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DISSEMINATION OF CRIMINAL JUSTICE INFORMATION

DOCUMENTS

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HEARINGS

BEFORE THE

SUBCOMMITTEE ON CIVIL RIGHTS AND CONSTITUTIONAL RIGHTS

OF THE

COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

NINETY-THIRD CONGRESS

SECOND SESSION

ON

H.R. 188, H.R. 9783, H.R. 12574, and H.R. 12575

TO AMEND TITLE 28 OF THE UNITED STATES CODE TO PROVIDE FOR THE DISSEMINATION AND USE OF CRIMINAL ARREST RECORDS IN A MANNER THAT INSURES THEIR SECURITY AND PRIVACY

JULY 26, AUGUST 2, SEPTEMBER 26, OCTOBER 11, 1973; FEBRUARY 26, 28, MARCH 5, 28, AND APRIL 3, 1974

Serial No. 44



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DISSEMINATION OF CRIMINAL JUSTICE INFORMATION

THURSDAY, JULY 26, 1973

HOUSE OF REPRESENTATIVES,
CIVIL RIGHTS AND CONSTITUTIONAL RIGHTS
SUBCOMMITTEE OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10 a.m., in room 2237, Rayburn House Office Building, Hon. Don Edwards [chairman of the subcommittee] presiding.

Present: Representatives Edwards, Sarbanes, Drinan, Wiggins, McClory, and Butler.

Also present: Alan A. Parker, counsel; Arden B. Schell, assistant counsel; and Michael W. Blommer, associate counsel.

Mr. EDWARDS. Good morning. The hearing will now come to order. This morning we begin hearings to amend title 28 of the United States Code to provide for the dissemination and use of criminal arrest records in a manner that insures their security and privacy. Of particular interest to us are the civil rights aspects and problems related to the collection and maintenance of raw arrest records.

[Copies of H.R. 188, H.R. 9783, H.R. 12574, and H.R. 12575 follows:]

93D CONGRESS
1ST SESSION

H. R. 188

IN THE HOUSE OF REPRESENTATIVES

JANUARY 3, 1973

Mr. EDWARDS of California introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To amend title 28 of the United States Code to provide for the dissemination and use of criminal arrest records in a manner that insures their security and privacy.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) title 28 of the United States Code is amended by inserting immediately after chapter 175 the following new chapter:

"Chapter 177—DISSEMINATION OF ARREST RECORDS

"Sec.
"3101. Dissemination by Federal officer or employee; only to law enforcement agencies.
"3102. Prohibition of dissemination, maintenance and use of arrest records.
"3103. Inspection of arrest records.
"3104. Prevention of illegal dissemination or use; correction of incorrect arrest records.
"3105. Court orders allowing dissemination, maintenance, or use in certain cases.
"3106. Questions concerning arrest.
"3107. Penalties.
"3108. Definitions.
"3109. Regulations.
"3110. Effective date.

"§ 3101. Dissemination by Federal officer or employee; only to law enforcement agencies

"(a) No officer or employee of the United States or of any federally assisted law enforcement agency may disseminate in any manner any criminal arrest record to any person other than another officer or employee of a law enforcement agency.

"(b) No officer or employee of any law enforcement agency may disseminate to any person, other than another officer or employee of a law enforcement agency, a criminal arrest record received from an officer or employee of the United States or of a federally assisted law enforcement agency.

"§ 3102. Prohibition of dissemination, maintenance, and use of arrest records

"(a) No officer or employee of the United States or of a federally assisted law enforcement agency, and with respect to a criminal arrest record received from an officer or employee of the United States or of a federally assisted law enforcement agency, no officer or employee of any law enforcement agency, may disseminate to any person a criminal arrest record—

"(1) relating to an arrest which occurred more than two years before the date of such dissemination and concerning which there is no prosecution pending in a court;

"(2) relating to an arrest concerning which the prosecuting attorney responsible for conducting any prosecution arising out of such arrest agrees no prosecution is warranted and that no criminal arrest record should be kept; or

"(3) which is expunged, or prohibited from being maintained, used, or disseminated under a provision of the law of the State in which the arrest which is the

subject of such record occurred, or by order of a court having jurisdiction with respect to such arrest.

"(b) No officer or employee of any law enforcement agency may disseminate any arrest record specified in subsection (a) which was received by such officer or employee from any officer or employee of the United States or of a federally assisted law enforcement agency.

"(c) Clause 1 of subsection (a) shall not apply to a criminal arrest record concerning any person who has been convicted of at least one felony under the laws of the United States or of any State.

"(d) No officer or employee of the United States or of a federally assisted law enforcement agency may maintain or use any criminal arrest record which is prohibited from being disseminated under subsection (a) except that a court may maintain and use a sealed criminal arrest record.

"(e) The dissemination, maintenance, or use of a criminal arrest record specified in subsection (a), (b), or (d) may be permitted by or in accordance with a court order issued under section 3105.

"§ 3103. Inspection of arrest records

"Every person shall have the right to inspect any criminal arrest record concerning him maintained by any officer or employee of the United States or of a federally assisted law enforcement agency. The officer or employee of

the United States or of such law enforcement agency whose duty it is to maintain criminal arrest records shall prescribe such regulations as are necessary to enable any person, upon request and proper identification, to procure the criminal arrest record concerning such person maintained by such officer or employee at the time of the request. In addition, such officer or employee shall keep, and upon such request, disclose to such person the name of all persons to whom such officer or employee transmitted or communicated such arrest record during the six-month period preceding the request.

"§ 3104. Prevention of illegal dissemination or use; correction of incorrect arrest records

"If at any time a person has reason to believe that a criminal arrest record concerning him will be maintained or disseminated by any officer or employee of the United States or of any federally assisted law enforcement agency, in violation of the provisions of this chapter, or that information in a criminal arrest record maintained by such an officer or employee is incorrect, such person may petition any United States district court to issue an order enjoining such maintenance or dissemination, or correcting such record.

"§ 3105. Court orders allowing dissemination, maintenance, or use in certain cases

"(a) The Attorney General or any officer of a law enforcement agency may make an application to a Federal

court of competent jurisdiction for, and such court may grant, after a hearing, an order authorizing or approving the dissemination, maintenance, or use of a criminal arrest record, which is otherwise prohibited under section 3102, by the Attorney General or by an officer of a law enforcement agency, if the applicant can show by substantial and convincing evidence that there is a compelling public interest in such dissemination, maintenance, or use.

"(b) Each application for an order authorizing or approving the dissemination, use, or maintenance of an arrest record shall be made in writing upon oath or affirmation to a Federal court of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

"(1) the identity of the law enforcement officer making the application, and the officer authorizing the application; and

"(2) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued.

"(c) The court may require the applicant to furnish additional testimony or documentary evidence in support of the application.

"(d) Orders granted under this section shall be sealed by the court. Custody of the orders shall be wherever the

court directs. Such orders shall be disclosed only upon a showing of good cause before a court of competent jurisdiction and shall not be destroyed except on order of the issuing or denying court.

"(e) Any violation of the provisions of this section may be punished as contempt of the issuing or denying court.

"§ 3106. Questions concerning arrest

"In responding to any question concerning any arrest the respondent may consider such question to apply only to an arrest the record of which may be lawfully disseminated, maintained, or used by the Attorney General. No person shall be required to waive the right granted to him by this section nor shall any person be penalized in any manner for exercising such right.

"§ 3107. Penalties

"(a) Any person with respect to whom a criminal arrest record has been maintained, disseminated, or used in violation of this chapter shall have a civil cause of action against the person responsible for such violation and shall be entitled to recover from any such person actual damages and reasonable attorney's fees and other litigation costs reasonably incurred. Exemplary damages may be granted by the court in appropriate cases.

"(b) Whoever willfully disseminates, maintains, or uses

a criminal arrest record knowing such dissemination, maintenance, or use to be in violation of this Act shall be fined not more than $1,000 or imprisoned for not more than one year, or both.

"§ 3108. Definitions

"As used in this chapter—

"(a) The term 'law enforcement' means any activity pertaining to crime prevention, control, or reduction or the enforcement of the criminal law, including, but not limited to, police efforts to prevent, control, or reduce crime or to apprehend criminals, activities of courts having criminal jurisdiction and related agencies, activities of corrections, probation, or parole authorities, and programs relating to the prevention, control, or reduction of juvenile delinquency or narcotic addiction.

"(b) The term 'State' means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

"(c) The term 'Federal court of competent jurisdiction' means a United States district court or a United States court of appeals.

"(d) The term 'criminal arrest record' means records and related data (including fingerprints) compiled by law enforcement agencies for purposes of identifying criminal of-

fenders and alleged offenders and maintaining as to such persons summaries of arrests and the nature and disposition of criminal charges arising out of such arrest.

"(e) The term 'federally assisted law enforcement agency' means a public agency which performs as its principal function activities pertaining to law enforcement and which is funded, in whole or in part, from grants received under the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3731–3737).

"§ 3109. Regulations

"The Attorney General, after consulting with officers and members of State and local law enforcement agencies, shall prescribe such regulations as he deems necessary to carry out the provisions of this Act.

"§ 3110. Effective date

"This chapter shall take effect on and after the one hundred and twentieth day after the date of enactment of this chapter, except for section 3102 (d) which shall take effect at the end of the one year period beginning on the date of enactment of this chapter."

(b) The chapter analysis of part VI of title 28 of the United States Code is amended by inserting immediately after:

"175. Civil Commitment and Rehabilitation of Narcotic Addicts"

the following new item:

"177. Dissemination of Arrest Records".

93D CONGRESS
1ST SESSION

H. R. 9783

IN THE HOUSE OF REPRESENTATIVES

AUGUST 1, 1973

Mr. EDWARDS of California introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To regulate the collection, storage, and dissemination of information by criminal data banks established or supported by the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

DEFINITIONS

SECTION 1. As used in this Act—

(1) the term "criminal data bank" means any criminal information data collection or storage operation which collects or maintains data identifiable to individuals and not generated in the course of such operation's official duties of the apprehension, adjudication, confinement, or rehabilitation of persons charged with

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or convicted of criminal offenses, and which is financed in whole or in part, directly or indirectly, by the United States, and which utilizes computers and data processing, or manual techniques, or a combination of such techniques, to compile data for dissemination to any person;

(2) the term "data" means any information on the allegedly criminal activities of any person, or pertaining to the apprehension, adjudication, confinement, or rehabilitation of any person on account of such activities;

(3) the term "criminal justice agency" means any public agency directly and principally engaged in the apprehension, adjudication, confinement, or rehabilitation of persons charged with or convicted of criminal offenses; and

(4) the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, and any other territory of the United States.

DATA CONTENT

SEC. 2. (a) No criminal data bank shall collect, maintain, or disseminate any information identifiable to an individual, unless such information is data which—

(1) is recorded by an officer or employee of a criminal justice agency in the performance of official duty;

(2) is, under the laws of the State of its origin, open to public inspection; and

(3) arises directly from the apprehension, adjudication, confinement, or rehabilitation of a person charged with or convicted of a criminal offense.

(b) Each criminal data bank shall provide for the periodic updating and systematic outside audit for accuracy of the data contained therein, under such rules as the Attorney General shall prescribe. Such rules shall provide that—

(1) any addition, correction, or deletion shall be made within ninety days of the receipt of the information to be added, corrected, or deleted; and

(2) corrections shall be made in all copies of any data in possession of the criminal data bank.

(c) Each criminal data bank shall remove and destroy outdated data. Outdated data includes—

(1) arrest records of an individual that are at least two years old, if no other arrest of such individual is on record at such data bank as having occurred during such two-year period; and

(2) records of any conviction, if the conviction is ten years old and no later conviction is on record at such data bank as having occurred during such ten-year period.

(d) No criminal data bank shall collect, maintain, or

disseminate any information which is defined as a juvenile record under the law of the State of the origin of such information.

(e) No criminal data bank shall collect, maintain, or disseminate any data relating to an offense for which the maximum penalty imposed by law is less than six months imprisonment or a fine of not more than $100.

(f) Each criminal data bank shall maintain a complete record of the sources of each item of data on record at such bank.

ACCESS AND DATA USE

SEC. 3. (a) No criminal data bank shall release any data to any person who is not an official of a criminal justice agency who seeks such data in the course of official duty, nor shall any person not in the course of official duty as such an official seek any data from a criminal data bank.

(b) Each criminal data bank shall maintain a complete record of to which persons, representing what organizations, and on what dates data has been disseminated.

(c) The identity of the official seeking data, and the purpose for which such data are sought shall be verified in each instance data are sought, under such rules as the Attorney General shall establish.

(d) No data received from a criminal data bank shall be used other than for the purpose specified and verified

under subsection (c), nor shall any recipient of such data divulge such data to any person other than other officials of the criminal justice agency employing the recipient. Each copy of data transmitted from a criminal data bank shall conspicuously give notice of the penalties for violations of this subsection.

(e) Data may be divulged by a criminal data bank for the purposes of outside audits under section 2 (b).

(f) Data may be disseminated by a criminal data bank for the purposes of research, but no data so disseminated shall be identifiable to any person.

(g) Each copy of data disseminated by a criminal data bank shall contain a clear statement of—

(1) the data bank from which it is disseminated; and

(2) the original source or contributor of such data.

RIGHT TO INSPECT, CHALLENGE, AND CORRECT DATA

SEC. 4. (a) Each criminal data bank shall provide for the inspection and challenge by any person of data contained in such criminal data bank and identifiable to that person, and for the correction of any data found to be erroneous upon such inspection and challenge.

(b) A criminal data bank may make reasonable rules to provide for the vertification of the identity of any person seeking to inspect data under subsection (a).

INDEPENDENCE OF DATA BANK

SEC. 5. Each criminal data bank shall be independent and distinct from any other data collection or storage operation.

PENALTIES

SEC. 6. (a) With respect to any criminal data bank established under the authority of the United States—

(1) whoever being the officer or employee of such criminal data bank willfully violates any provision of this Act or any rule prescribed by the Attorney General under this Act, and whoever being a recipient of data from such criminal data bank divulges any such data in violation of section 3(d) shall be fined $5,000 and imprisoned not more than five years;

(2) whoever is aggrieved by any violation of this Act by a criminal data bank or any of its officers or employees or any rule prescribed by the Attorney General under this Act, may, in a civil action, obtain injunctive and declaratory relief against the United States, or against such criminal data bank, officer, or employee, and recover actual and punitive damages, but in no case less than $1,000 per violation.

(b) With respect to any criminal data bank other than one established under the authority of the United States, the Attorney General, upon finding any substantial violation

by such criminal data bank, or any of its officers or employees—

(1) shall order the termination for a period of not more than two years of all Federal financial assistance to such criminal data bank,

(2) shall make an order that no data bank established under the authority of the United States shall furnish any data to such criminal data bank during a period of not more than two years, or

(3) shall order both such termination of financial assistance and such termination of furnishing data.

EFFECTIVE DATE

SEC. 7. This Act shall take effect six months after the date of its enactment.

93D CONGRESS
2D SESSION

H. R. 12574

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 5, 1974

Mr. RODINO (for himself and Mr. EDWARDS of California) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To facilitate and regulate the exchange of criminal justice information.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Criminal Justice Information Systems Act of 1974".

FINDINGS AND PURPOSE

SEC. 2. (a) The exchange of criminal justice information, including criminal offender record information or summaries of the criminal records of individuals, between Federal and State criminal justice agencies or between criminal justice agencies located in different States is a useful and

proper aid to law enforcement. However, such exchange and the handling of the information must be accomplished in a manner which safeguards the interests of the individuals to whom the information refers.

(b) Particular risks, from the standpoint of the individual, may be presented when criminal justice information is used for a purpose not related to criminal justice. No such use should be permitted unless it is clearly necessary and is justified on the basis of weighing the interests of the individual (including the right of privacy, procedural rights, and access to employment) against the needs of government or of society.

(c) Enforcement of criminal laws is primarily the responsibility of State and local governments. However, Federal regulation of the criminal justice information systems which are covered by this Act is appropriate because of the federally connected or interstate nature of those systems. This Act is based upon the powers of Congress—

(1) to place reasonable conditions upon the receipt of Federal grants or other Federal services or benefits,

(2) to regulate use of the means of interstate communication, and

(3) to enforce the due process and equal protection clauses of the fourteenth amendment.

DEFINITIONS

SEC. 3. For the purpose of this Act—

(a) "Criminal justice information system" means a system, including the equipment, facilities, procedures, agreements, and organizations, utilized for the collection, processing, preservation, or dissemination of criminal justice information.

(b) "Automated system" means a criminal justice information system that utilizes electronic computers or other automatic data processing equipment, as distinguished from a system in which all operations are performed manually.

(c) "Criminal offender record information" means information contained in a criminal justice information system, compiled by a criminal justice agency for the purpose of identifying individual criminal offenders and alleged offenders and consisting only of identifying data and notations of arrests, the nature and disposition of criminal charges, sentencing, confinement, release, and parole and probation status.

(d) "Criminal intelligence information" means information compiled by a criminal justice agency for the purpose of criminal investigation, including reports of informants and investigators, contained in a criminal justice information system and associated with an identifiable individual.

The term does not include criminal offender record information.

(e) "Criminal offender processing information" includes all reports identifiable to an individual compiled at any stage of the criminal justice process from arrest or indictment through release from supervision. This term does not include criminal intelligence information.

(f) "Criminal justice information" means criminal offender record information, criminal intelligence information, and criminal offender processing information.

(g) "Criminal justice" means any activity pertaining to the enforcement of criminal laws, including police efforts to prevent, control, or reduce crime or to apprehend criminals, and the activities of prosecutors, courts, correctional, probation, pardon, or parole authorities.

(h) "Criminal justice agency" means a public agency or component thereof which performs as its principal function a criminal justice activity.

(i) "Interstate system" means a criminal justice information system which is used for the transfer of criminal justice information between criminal justice agencies located in two or more States.

(j) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(k) "Attorney General" means the Attorney General of the United States or his designee.

(l) "Sealing" means the closing of a record so that the information contained in the record is available only (1) in connection with review pursuant to section 6 by the individual or (2) on the basis of a court order or a specific determination of the Attorney General.

COVERAGE

SEC. 4. (a) This Act applies to any criminal justice information system which is—

(1) operated by the Federal Government,

(2) operated by a State or local government and funded in whole or in part by the Federal Government.

(3) an interstate system, or

(4) operated by a State or local government and engaged in the exchange of criminal justice information with a system covered by paragraphs (1), (2), or (3): *Provided*, That a system described only by paragraph (4) shall be subject to this Act only to the extent of its participation with a system described by paragraphs (1), (2), or (3).

(b) This Act applies to criminal justice information obtained from a foreign government or an international agency to the extent that such information is contained in a criminal justice information system subject to this Act.

Whenever any criminal justice information contained in a criminal justice information system subject to this Act is provided to a foreign government or an international agency, appropriate steps should be taken to assure that such information is used in a manner consistent with the provisions of this Act.

(c) The provisions of this Act do not apply to lists or systems utilized by criminal justice agencies for the sole purpose of identifying or apprehending fugitives or wanted persons.

ACCESS AND USE

SEC. 5. (a) The provisions of this section apply to any criminal justice information system subject to this Act and to any agency or person who, directly or indirectly, obtains criminal justice information from such a system.

(b) Direct access to information contained in a criminal justice information system subject to this Act shall be available only to authorized officers or employees of a criminal justice agency.

(c) (1) Except as provided in paragraphs (2) and (3), criminal intelligence information may be used only for a criminal justice purpose, and only where need for the use has been established in accord with regulations issued by the Attorney General.

(2) Criminal intelligence information may be used for

a purpose not related to criminal justice if the Attorney General determines, with regard to the particular case or class of cases, that such use is necessary because of reasons of national defense or foreign policy.

(3) Criminal intelligence information compiled by a criminal justice agency which is a component of a Federal, State, or local agency may be made available to a non-criminal-justice component of the same agency if the information is necessary for performance of a statutory function of the non-criminal-justice component. Such information may be used by the non-criminal-justice component only in connection with performance of a statutory function.

(d) (1) Except as provided in paragraphs (2) through (4), criminal offender processing information may be used only for a criminal justice purpose, and only where need for the use has been established in accord with regulations issued by the Attorney General.

(2) Particular criminal offender processing information may be made available to the individual to whom the information refers, pursuant to a court order or a Federal or State statute or regulation.

(3) Criminal offender processing information may be made available to qualified persons for research related to criminal justice under procedures designed to assure the

security of the information released and the privacy of individuals to whom the information refers.

(4) Criminal offender processing information may be used for a purpose not related to criminal justice if such use is expressly authorized by a court order or Federal or State statute. The Attorney General shall determine, with regard to the particular case or class of cases, whether such use is expressly authorized by statute, and his determination shall be conclusive.

(e) (1) Criminal offender record information may be used for criminal justice purposes or for other purposes which are expressly provided for by Federal statute or Executive order or State statute. The Attorney General shall determine, with regard to the particular case or class of cases, whether such use is expressly provided for by statute or by Executive order, and his determination shall be conclusive.

(2) Criminal offender record information may be made available, pursuant to section 6, to the individual.

(3) Criminal offender record information may be made available to qualified persons for research related to criminal justice under procedures designed to assure the security of the information released and the privacy of individuals to whom the information refers.

(f) Any agency operating a criminal justice informa-

tion system subject to this Act shall maintain records with regard to—

(1) requests from any other agency or person for criminal justice information. Such records shall include:

(A) regarding any request for use for a criminal justice purpose, the identity of the requester, the nature of the information provided, and pertinent dates; and

(B) regarding any request for use for a non-criminal-justice purpose, the identity of the requester, the nature, purpose, and disposition of the request, and pertinent dates.

(2) the source of criminal offender record information: *Provided*, That regulations of the Attorney General may provide for exceptions with regard to the source of identifying data.

REVIEW OF CRIMINAL OFFENDER RECORD INFORMATION BY THE INDIVIDUAL

SEC. 6. (a) Any individual who complies with applicable regulations shall be entitled to review criminal offender record information regarding himself contained in any criminal justice information system subject to this Act, and to obtain a copy of the information for the purpose of challenge or correction.

(b) Each Federal agency which operates a criminal

justice information system and each State shall adopt regulations to implement this section. Such regulations shall (1) require that an individual making such a request verify his identity by fingerprints or other specified means, (2) explain the procedures for making such requests and performing such review, including such matters as time, place, and fees, and (3) provide for the waiver, in appropriate cases, of any applicable fees.

(c) Except with regard to national defense or foreign policy cases, or with regard to the appointment of a judge or a civil officer, which appointment is subject to the advice and consent of the Senate, when criminal offender record information is requested, in accord with paragraph (5) (c) (1), for a purpose not related to criminal justice, the criminal justice agency to which the request is made shall require the requester to notify the individual that criminal offender record information concerning him is being requested, and that he has a right to review his record for the purpose of challenge or correction.

(d) No individual who, in accord with subsection (a) or (c), obtains a copy of criminal offender record information regarding himself may be required or requested to show or transfer that copy to any person or agency.

(e) If, after review of information obtained pursuant to subsection (a) or (c), the individual disputes its accuracy

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or completeness, he may apply for correction or revision to the agency responsible for original entry of the allegedly incomplete or inaccurate information. When correction or revision is warranted, the responsible agency shall immediately make the necessary correction or revision and take appropriate steps to have the correction or revision made with respect to all criminal justice information systems containing the information.

(f) In the event that an individual is dissatisfied with the decision of a criminal justice agency with respect to his request for correction or revision of information, the individual shall be afforded administration review in accord with applicable regulations.

(g) If an individual is dissastisfied with the final administrative decision, he may obtain judicial review of that decision by bringing an action pursuant to subsection 14 (a).

ACCURACY AND COMPLETENESS OF CRIMINAL OFFENDER RECORD INFORMATION

SEC. 7. (a) Any criminal justice agency which contributes criminal offender record information to a criminal justice information system subject to this Act shall assure that the information it contributes is accurate and complete and that it is regularly and accurately revised to include dispositional and other subsequent information.

(b) All Federal, State, or local criminal justice agencies, including courts and correctional authorities, shall take the steps necessary to achieve compliance with subsection (a).

DISSEMINATION OF ARREST RECORDS

SEC. 8. (a) This section applies to any criminal justice information system subject to this Act and to any agency or person who, directly or indirectly, obtains criminal offender record information from any such system.

(b) No information relating to an arrest may be disseminated without the inclusion of the final disposition of the charges if a disposition has been reported. Any agency or person requesting or receiving information relating to an arrest from a system subject to this Act shall use such information only for the purpose of the request. Subsequent use of the same information shall require a new inquiry of the system to assure that it is up to date.

(c) Except as provided in subsection (d), criminal offender record information concerning the arrest of an individual may not be disseminated or used for a noncriminal justice purpose if—

(1) the individual is acquitted of the charge for which he was arrested,

(2) the charge is dismissed,

(3) a determination to abandon prosecution of the charge is made by the prosecuting attorney, or

(4) an interval of one year has elapsed from the date of the arrest and no final disposition of the charge has resulted and no active prosecution of the charge is pending: *Provided,* That the one-year period does not include any period during which the individual is a fugitive.

(d) The prohibition set forth in subsection (c) shall not apply—

(1) when the Attorney General determines, with regard to the particular case or class of cases, for reasons of national defense or foreign policy it should not apply,

(2) with regard to the appointment by the President of a judge or a civil officer whose appointment is subject to the advice and consent of the Senate,

(3) with regard to use, pursuant to paragraph (5) (e) (3), for research purposes,

(4) with regard to use, pursuant to subsection (6) (a) or (c), by the individual for adjudication of a claim that the information is inaccurate or incomplete,

(5) where a court order specifically provides otherwise, or

(6) where a Federal statute expressly provides that the prohibition shall not apply.

SEALING OF CRIMINAL OFFENDER RECORD INFORMATION

SEC. 9. (a) Criminal offender record information shall be sealed in accord with the requirements of a court order, a Federal or State statute, or regulations issued by the Attorney General, when appropriate notification is provided by the agency directly responsible for compliance with the order, statute, or regulation.

(b) The regulations shall, as a minimum, provide for the sealing of criminal offender record information regarding an individual who has been free from the jurisdiction or supervision of any criminal justice agency for—

(1) a period of seven years if the individual has previously been convicted of an offense for which imprisonment in excess of one year is permitted under the laws of the jurisdiction where the conviction occurred,

(2) for a period of five years if the individual has previously been convicted of an offense for which the maximum penalty is not greater than imprisonment for one year under the laws of the jurisdiction where the conviction occurred, or

(3) for a period of five years following an arrest if no conviction of the individual occurred during that period, no prosecution is pending at the end of that period, and the individual is not a fugitive.

(c) (1) The regulations may exempt from full com-

pliance with the requirements of this section criminal justice information systems for which full compliance is not feasible because of the manual nature of the systems.

(2) The regulations shall set forth procedures regarding access to a sealed record (A) in connection with review pursuant to section 6 by the individual or (B) on the basis of a court order or (C) a specific determination of the Attorney General.

PRECEDENCE OF STATE LAWS

SEC. 10. Nothing in this Act is to be construed to diminish greater rights of privacy or protection provided by a State law or regulation governing use, updating, or sealing of records in that State's criminal justice information system. Use of information in interstate systems or the use of information obtained through interstate transfer shall be governed solely by this Act and implementing regulations.

SECURITY OF CRIMINAL JUSTICE INFORMATION SYSTEMS

SEC. 11 (a) The security of information in a criminal justice information system subject to this Act shall be assured by management control by a criminal justice agency.

(b) All criminal justice information systems subject to this Act shall meet security standards promulgated by the Attorney General to guard against unauthorized access to

data contained in the systems. These standards will include, but not be limited to:

(1) Implementation, operation, and management control of criminal justice information systems.

(2) System design standards which take maximum advantage of security provided by existing technology.

(3) Physical security standards for the system facility and associated telecommunications networks.

(4) Administrative procedures for gaining access to data, safeguarding data, and removing of data.

(c) The Attorney General shall provide for a continuous review and periodic audits of the operations of criminal justice information systems to assure that there is full compliance with the standards issued pursuant to this section and that appropriate corrective actions and sanctions are promptly invoked when required.

OPERATING PROCEDURES

SEC. 12. (a) All criminal justice information systems subject to this Act shall include operating procedures which are consistent with the regulations established and promulgated by the Attorney General and at a minimum shall:

(1) include a program of verification and audit to insure that criminal offender record information is regularly and accurately updated,

(2) limit access and dissemination of criminal justice information in accordance with the provisions of this Act,

(3) provide an administrative review mechanism for challenges by individuals to the accuracy or completeness of their records,

(4) undertake an affirmative action program for the training of system personnel,

(5) require a complete and accurate record of access and use made of any information in the system including the identity of all persons and agencies to which access has been given, consistent with section 5(f).

(b) Each agency which operates an automated criminal justice information system subject to this Act shall publish notice at least once a year of—

(1) its existence,

(2) the nature of the system,

(3) policies regarding storage, duration of retention and dissemination,

(4) procedures whereby an individual can review criminal offender record information regarding himself,

(5) the title, name, and business address of the person immediately responsible for the system.

With regard to a system operated by the Federal Government, such notice shall be published in the Federal Register.

(c) Any agency operating or participating in a criminal justice information system subject to this Act may be required to provide periodic reports to the Attorney General.

ADMINISTRATIVE SANCTIONS

SEC. 13. (a) In the event that a criminal justice agency (1) obtains information from a criminal justice information system subject to this Act and uses or disseminates that information in a manner which violates this Act or regulations issued by the Attorney General, or (2) fails to provide dispositional information required by subsection 7(a), the agency may be denied access to criminal justice information systems subject to this Act.

(b) An agency or person, other than a criminal justice agency, who obtains criminal offender record information and uses that information in violation of this Act or regulations issued by the Attorney General may be denied the use of criminal offender record information subject to this Act.

(c) Procedures for implementing this section shall be set forth in regulations issued by the Attorney General. The regulations shall provide that no sanction may be imposed pursuant to subsection (a) until the Attorney General or, where appropriate, a State official has (1) provided notice of the alleged violation to the criminal justice agency in question, (2) determined that compliance cannot be secured by voluntary means, and (3) determined, after opportunity for

hearing, that substantial or repeated violation of this Act or regulations issued by the Attorney General has occurred.

CIVIL AND CRIMINAL REMEDIES

SEC. 14. (a) (1) To obtain judicial review, pursuant to subsection 6(g), of a final administrative decision, an individual may bring a civil action against the responsible agency.

(2) An individual with respect to whom criminal justice information has been maintained, disseminated, or used in violation of this Act or implementing regulations may bring a civil action against the individual or agency responsible for the alleged violation. If relief is sought against both the individual and the agency responsible for the alleged violation, such relief shall be sought in a single action.

(b) (1) If a defendant in an action brought under subsection (a) is an officer or employee or agency of the United States, the action shall be brought in an appropriate United States district court.

(2) If the defendant or defendants in an action brought under subsection (a) are private persons or officers or employees or agencies of a State or local government, the action may be brought in an appropriate United States district court or in any other court of competent jurisdiction.

(c) The district courts of the United States shall have

jurisdiction over action described in subsection (b), without regard to the amount in controversy.

(d) A prevailing plaintiff in an action brought under subsection (a) may be granted equitable relief, including injunctive relief, and actual damages, and may be awarded costs and reasonable attorney fees. In appropriate cases, a prevailing plaintiff may also be awarded exemplary damages.

(e) Any person who disseminates or uses criminal justice information knowing such dissemination or use to be in violation of this Act or any applicable regulations shall be fined not more than $10,000 or imprisoned for not more than one year, or both.

(f) Good faith reliance upon the provisions of this Act or of applicable law governing maintenance, dissemination, or use of criminal justice information, or upon rules, regulations, or procedures prescribed or approved by the Attorney General shall constitute a complete defense to a criminal action brought under this Act. With respect to damages, such reliance shall constitute a complete defense for an individual or an agency in a civil action brought under this Act. Such reliance shall not constitute a defense with respect to equitable relief.

COMPLIANCE WITH ACT

SEC. 15. Any State or local agency which operates or participates in a criminal justice information system subject

to this Act shall comply with this Act and with regulations issued by the Attorney General and shall be deemed to have consented to the bringing of actions pursuant to subsection 14(a).

REGULATIONS OF THE ATTORNEY GENERAL

SEC. 16. After appropriate consultation with Federal and State agencies which operate or use criminal justice information systems, the Attorney General shall issue regulations implementing this Act.

AUTHORIZATION

SEC. 17. There are hereby authorized to be appropriated such funds as may be necessary for the Attorney General to implement this Act.

EFFECTIVE DATE

SEC. 18. This Act shall become effective one year after the date of enactment, except that section 17 shall become effective upon the date of enactment.

93D CONGRESS
2D SESSION

H. R. 12575

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 5, 1974

Mr. RODINO (for himself and Mr. EDWARDS of California) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To protect the constitutional rights and privacy of individuals upon whom criminal justice information and criminal justice intelligence information have been collected and to control the collection and dissemination of criminal justice information and criminal justice intelligence information, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Criminal Justice Information Control and Protection of Privacy Act of 1974".

TITLE I—FINDINGS AND DECLARATION OF POLICY; DEFINITIONS

CONGRESSIONAL FINDINGS AND DECLARATION POLICY

SEC. 101. The Congress finds and declares that the several States and the United States have established criminal justice information systems which have the capability of transmitting and exchanging criminal justice information between or among each of the several States and the United States; that the exchange of this information by Federal agencies is not clearly authorized by existing law; that the exchange of this information has great potential for increasing the capability of criminal justice agencies to prevent and control crime; that the exchange of inaccurate or incomplete records of such information can do irreparable injury to the American citizens who are the subjects of the records; that the increasing use of computers and sophisticated information technology has greatly magnified the harm that can occur from misuse of these systems; that citizens' opportunities to secure employment and credit and their right to due process, privacy, and other legal protections are endangered by misuse of these systems; that in order to secure the constitutional rights guaranteed by the first amendment, fourth amendment, fifth amendment, sixth amendment, ninth amendment, and fourteenth amendment, uniform Federal legislation is necessary to govern these

systems; that these systems are federally funded, that they contain information obtained from Federal sources or by means of Federal funds, or are otherwise supported by the Federal Government; that they utilize interstate facilities of communication and otherwise affect commerce between the States; that the great diversity of statutes, rules, and regulations among the State and Federal systems require uniform Federal legislation; and that in order to insure the security of criminal justice information systems, and to protect the privacy of individuals named in such systems, it is necessary and proper for the Congress to regulate the exchange of such information.

DEFINITIONS

SEC. 102. For the purposes of this Act—

(1) "Information system" means a system, whether automated or manual, operated or leased by Federal, regional, State, or local government or governments, including the equipment, facilities, procedures, agreements, and organizations thereof, for the collection, processing, preservation, or dissemination of information.

(2) "Criminal justice information system" means an information system for the collection, processing, preservation, or dissemination of criminal justice information.

(3) "Criminal justice intelligence information system" means an information system for the collection, processing,

preservation, or dissemination of criminal justice intelligence information.

(4) "Automated system" means an information system that utilizes electronic computers, central information storage facilities, telecommunications lines, or other automatic data processing equipment used wholly or in part for data collection, analysis, or display as distinguished from a system in which such activities are performed manually.

(5) "Disposition" means information disclosing that criminal proceedings have been concluded, including information disclosing that the police have elected not to refer a matter to a prosecutor or that a prosecutor has elected not to commence criminal proceedings and also disclosing the nature of the termination in the proceedings; or information disclosing that proceedings have been indefinitely postponed and also disclosing the reason for such postponement. Dispositions shall include, but not be limited to, acquittal, acquittal by reason of insanity, acquittal by reason of mental incompetence, case continued without finding, charge dismissed, charge dismissed due to insanity, charge dismissed due to mental incompetency, charge still pending due to insanity, charge still pending due to mental incompetence, guilty plea, nolle prosequi, no paper, nolo contendere plea, convicted, deceased, deferred disposition, dismissed-civil action, extradited, found insane, found mentally incompetent,

pardoned, probation before conviction, sentence commuted, adjudication withheld, mistrial-defendant discharged, or executive clemency.

(6) "Dissemination" means the transmission of information, whether orally or in writing.

(7) "Criminal justice information" means information on individuals collected or disseminated, as a result of arrest, detention, or the initiation of criminal proceeding, by criminal justice agencies, including arrest record information, correctional and release information, criminal history record information, conviction record information, identification record information, and wanted persons record information. The term shall not include statistical or analytical records or reports, in which individuals are not identified and from which their identities are not ascertainable. The term shall not include criminal justice intelligence information.

(8) "Arrest record information" means information concerning the arrest, detention, or commencement of criminal proceedings on an individual which does not include the disposition of the charge arising out of that arrest, detention, or proceeding.

(9) "Correctional and release information" means information on an individual compiled by a criminal justice or noncriminal justice agency in connection with bail, pretrial or posttrial release proceedings, reports on the mental condi-

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tion of an alleged offender, reports on presentence investigations, reports on inmates in correctional institutions or participants in rehabilitation programs, and probation and parole reports.

(10) "Criminal history record information" means information disclosing both that an individual has been arrested or detained or that criminal proceedings have been commenced against an individual and that there has been a disposition of the criminal charge arising from that arrest, detention, or commencement of proceedings. Criminal history record information shall disclose whether such disposition has been disturbed, amended, supplemented, reduced, or repealed by further proceedings, appeal, collateral attack, or otherwise.

(11) "Conviction record information" means information disclosing that a person has pleaded guilty or nolo contendere to or was convicted on any criminal offense in a court of justice, sentencing information, and whether such plea or judgment has been modified.

(12) "Identification record information" means fingerprint classifications, voice prints, photographs, and other physical descriptive data concerning an individual which does not include any indication or suggestion that the individual has at any time been suspected of or charged with criminal activity.

(13) "Wanted persons record information" means identification record information on an individual against whom there is an outstanding arrest warrant including the charge for which the warrant was issued and information relevant to the individual's danger to the community and such other information that would facilitate the regaining of the custody of the individual.

(14) "Criminal justice intelligence information" means information on an individual on matters pertaining to the administration of criminal justice, other than criminal justice information, which is indexed under an individual's name or which is retrievable by reference to identifiable individuals by name or otherwise. This term shall not include information on criminal justice agency personnel, or information on lawyers, victims, witnesses, or jurors collected in connection with a case in which they were involved.

(15) "The administration of criminal justice" means any activity by a governmental agency directly involving the apprehension, detention, pretrial release, posttrial release, prosecution, defense adjudication, or rehabilitation of accused persons or criminal offenders or the collection, storage, dissemination, or usage of criminal justice information.

(16) "Criminal justice agency" means a court sitting in criminal session or a governmental agency created by statute or any subunit thereof created by statute, which performs

as its principal function, as expressly authorized by statute, the administration of criminal justice. Any provision of this Act which relates to the activities of a criminal justice agency also relates to any information system under its management control or any such system which disseminates information to or collects information from that agency.

(17) "Purge" means to remove information from the records of a criminal justice agency or a criminal justice information system so that there is no trace of information removed and no indication that such information was removed.

(18) "Seal" means to close a record possessed by a criminal justice agency or a criminal justice information system so that the information contained in the record is available only (a) in connection with research pursuant to section 201(d), (b) in connection with review pursuant to section 207 by the individual or his attorney, (c) in connection with an audit pursuant to section 206, or (d) on the basis of a court order pursuant to section 205.

(19) "Judge of competent jurisdiction" means (a) a judge of a United States district court or a United States court of appeals; (b) a Justice of the Supreme Court of the United States; and (c) a judge of any court of general criminal jurisdiction of a State who is authorized by a statute of that State to enter orders authorizing access to criminal justice information.

(20) "Attorney General" means the Attorney General of the United States.

(21) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

TITLE II—COLLECTION AND DISSEMINATION OF CRIMINAL JUSTICE INFORMATION AND CRIMINAL JUSTICE INTELLIGENCE INFORMATION

DISSEMINATION, ACCESS AND USE—GENERALLY

SEC. 201. (a) Criminal justice information may be maintained or disseminated, by compulsory process or otherwise, outside the criminal justice agency which collected such information, only as provided in this Act.

