ker v. California, 374 U.S. 23, 57 (1963) (Brennan, J., dissenting); Payne v. United States, 508 F.2d 1391, 1393-94 (5th Cir.), *cert. denied,* 423 U.S. 933 (1975). On the other hand, covert entry in surveillance requires vacancy in order to achieve its purpose of surreptitiously intercepting conversations. *See* United States v. Scafidi, 564 F.2d 633, 644 (2d Cir. 1977) (Gurfein, J., concurring), *cert. denied,* 436 U.S. 903 (1978). Covert entry in surveillance nevertheless imposes its own burden upon interests of the occupants protected by the fourth amendment. *See* notes 19-29 *infra* and accompanying text.

15. Ker v. California, 374 U.S. 23 (1963). In that case, a plurality of the Court deemed the no-notice entry in question to be reasonable under "the particular circumstances," which included a reasonable belief that evidence would otherwise be destroyed and that the occupants were expecting the police. *Id.* at 40-41. Although the rule of exigency was expressly articulated only by the dissent, *id.* at 47 (Brennan, J., dissenting), the *Ker* decision is widely viewed as establishing an exigency standard. *See, e.g.,* United States v. Murrie, 534 F.2d 695, 698 (6th Cir. 1976); Meyer v. United States, 386 F.2d 715, 717-18 (9th Cir. 1967); United States *ex rel.* Manduchi v. Tracy, 350 F.2d 658, 660-62 (3d Cir.), *cert. denied,* 382 U.S. 943 (1965); People v. Gastelo, 67 Cal. 2d 586, 589, 432 P.2d 706, 708, 63 Cal. Rptr. 10, 12 (1967); Commonwealth v. DeMichel, 442 Pa. 553, 561, 277 A.2d 159, 163 (1971).

16. 18 U.S.C. § 2518(3)(c) (1976). This standard is the codification of the exigency standard established in Berger v. New York, 388 U.S. 41 (1967). United States v. Tortorello, 480 F.2d 764, 774 (2d Cir.), *cert. denied,* 414 U.S. 866 (1973); United States v. Cox, 462 F.2d 1293, 1303 n.14 (8th Cir. 1972), *cert. denied,* 417 U.S. 918 (1974); *see* United States v. Bobo, 477 F.2d 974, 982 (4th Cir. 1973), *cert. denied,* 421 U.S. 909 (1975); Note, *Electronic Surveillance, Title III, and the Requirement of Necessity,* 2 Hastings Const. L.Q. 571, 582-86 (1975).

conducted from outside of the search premises.[17] Accordingly, it is submitted that a covert entry operation is reasonable under the fourth amendment only when the less intrusive means of nontrespassory surveillance have failed, or are likely to fail.[18]

Surveillance implemented by covert entry is more intrusive than nontrespassory surveillance because of the unobserved physical presence of government agents on private premises without consent.[19] When government agents are physically present without consent in a target building, they can closely scrutinize all objects inadvertently discovered within plain view.[20] Moreover, apart from the privacy invasion attendant to the exposure of personal papers and effects,[21] the bare act of entering the building without consent invades the occupant's interest, protected by the fourth amendment, in the uninterrupted enjoyment of property.[22] Finally, the intrusiveness of electronic sur-

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17. *See* notes 19-29 *infra* and accompanying text.

18. *Cf.* 18 U.S.C. § 2518(3)(c) (1976) (standard of exigency required for the institution of electronic surveillance). The federal surveillance statute distinguishes "oral communications" (*i.e.*, face to face conversations) from "wire communications" (*i.e.*, telephone conversations). *Id.* § 2510 (1)-(2). Despite this distinction the statute does not recognize that the interception of oral communications is more likely to require covert entry than the interception of wire communications. Indeed, the statute is "devoid of explicit language either authorizing or prohibiting surreptitious entries of private premises . . . ." *In re* United States, 563 F.2d 637, 642 (4th Cir. 1977). For state statutes that set standards for covert entry in addition to those imposed for electronic surveillance, see note 128 *infra*.

19. These characteristics flow from the definition of covert entry set forth in note 5 *supra*.

20. United States v. Ford, 553 F.2d 146, 158 (D.C. Cir. 1977); *see In re* United States, 563 F.2d 637, 643 n.6 (4th Cir. 1977). That papers and belongings are among the primary objects of fourth amendment protection is evidenced by the amendment's express language ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. Const. amend. IV) and by Supreme Court decisions. *See, e.g.*, United States v. United States Dist. Court, 407 U.S. 297, 313 (1972) (tangible items); Stanford v. Texas, 379 U.S. 476, 482-84 (1965) (papers); Olmstead v. United States, 277 U.S. 438, 463 (1928) (papers and effects). Once government agents are granted the right to enter private premises, the inadvertent exposure of papers and belongings within plain view as they pursue their limited purpose is tolerated as an inevitable consequence of the entry. *See* Coolidge v. New Hampshire, 403 U.S. 443, 465-68 (1971). The observation of objects within plain view is tolerated, however, only if the initial entry into the premises can pass a test of reasonableness. *See* United States v. Ford, 553 F.2d at 162 n.52. Nonetheless, even if the police are granted the right to enter the premises, they cannot seize objects not within plain view. *See* United States v. Bradshaw, 490 F.2d 1097, 1101 (4th Cir.), *cert. denied*, 419 U.S. 895 (1974). The prohibition against observing objects not within plain view indicates that it is not merely the act of entry which is intrusive, and thereby requires a showing of reasonableness, but that the exposure of papers and objects is itself an intrusive act which requires adequate justification. *See* Michigan v. Tyler, 98 S. Ct. 1942, 1948 (1978).

21. *See* note 20 *supra*.

22. *See* United States v. United States Dist. Court, 407 U.S. 297, 313 (1972) ("[P]hysical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed . . . ."); Alderman v. United States, 394 U.S. 165, 177 n.10 (1969) (both "invasion of premises" and seizure of effects are fourth amendment intrusions); *cf.* Katz v. United States, 389 U.S. 349, 350 & n.4 (1967) (fourth amendment protects interests in addition to privacy interests).

Entry into business premises is equally subject to fourth amendment safeguards when the purpose of the entry is the enforcement of the criminal law. *Cf.* G.M. Leasing Corp. v. United

veillance implemented by covert entry is demonstrated by the fact that the physical presence, without consent, of government agents in the building would necessitate compliance with the reasonableness requirement of the fourth amendment[23] if it arose in an arrest or in a seizure of tangibles.[24]

That the presence of the government agents is unobserved aggravates the intrusiveness of the entry because it provides an opportunity for intentional deviation from the limited purposes of the search.[25] This objection to unobserved search has long been recognized and remains cogent today.[26] Of course, any evidence not discovered within plain view will be inadmissible under the exclusionary rule.[27] But, as a practical matter, the accused will have difficulty sustaining his burden of proving that unobserved government agents committed illegal acts[28] when, instead of removing property from the premises, the agents merely examine forbidden objects and thereby obtain untraceable leads to evidence existing elsewhere. As a result of the difficulty in excluding this evidence,[29] government agents have the impetus to expand illegally the scope of their activities in search of papers and belongings outside of their plain view.

