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Judiciary Committee  
January 21, 2016

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[LB738 LB831 LB846 CONFIRMATION]

The Committee on Judiciary met at 1:30 p.m. on Wednesday, January 21, 2016, in Room 1113 of the State Capitol, Lincoln, Nebraska, for the purpose of conducting a public hearing on LB831, LB846, LB738, and gubernatorial appointments. Senators present: Colby Coash, Vice Chairperson; Laura Ebke; Bob Krist; Adam Morfeld; Patty Pansing Brooks; and Matt Williams. Senators absent: Les Seiler, Chairperson; and Ernie Chambers.

SENATOR COASH: We're going to go ahead and get this started. Welcome to the Judiciary Committee. I am Senator Coash. I am the Vice Chair of the committee. Senator Seiler is not going to be here today, so for the testifiers' benefit I'll sit in front and run the committee from here. So I want to welcome all of you. I'll introduce my colleagues. To my far right is Senator Williams. Senator Morfeld is going to be joining us. Senator Krist is here. Senator Chambers should be here soon. Diane is our legal counsel. Oliver is committee clerk. And to my far left is Senator Ebke, and next to her is Senator Pansing Brooks. So we welcome you to the Judiciary Committee. Today we've got three appointments and three bills and we're going to go through the appointments first. We'll follow that agenda. If you are going to testify on either the appointments or the bills, we'd ask you to fill out a testifier sheet and hand that to the pages. We'll ask you to spell and state your name. And if you have any copies of anything to hand out, we'll get those handed out to you. If you would please silence your cell phones. And we have new mikes in here and they are pretty sensitive. So if you don't want to be on the record you should keep your voices down a little bit. Beyond that, we are going to go ahead and get started with the first appointment, which is Virgil Patlan. Virgil is here. Great. Come on up. Virgil, you're a new appointee to the Parole Board. Is that correct? [CONFIRMATION]

VIRGIL PATLAN: No, sir, I'm a reappointment. [CONFIRMATION]

SENATOR COASH: This is a reappointment. [CONFIRMATION]

VIRGIL PATLAN: Yes. [CONFIRMATION]

SENATOR COASH: Okay. All right. We'll let you state and spell your name and we'll see if any...you can share whatever you want with us, then see if we have any questions for you. [CONFIRMATION]

VIRGIL PATLAN: (Exhibit 1) Thank you, sir. My name is Virgil Patlan, V-i-r-g-i-l J. P-a-t-l-a-n, and I'm a Sr. Good afternoon, Senators, distinguished Senators of the Judiciary Committee. My name is Virgil J. Patlan and I have been nominated by Governor Pete Ricketts to serve on the

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 21, 2016

---

Nebraska Board of Parole. First, I would like to introduce my wife of almost 39 years, and you met my grandson and my daughter, and I thank you for signing his little card on this trip today. My pledge to Governor Ricketts and to members of this Legislature is to put the safety of Nebraskans first in all my decisions. I have a strong faith in God and firmly believe that men and women can change and become law-abiding citizens of Nebraska. I wish to take this opportunity to honor the Nebraska correctional officers, the caseworkers, and the staff of the Department of Correctional Services. I have found them to be dedicated, hardworking, and in some cases going the extra mile to get the job done with the limited resources available to them. Every chance I get, I extend my hand for gratitude to the correctional officers who have a hard job. They have earned my utmost respect, never hesitate to tell them that. Being a member of the Nebraska Board of Parole has been very rewarding. I am currently assisting other board members in developing evidence-based parole guidelines and also encouraging inmates to complete treatment that is also evidence-based. This past year I was asked to be a keynote speaker at the Nebraska Correctional Youth Facility. At this graduation, 11 young men proudly received their high school diploma. I also visited the veterans group at the Omaha Correctional Center and spoke to the men about their past service to our country and the importance of their oath at their time of enlistment. I attended the graduation at the Residential Treatment Center at the Nebraska State Penitentiary. I spoke to over 200 men that day and was able to encourage them about changing their lives and becoming leaders of their families. Being on the Nebraska Board of Parole has given me opportunity to help change lives. I believe that with changed lives we can reduce recidivism and keep Nebraska a safe place to live. As the Nebraska Board of Parole, I'm committed to being fair to all inmates. Members of the Judiciary Committee, I am grateful and honored to be reconsidered for this nomination to the Nebraska Board of Parole. I thank you for your time and will answer any questions you may have. [CONFIRMATION]

SENATOR COASH: Thank you, Mr. Patlan. You know we made a lot of changes to the Parole Board in the last couple of years and you're one of the newer members. How do you think things are going? [CONFIRMATION]

VIRGIL PATLAN: Sir, yesterday we had an interview with a gentleman that we're going to be bringing in to be a transition director. And I believe you heard in my voice that we will be done with this transition, as directed, by July. There was no option for failure. We will get it done, sir. [CONFIRMATION]

SENATOR COASH: Very good. See if any other questions from the committee. Senator Williams. Oh. Seeing none, we really appreciate you coming down today. [CONFIRMATION]

VIRGIL PATLAN: Thank you. It's a pleasure to meet you. [CONFIRMATION]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 21, 2016

---

SENATOR PANSING BROOKS: Thank you. [CONFIRMATION]

SENATOR COASH: Just like bills, if there's anybody here to testify in support, we will take that testimony now. Welcome to the Judiciary Committee, Senator Fox. [CONFIRMATION]

SENATOR FOX: Thank you. Good afternoon. Members of the Judiciary Committee, my name is Senator Nicole Fox, N-i-c-o-l-e F-o-x, and I'm here today in strong support of confirmation of Virgil Patlan to the Nebraska Parole Board. I've had the privilege of knowing Mr. Patlan for some time now and I've always been moved by his dedication to the people of our community. He served 25 years with the Omaha Police Department and founded the Omaha Chapter of the Latino Police Officers Association. He has been an active member of the South Omaha Violence Intervention and Prevention working group, and he is a respected member of the south Omaha community, which includes my district. I feel that Mr. Patlan has the ability to look beyond the crime, so to speak, and to look at every individual as a human being. For example, less than two weeks ago I attended an event for Victory Boxing Club in south Omaha, at which Mr. Patlan spoke. Founded by a former gang leader that Mr. Patlan helped arrest, Victory's mission is to reach out to the youth of south Omaha and turn them away from the path violence. What is not widely known is that Mr. Patlan actually provided some of the funds necessary to open the club nearly ten years and has even served as the club's president, working hand in hand with a man he sent to prison. This is just one of the numerous instances of Mr. Patlan seeing the good side to individuals, many who would write them off as hopeless. Mr. Patlan takes the responsibility of serving on the Parole Board seriously and I feel he has done a wonderful job bringing a needed voice to our Parole Board. I consider him a friend. And I urge the committee to support the confirmation of Virgil Patlan. Thank you. [CONFIRMATION]

SENATOR COASH: Thank you, Senator Fox. Don't see any questions for you. Appreciate your testimony. That was great. Is anyone else here to testify in support of this nomination for the Board of Parole? Seeing none, is anybody here to testify against the nomination? All right. We will close the hearing on that appointment. We appreciate you coming down very much. Now we're going to open up the appointment for JoAnna Briggs to the Crime Victim's Reparations Committee. Here's JoAnna. Welcome. [CONFIRMATION]

JOANNA BRIGGS: Oh, thank you. Do you want me... [CONFIRMATION]

SENATOR COASH: Please. [CONFIRMATION]

JOANNA BRIGGS: JoAnna Briggs, B-r-i-g-g-s, JoAnna, J-o-A-n-n-a. I am the manager of the Lincoln Police Department Victim Witness Unit. I have been in that position since 1984. Our office outreaches to victims of crime and helps them in any way we can. That may be letting

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 21, 2016

---

them know what their rights are as a victim of crime. It may be helping them with filing for compensation, crime victim compensations, protection orders. We also make a lot of referrals to outside agencies so the victims get the information they need and the assistance they need to help them recover from the crime. I have also been past-president a couple of times with the Nebraska Coalition for Victims of Crime and been very interested in crime victim's rights legislation over the last 30 years. [CONFIRMATION]

SENATOR COASH: Very good. Ms. Briggs, we put some more effort into Justice Reinvestment over the past couple years, and I know sometimes it takes a while for the things that we do to trickle down to the folks who are actually out there reaching out to victims, as you are. [CONFIRMATION]

JOANNA BRIGGS: Uh-huh. [CONFIRMATION]

SENATOR COASH: Do you have any comment on some of the changes we've made and how it's impacting victims, from your perspective? [CONFIRMATION]

JOANNA BRIGGS: I think that, you know, I've been very interested in what's been happening with Corrections and the changes, and I think that it's helped in many ways: one, to show that there were some issues and that things needed to be changed; and then, two, to be able to discuss it with other advocates and victims to reassure them that there are going to be changes here in Nebraska and that...help them understand that victims are very important. Without crime victims there would be no criminal justice system because victims, if victims are afraid to report crimes to the police and afraid to testify or don't feel that they're comfortable doing it, then, you know, the system is failing. [CONFIRMATION]

SENATOR COASH: Appreciate that. Any other questions for Ms. Briggs? Appreciate your testimony today. Thanks for coming out. Is there anybody here to testify in support of this nomination? Is anybody here to testify in opposition of this appointment? Seeing none, we will close the hearing on that appointment. The third appointment is Brian Wachman who is not here. Is that...or is he? But he did send a letter to the committee for further review. (Exhibit 1) But I will ask if there's anybody here to testify in support of that appointment, or in opposition. [CONFIRMATION]

SENATOR KRIST: Can I just ask for the record, is there a compelling reason why he couldn't attend today and are we going to reschedule it? [CONFIRMATION]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 21, 2016

---

OLIVER VANDERVOORT: Generally, we just...he had another engagement and he sent a letter. We...generally that works (inaudible). [CONFIRMATION]

SENATOR KRIST: Okay. Well, we need to discuss the rules because the rules don't necessarily allow for that. But we can do that (inaudible). [CONFIRMATION]

SENATOR COASH: We'll do that in Exec Session with Senator Seiler. [CONFIRMATION]

SENATOR WILLIAMS: Is this a reappointment or is it a first time? [CONFIRMATION]

SENATOR COASH: Mr. Wachman is a... [CONFIRMATION]

SENATOR PANSING BROOKS: Continued appointment. [CONFIRMATION]

SENATOR COASH: ...reappointment. Okay. Well, we'll close that hearing then if nobody is here to... [CONFIRMATION]

SENATOR PANSING BROOKS: I can speak on his behalf because I know him. He's a good guy. But I agree with you, to figure out the rules, so. [CONFIRMATION]

SENATOR KRIST: Yeah, we just need the rule. [CONFIRMATION]

SENATOR COASH: All right. We'll close that hearing. Okay, so we are going to move into the three bills that we have today: LB831, LB846, and LB738. The first one is Senator Hansen's bill. Is he...they went to get him? Okay, great. If you just joined us, we're waiting for Senator Hansen to arrive so we can move forward with LB831. Don't all talk at once. There he is. Hi, Senator Hansen. Welcome. [LB831]

SENATOR HANSEN: Welcome. [LB831]

SENATOR COASH: You are recognized to open on LB831. [LB831]

SENATOR HANSEN: Well, thank you, Senator Coash and members of the Judiciary Committee. I apologize for my delay. I expected to get through a bill in Government before you got through appointments and I was apparently incorrect in that assumption. My name is state Senator Matt Hansen, M-a-t-t H-a-n-s-e-n, representing District 26 in northeast Lincoln. Today I'm here introducing LB831 which would adopt the Automatic License Plate Reader Privacy Act.

Automatic license plate readers, or ALPRs, are high-speed cameras that utilize computer technology to automatically convert license plate data into computer-readable data. They can vary between hand-held mobile versions to those more permanently mounted to a car's dashboard or a fixture such as a streetlight. Naturally, this technology provides potential benefit for law enforcement, with obvious examples being the ability to scan high amounts of traffic. It gets lists of license plates connected to stolen cars, missing persons, Amber Alerts, and etcetera. However, with any technology that enables government to collect data on its citizens, there are concerns. For example, ALPRs could compile an extensive list of where citizens go and that could be used to recreate their day-to-day habits. Things such as what time people get home from work to what doctors' offices they visit could be contained inside the data inside of such an ALPR database. Thus, it makes sense to implement a policy of best practices of who can access that data and how long that data would be retained. For an example, journalists discovered last fall that the Boston, Massachusetts, police department ALPR database was actually searchable by the public through an unsecured Web site. Naturally, when we think of situations such as stalking or harassment, such an open database could be a concern. Further, there are reasons that we would want to ensure that ALPRs could only be used for limited and proper purposes. And perhaps the most infamous and ironic misuse of this technology: a Canadian police chief was fired amidst allegations that he used ALPR technology to follow and harass a journalist that was critical of that same camera use. Thus, I believe, due to these concerns, the Legislature should protect citizens' privacy by both requiring proper database security and codifying the official uses of ALPR technology. That is why I've introduced LB831. This is becoming a trend among state governments. According to the National Conference of State Legislatures, ten states have enacted laws that restrict or prohibit the use of ALPR technology by law enforcement, including Arkansas, California, Minnesota, and North Carolina, just last year. I believe the time is right to adopt and codify a set of best practices such as those proposed by this bill. The survey of law enforcement agencies in Nebraska done by the ACLU last year showed that the Omaha Police Department had used ALPR technology in the past but has since stopped using the technology and erased their database. The Lincoln Police Department has already adopted written policy similar to the provisions of this bill governing their ALPR use. And the Nebraska State Patrol is using this technology in a limited fashion as they possess only one working ALPR camera. Seeing the limited use currently in Nebraska, it would seem prudent for the Legislature to take proactive action before the technology expands further so that all law enforcement agencies and citizens can share an understanding on how this technology can be used. Next, just a quick summary of the structure of the bill. After the title and relevant definitions, Section 3 provides a listing of entities that may use ALPR technology and a listing of which databases may be cross-checked, and situations which ALPR system can be used. Section 4 provides a listing of how data collected by an ALPR system can be used or shared by the agency. Section 5 provides a listing of who can request data from an ALPR database, including defendants in a criminal case. It also provides a time line for the removal of unneeded data. Section 6 provides for more public notice requirements for entities using ALPRs, as well as the adoptions of policies governing their

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 21, 2016

---

use, requires annual reports of ALPR data to the Nebraska Commission on Law Enforcement and Criminal Justice. Section 7 provides the data cannot be used in official proceedings if the use of that data violates the sections of the act; as well as Section 8 provides penalties for violations of the act. And Section 9 exempts the plate data and databases from public record statutes. In closing, I believe this is the proper time for the Legislature to codify and enact best practices in regards to ALPR technology. Protecting the privacy of our citizens should be one of our highest concerns. With that, I would ask the Judiciary Committee to advance LB831. Would be happy to take any questions. [LB831]

SENATOR COASH: Thank you, Senator Hansen. Does this authorize law enforcement to use this data to send me a ticket if it shows I ran a red light or was speeding? [LB831]

