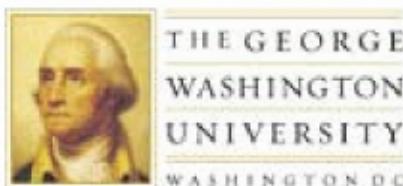


The Burger Court Opinion Writing Database

Dalia v. United States

441 U.S. 238 (1979)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

April 9, 1979

Dear Lewis:

Re: 77-1722 Dalia v. U.S.

I join.

Regards,

Mr. Justice Powell

cc: The Conference

Urb



Supreme Court of the United States
Washington, D. C. 20543

January 23, 1979

Dear Potter, Thurgood and John:

We four are in dissent in No. 77-1722 Dalia
v. United States. I'll try my hand at that dis-
sent.

Sincerely,

Mr. Justice Stewart

Mr. Justice Marshall

Mr. Justice Stevens

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

March 5, 1979

RE: No. 77-1722 Dalia v. United States

Dear Lewis:

I shall be circulating a dissent in the above
in due course.

Sincerely,



Mr. Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

March 22, 1979

RE: No. 77-1722 Dalia v. United States

Dear John:

Please join me.

Sincerely,



Mr. Justice Stevens

cc: The Conference

Mr. Justice BRENNAN
 Mr. Justice BRENNAN

From: Mr. Justice BRENNAN

Circulated: 16 MAY 1979

1st DRAFT

Circulated, 16 MAY 1979

SUPREME COURT OF THE UNITED STATES

No. 77-1722

Lawrence Dalia, Petitioner, | On Writ of Certiorari to the
 v. | United States Court of Ap-
 United States. | peals for the Third Circuit.

[March —, 1979]

MR. JUSTICE BRENNAN, concurring in part and dissenting
 in part.

I concur in Parts I and II of the Court's opinion.

I

I dissent from Part III for the reasons stated in the dissenting opinion of MR. JUSTICE STEVENS which I join.

II

I also dissent from Part IV. In my view, even if Title III could be read to authorize covert entries, the Justice Department's present practice of securing specific authorization for covert entries is not only preferable, see maj. op., at 19 n. 20, but also constitutionally required.

Breaking and entering into private premises for the purpose of planting a bug cannot be characterized as a mere mode of warrant execution to be left to the discretion of the executing officer. See maj. op., at 17. The practice entails an invasion of privacy of constitutional significance distinct from that which attends nontrespassory surveillance; indeed, it is tantamount to an independent search and seizure. First, rooms may be bugged without the need for surreptitious entry and physical invasion of private premises. See *Lopez v. United States*, 373 U. S. 427, 467-468 (1963) (BRENNAN, J., dissenting). Second, covert entry, a practice condemned long before we condemned unwarranted eavesdropping, see *Silverman v. United States*, 365 U. S. 505 (1961), breaches physical as well

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Brennan
Mr. Justice Stevens

From: Mr. Justice BRENNAN

Circulated: _____

Recirculated: 2 APR

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-1722

Lawrence Dalia, Petitioner, | On Writ of Certiorari to the
v. | United States Court of Ap-
United States. | peals for the Third Circuit.

[March —, 1979]

MR. JUSTICE BRENNAN, concurring in part and dissenting
in part.

I concur in Parts I and II of the Court's opinion.

I

I dissent from Part III for the reasons stated in the dissenting
opinion of MR. JUSTICE STEVENS which I join.

II

I also dissent from Part IV. In my view, even reading
Title III to authorize covert entries, the Justice Department's
present practice of securing specific authorization for covert
entries is not only preferable, see Ct. op., at 19 n. 20, but also
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which attends nontrespassory surveillance; indeed, it is tantamount
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States*, 373 U. S. 427, 467-468 (1963) (BRENNAN, J., dissenting).
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we condemned unwarranted eavesdropping, see *Silverman v.
United States*, 365 U. S. 505 (1961), breaches physical as well

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

March 5, 1979

Re: 77-1722 - Dalia v. United States

Dear Lewis:

I shall await circulation of the dissenting opinion which I understand Bill Brennan is writing.

Sincerely yours,

P.S.

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

April 3, 1979

Re: No. 77-1722, Dalia v. United States

Dear Bill,

I agree with Part II of your dissenting opinion. At the risk of some awkwardness, perhaps the best way of indicating this would be to insert the following after your name: "joined by Mr. Justice Stewart except as to Part I,".

Sincerely yours,

P. S.
T.

Mr. Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

March 1, 1979

Re: No. 77-1722 - Dalia v. United States

Dear Lewis,

I agree.