(b) Criminal justice information may be collected only by or disseminated only to officers and employees of criminal justice agencies: *Provided, however,* That beginning two years after enactment of this Act such information may be collected only by or disseminated only to officers and employees of criminal justice agencies which are expressly authorized to receive such information by Federal or State statute. Criminal justice information shall be used only for the purpose of the administration of criminal justice.

(c) Except as otherwise provided by this Act, conviction record information may be made available for purposes

other than the administration of criminal justice only if expressly authorized by applicable State or Federal statute.

(d) Criminal justice information may be made available to qualified persons for research related to the administration of criminal justice under regulations issued by the Federal Information Systems Board, created pursuant to title III. Such regulations shall require preservation of the anonymity of the individuals to whom such information relates, shall require the completion of nondisclosure agreements by all participants in such programs and shall impose such additional requirements and conditions as the Federal Information Systems Board finds to be necessary to assure the protection of privacy and security interests. In formulating regulations pursuant to this section the Board shall develop procedures designed to prevent this section from being used by criminal justice agencies to arbitrarily deny access to criminal justice information to qualified persons for research purposes where they have otherwise expressed a willingness to comply with regulations issued pursuant to this section.

DISSEMINATION OF CERTAIN CRIMINAL JUSTICE INFORMATION TO CRIMINAL JUSTICE AGENCIES

SEC. 202. (a) Except as otherwise provided in this section and in section 203, a criminal justice agency may disseminate to another criminal justice agency only conviction record information.

(b) A criminal justice agency may disseminate arrest record information on an individual to another criminal justice agency—

(1) if that individual has applied for employment at the latter agency and such information is to be used for the sole purpose of screening that application,

(2) if the matter about which the arrest record information pertains has been referred to the latter agency for the purpose of commencing or adjudicating criminal proceedings and that agency may use the information only for a purpose related to that proceeding, or

(3) if the latter agency has arrested, detained, or commenced criminal proceedings against that individual for a subsequent offense, and the arrest record information in the possession of the former agency indicates (A) that there was a prior arrest, detention, or criminal proceeding commenced occurring less than one year prior to the date of the request, and (B) that active prosecution is still pending on the prior charge. In computing the one-year period, time during which the individual was a fugitive shall not be counted. The indication of all relevant facts concerning the status of the prosecution on the prior arrest, detention, or proceeding must be sent to the latter agency and that agency may

use the information only for a purpose related to the subsequent arrest, detention, or proceeding.

(c) A criminal justice agency may disseminate criminal history record information on an individual to another criminal justice agency—

(1) if that individual has applied for employment at the latter agency and such information is to be used for the sole purpose of screening that application,

(2) if the matter about which the criminal history information pertains has been referred to the latter agency for the purpose of commencing or adjudicating criminal proceedings or for the purpose of preparing a pretrial release, posttrial release, or presentence report and that agency may use the information only for a purpose related to that proceeding or report, or

(3) if the requesting agency has arrested, detained, or commenced criminal proceedings against that individual for a subsequent offense or if the agency is preparing a pretrial release, posttrial release, or presentence report on a subsequent offense and such information is to be used only for a purpose related to that arrest, detention, or proceeding.

(d) A criminal justice agency may disseminate correctional and release information to another criminal justice agency or to the individual to whom the information per-

tains, or his attorney, where authorized by Federal or State statute.

(e) This section shall not bar any criminal justice agency which lawfully possesses arrest record information from obtaining or disseminating dispositions in order to convert that arrest record information to criminal history information. Nor shall this section bar any criminal justice information system to act as a central repository of such information so long as a State statute expressly so authorizes and so long as that statute would in no way permit that system to violate or to facilitate violation of any provision of this Act. Nor shall this section bar any criminal justice agency from supplying criminal history information to any criminal justice information system established in the Federal Government pursuant to section 307 of this Act.

DISSEMINATION OF IDENTIFICATION RECORD INFORMATION AND WANTED PERSONS RECORD INFORMATION

SEC. 203. Identification record information may be disseminated to criminal justice and to noncriminal justice agencies for any purpose related to the administration of criminal justice. Wanted persons information may be disseminated to criminal justice and noncriminal justice agencies only for the purpose of apprehending the subject of the information.

SECONDARY USE OF CRIMINAL JUSTICE INFORMATION

SEC. 204. Agencies and individuals having access to criminal justice information shall not, directly or through any intermediary, disseminate, orally or in writing, such information to any individual or agency not authorized to have such information nor use such information for a purpose not authorized by this Act: *Provided, however,* That rehabilitation officials of criminal justice agencies with the consent of the person under their supervision to whom it refers may orally represent the substance of such individuals criminal history record information to prospective employers if such representation is in the judgment of such officials and the individual's attorney, if represented by counsel, helpful to obtaining employment for such individual. In no event shall such correctional officials disseminate records or copies of records of criminal history record information to any unauthorized individual or agency. A court may disclose criminal justice information on an individual in a published opinion or in a public criminal proceeding.

METHOD OF ACCESS AND ACCESS WARRANTS

SEC. 205. (a) Except as provided in subsection 201 (d) or in subsection (b) of this section, an automated criminal justice information system may disseminate arrest record information, criminal history record information, or conviction record information on an individual only if the inquiry is

based upon positive identification of the individual by means of identification record information. The Federal Information Systems Board shall issue regulations to prevent dissemination of such information, except in the above situations, where inquiries are based upon categories of offense or data elements other than identification record information. For the purpose of this section "positive identification" means identification by means of fingerprints or other reliable identification record information.

(b) Notwithstanding the provisions of subsection (a), access to arrest record information, criminal history record information, or conviction record information contained in automated criminal justice information systems on the basis of data elements other than identification record information shall be permissible if the criminal justice agency seeking such access has first obtained a class access warrant from a State judge of competent jurisdiction, if the information sought is in the possession of a State or local agency or information system, or from a Federal judge of competent jurisdiction, if the information sought is in the possession of a Federal agency or information system. Such warrants may be issued as a matter of discretion by the judge in cases in which probable cause has been shown that (1) such access is imperative for purposes of the criminal justice agency's responsibilities in the administration of criminal justice and

(2) the information sought to be obtained is not reasonably available from any other source or through any other method. A summary of each request for such a warrant, together with a statement of its disposition, shall within ninety days of disposition be furnished the Federal Information Systems Board by the judge.

(c) Access to criminal justice information which has been sealed pursuant to section 206 shall be permissible if the criminal justice agency seeking such access has obtained an access warrant from a State judge of competent jurisdiction if the information sought is in the possession of a State or local agency or information system, or from a Federal judge of competent jurisdiction, if the information sought is in the possession of a Federal agency or information system. Such warrants may be issued as a matter of discretion by the judge in cases in which probable cause has been shown that (1) such access is imperative for purposes of the criminal justice agency's responsibilities in the administration of criminal justice, and (2) the information sought to be obtained is not reasonably available from any other source or through any other method.

SECURITY, ACCURACY, UPDATING, AND PURGING

SEC. 206. Each criminal justice information system shall adopt procedures reasonably designed—

(a) To insure the physical security of the system, to

prevent the unauthorized disclosure of the information contained in the system, and to insure that the criminal justice information in the system is currently and accurately revised to include subsequently received information. The procedures shall also insure that all agencies to which such records are disseminated or from which they are collected are currently and accurately informed of any correction, deletion, or revision of the records. Such regulations shall require that automated systems shall as soon as technically feasible inform any other information system or agency which has direct access to criminal justice information contained in the automated system of any disposition relating to arrest record information on an individual or any other change in criminal justice information in the automated system's possession.

(b) To insure that criminal justice information is purged or sealed when required by State or Federal statute, State or Federal regulations, or court order, or when, based on considerations of age, nature of the record, or the interval following the last entry of information indicating that the individual is under the jurisdiction of a criminal justice agency, the information is unlikely to provide a reliable guide to the behavior of the individual. Such procedures shall, as a minimum, provide—

(1) for the prompt sealing or purging of criminal justice information relating to an individual who has been

free from the jurisdiction or supervision of any law enforcement agency for (A) a period of seven years if such individual has previously been convicted of an offense classified as a felony under the laws of the jurisdiction where such conviction occurred, or (B) a period of five years, if such individual has previously been convicted of a nonfelonious offense as classified under the laws of the jurisdiction where such conviction occurred, or (C) a period of five years if no conviction of the individual occurred during that period, no prosecution is pending at the end of the period, and the individual is not a fugitive; and

(2) for the prompt sealing or purging of criminal history record information in any case in which the police have elected not to refer the case to the prosecutor or in which the prosecutor has elected not to commence criminal proceedings.

(c) To insure that criminal justice agency personnel may use or disseminate criminal justice information only after determining it to be the most accurate and complete information available to the criminal justice agency. Such regulations shall require that, if technically feasible, prior to the dissemination of arrest record information by automated criminal justice information systems, an inquiry is automatically made of and a response received from the agency which

contributed that information to the system to determine whether a disposition is available.

(d) To insure that information may not be submitted, modified, updated, disseminated, or removed from any criminal justice information system without verification of the identity of the individual to whom the information refers and an indication of the person or agency submitting, modifying, updating, or removing the information.

ACCESS BY INDIVIDUALS FOR PURPOSES OF CHALLENGE

SEC. 207. (a) Any individual who believes that a criminal justice information system or criminal justice agency maintains criminal justice information concerning him, shall upon satisfactory verification of his identity, be entitled to review such information in person or through counsel and to obtain a certified copy of it for the purpose of challenge, correction, or the addition of explanatory material, and in accordance with rules adopted pursuant to this section, to challenge, purge, seal, delete. correct, and append explanatory material.

(b) Each criminal justice agency and criminal justice information system shall adopt and publish regulations to implement this section which shall, as a minimum, provide—

(1) the time, place, fees to the extent authorized by statute, and procedure to be followed by an individ-

ual or his attorney in gaining access to criminal justice information;

(2) that any individual whose record is not purged, sealed, modified, or supplemented after he has so requested in writing shall be entitled to a hearing within thirty days of such request before an official of the agency or information system authorized to purge, seal, modify, or supplement the criminal justice information at which time the individual may appear with counsel, present evidence, and examine and cross-examine witnesses;

(3) any record found after such a hearing to be inaccurate, incomplete, or improperly maintained shall, within thirty days of the date of such finding, be appropriately modified, supplemented, purged, or sealed;

(4) each criminal justice information system shall keep and, upon request, disclose to such person the name of all persons, organizations, criminal justice agencies, noncriminal justice agencies, or criminal justice information systems to which the date upon which such criminal justice information was disseminated;

(5) (A) beginning on the date that a challenge has been made to criminal justice information pursuant

to this section, and until such time as that challenge is finally resolved, any criminal justice agency or information system which possesses the information shall disseminate the fact of such challenge each time it disseminates the challenged criminal justice information. In the case of a challenge to criminal justice information maintained by an automated criminal justice information system, such system shall automatically inform any other information system or criminal justice agency to which such automated system has disseminated the challenged information in the past, of the fact of the challenge and its status;

(B) if any corrective action is taken as a result of a review or challenge filed pursuant to this section, any agency or system which maintains or has ever received the uncorrected criminal justice information shall be notified as soon as practicable of such correction and immediately correct its records of such information. In the case of the correction of criminal justice information maintained by an automated criminal justice information system, any agency or system which maintains or has ever received the uncorrected criminal justice information shall if technically feasible be notified immediately

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of such correction and shall immediately correct its records of such information; and

(6) the action or inaction of a criminal justice information system or criminal justice agency on a request to review and challenge criminal justice information in its possession as provided by this section shall be reviewable by the appropriate United States district court pursuant to a civil action under section 308.

(c) No individual who, in accord with this section, obtains criminal justice information regarding himself may be required or requested to show or transfer records of that information to any other person or any other public or private agency or organization: *Provided, however,* That if a Federal or State statute expressly so authorizes, conviction record information may be disseminated to noncriminal justice agencies and an individual might be requested or required to show or transfer copies of records of such conviction record information to such noncriminal justice agencies.

INTELLIGENCE SYSTEMS

SEC. 208. (a) Criminal justice intelligence information shall not be maintained in criminal justice information systems.

(b) Criminal justice intelligence information shall not be maintained in automated systems.

TITLE III—ADMINISTRATIVE PROVISIONS; REGULATIONS; CIVIL REMEDIES; CRIMINAL PENALTIES

FEDERAL INFORMATION SYSTEMS BOARD

SEC. 301. (a) CREATION AND MEMBERSHIP.—There is hereby created a Federal Information Systems Board (hereinafter the "Board") which shall have overall responsibility for the administration and enforcement of this Act. The Board shall be composed of nine members. One of the members shall be the Attorney General and two of the members shall be designated by the President as representatives of other agencies outside of the Department of Justice. The six remaining members shall be appointed by the President with the advice and consent of the Senate. Of the six members appointed by the President, three shall be either directors of statewide criminal justice information systems or members of the Federal Information Systems Advisory Committee at the time of their appointment. The three remaining Presidential appointees shall be private citizens well versed in the law of privacy, constitutional law, and information systems technology. The President shall designate one of the six Presidential appointees as Chairman and such designation shall also be confirmed by the advice and consent of the Senate.

(b) COMPENSATION OF MEMBERS AND QUORUM.—Members of the Board appointed by the President shall be compensated at the rate of $100 per day for each day spent in the work of the Board, and shall be paid actual travel expenses and per diem in lieu of subsistence expenses when away from their usual places of residence, as authorized by section 5703 of title 5, United States Code. Five members shall constitute a quorum for the transaction of business.

