

CONSTITUTIONAL LAW—CRIMINAL PROCEDURE—EIGHTH CIRCUIT
 COURT OF APPEALS AUTHORIZES FORCIBLE, SURREPTITIOUS ENTRY
 INTO UNOCCUPIED BUSINESS PREMISES TO INSTALL ELECTRONIC
 SURVEILLANCE DEVICE—*United States v. Agrusa*, 541 F.2d 690
 (8th Cir. 1976).

In 1968 Congress enacted Title III of the Omnibus Crime Control and Safe Streets Act¹ as a means of controlling interception of oral and wire communications. The Act regulates electronic surveillance by requiring prior court authorization and compliance with certain standards governing execution of the court order.²

Despite the comprehensive nature of Title III, it does not outline the procedure to be followed when installing the electronic equipment. In *United States v. Agrusa*,³ the Court of Appeals for the Eighth Circuit held that a federal district court could authorize government agents to forcibly, and without prior notice, break and enter vacant⁴ business premises for the purpose of installing eavesdropping devices.⁵ To better understand the *Agrusa* court's analysis of this problem, knowledge of the judicial and legislative underpinnings of Title III is helpful.

BACKGROUND

In early wiretapping and bugging cases, the language of the fourth amendment,⁶ which prohibits unreasonable searches and seizures, was held not to extend to electronic eavesdropping.⁷ According to the Supreme Court in *Olmstead v. United States*,⁸ the amendment concerned a search of material things, such as a person or his effects, not messages passing over telephone wires.⁹ This

1. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 212 (codified at 18 U.S.C. §§ 2510-2520 (1970)).

2. *United States v. Cox*, 449 F.2d 679, 683 (10th Cir. 1971).

3. 541 F.2d 690 (8th Cir. 1976).

4. The premises in *Agrusa* were temporarily unoccupied, as distinguished from permanently abandoned.

5. *Id.* at 701.

6. 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. V.

7. L. WADDINGTON, *ARREST, SEARCH, AND SEIZURE* 181 (1974).

8. 277 U.S. 438 (1928).

9. *Id.* at 464-66.

focus on tangible property interests led to a line of cases holding that the fourth amendment requirements were brought into play only when the surveillance technique involved a "trespass,"¹⁰ "a physical intrusion into any given enclosure."¹¹

Until the 1960's the only protection against electronic eavesdropping not accompanied by a trespass was a federal statute, section 605 of the Federal Communications Act,¹² proscribing the interception of any telephone, telegraph, or radiotelegraph conversations.¹³ However, unless there was an interception of the type covered by section 605, no other constitutional or statutory provision prevented one from seizing a third party's communications and revealing their contents in court.¹⁴

Then in 1967, in *Katz v. United States*,¹⁵ and later in *Berger v. New York*,¹⁶ the Supreme Court held the seizure of intangible conversations subject to the limitations of the fourth amendment.¹⁷ Further, the Court expressly rejected the trespass doctrine and declared that the amendment "protects people-and not simply 'areas' . . ."¹⁸ Although the Court in *Katz* recognized the need for individuals to be free from uninvited eavesdropping, it softened its holding by stating that the limited eavesdropping undertaken there would have been constitutional if subject to "the procedure of ante-

10. On *Lee v. United States*, 343 U.S. 747, 751 (1952) (use of a "wired for sound" informant, who was an acquaintance of the defendant's, was not a trespass by fraud in violation of the fourth amendment); *Goldman v. United States*, 316 U.S. 129, 134-35 (1942) (detectaphone placed against the wall of a private office involved no trespass and therefore no fourth amendment violation). See *Silverman v. United States*, 365 U.S. 505, 509-11 (1961) ("spike mike" inserted into a party wall made contact with the heating duct of defendant's home; although held to be an illegal search and seizure, it was unclear whether the intrusion by the "spike mike" was a deciding factor).

11. *Katz v. United States*, 389 U.S. 347, 353 (1967).

12. 47 U.S.C. § 605 (1934) as amended by 18 U.S.C. §§ 2510-2520 (1970) (prohibited interception of any communication or revelation of its contents without the consent of the sender).

13. *Id.*

14. L. WADDINGTON, *ARREST, SEARCH, AND SEIZURE* 181 (1974).

15. 389 U.S. 347 (1967). In *Katz*, where officers attached an electronic surveillance device to the outside of a public telephone booth, the intercepted conversations were entitled to fourth amendment protection because "[t]he Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied. . . ." 389 U.S. at 353.

16. 388 U.S. 41 (1967). The Court found the broad language of New York's permissive eavesdropping statute, N.Y. CODE CRIM. PROC. § 813-a (1958), violative of the fourth and fourteenth amendments. *Id.* at 44.

17. *Katz* at 353; *Berger v. New York*, 388 U.S. 41 (1967).