SENATOR HANSEN: Yes. I could see the connection to that. It was not my intent to authorize red light cameras or other traffic cameras. And if there would be any necessary clarification, I'd be happy to make it. [LB831]

SENATOR COASH: Okay. Thank you. Senator Pansing Brooks. [LB831]

SENATOR PANSING BROOKS: (Exhibit 1) I'm just trying to understand. We have a letter here from Colonel Rice. Have you see this? [LB831]

SENATOR HANSEN: Yes. [LB831]

SENATOR PANSING BROOKS: I'm trying to understand. He thinks something needs to be amended. Do you under...can you explain in your terms? And I don't know if he's going to speak to us. Is Colonel Rice here? [LB831]

SENATOR HANSEN: If it's the letter I...you know, actually, I might have left that letter on my desk. He was kind enough to drop it off earlier. [LB831]

SENATOR PANSING BROOKS: He suggests amending the language and I was just trying to understand. Do you know? [LB831]

SENATOR HANSEN: I believe his suggestion was one of the places where the Nebraska State Patrol thinks they might like to use ALPRs is with the weigh stations along the interstates and highways, such that they already do some sort of mobile technology with semitrailers. And I think that's in line with what my bill would authorize because my bill, say, would allow for toll

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 21, 2016

---

collection, other things of that nature. And I would be totally acceptable to an amendment that would allow for weigh stations. [LB831]

SENATOR PANSING BROOKS: Willing to amend it? Okay. [LB831]

SENATOR HANSEN: I would be happy to work with the State Patrol and the committee on that language. [LB831]

SENATOR PANSING BROOKS: Okay, good. So you haven't talked to them really yet. But just have seen this letter? [LB831]

SENATOR HANSEN: I did get a chance to see the letter this afternoon but haven't talked with them at any length yet. [LB831]

SENATOR PANSING BROOKS: Okay. Thank you. [LB831]

SENATOR HANSEN: Thank you. [LB831]

SENATOR COASH: Senator Williams. [LB831]

SENATOR WILLIAMS: Thank you. Senator Hansen, it's my understanding from looking at the bill that it only applies to law enforcement. [LB831]

SENATOR HANSEN: Uh-huh. [LB831]

SENATOR WILLIAMS: Is that correct? [LB831]

SENATOR HANSEN: Yes. So law enforcement and government agencies. [LB831]

SENATOR WILLIAMS: Okay. So private citizens that might have this device, this legislation would not apply to them. [LB831]

SENATOR HANSEN: It would not. It would prevent, say, law enforcement from selling the data to, say, I know there's companies that do marketing data and whatnot. It would prevent them, prevent a law enforcement agency from doing that. But if somebody wanted to mount cameras on the top of their cars and drive around town, my legislation wouldn't impact that. [LB831]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 21, 2016

---

SENATOR WILLIAMS: Thank you. [LB831]

SENATOR COASH: I don't see any other questions. [LB831]

SENATOR HANSEN: Thank you. [LB831]

SENATOR COASH: Stick around? [LB831]

SENATOR HANSEN: I will. [LB831]

SENATOR COASH: All right. Great. Okay, we're going to take the testimony in support of LB831. Come on up. And I didn't mention this earlier but we do have a light system. So, for the testifiers, when you see the yellow you've got a minute, and the red, we'll ask you to wrap up. So welcome. [LB831]

MARY JANE TRUEMPER: Thank you for having this hearing today, Senators. And my name is Mary Jane Truemper, T-r-u-e-m-p-e-r. I reside at 5306 IZARD Street in Omaha. I'm here representing myself as a lover of liberty. I want to say that I am in favor of this common-sense legislation. Just because we have technology doesn't mean that we should use it necessarily, and I think that the decision shouldn't be in the hands of law enforcement. In order for us to strike that balance between liberty and security, we have to have common-sense legislation such as this that will lay parameters over when and where it can be used, and how we can safeguard the privacy and liberty of citizenry. One thing that we know from looking at totalitarian states is that you can't control what you can't monitor, and when we're all monitored 24/7 that leaves us open to abuse of power. I would like to say that we'll have cases like this coming up over and over. I don't know if you're aware, we also have Bluetooth technologies built into new cars, and we have Bluetooth readers that will capture that data. So the technology is progressing faster than the legislation can keep up with it, so this will be coming up over and over again, and even today. So I would just ask you to be mindful that there is...it's subject to abuse with this kind of data collection and to be that balance between the security and the ability, the technical, technological ability. Thank you for your time. [LB831]

SENATOR COASH: Thank you, Ms. Truemper. See if we have any questions for you, before we let you go. Seeing none, you can go. Appreciate your testimony. We'll take the next testifier in support. Welcome. [LB831]

SANDRA SMITH: (Exhibit 2) My name is Sandra Smith, S-a-n-d-r-a S-m-i-t-h. I am a concerned citizen and was born and raised in Nebraska. I want to thank Senator Hansen for

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 21, 2016

---

introducing this bill. I am a proponent of this, as there needs to be accountability and transparency in how vehicles are being tracked by law enforcement. What are they tracking people for? How long does this tracking take place? How often do they update their databases? What can a person do if they feel that they are being tracked? Who do they make a complaint to? I have seen many cameras going up in intersections in and around Omaha. I have also seen cameras recently put up on overpasses on I-80 between Lincoln and Omaha. One is at my exit in Gretna, Exit 426. It sits up on the west wall of this overpass and looks down on to I-80 traffic. Is this a license plate reader? It's not a red light camera, as there are no red lights. So I'm not sure what the camera is. The proliferation of technology is quickly outpacing the ability of local government to pass laws to regulate it. This is probably the biggest civil rights issue of our time, making sure this technology is not used in a nefarious manner or without transparency and accountability. Seattle has a police accountability board that is made up of many private citizens. They are responsible for investigating any and all complaints and making sure civil rights are not violated. I would like to see Nebraska create a police surveillance and accountability review board that would be responsible for reviewing all of the surveillance devices being purchased. They would also be responsible for taking citizen complaints and would have the authority to review and conclude whether the complaint is legit. The ordinary citizen does not have an independent board in Nebraska to go to, to make a complaint, except for the Omaha Police Department. Please pass this bill out of committee to be debated on and voted on by the Legislature. Thank you. [LB831]

SENATOR COASH: Thank you, Ms. Smith, for your testimony. I don't see any questions from the committee. Appreciate you coming out. [LB831]

SANDRA SMITH: Thank you. [LB831]

SENATOR COASH: Take the next testifier in support. Welcome, Ms. Miller. [LB831]

AMY MILLER: (Exhibit 3) Good afternoon. My name is Amy Miller, that's A-m-y M-i-l-l-e-r. I'm legal director for the ACLU of Nebraska. We support LB831 as a great balance between allowing law enforcement to use this technology but setting clear, uniform guidelines that would be used across the state. As Senator Hansen referenced, we surveyed the three largest law enforcement entities back in 2012 to discover if this technology was being used, and at that time it was very concerning. Omaha Police Department at that time had the technology but no written policies governing how long they maintained the records. We also discovered back in 2012 that this technology is not that reliable. Nebraska State Patrol data revealed that in one month they managed to scan 7,000 license plates; they had 14 hits. That means it's a success rate of .002 percent. But even those 14 ultimately proved to be drivers that had done nothing wrong and were not part of any law enforcement violation. So the technology has a lot of issues with it and we

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 21, 2016

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think that's why, since we renewed our study last summer, that what we've discovered is Omaha Police Department has abandoned the technology, Lincoln Police Department is still using it, and the Nebraska State Patrol is using it only to accept the information but they're not recording the data. For those reasons, we think that this technology, while it's here, it is the right time to have uniform guidance for all law enforcement agencies in case anyone else goes forward with it. And we know what it sounds like. People have said to us: Having a recording of your license plate in public, I can see your license plate in public; how is this a privacy concern? The reality is my license plate alone, standing alone, does not create a problem but if you have snapshots of my license plate where I am throughout the day, throughout the week, and throughout the month, you can very quickly paint a picture of someone, which does result if it's all in one database, in a warehouse of information that can reveal a lot: whether I'm seeing a psychiatrist; whether I attend a mosque, a temple, or a church; whether or not I'm having an affair. All of these things are revealed by where our car is. The technology has been misused in other places. You heard Senator Hansen give some examples. We've given you some other examples in our testimony. It is also a database for thieves, someone who wants to know where that nice car they see on "O" Street is heading. If they know then where my address is, knows where to find me at 3:00 a.m. Having uniform guidelines about where all this information is retained so police can use it but other people can't is a great way to balance both privacy and law enforcement needs. We thank Senator Hansen for introducing this legislation. I'm happy to answer any questions about the study we've done or about the larger privacy concerns. [LB831]

SENATOR COASH: Do you want to talk briefly about the scope of the study that you mentioned and the kind of questions you were asking? [LB831]

AMY MILLER: Yeah. Nebraska has a very robust open records law and this is one of the tools. That the material that you see in front of this committee often is a record request. We only, at the point that we participated in the 2012 study, we only asked our three largest law enforcement agencies: Omaha Police, Lincoln Police, and State Patrol. And we certainly can broaden that further, but it's our understanding this may not yet be in use in any other smaller places. We asked can you produce any records of policies, regulations, internal memos, and any log showing the use. And that's where some of the information that we got back, Lincoln Police now have a written policy. At the time that we did our study in 2012, they were using the technology with no written policy. They since have adopted one. And the technology also revealed a lot of problems. Nebraska State Patrol reported that though they had spent I think \$50,000 to buy two cameras, one wasn't working from the day they opened the box. Omaha Police reported they had similar technology problems and that was one reason why they ultimately abandoned it. They ultimately ended up using one of the cameras before they entirely discontinued use just as a hand-held camcorder, as a regular recorder, and were using it to do surveillance at gang-suspected activities. So it is perhaps a boondoggle that some law enforcement officers were tempted into purchasing this equipment. However, technology may have improved and if someone is inclined

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 21, 2016

---

to buy this again and bring it back to Nebraska, we want to make sure that they're using it appropriately. [LB831]

SENATOR COASH: Can you speak to this? I don't know if any law enforcement is going to testify on this bill. But what is...we know that they're not being used to enforce the law or, you know, I'm not getting, you know, speeding tickets or red light tickets. What are the law enforcement uses of this technology that you found in your survey? [LB831]

AMY MILLER: I think you may in fact hear from some law enforcement, perhaps in neutral testimony capacity today or you may get written testimony. As I understand it from reading what's happening both in Nebraska and elsewhere, there's two common circumstances when the technology is appropriately being used. If the camera snaps my plate and that uploads immediately and matches an Amber Alert, they would realize my car, associated with a kidnapping. They would know then where I was and they could head after me. Also, if I report my beautiful little Mazda stolen and that license plate is snapped, the police can scoot out and find the person who stole my car. So those are the two sort of examples of appropriate use for ALPR technology. The concern gets to the larger question that we've seen abuses in other states where they start snapping all the camera...all the license plates at a mosque parking lot to create a database of people who are Muslim. Having clear guidance on when you can and cannot use this technology, I don't think that would ever happen in Nebraska, but that way you'd have it in place. [LB831]

SENATOR COASH: I could be wrong but I believe right here in Lincoln there's...sometimes you see cameras at stoplights and that is, to my understanding, used for traffic purposes to help monitor traffic. Does this bill affect those types of cameras? [LB831]

AMY MILLER: It would not, and I think the previous testifier raised some questions about similar cameras she has seen in the Omaha area. It's our understanding that those are traffic study cameras and are sometimes used by news media to upload the pictures you see on the 6:00 news... [LB831]

SENATOR COASH: Right. [LB831]

AMY MILLER: ...of how busy the traffic is. They're not being used for red light purposes to issue tickets and, theoretically, they're not being recorded or downloaded into a database. Had a lot of concerns raised by constituents who have called us about those, but for right now those are being used for study purposes only. And I would agree with Senator Hansen that this bill would not reach to start allowing tickets to be issued for red light offenses, anything like that. [LB831]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 21, 2016

---

SENATOR COASH: Do you believe that this bill affects those traffic cameras? [LB831]

AMY MILLER: I do not. The technology is described very specifically in this bill about ALPRs. Those cameras, as I understand, are not in any way, shape, or form uplinking to some of these national databases. So they're filming but they're not later sending pings out to say, oh my gosh, there is a car with an Amber Alert. I think those study cameras would remain, unless you don't want them to remain, in which case we can help you craft language. But I think this would be very targeted. Senator Hansen has done a great job of having very limited language that will bring it just to this technology at issue. [LB831]

SENATOR COASH: All right. Thank you for your testimony. Any questions for Ms. Miller? Senator Pansing Brooks. [LB831]

SENATOR PANSING BROOKS: I think the previous testifier mentioned, Ms. Smith mentioned a police surveillance and accountability review board. I don't see that in here. [LB831]

AMY MILLER: No. I think that that might have been an additional good idea about a way to handle and tackle some of the questions about appropriate policing. [LB831]

SENATOR PANSING BROOKS: Okay. [LB831]

AMY MILLER: But that is not part of Senator Hansen's bill. [LB831]

SENATOR PANSING BROOKS: Okay. I didn't see it. So thank you. [LB831]

SENATOR COASH: All right. Thank you for your testimony. [LB831]

AMY MILLER: Thank you. [LB831]

SENATOR COASH: Take the next testifier in support of LB831. Seeing none, is there anybody here to testify in opposition of LB831? Is anybody here in a neutral capacity on LB831? Very good. Senator Hansen, you're welcome to close if you like. [LB831]

SENATOR HANSEN: Thank you, Senator Coash and members of the committee. I will close just by again summarizing, I think this is best practices in terms of both public knowledge, data security, as well as kind of efficient use of technology. Addressing the concerns that had been raised about possible abuses, if there's any work that needs to be done to clarify that, say, stop

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Transcriber's Office

Judiciary Committee  
January 21, 2016

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cameras don't want to be used or we need to allow extra exceptions for the State Patrol to monitor truck plates on the interstate, be happy to work with stakeholders and develop amendments. [LB831]

SENATOR COASH: Very good. Thanks for bringing the bill. [LB846]

SENATOR HANSEN: Thank you. [LB831]

SENATOR COASH: All right. We'll close the hearing on LB831 and open the hearing on LB846, our own Senator Pansing Brooks. You get to open on your bill. [LB831]

