MINUTES OF THE
SENATE COMMITTEE ON JUDICIARY

Seventy-fifth Session
March 3, 2009

The Senate Committee on Judiciary was called to order by Chair Terry Care at 8:38 a.m. on Tuesday, March 3, 2009, in Room 2149 of the Legislative Building, Carson City, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster. All exhibits are available and on file in the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Senator Terry Care, Chair
Senator Valerie Wiener, Vice Chair
Senator David R. Parks
Senator Allison Copening
Senator Mike McGinness
Senator Maurice E. Washington
Senator Mark E. Amodei

STAFF MEMBERS PRESENT:

Natalee Binkholder, Deputy Legislative Counsel
Linda J. Eissmann, Committee Policy Analyst
Kathleen Swain, Committee Secretary

OTHERS PRESENT:

Scott Jackson, Chief, Investigation Division, Department of Public Safety
Orrin Johnson, Deputy Public Defender, Washoe County Public Defender's Office
Rebecca Gasca, American Civil Liberties Union of Nevada
Janine Hansen, Nevada Eagle Forum
Helen Foley, T-Mobile USA
David F. Kallas, Director of Governmental Affairs, Las Vegas Police Protective Association
Bill Uffelman, Nevada Bankers Association
Michael Rosenauer

CHAIR CARE:
I have a bill introduction.

BILL DRAFT REQUEST 7-674: Enacts the Revised Uniform Unincorporated Nonprofit Association Act of 2008. (Later introduced as Senate Bill 169.)

SENATOR WIENER MOVED TO INTRODUCE BDR 7-674.

SENATOR AMODEI SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY.

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CHAIR CARE:
We have a letter from Linda Eissmann addressing the types of crimes that fall under each category of felony in the *Nevada Revised Statutes* (Exhibit C). The hearing is open on Senate Bill (S.B.) 51. This bill was referred to the Senate Committee on Energy, Infrastructure, and Transportation. Because of testimony suggesting Fourth Amendment implications, the bill was rereferred to this Committee.

SENATE BILL 51: Revises provisions governing the subpoenaing of public utility records by a law enforcement agency. (BDR 58-337)

SCOTT JACKSON (Chief, Investigation Division, Department of Public Safety):
Senate Bill 51 proposes amending the language to expand the scope of information available to law enforcement from subscribers to utilities. The law authorizes law enforcement to serve a subpoena on utilities to obtain a name and address of the subscriber. We propose expanding the scope to include the date of birth, social security number and/or valid passport number of the subscriber. If we serve a subpoena on a utility company and are provided with a name and address, that information does not necessarily positively identify that individual.

This information is helpful to positively identify that individual in the course of an investigation. In this age of identity theft, terrorism and alien identifications, it is difficult to appropriately identify individuals.

The proposed amendment also expands the scope of the language to include usage records for utilities. That information is important because usage records provide law enforcement with tools to identify individuals who may be involved in indoor marijuana cultivation. Excessive power usage is an indicator for law enforcement that there may be criminal activity afoot. Through further investigation and corroboration, we can apply for a search warrant for the residence, partly based on usage records.

The bill also expands the scope of telephone toll records. There are many crimes where it is important for law enforcement to help corroborate information. For example, if a crime occurred six months ago and near the time of the event the suspect was using a telephone and toll charges, we can help vector in that information through the use of historical toll records.

Administrative subpoenas are used by nearly every state and the federal government. The use of administrative subpoenas is well settled in the law. It is constitutional even though the United States Supreme Court has not specifically decided this issue regarding public utilities. It has decided this issue regarding third-party business records. Several cases have been cited.

Lower courts have decided there is no legitimate expectation of privacy with third-party business records in particular. They have come to that conclusion because the records are voluntarily disclosed, and there is an assumption of risk on the part of the subscriber.

The Ninth Circuit ruled in *United States v. Starkweather*, 972 F.2d 1347 (9th Cir. 1992) that it was legal for law enforcement to subpoena usage records. Starkweather was involved in indoor marijuana cultivation. Law enforcement served a subpoena on his records and obtained the usage records. Based on that information, in corroboration with a confidential informant, law enforcement obtained a search warrant of the residence and discovered the indoor marijuana growth.

You have a proposed amendment adding four words to section 2—"to the extent available" (Exhibit D). This is an amendment with concurrence of the public utilities, specifically Brian McAnallen representing EMBARQ and Robert Gastonguay representing the Nevada State Cable Telecommunications Association. They expressed concerns in previous testimony at the Energy,

Infrastructure and Transportation Committee that these records may be unavailable to the public utility. This language satisfies that concern.