18. *Katz* at 353.

cedent justification . . . that is central to the Fourth Amendment.
 . . .¹⁹

In response to the *Katz* and *Berger* decisions, Congress enacted the Omnibus Crime Control and Safe Streets Act²⁰ in 1968, which amended section 605 of the Federal Communications Act. Title III was an attempt to combat organized crime more effectively, while at the same time satisfying fourth amendment requirements.²¹ The Act gives a federal judge the authority to issue an order permitting wiretapping and bugging by a federal agency responsible for investigating the offense, if such interception may provide evidence of certain enumerated federal crimes.²² A similar provision allows application by a state or county prosecutor to a state judge when authorized by state law.²³

Under the Act, an order to intercept is granted if the judge concludes that probable cause exists to believe that a crime is being, has been, or is about to be committed; that communications concerning that offense will be intercepted; and that normal investigative methods have been or would be unsuccessful.²⁴ Additionally, each interception order must include the identity of the person, if known, whose conversations are to be overheard; the name of the place where the interceptions are to occur; a particular description of the type of conversations to be intercepted and the crime to which they relate; the name of the person authorizing the application and the agency authorized to intercept; and a statement whether the eavesdropping is to end when the desired conversations have been obtained.²⁵

FACTS AND HOLDING

In *Agrusa* the Government sought court authority to intercept oral and wire communications of the defendant, Salvatore Ross Agrusa, and others, at the defendant's business establishment in Independence, Missouri. The application submitted to Judge Hunter²⁶ stated that probable cause existed to believe that the defend-

19. *Katz* at 359 (quoting *Osborn v. United States*, 385 U.S. 323, 330 (1966)).

20. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 212 (codified at 18 U.S.C. §§ 2510-2520 (1970)).

21. Note, *Electronic Surveillance—Authorized Governmental Eavesdropping and the Numbers Game*, 29 RUTGERS L. REV. 400 (1976).

22. 18 U.S.C. § 2516(1) (1970).

23. 18 U.S.C. § 2516(2) (1970).

24. 18 U.S.C. § 2518(3) (a) (b) (c) (1970).

25. 18 U.S.C. § 2518(4) (1970).

26. District Judge for the Western District of Missouri.

ant was guilty of the theft,²⁷ receipt, and sale of goods stolen in interstate commerce,²⁸ and claimed satisfaction of the other prerequisites of Title III.²⁹ Accompanying the application was an authorization by the Attorney General, and an FBI affidavit describing the results of previous investigations and presenting the factual basis purporting to justify the issuance of an order.³⁰ The information given alleged the defendant's extensive dealings in stolen goods, and purported to link him with organized criminal operations in Kansas City.³¹ According to the Government, other investigative techniques could not have been utilized because the five informants supplying the information for the affidavit were unwilling to testify, and the defendant did not keep detailed records of his transactions so that conventional searches and seizures would be unavailing.³²

Judge Hunter found compliance with the Act's procedural requirements,³³ and issued an order authorizing the requested interceptions. This order limited the time period for the surveillance, called for progress reports to be made to the court, and required the Government to minimize the possibility of intercepting conversations not covered by Title III.³⁴ The order contained an additional statement permitting "secret and, if necessary, forcible entry any time of day or night [which is] least likely to jeopardize the security of [the] investigation,"³⁵ to install and remove the elec-

27. 18 U.S.C. § 659 (1970).

28. 18 U.S.C. § 2315 (1970). The Court also cited 18 U.S.C. § 371 (1970).

29. *Agrusa* at 692-93.

30. *Id.* at 692.

31. *Id.* at 694.

32. *Id.*

33. 18 U.S.C. § 2518(1) (1970). Under the Act, each application for an order must include: (a) the name of the officer submitting, and the officer authorizing, the application; (b) a statement establishing the factual basis upon which the application is predicated; (c) a statement of why other investigative techniques have not been successful, or would not be successful if tried; (d) the time period for which the surveillance is required to be maintained; (e) a statement of the facts of previous applications for interception orders involving the same suspect, and the action taken on those applications; and (f) where an extension of the original order is desired, a statement of the results already obtained from interception, or an explanation of why such results have not been obtained. The applicant may also be required to furnish additional information in support of the application.

34. *Argusa* at 692-93. These specifications are required by 18 U.S.C. § 2518(4) (e), (5), (6) (1970).

35. *Agrusa* at 693.

tronic listening equipment. Protected by this authorization, the Government established the wiretap in the business office of Agrusa's body shop without his knowledge, after regular business hours when the shop was locked and temporarily unoccupied.⁸⁶

When conversations were recorded indicating possible violations of a federal statute prohibiting dealing in firearms without a license,³⁷ the Government sought, and received, a supplemental order³⁸ permitting their use before a grand jury and at trial. The introduction into evidence of transcripts of the intercepted conversations led to the defendant's conviction of the firearms offense.³⁹

On appeal to the Eighth Circuit, the defendant raised six contentions,⁴⁰ each concerning the validity of the interceptions. The court rejected all of them,⁴¹ devoting the major part of the opinion to the propriety of the district court's authorization of a forcible, surreptitious intrusion by the government agents into the defendant's vacant body shop to situate the eavesdropping apparatus, apparently an issue of first impression in any court.⁴² After analyzing the defendant's claim that the method of entry was inconsistent with the fourth amendment and other applicable law, the court of appeals found the Government's action pursuant to the court order proper.