SENATOR PANSING BROOKS: (Exhibit 1) Thank you, Vice Chair Coash. I appreciate it. Okay, Senator Coash and fellow members of the Judiciary Committee, for the record, my name is Patty Pansing Brooks, P-a-t-t-y P-a-n-s-i-n-g B-r-o-o-k-s, and I represent the Legislative District 28, right here in the heart of Lincoln. And I'm here to introduce LB846. Last session I was thrilled to be approached by the Innocence Project and asked to introduce two bills for them involving DNA evidence and newly discovered evidence. I am sure that you all remember the really compelling testimony that we heard in this committee at the hearing for both of those bills. While those bills sought to remedy situations where someone may be serving time for a crime that they did not commit, this bill seeks to prevent the miscarriage of justice in the beginning. Eyewitness misidentification has played a role in 70 percent of convictions that have been overturned by DNA evidence since testing became available. The American Psychologists Association has written an amicus brief to the Supreme Court stating that, "Juries don't understand the many factors that can influence a witness's ability to accurately identify a suspect, including how much stress a witness is under, whether a weapon is present, the amount of time a witness had to look at the person, the lighting present at the time, how long it's been since someone first witnessed the crime, or suggestions of guilt by police." My testimony will be short, thankfully, as this is a very simple bill. It requires law enforcement agencies to adopt a written policy on suspect identification by witnesses by January 1, 2017. In December of 2014, the Nebraska Crime Commission, the Nebraska State Patrol, the Police Chiefs Association of Nebraska, the Nebraska Sheriffs' Association, and the Police Officers' Association of Nebraska agreed to support statewide adoption of an eyewitness identification model policy developed by the Nebraska League of Municipalities and the League Association of Risk Management. The policy includes best practices supported by the National Academy of Sciences, the President's Task Force on 21st Century Policing, the U.S. Department of Justice, the International Association of Chiefs of Police, and others; must at a minimum contain four best practices which I believe are as basic and fundamental to a system of justice and eyewitness identification as I can legally imagine. The first practice is a blind administration of the eyewitness process. This basically means that the administrator does not know who the suspect is. In the case of a small

law enforcement agency where there are not enough people, this practice could be handled simply by putting the photo with other photos in a folder to assure that the administrator doesn't know when the eyewitness is looking at the suspect's photo. This practice prevents the administrator of the lineup from providing inadvertent or intentional verbal or nonverbal cues to influence the eyewitness to pick the suspect. The second basic practice requires that instructions be given to the eyewitness that would include a statement that the perpetrator may or may not be among the persons in identification procedures. Clearly, it is just as integral to our justice system to exclude and eliminate the innocent as it is to identify the suspect. The third practice provides that nonsuspect fillers need to generally match the witness's description of the perpetrator, again, hardly something that is subject to disagreement. Finally, if the witness makes an identification, a statement as to the level of certainty should be obtained from the witness. In other words, how certain is the witness that the identification is correct? And that statement needs to be made at the time of the identification. LB846 also requires the Crime Commission to develop a suggested written model policy that contains all the best practices required by LB846, those four, that law enforcement agencies may choose to adopt. The policy of the Crime Commission would automatically be in effect for those law enforcement agencies that don't adopt their own policy by January 1, 2017. I want to bring your attention to an article in the latest issue of The New Yorker, which I think is being distributed or has been distributed to you. While I don't expect you to read the entire 18 pages, although it would be nice, I have highlighted portions that I would like you to look at. It tells a story of a young woman, who was a rape victim, who identified Timothy Cole as her attacker in a lineup. Mr. Cole was a 24-year-old student and military veteran when he went to prison, where he would die at the age of 39, having served 15 years for a crime that he did not commit which they determined via DNA evidence later. As a result of this case, Texas, under the active participation of Governor Perry, passed the Tim Cole Act requiring police departments to reform their lineup practices. The state is responsible when there is an incorrect lineup and so that's one reason I think it's important for us to consider this. So let's not wait for something to happen in Nebraska before we all require all law enforcement to use proven eyewitness identification practices. And I just want to add that I'm currently in some discussions with the AG's Office and the county attorneys about ways to strengthen the protocols for eyewitness IDs across the state, and I will keep you posted on that. So with that, I'll take any questions you might have. [LB846]

SENATOR COASH: Thank you, Senator. Are you aware of how many law enforcement agencies across the state already have some type of policy in place? [LB846]

SENATOR PANSING BROOKS: We have 60 percent are compliant right now, in compliance. [LB846]

SENATOR COASH: Sixty percent? [LB846]

SENATOR PANSING BROOKS: Uh-huh. [LB846]

SENATOR COASH: Okay. Any questions for Senator Pansing Brooks? Seeing none, thank you for opening. [LB846]

SENATOR PANSING BROOKS: Thank you. [LB846]

SENATOR COASH: We'll start with the testifiers in support of LB846. Welcome. [LB846]

MICHELLE FELDMAN: Hello. My name is Michelle Feldman, M-i-c-h-e-l-l-e F-e-l-d-m-a-n, and I am here to testify on behalf of the Innocence Project. We're a national organization that works to exonerate the wrongfully convicted with DNA evidence and we also work with our local partners across the country, including the Nebraska Innocence Project, to enact policies that prevent wrongful convictions. And as the senator mentioned, eyewitness misidentification is the leading contributing factor to wrongful convictions. Kirk Bloodsworth, who will speak after me, he can speak firsthand to all the consequences for innocent people when a misidentification occurs. And what sometimes gets lost in the conversation is the harm that mis-ID can do to public safety. Because when an innocent person is convicted, the real perpetrator can be out harming others. In our cases, when actual perpetrators were later identified in wrongful convictions involving misidentification, we found that they had gone on to commit 100 additional crimes, including 64 rapes and 17 murders, while the innocent person was in prison. So there is an absolute public safety implication in this bill. Witness memory is often unreliable and it could be impacted by many factors, including the way that the lineup procedures are conducted. And luckily there have been a set of best practices, the four practices that Senator Pansing Brooks mentioned, that have been proven to reduce the risk of misidentification and improve the accuracy. They've been endorsed by the National Academy of Sciences, the U.S. Department of Justice, the International Association of Chiefs of Police, and many others. We call them the core four reforms: it's blind or blinded administration of the lineup, witness instructions, proper use of nonsuspect fillers, and witness confidence statements. Across the country there are 14 states that have uniformly adopted the best practices and many others, since the National Academy of Sciences' report was issued in 2014, are moving in that direction. There's some really positive movement right here in Nebraska. We have...two years ago we met with law enforcement and we met with lawmakers to talk about a bill similar to what we're introducing now that would require best practices, and they said we want time to do this on their own. We believe in the reforms. So we listened to them and, as Senator Brooks described, we worked with the League of Municipalities to update its model policy and that was endorsed by the Sheriffs' Association, the Police Chiefs Association, and other law enforcement groups. We worked with the Crime Commission to mail out the model policy to every agency in the state and we held two statewide trainings. And so to date the Crime Commission, over the summer they

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Transcriber's Office

Judiciary Committee  
January 21, 2016

---

surveyed agencies and then the last two months the county attorneys and the Attorney General did some additional outreach. And right now 60 percent of agencies have reported that they have adopted policies with key best practices, which is a great start but that's still 40 percent that are out of compliance or that we don't know what they're doing. So all this bill does is achieve a uniform statewide practice. It's a one-page bill. It's pretty much as bare bones as you can get. It just literally requires the core four reforms to be adopted. It provides flex...sorry. Can I just summarize? I know I'm... [LB846]

SENATOR COASH: Yeah, you can wrap up. [LB846]

MICHELLE FELDMAN: Sure. It just requires that the core four reforms be adopted. And they still have the flexibility to create their own policies. There's no cost. The only cost is training, which we've already provided. There is no remedy. Other states have identification suppressions or jury instructions for failure to comply. So in short, we hope that the bill will pass to achieve uniform practice and ensure the fair administration of justice throughout the state. And thank you. And I'm happy to take any questions. [LB846]

SENATOR COASH: Okay. Thank you. Any questions? Senator Williams. [LB846]

SENATOR WILLIAMS: Thank you, Ms. Feldman. I do have one question. [LB846]

MICHELLE FELDMAN: Sure. [LB846]

SENATOR WILLIAMS: In the states that have adopted this type of legislation, the best practices as you talked,... [LB846]

MICHELLE FELDMAN: Yeah. [LB846]

SENATOR WILLIAMS: ...do they, in addition to stating something about best practices through a Crime Commission or something like that, actually list ingredients like this bill does? [LB846]

MICHELLE FELDMAN: Yes, most of them... [LB846]

SENATOR WILLIAMS: And are they the same type of (inaudible)? [LB846]

MICHELLE FELDMAN: Yes, exactly. I mean many of...some of the states go much further than this bill and they prescribe not only these four best practices but also what to do in case of a

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Judiciary Committee  
January 21, 2016

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showoff, which is when you take the witness to the crime scene. There are certain best practices involved in that and they go much further. Yeah, all the 14 states that have passed laws, they all outline the best practices. The only one that doesn't is Maryland because they had already adopted a model policy. So they just require them to adopt that model policy, but it includes the best practices. [LB846]

SENATOR WILLIAMS: Thank you. [LB846]

MICHELLE FELDMAN: Uh-huh. [LB846]

SENATOR COASH: Thank you, Ms. Feldman. Appreciate your testimony. [LB846]

MICHELLE FELDMAN: Thanks. Thank you. [LB846]

SENATOR COASH: We'll take the next testifier in support. Welcome. [LB846]

KIRK BLOODSWORTH: Thank you, Senator Coash and members of the committee. My name is Kirk Bloodsworth. I'm the first person in the United States to be freed by postconviction DNA testing from death row in the United States. In 1985 I was an honorably discharged Marine with no criminal record or criminal history. I was accused and convicted, wrongfully so, of the rape and murder of nine-year-old Dawn Hamilton, but my case shows eyewitness can get it wrong. There was five identification witnesses in my case. All of them picked me out. Five identification witnesses said that I was the last person seen with Dawn Hamilton. The two main witnesses were two little boys, one eight and ten years old. They held a lineup on that...I was arrested on a Thursday. They held a lineup on that coming Monday. Neither one of the children picked me out of the lineup, until two weeks later their parents called the Baltimore County Police Department--this is a Maryland case--and said our children picked out the wrong guy and it was number six. When they did the lineup, one person, the youngest of the two little boys, picked out a filler in the lineup and the other one didn't pick anybody out. A woman contacted the police back in those days and said that I looked like the composite sketch. They showed a photo array to the two main witnesses, and all the witnesses, as a matter of fact, and said one of the...the youngest of the two little boys could not identify, say it was me, and the oldest one said, he looks similar to the guy but his hair is too red. Senator Coash and other Senators, my hair was as red as a fireplug back in those days. I had sideburns down to here on either side. It was obvious that I was not the person they were looking for. This was not a double-blind lineup, although officers involved in investigations were in the room. Despite the boys' inability to identify me in the lineups, both testified at trial they saw me with Dawn Hamilton, even after all those red flags. Even though there was no physical evidence tying me to the crime, based on multiple witnesses' identifications and the statement, I was found guilty and sentenced to death. Finally, after almost

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Transcriber's Office

Judiciary Committee  
January 21, 2016

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nine years of this life, we did a DNA test in 1992 and caught the real perpetrator some years later. It took another ten years after my release, when I was released, and he was not 6 foot 5. The description of the last person seen with Dawn Hamilton was 6 foot 5, curly blonde hair, bushy mustache, tan skin, and skinny. Senator Coash, I think your vision is pretty good. I do not even remotely...the real killer, though, was found ten years later to be 5 foot 6 and 160 pounds. I would like to sum up if that's okay, Senator. [LB846]

SENATOR COASH: That would be fine. [LB846]

KIRK BLOODSWORTH: I am the first American on death row to be exonerated by DNA. Eyewitness identification cost me my freedom and it almost cost me my life. Had the lineups been conducted with a blind administrator and these practices that everyone is talking about were in place, I may not be sitting here today. Passing this bill is an opportunity for Nebraska to ensure that what happened to me does not happen to other innocent people. I want to thank all of you for letting me testify today because the truth is if it could happen to me it could happen to anybody in America. Thank you. [LB846]

SENATOR COASH: Thank you, Mr. Bloodsworth, for sharing your story. We'll see if we have any...I don't see any questions of the committee. Thanks for being here. [LB846]

KIRK BLOODSWORTH: Thank you, Senator. [LB846]

SENATOR COASH: Take the next testifier in support. [LB846]

BRIAN BORNSTEIN: Good afternoon. My name is Brian Bornstein, B-r-i-a-n B-o-r-n-s-t-e-i-n. I'm the director of the University of Nebraska-Lincoln law and psychology program, a dual-degree program between the College of Law and the Department of Psychology. I received my Ph.D. from the University of Pennsylvania and have been at UNL since 2000. My research and teaching focus primarily on the reliability of eyewitness memory and how juries make decisions. Eyewitness memory, like all memory, is often unreliable. Memory is not like a videotape that plays back events exactly as they occurred. Rather, it is a reconstruction of events that is influenced by a variety of factors, some of which can be controlled by the justice system, including the way that the authorities conduct lineup procedures and question witnesses. Over 30 years of scientific research has identified some of the limitations of eyewitness memory, along with a set of eyewitness identification procedures that can reduce the risk of false identification. These practices come from hundreds of studies published in peer-reviewed journals. Most recently, they were confirmed in a 2014 report issued by the National Academy of Sciences which conducted the first-ever comprehensive review of eyewitness identification research. Ms. Feldman and Senator Pansing Brooks touched on some of the National Academy of Sciences'

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Transcriber's Office

Judiciary Committee  
January 21, 2016

---

recommendations and I would like to explain the science behind them in a little more detail. First, the National Academy of Sciences recommends using double-blind lineup procedures where neither the officer conducting the lineup nor the witness knows which member of the lineup is the suspect. Double-blind procedures are routinely used in scientific studies to prevent administrators from influencing the outcome of the research, and the same principle can be applied to lineups. Even if officers are careful not to make leading comments, witnesses can be influenced by unintended body gestures, facial expressions, or nonverbal cues. Double-blind administration removes any chance of suggestiveness, which protects the innocent and helps law enforcement build stronger cases against the guilty since courts can suppress an impermissibly suggestive identification. The report also recommends using a set of standardized instructions to the witness, including that the perpetrator may or may not be in the lineup and that the investigation will continue whether or not an identification is made. Research shows that without this instruction witnesses are more likely to assume that the guilty party is in the lineup, which increases the rate of false identifications. The idea is to take the pressure off of witnesses so they don't feel like they have to make an identification, which can be in error if the real perpetrator is not in the lineup. Also related to instructions the report recommends that law enforcement document the witness's level of certainty in his or her own words immediately after an identification. Self-reported confidence at the time of trial was not a reliable predictor of eyewitness accuracy. From the time the initial identification is made until trial, witness confidence can be inflated by interactions with the media, prosecutors, and investigators. Capturing a witness's confidence at the time of the identification means that it will more likely be based on the witness's memory than other biasing factors. To wrap up, all of the eyewitness identification procedures required by this bill are supported by well-established scientific research. Ensuring that law enforcement agencies use these practices would improve the accuracy of investigations which protects the innocent and helps law enforcement identify the truly guilty. Thank you for your time and consideration. [LB846]

SENATOR COASH: Good timing. Thank you, Mr. Bornstein. Any questions for this testifier? Seeing none, appreciate your testimony. We'll take the next testifier in support. Welcome. [LB846]

CHRISTY HARGESHEIMER: My name is Christy Hargesheimer, C-h-r-i-s-t-y H-a-r-g-e-s-h-e-i-m-e-r. I don't have a scientific approach here but, rather, a narrative about an experiment that I did, not with law school students but rather with Lincoln Public School staff development program of teachers. And when I was teaching this course, I went in one evening and said, do not overreact to what's about to happen but just observe. A few minutes later, a young African-American high school student, male, burst into the room in an agitated state and said that somebody was blocking his car in the parking lot. He marched around the room in a library, lit like this room is. Everybody had a chance to spend time observing him. After he left, I asked...I divided the class into three groups. One group was given a packet of mugshots of this young man

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 21, 2016

---

and five of his high school buddies. The other two groups were asked to write a description of what they had just seen and describe the young man. The group with the photos identified, maybe half of them correctly, the person that they had just seen. At the end of the class, a second group was given the folder and asked to identify the person. The third group received the lineup pictures the following week. About one-third of them accurately identified the person. The attorney who was speaking that evening at our class who had represented death row people had misidentified the person. In fact, she said, well, he's not in this lineup. She was wrong. So the following week I reported to them about how they had described the young man and they had him between 5 foot 6 and, as Mr. Bloodsworth said, you know, 6 foot 3 or something, between 150 and 220 pounds. He had a dew rag on, most of them saw that, but they didn't agree with the color of the dew rag. So all I can say is that if these people, under good circumstances and without the stress of having just witnessed an emotional, horrible thing, if they could not identify the person how can we rely on this? So I do believe there is a place for witness identification but it needs to be very carefully done and it can never be the entire basis of a conviction. And there are people who have been on death row that that is the only thing that identifies them. Thank you for your time. And by the way, I represent Amnesty International. [LB846]

SENATOR COASH: All right. Thank you for your testimony. I don't see any questions, so thank you. We'll take the next testifier in support. [LB846]

THOMAS STRIGENZ: (Exhibit 2) Good afternoon, Senators. My name is Thomas Strigenz. I appear on behalf of the Nebraska Criminal Defense Attorneys Association in support of LB846, strong support in support of LB846. The membership of NCDAA hits all four corners of the state of Nebraska. And what we, when we talked about LB846 as a membership, we want...the thing that we were most happy about is the best practices being across the state from Omaha to Scottsbluff, McCook to Valentine. And that's the most important thing because it is no question that eyewitness testimony is very strong evidence and the best practices in this bill, LB846, will put the common standards and the common methodology of how eyewitness testimony is developed, because, you know, it is developed. The purpose of investigations is to go where the evidence takes you, not to have a piece of evidence support a conclusion. And many times the false eyewitness testimony and false convictions are based upon a conclusion and then let's support it with an eyewitness. So we strongly support LB846 because again it will make a standard best practices on the state and that is the most important thing. And we know maybe some smaller law enforcement jurisdictions might have some problems with the line, but this bill, as Senator Pansing Brooks talked about, is that solves that. And the goal is justice and the goal is to get the real perpetrator, and this bill is justice and good. So with that, I strongly support. [LB846]

SENATOR COASH: Okay. Thanks for being here, Tom. I don't see any questions from the committee. We appreciate your testimony. [LB846]

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Transcriber's Office

Judiciary Committee  
January 21, 2016

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THOMAS STRIGENZ: Thank you. [LB846]

SENATOR COASH: Take the next testifier in support. Welcome. [LB846]

GREG GONZALEZ: Good afternoon. Greg Gonzalez, Omaha Police, deputy police chief, here in support of LB846. The Omaha Police Department for years has already followed best practices. In fact, we've had the Innocence Project attend a training session in our training unit early in the summer. So we already pretty much have adopted most of the provisions in the draft bill, with one recommendation and that is under section (2)(d): If a witness makes an identification, the officer shall elicit and document the witness's level of certainty, in his or her own words, immediately after the identification is made. So we would just submit that may be a little bit counterintuitive. We already ask four specific questions and that being: Do you recognize anybody in the photo? Who are they? And then the witness would have to identify the number and then we offer some commentary for the witness to identify, and we're just looking for a little bit more specific language. We think it might be a little bit open-ended, and that may not have been intent when you initially drafted the bill. But otherwise, we support the bill as it stands and would just look for some feedback to work with you in the future on that bill. Otherwise, that's it. Any questions? [LB846]

SENATOR COASH: Thank you very much. Senator Pansing Brooks. [LB846]

SENATOR PANSING BROOKS: Do you have some specific language that you...? [LB846]

GREG GONZALEZ: I do. In fact, I can send you a copy of our admonishment. And so ours is four simple questions. It's just a little bit more exact so...because how do you really quantify level of certainty? We're just trying to make sure that we're all on the same page. [LB846]

SENATOR PANSING BROOKS: Okay. So have you tried the other form out where somebody will express in their own words their own level of certainty? [LB846]

GREG GONZALEZ: Do you recognize anybody in the photo? I can always tell you verbatim what they are, but I'll look at my notes. Who is that individual that you recognize? And then the witness would actually have to point out a specific number on the six photos that were presented to him or her. So already some of the provisions are already...those safeguards are already in the policy...actually on the admonishment form. Where do you know them, him or her, from? And then lastly, any additional comments from the witness so they can actually stipulate or actually provide some additional commentary to the officer. [LB846]

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Transcriber's Office

Judiciary Committee  
January 21, 2016

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SENATOR PANSING BROOKS: So I was just wondering then, because it's my understanding that by not having the question, how sure are you or how confident do you feel, if the person says I don't feel very confident or I'm 50 percent sure, that's information that's valuable, it's my understanding. And the gentleman, Mr. Bloodsworth, that was just here, the children didn't ID him at all at the beginning and it was only later, after speaking with other adults, that they came to the conclusion, so. [LB846]

GREG GONZALEZ: Right. I can't really comment on his case. [LB846]

SENATOR PANSING BROOKS: No, I know. [LB846]

GREG GONZALEZ: (Inaudible) obviously a little bit different, and we've come a long ways with photo lineups, since then at least, having done hundreds of them. [LB846]

SENATOR PANSING BROOKS: Yeah. [LB846]

GREG GONZALEZ: I would be a little bit more comfortable with the witness having to be specific to what they saw and who they know as opposed to the officer asking them, well, what is your level of certainty and what does that mean, are you sure or you're not sure, because that's already asked in our admonishment form. So we just want to make sure that we tie up some loose ends there. That way we can kind of safeguard everybody involved, not only the officer but the witness. [LB846]

SENATOR PANSING BROOKS: I look forward to working with you. Thank you. [LB846]

GREG GONZALEZ: Okay. Thank you. [LB846]

SENATOR COASH: Thank you. Take the next testifier in support. Seeing none, is there anybody here to testify in opposition? Welcome. [LB846]

JOHN FREUDENBERG: Good afternoon. My name is John Freudenberg. I appear today on behalf of the Nebraska Attorney General's Office in opposition to LB846. Now to be clear, our office is not opposed to and actually encourages all law enforcement agencies to have written uniform policies on witness identification of suspects. However, our specific concern is when you attempt to dictate the details of those policies by specific legislative language. Specific witness identification protocols set out in legislative language is not necessary to address the concern. In short time we were given by the Innocence Project to look into the matter, we have worked with county attorneys and law enforcement associations to establish that a majority of

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Transcriber's Office

Judiciary Committee  
January 21, 2016

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Nebraska law enforcement agencies already have these types of policies, and those which don't are not in opposition to adopting them. Even in the absence of legislation, we believe that the vast majority if not all law enforcement agencies would have an adopted policy by end of this year if an effort to encourage them to do so was made. We think that the best approach is to have the Nebraska Crime Commission issue published standards as proposed in the current legislation and then have those standards distributed to all law enforcement agencies in Nebraska with the full support of our office. As we all know, best legislative practice dictates that such standards should not be included due to the fact they evolve over time. What's science today is not necessarily the best science tomorrow. When the standards evolve, the proposed approach requires repeated legislative action in the future if we use this course we're taking today. We encourage the Crime Commission oversight similar to that in the racial profiling policy statute, which is Section 20-504. Finally, our office does have a concern when national organizations approach the state on matters relating to criminal investigations and prosecution. Oftentimes these national organizations utilize statistics or examples that do not properly model what's happening in Nebraska. We ask that our Legislature allow us an opportunity to give you the status of what is actually occurring in Nebraska before it assumes that alleged injustices that may occur in other states are actually a problem in Nebraska. In closing, I reiterate that we agree (inaudible) policies on this topic are desired. And if this body concludes that action is actually necessary, we simply request that the standards be removed from the language of the bill, and that's paragraph (2) of the bill. And we are willing to continue to work with this bill with the senators on these points. [LB846]

SENATOR COASH: Thank you, John. Seeing no questions, appreciate your testimony. [LB846]

JOHN FREUDENBERG: Thank you. [LB846]

SENATOR COASH: Take the next testifier in opposition. Welcome. [LB846]

TRICIA FREEMAN: Thank you. My name is Tricia Freeman, T-r-i-c-i-a F-r-e-e-m-a-n. I'm the chief deputy county attorney in the Sarpy County Attorney's Office. And I also appear on behalf of the County Attorneys Association and we're here to oppose LB846 as drafted. But I also want to be clear as Mr. Freudenberg was that we are absolutely in support of procedures being required of all law enforcement agencies related to witness identification. What we object to is specifically subsection (2) of this bill. And we would ask, it would be our position that that information be removed from the bill. And while I'm not a scientist, certainly, I want to offer a little bit of information just by way of observation. I read an article that was written October of this year through what I think is probably an on-line blog, [TheMarshallProject.org](http://TheMarshallProject.org). And it was about a situation that occurred in 1985 of a wrongful conviction of a man convicted for raping Jennifer Thompson, ten years later was exonerated and the real rapist was actually identified and

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Transcriber's Office

Judiciary Committee  
January 21, 2016

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convicted. But what was interesting about the article was that it talked about two leading experts in the field of witness identification, one of them being John Wixted, a psychology professor at the University of California in San Diego who was a lead author of a paper in September 2015 in the issue of American Psychologist. And his position was that he believed the relationship between initial confidence and accuracy was strong. In the same article there's a mention of the opposite camp from Iowa State University Professor Gary Wells, who's identified as the most prominent academic in the eyewitness field, where he indicates, quote, that initial confidence level has some diagnostic value or is useful but is far from perfect. And I offer that observation not for its truth but just simply to suggest this, herein, is the reason that it's not a good idea to legislate best practices. Certainly we support and are happy to work with the senator, with the Crime Commission, with whomever we must to assist in the drafting of a model policy that includes what are current best practices. But to legislate them would then require any change in those practices to come back here before the committee or the Legislature to change the law before the policies could be amended. Thank you. [LB846]

SENATOR COASH: Okay. Thank you, Ms. Freeman, for your testimony. I don't see any questions from the committee. [LB846]

TRICIA FREEMAN: Thank you. [LB846]

SENATOR COASH: Take the next testifier in opposition. Seeing none, is there anyone here to testify in a neutral capacity? Welcome. [LB846]

THOMAS MAUL: Senators, good afternoon. Thomas Maul, M-a-u-l, 2468 18th Avenue, Columbus, Nebraska. I appear here this afternoon as president of and on behalf of the Nebraska State Bar Association. Our legislation committee looked at this bill last week. And as you've heard today from both the proponents and the opponents, and I think everyone on our committee certainly agreed, that we agree with the concept that everyone, both prosecution and defense, which are both contained within our committee, have all agreed that there should be a policy. There should be a standard by which law enforcement agencies conduct these photo lineups. So while the Bar Association, because we're made up of many members, and while we can certainly support the concept, we have no recommendation, again, on behalf of the Bar Association, as to who or how that exact policy is determined. Be happy to answer any questions, but you've heard a lot of testimony here today. [LB846]

SENATOR COASH: Thank you, Mr. Maul. Senator Morfeld. [LB846]

SENATOR MORFELD: Perhaps I should have asked somebody who was an opponent, but I'll ask you the question and I'll follow up with them after. I just came back from a committee

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Judiciary Committee  
January 21, 2016

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hearing, so I apologize. But it seems like everybody thinks that there should be a standard. What should be the punishment for violating the standard? [LB846]

THOMAS MAUL: Well, I think part of...and that's a good question because we did talk about that. You've heard today or they testified today that 60 percent of them have the policy, that law enforcement have that policy. The punishment, if you will, for violating or not having the policy, okay, if you don't have the policy, obviously, any convictions or any prosecution is going to be at risk. But as far as the policy, if you don't have the policy, again, that's going to be up to the Legislature to decide if they don't have it. But what I am understanding from everyone, again, as part of our committee and that's testified here today, that everyone is going to have that. As a practical matter, every law enforcement does a lineup. It's how well they do that lineup which is going to be the fairest way possible. And, yeah, I know...it's a good question. I don't know what the penalty would be if they don't do that. [LB846]

SENATOR MORFELD: I guess my only comment to that, and this is more of a statement so don't...you can answer if you want, but is that I just don't think 60 percent is good enough. And to me, that's an indication that we need something that mandates. So now if we come back and you say 95 percent, then that's a little bit better. And then I want to look into why those other 5 percent don't have a model or standard policy. But there has to be consequences, even for law enforcement, for not having good standards, particularly when it means that lives and freedom are at risk. But that's just more of a statement. I know you guys are neutral and I appreciate that. [LB846]

THOMAS MAUL: No, and I think the question is to who...that we need it but who is going to dictate what that policy should be. The good, best practices, I understand that. The legislation as written, you've got three separate entities. There was some concern about they all may agree what's the best practice today but they may not all agree what the best practice is next week. I agree with you, that was 100 percent, that's what we need and that's what I think everybody wants. [LB846]

SENATOR MORFELD: Thank you very much, sir. [LB846]

THOMAS MAUL: Thank you. [LB846]

SENATOR COASH: Mr. Maul. Any other questions from the committee? Seeing none, appreciate your testimony. [LB846]

THOMAS MAUL: Thank you. [LB846]

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Transcriber's Office

Judiciary Committee  
January 21, 2016

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SENATOR COASH: Is there anybody else here to testify in a neutral capacity? Seeing none, Senator Pansing Brooks, would you like to close? [LB846]

SENATOR PANSING BROOKS: Sure. [LB846]

SENATOR COASH: Can I...I want to ask a question before you close because Senator Morfeld brought up I think a very important point. If LB846 became law, and after the deadline these policies, as prescribed, were in place, and a law enforcement officer, you know, maybe erroneously, did not follow, you know, didn't do the double-blind or something, you know, violated that policy, what would be the practical outcome of that violation? [LB846]

SENATOR PANSING BROOKS: Well, as a defense attorney, I would immediately be able to say this was not...that you would request that the judge make instructions to the jury that the eyewitness identification not be given great weight. Or at least you would be able to argue that that was not...it had not followed protocol and that the eyewitness verification had not met the minimum standards of the best practice that 60 percent of our state has adopted and, as you heard, all sorts of groups. Did you have anything further? [LB846]

SENATOR COASH: No. That was just my question. [LB846]

SENATOR PANSING BROOKS: Okay. [LB846]

SENATOR COASH: If you want to go ahead and close, that would be fine. [LB846]

SENATOR PANSING BROOKS: Well, I think it's unfortunate that we have to turn this into a situation where the AG's Office is coming in to stand up against this. We had made an agreement to try to work on this and...but to come in and say that it's not a good idea to have the Legislature setting the best standards and trying to set forth any kind of requirements for law enforcement, that is our job. I know they may not like it, but that is what we do. We just quickly looked up, because I had the feeling this was coming. We quickly looked up laws and just in no time, it says here, each law enforcement agency within the state of Nebraska shall implement a written policy regarding the pursuit of motor vehicles. Laws: 20-504, written policy from the Nebraska Crime Commission on racial profiling; the laws on all the work that was done last year on videotape testimony; all sorts of discussions and best standards on missing person information; the law enforcement officers' jurisdiction and powers. We create all sorts of best standards. And maybe they don't like a national group coming in. That's what we just heard, that a national group came in and suggested this to us. National groups all over the country make recommendations. And if they aren't right for Nebraska then that's fine. But 60 percent of law enforcement have adopted

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 21, 2016

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this as best practices. You did hear from one officer who said, yes, we are using it and it's just fine. So we have situations where this state has paid for the improper use of justice. And when you think about what happened with the Beatrice Six, there are standards that we need to follow nationally. And these are the most basic. We've already met and cut it down already to four basic standards. And again, they are best practices recommended by the National Research Council. The League of Municipalities has agreed to this in Nebraska. I just want to reinstate again that there are major groups in this state that have okayed this policy. The Nebraska Crime Commission, the Nebraska State Patrol, the Police Chiefs Association of Nebraska, the Nebraska Sheriffs' Association, the Police Officers' Association of Nebraska have all agreed to support statewide adoption of the model policy. So this has been in the process for two years. And when I talk to people at the Crime Commission, it's my understanding that the Crime Commission doesn't have teeth to enforce this kind of a policy. So we have come forward with a minimum for best practices. The blind or blinded administration of a lineup, that means that you can't...an officer cannot be standing there saying, do you understand, do you see the suspect in there, is he the third one to the right? We all want the ability to have a blind administration if we are erroneously charged with something. The second one is that the perpetrator that...including that the perpetrator may not be...the instructions to the eyewitness that the perpetrator might not be in that group. That's true. We know that. There's a chance, and it was in the case of Mr. Bloodsworth right here today. He was among the group and he was chosen, and the actual perpetrator was not in the group. So why would we have any concern about saying to the witness, remember, there's a chance that the suspect is not in this lineup. Third, it says the use of nonsuspect fillers. Again, if you have somebody that's described as a white person, you wouldn't put the white person in with six African-Americans, and vice versa. That's just common sense. And, yes, gee, there's a chance that best standards and scientific evidence will change. And at that point you know what? We're legislators. We can change the law. That's the wonderful part about the position we're in at this point. And lastly, again, I don't think this is a big deal. I am willing to talk to the officers who are engaged in this in an ongoing basis, but having the witness say in their own words how sure they are about this does not seem like a huge intrusion on anybody. And I think it allows the person at the time to be able to say, I'm feeling really confident about this. That helps in the prosecution. Or, I'm not feeling so confident about this. So again our goal is safety for our communities. Our goal is to make sure that we do the best the job we can in arresting the guilty person. And arresting an innocent person, having them put up there and grabbed because it's the easiest thing to do, that is not the goal of any of us. I don't think that's the goal of the Attorney General's Office. I don't think that's the goal of the county attorneys' offices. And I think that we need to go forward and work hard to at least set some minimum standards for this kind of eyewitness identification. Thank you. [LB846]

SENATOR COASH: Thank you for that closing. All right. We're going to close the hearing on LB846 and open the hearing on LB738 with our own Senator Ebke. [LB846]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 21, 2016

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SENATOR EBKE: Irony: I dropped my cell phone on the way over here. [LB738]

SENATOR COASH: Go ahead. [LB738]

SENATOR EBKE: Thank you, Senator Coash and members of the Judiciary Committee. For the record, my name is Senator Laura Ebke, L-a-u-r-a E-b-k-e. I represent the 32nd Legislative District. We still have a fairly nice group here, but I will do my part to make sure that we aren't here as late as we were last night. LB738 is a civil liberties matter dealing with cellular site simulator technology, which is more commonly referred to as "stingrays." That is their brand name. I'll give you a quick summary of what this technology is and then proceed to the bill itself. Cell-site simulators work by tricking cell phones or other media devices with cell connections into thinking that they are legitimate cell phone service provider towers. There may be others here today with testimony that could better address some of the technical issues, and I don't pretend to know everything about them, but some may be here who can. There's certainly concern that these could be used by criminals for nefarious purposes. But there's also concern, I think, of how they could be utilized by law enforcement agencies. And that's what this bill specifically addresses. While the value as a law enforcement tool is understood, the concern that I have is that these sweeps can't be narrowly focused and targeted on the subjects of investigations under a warrant. So when utilized, these "stingray" systems are picking up all available data within the device range. So for example, anyone in this room, in theory, could be sweeping all the cell phone data of everyone here today. Think about all of the data that you have on your cell phone. And I'll pick it up. Think about the e-mails, the texts, the messages, the contact lists, the record of where you've been. In a populous location, these sweeps could be gathering data of hundreds if not thousands of phones that are not part of an actual investigation. Aside from the data collection issues, the element of tracking of people's location constitutes a significant invasion of privacy. Consider what information could be gathered which would reveal many of the things about our lives, such as who our friends are, where we go to the doctor, what meetings we've gone to, what church we go to, and on and on and on. I keep my calendars on my phone. Where I'm going to be could be downloaded. I think we're dealing with potential, and I just say potential because we don't know that this is happening yet, blatant civil liberties concerns with this "stingray" technology. I believe that we could be directly violating the Fourth Amendment of the United States Constitution with the broad sweep capabilities with cell-site simulators. Let me remind you what the Fourth Amendment says: The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated and no warrant shall be issued but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized. While it's asserted by some that law enforcement is not using "stingrays" in Nebraska, and I don't know whether that's true or not, there have been...there's been plenty of anecdotal evidence to suggest that some of the federal organizations are using it around the country and that they also cooperate with local law enforcement who are also using it somewhat. Until we're

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Transcriber's Office

Judiciary Committee  
January 21, 2016

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able to verify the source of use of "stingrays" and verify that technology can specifically target the subjects of investigation and not the general public, I think it would be wise policy for us to stay away from the use of such devices and side with our Fourth Amendment rights and do what we're supposed to do as a legislative body--protect those rights. LB738 imposes a general prohibition on the use of cell-site simulator technology. Over the next few years it's likely that the capability of these devices and specific utilities can become defined and it may be that permissible uses with proper safeguards will emerge; that it will be possible to specifically target and not just sort of a broad sweep. While thoroughly debated and targeted exceptions to the general prohibition can be expected to be authorized by future Legislatures, the process of cautious regulation and liberty sensitivity oversight needs to begin with a general prohibition set forth in this bill. I would encourage you to stand with the protection of people's rights, support LB738 by voting it out of committee. And I'd be happy to try to address any questions you might have, either now or after you've had the chance to hear the other testimony. [LB738]

SENATOR COASH: All right. Senator Williams. [LB738]

SENATOR WILLIAMS: Thank you. Senator Ebke, just one very simple question. As I read this bill, it only applies to law enforcement. [LB738]

SENATOR EBKE: Yes. [LB738]

SENATOR WILLIAMS: Thank you. [LB738]

SENATOR COASH: Seeing no other questions, we'll start with the proponent testimony. Welcome. [LB738]

MARY JANE TRUEMPER: Thank you. Hello again. My name is Mary Jane Truemper, T-r-u-e-m-p-e-r. I reside at 5306 IZARD Street in Omaha. I came to speak in favor of this bill. As I mentioned before, I'm a lover of liberty. And as a lover of liberty, I look to shine the light on the workings of government with limited exceptions. There has consistently been a pall of secrecy by government on the use of this technology. Much of what we know is the report findings and not voluntarily given. Law enforcement may say that they don't have this technology, and they may not. So I say great, then there shouldn't be a problem restricting its use. You may not realize it but law enforcement is often asked to sign nondisclosure agreements related to this technology. Many cases where the guilty had...there were many cases where the guilty had to be freed rather than reveal that they had used this technology to find the evidence against them, and we found that through court cases. I was also told this past week by a county attorney that the technology doesn't pick up cell phone communication itself like the actual conversations, it just collects the data communication. And he may honestly believe that. I don't think he was trying to tell me a

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 21, 2016

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story. But that's not true. A recent court case revealed that the technology picks up actual conversations and much more. There's a concept called parallel construction. Law enforcement learns, through the use of this technology, that somebody is behaving in a criminal manner and they share that with another agency, and just for an example we'll say the IRS. But they don't want it acknowledged that the information, the original information about the criminal behavior, came from "stingrays" or similar technology so they do a parallel construct. They tell the IRS, you need to...you know this guy is now doing criminal behavior but we want you to go find that information through another source now that we've IDed him, and then you construct your case based on that evidence. And it's a way of using the technology but it's not revealed in court how the information came about. It's called parallel construction. We live in dangerous times and this is necessary--you often hear that as a reason for using this technology. But I can assure you that the criminals know about this technology. And some may believe that the ends justify the means, but I'm not one of those. We know as a free people we have to balance liberty with safety. In the case of our country, I'll say it is the illusion of safety because there is no absolute security. We have open borders and countless ways that we are vulnerable to security threats. I won't go into those because I don't want to give anybody any ideas. But is law enforcement able to self-limit? If you're not doing anything wrong, then you don't have to worry. We hear all these things. The technology quells political speech and even business transactions. I'm president of Omaha Liberty Ladies and we've had two victims of this type of political squelching of conversation. We had the Catherine Engelbrecht from True the Vote who was a target of IRS, FBI, and ATF. We had the Wisconsin John Doe, Eric O'Keefe, who was zealously prosecuted by somebody of a different ideology. And fear is often used to rationalize this loss of liberty for the illusion of security. And I want to just leave you with two quotes, one from Thomas Jefferson: I prefer dangerous liberty to quiet servitude. And then M.L.K., in honor of his birthday this week, he says, "We know through painful experience that freedom is never voluntarily given by the oppressor; it must be demanded by the oppressed." And you are the ones that come between us and this loss of liberty, and this technology does need to be regulated. [LB738]

SENATOR COASH: Thank you for your testimony, Ms. Truemper. I don't see any questions of the committee. [LB738]

MARY JANE TRUEMPER: Thank you. [LB738]

SENATOR COASH: Appreciate it. We'll take the next testifier in support. Welcome. [LB738]

SANDRA SMITH: (Exhibit 1) My name is Sandra Smith, S-a-n-d-r-a, Smith, S-m-i-t-h. I want to thank Senators Ebke and Morfeld and Watermeier for introducing this bill. I'm here to give testimony as a concerned citizen. I was born and raised in Nebraska and have lived here most of my life. My journey in learning about "stingrays" began in the fall of 2014. I was sitting in my

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Transcriber's Office

Judiciary Committee  
January 21, 2016

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van in Nebraska, talking on my cell phone. All of a sudden, men's voices broke into my cell phone call and they were talking to each other. It was apparent they were in a room or a vehicle and not on a cell phone call themselves because their voices overlapped. I asked the person I was talking to if she heard them. When I said that, immediately the men's voices stopped talking. It was clear the men heard me say this. I was stunned and hung up my cell phone call. A second similar incident happened again about a month later in the fall of 2014. However, this was in a different town in Nebraska. Men's voices broke into my cell phone call and I asked the other person on my call if she could hear them. The men's voices stopped immediately and there was a dead silence, and then I hung up the call. I began to wonder, if someone was listening in to cell phones, what device could be used to break into a cell phone call. I researched and discovered that "stingrays" or IMSI catchers can listen in and record telephone calls, as well as pick up text messages, Web searches, contacts, and other very invasive details from cell phones. They do not discriminate and they pick up cell phone data within up to a mile radius, including children's cell phones. Police departments in Kansas City, St. Louis, Chicago, Tallahassee, and many other cities have admitted purchasing them and using them. A Cryptophone 500 cell phone can detect IMSI catchers, or "stingrays," attaching to the phone. I bought one in May of 2015. An alert pops up on the Cryptophone immediately when it is detecting a possible "stingray" in the area attaching to the phone. Since I have purchased it, I've had eight alerts on the phone since May. Out of those, five were in Gretna, two in Ashland, and one in Omaha. With the phone you can send the data log to the Cryptophone company. It's kind of like a computer log of the data on the phone. And in three of those incidents I sent the data log from my phone to the CEO and he indicated that in those incidents it was highly likely and appeared that my cell phone was connected to an IMSI catcher. Two more alerts of IMSI catchers in October are now being reviewed by the CEO and I haven't heard back from him yet, probably next week. I know that private hackers can work out of their homes to access cell phones, especially in major cities. In the incidents above, however, I don't believe this was a private hacker living in or around Gretna as my cell phone would pick up this hacking on a daily or weekly basis, since I also live in Gretna. I only receive an alert on my phone that there may be an IMSI catcher in the area one to two times a month. Also, the alert lasts about five minutes and not more than an hour. It appears that this device comes into the area and then leaves. It seems as if IMSI catchers are being used in Nebraska. We don't know who is using them here. We do know the Kansas City Police Department and the St. Louis Police Department have admitted to using them and purchasing them. That is very close to home. Please pass this bill out of committee so it can be fully debated and voted on in the Legislature. Thank you. [LB738]

SENATOR COASH: Thank you, Ms. Smith. Appreciate your testimony. [LB738]

SANDRA SMITH: Thank you. [LB738]

SENATOR COASH: Next testifier in support. [LB738]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 21, 2016