CHAIR CARE:
What would prevent law enforcement from requesting these records based only on a hunch?

MR. JACKSON:
The statute provides those protections. The statute requires an active criminal or civil investigation to apply for a subpoena. It must be approved by the chief executive officer of the law enforcement agency applying for the subpoena. It is not a fishing expedition. It is pursuit of a legitimate law enforcement need based on a reasonable suspicion. In each case, we will have an address associated with the person we need to identify through the use of a subpoena.

CHAIR CARE:
What determines whether there is an ongoing criminal investigation? What is there to say this is now a criminal investigation?

MR. JACKSON:
It is largely based on a reasonable suspicion standard. It is based on whatever information is provided to law enforcement, whether it is a criminal complaint from a citizen or an allegation from an anonymous source. It is based on some reasonable suspicion that someone is involved in criminal activity. We do not just pick a name out of the hat and try to find out what that individual might be doing. Information leads us to that criminal investigation.

CHAIR CARE:
I understand your argument of identifying information for purposes of indoor marijuana cultivation. Telephone toll records go beyond that. You want to know who the person with the heightened use of power has been talking to and when he talked to them, right?

MR. JACKSON:
That is one application. It is not just regarding people involved in indoor marijuana cultivation. It is any criminal activity where it is beneficial to law enforcement to know information that may be historical and retained by the public utility.

CHAIR CARE:
What is the duty of a utility to retain information like this?

MR. JACKSON:
I cannot speak to the duty to retain information.

SENATOR AMODEI:
When there is an investigation and you receive the telephone records of a particular person, if that person has been calling another person a lot, can that lead to opening an investigation on the person being called?

MR. JACKSON:
The nature and scope of that information is usually corroborated through further investigation. Because we identify other individuals who may be associated with our suspect does not mean they are criminally suspect as well. It would require additional information based on corroborating information from informants and follow-up investigation. The process of criminal investigation determines who may be related to the criminal activity.

SENATOR AMODEI:
Is there any way to narrow it?

MR. JACKSON:
We are faced with this dilemma every day in law enforcement. Just because an individual's name is thrown to law enforcement as a potential participant does not mean they are involved in criminal activity or that there is probable cause to identify that person.

CHAIR CARE:
Is there a duty for the utility or someone to notify the customer that this information has been produced?

MR. JACKSON:
Some of those provisions are in federal law. I am not aware of a provision in this particular law that the subscriber is notified of law enforcement's interest.

SENATOR WASHINGTON:
Is this any different from subpoenaing financial records? Is there a difference between making them available or notifying the individual their records have been subpoenaed?

MR. JACKSON:
This particular provision of the law does not refer directly to financial institutions per se. However, it is considered a third-party business record. I make that comparison when law enforcement requests that information. It is much like obtaining financial information, and it is consistent with this statute.

SENATOR PARKS:
Who can issue a subpoena?

CHAIR CARE:
We will hear from Mr. Wilkinson on that.

ORRIN JOHNSON (Deputy Public Defender, Washoe County Public Defender's Office):
We are opposed to S.B. 51. This bill is unconstitutional. It represents a search within the meaning of the Fourth Amendment. This search without the requirement of a warrant violates the Fourth Amendment to the United States Constitution and the Nevada Constitution's protections against unreasonable searches and seizures.

It is not unreasonable for the police to seek this information in a criminal investigation. The question is whether they can do it with a reasonable suspicion standard as opposed to probable cause. This bill specifically excludes the requirement of a warrant and allows them to do it with a subpoena issued by their own department. There is no check from a neutral magistrate.

It could be used to cast a net over certain neighborhoods with certain people. It is not just the energy usage records for hydroponics. It is any public utility. Some time in the future, broadband Internet could become a public utility, and your searches on the Internet could be fair game. If the police need this information because it is legitimately part of a criminal investigation, they can get a warrant.

Mr. Jackson mentioned a Ninth Circuit case and other cases that discuss third-party business records. If I choose to do business with a third party, I have given up my reasonable expectation of privacy. But public utilities are a different issue. I cannot choose not to use electricity or not to use water or sewer. The point of a public utility with that public regulation is because of the interest of some government oversight and a monopoly. That also takes away my ability to keep my affairs private. The Fourth Amendment protects not just my ability to be secure in my house, but my ability to be secure in my papers, which should include records I cannot live without producing in this day and age.