Sincerely yours,



Mr. Justice Powell

Copies to the Conference

cmc

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 5, 1979

Re: 77-1722 - Dalia v. United States

Dear Lewis:

I, hopefully, await a dissent.

Sincerely,

T.M.

T.M.

Mr. Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 22, 1979

Re: No. 77-1722 - Dalia v. United States

Dear John:

Please join me in your dissent.

Sincerely,



T.M.

Mr. Justice Stevens

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 5, 1979

Re: No. 77-1722 - Dalia v. United States

Dear Lewis:

Please join me.

Sincerely,



Mr. Justice Powell

cc: The Conference

[Large handwritten signature and initials "J.P." crossed out with a large X]

To: The Chief Justice
 Mr. Justice Brennan
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Blackmun
 Mr. Justice Rehnquist
 Mr. Justice Stevens

From: Mr. Justice Powell

28 FEB 1979

Circulated: _____

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-1722

Lawrence Dalia, Petitioner, | On Writ of Certiorari to the
 v. | United States Court of Ap-
 United States. | peals for the Third Circuit.

[March —, 1979]

MR. JUSTICE POWELL delivered the opinion of the Court.

Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 197, 18 U. S. C. §§ 2510-2520 (Title III), permits courts to authorize electronic surveillance¹ by Government officers in specified situations. We took this case by writ of certiorari to resolve two questions concerning the

¹ All types of electronic surveillance have the same purpose and effect: the secret interception of communications. As the Court set forth in *Berger v. New York*, 388 U. S. 41, 45-47 (1967), however, this surveillance is performed in two quite different ways. Some surveillance is performed by "wiretapping," which is confined to the interception of communication by telephone and telegraph and generally may be performed from outside the premises to be monitored. For a detailed description, see Note, *Minimization of Wire Interception: Presearch Guidelines and Postsearch Remedies*, 26 Stan. L. Rev. 1411, 1414 n. 18 (1974). At issue in the present case is the form of surveillance commonly known as "bugging," which includes the interception of all oral communication in a given location. Unlike wiretapping, this interception typically is accomplished by installation of a small microphone in the room to be bugged and transmission to some nearby receiver. 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, 2 (1977); Blakey, *Aspects of the Evidence Gathering Process in Organized Crime Cases: A Preliminary Analysis*, reprinted in the President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Organized Crime*, App. C, at 92, 97 (1967). Both wiretapping and bugging are regulated under Title III. See 18 U. S. C. § 2510 (1) and (2).

To: The Chief Justice
 Mr. Justice Brennan
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Blackmun
 Mr. Justice Rehnquist
 Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: _____

Recirculated: 30 MAR 1979

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-1722

Lawrence Dalia, Petitioner, | On Writ of Certiorari to the
 v. | United States Court of Ap-
 United States. | peals for the Third Circuit.

[March —, 1979]

MR. JUSTICE POWELL delivered the opinion of the Court.

Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 197, 18 U. S. C. §§ 2510-2520 (Title III), permits courts to authorize electronic surveillance¹ by Government officers in specified situations. We took this case by writ of certiorari to resolve two questions concerning the

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To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

4/5/78/1972

From: Mr. Justice Powell

Circulated: _____

3rd DRAFT Recirculated: 12 APR 1979

SUPREME COURT OF THE UNITED STATES

No. 77-1722

Lawrence Dalia, Petitioner, | On Writ of Certiorari to the
v. | United States Court of Ap-
United States. | peals for the Third Circuit.

[March —, 1979]

MR. JUSTICE POWELL delivered the opinion of the Court.
Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 197, 18 U. S. C. §§ 2510-2520 (Title III), permits courts to authorize electronic surveillance¹ by Government officers in specified situations. We took this case by writ of certiorari to resolve two questions concerning the

¹ All types of electronic surveillance have the same purpose and effect: the secret interception of communications. As the Court set forth in *Berger v. New York*, 388 U. S. 41, 45-47 (1967), however, this surveillance is performed in two quite different ways. Some surveillance is performed by "wirerecording," which is confined to the interception of communication by telephone and telegraph and generally may be performed from outside the premises to be monitored. For a detailed description, see Note, Minimization of Wire Interception: Presearch Guidelines and Postsearch Remedies, 26 Stan. L. Rev. 1411, 1414 n. 18 (1974). At issue in the present case is the form of surveillance commonly known as "bugging," which includes the interception of all oral communication in a given location. Unlike wirerecording, this interception typically is accomplished by installation of a small microphone in the room to be bugged and transmission to some nearby receiver. 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, 2 (1977); Blakey, Aspects of the Evidence Gathering Process in Organized Crime Cases: A Preliminary Analysis, reprinted in the President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Organized Crime, App. C, at 92, 97 (1967). Both wirerecording and bugging are regulated under Title III. See 18 U. S. C. § 2510 (1) and (2).

