

MEMO

RE: A.B. 374

TO: STATE BAR HUMAN RIGHTS COMMITTEE

FROM: JOHN WARWICK MONTGOMERY

SUMMARY:

A.B. 374 is a wire interception bill introduced to cover intrastate electronic eavesdropping. It is patterned after federal law. The basic statute is Title III of the Omnibus Crime Control and Safe Streets Act of 1968, codified at 18 U.S.C.S. 2510-2520, which covers interstate wiretapping.

RECOMMENDATION:

Oppose the bill, but encourage its revision to eliminate the serious flaws it still has in common with Title III of the Omnibus Crime Control Act of 1968.

BACKGROUND:

In Berger v. New York (1967) 388 U.S. 41 and Katz v. United States (1967) 389 U.S. 347, the Supreme Court held that eavesdropping constituted a search and seizure and was therefore subject to the warrant requirement of the Fourth Amendment. In Berger and Katz, the Court set out what a statute authorizing eavesdropping must contain in order to pass constitutional scrutiny.

The constitutional pre-requisites identified in Berger were the following: (1) There must be probable cause to believe that a particular offense has been or is being committed; (2) the conversations to be intercepted must be particularly described; (3) the surveillance must be for a specific and limited period of time, to minimize the intrusion into privacy; (4) continuing probable cause must be shown if the warrant is to be renewed; (5) eavesdropping must terminate once the evidence sought has been seized; (6) there must be notice unless a factual showing of exigency is made; and (7) there must be a return on the warrant so that the court may supervise and restrict the use of the seized conversations. See Berger v. New York (1967) 388 U.S. 41, 54-60, 18L.Ed. 2d. 1040 87 s.Ct. 1873, conformed to 20 N.Y. 2d. 801, 284 N.Y.S. 2d. 456, 231 N.E.2d. 132.

A.B. 374 is to authorize and provide guidelines for law enforcement officials to wiretap in conformance with constitutional standards. This bill was previously introduced in 1979 (S.B. 931). Currently the State Attorney General's Office requested this bill be drafted because California prohibits both state electronic eavesdropping and the introduction into evidence in a state proceeding of interceptions gleaned by federal agents under the federal wiretap law.

MEMO
RE: A.B. 274
TO: STATE SENATE
FROM: JOHN WARWICK

SUMMARY:

A.B. 274 is a measure
intended to amend the
California Penal Code and
the California Evidence Code
U.S.C.S. 1873, 1874, 1875

RECOMMENDATION:

Oppose the bill, but
the serious illness of
the Omnibus Crime Control

Background

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(1873) and U.S.
1873, 1874, 1875
231, 232, 233

A.B. 274 is a measure
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1979 (S.B. 231) and
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ARGUMENT OF PROPONENTS:

Proponents of the bill state that the existing federal bill authorizes interstate wire interception but does not cover intrastate. With no bill on the books to cover crime within the state they consider their major problem to be that organized criminals are migrating to California.

They state that twenty three (23) other states have wiretap legislation which include New Jersey, New York and Florida.

Proponents further point out that the National Wiretap Commission created by the United States Congress to study the effects of Federal Wiretap Law noted much of the organized criminal activity in the State of New Jersey was eliminated through the use of electronic surveillance. The Commission specifically concluded that the inability of Los Angeles and Chicago investigators to use Court ordered electronic surveillance foreclosed the possibility of identifying the top leaders of organized crime.

For a detailed statement of the proponents' position, see APPENDIX A.

OPPOSITION ARGUMENTS:

The development of constitutional issues includes serious questions relating to the Fourth Amendment. The most significant Fourth Amendment problem is defining eavesdropping in terms of search and seizure. It is distinguishing between the "search of a conversation" and the "seizure of it". For example, when the police execute a search warrant, they of necessity examine many objects while searching for the items particularly described in the warrant, but they are said to have seized only those things which they take into their physical custody. When officers are monitoring a wiretap or bug, on the other hand, the distinction between the perception - hearing - of a conversation and the seizure of it is more metaphysical (or metaphorical) than it is factual. This problem is compounded by the failure of Title III to provide a clear definition of a term which is central to the entire statute. (The Supreme Court has not yet ruled on this)

A few state statutes avoid the ambiguity of Title III by defining "intercepted communication as one which has been 'intentionally overheard or recorded' without the consent of a participant, 'by means of any instrument, device or equipment'." New York Crim.Pro.L 700.05(3). However, the California bill has not used this definition.

Lapidus, in her standard monograph on the subject (Eavesdropping on Trial) writes:

"Criticism of court-ordered eavesdropping centers around seven aspects of the procedure mandated by Title III:

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1. Offenses for which an order may be obtained are practically unlimited, and are not restricted to those characteristic of organized crime or serious offenses.
2. The provision that the application and order shall describe the type of communication sought to be intercepted does not comply with Supreme Court requirements as to particularity.
3. Judge-shopping is possible, and there is opportunity for laxness in supervising interception of conversations.
4. Overhearing of innocent conversations and privileged communications is unavoidable and may be constitutionally impermissible.
5. The thirty-day period allowed for listening in, with an unlimited number of thirty-day extensions, may protract eavesdropping excessively and violate requirements of the Supreme Court.
6. The law is ambiguous as to who is to be notified of the eavesdropping, who may object, and when motions to suppress evidence may be made.
7. Reports required to be filed are inadequate to inform the public and to form the basis for evaluation of operation of Title III." Eavesdropping on Trial, Edith L. Lapidus, p. 73.

These criticisms would be applicable to the state bill as the state and federal language are almost completely similar.