Starkweather is an unpublished opinion. I refer you to *Kyllo v. United States*, 533 U.S. 27 (2001). In this case, police officers sat outside a house on a public street and used a heat gun the public did not have access to. They were looking for hydroponics and the heat sources that might emanate from a house. The *Kyllo* court held that the use of a thermal device from a public vantage point to monitor the radiation of heat from a person's apartment was a search within the meaning of the Fourth Amendment and required a warrant. Their reasoning was because police were using a tool only reasonably available to them, it was a search within the meaning of the Fourth Amendment. The subpoena power in this bill is a tool only available to the police at this stage.

Kyllo is not directly on point. It is analogous. Even if it is constitutional, the question is whether it meets the spirit of the Fourth Amendment. The bill is too broad and could be abused.

CHAIR CARE:
In law regarding identifying information of name and address, do you suggest that statute runs afoul of the Fourth Amendment?

MR. JOHNSON:
No. The touchstone of the Fourth Amendment is reasonableness.

CHAIR CARE:
Does it trouble you when identifying information—date of birth, social security number and valid passport number—is added to law?

MR. JOHNSON:
It troubles me less than one might imagine. Access to the social security number could open someone up to identity theft. That information is available to

police through other means. The language "without limitation" on page 2, line 23 of the bill bothers me. Since identifying information is undefined, other information could be gathered beyond the scope of mere public record.

CHAIR CARE:
Is the heart of your objection telephone toll records and usage records?

MR. JOHNSON:
Yes.

REBECCA GASCA (American Civil Liberties Union of Nevada):
The *Starkweather* case was about seizing third-party business records. This involves personal records that address one's activity inside their house. That changes the application of the Fourth Amendment. History shows broad power is often abused. As this bill is written, officers could seek the records of hundreds of individuals in various neighborhoods. This bill is not in the best interest of Nevadans' privacy rights and expectations.

The Nevada Attorneys for Criminal Justice has detailed the use of pen registers and how the federal government treats those registers. There are some good checks and balances on pen registers, which include the detailed public utility usage records. The federal government recognized the possible abuse of power when law enforcement has the opportunity to seek records without probable cause. Warrants are critical for Nevadans. Probable cause and the use of warrants are modest checks and balances on the good faith assumption law enforcement uses in their daily activities.

CHAIR CARE:
We all received a letter from Lisa Rasmussen (Exhibit E). Is that what you are referring to in your discussion of the pen registers?

MS. GASCA:
Yes. I want to incorporate that as part of my testimony.

JANINE HANSEN (Nevada Eagle Forum):
There was a reason for the Fourth Amendment. The Nevada Constitution, Article 1, section 18, is exactly the same. The Nevada Constitution says warrants are issued on probable cause. It does not permit administrative subpoenas.

Sometimes, people in government can be overzealous and abuse their power. We have the constitutional foundation for criminal procedure because throughout history, government abuses the people. In America, we only give the government or police the power we deem they should have.

I encourage you to maintain the balance of power. Police have the option of using probable cause and getting a warrant. Be wary of things that seem reasonable but break down our constitutionally founded liberties. Please vote against S.B. 51.

HELEN FOLEY (T-Mobile USA):
We oppose S.B. 51. The legislation exceeds the federal authority. A warrant should be issued for this information.

CHAIR CARE:
Do you know the duty of a utility to retain information?

MS. FOLEY:
I do not know.

DAVID F. KALLAS (Director of Governmental Affairs, Las Vegas Police Protective Association):
I ask you to amend our position from in favor of the bill to neutral. I understand the concerns of opponents of the bill regarding abuses. This bill can provide many benefits for our community with the appropriate checks and balances to ensure accountability regarding law enforcement activities.

The ability to acquire identifying information—date of birth or social security number—is imperative in the ability to positively identify an individual to conduct a criminal investigation. I do not disagree with Mr. Johnson's concerns about the Fourth Amendment violations regarding the heat-seeking device used on the house. That device did penetrate the walls of that residence. Information contained in a utility that you do not have to have takes it to a different level.

A pen register is different than the information this bill attempts to acquire, which is historical in nature. A pen register gives real-time information on phone calls coming into and from the telephone being monitored.

MR. JACKSON:
The *Kyllo* case involved a thermal imaging device to penetrate a wall. There was an invasion of the premises. We agree the Constitution protects our castles. I agree with the finding in that case, but it is distinctive from the third-party business record for which we are applying.

I will provide you with case citations that speak to third-party business records. This proposed amendment to the bill does not apply to commercial radio or mobile radio services. This only applies to telephone toll records relating to landline telephone services. It does not apply to cellular telephones.

Nevada law for a pen register follows United States Code, which only requires reasonable suspicion. It does go through a judicial review process. It is not a search warrant. We apply to a district court judge, and a pen register is issued that gives us live time records from telephones. It is similar to the telephone toll records we are requesting, except it is live time and instantaneous to law enforcement in the course of investigation. It does not give us the historical data we are requesting through the use of the subpoena.