Additionally, some courts have contended that covert entry adds to the intrusiveness of a surveillance operation because the owner or occupant has

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States, 429 U.S. 338, 352-54 (1977) (individuals in business entitled to full fourth amendment protection when entry furthers the enforcement of laws applicable to all individuals).

More recently, in Marshall v. Barlow's Inc., 98 S. Ct. 1816 (1978), the Court held that the regulatory business inspection at issue required a warrant, *id.* at 1826, and stated that the "basic purpose of this Amendment . . . is to safeguard the privacy *and security* of individuals against arbitrary invasions by government officials." *Id.* at 1820 (emphasis added) (quoting Camara v. Municipal Court, 387 U.S. 523, 528 (1967)). The focus of the search in *Marshall* was not an office, where papers are usually present, but rather a production area. Yet, the Court deemed the invasion more than insignificant, *id.* at 1825, a fact which supports the view that physical presence in private premises without consent is objectionable as an invasion of the right to quiet enjoyment of the premises as well as the right to shield private papers and belongings.

23. *See* note 8 *supra* and accompanying text.

24. *See* note 5 *supra*.

25. *See* United States v. Gervato, 340 F. Supp. 454, 462 (E.D. Pa. 1972) (unoccupied premises vulnerable to a general search), *rev'd*, 474 F.2d 40 (3d Cir.), *cert. denied*, 414 U.S. 864 (1973); 57 B.U. L. Rev. 587, 601 (1977).

26. *See* Entick v. Carrington, 95 Eng. Rep. 807, 817 (K.B. 1765); authorities cited note 25 *supra*.

27. *See generally* Stone v. Powell, 428 U.S. 465 (1976).

28. The government, however, bears the burden of proving that its evidence is not a product of illegality. *See* Nardone v. United States, 308 U.S. 338, 341 (1939); Harlow v. United States, 301 F.2d 361, 373 (5th Cir.), *cert. denied*, 371 U.S. 814 (1962); United States v. Coplon, 185 F.2d 629, 636 (2d Cir. 1950), *cert. denied*, 342 U.S. 920 (1952).

29. The defendant can prove that the agents have rummaged in the premises only by linking the derivative evidence to objects within the premises. This proof will be difficult since, once the agents have acquired knowledge which is of great use in carrying forward an investigation against its present suspects or expanding an investigation to other suspects, continued investigation is likely to produce means of fabricating a legitimate path to evidence which is, in fact, illegally acquired. *Cf.* United States v. Falley, 489 F.2d 33, 40-41 (2d Cir. 1973) (even when illegal seizure of address book is unquestioned, government successfully argued that it would have inevitably acquired evidence by completing an arduous saturation search that had barely begun at the time of the illegal seizure).

only after-the-fact notice of entry.[30] This argument appears to rely on the fact that electronic surveillance in general and no-knock entries, which also provide only after-the-fact notice, are classified as exceptionally intrusive and require a showing of exigency.[31] This reasoning, however, is unpersuasive. No-knock entries were placed on a strict exigency basis in order to minimize the exposure to the government of intimate activities unrelated to the purpose of the search.[32] Similarly, the exigency standard for electronic surveillance was designed to protect intimate conversations.[33] In a covert entry-surveillance operation, however, the premises are unoccupied as a matter of necessity.[34] The entry exposes neither intimate activities nor intimate conversations.[35]

Although the lack of prior notice does not render a covert entry operation more intrusive, the unobserved presence of government agents in private premises appreciably adds to the intrusiveness of a surveillance operation.[36] As a result, the fourth amendment's reasonableness requirement should limit the use of covert entry to circumstances in which nontrespassory surveillance is inadequate.[37]

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30. *See* United States v. Finazzo, No. 77-5186, slip op. at 18-19 (6th Cir Aug. 28, 1978); United States v. Agrusa, 541 F.2d 690, 703 (8th Cir. 1976) (Lay, J., dissenting), *cert. denied*, 429 U.S. 1045 (1977); *In re* United States, 438 F. Supp. 995, 1000 (D. Md. 1976), *rev'd on other grounds*, 563 F.2d 637 (4th Cir. 1977).

It has also been suggested that covert entry is exceptionally intrusive because it requires unseemly government conduct such as breaking-and-entering or entry by deceit. United States v. Agrusa, 541 F.2d 690, 704 (8th Cir. 1976) (Lay, J., dissenting), *cert. denied*, 429 U.S. 1045 (1977). This moral analysis, however, is irrelevant to the question of whether a particular act is intrusive or not. Covert entry is exceptionally intrusive regardless of whether it is accomplished through moral or immoral means. In any event, the Supreme Court has indicated that unseemliness, as such, does not enter into fourth amendment analysis. *See* Stone v. Powell, 428 U.S. 465, 484-86 (1976).

31. *See* notes 15-16 *supra* and accompanying text.

32. *See* Ker v. California, 374 U.S. 23 (1963). In addition, giving notice prevents the "shock" and "fright" as well as the "embarrassment" of the occupants. *Id.* at 57 (Brennan, J., dissenting). For a discussion of the *Ker* privacy basis, see Sonnenreich & Ebner, *No-Knock and Nonsense, An Alleged Constitutional Problem*, 44 St. John's L. Rev. 626, 647 (1970).

33. Berger v. New York, 388 U.S. 41, 60 (1967), *discussed at* note 16 *supra* and accompanying text.

34. *See* note 14 *supra*.

35. Only the papers and belongings of the occupant are exposed. The privacy interest in these latter items does not appear to be furthered by the no-notice rule. This can be gleaned from analyzing searches that are conducted with notice. Once the investigating officer announces his authority to enter, the inhabitants have no right to hide papers and belongings from view if they fall within the officer's legitimate sphere of search. United States v. Haywood, 284 F. Supp. 245, 249 (E.D. La. 1968); United States v. McKethan, 247 F. Supp. 324, 328 (D.D.C. 1965). Moreover, if the officer is refused admittance after giving notice, he has the right to break into the premises without further delay. 18 U.S.C. § 3109 (1976). Under this statute federal officers may interpret delay after notice as an attempt to destroy evidence and may take action to deny the occupants the opportunity to conceal or to destroy papers and belongings. *See* United States v. Smith, 524 F.2d 1287, 1287 (D.C. Cir. 1975); United States v. Manning, 448 F.2d 992, 1001 (2d Cir.), *cert. denied*, 404 U.S. 995 (1971). In effect, then, entries conducted with notice are conducted routinely without notice with respect to the exposure of papers and belongings.

36. *See* notes 19-29 *supra* and accompanying text.

37. *See* notes 11-17 *supra* and accompanying text.

