

EXHIBIT A

California Bill Analysis, S.B. 1016 Sen., 6/13/1995

California Bill Analysis, Senate Committee, 1995-1996 Regular Session, Senate Bill 1016

June 13, 1995
California Senate
1995-1996 Regular Session

SENATE JUDICIARY COMMITTEE

Charles M. Calderon, Chairman

1995-96 Regular Session

SB 1016 (Boatwright)

As amended May 9, 1995

Hearing date: June 13, 1995

Penal Code

GWW:md

WIRETAPPING

-EXPANSION TO OTHER CRIMES AND ELECTRONIC COMMUNICATIONS-

HISTORY

Source: California Attorney General's Office

Related Pending Legislation: None Known

(THIS ANALYSIS REFLECTS AUTHOR'S AMENDMENTS TO BE OFFERED IN COMMITTEE.)

KEY ISSUES

1. SHOULD THE PERMITTING ELECTRONIC SURVEILLANCE BE EXPANDED FROM WIRE COMMUNICATIONS TO ALSO ALLOW THE INTERCEPTION OF ELECTRONIC COMMUNICATIONS?
2. SHOULD THE LIST OF CRIMES FOR WHICH A LAW ENFORCEMENT OFFICER MAY OBTAIN A WIRETAP

ORDER BE EXPANDED TO INCLUDE THE FOLLOWING

FELONIES: SOLICITATION TO COMMIT MURDER, CONSPIRACY TO COMMIT MURDER, AGGRAVATED KIDNAPPING, A BOMBING, OR CHILD MOLESTATION?

3. SHOULD THE TIME WHICH AN AGENCY MUST REPORT BACK TO A JUDGE REGARDING AN ELECTRONIC SURVEILLANCE BE EXPANDED FROM EVERY 72 HOURS TO EVERY 5 DAYS?

4. SHOULD THE REQUIREMENTS FOR MINIMIZATION DURING A WIRETAP AND FOR IMMEDIATE VERIFICATION OF AUTHENTICITY AND ORIGINALITY OF THE TAPE BE MODIFIED, AS SPECIFIED?

5. SHOULD LAW ENFORCEMENT OFFICERS PERFORMING AN ELECTRONIC SURVEILLANCE OPERATION PURSUANT TO A COURT ORDERED WARRANT BE EXPRESSLY EXEMPT FROM SEVERAL PENAL CODE PROVISIONS PROHIBITING THE INTERCEPTION OF COMMUNICATIONS OVER CELLULAR OR DIGITAL TELEPHONES?

6. SHOULD THE JANUARY 1, 1999 SUNSET FOR THE CURRENT WIRETAP LAW BE REPEALED?

PURPOSE

The Presley-Felando-Eaves Wiretap Act of 1988 permits the interception of wire communications by law enforcement officers investigating certain controlled substances violations under specified judicial authorization procedures. Generally, it allows a judge, upon application, to authorize a wiretap if he or she determines that probable cause exists to believe that an individual is committing, has committed, is about to commit, or is conspiring to commit one of various specified offenses involving large quantities of controlled substances. The wiretap law will sunset on January 1, 1999.

At the federal level, Congress first passed a comprehensive statute governing the use by the federal government of electronic surveillance and granted permission for states to likewise enact statutes authorizing their law enforcement officers to use electronic surveillance in 1968 (Pub.L. 90-351, Title III, section 802, June 19, 1968, 82 stat. 212 ["Title III"].) Congress revised and expanded Title III in 1986 to distinguish between wire and electronic communications and again in 1994 with the "Communications Assistance for Law Enforcement Act" in reaction to changing technology.

Congress has not pre-empted the field, but has set minimum standards for states to follow if a state elects to enact a wiretap law.

1. Existing law permits the interception of wire communications by law enforcement under specified judicial authorization. This bill would also permit the interception of electronic communications, as defined. (Author's amendments in committee will remove the proposed extension to permit interception of oral communications, i.e., covert "bugging" operations. The amendments will also remove the provisions authorizing covert entry into a person's dwelling to facilitate the surveillance operation.)

2. Existing law provides that a judge may authorize a wiretap if there is probable cause to believe an individual is committing, has committed, or is about to commit one of various specified offenses involving controlled substances.