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AMY MILLER: (Exhibit 2) Good afternoon. My name is Amy Miller, it's A-m-y M-i-l-l-e-r. I'm legal director for the ACLU of Nebraska. As you've heard from previous testifiers, this sort of technology with the generic name cell-site simulator technology can, according to records we've obtained from the Justice Department, record incoming and outgoing phone numbers, intercept content of voice mail, e-mail, and text messages. While there are a lot of technical things you could say about this, I think the easiest thing to say is this is super creepy. We have provided, along with our testimony, a graphic that sort of shows the easy way how this technology works. This is from The Washington Post. Essentially, the technology fools your phone into thinking that it's a cell phone tower. So that your phone is contacting your cell phone towers on a regular basis, instead it sends info to the law enforcement agency that's using the technology. The other simpler way that I've heard national privacy experts describe it is the children's game of Marco Polo. Your cell phone is in your pocket. Law enforcement cries out Marco and your cell phone cries out Polo and then offers up all of the information in your cell phone. We are concerned about the fact that where we have seen examples across the country where law enforcement say we are using warrants and we are targeting just one person, the difficulty is that if I'm after Senator Morfeld's cell phone, when I shout out Marco, his is not the only phone that will shout back Polo. Everybody in the near zone will also shout back. So even a warrant exception would protect the privacy only then of the person that law enforcement were after but would not protect all the innocent people whose cell phone information is being given up. We have seen abuses of this technology nationwide and it's hard to collect the information. As Senator Ebke touched on, the FBI is making law enforcement agencies sign nondisclosure agreements, so even when a judge in a criminal case orders the local law enforcement to turn over information to assist in the defense of a criminal case, prosecutors are dropping the prosecution rather than provide information because they say their hands are bound by the FBI. This is government power out of whack. We are removing the oversight that happens between the three branches of the government. That's why we believe this bill is necessary. A few of the abuses have come to light and we've outlined those on the last two pages of our testimony. I photocopied a recent article from The Baltimore Sun because what's happening in Maryland is of particular concern. After court records are finally disgorged after a long court battle, the Baltimore Police Department, it turns out, has used this technology over 4,300 times. They're not talking about using this technology to catch high-level terrorists or "El Chapo." This technology is being used to catch pot dealers and average run-of-the-mill criminals without any of the normal oversight that happens with the Fourth Amendment. We strongly support this bill. We think that Nebraskans' privacy rights are going to be implicated. By its very nature, this technology is a mass surveillance device. There is no way for it to target in on just one person. We think this ban is appropriate. Happy to answer any questions. [LB738]

SENATOR COASH: Thank you, Ms. Miller. Senator Morfeld. [LB738]

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Transcriber's Office

Judiciary Committee  
January 21, 2016

---

SENATOR MORFELD: Thank you for coming today, Amy. And I'm sure it might be in your testimony, I haven't gone through it all yet, but regarding the Fourth Amendment, reasonable search and seizure, what kind of cases have been out there so far? Has there been any cases that have indicated that this technology would be...or any other cases, maybe not specifically related to this type of technology but to others that...? [LB738]

AMY MILLER: Yeah. I think that's the interesting thing. I have not yet seen a proactive civil rights lawsuit where someone has brought a case saying, I think my Fourth Amendment rights have been violated. The cases that we've seen have bubbled up in the criminal context where someone has been charged with a crime. The defense attorney, in reviewing the police report, sees reference to this technology and says, ahem, I'd like to ask more questions about that. And then sort of the door opens just a little bit so we can peek and see what's happening. [LB738]

SENATOR MORFELD: Uh-huh. [LB738]

AMY MILLER: One of the examples that I've given you a hyperlink to in the testimony, in Florida we had a low-level drug dealer who held up his pot dealer with a BB gun, walked away with \$130. Police thought that they'd be able to find him through his cell phone. And so according to court records and the depositions, which are all now available on-line, police went from door to door outside of the apartment complex that they thought that he might live in, with the hand-held version of the "stingray." That means every single person living in that apartment building, their information went into the "vacuum cleaner," essentially. Ultimately, they took that man's armed robbery felony charges and dropped them down to a misdemeanor in order to not have to turn over any more information about the "stingray" device. Meanwhile, all the people that lived in that apartment building had no idea that all of their information, and there is very personal information on people's cell phones, had flown straight into police hands. And, no indication what happens to the data. Do the police retain it? What if, while looking, they discovered that another person in the apartment building had back-due child support? Are they going to pounce on that person as well or do they not look at the additional data that's sucked up? Because there's so much secrecy surrounding this information, it's hard I think to structure any sort of reasonable limits. It's why the bill's absolute ban on the technology seems the most appropriate until we can move to a time when perhaps, not unlike the ALPR technology discussed earlier today, we could talk about reasonable limiting policies and data retention after we know more about this actual technology. [LB738]

SENATOR MORFELD: And could you...this is a little bit of Con. Law 101 I guess. But could you just walk me through what your argument would be that this is unconstitutional, just based on the plain language of the Fourth Amendment. [LB738]

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Transcriber's Office

Judiciary Committee  
January 21, 2016

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AMY MILLER: Yeah. I think that you could make an argument both for the individual, say the BB gun robber, I think he has a Fourth Amendment concern, but so do the other people living in that apartment building. The BB gun robber, if he had been subject to a search warrant, police would have gone to a judge and said, we believe that the BB gun robber lives in this apartment. The judge would review that, decide whether or not they had probable cause, and then, using the appropriate balance between the judicial branch and the executive branch, would issue a search warrant. They would have gone and they would have looked at his house, looking for evidence. Because the police do not have to approach a judge, because they do not have to reveal to the defense counsel that this technology was used, you've completely removed that neutral observation that happens under the Fourth Amendment when the judiciary says, yeah, this is going to be a privacy violation but it's a reasonable one because we want to catch the bad guy. If you don't have a warrant and you don't have that independent review, you have executive branch, law enforcement, in complete power making their own decisions. But more concerning is all the other people living in that apartment because they never would be subject, even if you went and got a warrant, you would not be able to figure out how to say, and in the two-block radius, here's the name of everybody else, we'll just drop them a line and let them know we looked at their cell phone, which is why this technology is ubercreepy. [LB738]

SENATOR MORFELD: And as I recall from my Con. Law 101 class just a few years ago, the area of search for a Fourth Amendment warrant has to be somewhat precise. I mean it can't...there are limitations on that, correct? [LB738]

AMY MILLER: Very much so. [LB738]

SENATOR MORFELD: And what does that look like? [LB738]

AMY MILLER: That's a good point. If, for example, they are looking for a man and they have come to his mother's house to look for him, they may look in places where a man may hide: under the bed, in the closet, in the basement. They may not open Mom's sock drawer or riffle through Mom's diary because that would not be a reasonable place where you would find a man. So the warrant requirement not only narrows then where they may look but also makes it tailored to the individual circumstance. [LB738]

SENATOR MORFELD: Thank you. [LB738]

SENATOR COASH: Thank you, Ms. Miller. [LB738]

AMY MILLER: Thank you. [LB738]

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Transcriber's Office

Judiciary Committee  
January 21, 2016

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SENATOR COASH: We'll take the next testifier in support of LB738. Okay. We'll now go to the opposition testimony on LB738. Is there anybody here to testify in opposition? Welcome. [LB738]

KEVIN STUKENHOLTZ: Good afternoon, Senator Coash, other members of the Judiciary Committee. My name is Kevin Stukenholtz, S-t-u-k-e-n-h-o-l-t-z. I'm currently the Saunders County Sheriff. I'm here to represent the Nebraska Sheriffs' Association. The Nebraska Sheriffs' Association is opposed to LB738 as written. We believe this bill would prevent law enforcement from utilizing technology to locate individuals during emergencies. We've investigated numerous incidents involving lost senior citizens, young people, suicide victims, and individuals that have been kidnapped. I'm not sure exactly what technology, the specific name of it, that we utilize when we use a ping service, but time is critical in those situations. When we're doing an investigation, we obviously seek a warrant. However, during an emergency where we have a young person who's contacted a friend through Facebook and is in the act of committing suicide, then we start the process of pinging that individual's phone, without their permission, and then we're able to locate them. In several cases we've been able to intervene in time. There have been some cases where we've not been able to get there in time. I'm familiar with two kidnapping incidents where a lady was kidnapped and was being held in a motel here in Lincoln. The FBI utilized a pinging service there. That individual was then tracked into several other counties. We located the victim and were able to bring that to a positive conclusion. The individual that had kidnapped her was telling her that he was tired of her and he was going...it was time to kill her. She was able to get to his phone, called in and asked for help, and so that process had to occur immediately. We believe the language in this bill is going to prevent those kinds of tracking and, therefore, prevent law enforcement to assist people in extreme emergencies. That's all I have and I'd be happy to answer any of your questions. [LB738]

SENATOR COASH: Thank you for that testimony and that side of the story. Senator Morfeld, you have a question. [LB738]

SENATOR MORFELD: Thank you for coming today. Are you aware of the kind of "stingray" machines that you guys use? Are they StingRay? Are they...? [LB738]

KEVIN STUKENHOLTZ: We don't...we don't utilize any of the systems that are listed here. [LB738]

SENATOR MORFELD: Uh-huh. [LB738]

KEVIN STUKENHOLTZ: But I can't speak to what the federal agents may have used during the kidnappings that I'm referring to. [LB738]

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Transcriber's Office

Judiciary Committee  
January 21, 2016

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SENATOR MORFELD: But Nebraska law enforcement officials, local and state, do use StingRay machines or not? [LB738]

KEVIN STUKENHOLTZ: I'm not aware of any organization that's currently using those. [LB738]

SENATOR MORFELD: But do you guys have the ping systems then? [LB738]

KEVIN STUKENHOLTZ: What we do is we ping through the telephone companies. [LB738]

SENATOR MORFELD: Okay. [LB738]

KEVIN STUKENHOLTZ: And each company requires different criteria but those are only utilized during emergencies. [LB738]

SENATOR MORFELD: So you guys go through the telephone company. [LB738]

KEVIN STUKENHOLTZ: Yes. [LB738]

SENATOR MORFELD: Okay. [LB738]

KEVIN STUKENHOLTZ: And we do confer with federal agents, depending on the circumstances, and I have no idea what technology they have to utilize. [LB738]

SENATOR MORFELD: Okay. And so going through the fed, so you guys go through the local law enforcement folks or, excuse me, I'm sorry, the local telephone company to ping them. So you guys have uses for something other than a missing person though, correct or...? By "you guys," I mean either in your county or based on your knowledge statewide. [LB738]

KEVIN STUKENHOLTZ: Have we used it for other than missing persons? [LB738]

SENATOR MORFELD: Yep, missing persons, suicides. Other than missing person, suicide, things like that, for other criminal activity. [LB738]

KEVIN STUKENHOLTZ: The only other time we would use it is if we had a warrant. [LB738]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 21, 2016

---

SENATOR MORFELD: Okay. But you guys, you can only get the information. So how do you get the information from the telephone company then I guess? So the telephone company is doing it for you. [LB738]

KEVIN STUKENHOLTZ: That's correct. [LB738]

SENATOR MORFELD: And how do they report back that information to you? [LB738]

KEVIN STUKENHOLTZ: They report it back in real time. [LB738]

SENATOR MORFELD: In real time, okay. [LB738]

KEVIN STUKENHOLTZ: Yes. [LB738]

SENATOR MORFELD: And what kind of information do you get back when they're reporting in real time? [LB738]

KEVIN STUKENHOLTZ: We'll get a general location of where the last ping was. [LB738]

SENATOR MORFELD: General location, okay. [LB738]

KEVIN STUKENHOLTZ: So...and depending on the...that can vary from location to location, depending on the towers, and it varies also on the brand of the phone. [LB738]

SENATOR MORFELD: Uh-huh. [LB738]

KEVIN STUKENHOLTZ: So in an instance where we had a senior citizen that was lost, knew they were lost but didn't want to disclose that because they were afraid of the consequences after that, just continued to drive. And then the ping would come back, and by the time we'd get an officer there they wouldn't be there. But when they finally stopped then it pinpointed it. [LB738]

SENATOR MORFELD: Okay. And so you get that ping location, that information. Do you receive any other information? [LB738]

KEVIN STUKENHOLTZ: No. [LB738]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 21, 2016

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SENATOR MORFELD: Messages, texts,... [LB738]

KEVIN STUKENHOLTZ: No. [LB738]

SENATOR MORFELD: ...anything like that, voice mails? [LB738]

KEVIN STUKENHOLTZ: No. [LB738]

SENATOR MORFELD: Okay. Has any law... [LB738]

KEVIN STUKENHOLTZ: That's locating the device. [LB738]

SENATOR MORFELD: Pardon me? [LB738]

KEVIN STUKENHOLTZ: I'm sorry. That the purpose of that is locating the device. [LB738]

SENATOR MORFELD: Okay. And to your knowledge, and I know you're representing the County Sheriffs' Association, correct? [LB738]

KEVIN STUKENHOLTZ: That's correct. [LB738]

SENATOR MORFELD: I know that you may not know what everybody is doing in all the counties, but are there any law enforcement agencies that are currently in Nebraska thinking about purchasing these or your county? [LB738]

KEVIN STUKENHOLTZ: Not that I'm aware of. [LB738]

SENATOR MORFELD: Okay. Thank you. [LB738]

SENATOR COASH: Thank you. Thanks for your testimony. [LB738]

SENATOR WILLIAMS: One? [LB738]

SENATOR COASH: Oh, excuse me, one more question. Senator Williams. [LB738]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 21, 2016

---

SENATOR WILLIAMS: Sheriff Stukenholtz, just one follow-up to Senator Morfeld. When you're pinging in that instance that you're talking about, you're only pinging for one device. [LB738]

KEVIN STUKENHOLTZ: That's correct. [LB738]

SENATOR WILLIAMS: Am I correct? Thank you. [LB738]

SENATOR COASH: Sheriff, I wanted to ask, is it your belief that this bill would prohibit your ability... [LB738]

KEVIN STUKENHOLTZ: Yes. [LB738]

SENATOR COASH: ...to do that? [LB738]

KEVIN STUKENHOLTZ: Yes. [LB738]

SENATOR COASH: Okay. And if the law was crafted in order to...if it was the will of this committee and the Legislature to say we don't want the broad-based "stingrays" being used but we are okay with local law enforcement pinging, if that's the term, a phone for a particular purpose such as finding a missing person or assisting somebody in an emergency, would that change the way that you view this legislation? [LB738]

KEVIN STUKENHOLTZ: Yes. [LB738]

SENATOR COASH: Would your...okay. So I'm just trying to help Senator Ebke understand kind of where there might be some room to allow law enforcement to do important things like find missing people but not do it in a broad way that (inaudible). [LB738]

KEVIN STUKENHOLTZ: Yeah, we'd be agreeable to that. [LB738]

SENATOR COASH: Okay. Thank you, Sheriff. Take the next testifier in opposition. Welcome. [LB738]

JEFF LUX: Good afternoon. My name is Jeff Lux. I'm a deputy Douglas County Attorney. I work in the Douglas County Attorney's Office for Don Kleine. I'm here representing the Nebraska County Attorneys Association in opposition of LB738 as it's written because it's a

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Transcriber's Office

Judiciary Committee  
January 21, 2016

---

complete ban. I think we...I know I personally would appreciate having the opportunity to work on language with you, Senator, and with this committee to address some of the concerns. I have worked with this type of technology. I had the same concerns that have been brought up by the senator and other testifiers. And one of the things that we did was, number one, the county attorney's office was brought into the process. It wasn't just a law enforcement agency having this technology and turning it on and off without any type of oversight whatsoever. Number two is I went to a district court judge and brought the issue before a district court judge and said, we've got a situation in a high-level drug trafficking, meth distribution investigation where this technology would be helpful in attaining the phone number of a person that we are investigating. They kept dropping their phones, their burner phones, while they were selling methamphetamine in bulk amounts. And in order to try and get the right number for this particular individual, using this technology was helpful in doing that. You can do it in two ways. You can either use the technology to locate somebody at a location, and that was kind of talked about with the pings. The pings are completely separate. But with pings, depending on the phone, you might get a ping that will come back within 5 meters; another ping might come back within 1,500 meters. So if you've got that type of situation, maybe the ping isn't going to be so helpful when it comes back 1,500 meters. This technology would help you in that type of scenario of tracking down a lost individual, kidnap types of scenario. But one of the things we did then was when we brought it before, this idea, before a district court judge and we talked about it, and our concerns were privacy concerns, Fourth Amendment concerns. We presented to the judge and said, we believe that we have probable cause here in this situation. We had a target identified. We had surveillance on that target. We just needed to know his new number. And so one of the things we did, is this technology going to interfere with 911 operations or emergency services? Found out, no, it was not. What was the duration of the use of this technology? And we were able to craft that for the judge, explain here's the duration and why. And information that's collected from nontargets, what is that? What could it be used for? And my opinion was we shouldn't be using it for anything. It's not a target of the investigation. My understanding is it was completely noncontent-oriented information. It was the same kind of information that a cell phone normally sends to any cell tower. And we just wanted to know the number and the ESN, which is basically the serial number for that particular phone. So we did it. You can do it. We did it like three times, three separate instances where we had eyes on the target, and his number popped up on all three. That's how we knew it was his number. All the rest of the numbers, all the rest of the information, deleted. We didn't want the government holding any type of information about these other cell phones in a database or anything like that. We felt that that was improper. And so we kind of crafted that together. With regard to your asking questions about the Fourth Amendment, we talked about that in terms of what about these other people and that aren't the target? And what kind of information...we don't want the government keeping it, number one. Number two, when you look at someone who's got a cell phone, right, they're agreeing with their cell phone provider that the cell phone provider is going to be collecting all sort of information. And I've got just an example from Sprint what a user from Sprint is agreeing to be collected: location

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 21, 2016

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information, Web site information, searches, signal strength, whether it's on or off. There's all sorts of information that a person is agreeing to have the cell provider collect. One of the other things they're also agreeing to is that the service provider is telling that person, hey, we'll give that information to other people and one of the reasons we'll give it is if there's a court order. And so in our situation, we figured we had probable cause for the target, we weren't going to keep any of this information, it wasn't going to be kept or used by law enforcement, and it was going to be discarded. And the privacy concerns, we didn't feel we were getting any type of content information. We wanted the specific number and the ESN number. And we felt that with those type of safeguards that we were able to move forward. I'm sorry I went over but I wanted to answer the question of Senator Morfeld. [LB738]

SENATOR COASH: All right. Senator Morfeld, do you have a follow-up question? [LB738]

SENATOR MORFELD: Yeah. Well, first off, I can appreciate that if you have a warrant, probable cause, that perhaps you can contact the cell provider and get that without collecting other people's information. The difference between you collecting my information and me contracting with my cell provider that they're going to have access to that information is that I contracted with my cell provider that...agree to have them have access to that information. And so I mean I understand that it's in the contract, all that, but I'm not agreeing with you that you can look at my information or glean it if you're looking at somebody else. So in terms of the "stingray," it seems like you've been...you said that you've actually had experience using it. [LB738]

JEFF LUX: I had an investigation (inaudible). [LB738]

SENATOR MORFELD: You had an investigation. Okay. So, other than pings, what other kind of...were you collecting information other than pings? It sounds like you guys were collecting information and you had to delete it and all that. [LB738]

JEFF LUX: Yeah. Pings are separate now. [LB738]

SENATOR MORFELD: Okay. [LB738]

JEFF LUX: The writing of the language in this bill,... [LB738]

SENATOR MORFELD: Yeah, but one second, sir. [LB738]

JEFF LUX: ...I would worry about whether... [LB738]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 21, 2016

---

SENATOR MORFELD: Yeah, one second, sir. So my question is have you used a "stingray" before or worked with other people that have used it? [LB738]

JEFF LUX: Yes. [LB738]

SENATOR MORFELD: Okay. So, other than just pings. So the question I had earlier was did we have any knowledge of any law enforcement agencies that use "stingrays," and he may very well have not known that you guys were using them. So when you collected that information, how did you get that information? Who sent that to you? [LB738]

JEFF LUX: I believe the device collects the information. [LB738]

SENATOR MORFELD: Okay. And then it just kind of data dumps all that information that was collected from that area, correct? [LB738]

JEFF LUX: Yes. [LB738]

SENATOR MORFELD: Okay. So it wasn't just the individual that you were targeting. You got a bunch of other information from other people. [LB738]

JEFF LUX: Right. [LB738]

SENATOR MORFELD: Then you had to delete that. [LB738]

JEFF LUX: Yes. [LB738]

SENATOR MORFELD: Okay. So in looking at the Fourth Amendment, talking to the judge, I guess I understand you looking for the person, that you have probable cause, all those other things. But tell me how you justify being able to collect all of my information. And even if you're not looking at it and, granted, you seem like a nice guy, I'd probably trust you. You know, I don't trust a bunch of folks that I don't know, whether they be law enforcement or otherwise. Tell me your legal rationale and how you would argue that collecting all of my information, who innocently happens to be in the area of the target that you have probable cause for, is not a violation of my Fourth Amendment right to privacy. Just give me your legal argument. [LB738]

JEFF LUX: Well, number one... [LB738]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 21, 2016

---

SENATOR MORFELD: If I was the judge right now, how would you justify that legally?  
[LB738]

JEFF LUX: Number one, I don't believe we were collecting all of your information. This isn't an intercept like a wiretap. [LB738]

SENATOR MORFELD: Okay. [LB738]

JEFF LUX: Getting content is completely different. I mean that's a whole nother set of statutes that need to be applied, a very high standard. [LB738]

SENATOR MORFELD: So I guess I'm a little confused then. So you said that you collected a lot of information, not just that individual from that area. What kind of information is that then?  
[LB738]

JEFF LUX: Phone numbers and ESN numbers, which are the serial numbers for the phone.  
[LB738]

SENATOR MORFELD: Okay. [LB738]

JEFF LUX: That's what the information we wanted. [LB738]

SENATOR MORFELD: Okay. But you collected a bunch of other information inadvertently. I mean it was just coming in, right, or not? [LB738]

JEFF LUX: I think that there might have been other information. [LB738]

SENATOR MORFELD: Okay. [LB738]

JEFF LUX: I don't believe any of it was content information. [LB738]

SENATOR MORFELD: You don't believe any of it was content information. [LB738]

JEFF LUX: I do not. [LB738]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 21, 2016

---

SENATOR MORFELD: Okay. So what kind of information would it be then if it wasn't ESN and phone number and...? [LB738]

JEFF LUX: Well, that's the information that we were focusing on, so it... [LB738]

SENATOR MORFELD: Okay. But it did collect a bunch of other information. [LB738]

JEFF LUX: It collected other information that it was sending out to whatever tower that it was sending out before it went to the simulated tower. [LB738]

SENATOR MORFELD: So I mean it very well could be text messages. It could be e-mails. [LB738]

JEFF LUX: Well, we might get information that an e-mail was sent during a time period, but I don't believe that we could get the content of that e-mail or the context of text messages. That is an intercept. [LB738]

SENATOR MORFELD: Okay. [LB738]

JEFF LUX: That would be a wiretap that you would have to go through a wiretap order for. [LB738]

SENATOR MORFELD: Okay. I...you know, it's interesting to me because I've done a lot of research after...before and after signing on this bill. And the "stingray" technology, it's very clear that it can intercept all of that information and it's essentially a data dump. And I'm not just going off, you know, whacky blogs or anything. I mean these are... [LB738]

JEFF LUX: Well, I think... [LB738]

SENATOR MORFELD: ...solid news sources. [LB738]

JEFF LUX: I think when you say "data" as opposed to "content," I think there's (inaudible) there. [LB738]

SENATOR MORFELD: It's the same thing. It really is the same thing, I mean because data and content are the same thing in the digital world. I mean I took a Programming 101 class. I mean I understand what that is. I mean it's the same thing. Data is turned into content. And so it's really

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 21, 2016

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one in the same. I guess my concern is that I can understand the ping technology. I think that that could be a reasonable amendment that maybe we can look into. What I don't understand is the need for the "stingray" and being able to collect all of that data. And that data is information and oftentimes it's very private information. I think that if I asked you for your cell phone right now and for you to unlock it and give it to me, and don't worry, I'll give it back to you right after this, and don't worry, I'm a state official, elected by the people, people trust me, I don't think that you would do it. And I don't think that you would feel comfortable with it. And for me and particularly my generation, which I rarely make phone calls or anything like that, that's very private information and it's very concerning for me. And I don't think that it meets the constitutional requirements under the reasonable search and seizure portion of our Fourth Amendment. [LB738]

JEFF LUX: Well,... [LB738]

SENATOR MORFELD: So I think there's some room to move on the ping issue, for me anyway. I can't speak for Senator Ebke. But to be able to collect all this data, whether it just be phone numbers, text messages, whatever the case may be, I don't understand how you can reasonably justify collecting that information. You weren't able to give me a good legal argument for... [LB738]

JEFF LUX: Well, the argument that I used with the judge was that with this particular person, here's what this particular cell phone provider was and here's what the particular cell phone provider says that they agreed to. [LB738]

SENATOR MORFELD: Not that person that you're targeting,... [LB738]

JEFF LUX: That was the target person, that's correct. [LB738]

SENATOR MORFELD: ...me, other individuals who are not being targeted, who should not be targeted, because you're collecting that information with the "stingray" too. And if you're not collecting that information with a "stingray," the "stingray" has the ability to collect that information. [LB738]

SENATOR COASH: Mr. Lux,... [LB738]

JEFF LUX: Yes. [LB738]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 21, 2016

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SENATOR COASH: ...I'm going to interject here for a minute. I'm still trying to wrap my head around this technology and I think the reason you're getting all these question is you're the first person that came up here that says, hey, I've actually interfaced with this technology, so. [LB738]

JEFF LUX: And I think there's probably some confusion between a ping and some other things. But that's why...I mean I would work with the senators on this. [LB738]

SENATOR COASH: Here's what I think would be helpful for the committee, because I don't think we'll get to it here. But what I'm trying to wrap my head around is what type of...you know, you're going to get...you use this technology and you get information, right, and you mentioned two specific: phone number and a serial number. But this technology is going to produce a list of information that can be gathered on the person you're looking for but also people in there. And what I don't think we've got yet and if you could respond back, thinking going back, look at that case, I'm just interested to know, you know, if I was...you know, I'll personalize it like Senator Morfeld was. If I was in that area, were you going to see photos that I have stored on my phone? Were you going to see text messages I send or receive, the e-mails that are stored here, even though it's cloud-based? Or is it like you said, you're going to see that an e-mail was sent but not the content of the e-mail? I think what we're struggling with, I'll just speak for myself, is being specific about what this technology can and can't do. [LB738]

JEFF LUX: Right. [LB738]

SENATOR COASH: Because there's things we want it to be able to do that serve a purpose, the sheriff and you have laid those out, and there's things we don't want them to be able to do. But I'm...and we're pointing at... [LB738]

JEFF LUX: And those are some of the same concerns that we had and so that's why we brought all these, why we brought in, went to a judge, wanted probable cause, tried to take into account the other people that were out there and say, hey, is this...we're not getting content. This is information that they are voluntarily sending out through their phones. They know they are because their cell phone provider needs that information to be sent out in order for cell phones to even work. [LB738]

SENATOR COASH: Well, you... [LB738]

JEFF LUX: And we're not keeping it. We're not using it and it's being discarded. [LB738]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 21, 2016

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SENATOR COASH: And you got permission. You know you got your warrant. Right now you're our...the committee's expert in this technology, so (laughter)... [LB738]

JEFF LUX: And as far as I know... [LB738]

SENATOR COASH: ...we're going to put you on the... [LB738]

SENATOR MORFELD: Unfortunately for you. [LB738]

SENATOR COASH: I mean we...but that...your experience with it and what data can be seen is I think important to this committee as we determine what we want to allow and disallow. And realizing technology can change, it... [LB738]

JEFF LUX: And when this option came up, I was like, yeah, we just should not have law enforcement out there flipping this on and off. [LB738]

SENATOR COASH: Uh-huh. [LB738]

JEFF LUX: I was definitely against that. I was in the school of, well, if this is an option, it needs to have a judge involved. It needs to have a probable cause standard involved. The other people whose information is potentially being collected, it should not be content, it should not be retained, it should not be used in any law enforcement way. Those are the things that we try to then use to have a holistic approach... [LB738]

SENATOR COASH: Right. [LB738]

JEFF LUX: ...to moving forward. And here's the information that we want... [LB738]

SENATOR COASH: Yeah, we just want... [LB738]

JEFF LUX: ...the phone number and the ESN. [LB738]

SENATOR COASH: I know that's what you're looking for. We just want to see what else you can do. Senator Krist and then Senator Pansing Brooks. [LB738]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 21, 2016

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SENATOR KRIST: I was in another committee presenting and then I went back up to my office and saw most of what's been going on. I have a completely different perspective. I've spent my whole life in reconnaissance. Hypothetically, we flew an exercise over southern Florida and hypothetically we had targets that were of interest. And hypothetically, that information was all data dumped and downloaded to the officials that they needed to. Hypothetically, there was action taken which saved lives, stopped drugs, etcetera, etcetera. That mission in Florida was all set up with that perspective. I'm of the generation and I'm of the background that you should be able to collect data if you have reasonable cause and you get a judge's...a warrant to do on specific, and the noise needs to be separated from the target information. And if that's Senator Ebke's purpose then we do need to figure out the technology. My information and my base comes from technology that is so far ahead of "stingray," and that's only ten years old,... [LB738]

JEFF LUX: (Laugh) Right. [LB738]

SENATOR KRIST: ...that you know where I'm coming from. So you will be a...you can be a functional expert. But I think the committee owes it to itself to really get a technical expert in terms of what the capability is and how you define it. And if anybody thinks that NSA is not listening to things going on, on another level, you're dreaming. So the data, like any time you sign up for that service, your phone has to communicate. And in order for it to communicate, it has to send out a signal. And so again I come from a whole different perspective. Senator Coash is absolutely right though. I mean we need a functional expert if we're going to move on something this technical. You know it's like immunizations. We know nothing about them so we're not going to do it. (Laughter) [LB738]

SENATOR COASH: Senator Pansing Brooks. [LB738]

