

SENATE BILL REPORT

SB 5126

AS REPORTED BY COMMITTEE ON LAW & JUSTICE,
JANUARY 28, 1991

Brief Description: Authorizing the use of pen registers.

SPONSORS: Senators Nelson, Madsen, Patterson, Rasmussen, Thorsness, Hayner, Johnson, A. Smith, Jesernig and L. Smith.

SENATE COMMITTEE ON LAW & JUSTICE

Majority Report: That Substitute Senate Bill No. 5126 be substituted therefor, and the substitute bill do pass.

Signed by Senators Nelson, Chairman; Thorsness, Vice Chairman; Erwin, Hayner, Kreidler, L., Madsen, Newhouse, Rasmussen, and Smith, A.

Staff: Jon Carlson (786-7459)

Hearing Dates: January 21, 1991; January 28, 1991

BACKGROUND:

The pen register is a device which is used to tap into a criminal suspect's telephone and decode the number being dialed. A trap and trace device captures the incoming electronic or other impulses that identify the originating number of an instrument or device from which a wire or electronic communication was transmitted.

These devices were used by law enforcement to gather information regarding criminal activity until 1986. At that time, the State Supreme Court held in State v. Gunwall, 106 Wn.2d 54, that pen registers without valid legal process violate privacy rights under the State Constitution and can only be authorized by a search warrant or statute. Further, the Supreme Court stated that even with a warrant or statutory authorization, the use of the pen register would be limited to those circumstances involving national security, danger to human life, or imminent arson or riot. These circumstances are set forth in Washington's current "no-party consent" statute pertaining to the interception of private communications.

It is suggested that law enforcement's ability to conduct effective criminal investigations would be enhanced by provisions that allow the use of pen registers and trap and trace devices for all criminal activities.

SUMMARY:

A law enforcement officer may apply to superior court for an order authorizing the installation and use of a pen register or trap and trace device. The court must issue an authorizing order if the law enforcement officer has certified to the court that the information is likely to be relevant to an ongoing criminal investigation. No person may install or use a pen register or a trap or trace device without first obtaining a court order.

The authorizing order must specify the identities of both the suspect and the person who leases the telephone line to which the pen register or trap and trace device is attached. In addition, the order must indicate the location of the telephone line and, in the case of the trap and trace device, the geographic limits of the trap and trace order. The order is also required to state the offense which is likely to be charged as a result of the information obtained by these devices.

Upon the law enforcement officer's request, the order must direct the telephone company and others to furnish information, facilities, and technical assistance necessary to install the devices. The authorizing order is valid for a period not to exceed 60 days, with a possible extension period not to exceed 60 days.

The person owning or leasing the line to which the device is attached, or who provides assistance to the applicant, must not disclose the existence of the device to any person, unless otherwise ordered by the court. Telephone companies and others must be reimbursed for reasonable expenses incurred in providing facilities and assistance.

No cause of action may be brought against a telephone company or other specified persons for complying with the terms of a court order. A good faith reliance on a court order, legislative authorization, or statutory authorization is a complete defense against any civil or criminal action brought under these provisions.

EFFECT OF PROPOSED SUBSTITUTE:

A good faith reliance on a court order is a complete defense against any civil or criminal action brought under these provisions.

Appropriation: none

Revenue: none

Fiscal Note: requested January 16, 1991

TESTIMONY FOR:

Pen registers and trap and trace devices would provide a valuable tool for law enforcement during criminal investigations, particularly in the area of illegal drug trafficking.

TESTIMONY AGAINST:

These devices unnecessarily intrude upon the privacy rights of citizens.

TESTIFIED: Leo Poort, Seattle Police Department (pro); Lt. Dennis Nixdorf, Seattle Police Department (pro); Jerry Sheehan, American Civil Liberties Union (con)