CHAIR CARE:
The hearing is closed on S.B. 51. The hearing is open on S.B. 141.

SENATE BILL 141: Enacts the Uniform International Wills Act. (BDR 12-673)

SENATOR TERRY CARE (Clark County Senatorial District No. 7):
The National Conference of Commissioners on Uniform State Laws is a 117-year-old organization made up of lawyers, judges, law school professors, practitioners and representatives from attorneys general offices. They try to come up with uniform legislation. The idea is to take these bills back to their home states and try to get them enacted so all 50 states are playing by the same rules, absent any federal legislation. The best example is the Uniform Commercial Code.

Regarding the bill before you, there is a uniform act called the Uniform Probate Code. Nevada has adopted some provisions of it and not others. Part of the Uniform Probate Code is the international will. The International Wills Act was adopted by the Uniform Law Commission in 1977 as part of the Uniform Probate Code. That stemmed from an international convention in 1972 that now has 14 signatories, not including the United States. If you are an American

citizen who owns real property in a country that has signed this convention and you have executed an international will, when you die, your property located in that country will be probated precisely how you intended under your will. If you are a citizen in a country that has signed the Act and own property in the United States, we would give deference to the terms of the international will.

The idea is to avoid any dispute with local law or custom that might contradict the wishes of the deceased. Seventeen states have signed this Act. As more states adopt this, we hope other countries will be encouraged to adopt it too. This is not my area of expertise. It is intended to add an extra arsenal for the American citizen who owns real property in another country so your property would be distributed and probated consistent with your wishes. In recent years, the Uniform Law Commission has decided to encourage other countries to adopt the Act.

SENATOR WIENER:
When someone purchases property in a foreign country, Great Britain for example, and has their documents drawn up for distribution after death, is the purchaser warned they should be prepared that the property would not be subject to the laws of the country they come from?

SENATOR CARE:
The corollary is that if you validly execute a will and you live and die in another state, you will be okay. That is a general proposition within the 50 states. In the example of Great Britain you just raised, I do not know the law in Great Britain. If you own real property in a country that is not a signatory, you will be concerned with choice of law provisions and local customs. In the 14 countries that are signatories, you do not have that apprehension and uncertainty.

NATALEE BINKHOLDER (Deputy Legislative Counsel):
I will present the contents of S.B. 141. I am neutral on this bill. Section 2 of the bill sets forth the short title so the provisions of this Act can be cited as the Uniform International Wills Act.

Section 4 defines an authorized person and provides who may supervise or oversee the execution of an international will. It includes members of the diplomatic and consular service of the United States. It also includes attorneys licensed and in good standing who are active members of the Nevada Bar.

Section 5 defines an international will. The qualifying term “international” is meant to indicate what the testator had in mind at the time of making a will. Any will executed in conformity with the requirements of this Act will be an international will. No international element is actually required. The provisions of this Act can apply to an attested will or when someone wants to execute an international will because they think it might be more convenient or offer more advantages than another form of will.

Section 6 provides the validity of an international will. If the will complies with the format requirements of this Act, it will be valid regardless of where it was made; the location of the assets; or the testator’s domicile, nationality or residence. If it does not meet the requirements of this Act, it can still be a valid will if it meets other requirements, such as those for a holographic will.

This Act does not affect the other forms of wills recognized in Nevada, and it does not apply to a joint will. Section 7 sets forth the form requirements. The requirements in section 7 are absolutely required for it to be a valid international will. It must be in writing. The writing can be in any language and any form. It must be witnessed by two people. The testator must sign the will or, if he has already signed it, acknowledge his signature in the presence of the witnesses. If the testator is unable to sign for any reason, he can let the authorized person know that. The authorized person can note that on the will. Someone else can sign for the testator, but this is not required. The witnesses and the authorized person must sign the will in the presence of the testator.

Section 8 also deals with the form of an international will, but failure to do any of these elements will not render the international will invalid. Section 8 requires the signatures to be placed at the end of the will. The testator must sign each page if there are multiple pages or, as provided in section 7, state why he cannot sign. The authorized person shall make a note of that. It should be dated at the end of the document, with the date reflecting the date on which the authorized person signs the will. There is provision for the testator to declare where he intends to keep the will for safekeeping.

Section 9 is a certificate of compliance. This is executed by the authorized person, signed and attached to the end of the will. It states the requirements of the Uniform Act have been complied with. The authorized person must keep a copy and deliver a copy to the testator.