THE FOURTH AMENDMENT CLAIM

In addressing the fourth amendment claim, the court recognized that the Government's search and seizure involved two

36. *Id.*

37. 18 U.S.C. § 922(a) (1970).

38. 18 U.S.C. § 2517(b) (1970). Title III, 18 U.S.C. § 2517(3) (1970), authorizes use of intercepted communications relating to offenses not listed in § 2516. *Agrusa* at 693; Note, *Internal Revenue Service Use of Electronic Surveillance Information in the Enforcement of the Wagering Taxes*, 55 B.U.L. Rev. 387, 393 (1975).

39. *Agrusa* at 693.

40. The defendant contended: (1) that the Government's request for a court order did not satisfy the probable cause and particularity requirements of the fourth amendment and Title III; (2) that the FBI affidavit did not adequately explain why other, less intrusive, investigative techniques could not have been utilized; (3) that the court order itself did not comply with the minimization requirements of Title III; (4) that the supplemental order entered by the district court was improper; (5) that the method of entry used to install the eavesdropping equipment was inconsistent with the fourth amendment and other applicable law; and (6) that the use of the intercepted conversations against the defendant violated the fifth amendment. *Id.*

41. *Id.*

42. *Id.* at 696.

aspects, (1) the breaking and entering of the defendant's place of business, and (2) the interceptions themselves,⁴³ each subject to some degree of protection under the fourth amendment. The court was not concerned with the second aspect since the Eighth Circuit had held in a previous case that compliance with Title III satisfied fourth amendment requirements concerning the act of surveillance itself.⁴⁴ Consequently, the interception of Agrusa's conversations *alone* did not constitute an unreasonable search and seizure, since the district court issued the interception order pursuant to Title III.

Receiving closer scrutiny was the other aspect of the search and seizure: the breaking and entering of the body shop. The provisions of the fourth amendment were involved because of the reasonable expectation of privacy which surrounds business premises to some degree.⁴⁵

The fourth amendment, as a codification of the early English common law, was designed to restrict the general warrants or writs of assistance feared by the American colonists.⁴⁶ The amendment, which contains no statement concerning the execution of a search warrant, prohibits only "unreasonable" searches and seizures. The court's constitutional analysis, therefore, focused on the "reasonableness" of the secret and forceful entry authorized by the district court and employed by the Government to place the bug in the defendant's temporarily vacant business office.

The Eighth Circuit relied on the general standards developed by the Supreme Court in *Ker v. California*,⁴⁷ the leading case on the constitutionality of breaking and entering without prior announcement. In *Ker* police entered the defendant's home without notice of their authority and arrested the defendant for possession of marijuana.⁴⁸ Mr. Justice Clark, speaking for only four members of the Court,⁴⁹ stated that the officers were justified in failing to

43. *Id.* at 696, & n.14.

44. *United States v. Kirk*, 534 F.2d 1262, 1273 (8th Cir. 1976). The Supreme Court has not yet ruled on the constitutionality of Title III.

45. *Agrusa* at 696. The Court cited *Mancusi v. DeForte*, 392 U.S. 364, 367 (1968) ("the word 'houses,' as it appears in the Amendment, is not to be taken literally, and the protection of the Amendment may extend to commercial premises") and *Lanza v. New York*, 370 U.S. 139, 143 (1962) (fourth amendment protection has been extended to a house, an auto, an office, or a hotel room, but not to a jail cell, where "official surveillance traditionally has been the order of the day").

46. *Payne v. United States*, 508 F.2d 1391, 1394 (5th Cir. 1975).

47. 374 U.S. 23 (1963).

48. *Id.* at 28.

49. Mr. Justice Clark was joined by Mr. Justice Black, Mr. Justice Stewart, and Mr. Justice White.

give notice. "In addition to the officers' belief that Ker was in possession of narcotics, which could be quickly and easily destroyed,"⁵⁰ Ker's earlier attempts to elude the police led them to believe he was expecting them.⁵¹ The opinion concluded by saying that if state law allows unannounced entry because evidence could easily be destroyed, the law does not violate federal constitutional standards of reasonableness.⁵² Mr. Justice Harlan concurred, stating that searches and seizures should be governed by concepts of fundamental justice.⁵³

In his dissent, Mr. Justice Brennan⁵⁴ declared that even if probable cause exists for the arrest of a defendant, unannounced police intrusion into a private home, with or without a warrant, violates the fourth amendment unless excused by one of three exceptions:

(1) where the persons within already know of the officers' authority and purpose, or (2) where the officers are justified in the belief that persons within are in imminent peril of bodily harm, or (3) where those within, made aware of the presence of someone outside (because, for example, there has been a knock at the door), are then engaged in activity which justifies the officers in the belief that an escape or the destruction of evidence is being attempted.⁵⁵

