STATE OF CALIFORNIA
OFFICE OF LEGISLATIVE COUNSEL

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Sacramento, California
July 7, 1972

Honorable John Stull
Assembly Chamber

Privacy (A.C.A. 51) - #10722

Dear Mr. Stull:

QUESTION

You have asked us to explore the possible ramifications of Assembly Constitutional Amendment No. 51 as amended in Assembly June 8, 1972, if adopted, both generally, and in regard to "wire tapping," repossession, use of a search warrant, and "frisking."

OPINION AND ANALYSIS

A.C.A. 51 as amended in Assembly June 8, 1972, would, if adopted by the people, amend Section 1 of Article 1 of the California Constitution to provide as follows:

> "Section 1. All men people are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing, and protecting property; and pursuing and obtaining safety, and happiness, and privacy."

Thus the proposal would include pursuing and obtaining privacy among the inalienable rights guaranteed by the California Constitution. The Constitution, however, would not contain a definition of the term "privacy."

In this regard, the rights presently guaranteed by Section 1 of Article 1 have been defined and restricted by the Legislature (see, for example, Sec. 1000 et seq., Civ. C.; Sec. 447 et seq., Pen. C.), and the courts will give great weight to legislative interpretation of constitutional provisions (Woodcock v. Dick (1950), 36 Cal. 2d 146, 148).

The right of privacy is recognized under existing California case law and has been defined in a general sense as the right to live one's life in seclusion, without being subjected to unwarranted and undesired publicity (Gill v. Curtis Publishing Co. (1952), 38 Cal. 2d 273, 276). In short it is the right to be let alone (Kerby v. Roach Studios Inc. (1942), 53 Cal. App. 2d 207). It has been held however, that such right is not absolute (see Metter v. Los Angeles Examiner (1939), 35 Cal. App. 2d 304, 312; Voneye v. Turner, 240 S.W. 2d 588, 590).

The court in the case of Melvin v. Reid (1931), 112 Cal. App. 285, at page 290 summarized the law in this regard, as follows:

> "A few general principles, founded on authority or reason, seem to run through most of the better considered decisions from the jurisdictions which recognize the doctrine as well as those which do not. We may summarize them as follows:
>
> "1. The right of privacy was unknown to the ancient common law.
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> "2. It is an incident of the person and not of property--a tort for which a right of recovery is given in some jurisdictions.
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> "3. It is a purely personal action and does not survive, but dies with the person.
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> "4. It does not exist where the person has published the matter complained of, or consented thereto.
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> "5. It does not exist where a person has become so prominent that by his very prominence he has dedicated his life to the public and thereby waives his right to privacy. There can be no privacy in that which is already public.

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"6. It does not exist in the dissemination of news and news events, nor in the discussion of events of the life of a person in whom the public has a rightful interest, nor where the information would be of public benefit as in the case of a candidate for public office.

"7. The right of privacy can only be violated by printings, writings, pictures or other permanent publications or reproductions, and not by word of mouth.

"8. The right of action accrues when the publication is made for gain or profit. (This however is questioned in some cases.)"

In approaching the concept of the right of privacy, the California courts have taken the view that although such right does not provide immunity from compliance with reasonable civil requirements imposed by the state in the interest of public welfare, and does not bar legislative control of acts inimical to the peace, good order, and morals of society (see Carlisle v. Fawcett Publications, Inc. (1962), 201 Cal. App. 2d 733; Morrison v. State Board of Education (1969), 1 Cal. 3d 214; People v. Garber (1969), 275 Cal. App. 2d 119), where there is a significant encroachment upon personal liberty the state may regulate only upon showing a subordinating compelling interest (City of Carmel-by-the-Sea v. Young (1970), 2 Cal. 3d 259).

In this connection the United States Supreme Court, in discussing the federal law with regard to search and seizure as based on the interplay between the Fourth and Fifth Amendments to the United States Constitution, in the case of Davis v. United States (1946), 90 L. ed. 1453, said that this law reflected a dual purpose, one of which was protection of the privacy of the individual, his right to be let alone, the other, protection against compulsory production of evidence to be used against him (see also Trupiano v. United States (1948), 92 L. ed. 1663; Jones v. United States, 2 L. ed. 2d 1514; Frank v. Maryland, 3 L. ed. 2d 877; Mapp v. Ohio, 6 L. ed. 2d 1081).