(c) AUTHORITY.—For the purpose of carrying out its responsibilities under the Act the Board shall have authority to—

(1) issue regulations as required by section 303;

(2) review and disapprove of regulations issued by a State agency pursuant to section 304 or by any criminal justice agency which the Board finds to be inconsistent with this Act;

(3) exercise the powers set out in subsection 307 (d);

(4) bring actions under section 308 for declaratory and injunctive relief;

(5) operate an information system for the exchange of criminal justice information among the States and with the Federal Government pursuant to section 307;

(6) supervise the installation and operation of any criminal justice information system or criminal justice

intelligence information system operated by the Federal Government;

(7) conduct an ongoing study of the policies of various agencies of the Federal Government in the operation of information systems;

(8) require any department or agency of the Federal Government or any criminal justice agency to submit to the Board such information and reports with respect to its policy and operation of information systems or with respect to its collection and dissemination of criminal justice information or criminal justice intelligence information and such department or agency shall submit to the Board such information and reports as the Board may reasonably require; and

(9) conduct audits as required by section 306.

(d) OFFICERS AND EMPLOYEES.—The Board may appoint and fix the compensation of a staff director, legal counsel, and such other staff personnel as it deems appropriate.

(e) REPORT TO CONGRESS AND TO THE PRESIDENT.—The Board shall issue an annual report to the Congress and to the President. Such report shall at a minimum contain—

(1) the results of audits conducted pursuant to section 306;

(2) a summary of public notices filed by criminal

justice information systems, criminal justice intelligence information systems, and criminal justice agencies pursuant to section 305; and

(3) any recommendations the Board might have for new legislation on the operation or control of information systems or on the collection and control of criminal justice information or criminal justice intelligence information.

FEDERAL INFORMATION SYSTEMS ADVISORY COMMITTEE

SEC. 302. (a) CREATION AND MEMBERSHIP.— There is hereby created a Federal Information Systems Advisory Committee (hereinafter called the Committee) which shall advise the Board on its activities. The Committee shall be composed of one representative from each State appointed by the Governor, who shall serve at the pleasure of the Governor. However, once the State has created an agency pursuant to subsection 304 (b), the State's representative on the Committee shall be designated by that agency and shall serve at the pleasure of that agency.

(b) CHAIRMAN AND SUBCOMMITTEE.—The Committee shall be convened by the Board and at its first meeting shall elect a chairman from its membership. The Committee may create an executive committee and such other subcommittees as it deems necessary.

(c) AUTHORITY.—The Committee shall make any rec-

ommendations it deems appropriate to the Board concerning the Board's responsibilities under this Act, including its recommendations concerning regulations to be issued by the Board pursuant to section 303, concerning the Board's operation of interstate information systems pursuant to section 307, and concerning any recommendations which the Board might make in its annual report to Congress and the President.

(d) OFFICERS AND EMPLOYEES.—The Committee shall have access to the services and facilities of the Board and if the Board deems necessary the Committee shall have its own staff.

FEDERAL REGULATIONS

SEC. 303. The Board shall, after appropriate consultation with the Committee and other representatives of State and local criminal justice agencies participating in information systems covered by this Act and other interested parties, promulgate such rules, regulations, and procedures as it may deem necessary to effectuate the provisions of this Act. The Board shall follow the provisions of the Administrative Procedures Act with respect to the issuance of such rules. All regulations issued by the Board or any criminal justice agency pursuant to this Act shall be published and easily accessible to the public.

STATE REGULATIONS AND CREATION OF STATE INFORMATION SYSTEMS BOARD

SEC. 304. Beginning two years after enactment of this Act, no criminal justice agency shall collect criminal justice information from, nor disseminate criminal justice information to, a criminal justice agency—

(a) which has not adopted all of the operating procedures required by sections 206 and 207 and necessitated by other provisions of the Act; or

(b) which is located in a State which has failed to create a State information systems board. The State information systems board shall be an administrative body which is separate and apart from existing criminal justice agencies and which will have statewide authority and responsibility for:

(1) the enforcement of the provisions of this Act and any State statute which serves the same goals;

(2) the issuance of regulations, not inconsistent with this Act, regulating the exchange of criminal justice information and criminal justice intelligence information systems and the operation of criminal justice information systems and the operation of criminal justice intelligence information systems; and

(3) the supervision of the installation of criminal justice information systems, and criminal justice intelligence information systems, the exchange of information by such systems within that State and with similar systems and criminal justice agencies in other States and in the Federal Government.

PUBLIC NOTICE REQUIREMENT

SEC. 305. (a) Any criminal justice agency maintaining an automated criminal justice information system or a criminal justice intelligence information system shall give public notice of the existence and character of its system once each year. Any agency maintaining more than one system shall publish such annual notices for all its systems simultaneously. Any agency proposing to establish a new system, or to enlarge an existing system, shall give public notice long enough in advance of the initiation or enlargement of the system to assure individuals who may be affected by its operation a reasonable opportunity to comment. The public notice shall be transmitted to the Board and shall specify—

(1) the name of the system;

(2) the nature and purposes of the system;

(3) the categories and number of persons on whom data are maintained;

(4) the categories of data maintained, indicating which categories are stored in computer-accessible files;

(5) the agency's operating rules and regulations issued pursuant to sections 206 and 207, the agency's policies and practices regarding data information storage, duration of retention of information, and disposal thereof;

(6) the categories of information sources;

(7) a description of all types of use made of information, indicating those involving computer-accessible files, and including all classes of users and the organizational relationships among them; and

(8) the title, name, and address of the person immediately responsible for the system.

(b) Any criminal justice agency, criminal justice information system, or criminal justice intelligence information system operated by the Federal Government shall satisfy the public notice requirement set out in subsection (a) of this section by publishing the information required by that subsection in the Federal Register.

ANNUAL AUDIT

SEC. 306. (a) At least once annually the Board shall conduct a random audit of the practices and procedures of the Federal agencies which collect and disseminate information pursuant to this Act to insure compliance with its require-

ments and restrictions. The Board shall also conduct such an audit of at least ten statewide criminal justice information systems each year and of every statewide and multistate system at least once every five years.

(b) Each criminal justice information system shall conduct a similar audit of its own practices and procedures once annually. Each State agency created pursuant to subsection 304(b) shall conduct an audit on each criminal justice information system and each criminal justice intelligence information system operating in that State on a random basis, at least once every five years.

(c) The results of such audits shall be made available to the Board which shall report the results of such audits once annually to the Congress by May 1 of each year beginning on May 1 following the first full calendar year after the effective date of the Act.

PARTICIPATION BY THE BOARD

SEC. 307. (a) Subject to the limitations of subsections (b) and (c) of this section, the Board may participate in interstate criminal justice information systems, including the provision of central information storage facilities and telecommunications lines for interstate transmission of information.

(b) Facilities operated by the Board may include criminal history record information on an individual relating to

a violation of the criminal laws of the United States, violations of the criminal laws of two or more States, or a violation of the laws of another nation. As to all other individuals, criminal justice information included in Board facilities shall consist only of information sufficient to establish the identity of the individuals, and the identities and locations of criminal justice agencies possessing other types of criminal justice information concerning such individuals.

(c) Notwithstanding the provisions of subsection (b), the Board may maintain criminal history record information submitted by a State which otherwise would be unable to participate fully in a criminal history record information system because of the lack of facilities or procedures but only until such time as such State is able to provide the facilities and procedures to maintain the records in the State, and in no case for more than five years. Criminal history record information maintained in Federal facilities pursuant to this subsection shall be limited to information on offenses classified as felonies under the jurisdiction where such offense occurred.

(d) If the Board finds that any criminal justice information system or criminal justice agency has violated any provision of this Act, it may (1) interrupt or terminate the exchange of information as authorized by this section, or (2) interrupt or terminate the use of Federal funds for the

operation of such a system or agency, or (3) require the system or agency to return Federal funds distributed in the past, or it may take any combination of such actions or (4) require the system or agency to discipline any employee responsible for such violation.

CIVIL REMEDIES

SEC. 308. (a) Any person aggrieved by a violation of this Act shall have a civil action for damages or any other appropriate remedy against any person, system, or agency responsible for such violation after he has exhausted the administrative remedies provided by section 207.

(b) The Board or any State agency created pursuant to subsection 304 (b) shall have a civil action for declaratory judgments, cease and desist orders, and such other injunctive relief against any criminal justice agency, criminal justice information system, or criminal justice intelligence information system within its regulatory jurisdiction.

(c) Such person, agency, or the Board may bring a civil action under this Act in any district court of the United States for the district in which the violation occurs, or in any district court of the United States in which such person resides or conducts business, or has his principal place of business, or in the District Court of the United States for the District of Columbia.

(d) The United States district court in which an action

is brought under this Act shall have exclusive jurisdiction without regard to the amount in controversy. In any action brought pursuant to this Act, the court may in its discretion issue an order enjoining maintenance or dissemination of information in violation of this Act, or correcting records of such information or any other appropriate remedy except that in an action brought pursuant to subsection (b) the court may order only declaratory or injunctive relief. In any action brought pursuant to this Act the court may also order the Board to conduct an audit of the practices and procedures of the agency in question to determine whether information is being collected and disseminated in a manner inconsistent with the provisions of this Act.

(e) In an action brought pursuant to subsection (a), any person aggrieved by a violation of this Act shall be entitled to a $100 recovery for each violation plus actual and general damages and reasonable attorneys' fees and other litigation costs reasonably incurred. Exemplary and punitive damages may be granted by the court in appropriate cases brought pursuant to subsection (a). Any person, system, or agency responsible for violations of this Act shall be jointly and severally liable to the person aggrieved for damages granted pursuant to this subsection. Any criminal justice information system or any criminal justice intelligence information system which facilitates the transfer of informa-

tion in violation of this Act shall be jointly and severally liable along with any criminal justice agency or person responsible for a violation of this Act.

(g) For the purposes of this Act the United States shall be deemed to have consented to suit and any agency or system operated by the United States, found responsible for a violation shall be liable for damages, reasonable attorneys' fees, and litigation cost as provided in subsection (f) notwithstanding any provisions of the Federal Tort Claims Act.

CRIMINAL PENALTIES

SEC. 309. Whoever willfully disseminates, maintains, or uses information knowing such dissemination, maintenance, or use to be in violation of this Act shall be fined not more than $5,000 or imprisoned for not more than five years, or both.

PRECEDENCE OF STATE LAWS

SEC. 310. (a) Any State law or regulation which places greater restrictions upon the dissemination of criminal justice information or criminal justice intelligence information or the operation of criminal justice information systems or criminal justice intelligence information systems or which affords to any individuals, whether juveniles or adults, rights of privacy or protections greater than those set forth in this Act shall

take precedence over this Act or regulations issued pursuant to this Act.

(b) Any State law or regulation which places greater restrictions upon the dissemination of criminal justice information or criminal justice intelligence information or the operation of criminal justice information systems or criminal justice intelligence information systems or which affords to any individuals, whether juveniles or adults, rights of privacy or protections greater than those set forth in the State law or regulations of another State shall take precedence over the law or regulations of the latter State where such information is disseminated from an agency or information system in the former State to an agency, information system, or individual in the latter State. Subject to court review pursuant to section 308, the Board shall be the final authority to determine whether a State statute or regulation shall take precedence under this section and shall as a general matter have final authority to determine whether any regulations issued by a State agency, a criminal justice agency, or information system violate this Act and are therefore null and void.

APPROPRIATIONS AUTHORIZED

SEC. 311. For the purpose of carrying out the provisions of this Act there are authorized to be appropriated such sums as the Congress deems necessary.

SEVERABILITY

SEC. 312. If any provision of this Act or the application thereof to any person or circumstance is held invalid, the remainder of the Act and the application of the provision to other persons not similarly situated or to other circumstances shall not be affected thereby.

REPEALERS

SEC. 313. The second paragraph under the headings entitled "Federal Bureau of Investigation; Salaries and Expenses" contained in the "Department of Justice Appropriations Act, 1973" is hereby repealed.

EFFECTIVE DATE

SEC. 314. The provisions of this Act shall take effect upon the date of expiration of the one-hundred-and-eighty-day period following the date of the enactment of this Act: *Provided, however,* That section 311 of this Act shall take effect upon the date of enactment of this Act.

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Mr. EDWARDS. It is common knowledge that arrest records are widely used in this Nation by law enforcement agencies, but the practice has not been limited to these agencies. There is growing evidence and statistics that indicate that many Federal and private agencies, private industrial employers and credit bureaus, among others, have ready access to these records. Raw arrest records, which merely record an arrest, but are not necessarily a conviction, have been used to eliminate consideration of applicants from jobs, credit, and housing.

Raw arrest records, when disseminated, are frequently, if not always, treated as and equated with criminal records, and the people on whom these records are kept are treated as and equated with criminals. This procedure violates a basic legal concept of this country's criminal jurisprudence—that a person is presumed innocent until proven guilty. One of our purposes through these hearings will be to ascertain the law enforcement necessity for gathering and maintaining this kind of information.

It's really never been explained to the committee what use a detective can have, for example, with this kind of information and how it helps him to do his job.

Another purpose will be to ascertain what harmful effects the present system inflicts on individual's lives and individual's rights to privacy, and to strike a balance between the two competing interests. With these goals in mind, we can proceed with the testimony this morning.