Although none of these justified the mode of entry undertaken by the Government in *Agrusa*, the Eighth Circuit nevertheless sustained the Government's action. Senior Circuit Judge Van Oosterhout noted that Mr. Justice Brennan's categories refer specifically to intrusion into a private home, which historically has enjoyed maximum constitutional protection, and not business premises, as in the case under consideration.⁵⁶ Also, none of these exceptions envisioned premises which are vacant at the time of entry.⁵⁷

Finding the manner of entry constitutionally valid, the *Agrusa* court supported its decision by emphasizing that the exigencies present were as great or greater than those in *Ker*; while there was a possibility that Ker might have destroyed the narcotics had the officers announced their purpose, it was "a virtual certainty" that *Agrusa* would have avoided any self-incriminating conversa-

50. *Ker* at 40.

51. *Id.*

52. *Id.* at 41.

53. *Id.* at 44.

54. Mr. Justice Brennan was joined by Mr. Chief Justice Warren, Mr. Justice Douglas, and Mr. Justice Goldberg.

55. *Ker* at 47.

56. *Agrusa* at 697 n.16.

57. *Id.*

tions had he known that government agents were eavesdropping.⁵⁸ The need for the destruction of the evidence exception to the announcement requirement is heightened in the execution of wire-tapping orders by the fact that "any giving of notice to a party under surveillance would completely destroy the usefulness of the electronic search and seizure."⁵⁹

Further sanctioning the Government's activity, the court sought to distinguish vacant business premises from occupied homes. According to the majority opinion, business premises are not entitled to the same security as a home, although they are permitted some protection under the fourth amendment. The court cited *See v. City of Seattle*,⁶⁰ where the Supreme Court recognized that a businessman has a right to be free from unreasonable intrusions upon his private commercial premises, but did not in any way "imply that business premises may not reasonably be inspected in many more situations than private homes."⁶¹ The privacy interest in *Agrusa* and the degree of fourth amendment protection given that interest were therefore less substantial than in *Ker*.⁶²

The court also emphasized that while *Ker* involved an arrest of the defendant in his home, *Agrusa* concerned a search of premises while the owner was away. Contrasting the two situations, the Eighth Circuit maintained that officers have no reason to enter a building to execute an arrest if they know it is vacant,⁶³ but the same is not true when they seek to carry out a search warrant, for the task authorized by the court may be completed whether or not the owner or occupant is present.⁶⁴ The court cited *Payne v. United States*⁶⁵ and *United States v. Gervato*,⁶⁶ as authorizing

58. *Id.* at 697.

59. Comment, *Eavesdropping Statute Held Violative of Fourth Amendment*, 52 MINN. L. REV. 541, 552 (1967). Cf. Note, *Eavesdropping Provisions of the Omnibus Crime Control and Safe Streets Act of 1968: How Do They Stand in Light of Recent Supreme Court Decisions?*, 3 VAL. U.L. REV. 89, 97 (1968) (Title III's requirement that the inadequacy of other investigative methods be shown "is probably sufficient to overcome the defect of lack of notice" inherent in wiretapping).

60. 387 U.S. 541 (1967); See involved administrative inspections of residential and commercial buildings for safety violations.

61. 387 U.S. at 545.

62. *Agrusa* at 697.

63. *Agrusa* at 697 n.16; See also *Rice v. Wolff*, 513 F.2d 1280, 1292 (8th Cir. 1975); *Greven v. Superior Ct.*, 78 Cal. Rptr. 504, 508 n.9, 455 P.2d 432, 436 n.9 (1969).

64. *United States v. Watson*, 307 F. Supp. 173, 176 n.2 (D.D.C. 1969); Annot., 21 A.L.R. Fed. 820, 892-93 (1974).

65. 508 F.2d 1391 (5th Cir. 1975).

66. 474 F.2d 40 (3d Cir. 1973).

forcible entry into unoccupied premises, including homes, pursuant to a search warrant, *without* a showing of exigent circumstances.⁶⁷

In concluding its discussion of the defendant's fourth amendment claim, the court stressed that any doubts remaining after *Ker's* close decision were dispelled by the 7-1 ruling in *Katz* that electronic eavesdropping could be undertaken without a prior announcement.⁶⁸ There, the Supreme Court recognized that although in a conventional search the warrant itself serves as a notice to the suspect, if the defendant in a wiretapping case is told in advance that his conversations are to be recorded, the incriminating evidence will be lost.⁶⁹ Relying on *Ker*, the *Katz* Court noted that the authorization of electronic surveillance without requiring advance notice was a recognition "that officers need not announce their purpose before conducting an otherwise authorized search if such announcement would provoke . . . the destruction of critical evidence."⁷⁰

Although *Agrusa* involved both a forcible and stealthy entry and the interceptions themselves, while *Katz* was concerned with the electronic surveillance of private conversations only, the court viewed the latter decision as removing any "per se" rule against excusing notice when the destruction of the evidence is threatened.⁷¹ Furthermore, *Katz* specifically indicated that the self-defeating nature of pre-surveillance notice was a sufficiently exigent circumstance to make an unannounced search and seizure reasonable. Therefore, the difference between the two aspects of the search and seizure in *Agrusa*, compared with the one in *Katz*, was for fourth amendment purposes "one of degree rather than kind. Since an intrusion occur[red] in either case, and since the exigencies [were] precisely the same, the result should likewise be the same."⁷² Thus, both aspects of the search and seizure involved in *Agrusa* were held to be reasonable under the fourth amendment.