II. PROBABLE CAUSE AND THE PRESEARCH JUSTIFICATION OF REASONABLENESS

Logically arising from the contention that covert entry in implementation of surveillance requires its own showing of reasonableness is the question of when the showing of reasonableness must be made. The accused can always challenge the reasonableness of a search after the fact in a suppression hearing. The government's obligation to demonstrate the reasonableness of a search prior to its execution, however, is merely coextensive with the fourth amendment requirement of showing probable cause.[38] As traditionally interpreted, probable cause demands a showing of reasonableness only to the extent that the government must show a reasonable belief[39] that the objects of the search are related to the crime[40] and are in the place to be explored.[41] Therefore, the traditional standard imposes no obligation to justify in advance the reasonableness of covert entry since its use affects neither the place nor the criminal relevance of the objects of the electronic search. It will be demonstrated, however, that a flexible probable cause standard exists under which more intrusive searches are subject to a more stringent test.[42] Guidelines will be suggested to determine under what circumstances the flexible probable cause test requires that an exceptionally intrusive action be justified in advance.[43] Pursuant to these guidelines, it will be shown that covert entry requires a presearch showing of reasonableness,[44] that is, that surveillance without entry is inadequate.[45]

A. *Flexible Probable Cause*

1. The Early Cases

Under the traditional view all that is necessary for a government showing of probable cause sufficient to support the issuance of a warrant is a reasonable belief that a crime has been or is being committed, that the objects of the search are related to the crime, and that the objects of the search are in the place to be explored.[46]

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38. The fourth amendment provides that "no Warrants shall issue, but upon probable cause . . . ." U.S. Const., amend. IV. This probable cause requirement functions as the standard of antecedent justification by which a "particular decision to search is tested against the constitutional standard of reasonableness." Zurcher v. Stanford Daily, 98 S. Ct. 1970, 1976 (1978) (quoting Camara v. Municipal Court, 387 U.S. 523, 534-35 (1967)).

39. Brinegar v. United States, 338 U.S. 160, 175-76 (1949) (citing Carroll v. United States, 267 U.S. 132, 162 (1925)).

40. Warden v. Hayden, 387 U.S. 294, 307 (1967); Amsterdam, *supra* note 5, at 358.

41. Amsterdam, *supra* note 5, at 358; *see* Camara v. Municipal Court, 387 U.S. 523, 534-35 (1967); Jones v. United States, 362 U.S. 257, 271 (1960); Durham v. United States, 403 F.2d 190, 193 (9th Cir. 1968); Schoeneman v. United States, 317 F.2d 173, 176 (D.C. Cir. 1963). For a recent statement reiterating the three elements of the traditional view, see Zurcher v. Stanford Daily, 98 S. Ct. 1970, 1978 (1978) (citing United States v. Manufacturers Nat'l Bank of Detroit, 536 F.2d 699, 703 (1976), *cert. denied,* 429 U.S. 1039 (1977)).

42. *See* pt. II(A) *infra*.

43. *See* pt. II(B) *infra*.

44. *See* pt. II(B) *infra*.

45. *See* pt. I *supra*.

46. *See* notes 39-41 *supra* and accompanying text.

Beginning with *Camara v. Municipal Court*,[47] however, the probable cause standard has been interpreted more flexibly. In *Camara*, the Supreme Court extended the need to obtain a warrant to a municipality's noncriminal search for building code violations.[48] In so extending the warrant requirement to mass routine inspections, the Court was confronted with the inappropriateness of measuring probable cause under the traditional test[49] since municipalities cannot possibly substantiate the probable existence of violations in buildings with the same confidence that police, as a result of focused investigation, can assert the probable presence of criminally related objects in a single suspect building.[50] Accordingly, the Court approved the issuance of warrants by adopting a flexible probable cause test which balanced "the need to search against the invasion which the search entails."[51] Thus, at least in so far as a search furthered the enforcement of civil prohibitions, *Camara* converted the probable cause test from a narrow scrutiny of the place and objects of the search to a balancing of the interests in order to determine the search's overall reasonableness.[52]

The Court applied a parallel analysis to a criminal search in *Terry v. Ohio*.[53] In *Terry*, a policeman, on the basis of less than traditional probable cause, searched a person whom he reasonably suspected to be armed, dangerous, and engaged in criminal activity.[54] The Court decided that the protection of police and third parties outweighed the intrusion caused by a limited search for weapons and upheld the search on less than the traditional test's requirement of reasonable belief.[55] Although *Terry* established flexible probable cause in the context of a warrantless criminal search,[56] its balancing of interests approach was subsequently extended by the Court in dictum in *United States v. United States District Court*[57] to at least one type of criminal warrant. In that case, the Court suggested that probable cause for electronic surveillance orders in criminal investigations that protect domestic security

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47. 387 U.S. 523 (1967).

48. *Id.* at 529-30.

49. Note, *The Right of the People to be Secure: The Developing Role of the Search Warrant*, 42 N.Y.U. L. Rev. 1119, 1120 (1967) [hereinafter cited as *Search Warrant*].

50. 387 U.S. at 534-36.

51. *Id.* at 537.

52. *See* Greenberg, *The Balance of Interest Theory and the Fourth Amendment—A Selective Analysis of Supreme Court Action Since* Camara *and* See, 61 Cal. L. Rev. 1011, 1013-14 (1973); LaFave, *"Street Encounters" and the Constitution:* Terry, Sibron, Peters *and Beyond*, 67 Mich. L. Rev. 39, 55-56 (1968). For two recent administrative searches applying *Camara* principles, see Michigan v. Tyler, 98 S. Ct. 1942, 1949 (1978) and Marshall v. Barlow's Inc., 98 S. Ct. 1816, 1822 (1978).

53. 392 U.S. 1, 21 (1968); *see* Greenberg, *supra* note 52, at 1014-15; LaFave, *supra* note 52, at 54-56.

54. *See* 392 U.S. at 24.

55. Although the *Terry* Court referred to the standard of probability as a reasonable belief, *id.* at 27, a terminology which is identical to that used in the traditional probable cause standard, *see* Brinegar v. United States, 338 U.S. 160, 175-76 (1949), the Court expressly stated that its standard was less stringent. 392 U.S. at 24, 27.

56. *See* 392 U.S. at 20.