April 23, 1979

LFP

MEMORANDUM TO THE CONFERENCE

Cases held for Dalia v. United States, No. 77-1722

States: Three cases have been held for Dalia v. United States: Volpe v. United States, No. 78-385; United States v. Finazzo, No. 78-1051; and Grant v. United States, No. 78-1179.

Volpe v. United States, No. 78-385 (Cert to CA2)

Petitioners in Volpe were convicted of various charges stemming from their operation of a gambling enterprise. Their convictions were based in part on evidence gained from electronic surveillance of the business office of one of the petitioners. On December 16, 1974, a federal district court issued an order under 18 U.S.C. §2518 for interception of both telephone and other conversations emanating from the office. In installing the electronic equipment necessary for this interception, FBI agents twice entered an adjoining business--once secretly and once by ruse.

In this Court, petitioners press four principal claims. First, they argue that courts are without power under 18 U.S.C. §2518 to authorize covert entries, and that such authorization, if it can be given, cannot be inferred from an eavesdropping order. Second, they contend that the interceptions were unlawful because the adjoining business was entered even though it was not mentioned in the eavesdropping order. Third, they claim that the eavesdropping order was invalid under 18 U.S.C. §2518(1)(e) because the officer applying for the order failed to tell the District Court that the same premises had been the subject of an eavesdropping order in 1972. Last, petitioners contend

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 2, 1979

Re: No. 77-1722 - Dalia v. United States

Dear Lewis:

Please join me.

Sincerely,



Mr. Justice Powell

Copies to the Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

1st DRAFT

From: Mr. Justice Stevens

SUPREME COURT OF THE UNITED STATES

ES circulated: MAR 21 1977

No. 77-1722

Recirculated: _____

Lawrence Dalia, Petitioner, v. United States. On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[March —, 1979]

MR. JUSTICE STEVENS, dissenting.

At midnight on the night of April 5-6, 1973, three persons pried open a window to petitioner's business office and secretly entered the premises. During the next three hours they moved freely about the building, eventually implanting a listening device in the ceiling. Several weeks later, they again broke into the office at night and removed the device.

Arguably, two considerations may legitimate these "otherwise tortious and possibly criminal" invasions of petitioner's private property.¹ The perpetrators of the break-ins were agents of the Federal Bureau of Investigations, and a federal judge had entered an order authorizing them to use electronic equipment to intercept oral communications at petitioner's office. The order, however, did not describe the kind of equipment to be used and made no reference to an entry, covert or otherwise, into private property. Nor does any statute expressly permit such activity or even authorize a federal judge to enter orders granting federal agents a license to commit criminal trespass. The initial question this case raises, therefore, is whether this kind of power should be read into a statute that does not expressly grant it.

In my opinion there are three reasons, each sufficient by itself, for refusing to do so. First, until Congress has stated otherwise, our duty to protect the rights of the individual should hold sway over the interest in more effective law.

⁴ T. Taylor, *Two Studies in Constitutional Interpretation* 110 (1969).

pp. 1, 5, 8, 10, 13-18

footnotes renumbered

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: _____

Recirculated: Mar 23 1979

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-1722

Lawrence Dalia, Petitioner, | On Writ of Certiorari to the
v. | United States Court of Ap-
United States. | peals for the Third Circuit.

[March —, 1979]

MR. JUSTICE STEVENS, with whom MR. JUSTICE BRENNAN
and MR. JUSTICE MARSHALL join, dissenting.

At midnight on the night of April 5-6, 1973, three persons pried open a window to petitioner's business office and secretly entered the premises. During the next three hours they moved freely about the building, eventually implanting a listening device in the ceiling. Several weeks later, they again broke into the office at night and removed the device.

The perpetrators of these break-ins were agents of the Federal Bureau of Investigation. Their office, however, carries with it no general warrant to trespass on private property. Without legislative or judicial sanction, the conduct of these agents was unquestionably "unreasonable" and therefore prohibited by the Fourth Amendment.¹ Moreover, that conduct violated the Criminal Code of the State of New Jersey unless it was duly authorized.²

The only consideration that arguably might legitimate these "otherwise tortious and possibly criminal" invasions of peti-

¹ See *United States v. United States District Court*, 407 U. S. 297. The Fourth Amendment provides:

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

² N. J. Stat. Ann. §§ 2A:94-1, 2A:94-3.