67. *Agrusa* at 698.

68. 389 U.S. at 355 n.16 (citing *Osborn v. U.S.*, 385 U.S. 323 (1966)) (judicially approved use of informant with hidden tape recorder).

69. *Katz* at 355 n.16.

70. *Id.* That footnote also discussed Justice Brennan's dissent in *Ker*, the only opinion in that case stating reasons for the constitutional announcement rule. However, his fear that "innocent citizens should not suffer the shock, fright or embarrassment attendant upon an unannounced police intrusion" and belief that the notice requirement guards the entering officers from "the hazards [of their] dangerous calling", *Ker* at 57-58, are not relevant to forceful entry to plant wiretapping devices in *vacant* buildings. *Id.* at 355-56 n.16 (quoting *Ker* at 57-58). Also discussing this dissent was *Agrusa* at 698 n.17.

71. *Agrusa* at 698.

72. *Id.*

THE STATUTORY AND COMMON LAW CLAIM

In addition to contending that the government's activity was not permissible under the fourth amendment, defendant Agrusa also claimed that statutory and common law principles prohibited the challenged activity.⁷³ The court noted that 18 U.S.C. § 3109,⁷⁴ which forbids forcible entry into a home to execute a search warrant unless, after giving notice of his authority and purpose, an officer is refused admittance or is in need of liberation, is a codification of the common law and subject to any exceptions which were there recognized.⁷⁵ A review of early English and American case law reveals that nondwellings were given less protection than homes.⁷⁶ Also, vacant premises, as opposed to occupied ones, were less secure against unannounced forcible entries.⁷⁷

The Government argued that section 3109 authorized the officers' entry into the body shop.⁷⁸ The court rejected this claim, observing that, if applied literally, the statute's terms would not uphold the *Agrusa* entry.⁷⁹ The Eighth Circuit concluded, however, that section 3109 "is not a statute to be woodenly applied without regard to the particular circumstances at hand. . . ."⁸⁰ Although the Supreme Court has not yet delineated whether, and what, exigent circumstances would excuse compliance with the statute,⁸¹ the

73. *Id.*

74. This statute provides:

The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of a warrant.

Originally enacted to govern the execution of federal search warrants, § 3109 has been extended by the Supreme Court to cover entries made to effectuate an arrest, with or without a warrant. *Sabbath v. United States*, 391 U.S. 585, 588 (1968); *Miller v. United States*, 357 U.S. 301, 306 (1958).

75. *Agrusa* at 699 n.19. Because the common law controlled the result, the court did not need to decide whether the precise terms of § 3109 applied to the *Agrusa* facts. It chose "to view the kind of premises searched and whether they were occupied [at the time] as circumstances to be considered in assessing what the common law was and is." *Id.*

76. See G. Blakey, *The Rule of Announcement and Unlawful Entry: Miller v. United States and Ker v. California*, 112 U. Pa. L. Rev. 499, 505, 508 (1964) and cases cited notes 93-94 *infra*.

77. See G. Blakey, *supra* note 76, and cases cited note 97 *infra*.

78. *Agrusa* at 699.

79. *Id.*

80. *Id.*

81. *Ker v. California*, 374 U.S. 23, 40 n.11 (1963); *Wong Sun v. United States*, 371 U.S. 471, 483-84 (1963); *Miller v. United States*, 357 U.S. 301, 309 (1958) (recognized state decisions holding that justification for noncom-

court of appeals found guidance in the language in *Sabbath v. United States*.⁸²

Exceptions to any possible constitutional rule relating to announcement and entry have been recognized, see *Ker v. California*, *supra*, at 47 (opinion of BRENNAN, J.), and there is little reason why those limited exceptions might not also apply to § 3109, since they existed at common law, of which the statute is a codification.⁸³

This view has received support by the courts of appeals,⁸⁴ including the Eighth Circuit which recognized that "in construing . . . section 3109, the federal courts have held that when exigent circumstances exist, failure to comply with the statute does not render the entry upon the premises unlawful."⁸⁵

The court then faced the job of deciding whether the particular situation in *Agrusa* excused conformance with the terms of section 3109 and its common law background. Much of the rationale previously used to find the search reasonable under the fourth amendment was applied to place the Government's activity within an exception to the statute's commands. The obvious invasion of privacy was tempered by the fact that the premises involved were unoccupied business premises.⁸⁶ The fact that compliance with the notice demands of section 3109 would have been "self-defeating heightened the legitimate need of the law enforcement officials to proceed as they did."⁸⁷

The court began its analysis with a return to the argument that the home has been given greater security than other areas, and cited a number of decisions finding section 3109 applicable only to dwellings.⁸⁸ Again stressing the common law background of the

pliance exists in exigent circumstances, although the Government there made no claim of any such demanding circumstances).

82. 391 U.S. 585 (1968).

83. *Id.* at 591 n.8.

84. *United States v. Mapp*, 476 F.2d 67, 75 (2d Cir. 1973) (claimed that a merger of the fourth amendment and the statutory standard announced in § 3109 was accomplished in *Sabbath*). This view was adopted earlier in *United States v. Manning*, 448 F.2d 992, 1001 (2d Cir. 1971), but is a position which the *Agrusa* court found unnecessary to embrace in order to decide its case. *Agrusa* at 699 n.20. See also *Rodriguez v. Jones*, 473 F.2d 599, 607 (5th Cir. 1973) (recognized noncompliance with the statute in accordance with the *Ker* exceptions) and *United States v. Bustamante-Gamez*, 488 F.2d 4, 9 (9th Cir. 1973) (held that to some extent, the requirements of § 3109 have been incorporated into the fourth amendment, citing *Ker*).

85. *Salvador v. United States*, 505 F.2d 1348, 1352 (8th Cir. 1974).

86. *Agrusa* at 699-700.

87. *Id.* at 700.

88. *United States v. Johns*, 466 F.2d 1364, 1365 (5th Cir. 1972) (no violation of § 3109, as small concrete block building furnished with a special

statute, the court pointed out that leading cases interpreting section 3109,⁸⁹ and Mr. Justice Brennan's dissent in *Ker*,⁹⁰ relied on the maxim "every man's home is his castle," which originated in the ancient English decision of *Semayne's Case*.⁹¹ Although the rule of *Semayne's Case* was widely followed in early American decisions, the privilege was confined to the home,⁹² and forcible entry was allowed into nondwellings such as stores⁹³ and warehouses.⁹⁴

Also stressed a second time was the distinction between occupied and unoccupied premises, the court citing a line of cases holding that section 3109 does not apply to an empty building.⁹⁵ The statute was said to presuppose the presence of someone in the

gambling table was not a "house"); *Fields v. United States*, 355 F.2d 543 (5th Cir. 1966) (large distillery held not covered by § 3109 as not within the curtilage); *United States v. Hassel*, 336 F.2d 684, 686 (6th Cir. 1964) (no violation of § 3109 since this was a nonforcible entry into a barn and not a house). *But cf. Wong Sun v. United States*, 371 U.S. 471, 479-87 (1963): *Wong Sun v. United States*, *supra*, involved an arrest of the defendant at his place of business which was linked to his home by a hallway. *Id.* at 474. The arrest was held invalid due to the Government's failure to list exigent circumstances justifying noncompliance with § 3109. *Id.* at 483-84; *United States v. Phillips*, 497 F.2d 1131, 1133 (9th Cir. 1974) (unannounced entry into a locked office building *occupied* by the defendant was seen to carry a potential for violence requiring compliance with § 3109); *United States v. Case*, 435 F.2d 766, 770 n.1 (7th Cir. 1970) (like the fourth amendment, § 3109 has been held to include commercial establishments).

89. *Sabbath v. United States*, 391 U.S. 585 (1968); *Miller v. United States*, 357 U.S. 301 (1958).

90. *Ker* at 51-52.

91. 77 Eng. Rep. 194 (K.B. 1603).

92. G. Blakey, *The Rule of Announcement and Unlawful Entry: Miller v. United States and Ker v. California*, 112 U. PA. L. REV. 499, 504 (1964).

93. *Id.* at 505 (citing *Haggerty v. Wilbur*, 16 Johns 287 (N.Y. Sup. Ct. 1819)).

94. *Burton v. Wilkinson*, 18 Vt. 186, 189-90 (1846). *See also Androscoggin R.R. v. Richards*, 41 Me. 233, 238 (1856) (train depot held not to be a dwellinghouse).