I might add as an aside, the subcommittee has made a study of the procedure other countries have to handle their arrest records and their criminal records system. We examined, of course, those countries that have political systems that can be related to ours, such as Canada and Western European countries and Germany. Staff members traveled to Europe last winter, last December, to talk to police officials in countries such as France, Great Britain, Switzerland, Norway, and others to see how they handle the situation. I might say that they had a fairer and more equitable system than we have. The thought of sending an arrest record without a disposition in any Western European country or Canada to another country, even to another criminal justice organization, is unheard of. There is no such thing as a raw arrest record being disseminated. Even in a number of our own States today that is the case. I would particularly mention the State of Massachusetts which has a very interesting new law that does regulate strictly and in some accordance with the legislation we have before us. I would like to place in the record a statement prepared by our colleague, Representative Michael Harrington that expresses his concern over the collection and dissemination of criminal arrest record information, particularly arrest records.

Without objection, Congressman Harrington's statement will be included in the record.

[The prepared statement of Hon. Michael J. Harrington follows:]

STATEMENT OF THE HONORABLE MICHAEL J. HARRINGTON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MASSACHUSETTS

Mr. Chairman, I appreciate your affording me the opportunity to present my views with regard to the problems stemming from the dissemination of criminal arrest records.

No government on earth collects, records, and disseminates as much individualized criminal information as the U.S. This collection and dissemination

by Federal, State, and local government, if allowed to go unchecked, creates two fundamental problems. First, information out of a personal data file may be disclosed to an unauthorized person. Second, such information may be false, incomplete, or disclosed in a misleading way, so that its recipient receives a mistaken impression of the individual in question.

An individual's ability to obtain employment can be severely affected by the mishandling of arrest records. In New York City alone, 75 percent of the employment agencies will not recommend an individual for employment who has been arrested regardless of whether that arrest was followed by a conviction. This disadvantage is compounded by the fact that a large number of people are arrested, found not guilty and then released without charges being filed. The record states, however, that an arrest was made, but includes no follow-up information. This often leads to seriously mistaken assumptions about the nature of the arrest and works particular hardship on minority groups. As Mr. Arthur P. Miller points out:

"It has been estimated that an extremely high percentage of black males in an urban ghetto have an arrest record by the time they are 18 or 21. In many cases, the records result from dragnet arrests, street cleaning operations or a large number of innocent people are taken into custody. If their record simply shows arrests, we are, in effect, putting a cross on their backs in terms of getting them into the job and education market."

Problems can arise even if the record is complete. Let's take the example of the man whose record states he was arrested, tried, and convicted under a law which has subsequently been struck down by the Supreme Court. He still has a conviction record.

The laws of privacy which have been developed deal mainly with misinformation which is revealed in the mass media. But if an individual's arrest record contains false information unknown to him, certainly we must provide that individual with forms of recourse.

The problem was not as acute years ago because information collected was not as extensive or as accessible to various institutions. Technology has brought us to a point where the information goes from one agency to a university, to a corporation, to the States and cities without giving the individual the right of access to that file or the right to challenge its accuracy. In fact, he will seldom know it exists, and if he does, he will not know about its distribution to various public and private agencies and institutions. These problems grow more serious as the Federal data bank ties in with more and more state data banks.

These issues are exemplified by the relationship which has developed between Massachusetts and the Federal government. In 1972, Massachusetts enacted the Criminal History Systems Act which created a state-wide data bank and established strict regulations for the handling of that information. The system has been designed to tie into the FBI's National Crime Information computerized system, but, as I have pointed out, the Federal regulations do not provide adequate internal and external safeguards against potential abuse. While the National Crime Information Center (NCIC) Policy Paper claims that "each record; for all practical purposes remains the possession of the entering agency," the claim is patently false. Once a state enters its records to the NCIC file, it loses control over the uses to which those records will be put by persons outside its jurisdiction. Once the information reaches the Federal level Massachusetts would have no assurance that this information would not be given to groups prohibited from receiving this information under Massachusetts law. Governor Sargent has refused to allow Massachusetts to tie into the Federal bank until he receives assurances that the information will be handled in compliance with Massachusetts regulations. In a letter to Attorney General Richardson, dated June 13, 1973, Sargent stated that, "There are serious doubts that internal controls and self-policing by the operating agencies or administrators can guarantee the integrity of something as sensitive and potentially abusive as an interfacing national/state criminal information computer system." Massachusetts is to be commended for adopting landmark legislation in this area and I wholly support Governor Sargent's position in this matter. Failure of the FBI to adopt minimum standards which are not so minimal as to permit the abuse of Constitutional rights or to enact adequate sanctions for improper use of the system cannot be justified. The NCIC is a voluntary system; no state is compelled to join. Assurances by Attorney General Richardson that adequate safeguards will be taken are not enough. Legislation must be enacted to ensure that personal rights are protected.

In 1970, Congress expressed its concern by adding an amendment to the Safe Streets Act requiring LEAA to submit legislation by May 1, 1971 to ensure:

"The integrity and accuracy of criminal justice data collection, processing and dissemination system funded in whole or in part by the Federal government, and protecting the Constitutional rights of all persons covered or affected by such systems." P.L. 91-644 S 519(b).

Yet, three years later we still have no regulations. The bill which LEAA submitted in 1971 failed to provide adequate protection against misuse of data or invasion of privacy and was therefore not acted upon by the 92nd Congress. The LEAA has prepared another bill which is presently at OMB, but it appears to be the same as the one they submitted before.

Fault also lies with the Justice Department itself. Its duty is to ensure that individuals' Constitutional rights are protected and to adopt standards which achieve this end. At present the policies and standards for the operation of the national data bank are developed by an Advisory Policy Board to the NCIC that is comprised almost entirely of representatives of police agencies. The Justice Department, under the direction of Attorneys General Mitchell, Kleindienst, and Richardson, has refused to issue binding standards through the formal process of Federal Register publication. The Attorney General should take the initiative to ensure that adequate regulations are promulgated since the Advisory Board has proven its inability to develop adequate regulations.

At present the states receive important services from the FBI, services that are funded through Justice Department appropriations. The regulations which are included in my bill could easily be incorporated as a condition to the receipt of FBI services and related Federal resources. But first, the Justice Department, under the directorship of the Attorney General, must take steps to formulate adequate regulations. The Attorney General has an affirmative duty to adopt rules to insure the protection of basic Constitutional rights in the operation of programs within his responsibility. The duty has not been discharged, nor has the authority been exercised. In the absence of such affirmative action Congress must act to insure that personal rights are protected.

It would be difficult to enact legislation to cover every possible injustice which could arise without putting serious constraints on the criminal justice system, but we have an obligation to deal with inequities which now exist. The legislative branch must establish rules governing the kind of information that can be gathered and stored, proceedings for insuring the accuracy and relevance of file materials, proceedings for insuring individuals the right to review and correct this file, to whom it can be distributed and for what purposes.

I have introduced a bill which is identical to the one which was introduced by Congressman Edwards. I urge the Committee to take affirmative action on the bill as soon as possible.

Mr. EDWARDS. Before I welcome our first witness, I would like to yield to either of my colleagues if they have comment.

Mr. SARBANES. No comment.

Mr. DRINAN. No comment.

Mr. EDWARDS. I am pleased to welcome this morning a person we are well acquainted with on this subcommittee, and who has long been involved in the issues that affect individual rights in this country, Mr. Aryeh Neier, executive director of the American Civil Liberties Union.

After Mr. Neier, it will be a pleasure to receive the testimony of Mr. John Pemberton, Deputy General Counsel for the Equal Employment Opportunity Commission.

Mr. Neier, would you so kindly come up and present your testimony in any way that you feel comfortable.

TESTIMONY OF ARYEH NEIER, EXECUTIVE DIRECTOR, AMERICAN CIVIL LIBERTIES UNION

Mr. NEIER. Thank you very much, Mr. Chairman.

If I may, I would like to submit the prepared testimony, which I believe has been received by the committee for the record, and then

I would like to make some comments on that testimony and on the general issue before you.

The testimony addresses itself to some of the particular provisions of the bill that you have before you, H.R. 188. I am not going to repeat the particular suggestions that are set forth in the testimony. Rather, I would like to address myself to the larger social context in which I think this issue should be viewed, and underscore the significance of what I think you are trying to accomplish with H.R. 188.

If I may, I would like to start by referring to your opening statement, Mr. Chairman, in which you spoke of two competing interests—the competing interests of law enforcement on the one hand, and the interest in individual liberties and the individual's right to privacy. I demur from that perspective. I do not regard this issue as one in which we have two competing interests. I think the interests on both sides are the same, and it's to that point I wish to address myself.

The question of arrest records I think has to be viewed in the context of the collection of records that takes place in this country. It starts at a fairly early age. It may involve the accumulation of a record in a school known as an anecdotal record, which describes the various misdeeds that a child has engaged in or is alleged to have engaged in while in school. It may even start before that when the school, in order to administer a free lunch plan or some other Federal aid program, learns that the child coming to school is a welfare receipient, and tags the child in some fashion because they learn that he is a welfare recipient. The anecdotal records compiled by schools may ultimately lead to a student being pushed out of school or dropping out of school on his own. Then there is a substantial likelihood that in the years immediately after leaving school a person is going to get arrested. Most arrests involve people between the ages of 16 and 24.

Around that time, the person is also compiling a selective service record. The Selective Service System may find a person unfit for reasons which include an arrest and conviction record. Or, the person may go into military service, and the military equivalent of the arrest record is the less than honorable discharge, generally conferred without due process. In the Vietnam war era, there are some 400,000 young men who came out of the service with less than honorable discharges. By the age of 22 or 23, a young black, urban male is very likely to have a school record which has labeled him in some way unfit because he has dropped out or been pushed out of high school. He may very well have an arrest record. Sometimes he may have a conviction record, but almost half of the people who are arrested are not subsequently convicted. He may have an unfit selective service record, and although that is supposed to be confidential, the Selective Service System honors all waivers, and if an employer requires a waiver as a condition for getting a job, the Selective Service System simply forwards the record to the employer. He may have a less than honorable discharge from the armed services.

A person who had that accumulation of unfavorable records is pretty much lost to the social mainstream. Yet that is the condition of a substantial number of young people in our society, particularly young, black, urban males. Those "misfits," those people who have been

exiled by their records from the mainstream of society, become a great threat to the order and stability that our society finds necessary. We have created a class unable to integrate itself into the social mainstream, and existing as a danger to society on society's margins.

The process of accumulating arrest records is the most devastating part of what I perceive as a complex of problems.

This business of accumulating records has as its purpose society's need for safety and security. Records tell us who are troublemakers. We think that by excluding people with records from a particular part of our lives we are going to insure safety for ourselves. All of us are troubled by the lack of safety in contemporary American society, by the enormous crime problems that we have. We try to insulate segments of our lives from those problems and we do that by looking at these records and excluding people because of them. But we don't wipe those people off the face of the Earth. They continue to exist. Very often, they move from one place to another for the precise purpose of trying to escape the records. It used to be possible to move to other cities and in some way get away from those records. That isn't possible in contemporary American society. The record generally follows a person. We have increased the efficiency with which we disseminate this information, which makes it impossible for anybody to escape his past record.

It also used to be possible for people to escape their records by lying about the past. I am hardly anxious to advocate a course of lying, but it served a certain social purpose. It served a social purpose if somebody could break the pattern of existence into which he had fallen, and lie his way into a job and become a decent citizen, able to function normally within the social mainstream. Lying doesn't work anymore. In fact, there are a substantial number of employers who would be willing to hire people with arrest records, but who are not willing to hire people who lie about their past. These days, employers find it very easy to find about arrest records if the person has not told the truth about his own arrest record. They get the information from a credit bureau or law enforcement agency or some other source, and lying becomes a disqualification for employment.

There has to be a point at which we try to break the vicious circle that I have tried to describe. I think that the legislation that you have before you—H.R. 188—is a major step in that direction. Of all the kinds of records which I have described which disable people and impose upon them burdens which exclude them from society, the problem of arrest records is the largest. That record, more than any other, tells a potential employer or creditor or lender or renter that the person that he is dealing with may be dangerous. Arrest records generally are not accompanied by disposition records and, therefore, the potential provider of one or other social benefit is left to assume that the person was probably guilty. Unfortunately, the popular conception of an arrest record is such that even if a disposition record were provided and showed that a person had not been convicted, I am afraid that most employers would rather not hire a person with an arrest record. They would rather look at the person who had a "clean" background.

In 1967, the President's Commission on Law Enforcement estimated that, for all males, the chances of being arrested at some time during lifetime, were 50 percent. For white urban males, the figure was 58

percent, and for black urban males, the probability of being arrested at some point during lifetime was a startling 90 percent. Those figures, I think, demonstrate just how pervasive this problem of an arrest record is. None of the other kinds of records that I have described affects as large a number of people as the problem of arrest records. This is the central part of the records problem and, therefore, the special significance of this legislation.

I do want to make one additional point that is not covered in the prepared statement. It concerns whether the legislation could govern law enforcement agencies other than Federal agencies, and other than those which receive Federal funds.

I make this point disclaiming expertise on the particular subject which I am going to discuss. There might be a basis for extending this legislation to all State and local law enforcement agencies because of the impact on employment and the economy generally of people disabled by arrest records. Therefore, the power to regulate interstate commerce could provide the constitutional basis for extending this legislation to local law enforcement agencies. I say that, telling you that I am the last person to be able to talk with any expertise about the reach of the interstate commerce clause of the Constitution. It is not a subject on which I can be helpful to you. However, I do want to suggest this possibility to you and ask you to consider it.

At this point, I will be happy to respond to any questions.

Mr. EDWARDS. We haven't thought of that particular legal theory. The bill, as you note, would affect any record, any criminal record-keeping by State and local organizations that are being assisted by LEAA.

Mr. NEIER. That could cover an awful lot.

Mr. EDWARDS. Yes; there seem to be some rather simple things that could be done with the FBI's recordkeeping that would not be particularly controversial. For one, there is no provision, no law that would allow American citizens to examine their own record in the Bureau, and if found to be incorrect, to utilize a convenient method of having it corrected.

Would you comment on that?

Mr. NEIER. I would comment on that. While I would favor a procedure of that sort, I don't think you ought to consider it a very meaningful thing. I live in the State of New York. New York has something called the New York State Identification and Intelligence System, which is a miniversion, of the FBI Identification Division. The New York State Identification and Intelligence System is linked to the National Crime Information Center. It maintains on file some 6 million sets of fingerprints of persons in New York State. Most of the fingerprints relate to arrest records. The New York State Identification Intelligence System does permit a person to examine his own record and seek changes in the record if there are errors. Only a small handful of people each year take advantage of that. One reason is that in order to be sure that the person is seeking to look at his own record, and not the record of somebody else, the New York State Identification and Intelligence System requires a person to come to one of its offices and submit his fingerprints so they can be checked against the fingerprints on file to be sure it is the same person.

That is a reasonable security measure with which I have difficulty quarreling. But, not many people are willing to come and give their

fingerprints in the first instance to the State Identification and Intelligence System. Therefore, while I don't know the figures, I am quite certain that only a handful of people take advantage of this each year.

If the full thrust of this legislation is too ambitious for the Congress as a whole, at this time, Mr. Chairman, I think there perhaps is one area where you should be able to get general consent. That is, every time an arrest record is disseminated, there ought to be, at the very least, a disposition record that accompanies it. That is a matter of elementary fairness, with which I don't think anybody could seriously quarrel. The only reason that I know of that disposition records do not regularly accompany arrest records is the simple bureaucratic problem in accumulating these disposition records. It's not all that large a bureaucratic problem. Disposition records come about when cases are dismissed, when people are acquitted, when appeals are acted upon. These drag out over a period of time, and a number of law enforcement agencies haven't made the accumulation of these disposition records a high enough priority to spend the effort that is necessary to be sure when the disposition is arrived at, the record is transmitted to the agencies which recorded the underlying arrest. I think the way to deal with that is to say that no arrest record will be disseminated unless it is accompanied by a disposition record. If there has been no disposition, it could be stated that the matter is still pending.

If there is no disposition record after a given period of time, in fairness to the person who is the subject of the record, the assumption should be made that the disposition record did not result in conviction.

Mr. EDWARDS. I am afraid that bothers me to some extent. Why wouldn't dissemination be limited to conviction records?

Mr. NEIER. I think it should be limited to conviction records. I advocate a requirement that disposition records accompany arrest records only if you find it necessary to proceed with very small steps. I do consider that a very small step. I was simply suggesting that as perhaps something which could secure almost universal agreement. I think you will find, and I am sure you are aware of this, the proposition that only conviction records should be disseminated will run into a lot of opposition.

Mr. EDWARDS. I can see your problem with a pending case, where the criminal has not been brought to trial. Yet, there can be an argument made that certain activities, under strict rules, could be disseminated. But certainly young persons who have been arrested four or five or six times, and perhaps by the same policeman for all we know, some policeman who was in the neighborhood who didn't get along with the person, shouldn't go to the FBI. Under present law, that does go to the FBI. For the rest of his life, that is disseminated. There is no way for him to stop dissemination unless he goes to the original police department that sent it in, and that is very unlikely, and very seldom used. So this young person has an albatross around his neck for the rest of his life, and even if the dismissal had been attached and would show on the criminal record that is disseminated, he would be prejudiced severely. This is a terrible way to convict him.

Mr. NEIER. I fully concur with what you are saying. I want to add on this question of multiple arrests that quite aside from the problem that you describe of a given law enforcement officer, prejudiced against a

particular person, a problem of multiple arrests comes about also in part because a person who has a record becomes a natural target of suspicion. When a new offense has been committed, law enforcement officers, look to those who previously have gotten into trouble. They become the targets for new arrests. Once an arrest record has been acquired in the first instance, it's very likely to lead to further arrests.

When you hear somebody described as having a record as long as your arm, it may be there was an incident which resulted in an initial arrest, and then the rest of the record was acquired precisely because of that initial arrest.

I think that multiple arrests, which are not followed by conviction, have no more probative value than a single arrest that is not followed by a conviction. That view has also been adopted by the Federal courts in the ninth circuit in the case of *Gregory* v. *Litton Systems*. Litton had as its policy the denial of employment to a person with multiple arrests. They were willing to employ a person with one or two arrests, but I think Gregory had a record of 14 arrests not followed by convictions. The Federal District Court pointed out among other things that black urban males like Earl Gregory are the targets of the least probative arrests of all, and those are dragnet or investigative arrests that urban police forces have been known to make. The court heard expert testimony from crime statisticians on that. The Federal District Court decided in the Gregory case that Litton Industries' policy not to hire people with multiple arrests discriminated against blacks and Gregory was awarded damages. The award was upheld earlier this year by the Ninth Circuit Court of Appeals.

Mr. EDWARDS. This legislation meets resistance from some police departments, some police chiefs, and their statement is that it will interfere with their police work in apprehending and convicting criminals. What use would an arrest record have to a detective who is trying to solve a criminal case?

Mr. NEIER. Let me first respond to that by saying I think you have properly stated the way in which police officials perceive their job. It is not the way I perceive their jobs.

They perceive their jobs apprehending criminals. I think they should perceive their jobs as stopping crime. The two may very well be inconsistent. You can apprehend a very large number of criminals if there are a very large number of criminals to be apprehended. Your proper job as a law enforcement officer, I think, should be to stop crime. I think you stop crime more effectively by reducing the criminal population—that is, by reducing the number of people in our society who can't enter into the social mainstream. I think records help create criminals. They help to define a class of people who have very little choice but to turn to criminal activity.

As to how much value an arrest record might have in apprehending a criminal in a particular case, since by itself it tells nothing about a person, it should be meaningless in helping a policeman apprehend a person responsible for a particular crime.

I am not a law enforcement officer. I have never been a law enforcement officer. However, I would have thought that if arrest records had been useful to law enforcement officers in apprehending criminals, they would have been able to demonstrate how they have been helpful. There have now been quite a number of court cases, dealing with main-

tenance and dissemination of arrest records. Local police departments, State police agencies, and the Federal Bureau of Investigation have all been the defendants in court cases in which this precise question has been raised.

The issue has been of great significance to a lot of the police agencies which have been the defendants in this litigation. Yet I am not aware of a single instance in which a law enforcement agency produced testimony in any of these cases which demonstrated that arrest records had value to them in apprehending criminals. It would seem to me if it was possible to have produced that kind of testimony, the agencies which were the defendants in these cases would have done so.

Mr. EDWARDS. The gentleman from Maryland.

Mr. SARBANES. I have no questions.

Mr. EDWARDS. Mr. McClory.

Mr. MCCLORY. Thank you, Mr. Chairman.

There are a fairly large number of individuals involved in what we call organized crime who seem to be successful in obtaining favorable dispositions of their cases. This is particularly because they have very effective ties with the judiciary or other public officials. Organized crime has been quite prevalent in our large cities and causes serious damage to our free society, to economic opportunities, opportunities for individuals, minorities, and so on. Now, if the maintenance and dissemination of arrest records with regard to these individuals is made unlawful, it seems to me we are doing great injury to our local judicial systems and to society in general.

Could you distinguish between arrest records of the poor black or the teenager that gets arrested for possessing marihuana, related to a current fad, and this really vicious element in our society that tends to escape punishment and conviction?

Mr. NEIER. I have to answer that question in several ways.

First, in terms of the number of people who might be involved. In the last year for which the FBI crime reports are available, there were some 8.6 million nontraffic arrests and close to 4 million of those persons were not convicted. I am sure you would agree that while we have a large organized crime problem in this country, the persons in organized crime would comprise only a very tiny percentage of that tremendous number of arrests that took place. Therefore, purely in terms of the number of people involved, I think that the organized crime problem becomes a rather small problem.

Second, from what I know of the way in which law enforcement agencies try to keep tabs on persons engaged in organized crime, the rap sheets that are available from the Federal Bureau of Investigation which report arrest records, are not central to surveillance of participants in organized crime. Their recordkeeping system about those individuals is far more elaborate than anything that is available from the ordinary Identification Division services of the Federal Bureau of Investigation or of the National Crime Information Center. Most law enforcement agencies maintain fairly detailed profiles on the persons they believe to be engaged in organized crime, whether or not those persons ever have been arrested The limitations imposed by the legislation you are considering that are involved here probably do not begin to affect the maintenance of those profiles.

I am not sure that the arrest record per se has anything to add to

what law enforcement agencies manage to keep on persons they believe to be engaged in organized crime.

Third, I would say that the thrust of this legislation is to make sure that people do not suffer employment disabilities as a consequence of an arrest record. My own feeling about people engaged in organized crime is that I would be delighted if they would get jobs and go to work as cabdrivers, teachers, or welfare workers, or any of the kinds of things that they are currently not able to do as a consequence of arrest records. I think we would all be a lot better off if they got those kinds of jobs and left organized crime.

Mr. McCLORY. I think you underestimate the seriousness of the economic impact of organized crime. My recollection is that it is very substantial and estimated to be in the billions of dollars.

Mr. NEIER. I am sure it is very large.

Mr. McCLORY. And in some areas it amounts to virtual control of entire segments of the business community.

Mr. NEIER. I don't underestimate its economic impact. I was merely saying that the 8.6 million people arrested during the year, very few of those arrests involve persons active in what might be called organized crime.

I would venture to say that substantially more than 8.5 million of the 8.6 million arrests involve other persons.

Mr. McCLORY. In other words, it doesn't amount to too many people in this category?

Mr. NEIER. Congressman, if you think it's desirable to burden millions and millions of other persons in our society with arrest records, because of the problem of organized crime, in addition to organized crime, we will continue to have a giant unorganized crime problem in this country. The unorganized crime problem, I believe, comes about in large part because of the numbers of people who are excluded from society by records. I don't think you can do much about organized crime by maintaining arrest records. I think you can do a great deal about stopping unorganized crime by not collecting and disseminating records.

Mr. McCLORY. There is no harm in the arrest record if it is complete and correct, and if we provide that the person who is arrested and exonerated cannot be prejudiced by it with respect to employment. It seems to me that is a much better solution than to eliminate all arrest records and let a lot of dangerous people in society travel about unidentified as such. In my opinion, this would be very corrupting, in politics, in business, and in other segments of society.

Mr. EDWARDS. Mr. Drinan.

Mr. DRINAN. Thank you very much for coming, sir, and we appreciate also your testimony on April 26, 1972, on this question. I was not a member of this subcommittee at that time, but I reviewed your testimony on several occasions, and I want you to know that your article in the New York Times had a very spectacular impact on one of my constituents. He was arrested in Buffalo some time ago for a vehicular accident. He was fingerprinted, mugged, and arrested, and detained for several hours, and it was then completely nolle prossed. I am in the process of trying to find out where the arrest record went.

It's not very easy to find out, as you know. I am wondering whether there is hope for this committee on this bill in the proceeding now

going on in Massachusetts. The Department of Justice is suing us, the State of Massachusetts, for carrying out what you have been recommending. I would hope the ACLU would be an amicus for the Commonwealth of Massachusetts.

Mr. NEIER. Either amicus or an intervenor on behalf of citizens of Massachusetts.

Mr. DRINAN. We have a new constituency on behalf of H.R. 188 now that there are some scientists and engineers who are being denied clearance by the Federal Government. Now you have an upper middle, white class group of people who know what it is all about.

I wonder if you can give us a little more help, insofar as presenting empiricals on the key question that comes up whenever I bring up this law enforcement problem.

As you know, on page 4, you are arguing probabilities or theories and as the Illinois case says, even a minute possibility that this arrest record can be of help, outweighs in this opinion, the opinion of this judge, the conjectural harm.

I think you would go on, and I would agree there is no evidentiary value to the arrest record. But the law enforcement people take the hard line that anything that we can get about these people is all right, is good, is helpful, and at least they should point out to me how an arrest record from Wisconsin helps to identify this man who has been apprehended in Florida. Now, how do you rebut all of this?

Mr. NEIER. I don't know any effective way to rebut that except to say the argument proceeds from a distortion of viewpoint. As long as the perspective is one of apprehending criminals and not one of trying to reduce the overall crime problem that we have, we are not going to be able to solve this problem. We have to address ourselves to the crime problem itself, and not to the apprehension of criminals. We have to go back and figure out why it is that during all this period in which we have become ever more efficient in apprehending criminals, we have also become ever more proficient in creating crimes. My argument is that there is a direct relationship between the two. If you label a person a criminal, you create a criminal.

I was very much moved by an article that appeared in the New York Times Magazine by a graduate of Attica prison named Coons. He wrote that once you get that record, it is with you for life. You never escape it. The sentence that you are serving in prison, if you are convicted, runs out at a given point. The record is lifelong. This is all the more unfair when it's a record based on arrest and not based upon conviction.