57. 407 U.S. 297 (1972).

can be lower than that required for surveillance orders in investigations of ordinary crime.[58]

Although the Supreme Court has not expressly invoked the *Camara* flexible probable cause test to evaluate a warrant procured in the investigation of an ordinary crime, two decisions suggest that this test applies nevertheless in such a case. In *Berger v. New York,*[59] the Supreme Court added to the traditional probable cause burden by requiring a demonstration of exigency whenever the government wishes to obtain an order for the electronic surveillance of conversation.[60] In so doing, the Court established that the flexible probable cause standard can not only be lessened, as it was in *Camara* and *Terry,* but can also become more rigorous when an exceptionally intrusive search is involved.[61]

Schmerber v. California[62] similarly points toward a flexible and, in appropriate situations, more restrictive probable cause standard. *Schmerber* suggested that a clear indication of the presence of search objects, rather than a mere reasonable belief in their existence, is a precondition to a search that intrudes into the body, such as the blood test at issue in the case.[63] Although the suggestion arose in the context of a warrantless search,[64] *Schmerber*'s additional assertion that bodily intrusions should nearly always be conducted pursuant to a warrant[65] would appear to require a clear indication for the issuance of a warrant authorizing intrusions into the body.[66]

As the foregoing cases show, the traditional probable cause test has been interpreted more flexibly in recent years. Moreover, the flexible probable cause test which has resulted is not a "one-way street" used only to lower presearch requirements when government interests are compelling.[67] Instead, as *Berger* and *Schmerber* indicate, presearch requirements must be raised when an exceptionally intrusive search is to be conducted.[68]

2. Recent Developments

Flexible probable cause continues to be a viable approach in defining the government's burden of presearch justification. In the recent case of *Zurcher v. Stanford Daily,*[69] the Supreme Court held that the fourth amendment does

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58. *Id.* at 322-23.

59. 388 U.S. 41 (1967), *discussed at* note 16 *supra* and accompanying text.

60. *Id.* at 60.

61. *See* LaFave, *supra* note 52, at 55 n.82; *Search Warrant, supra* note 49, at 1129-30.

62. 384 U.S. 757 (1966), *discussed at* note 12 *supra* and accompanying text.

63. *Id.* at 758-59.

64. *See id.* at 770.

65. *Id.*

66. *Cf.* United States v. Crowder, 543 F.2d 312, 316 (D.C. Cir. 1976) (adversary hearing required when government requests right to remove evidence by surgery), *cert. denied,* 429 U.S. 1062 (1977); Note, *Fourth Amendment Balancing and Searches Into the Body,* 31 U. Miami L. Rev. 1504, 1513 (1977) (request to perform surgery should be granted only when object sought is only available evidence).

67. Gooding v. United States, 416 U.S. 430, 464-65 (1974) (Marshall, J., dissenting).

68. *See* notes 59-66 *supra* and accompanying text.

69. 98 S. Ct. 1970 (1978).

not require a showing that a subpoena duces tecum would be impracticable before a warrant can be issued to search the premises of a third party unsuspected of crime[70] and that when the third party premises to be searched are that of a newspaper, an even clearer showing of impracticability is not required.[71] Although the Court stated that the traditional showing of probable cause—the reasonable belief of finding criminally related objects in a given location—was per se grounds for the issuance of any criminal warrant,[72] the decision nevertheless evinces the Court's continued support for the flexible probable cause test.

In its decision, the *Zurcher* majority rejected more stringent warrant requirements on the ground that searches of unsuspected third parties were not exceptionally intrusive. Indeed, as Justice White noted in the majority opinion, searches of the premises of third parties not suspected of a crime are, if anything, less intrusive than ordinary searches of premises occupied by suspects since the objects of the search generally will not incriminate the unsuspected third party.[73] On the other hand, by requiring a magistrate to apply warrant requirements with "particular exactitude" in a search invading first amendment interests,[74] the Court did seem to give more explicit recognition to the flexible probable cause standard. The Court viewed this additional obligation of "particular exactitude" as an adequate safeguard against the potential abuses of the power to search because it imposed a duty upon a magistrate to tailor the search warrant so as to prevent rummaging through extraneous materials, interference with the timely publication of the newspaper, and bulk seizures that would be tantamount to "prior restraints."[75] Moreover, the Court expressly reserved the right to impose additional requirements if "particular exactitude" proved to be an inadequate curb upon the police in searches invading first amendment interests.[76]

Thus, the disposition of the newspaper claim in *Zurcher,* as well as the disposition of the unsuspected third party claim, is indicative of a pragmatic rather than a doctrinaire approach to probable cause.[77] The Court's rejection of the novel contention that the impracticability of a subpoena should be a precondition to obtaining a search warrant should not be interpreted as a renunciation of the policy established in *Berger* and *Schmerber* of requiring, in appropriate circumstances, a stricter standard of presearch justification than that of traditional probable cause.[78]

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70. *Id.* at 1979. For the rule of impracticability fashioned by the lower courts in *Zurcher,* see *id.* at 1975.

71. *See id.* at 1980-83.

72. *Id.* at 1978.

73. *Id.* at 1976.

74. *Id.* at 1982.

75. *Id.*

76. *Id.*

77. Justice Powell also approved of the flexible approach: "As the Court's opinion makes clear . . . the magistrate must judge the reasonableness of every warrant in light of the circumstances of the particular case, carefully considering the description of the evidence sought, the situation of the premises, and the position and interests of the owner or occupant." *Id.* at 1984 (Powell, J., concurring).

78. *See* notes 59-66 *supra* and accompanying text.

B. *The Presearch Justification of Reasonableness for Covert Entry*

Not all exceptionally intrusive police actions should be subjected to standards of presearch justification more stringent than those imposed under the traditional probable cause test. Some police actions, even when occurring in a search pursuant to warrant, are justifiable only by circumstances that do not arise until the moment of search. For example, justification for entering an occupied premises without a knock on the door and an announcement of authority cannot possibly exist before the search. Instead, the need for the no-knock entry arises on the spur of the moment when the police, upon arriving at the place of search, determine that evidence is about to be destroyed.[79]

When prior justification is not an impossibility, however, it is suggested that the need for more stringent probable cause requirements should be determined by balancing the burden on law enforcement officials against the fulfillment of the functions performed by the process of prior justification.[80] These functions are the avoidance of a postsearch determination of reasonableness in which hindsight clouds the factual issues,[81] and the substitution of the judgment of magistrates for that of overzealous executing officers to prevent unjustifiable intrusions before they are carried out.[82] Based upon these guidelines, the reasonableness of covert entry should be determined prior to search.

The additional burden on the government of providing prior justification for a covert entry does not appear significant. Indeed, responsible law officers appear willing to show why some sort of covert entry is required.[83] Additionally, prior justification for covert entry imposes only an administrative burden on the government and does not directly inhibit its ability to apprehend

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79. *See* People v. Gastelo, 67 Cal. 2d 586, 588-89, 432 P.2d 706, 708, 63 Cal. Rptr. 10, 12 (1967).

80. *Cf.* Chimel v. California, 395 U.S. 752, 761-63 (1969) (warrantless search incident to arrest protects arresting officer); Carroll v. United States, 267 U.S. 132, 153 (1925) (warrantless search of car for contraband justified by vehicle's mobility).

81. *See* United States v. Martinez-Fuerte, 428 U.S. 543, 565 (1976). This case also sets forth another purpose of prior justification: to give prior notice of authority to search to the party whose person or property is to be searched. *Id.* This function, however, is not served by a surveillance order authorizing covert entry because, by definition, covert entry is a secret operation in which the occupants of the premises to be searched are not informed of the entry until after the fact. *See* note 14 *supra* and accompanying text.

82. *See* United States v. United States Dist. Court, 407 U.S. 297, 316-17 (1972).

83. *See* McNamara, *The Problem of Surreptitious Entry To Effectuate Electronic Eavesdrops: How Do You Proceed After the Court Says "Yes"?*, 15 Am. Crim. L. Rev. 1, 27 (1977) (author, an assistant United States attorney, recommends inclusion of express entry provision in a surveillance order as a means of indicating that magistrate struck privacy-public interest balance in favor of entry). Indeed, law officers were aware of the need for prior justification of covert entry in surveillance before the issue ever surfaced in the courts. *See* National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance, Electronic Surveillance Report (1976) [hereinafter cited as National Commission]. In this report, the majority of the commission recommended that judges be required to authorize explicitly entry to plant a surveillance device. *Id.* at 15. The recommendation was based in part on the doubts of law enforcement officials as to the propriety of entering without authorization. *See id.* at 14.

criminals. In all but the rarest of circumstances, the government must obtain an electronic surveillance order before it may conduct surveillance.[84] Therefore, adding a justification of covert entry to the other contents of the surveillance application, though increasing the paperwork,[85] does not entail an additional trip to the magistrate, which might further delay an opportunity to gather evidence. Moreover, the proof of the inadequacy of surveillance without entry will add little to the administrative burden when the government's request for permission to enter is in good faith and not prompted by the desire to rummage within the premises.[86] Because covert entry is a difficult and dangerous procedure,[87] a good faith request will probably be the result of the government's already completed inquiry into the inadequacy of surveillance without entry.

On the other hand, while imposing only an incremental burden upon the government, mandatory presearch justification of covert entry appreciably furthers at least one purpose of presearch justification. Admittedly, one function of presearch justification, the avoidance of a postsearch determination of reasonableness in which hindsight distorts the factual issues,[88] is not served. In many instances the government's after-the-fact justification of the covert action may be of a technical or otherwise clear-cut variety which is plainly attributable to what was known about the premises or the search subjects prior to obtaining the surveillance order.[89]

A prior determination of the reasonableness of covert entry, however, undoubtedly does perform the function of substituting the judgment of a judge for that of an overzealous law enforcement officer. Of course, an individual might be adequately protected without a prior determination by a judge if the investigating official's judgment was tempered by his recognition

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84. United States v. United States Dist. Court, 407 U.S. 297, 316-18 (1972). A surveillance order is not necessary when one party to the desired conversations consents to the surveillance. *See* United States v. White, 401 U.S. 745, 750 (1971). In addition, even if consent is not given the surveillance, the federal statute controlling government-conducted electronic surveillance permits the search without an order when an "emergency situation exists with respect to conspiratorial activities threatening the national security interest or to conspirational activities characteristic of organized crime." 18 U.S.C. § 2518(7)(a) (1976). State exceptions to the surveillance order requirement can be no broader than the federal exceptions. *See* note 3 *supra*.

85. Requiring prior approval of covert entry would only incrementally add to the lengthy process whereby a detailed application must be approved by a law enforcement official before it is submitted to the magistrate. *See* 18 U.S.C. §§ 2516(1), 2518(1) (1976). For a discussion of the arduousness of the present procedures, see National Commission, *supra* note 83, at 7.

86. *See* note 20 *supra*.

87. *See* National Commission, *supra* note 83, at 15, 44.

88. *See* note 81 *supra* and accompanying text.

89. For example, the inadequacy of wiretapping as an alternative to entering covertly to install a surveillance device can be demonstrated by simply resubmitting the unproductive wiretapping tapes which, by statute, must already have been brought to the attention of the magistrate upon the completion of the unsuccessful wiretap. *See* 18 U.S.C. § 2518(8)(a) (1976). The existence of an antiwiretapping phone system would also be clearly probative of the inadequacy of tapping. *See* United States v. Volpe, 430 F. Supp. 931, 936 (D. Conn. 1977). Once wiretapping is proved inadequate, the impossibility of acquiring face-to-face conversations by means other than covert entry could be shown by readily verifiable facts, such as the structural impossibility of using adjoining premises to intercept in-room conversations.

that the entry might need to be justified in an after-the-fact suppression hearing. It is equally possible, however, that the opportunity to scrutinize legally any incriminating matter within plain view and to scrutinize illegally any concealed objects while he is on the premises unobserved[90] could well lead an officer to gamble that the unauthorized covert entry will be deemed reasonable in a suppression hearing. The presearch justification of entry eliminates the risk in relying on a law enforcement official's discretion and instead affords the individual more solid protection in the hands of an impartial magistrate. Since the magistrate's disinterested determination fulfills perhaps the most important purpose of the requirement of prior justification[91] without imposing a considerable burden upon the government,[92] it is maintained that the fourth amendment requires that the government demonstrate the reasonableness of covert entry, namely that less intrusive means of electronic surveillance are inadequate, prior to the issuance of the warrant.

III. Express Warrant Authorization for Covert Entry

Without deciding the threshold question of whether entry in surveillance requires a presearch determination of reasonableness,[93] several courts have decided that the magistrate's approval of the entry need not take the form of an express warrant authorization.[94] The better view, however, is that the particularity clause of the fourth amendment requires express warrant authorization of covert entry.[95] It will be maintained that this requirement cannot be satisfied by arguing that express authorization of the interception of in-room conversations is tantamount to express authorization of a covert entry.[96] Finally, it will be suggested that the entry provision, although mandatory, need not be drawn with exactitude.[97]

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90. *See* notes 20-21, 25-29 *supra* and accompanying text.

91. *See* United States v. United States Dist. Court, 407 U.S. 297, 316-17 (1972).

92. *See* notes 83-87 *supra* and accompanying text.

93. *But see* note 94 *infra*.

94. United States v. Dalia, 575 F.2d 1344, 1346 (3d Cir.), *cert. granted*, 99 S. Ct. 78 (1978) (No. 77-1722); United States v. Scafidi, 564 F.2d 633, 640 (2d Cir. 1977), *cert. denied*, 436 U.S. 903 (1978); United States v. London, 424 F. Supp. 556, 560 (D. Md. 1976), *aff'd on other grounds sub nom.* United States v. Clerkley, 556 F.2d 709 (4th Cir. 1977). *Scafidi* and *London* suggest that probable cause for surveillance is adequate presearch justification for entry. "Once a judicial officer is convinced by the facts presented to him that electronic surveillance will aid in the detection of crime, his authorization that it be used should then transfer to the appropriate police agency the decision as to the precise mechanical means whereby the order is to be carried out." United States v. Scafidi, 564 F.2d at 640. "Realistically, this intrusion [covert entry] was no greater than the interceptions themselves, which were judicially authorized after a finding of probable cause." United States v. London, 424 F. Supp. at 560. Both cases, however, primarily relied on the "implied authorization" theory in deciding that an express provision is not necessary. *See* pt. III(B) *infra*.

95. United States v. Finazzo, No. 77-5186, slip op. at 27 (6th Cir. Aug. 28, 1978) (Celebrezze, J., concurring); *In re* United States, 563 F.2d 637, 644 (4th Cir. 1977) (dictum); United States v. Ford, 553 F.2d 146, 155 (D.C. Cir. 1977); United States v. Finazzo, 429 F. Supp. 803, 806-07 (E.D. Mich. 1977), *aff'd on other grounds*, No. 77-5186 (6th Cir. Aug. 28, 1978); *see* pt. III(A) *infra*. *See also* United States v. Agrusa, 541 F.2d 690, 696 n.13 (8th Cir. 1976), *cert. denied*, 429 U.S. 1045 (1977).

96. *See* pt. III(B) *infra*.

97. *See* pt. III(C) *infra*.

A. *The Particularity Clause and Express Authorization*

Three fourth amendment requirements exist for a valid warrant—issuance by a neutral magistrate, probable cause, and particularity.[98] Of these, only particularity must be satisfied by the inclusion of an express provision in the warrant. The particularity requirement demands that a warrant "particularly describ[e] the place to be searched and the persons or things to be seized."[99]

The judiciary has traditionally applied a literal interpretation to the language of the particularity clause. The Supreme Court has characterized the language of the clause as "precise and clear"[100] and therefore satisfied when the location and the objects of the search have been adequately described in the warrant.[101]

Notwithstanding the strong precedential support for the literal approach to particularity, such an approach should not be a talismanic solution to every instance in which the facial adequacy of a warrant is in question.[102] This point is dramatically illustrated by *Katz v. United States*.[103] In that case, the Supreme Court rejected the long-standing view that the original purpose of the fourth amendment's "unreasonable searches and seizures" clause limited its protection to the tangible interests represented by the clause's reference to "persons, houses, papers, and effects."[104] The Court instead decided that the broader fourth amendment objective of protecting "people," rather than their bodies and their property, encompassed a right to conversational privacy.[105]

Similarly, although the particularity clause's literal requirement of describing the "objects" and "place" of search is reflective of an original intention to prevent ransacking physical intrusions,[106] it is submitted, on the basis of

98. *See* Warden v. Hayden, 387 U.S. 294, 309-10 (1967); Amsterdam, *supra* note 5, at 358.

99. U.S. Const. amend. IV.

100. Stanford v. Texas, 379 U.S. 476, 481 (1965).

101. *See id.;* United States v. Johnson, 541 F.2d 1311, 1313 (8th Cir. 1976); J. Cook, *supra* note 12, § 26, at 177-78; Amsterdam, *supra* note 5, at 358. *See generally* Mascolo, *Specificity Requirements for Warrants Under the Fourth Amendment: Defining the Zone of Privacy*, 73 Dick. L. Rev. 1 (1968).

102. One case eschewing the literal approach by expanding the particularity clause's requirements is Berger v. New York, 388 U.S. 41 (1967). The *Berger* Court criticized the New York surveillance statute for allowing the authorization of eavesdropping at length, continuously, without prompt execution, and without termination upon obtaining the desired conversations. *Id.* at 59-60. The federal surveillance statute, drawn to comply with *Berger* without unduly hindering law enforcement, *see* note 3 *supra*, requires inclusion in the surveillance order of the temporal limitations suggested by the court with only slight modification. *See* 18 U.S.C. § 2518(4)(c), (5) (1976).

103. 389 U.S. 347 (1967).

104. *Id.* at 352-53. *Katz* overruled Olmstead v. United States, 277 U.S. 438, 463, 465 (1928), in which the Court relied on the original purpose and literal construction of the "unreasonable searches and seizures" clause to exclude intangibles from fourth amendment protection. *Compare* Katz v. United States, 389 U.S. at 364-67 (Black, J., dissenting) (*Katz* majority criticized for departing from original purpose and literalism) *with* Olmstead v. United States, 277 U.S. at 476 (Brandeis, J., dissenting) (*Olmstead* majority criticized for adhering to literal interpretation of fourth amendment).

105. 389 U.S. at 353; *see* Olmstead v. United States, 277 U.S. 438, 472-74 (1928) (Brandeis, J., dissenting) (fourth amendment should have "wider application than the mischief which gave it birth" and should be construed so as to preserve "value" of its "general principles").

106. *See* Katz v. United States, 389 U.S. 347, 367-68 (1967) (Black, J., dissenting) (quoting

Katz, that the particularity clause should be recognized as more broadly functioning to "protect people" by limiting a search in all respects to those government actions that have been justified by a presearch showing of probable cause. This function is evidenced by the manner in which the particularity clause as traditionally interpreted has interacted with the traditional probable cause standard.

Operating in conjunction with the traditional probable cause standard,[107] the particularity clause requires that the warrant expressly name only those objects which have been shown to be probably related to a crime[108] and only those places which have been shown to be probable locations of the search objects.[109] In doing so, the particularity of the warrant notifies the occupant of the premises of the scope of the executing officer's authority.[110] Even more significantly, the particularity requirement provides protection to the individual by requiring the executing officer to look only to the warrant to determine the extent of his authority.[111] This clear-cut rule for determining the scope of his authority prevents the officer from overestimating the extent to which the issuing magistrate has found the proof of probable cause to be adequate and thus minimizes the risk that the officer will search unjustified places and seize unauthorized objects.[112]

In recent years, the traditional probable cause standard has been applied more flexibly.[113] When this doctrine of flexible probable cause requires that the government show justification for aspects of a search other than its place and its objects, such as an electronic surveillance search implemented by covert entry,[114] it is suggested that the warrant should expressly indicate,

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Olmstead v. United States, 277 U.S. 438, 464 (1928)); Stanford v. Texas, 379 U.S. 476, 481 (1965); Mascolo, *supra* note 101, at 2-3.

107. *See* notes 39-41 *supra* and accompanying text.

108. *See, e.g.*, Andersen v. Maryland, 427 U.S. 463, 430-82 (1976) (objects named in warrant sufficiently related to a specific crime); Marcus v. Search Warrant, 367 U.S. 717, 732 (1961) (warrant overbroad for failing to specify only those publications which have been shown to be probably obscene); Mascolo, *supra* note 101, at 6.

109. *See* Zurcher v. Stanford Daily, 98 S. Ct. 1970, 1975-76 (1978); United States v. Hinton, 219 F.2d 324, 326 (7th Cir. 1955); Amsterdam, *supra* note 5, at 358; Mascolo, *supra* note 101, at 6.

110. United States v. Johnson, 541 F.2d 1311, 1315 (8th Cir. 1976); United States v. Marti, 421 F.2d 1263, 1268 (2d Cir. 1970), *cert. denied*, 404 U.S. 947 (1971); *see* United States v. Martinez-Fuerte, 428 U.S. 543, 565 (1976).