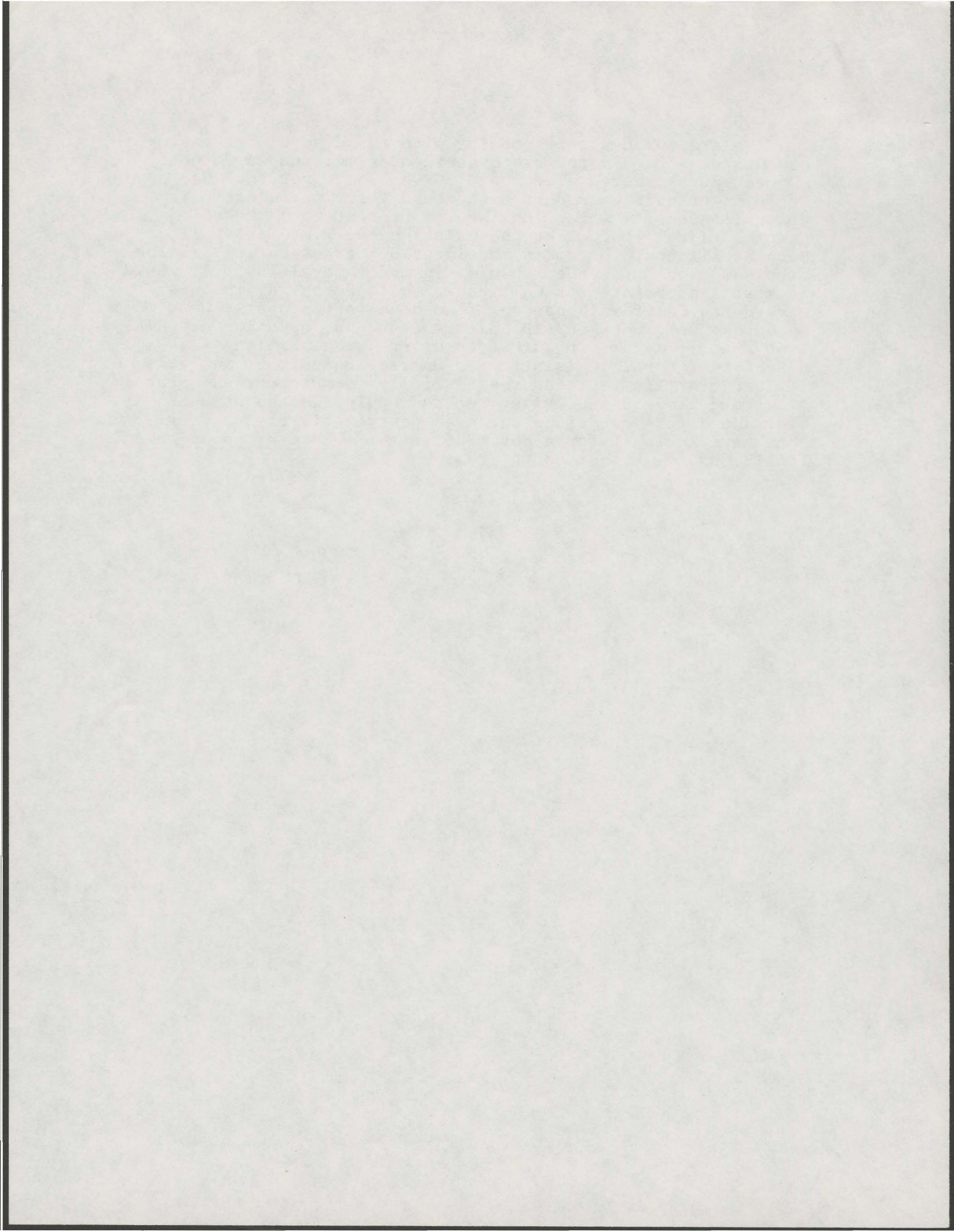
The one significant difference between the federal and state laws is that the federal law allows wire interception for thirty days and the pending state bill allows interception maximum of ten (10) days. This difference renders the proposed state law more strict.

A.B. 374 also allows for a motion to suppress evidence obtained in violation of these safeguards.

In all other respects, however, A.B. 374 retains the ambiguities which have brought Title III under the most severe (and, in our opinion, justified) criticism from civil libertarians (see, in extencio, APPENDIX B).

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We are in complete sympathy with the desire of the proponents of A.B. 374 to curb organized crime, and we do not oppose court-ordered electronic surveillance per se. We would in principle support a thoroughly revised electronic surveillance bill which (unlike the present one) showed a careful effort to correct the existing evils of Title III. Such a bill could become a model for better state legislation elsewhere and for needed changes in the federal law. It would be most appropriate for California to lead the way in this regard, as California has so often done in the past. We encourage more work on A.B. 374 to that end, opposing at this time the repetition in our state of existing perilous weaknesses in federal legislation: "Unless ambiguities in Title III are clarified, procedures carefully formulated, and practice more closely supervised, eavesdropping in the name of 'law and order' can erode and even destroy liberty as Americans have known it for almost 200 years." Eavesdropping on Trial, Edith J. Lapidus, p. 223.



SOURCES

1. U.S.C. Service Title 18, 2518, etc.
2. "The Problems of Electronic Eavesdropping"
Monrad G. Paulsen, ALI ABA Committee on Continuing
Professional Ed.
3. "Eavesdropping on Trial"
Edith J. Lapidus
4. "Standards Relating to Electronic Surveillance"
ABA Advising Committee
5. "Wiretapping and Eavesdropping"
Clifford S. Fishman
6. "The Law of Electronic Surveillance"
James C. Carr

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