

Opinion No. 71-37

March 2, 1971

BY: OPINION OF DAVID L. NORVELL, Attorney General

TO: Honorable Turner Branch New Mexico State Representative House of Representatives Legislative Executive Building Santa Fe, New Mexico 87501

QUESTIONS

QUESTION

House Bill 348 allows state and federal officials to do wiretapping and electronic surveillance if they first obtain a warrant. Is House Bill 348 constitutional?

CONCLUSION

Yes.

OPINION

{*53} ANALYSIS

The following analysis of House Bill 348 is not intended as an expression of approval or disapproval of a wiretapping statute. It is not the policy of this office to counsel the legislature on the advisability of enacting certain laws, and we do not do so in this opinion. The analysis will be confined to an examination of the proposed bill in light of constitutional principles established by the U.S. Supreme Court.

House Bill 348 amends Section 40A-12-1, N.M.S.A. 1953 Comp. to allow official wiretapping and electronic surveillance under certain specified conditions. The provisions of this bill are almost identical to the wiretapping provisions of the Federal Omnibus Crime Control and Safe Streets Act of 1968. 18 U.S.C. §§ 2516-2520. The federal law's constitutionality has not been challenged in the courts; consequently, House Bill 348 must be examined in light of the U.S. Supreme Court's decisions on official wiretapping in general.

The Supreme Court has held that law enforcement officials must obtain a warrant before engaging in any form of electronic surveillance. **U.S. v. Katz**, 389 U.S. 347, (1967). In that case the court held wiretap evidence inadmissible because the government agents had ignored " 'the procedure of antecedent justification . . . that is central to the Fourth Amendment,' a procedure that we hold to be a constitutional precondition of the kind of electronic surveillance involved in this case." **U.S. v. Katz**, **supra**. Sections 2-6 of House Bill 348 specify the procedure for law enforcement officials to follow to obtain a court order to wiretap. House Bill 348 meets the

requirement of **Katz** that there be antecedent justification to a court before wiretapping is employed.

The procedures and guidelines for this antecedent justification must be precise, however. The Supreme Court ruled unconstitutional a New York {*54} statute which instituted procedures for obtaining an ex parte order to wiretap because the statute was too vague to adequately protect the rights guaranteed by the U.S. Constitution's Fourth Amendment. **Berger v. New York**, 388 U.S. 41 (1966). The Court's discussion of the New York Statutes' weaknesses supplies us with criteria to test the constitutionality of House Bill 348.

The Supreme Court found the New York Statute deficient in several major respects. None of those constitutional weaknesses is present in House Bill 348. The New York Statute did not require a showing of probable cause that a **particular** offense was being or was about to be committed. House Bill 348, Section 2, allows issuance of an order only for the investigation of certain enumerated crimes. Section 3B requires the application for an order to give "details as to the particular offense." The New York statute did not require a particular description of the conversations sought. House Bill 348, Section 3B(3), requires a particular description.

The New York statute authorized eavesdropping for a two month period. The court said this was tantamount to a series of searches upon only one showing of probable cause. House Bill 348, Section 6, avoids this difficulty by declaring that the order shall be executed as soon as practicable and shall terminate when the objective is obtained or in thirty days at the latest. The New York Statute allowed extensions of the order upon a showing that the extension was in the public interest. House Bill 348, Section 6, requires that probable cause be shown to obtain an extension in the same manner as if the application were for an original order.

The New York statute did not provide for termination of the wiretap once the conversation was seized. Termination was entirely in the officer's discretion. House Bill 348, Section 3D, requires the applicant to establish that there is probable cause to believe that additional communications of the type to be intercepted will occur; otherwise, the order terminates automatically upon interception of the conversation described in the application. The New York statute contained no provisions for a return on the warrant. It left full discretion in the officer as to the use of seized conversations. House Bill 348, Section 7, provides that immediately upon expiration of the order, the recording is to be given to the judge, sealed, and placed in custody pursuant to his orders.

Finally, the New York statute did not provide for any notice to the party whose communications were intercepted. House Bill 348, Section 7D, requires the judge to notify the persons named in the wiretap order and any other parties to the intercepted communications whose notification the judge determines is in the interest of justice. The parties must be notified within 90 days after the order is terminated or denied. That section also allows the parties to inspect their statements which were recorded. Section

8A requires that the parties whose conversations were intercepted be given copies of the court order and application at least ten days before any court proceeding in which the recorded evidence is to be introduced. These notice requirements satisfy the requirements of the Fourth Amendment since the parties whose conversations were seized are notified before such conversations are used against them. Prior notice would, of course, defeat the purpose of electronic surveillance.

We conclude, without expressing any opinion on its advisability, that House Bill 348 conforms to the constitutional guidelines specified by the U.S. Supreme Court.

By: Thomas Patrick Whelan

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