111. Mascolo, *supra* note 101, at 10-11; *see* Stanford v. Texas, 379 U.S. 476, 485 (1965); Marron v. United States, 275 U.S. 192, 196 (1927); United States v. Johnson, 541 F.2d 1311, 1315 (8th Cir. 1976); United States v. Marti, 421 F.2d 1263, 1268 (2d Cir. 1970), *cert. denied*, 404 U.S. 947 (1971). To determine the scope of his authority, an officer may also look to an underlying affidavit of probable cause if it is incorporated by reference and attached to the warrant. *See* United States v. Johnson, 541 F.2d at 1315; United States v. Moore, 461 F.2d 1236, 1238 (D.C. Cir. 1972). *But see* United States v. Armocida, 515 F.2d 29, 45-46 (3d Cir. 1975) (dictum) (incorporation of magistrate's oral statements by reference may be permissible).

112. *See* Steele v. United States, 267 U.S. 498, 503-04 (1925); United States v. Johnson, 541 F.2d 1311, 1313 (8th Cir. 1976); United States v. Marti, 421 F.2d 1263, 1268 (2d Cir. 1970), *cert. denied*, 404 U.S. 947 (1971).

113. *See* pt. II(A) *supra*.

114. *See* pt. II(B) *supra*.

both to the searching party and the party to be searched, whether the magistrate has decreed the additional intrusion of covert entry justifiable. Although such a provision will not give prior notice to the owners or occupants of the premises since the entry is by definition covert,[115] it will fulfill the particularity clause function of clearly informing the officer whether or not the entry has been approved.[116] In the same way that express authorization of the target premises and the conversations to be seized minimizes possible official misunderstanding as to the justifiable scope of surveillance,[117] express authorization of the covert entry protects the individual from an unjustifiable entry. To deny the individual this added margin of protection is to interpret the particularity clause too narrowly in light of both the breadth with which fourth amendment language has been usually interpreted[118] and the need to keep the particularity clause abreast of the recent changes in the probable cause standard.[119]

B. *The Implied Authorization Argument*

The language of a warrant is the sole source of search authority unless the warrant incorporates supplementary information by express reference.[120] Thus, unincorporated indications of a planned covert entry, such as the magistrate's actual knowledge, cannot be used to fulfill the warrant authorization requirements.[121] Nevertheless, two courts have argued that the language of the warrant implies authorization to enter covertly when the warrant expressly authorizes the interception of in-room, as opposed to telephone, conversations.[122]

The faulty premise of this argument lies in the presumption that covert entry inevitably implements in-room interceptions.[123] At the Supreme Court level alone, four cases have involved the interception of in-room conversations

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115. *See* note 81 *supra*.

116. *See* notes 111-12 *supra* and accompanying text.

117. *See* notes 107-12 *supra* and accompanying text.

118. *See* notes 102-05 *supra* and accompanying text.

119. *See* notes 106-14 *supra* and accompanying text.

120. *See* United States v. Johnson, 541 F.2d 1311, 1315 (8th Cir. 1976); United States v. Moore, 461 F.2d 1236, 1238 (D.C. Cir. 1972).

121. *See* United States v. Armocida, 515 F.2d 29, 45-46 (3d Cir. 1975); United States v. Ford, 414 F. Supp. 879, 884 (D.D.C. 1976), *aff'd*, 553 F.2d 146 (D.C. Cir. 1977).

122. United States v. Scafidi, 564 F.2d 633, 640 (2d Cir. 1977), *cert. denied*, 436 U.S. 903 (1978); United States v. London, 424 F. Supp. 556, 560 (D. Md. 1976), *aff'd on other grounds sub nom.* United States v. Clerkley, 556 F.2d 709 (4th Cir. 1977); *see* United States v. Dalia, 575 F.2d 1344, 1346 & n.3 (3d Cir. 1978), *cert. granted*, 99 S. Ct. 78 (1978) (No. 77-1722) (sustains surveillance order without entry provision because there was probable cause for surveillance, reasonably executed covert entry, and awareness by the issuing magistrate that covert entry was "appropriate").

123. United States v. Scafidi, 564 F.2d 633, 640 (2d Cir. 1977) ("It would be highly naive to impute to a district judge a belief that the device required to effect his bugging authorization did not require installation."), *cert. denied*, 436 U.S. 903 (1978); United States v. London, 424 F. Supp. 556, 560 (D. Md. 1976) ("Necessarily concomitant to and envisioned in the court order, this court believes, was the covert installation of the recording devices."), *aff'd on other grounds sub nom.* United States v. Clerkley, 556 F.2d 709 (4th Cir. 1977).

without the use of covert entry.[124] An expanding technology has provided alternatives to in-room installations[125] and has increased the likelihood that the government will choose means of in-room interception that do not entail the acknowledged risks of discovery attendant to a covert entry.[126] Moreover, as a practical matter, the "Watergate overtones" of covert entry have apparently influenced government officials to employ other means of acquiring in-room conversations.[127] Finally, the Connecticut, Massachusetts, and New York surveillance statutes, which require express authorization for secret entry when it is used to implement electronic surveillance,[128] further indicate that entry is not inextricably linked to in-room surveillance.

The lack of a hand-in-hand relationship between in-room interception and covert entry fatally flaws the implied authorization argument. The fourth amendment requires that the warrant allow the executing officer to be able to "ascertain" with "reasonable effort" the scope of his authority.[129] Clearly, then, it is not reasonable to interpret silence as a green light to take an action like covert entry, which is intrusive enough to require a mandatory presearch determination of reasonableness,[130] when that act of covert entry does not inevitably accompany the activities authorized by the warrant's express language.[131]

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124. *See* Desist v. United States, 394 U.S. 244, 244-45 (1969) (microphone between doors of adjoining hotel rooms); Clinton v. Virginia, 377 U.S. 158 (1964) (spike mike in wall), *rev'g per curiam* 204 Va. 275, 130 S.E.2d 437 (1963); Silverman v. United States, 365 U.S. 505, 506 (1961) (spike mike in wall); Goldman v. United States, 316 U.S. 129, 131-34 (1942) (detectophone placed on outer wall).

125. *See* National Commission For the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance, Commission Studies 169, 171-72, 181-82 (1976).

126. National Commission, *supra* note 83, at 15, 44.

127. *See* United States v. Ford, 414 F. Supp. 879, 881 (D.D.C. 1976), *aff'd*, 553 F.2d 146 (D.C. Cir. 1977). In *Ford*, the police elected to employ a bomb scare ruse in order to avoid the stigma of breaking-and-entering. *Id.*

128. *See* Conn. Gen. Stat. Ann. § 54-41(e)(10) (West Supp. 1978); Mass. Ann. Laws ch. 272, § 99(D)(5) (Michie/Law. Co-op Supp. 1978); N.Y. Crim. Proc. Law § 700.30(8) (McKinney 1971).

129. Steele v. United States, 267 U.S. 498, 503 (1925); United States v. Johnson, 541 F.2d 1311, 1313 (8th Cir. 1976).

130. *See* pt. II(B) *supra*.