95. *Payne v. United States*, 508 F.2d 1391, 1393-94 (5th Cir. 1975). In *Payne v. United States*, *supra*, it was noted that the three interests said to be protected by the announcement rule are: "(1) the prevention of violence and physical injury to the police and the occupants; (2) the unexpected exposure of the private activities of the occupants; (3) the property damage resulting from forced entry." *Id.* at 1393-94. When the building broken into is a vacant one, only this third interest, the "least significant in terms of individual privacy," is involved. *Id.* at 1394; *United States v. Hawkins*, 243 F. Supp. 429, 432 (E.D. Tenn. 1965) (deeming it an "empty gesture" for officers to announce to an empty dwelling that they have come to carry out a search warrant); *United States v. Gervato*, 474 U.S. 40, 44 (1963); 79 C.J.S. *Searches and Seizures* § 83, at 906 (general execution of a search warrant). *See also note 69 supra*.

area.⁹⁶ Again, the court found similarities with the early common law in the United States, which apparently gave less protection to premises which were vacant when searched.⁹⁷

Finally, the exigencies present in *Agrusa* were reemphasized. The analogy previously recognized between the possible destruction of evidence and the fact that "secrecy is an essential, indeed a definitional, element of eavesdropping,"⁹⁸ was said to be useful in the statutory context. However, the court was unwilling to declare the existence of any wide loophole in the terms of the statute. The decision to label section 3109 a codification of the common law was based in large part on the *Sabbath* footnote which, in finding exceptions to section 3109, referred to Mr. Justice Brennan's opinion in *Ker*. That opinion omitted any broad destruction of the evidence exception unless there is first a knock.⁹⁹ In addition, decisions of the lower federal courts have required at least a knock, declining to adopt any all-encompassing rule allowing unannounced entry to avoid loss of the evidence.¹⁰⁰

96. *People v. Johnson*, 231 N.Y.S.2d 689, 691 (Ct. Gen. Sess. (1962) (stating that compliance with a state demand/notice statute is unnecessary when no one is found in charge of the place to be searched).

97. *G. Blakey, The Rule of Announcement and Unlawful Entry: Miller v. United States and Ker v. California*, 112 U. PA. L. REV. 499, 505, 508 (1964); *Androscoggin R.R. v. Richards*, 41 Me. 233, 238 (1856) (forced entry into an empty train depot to execute a search warrant for liquor); *Howe v. Butterfield*, 58 Mass. (14 Cush.) 302, 305 (1849).

98. *Berger v. New York*, 388 U.S. 41, 86 (1967) (Black, J., dissenting).

99. *Agrusa* at 700-01.

100. *United States v. Wysong*, 528 F.2d 345, 348 (9th Cir. 1976); *United States v. Bustamante-Gamez*, 488 F.2d 4, 10-12 (9th Cir. 1973); *United States v. Mapp*, 476 F.2d 67, 75 (2d Cir. 1973); *United States v. Manning*, 448 F.2d 992, 994 (2d Cir. 1971); *United States v. Likas*, 448 F.2d 607, 608-09 (7th Cir. 1971); *Masiello v. United States*, 304 F.2d 399, 400-01 (D.C. Cir. 1962). Several state decisions have allowed an exception to search warrant execution statutes when, after giving some notice of their presence, officers were justified in believing that destruction of the evidence was then being attempted or based upon specific facts known to the officers before entering. *See, e.g., People v. Pacheco*, 27 Cal. App. 3d 70, —, 103 Cal. Rptr. 583, 586 (1972); *Commonwealth of Pennsylvania v. Soychak*, 289 A.2d 119, 125 (Pa. Super Ct. 1972); *People v. Perales*, 4 Cal. App. 3d 113, —, 84 Cal. Rptr. 604, 608 (1970); *People v. Rosales*, 68 Cal. App. 2d 299, — 66 Cal. Rptr. 1, 5, 437 P.2d 489, 493 (1968); *People v. McIlwain*, 28 App. Div. 711, —, 281 N.Y.S.2d 218, 220 (1967). Other states have gone further and have held the exigent circumstances exception applicable where there is no reason to believe evidence is being destroyed, but only that destruction would result if the officers announced their authority and purpose. *People v. Lujan*, 174 Colo. 554, —, 484 P.2d 1238, 1240-41 (1971); *State v. Clarke*, 242 So. 2d 791, 795 (Fla. (1970)); *People v. DeLago*, 266 N.Y.S.2d 353, 356, 213 N.E.2d 659, 660 (N.Y. 1965). Pursuant to N.Y. Code Crim. Proc. § 799 (now included in N.Y. Code Crim. Proc. § 690.35(3)(b) (McKinney 1971)) a judge could

Therefore, the court chose instead to announce that each case must be individually scrutinized,¹⁰¹ with attention paid to the type of premises involved, whether they are vacant or occupied when searched, and the character of the alleged exigency. Expressing no view as to the result if the peculiar facts of *Agrusa* were altered in any way, the court held that law enforcement officers acting under express court authority may forcibly and secretly, without notice of their authority and purpose, break into vacant business establishments to install electronic surveillance equipment if the eavesdropping activity is court-authorized, based on probable cause, and complies with the other requirements of Title III.¹⁰²

CONCLUSION

The Supreme Court has recognized that the enactment of Title III involved some "tension" between congressional goals:

Congress was concerned with protecting individual privacy when it enacted this statute. But it is also clear that Congress intended to authorize electronic surveillance as a weapon against the operations of organized crime.¹⁰³

Although the court of appeals in *Agrusa* resolved this conflict in favor of limited noncompliance with constitutional and statutory notice requirements, the closeness of the question was apparent in the 4-4 decision denying a rehearing of the *Agrusa* case before the whole court.¹⁰⁴

Disagreeing with the result the majority reached in balancing the two congressional objectives, Judge Lay wrote a strong dissent. He stated that the installation of the eavesdropping device in *Agrusa's* unoccupied office should have been done openly, without "clandestine breaking and entering of private premises."¹⁰⁵ He concluded that the circumstances were not sufficiently exigent to justify the Government's method of obtaining evidence.¹⁰⁶ Alternative means not requiring surreptitious entry were available, he

include a no-knock provision in the search warrant if the property sought might be quickly destroyed if notice were given.

