



Testimony for the Judicial Proceedings Committee

March 9th, 2023

SB 749- Interception of Wire, Oral, or Electronic Communications – Exception for Imminent Danger and Admission as Evidence

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UNFAVORABLE

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The ACLU of Maryland opposes SB 749, which would allow wiretaps and other communication interceptions in certain instances, specifically if the person believes they are about to become a victim of a crime of violence, stalking, or abuse. This bill would impede the privacy rights of Marylanders and create another tool of incarceration by allowing these communication interceptions to be used as evidence in a court of law. This bill has inadequate safeguards for potential misuse and could lead to instances of interception for illegitimate reasons.

Maryland is currently a two party consent state that requires the consent of all parties in order for a conversation to be legally recorded. Carving out an exception for potential victims of violence is a noble pursuit, however, it would trample on the right to privacy that Marylanders currently enjoy by taking away the element of consent. Current law already provides carve outs for interception of wire communications if a person is under criminal investigation by a law enforcement entity¹. Art. Courts and Judges, §10–402, (c), (1), (ii), (1). There is also a carve out for communication providers to intercept wire communications upon receiving a court order signed by a judge. Art. Courts and Judges, §10–402, (c), (2), (ii). This standard at least requires judicial approval before the element of consent is taken away from the subject to be recorded. While providing tools for victims of domestic violence is essential to their protection, this bill goes too far in stripping a party of their individual autonomy and right to not be recorded without consent. Allowing one way consent in communications recording sets a precedent that is ripe for misuse by

¹ <https://mgaleg.maryland.gov/mgawebsite/Laws/StatuteText?article=gcyj§ion=10-402&enactments=false>

private citizens. All one would have to do for their interception to be legal is to make a claim of fear of being the victim of one of the enumerated crimes, whether that fear be real or imagined. So long as that claim is made the recording would be deemed legal regardless if the basis for the claim is ever prosecuted or ends in conviction. SB 749 lacks the proper safeguards against this form of misuse.

Evidentiary Use

The bill would also allow these interceptions by private citizens, not authorized by a judge, to be used as evidence at trial for the crimes they are alleged to have committed. While the bill would require that the proponent give notice to the adverse party, there are no other safeguards or exclusionary provisions in place should the adverse party object to the interception of the wire's use as evidence.

Further, the bill allows the recording to be introduced as evidence if "the probative value of the communication is greater than other evidence the proponent is able to procure through reasonable efforts." This new standard would ask the Court to determine the relevance, or probative value, of evidence and have it determine the weight it should be afforded, which has always been the duty of the trier of fact, not the court.

For the foregoing reasons we oppose SB 749.

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