131. An additional argument against the express warrant authorization of covert entry was set forth in United States v. London, 424 F. Supp. 556 (D. Md. 1976), *aff'd on other grounds sub nom.* United States v. Clerkley, 556 F.2d 709 (4th Cir. 1977). In that case, the district court contended that covert entry need not be authorized in the warrant because, as a practical matter, even if a covert entry provision were constitutionally required, and was left out, the content of any of the conversations intercepted would still be admissible so long as the electronic surveillance itself was expressly authorized in the warrant. *Id.* at 560 (dictum) (citing Wong Sun v. United States, 371 U.S. 471, 488 (1963)). This contention is based upon the fourth amendment doctrine of "attenuation," which admits unconstitutionally seized evidence when the causation between the police's illegal act and the ultimate seizure of the evidence is "attenuated," as opposed to proximate, because of sufficient intervening acts. Wong Sun v. United States, 371 U.S. 471, 487-88 (1963); Nardone v. United States, 308 U.S. 338, 341 (1939). Although this doctrine is notoriously murky, Amsterdam, *supra* note 5, at 361, its requirements appear to be that the unconstitutional police actions produce the evidence in unforeseeable ways, *see* Stone v. Powell, 428 U.S. 465, 486-88 (1976) (illegally acquired evidence is to be excluded only when the deterrent effect on the police is appreciable), or by means of intervening and sufficiently voluntary

C. *Express Authorization Specifics*

Although express warrant authorization for covert entry should be mandatory, the warrant need only state that a covert entry operation has been authorized, and need not specify the manner or time of day of entry.[132] Limiting the government to a specified manner of covert entry would serve little purpose. In the absence of injury to the occupants or significant damage to the premises, it is difficult to see how one manner of covert entry could be more objectionable than the next.[133] It is, moreover, unnecessary to proscribe either of these abuses by requiring a warrant description of the manner of covert entry since it is highly unlikely that the government would attempt to frustrate the inherently surreptitious purpose of the covert entry by causing personal injury or significant property damage in its execution.[134]

Case law addressing time of day in other than covert entry situations indicates that it is not a significant factor in determining the fourth amendment reasonableness of a search in either presearch or postsearch scrutiny.[135] To the limited extent that nighttime searches of occupied premises have been deemed exceptionally intrusive, their offensiveness has been said to lie in the necessity of awakening the occupants in order to provide notice of search.[136] In entering to plant surveillance equipment, however, the government agents will strive to conceal their purpose by entering the premises when unoc-

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statements. *See, e.g.*, United States v. Mullens, 536 F.2d 997, 1000 (2d Cir. 1976). Neither of these alternative preconditions to the application of the "attenuation" doctrine appear to be satisfied in the case of covert entry. The only utterances involved in a covert entry are the seized conversations themselves which are certainly not made voluntarily to the government listeners. Moreover, it is equally clear that the police, in covertly entering, intended to capture the very conversations which they eventually "seize" and that, therefore, the conversations are not an unforeseeable product of the entry.

The cryptic district court opinion may be suggesting, however, that the relevant claim of causation is "attenuated" because it extends, not from the illegal entry to the seizure of conversations, but from the illegal omission of an entry provision to the seizure. Lengthening the causal chain does not attenuate the relationship between the illegality and the seizure of the evidence because, in any event, the failure to provide the covert entry provision in the warrant will render the conversations inadmissible. This is evident from other cases in which evidence has been excluded when the warrant is facially inadequate. *E.g.*, Stanford v. Texas, 379 U.S. 476 (1965); Marcus v. Search Warrant, 367 U.S. 717 (1961).

132. *Cf.* United States v. Ford, 553 F.2d 146, 169-70 (D.C. Cir. 1977). Although the *Ford* court nominally limited its holding to a determination that the surveillance order was overbroad, *id.* at 170, the opinion also criticized the warrant for its "failure" to "limit" the time of entry. *Id.* Because the order in question simply omitted reference to time of day, *see id.* at 149, 150, there is a strong intimation that the *Ford* court would have deemed an authorization that did not address the details of entry just as objectionable as a broad authorization granting too much latitude as to details. Moreover, the court's repeated assertion that there is a duty to provide a particularized or circumscribed authorization, *see id.* at 154-55, 158, strongly suggests that bare mention of the fact of entry would not satisfy the *Ford* court.

133. The risk of discovery, and the attendant possibility of confrontation, applies equally to both ruses and breaking-and-entering. *See* National Commission, *supra* note 83, at 15.

134. *See* note 14 *supra*.

135. *See* Gooding v. United States, 416 U.S. 430, 446 (1974) (statute pertaining to service of search warrants for controlled substances held not to differentiate between daytime and nighttime searches).

136. *See id.* at 462 (1974) (Marshall, J., dissenting).

cupied.[137] Accordingly, the omission of any reference to the time of day or the inclusion of a nighttime entry provision should not render the warrant overbroad.

On the other hand, a warrant authorizing more than one covert entry should be deemed overboard.[138] Any covert entry is exceptionally intrusive and thus necessitates a presearch showing that less intrusive means of implementing electronic surveillance are inadequate.[139] The government cannot show the need for covert entries other than the first until it can demonstrate that the initial installation of surveillance equipment is inadequate. The inadequacy of the original installation, however, will only arise subsequent to the initial entry when the inability to overhear conversations necessitates repairing or repositioning the surveillance device.

This obligation to justify and to authorize entries on an individual basis does not, however, diminish the government's leeway with regard to the manner and time of entry. Authorization of entries upon an individual basis is instead merely consistent with the view that covert entry is a seriously intrusive police action, justifiable only when the attempted surveillance is otherwise likely to fail.

CONCLUSION

The common thread running through the foregoing analysis of covert entry in electronic surveillance is that stiffer fourth amendment standards must be substituted for the traditional rules of thumb in evaluating the reasonableness of an exceptionally intrusive search and the adequacy of its procedural safeguards.[140] Accordingly, it has been argued that the need for a covert entry in implementation of surveillance must be evaluated prior to search by a neutral judge and, if deemed to be reasonable, must be expressly approved in the surveillance order. This approach is not an exercise in judicial legislation which unduly stretches the limits of fourth amendment protection. Instead, it is an approach consistent with the frequent instances in which the Supreme Court has flexibly applied constitutional standards to accommodate the enforcement of the criminal law and other important public interests.[141]

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137. *See* note 14 *supra*.

138. *See* United States v. Ford, 553 F.2d 146, 167 (D.C. Cir. 1977).

139. *See* notes 11-18 *supra* and accompanying text.

140. *See* notes 11-18, 46-68, 106-19 *supra* and accompanying text.

141. *See, e.g.*, United States v. Martinez-Fuerte, 428 U.S. 543, 556-58 (1976); Stone v. Powell, 428 U.S. 465, 495 (1976); United States v. Brignoni-Ponce, 422 U.S. 873, 880-85 (1975); Chimel v. California, 395 U.S. 752, 761-63 (1969); Carroll v. United States, 267 U.S. 132, 153 (1925); notes 47-58 *supra* and accompanying text.