Section 10 is the effect of the certificate. If a certificate is executed, unless additional evidence suggests otherwise, the existence of the certificate is conclusive of the formal validity of the will. If there is not a certificate or the certificate does not comply with the provisions of sections 9 and 10, it does not mean the will is necessarily invalid.

Section 11 deals with revocation of an international will. An international will can be revoked according to existing statutes in chapter 133 of *Nevada Revised Statutes*. It is revoked in the same manner as any other will in the State of Nevada.

Section 12 is an interpretations clause. This is included in other uniform acts. It ensures that lawyers in interpreting the Uniform Act do so with consideration for its international character and not solely based on the laws of this State. It tries to ensure the unification of interpretation in the states that adopt it.

Section 13 permits attorneys licensed in the State in good standing to supervise and oversee the execution of an international will.

Section 14 amends existing law that provides if a will is executed in conformity with the laws of the place where it is made, it is valid. An exception is included in this section so if a will is executed in conformity with the requirements of an international will that may not meet the requirements of the place where it is made, it can still be a valid international will.

SENATOR CARE:
I have provided a listing (Exhibit F, original is on file in the Research Library) of the 17 states that have adopted this Act. It has also been approved by the American Bar Association.

SENATOR WIENER:
I have two bills dealing with wills, trusts and probate. What impact does this bill, if passed, have on legislation processing at the State level in that arena?

SENATOR CARE:
It should have no impact.

BILL UFFELMAN (Nevada Bankers Association):
We support this bill. This bill through section 13 is about the origination of international wills in this State. If a person is overseas when they execute the will, they have used United States consular services. Section 14 pertains to wills originated other places arriving here. Is that correct?

SENATOR CARE:
That is my understanding.

MICHAEL ROSENAUER:
I am a practitioner doing probate and trust administration. This bill would directly impact how we probate and process wills in Nevada. I am concerned that somebody doing an international will overseas would have to find consular services to get it certified. Many people live some distance from consular services. Therefore, the number of people interested in having an international will would be constricted because they would have to come to the consular service to have the will stamped.

I understand other provisions would permit a will to still be valid notwithstanding the fact it will not comply with an international will. This bill does not require the person doing the certification to check the reliability. That safeguard is gone in this bill. That is important because as our population continues to age, there are more people who are against guardianships because capacity is a big thing.

If an international will was executed somewhere else, the authorized person is obligated to keep the certificate with them and give one to the testator. However, they do not have to certify the testator had the capacity to do the will. The bill specifically states the witnesses do not have to be present at the time the testator signs the international will. There is a provision that permits the person doing the certification to say they were there when the testator signed it. Abuse could occur that would be inconsistent with what we are required to do in Nevada—the witnesses were in the room, and they certify the testator signed that document. We will lose a significant amount of reliability.

If a will was executed in Belgium, for example, it might be in French. It has to be translated and must have all the other safeguards as far as execution is concerned. It is a concern if someone says they were authorized on behalf of the decedent, whom they did not know, to sign his name.

The Nevada Revised Statutes deals with all these issues. Senator Care has a good point that there should be uniformity. However, we balance uniformity with reliability—that the person was there; they knew the objects of their bounty; they actually signed the document; they knew what they were giving away. This bill would erode those safeguards. Reliability is important as you deal with more and more assets being processed. Two years ago, Washoe County probated $2.2 billion worth of assets. The bill is not necessary.

SENATOR CARE:
Drafts of these uniform acts are available with the comments of the drafters showing what they intended to do. I will get Mr. Rosenauer a copy of the comments. I also suggest he contact the Chicago office of the Uniform Law Commission.

SENATOR WIENER:
I had asked what impact this would have on Nevada law. That is something we will address because of the concern about eroding Nevada law. You commented that many concerns addressed by this bill are already addressed by Nevada statutes. Do you have an idea what is not addressed by Nevada statutes that this Act would address?

MR. ROSENAUER:
There is nothing not addressed under Nevada law.

SENATOR WIENER:
Do you believe the Nevada statutory scheme addresses the need for uniformity of transactions in other countries?

MR. ROSENAUER:
The safeguards we have in Nevada adequately address the reliability of wills drafted in the United States or overseas. In my practice, we have four wills executed overseas that are being probated in Washoe County because the real and personal property is in Washoe County.

We have no problems probating them once they are either qualified as a holographic will, or they comply statutorily regarding reliability issues. With those safeguards, Nevada law is adequately protecting its citizenry and the disposition of the property found in Nevada.

CHAIR CARE:
There being nothing further to come before the Committee, we are adjourned at 9:50 a.m.

RESPECTFULLY SUBMITTED:

Kathleen Swain,
Committee Secretary

APPROVED BY:

Senator Terry Care, Chair

DATE: