

No. 78-5374

The memo writer is correct that there is no rock-solid conflict among the circuits as to whether installation of a pen register constitutes a "search." Just the same, there is quite a bit of disagreement among them. CAs 2, 7 & 8 have assumed that installation of pen registers is a search; in each case, however, the Govt had secured court orders authorizing the installations and the CAs held that these orders were supported by probable cause and hence satisfied the 4th Amend warrant requirement. In Hodge, CA 9 held that installation of a pen register was not a search, but confined its holding to the facts of that case, where the telephone co was doing its own investigation of obscene calls, rather than helping the Govt investigate crime. In Clegg CA 5 likewise said that installation of a pen register was not a search; although this was not the "holding" of the case, it was a critical step in the chain of reasoning by which CA 5 reached its holding. Given the evident disparity in approach taken by the CAs, the large number of pen register cases that are bubbling up these days, and the fact that the "search" question is open in this Court, I would be inclined to grant unless the State's response is very convincing.

10/21/78

AGL

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