SENATOR PANSING BROOKS: Probably the piece of information that I keep from law school at all times is don't be at the wrong place at the wrong time. And if this isn't the example of that, I don't know what is. And I agree, law enforcement needs an ability to see things and to be able to have a warrant and go and search. But the promise that we won't peek at the other things or that we won't be tempted to look at the other information that comes forward and, oh gee, here's some things that we might be able to use, it's too much of a temptation. And if you can't look at the e-mails right now, tomorrow you will be able to. Tomorrow you'll be able to look at every picture, every e-mail, every text, every breath taken because we know technology is rapidly changing at a pace faster than we can even suggest to even understand. My concern is even discussing something like "stingray" technology because next year it's going to be something else that's just...it's sort of like the chemical drugs that we keep trying to stay ahead of that we cannot stay ahead of, where they change the format, then all of a sudden it's something else. But what we have to do is protect rights. We have to protect our constitutional rights and, yes, even at

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 21, 2016

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the risk of having some bad things happen. And in a perfect world, we're going to protect everybody, but when we can't do that we have to protect the rights that we have, which includes unreasonable search and seizures. And to be able to just open our lives and our doors to every single thing, because I know anybody can come in and look at something and decide in some format that that's an indication of some criminal activity. We all know that. We know that something could be twisted in a way to seem inappropriate. And I'm quite concerned about not protecting those rights. And we've got to figure out not necessarily the...how to define the technology but how to define the protection of the rights in light of this technology. And that's what I'm concerned about. I'm grateful for Senator Ebke bringing this forward and I'm happy to work with you on anything that seems possible to somehow limit it. But again, going to a judge and asking for a warrant on a specific issue, it's worked for a long time and I really like that method of gathering evidence and finding people guilty so...and charging people. So I hope we continue that method that's based in our constitution. Thank you. [LB738]

SENATOR MORFELD: Senator Coash, I have one more question. [LB738]

SENATOR COASH: Senator Morfeld. [LB738]

SENATOR MORFELD: Is Douglas County currently using this technology right now? [LB738]

JEFF LUX: No, sir. [LB738]

SENATOR MORFELD: It's not using it right now? Okay. [LB738]

JEFF LUX: My...from what I know, it was used once... [LB738]

SENATOR MORFELD: Okay. Thank you. [LB738]

JEFF LUX: ...and that was it. [LB738]

SENATOR COASH: Thank you, Mr. Lux. Appreciate your testimony. [LB738]

JEFF LUX: Thank you all. [LB738]

SENATOR MORFELD: You can leave your cell phone right here if you want. (Laughter) I'll take good care of it. [LB738]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 21, 2016

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SENATOR COASH: Thank you. We'll take...is there anyone else here to testify in opposition to LB738? Is anybody here to testify in a neutral capacity? Welcome. [LB738]

STEVE HENSEL: (Exhibit 3) Good afternoon. I'm Chief Steve Hensel, H-e-n-s-e-l, Crete Police Department. I'm the second vice president of the Police Chiefs Association of Nebraska and I'm representing the association. I've been asked to read a statement. The association is neutral on this bill. The privacy of the people of Nebraska must be safeguarded. The Police Chiefs Association understands the concern and appreciates the need to regulate cell-site simulator technology. The association is not aware of any local law enforcement agency in Nebraska with such equipment. With that said, PCAN recognizes the value of information technologies during investigations. It is for this reason that our association strongly urges amended language that would allow the use of this technology by law enforcement when authorized by warrant to collect specific data from a particular device. The warrant may specify that no other data or information may be retained or used by law enforcement for any other purpose apart from that approved by the court. With that said, Senator, Senator, I'm in the wrong place at the wrong time. (Laughter) [LB738]

SENATOR COASH: That's okay, Chief. You have a gun so... (Laughter) [LB738]

STEVE HENSEL: No, no. I appreciate what's been said here today, learning there does need to be more information on the device itself, devices as I understand them, not just a "stingray" as they're commonly called. And I share the concerns, share the concerns. [LB738]

SENATOR MORFELD: Thank you. [LB738]

STEVE HENSEL: Willing to answer any questions. Sir. [LB738]

SENATOR COASH: Senator Krist. [LB738]

SENATOR KRIST: In your capacity and with your organization, is it possible to generically...and maybe I pose this question to the State Patrol as well, any law enforcement officer or group. This is happening in DEA and many other agencies. It would be helpful for us to know what's happening. So in your association and your conversations with other states, with other agencies, both federal and potentially state, I'd like to know what's being used out there and in what capacity. What does it take for NSA, DEA, whoever wants to tap in and find the person at a given time, what are they doing and how are they managing it? Just like fashions move from the Coast to the center of these United States, I think technology sometimes is a little slow in

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 21, 2016

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adapting maybe, maybe not. But it would be helpful for this committee to know what is being used out there. [LB738]

STEVE HENSEL: Understood, sir. We have a meeting of the association tomorrow morning in Grand Island. I will pose your question to the group. [LB738]

SENATOR KRIST: Thank you very much. [LB738]

STEVE HENSEL: Yes, Senator. [LB738]

SENATOR COASH: Thank you, Chief. Appreciate you coming down. [LB738]

SENATOR PANSING BROOKS: Thank you. [LB738]

COREY O'BRIEN: Good afternoon, Mr. Chairman, members of the committee. My name is Corey O'Brien, it's C-o-r-e-y O-'-B-r-i-e-n. I represent the Nebraska Attorney General's Office, appearing here to testify in the neutral capacity. The reason I'm testifying neutral is yesterday I had the opportunity to visit with Senator Ebke about this bill. And I must confess to the members of this committee, prior to this issue, I was vaguely aware of the technology that was being used. However, after Senator Ebke dropped her bill, I've been on a scrambling mission, trying to find exactly what the capabilities of this technology are. My experience is I've worked probably 30 to 45 wiretap investigations in my career, and so I was designated as the technology person to come in and kind of figure out what we could do. I have some concerns with the bill as drafted in terms of the way that it's drafted and the very broad language that tramples upon some of the existing technologies that we can already legally do and that are approved. And I think we can nutshell some of the language in terms of what the definition of a cell-site simulator is really to subsection (f) as defined in the statute. I think the other things are a little bit too broad. The other thing that I visited with Senator Ebke, and she showed a genuine interest in, is working with us to develop some exceptions when we can use this technology. And I understand that we're afraid of big brother and the technology that we don't understand and the ability for it to trample upon our privacy interest. And I can tell you, for one, I will not put up with anybody that intercepts content information without going through the proper channels. To Ms. Smith that testified earlier, you know, she mentioned that there was some content information that she thought was being intercepted. That is a violation of the law and my office and all county attorneys would aggressively prosecute that if in fact that is being done. We are concerned that this technology has that ability. However, we want to work with this committee to understand the technology a lot better, to understand what the limitations are, and to develop a process where we can use this technology effectively if the situation arises. I'm not willing to walk away from this technology because I think it can do some good finding the suicide person who is threatening to commit

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 21, 2016

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suicide, finding the terrorist who's threatened to blow himself up in the mall. I'd hate to see an all-out prohibition. And the last thing I'll throw out is this is being bandied about I think in probably 50 other legislative houses right now. There is a bill currently pending before the U.S. House of Representatives that does provide for some exceptions, the ability to get a court order. The state of Washington actually is the only state that I know of that has actually passed a bill and they do allow for prophylactic measures, including a court order. The ACLU...the National ACLU has applauded what Washington State did. And I'd seriously like to have the conversation, you know, whether or not we can go that direction. Department of Justice has recently also passed some guidelines on the use of this technology. So I'm testifying in a neutral capacity, hopefully with the idea of educating myself, educating the members of this committee, and trying to work out a solution that fits both interests, both the Fourth Amendment interests of the general public that we do not wish to trample upon but as well the general safety of the community. Thank you. [LB738]

SENATOR COASH: Thank you, Mr. O'Brien. Senator Krist. [LB738]

SENATOR KRIST: The technology that's in the 911 centers now with finding someone who was freezing that we had an unfortunate situation in... [LB738]

COREY O'BRIEN: In Sarpy County. [LB738]

SENATOR KRIST: ...Sarpy County. [LB738]

COREY O'BRIEN: Right. [LB738]

SENATOR KRIST: You're familiar with it. [LB738]

COREY O'BRIEN: Yes, sir. [LB738]

SENATOR KRIST: And that really is kind of basic technology in terms of where we're going in going forward. Just like those drugs we keep trying to relabel so that we can prosecute them, I agree with you in part (f), in section (f), but I also think that we need to look at what capability is out there. And the question I asked the chief is I think they ought to let us see what capabilities are out there and let's try to scope something that doesn't trample but protects, and we have that capability when we need it. [LB738]

COREY O'BRIEN: And Washington State, you know, they did something that we do a lot in the...when we intercept somebody pursuant to a Title III wiretap and that is minimization

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 21, 2016

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standards and minimization requirements. And certainly when I visited with Senator Ebke, I mentioned that we would definitely like to do that. Whenever I work with law enforcement on a wiretap, because they come in contact with so much information that's sensitive, I tell each and every one of them, I said if you use this information beyond what the scope of the warrant is you will be behind bars because I will prosecute you. And I take it very seriously (inaudible). [LB738]

SENATOR KRIST: Plus you would jeopardize using the information that you get. [LB738]

COREY O'BRIEN: Absolutely. It's automatic suppression. [LB738]

SENATOR KRIST: Right. [LB738]

COREY O'BRIEN: Thank you, Senator. [LB738]

SENATOR KRIST: Thank you. [LB738]

SENATOR COASH: Thank you, Mr. O'Brien. [LB738]

COREY O'BRIEN: Thank you. [LB738]

SENATOR COASH: Anyone else here to testify neutral? [LB738]

SENATOR KRIST: Do we need to come to attention or...? [LB738]

BRADLEY RICE: (Exhibit 4) Senator Coash and members of the Judiciary Committee, I am Colonel Brad Rice, B-r-a-d R-i-c-e, superintendent of the Nebraska State Patrol, and I want to thank you, the committee, for giving me the opportunity to appear before you today to offer my agency's neutral testimony on LB738. I will note that the Nebraska State Patrol has made contact with Senator Ebke's office to discuss some of our concerns with the bill. It is our understanding that Senator Ebke is open to continue this discussion and take some of our thoughts into consideration as this bill progresses. My remarks today are intended to offer the committee some perspectives relative to law enforcement and the use of cell phone data. I come before you today to share information that we feel is pertinent as you consider this legislative bill, and also to point out perhaps some unintended consequences due to the proposed language. Let me first state for the record that the Nebraska State Patrol has not purchased and does not use cell-site simulators which are marketed under the trade names StingRay, Triggerfish, ISMI catcher, or

Judiciary Committee  
January 21, 2016

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digital analyzer. Such devices are sophisticated technology. And pursuant to federal practice, such devices require a court order under the pen register statute showing that the material obtained is relevant to an ongoing investigation. The courts are in the process of ruling, as is the practice with new technology. As cases are handed down by the courts interpreting our right to privacy, the Nebraska State Patrol is committed to following the directives of the courts and will continue to develop our policy and training in compliance with those decisions. One concern I have as superintendent of law enforcement and public safety with LB738 is that I believe the language of the bill encompasses more than just cell-site technologies. For example, the Nebraska State Patrol does have technology that it has purchased that would access stored data from a communication device. This is only done when the State Patrol has actual possession of the cell phone. The Nebraska State Patrol, in using this technology, abides by the constitutional requirements of the Fourth Amendment and obtains a search warrant to obtain this stored data in cases of homicides, drug trafficking, child pornography, sexual crimes against children, and human trafficking, as well as other types of criminal cases. Federal agencies such as the FBI, DEA, and others obtain this stored data as well. According to the language of this bill, accessing communications or stored data from a communications device would be prohibited. If a parent of a 13-year-old has discovered an inappropriate relationship with an adult, law enforcement would be unable to access any text messages, photos, or stored phone numbers from their communication device, even though the parent is the owner of that device. Law enforcement would be unable to obtain the data from the cell phone of a missing person. Even when a person has a medical emergency and cannot speak to the emergency responders, to include law enforcement, the first place we normally look for assistance is the cell phone, as it contains names and numbers of those persons who can be a resource in determining the best course of treatment for the patient. Further reading of the bill finds that denying a communications device from communications services would also be illegal under this bill. Frequently, in a hostage situation, it is advantageous for law enforcement to cut off a hostage taker's communication and establish a secondary communication with a trained hostage negotiator. Under this bill, law enforcement would be unable to block the hostage taker's communication to outside persons using a cell phone. The bill also prevents the locating or tracking of movements of a communications device. Typically, in situations involving missing or possible endangered persons, law enforcement works with the cell phone providers to isolate a particular geographical area to search for the person. This is only done in emergency situations where someone's safety and well-being is endangered. Congress is considering related legislation in this area which would provide exceptions for warrants and emergencies. Should the committee move forward with legislation in this area, we suggest adding provisions to allow a similar exception, consistent with the application of the Fourth Amendment. In closing, I want to thank you for carefully considering all the information we provided and the opportunity to testify before you today. And I look forward to working with Senator Ebke on a potential amendment. I'd be happy to try to answer any questions you may have. [LB738]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 21, 2016

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SENATOR COASH: Thank you, Colonel. Senator Pansing Brooks. [LB738]

BRADLEY RICE: Yes, ma'am. [LB738]

SENATOR PANSING BROOKS: Thank you for being here and for your service. I was just wondering. So you're saying that you would feel okay about it if there were an amendment regarding...that basically was consistent with the Fourth Amendment for searches. Is that what you're saying? [LB738]

BRADLEY RICE: I think we're prepared to do...to abide by anything that would safeguard people's Fourth Amendment. I mean that's what we're doing right now. [LB738]

SENATOR PANSING BROOKS: Okay. [LB738]

BRADLEY RICE: So...and our purpose would be to work with you, to show you what needs we feel are important, as I tried to outline, and the best, safest way possible to ensure people's rights are secured, and also obtain that emergency information or need that information in an emergency. [LB738]

SENATOR PANSING BROOKS: That's the difficult balance, isn't it? [LB738]

BRADLEY RICE: Yes, ma'am. [LB738]

SENATOR PANSING BROOKS: Yeah. And I think that's what we're really concerned about. Thank you for your time. [LB738]

BRADLEY RICE: Yes, ma'am. [LB738]

SENATOR COASH: Don't see other questions. Thanks, Colonel. [LB738]

BRADLEY RICE: Thank you very much. [LB738]

SENATOR COASH: Any other neutral testimony? All right. Senator Ebke. [LB738]

SENATOR EBKE: Thank you, Senator Coash and my fellow committee members for your patience today. Thank you to all of the testifiers, both pro and con and the neutral folks. I think

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office

Judiciary Committee  
January 21, 2016

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it's a good conversation for us to have as we enter into this kind of brave new world. You know, it seems to me that at some level we have some mixing of technology issues. The question of emergency pinging is somewhat different, I think, than what was intended here with respect to the "stingray" technology. And I think that we can certainly work through some of those issues to clarify in the bill as well. What I would propose is that over the next couple of weeks that I get together with the AG's Office, with the State Patrol, with other interested parties and see if we can craft some language that will be acceptable, and then bring it back to the committee in Exec Session as part of an amendment. [LB738]

SENATOR COASH: Very good. Thank you, Senator Ebke. That will close the hearing on LB738 and the hearings for today. [LB738]