As was stated by the court in the City of Carmel-by-the-Sea case, supra (2 Cal. 3d 259, at p. 268):

"... we are satisfied that the protection of one's personal financial affairs and those of his (or her) spouse and children against compulsory public disclosure is an aspect of the

> zone of privacy which is protected by the Fourth Amendment and which also falls within that penumbra of constitutional rights into which the government may not intrude absence a showing of compelling need and that the intrusion is not overly broad. '[W]here fundamental personal liberties are involved, they may not be abridged by the States simply on a showing that a regulatory statute has some rational relationship to the effectuation of a proper state purpose. "Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling." [Citation.] The law must be shown "necessary, and not merely rationally related to, the accomplishment of a permissible state policy." [Citations.]' (Griswold v. Connecticut, supra, 381 U.S. 479, 497 [14 L.Ed.2d 510, 522, 85 S.Ct. 1678, 1689].) 'The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose.' (Shelton v. Tucker, supra, 364, U.S. 479, 488 [5 L.Ed.2d 231 at p. 237].)"

While we do not think it is possible to predict with absolute certainty the effect with regard to any given situation of the amendment of Section 1 of Article I of the California Constitution to expressly state that the pursuit and obtainance of privacy is among the inalienable rights guaranteed thereby, we think the existing case law on the subject is persuasive, and would afford a basis for the courts to conclude that the rights discussed above are those assimilated in the right of privacy proposed by A.C.A. 51. The final characteristics of any such rights would, of course, be influenced by any legislation implementing the constitutional amendment, if adopted.

Thus, we turn to the question of the specific effect of the proposed amendment on "wire tapping," repossession, use of a search warrant, and "frisking."

Initially, it must be recognized with respect to the right of privacy recognized under existing law, that in order for there to be a violation of the right

of privacy the thing into which there is prying or intrusion must be entitled to be private. It has been held, for instance, that a person has no basis for complaint when the police, acting within their powers, take his photograph, fingerprints, or measurements (see Voelker v. Tyndall (1947), 75 N.E. 2d 548; McGovern v. Ripper (1947), 54 A. 2d 469; People v. Blair (1969), 2 Cal. App. 3d 249, 256).

However, the courts have recognized that a "pat-down" incident to an arrest for an ordinary traffic violation can constitute an invasion of privacy when not predicated on circumstances giving reasonable grounds to believe that a weapon is secreted on a motorist's person (People v. Superior Court (1972), 7 Cal. 3d 186, 206; see Terry v. Ohio (1968), 20 L. ed. 2d 889, 903). Accordingly, we think that upon the adoption of ACA 51, as amended, the courts would continue to view "frisking" as an activity which must be based upon the possession of reasonable grounds for suspecting that the safety of the police officer or of others is in danger (see People v. Superior Court, supra, at p. 203).

With regard to "use of a search warrant," we point out that it has been held that in the case of a search without a warrant, in the absence of a showing of true necessity - that is, an imminent and substantial threat to life, health, or property - the constitutionally guaranteed right to privacy must prevail (People v. Smith (1972), 7 Cal. 3d 282, 286). We think that upon the adoption of the constitutional amendment the courts would continue to so hold. On the other hand we do think that the adoption of such measure would not have a restrictive effect upon the conduct of a search pursuant to a lawfully issued warrant (see People v. Smith, supra, at p. 285). Since various official intrusions relative to repossessions have been held to be "searches" within the Fourth Amendment of the United States Constitution (Blair v. Pitchess, 5 Cal. 3d 258) these views would, we think, be equally applicable to such repossessions.

Analogously, as to "wiretapping," we think that while the right of privacy would not prevent intrusion otherwise lawful, an intrusion not in accordance with

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lawful procedures would be violative of such principles (see People v. Lawrence (1957), 149 Cal. App. 2d 435, 441-442; Lapresse v. Raymours Furniture Co. (1970), 315 F. Supp. 716, 722-723). Of course, nothing could be authorized in implementing legislation as to wiretapping if it is prohibited by federal law (see Halpin v. Superior Ct., 6 Cal. 3rd 885).

In summary, we do not think the adoption of A.C.A. 51 would affect the law relating to "wire tapping," repossession, use of search warrants, or "frisking" in absence of additional implementing legislation.

Very truly yours,

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By
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Two copies to Honorable Kenneth Cory, pursuant to Joint Rule 34.