

CCDLA

"Ready in the Defense of Liberty"
Founded in 1988

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**Testimony of Jon L. Schoenhorn, President
Connecticut Criminal Defense Lawyers Association**

Raised House Bill No. 7334
An Act Concerning the Installation and Use of Pen Registers and Trap and Trace Devices

**Judiciary Committee Public Hearing
March 12, 2007**

Chairman McDonald, Chairman Lawlor, and distinguished Committee Members:

The Connecticut Criminal Defense Lawyers Association (CCDLA) is a statewide organization of 300 lawyers dedicated to defending persons accused of criminal offenses. Founded in 1988, CCDLA works to improve the criminal justice system by ensuring that the individual rights guaranteed by the Connecticut and United States constitutions are applied fairly and equally and that those rights are not diminished.

CCDLA opposes Raised Bill No. 7334, An Act Concerning The Installation And Use Of Pen Registers And Trap And Trace Devices.

The CCDLA opposed a version of this bill in 2005 and believes that the current version offers little improvement. Raised Bill No. 7334 is overly broad and at odds, in a number of ways, with the Connecticut wiretap provisions set forth in General Statutes Section 54-41a, et seq. Section 2 of the bill empowers the deputy chief state's attorney and assistant state's attorneys to make application for an order, while only the Chief State's Attorney or a state's attorney may make an application for an order authorizing a wiretap. See General Statutes Section 54-41b. Further, unlike the wiretap provisions, see Section 54-41c (11) (interception orders limited to 35 absent statement citing emergency), there is no limit on the number of successive pen registers or trap and trace devices that can be secured. Still further, unlike the wiretap provisions, the application under Section 2 for a pen register or trap and trace device is not circumscribed by a unique group of offenses.

Section 3(a) of the bill is also problematic. First, use of the word "shall" indicates that the Court lacks the discretion to reject the application, but rather must approve the application if it has been certified by the applicant. Thus, the application turns not on the decision of the Court - which is neutral and detached - but rather on the ability of the prosecutor to perform the mechanical task of completing the certification. Further, the task of certifying the application amounts to noting

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more than stating in writing “that the information likely to be obtained is relevant to an ongoing criminal investigation.” Second, the certification requirement, and thus the order of the Court, rests not on a demonstration of probable cause, but rather, as stated, on the assertion that the information likely to be secured is “relevant to and ongoing criminal investigation.” There is a world of difference between information that is “relevant” to an investigation and information that establishes probable cause to believe that a crime has been committed or that a particular person has committed it. Moreover, almost anything can be made to appear relevant. Relevancy is an extremely vague and broad concept. Resting the application on a “relevancy” standard, rather than on the time-honored standard of probable cause, virtually ensures that no application will ever be scrutinized or rejected by a judge.

Section 3(d) of the bill impermissibly fails to provide notice of the order to the listed subscriber and, indeed, forbids to disclosure of the order to the subscriber, thus foreclosing any timely legal challenge of the order by the subscriber.

Section 5 authorizes installation and use of a pen register or trap and trace device without a court order in emergency situations, but fails to require that the designated official file a certification or affidavit with the provider stating that the requirements of the statute have otherwise been met. Consequently, there is no record establishing or memorializing the basis for the official’s immediate installation and use of the device without prior court approval.

Section 5 also fails to define the term “terrorism” which, on its face and as applied, is a vague term, thus creating the opportunity for this provision of the statute to be misused or used in ways not originally intended by the Legislature.

Section 6, which requires the Chief State’s Attorney to submit an annual report to the joint standing committee of the General Assembly, fails to require the Chief State’s Attorney to identify of the law enforcement agencies that installed and used such devices during the year.

Finally, the bill has no provision for a motion to quash by the listed subscriber or any other affected person or entity. Thus, it affords no immediately protection for the innocent, for those who have had their constitutional rights violated, and for those who have been the subject of police and/or prosecutorial misconduct and abuse.

Accordingly, for the foregoing reasons, CCDLA opposes Raised Bill No. 7334.

Thank you for your consideration.

Respectfully Submitted,

Jon L. Schoenhorn, Esq.
President, CCDLA