101. *Agrusa* at 701 (citing *Jones v. United States*, 362 U.S. 257, 272 (1960)). *Go Bart Importing Co. v. United States*, 282 U.S. 344, 357 (1931); *State v. Mitchell*, — Or. App. —, 487 P.2d 1156, 1160 (1971) (each case must be decided on its merits with no blanket exceptions).

102. *Agrusa* at 701.

103. *United States v. Kahn*, 415 U.S. 143, 151 (1974).

104. *Agrusa* at 704.

105. *Id.* at 703.

106. *Id.*

said, through use of confidential informants and wiretaps on the defendant's telephone.¹⁰⁷

Judge Lay saw the narrowness of the majority's holding as indicating a certain uneasiness on its part about the precedent it would set.¹⁰⁸ He thought the distinction between homes and businesses was "artificial" and, at best, "tenuous"; he suggested "that the privacy of a person within business premises deserves the same consideration."¹⁰⁹ Branding the Government's activity in this case as "dirty business," Judge Lay questioned whether the *Agrusa* wiretapping could be struck down under the court's analysis even if it had occurred in the defendant's dwelling.¹¹⁰ Finding the Government's interest in gathering tangible evidence inadequate to override the citizens' expectations of privacy in home or office, he would label such searches "unreasonable per se."¹¹¹

The reasoning of the Eighth Circuit in *Agrusa* drew upon an analogy between the destruction of evidence possibility in the narcotics area and the secrecy necessary in wiretapping to prevent the "destruction" of the desired conversations. Although the majority of the cases cited for support of this comparison did not involve prior judicial sanction of the method of entry, a number of states have enacted legislation providing for no-knock entry if judicially approved before execution of the search warrant.¹¹²

107. *Id.* at 702-03. The majority upheld the district court's finding that the Government's affidavit adequately explained why other investigative techniques would not succeed if tried. This holding was based upon information in the affidavit that the informants were afraid to testify; that the Government would be unable to obtain additional knowledge essential to convict *Agrusa* because he was adept at avoiding apprehension; that conventional searches and seizures would be unsatisfactory because the defendant did not keep records of the merchandise; and that infiltration was a dangerous idea "because the defendant was a knowledgeable member of the Kansas City criminal community." *Id.* at 694. See also *United States v. Smith*, 519 F.2d 516, 518 (9th Cir. 1975), where the court stated: "Congress, in its wisdom, did not attempt to require 'specific' or 'all possible' investigative techniques (under Title III) before orders for wiretaps could be issued." *Id.* at 518.

108. *Agrusa* at 703.

109. *Id.* at 704. For support of this proposition, Judge Lay cited *Lanza v. New York*, 370 U.S. 139 (1962), which held that interception of a jail conversation did not violate the fourth amendment. There, the Supreme Court stated that "a jail shares none of the attributes of privacy of a home, an automobile, an office, or a hotel room." *Id.* at 143 (emphasis added). Judge Lay also mentioned *United States v. Phillips*, 497 F.2d 1131, 1133 (9th Cir. 1974), standing for the invalidity of an unannounced entry into an occupied, locked office building.

110. *Agrusa* at 704.

111. *Id.*

112. *E.g.*, NEB. REV. STAT. § 29-411 (Reissue 1975); N.Y. CODE CRIM. PROC.

The many statutes which have been passed specifically to enable officials to better control illegal drugs and gambling demonstrate that the announcement rule has had its greatest impact in the area of organized crime.¹¹³ It is argued that the societal danger presented by a continuing criminal operation, such as that involved in *Agrusa*, is significantly different from that posed by all crime, and that "[a]ny formulation of competing interests must then take this factor into account."¹¹⁴ When the reasonableness of an uninvited entry is in question, the privacy interests are said to weigh less when organized crime is involved than in the usual no-knock case.¹¹⁵

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§ 690.35(3)(b) (McKinney 1971); N.D. CENT. CODE § 19-03.1-32 (1971); S.D. COMPILED LAWS ANN. § 39-17-125 (Supp. 1976).

113. G. Blakey, *The Rule of Announcement and Unlawful Entry: Miller v. United States and Ker v. California*, 112 U. PA. L. REV. 499, 556 (1964).

114. *Id.* at 556.

115. Note, *Police Practices and the Threatened Destruction of Tangible Evidence*, 84 HARV. L. REV. 1465, 1496 (1971).