

SUBJECT: Revisions on interception of wire, oral, electronic communication

COMMITTEE: Criminal Jurisprudence— favorable, without amendment

VOTE: 5 ayes — Place, Talton, Farrar, Nixon, A. Reyna
0 nays
4 absent — Dunnam, Galloway, Hinojosa, Keel

SENATE VOTE: On final passage, April 29 — voice vote

WITNESSES: No public hearing

BACKGROUND: A pen register is a device that attaches to a telephone line and can record outgoing numbers dialed from that line but cannot record the origin of an incoming communication or the content of the communication. A trap and trace device attaches to a telephone line and can record an incoming electronic or other impulse that identifies the originating number of an instrument or device where a wire or electronic communication was transmitted.

DIGEST: SB 1120 would revise the Penal Code and Code of Criminal Procedure concerning the interception of wire, oral and electronic communications and the use of pen registers and trap and trace devices.

SB 1120 would take effect September 1, 1997.

Wire, oral or electronic communications. SB 1120 would expand the number of locations where judges would be authorized to act on an application to authorize the interception of wire, oral or electronic communications. Instead of allowing only a specified judge in the administrative judicial district in which the proposed interception would be made to act on a request to intercept a communication, SB 1120 would allow the decision to be made by a specified judge in the administrative region that was the site of:

- the proposed interception;

- the place where the device would be installed or monitored;
- the communication device that was being intercepted;
- the billing, residential, or business address of the subscriber to the electronic communications service that would be intercepted;
- the headquarters of the law enforcement agency requesting the interception; or
- the headquarters of the service provider.

SB 1120 would include the radio portion of cordless telephone communications in the definition of wire communications, bringing the interception of this type of communication under the regulation of the interception statutes.

Other changes would include:

- authorizing in the Code of Criminal Procedure suits by the federal and state government for injunctive relief against persons violating Penal Code prohibition against illegal divulgence of public communications and eliminating a similar provision in the Penal Code;
- eliminating current Code of Criminal Procedure provisions that make sections on wire, oral and electronic communications not applicable to certain persons and stating that the sections do not apply to circumstances that are currently covered by affirmative defenses to prosecution for unlawful interception of these communications; and
- making changes to definitions including those of pen register and readily accessible radio communications.

Pen registers and trap and trace devices. SB 1120 would increase the number of days that an order for the installation and use of a pen register or trap and trace device would be valid from 30 days to 60 days after the day the device was installed. The length of extensions that could be granted for the devices also would be increased from 30 days to 60 days.

The bill would include enforcement officers employed by the Texas Department of Criminal Justice (TDCJ) among the authorized peace officers

who could request prosecutors to ask judges for permission to install pen registers and trap and trace devices and who could install devices in an emergency.

Other changes would include:

- requiring governmental agencies that install and use pen registers to use reasonably available technology to record and decode electronic or other impulses that are used to identify the numbers dialed or transmitted only and not to identify other numbers or codes that could be part of the communication;
- eliminating authority for the DPS director to designate peace officers who can install the devices without standard authorization in an emergency situation; and
- changing definitions of aural transfer and trap and trace device and eliminating other definitions relating to wire, oral and electronic communications, pen registers and other devices.

Other offenses. SB 1120 would change the exceptions of applications to affirmative defenses to prosecution under the offense of unlawful use of pen registers or trap and trace devices, unlawful access to stored communication and illegal divulgence of public communications and make other changes in the affirmative defenses.

SUPPORTERS
SAY:

SB 1120 would conform Texas law on the interception of communications with federal law, make changes in the statutes to reflect changes in technology, expand the locations at which judges can authorize the interception of communications, give TDCJ enforcement officers the same authority as other peace officers concerning gaining authorization to install pen registers and trap and trace devices, and put Penal Code and Criminal Procedure statutes dealing with these topics into a more logical arrangement.

SB 1120 would make no substantive changes or expansions in the authority of persons to use wire taps. Many of the changes would simply make Texas law conform to federal law or update the statutes to reflect changes in

technology. For example, the bill would make Texas law concerning interception of cordless telephone conversations conform to federal law and would ensure these interceptions would fall under the regulations.

SB 1120 would expand the locations where peace officers can ask judges to approve the interception of communications. This would address a problem that is encountered when the only location that is currently authorized — the location where the interception is to be made — is different from the location where the suspect lives or the alleged crime is being committed. For example, police officers might want to tap a phone in one city but the interception itself might take place in another city where the suspect's phone company is located. Under these circumstances, it can be difficult for peace officers to operate in the legal system far away from the crime or the suspect. SB 1120 would give peace officers more options for locations to ask judges for the necessary approval but would ensure that the permission must come from an area that is somehow involved in the activities. SB 1120 would make no changes in the requirements for a judge's approval for installation of interception devices.

Increasing the number of days that pen registers or trace and trap devices can be valid from 30 days to 60 days would make Texas law match federal law. Sixty days is still a short, reasonable amount of time to allow the use of these devices.

Texas Department of Criminal Justice enforcement officers should be authorized to request prosecutors to ask judges for permission to install pen registers and trace and trap devices and who can be given some limited authority to install these devices in an emergency. This would allow TDCJ enforcement officers to directly request prosecutors to ask judges for permission to install pen registers and trace and trap devices rather than require them to ask another peace officer to make the request. In addition, in an emergency involving immediate danger of death or serious injury to another, they could be designated by the district or criminal attorney to install a device. This authority is necessary so that TDCJ officers can react to emergency situations when an inmate escapes and quickly put in a request for a pen register or trace and trap device. In rare situations, TDCJ might want to ask for permission to place a pen register or trace and trap device on an escapee's family or best friend's phone.

TDCJ officers would be given no more authority than that currently given to other peace officers, including sheriffs, police officers, law enforcement agents of the Alcoholic Beverage Commission and officers commissioned by the Parks and Wildlife Commission. TDCJ officers would have to follow the standard rules for other peace officers, including authorization by the district or criminal district attorney to install a device in an emergency situation and requirements that devices installed in emergency situations have judicial approval within 48 hours. SB 1120 would give TDCJ officers authority concerning pen registers and trace and trap devices only; the bill would not give them any authority concerning installing wiretaps.

OPPONENTS
SAY:

SB 1120 should include provisions to ensure that law enforcement authorities do not shop around for a sympathetic judge among the expanded locations at which they would be authorized to obtain approval for a communications interception. The bill could require peace officers to justify the location of their request if different from the one required by current law or could allow requests in a different location only if it would be unreasonable to make the request in the location currently allowed.

Texas has traditionally allowed pen registers or trace and trap devices to be valid for 30 days, and there is no compelling reason to lengthen this. A short validity period helps keep these devices from being abused by authorities.

It is unnecessary to give TDCJ enforcement officers authority to bypass standard procedures and make direct requests of prosecutors to obtain a judge's permission to install pen registers and trace and trap devices and to install devices in an emergency. Requiring TDCJ officers to go through an authorized peace officer such as a sheriff or police officer ensures standard procedures are followed and helps monitor the use of these devices.