As amended by author's amendments to be offered in committee, this bill would additionally authorize the granting of an electronic surveillance order if there is probable cause to believe an individual is committing, has committed, or is about to commit any one of the following specified crimes:

- solicitation to commit murder;
- conspiracy to commit murder, aggravated kidnapping for robbery or ransom, bombing, or child molestation of a child under the age of 14.

3. Existing law provides that all interceptions shall be executed as soon as possible after the order is granted and should be done in such a way as to minimize the interception of innocent conversations not subject to the interception. Existing law also requires the recording of the contents of wire communications to be done in a way that will ensure that the recording can im-

mediately be identified as to its authenticity and originality and any alterations can be immediately detected.

This bill would provide that if the communication is in a foreign language, a linguistics expert in that language may also participate in the interception to interpret the foreign language. The use of the interpreter would not limit or reduce the minimization requirement. (Author's amendments in committee will remove provisions which had proposed elimination of the minimization requirement whenever an intercepted communication was in a code or foreign language.)

This bill would also modify the present requirement for immediate authentication of the originality of the recorded tape to detect alterations to allow that verification to be made by "means of current or any new, appropriate technology."

4. Existing law provides that written reports must be submitted at least every 72 hours to the judge issuing the order allowing the interception.

This bill would extend that time to five days instead.

5. Existing law specifies that nothing in the following provisions prohibit an officer from intercepting a communication under a proper court order:

~~-Penal Code section 631, prohibition against wiretapping;~~

~~-Penal Code section 633, exemption to wiretapping prohibition under specified circumstances for Airport Law Enforcement officers;~~

~~-Penal Code section 637, the wrongful disclosure of private telephone conversations.~~

This bill would add the following code sections to the above list:

~~-Penal Code section 632, prohibition against eavesdropping or recording confidential communications;~~

~~-Penal Code section 632.5, prohibition against improperly intercepting or receiving cellular radio or telephone communications;~~

~~-Penal Code section 632.6, prohibition against improperly intercepting or receiving cordless phone communications;~~

~~-Penal Code section 632.7, prohibition against recording cellular radio telephone, cordless phone or landline telephone communications without consent.~~

6. Under existing law, the law permitting wiretapping would sunset on January 1, 1999.

This bill would repeal the sunset clause.

The purpose of this bill is to extend the present wiretapping law to also allow the interception of electronic communications and to extend its application to a larger number of life-threatening felonies.

COMMENTS

1. Expansion to Electronic Communications

Federal law allows not only the interception of wire communications but also the interception of electronic communications. The sponsor, the State Attorney General's Office, asserts that it is vitally necessary to expand this part of California's wiretap law to conform to the federal law.

a) Electronic communications

According to the sponsor, the most common form of electronic communication affected by the proposed expansion is the broadcast of the digital pager. They state: "[t]hat dealers use digital pagers in the conduct of their business is almost axiomatic and has received judicial recognition." The sponsor argues that not being able to intercept the broadcast pager inhibits a narcotic officer's ability to enforce the law. They assert that intercepting broadcast pagers is actually less intrusive than wire

communications because all that is intercepted are phone numbers and not statements.

This bill does not so limit the definition of "electronic communications" however to digital pagers. The bill defines electronic communications broadly to include "a transfer of signs, signals, writing, images, sounds, data or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system.... (See definition section beginning page 6, line 32.)

The proposed definition generally tracks the definition in federal law. The comment of the federal Senate Judiciary Committee states:

"As a general rule, a communication is an electronic communication protected by the federal wiretap law if it is not carried by sound waves and cannot fairly be categorized as containing the human voice. Communications consisting solely of data, for example, and all communications transmitted only by radio are electronic communications. The term also includes electronic mail, digitized transmissions, and video tell conferences." Thus, interception of an e-mail sent or stored within a computer system is not permitted without a court order. Another Senate Report, however, distinguishes e-mail within a system from electronic bulletin boards which are not covered by the protections because of the "readily accessible nature of the service".

It is not clear that California law specifically protects e-mail and other electronic communications from improper interception by either private parties or law enforcement. SHOULD, AS A COROLLARY TO THE EXTENSION OF THE WIRETAP LAW

TO ELECTRONIC COMMUNICATIONS, THE PRIVACY LAWS BE AMENDED TO EXPRESSLY PROTECT ELECTRONIC COMMUNICATIONS FROM INTERCEPTION BY ANYONE IN THE ABSENCE OF A COURT ORDER?

b) Prior attempt at expansion rejected

SB 800 of 1993 also proposed the expansion of the wiretap law to include electronic communications. Because of the uncertainty of the breadth of the proposed expansion at that time, the measure was approved by this Committee in a narrower form to expressly permit the interception of digital pagers.

2. Expansion of law to more crimes.

The sponsor asserts that the ability to intercept telephone and electronic communications should be expanded to other serious life-threatening crimes. The sponsor points out that various other states that have authorized electronic surveillance orders for murder and murder for hire.

This bill would additionally authorize the interception of communications in the investigation of a solicitation to commit murder offense; or a conspiracy to commit murder, aggravated kidnapping for robbery or ransom, bombing, or child molestation of a child under the age of 14.

According to the sponsor, the use of wire or electronic communication is often used in the commission of these additional offenses. Child molesters are said to use computer networks to communicate and to distribute information that may lead to a molestation. Solicitations for murder and conspiracies to commit murder or aggravated kidnapping often also involve telephone communications. Therefore, it is argued, the proposed expansion properly balances the need of law enforcement for a valuable surveillance tool against privacy rights of Californians.

SHOULD NOT THE PROVISION AUTHORIZING THE USE OF ELECTRONIC SURVEILLANCE TO INVESTIGATE CHILD MOLESTATION CRIMES BE SPECIFICALLY LIMITED TO INVESTIGATION OF CRIMES COMMITTED THROUGH THE USE OF COMPUTER NETWORKS?

3. Modifying minimization and authentication of recording requirements

Minimization

Existing law requires a person intercepting a communication to minimize the interception of conversations not otherwise subject to the interception. This is done by turning the listening device off for a specified time and then back on, then off again, etc., so that the entire conversation is not monitored but pertinent conversations will not be missed.

This bill would allow the use of a foreign language interpreter to assist the peace officer executing the interception if the intercepted communication is in a foreign language. The bill would not reduce or affect the present requirements for minimization.

The bill would also add "persons necessary to provide linguistic interpretation" to the list of persons whom can be trained in the aspects of the interception of communications.

Authentication of originality and non-alteration of tape

Existing law requires that the intercepted communication is recorded in a way that ensures the recording is protected from editing and ensures that the audio tape can be immediately verified as to its authenticity and originality and that any alteration can be immediately detected.

This bill would modify that requirement to provide that "any alteration can be immediately detected 'by means of current or any new, appropriate technology.'"DD'

This modification is necessary, according to the sponsor, because there is only one type of machine that can simultaneously verify the authenticity of a tape. It is made in Australia and extremely expensive. The proposed amendment would allow law enforcement to develop and use other technology to satisfy the standard.

Nothing in existing law specifies the technology to be used to verify that a tape has not been altered. Thus, existing law already permits use of any new, appropriate technology to satisfy the standard. Concern is therefore expressed that the additional language could be read to lessen or reduce the standards in some way.

COULD NOT LAW ENFORCEMENT USE NEW, APPROPRIATE TECHNOLOGY TO VERIFY THE NON-ALTERATION OF A TAPE WITHOUT THE PROPOSED LANGUAGE?

4. Reports to judge

Existing law requires that after an order to intercept communications is granted, the persons carrying out the order must give written report to the judge every 72 hours and the judge then determines whether the intercept should continue. Federal law does not require reports to be filed but the federal practice is to report every 10 days and this bill seeks to extend the reporting requirement in California to every 10 days.

The sponsor states that as a practical matter a meaningful determination of whether probable cause exists to continue an interception cannot meaningfully be judged in 72 hours. Moreover, when the surveillance is conducted in remote areas, the every 72 hours reporting requirement could be burdensome.

This bill would increase the reporting requirements to every five days.

SHOULD THE REPORTING REQUIREMENT BE EXTENDED TO FIVE DAYS?

SHOULD NOT THE JUDGE BE GIVEN AUTHORITY TO ORDER THE SHORTER 72-HOUR REPORTING PERIOD, IN THE JUDGE'S DISCRETION?

5. Exemptions for law enforcement eavesdropping

Existing law provides that specified provisions against wiretapping and disclosure of phone conversations do not apply to an officer with a valid interception of communication order.

This bill would additionally exempt officers eavesdropping on confidential communications (Section 632), cellular phone communications (Sec. 632.5), cordless phone communications or landline telephone communications (Sec. 632.7) pursuant to a valid interception of communication order.

It is not known why an exemption to Section 632's prohibition against eavesdropping on confidential communications is necessary in light of the author's amendments to remove "bugging" from the bill.

IS AN EXEMPTION FROM SECTION 632 NECESSARY OR APPROPRIATE?

6. Sunset Clause

SB 800 extended the sunset clause on the wiretap bill to January 1, 1999. This bill would repeal the sunset clause.

IN LIGHT OF THE EXPANSIONS SOUGHT IN THIS BILL, SHOULD THE SUNSET CLAUSE REMAIN SO AS TO GIVE THE LEGISLATURE AN OPPORTUNITY TO REVIEW THE EXPANSION?

7. Opposition

The defense bar objects to granting law enforcement further authority to engage in intrusive surveillance of a person's private conversations.

CACJ states that "[t]he lesson we have learned from federal wiretapping provisions is not that the courts are deliberately insensitive to constitutional rights, but that wiretapping is difficult to control and limit in practice." Moreover, opponents note that surveillance operations are extremely expensive and should not be readily available as a short-cut for law enforcement.

8. Limited experience under wiretap law

Since the wiretap law became effective January 1, 1989, there have been few cases investigated under its provisions. According

to the Attorney General's 1994 Legislative report, California law enforcement obtained orders to conduct a wire intercept in three cases in 1993. While no arrests have yet resulted from the three intercepts, the investigations are continuing and have resulted in over 100 kilograms of cocaine being seized. The cost of the surveillance operations are estimated at \$310,000, \$165,000, and \$165,000, respectively.

Other than those three cases, the wiretap law has been used in four other situations. In one case, the drug trafficker was convicted and sentenced to 20 years in prison. In another, the investigations resulted in the seizure of over \$2,000,000; no arrests have yet been made and the investigation is continuing without electronic surveillance. In a third case, a "ring" involving 11 defendants were arrested and charged. Three defendants have pleaded guilty, and six are still awaiting trial. Two defendants had dismissal motions granted. In the fourth case, the electronic surveillance "netted" the person suspected to be the largest cocaine distributor in the Santa Barbara County area. The suspect was arrested and convicted. An appeal is now pending.

These reports demonstrate that electronic surveillance can be effective, but is very expensive. To the extent that the wiretap authority is broadened to include other crimes, the expansion could result in fewer resources being available to investigate and arrest major drug traffickers.

GIVEN THE LIMITED RESOURCES OF LAW ENFORCEMENT, AND THE EXPENSIVE COST OF ELECTRONIC SURVEILLANCE OPERATIONS, WOULD EXPANSION OF THE WIRETAP LAW TO OTHER CRIMES TAKE AWAY FROM LAW ENFORCEMENT EFFORTS TO INVESTIGATE AND ARREST MAJOR DRUG TRAFFICKERS?

9. Other provisions of wiretap law unaffected

Author's amendments in Committee will restore the other provisions of existing law which had been proposed for amendment or repeal. Most significantly, current rules regarding the derivative use of evidence garnered in a wiretap would remain in effect. In addition, the current penalties for a violation of the wiretap law would remain in effect.

Prior Legislation:

SB 800 (1993) - amended out;
SB 1120 (1991) - amended out;
SB 83 amended out in part and chaptered in part
as SB 1499 (1988);
SB 1499 Chapter 111, Stats. 1988

Support: California Peace Officers' Association; California Police Chiefs' Association; California District Attorneys' Association; California Sheriffs' Association; CAUSE; Los Angeles District Attorney's Office; Los Angeles County Sheriff; Orange County Sheriff; Orange County District Attorney; Doris Tate Crime Victims Bureau

Opposition: American Civil Liberties Union; California Attorneys for Criminal Justice; California Public Defenders' Association

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