The argument cannot be won with law enforcement people if one has to prove beyond a reasonable doubt that there is never any value which grows out of an arrest record. One can challenge them to demonstrate the affirmative value of an arrest record and they have not been able to do that. I don't think it is possible for someone in my position to prove the negative, to prove that it's never of any value.

Mr. DRINAN. Thank you.

On another point, I wonder in all your research on this, if you have come across any significant number of misidentifications. As you know, this subcommittee spent a full two mornings in the FBI, their file records and in all candor, I was not impressed with their efficiency. They have square miles of these files done without computers, really,

and I am certain that there are a number of cases where the John Browns of this life get mixed up.

Have you come across any misidentification?

Mr. NEIER. I have come across misidentification. I am not sure I would like to press that point because there is a ready law enforcement response. The response is we can prevent misidentifications by the use of fingerprints. I am not very anxious to support the move to fingerprint more and more people.

I notice an article in the newspaper this morning reporting that the ACLU has lost a case in New Jersey which involves the fingerprinting of schoolchildren. Prior to that, we lost a case in the State of New York in which the securities industry was fingerprinting every employee and having the fingerprints checked with the New York State identification system to see if there had been any previous arrests.

A society in which everybody gets fingerprinted every time they go into school or apply for a job is not one that I would like to see come about. Yet that is the law enforcement response to the problems of misidentification. But the problems do occur. Just to give a small firsthand example, when I wrote that article in the New York Times Magazine, I mentioned the name of one young man who had been arrested on a charge of possession of marihuana, and the charges had been dismissed. Subsequently, he had been unable to get a job as a cab driver in Boston.

I was approached a little later by a young man in New York with the same name as the young man in Boston. He was upset because my article in using his name, had caused him some grief. Some people wondered if he was the person that I had referred to in the article. So merely because he had the same name, and the name turned up in my article, I caused him a problem.

Misidentifications do take place, but I don't believe they are the major part of this problem.

Mr. DRINAN. Well, on misidentification of the fingerprints in the two mornings that we had with L. Patrick Gray and his associates, they said the fingerprints are infallible. That is what they claimed and kept saying, as if they never make a mistake, but they didn't want to get into the scientific aspects. But then I noticed that on many of the files and cards, they had photographs, and I said why do you have photographs, and they said, just in case the fingerprints go wrong. That is illegal, as I read whatever authority they have to collect photos, and also they separate them by race. C means Caucasian. I assume you have gone into all of this, and in your profession, and in your prepared statement, do you get into that question of photographs?

Mr. NEIER. Into the question of photographs?

Mr. DRINAN. Photographs and identification by race.

Mr. NEIER. That is not dealt with in the testimony. I think that is an important problem. I think that you may have also among your constituents, Congressman, the Polaroid Co. I think it worth noting that the Polaroid Co. is demonstrating extraordinary social responsibility in this area. Their equipment is favored by law enforcement agencies that want to make photoidentification files. The Polaroid Corp. is actively engaged in trying to prevent the use of their equipment for this purpose. They have been lobbying against legislation for photoidentification files in several State legislatures. They have appeared and testified in the Massachusetts State Legislature, and several other State legislatures on this issue.

I think this is a notable example of corporate willingness to forego financial returns and stand up for a very important principle.

Mr. DRINAN. One last question, Mr. Chairman, if I may.

Would you tell me—I should know this, but I don't know—the exact status of the *Menard* case now?

Mr. NEIER. The case has been argued for the second time in the U.S. Court of Appeals for the District of Columbia. It has not yet been decided. It was originally argued in the U.S. Court of Appeals after it had been dismissed by the district court; then it went back to Judge Gessell for a trial, and then Judge Gessell's ruling was appealed by both sides. The ACLU and the FBI appealed.

In the interim, there has been legislation which effectively reversed Judge Gessell's order, and said that arrest records could continue to be disseminated to any agencies authorized by State or local law to receive such a record for whatever purposes were specified in those laws.

Mr. EDWARDS. Would the gentleman yield at that point?

That was legislation in an appropriation bill subject to a point of order, gotten around by a parliamentary maneuver to specifically avoid the Judiciary Committee, and we are rather upset with that.

Mr. DRINAN. I remember that.

The circuit court, in its forthcoming decision, is it conceivable that they could turn up with a decision that would solve this problem in the posture of the case now? Is that possible?

Mr. NEIER. I think it's possible; I am not sure how likely it is.

Mr. DRINAN. Another hypothetical question. Do you think the President and the Attorney General, being from the the Commonwealth of Massachusetts, might see things that way? I don't know who ordered it in the Department of Justice, and I can't find out. The suit against the Commonwealth of Massachusetts, but from anything you have learned in all of your investigations, do you think that is possible?

Mr. NEIER. I am sorry. What is possible?

Mr. DRINAN. That Attorney General, Mr. Richardson, would see the like of your fine presentation here, in the light of H.R. 188, and he had the power to say it shall be done?

Mr. NEIER. It would come as a very pleasant surprise to me if he took that position. I am not sure that he would be able to do it on an administrative basis. I think the statute enacted by Congress which makes the FBI records available to those agencies authorized by State and local law to receive them, may be couched in mandatory rather than simply in authorizing language. I don't have it in front of me, and therefore I am not precisely sure on that point.

Mr. DRINAN. If the Department of Justice gave us any cooperation in this matter which today has been minimal or nonexistent, I am certain that this could go through on the consent calendar.

Thank you very much for coming.

Mr. EDWARDS. Were you finished, Mr. McClory?

Mr. MCCLORY. I don't have any questions now.

Mr. EDWARDS. Would you like to question at this time, Mr. Butler?

Mr. BUTLER. Let counsel proceed.

Mr. EDWARDS. Mr. Parker.

Mr. PARKER. I want to clear up a couple of small points, if I understand your position correctly.

You would eliminate the dissemination of arrest or conviction records to the private sector. You would have under no conditions any dissemination?

Mr. NEIER. There would never be any dissemination to the private sector.

Mr. PARKER. Of arrest or conviction records.

Mr. NEIER. Of either arrest or conviction records.

Mr. EDWARDS. Will counsel permit an interpolation at that point?

I understand there is a Federal law that requires that banks and savings and loan, federally insured banks and savings and loan associations will not hire someone with a conviction record. Not a criminal record, a conviction record. So they say, well that Federal law is in existence, we need access to the FBI criminal records file. How do you get around that?

Mr. NEIER. The only response I would have there is that I would be in favor of repealing that legislation. It seems to me that the penalty for any criminal offense ought to be the penalty specified in the statute, and the sentence that is imposed by the judge, and not the lifelong sentence of employment disability. I think there is also a problem in trying to define one area of employment, which is an especially sensitive one. A great many other people can come forward, and say this or that area of employment is also terribly sensitive, and therefore, we have to have the records too.

I would take an absolute position on this. I would also say that there are very, very much stronger arguments in my mind for limiting or eliminating the use of arrest records than there are for eliminating the use of conviction records. There is no probative value to the arrest record per se. There is a probative value to conviction records. They are distinguishable, and the case is not nearly as strong for barring use of conviction records. I think the case for limiting use of conviction records is primarily based on the social value of trying to recapture people for society. The case with respect to arrest records goes much further.

Mr. PARKER. And then if I understand correctly, would you limit the dissemination of the record between law enforcement agencies to just convictions?

Mr. NEIER. Yes, sir.

Mr. PARKER. And that if it were not legislatively impossible, the fallback position would be that you would limit the dissemination of arrest records providing there was a complete history of the disposition?

Mr. NEIER. Yes, sir.

Mr. PARKER. What would you do with a pending case, assuming someone was arrested, and the case has yet to be disposed of, and there are probably tens of thousands of those pending. Would you take the position that that case is not yet disposed of, and would not be disseminated?

Mr. NEIER. I would prefer to take that route. Alternatively, I would say that if it were disseminated, the fact that it had not yet been disposed of should be noted, and if there is no disposition available after a specified period of time, that it should be considered as having been disposed of without a conviction.

Mr. PARKER. In terms of your distinction between the prevention of crime and the apprehension of criminals, which is the primary pur-

pose of law enforcement, it would also seem that it would follow, if you are going to have to prevent crime, someone will have to have the authority to apprehend criminals. So if in apprehending that criminal, you are very probably starting with the population at large, you would narrow the odds of who you are looking for, and what I am voicing, obviously, is the argument used by law enforcement agencies.

In order to narrow those odds, you have looked at whatever smoke there is, and that is that wherever there is smoke, there is fire. If you have a number of individuals with a long list of arrests in a particular area, embezzlement, or particular sex crimes, or others, these are the examples that are always read, there seems to be some efficacy in trying to narrow the area that you are going after.

Do I understand your position to be that even if that was a valid contention, that the number of persons that that touches on is so slight, or the presumption should have been reversed in the first instance, and if you presume that they are innocent until proven guilty, you cannot operate on the basis of arrest records, because they have no probative value.

Mr. NEIER. I think one ought to require of law enforcement officials more than just the assertion that they are valuable in the kinds of cases you describe. I think one ought to require of them some careful and responsible study of just how those records are used, and whether those records were in fact crucial. I have not seen anything of that sort. I know of nothing along those lines. I don't think that one ought to be guided simply by the unsupported assertion along those lines. I think that my position would probably not change, even if they could back up their assertion. But, in your position, in considering the arguments that they make, you ought to demand of them support for those assertions.

Mr. PARKER. Mr. Neier, in touching on one thing in response to Mr. McClory's questioning, you touched on the fact that police departments or law enforcement agencies very often have other forms of information available besides arrest records, such as dossiers and people they believe to be involved in crime. Is it your experience that they actually do rely on sources other than arrest records in terms of investigative work?

Mr. NEIER. It is my impression that most law enforcement agencies have specialists in organized crime. Where I live, the New York County District Attorney's office certainly has a highly experienced rackets bureau, and the New York City Police Department certainly has experts in this particular area.

It is my impression that the people in those segments of those law enforcement agencies can generally tell you the entire life history of the people they believe are engaged in organized crime. They would scoff at the kinds of records we are talking about, as being of any value to them in the work that they do. They are professionals in that field.

Mr. PARKER. Is it also true that in large urban police departments, they specialize in other areas, such as drugs, and they have special departments, and their sources generally relating to drugs or sex crimes really come from something other than arrest records?

Mr. NEIER. I think they do. I think in some of those areas, they often come from very unreliable sources. They rely on a narcotics addict who

needs a fix to supply information on somebody else, and they seem to go wrong a great deal, when they try to enforce that kind of law.

Mr. PARKER. No further questions.

Mr. EDWARDS. I think you pointed out a police department cannot get a criminal record from the FBI without apprehending someone, taking his fingerprints and sending the prints to Washington?

Mr. NEIER. Yes, sir.

Mr. EDWARDS. So the person under suspicion has already been arrested.

Mr. NEIER. Yes.

Mr. EDWARDS. Right. Mr. Butler.

Mr. BUTLER. No questions at this point.

Mr. EDWARDS. Mr. Blommer.

Mr. BLOMMER. Mr. Neier, on page 2 of your statement you quote to the committee two sentences from *Michelson* v. *United States*, I wonder if you could briefly recite the facts and issues in that case?

Mr. NEIER. I am sorry, I cannot. This was originally written some time back, and I do not recall the details.

Mr. BLOMMER. Have you read that case?

Mr. NEIER. Not for quite some time.

Mr. BLOMMER. Let me try to refresh your recollection, if you have read it. Michelson was convicted of bribing a Federal law enforcement officer. The Supreme Court rejected his argument having to do with the cross examination by the prosecutor of a character witness. In that cross examination the prosecutor used a 27-year-old arrest record related to the defendant, after, on direct examination two character witnesses said that they knew the defendant for more than 30 years and his reputation in the community was one of integrity.

Now, do you know what the decision was? The decision was that this was proper cross examination.

Would you comment on the wisdom of the court?

Mr. NEIER. Well, I think I really wouldn't want to respond to that question right now. I would be happy to submit a written statement later to that point. I still do not have enough—a clear enough recollection of the case.

Mr. BLOMMER. You support the dicta; you are not sure about the result?

Mr. NEIER. I would want to submit a statement on that.

Mr. BLOMMER. I think it's been stated here that arrest records have no probative value, no law enforcement use. In this case in the cross examination of a character witness is very commonly used. Do you think that practice should be stopped?

Mr. NEIER. I think it should. I think that under those circumstances, it might be appropriate to ask about a conviction record, but not appropriate to ask about an arrest record.

Mr. BLOMMER. Well, the issue we are talking about is the credibility of the witnesses, it has to do with capability to speak to someone's reputation in the community.

Mr. NEIER. Yes.

Mr. BLOMMER. Now, don't you think it is relevant that if someone said, I know Mr. Neier, I have known him for 10 years, and his reputation in the community is of the highest, that he should be questioned

if he knew whether or not you had been arrested, if you had? Doesn't that question strike you as being relevant?

Mr. NEIER. Well, I appreciate it.

Mr. BLOMMER. Let me go on to two other cases you don't cite.

This bill which you are testifying on prevents the dissemination of arrest records in any manner outside the law enforcement community.

Mr. NEIER. Yes.

Mr. BLOMMER. Now, would the prosecutor in cross examining a character witness and reading that arrest record to the world, be guilty of a violation of a Federal law if this bill were the law?

Mr. NEIER. I think that——

Mr. BLOMMER. Would he not be disseminating that information to the public?

Mr. NEIER. I have not thought about that particular question. I would want to study that question, and respond later on. Let me say that I think this kind of problem does not address the thrust of the legislation at all. The thrust of the legislation deals with the use of arrest records as a disability for a large number of persons.

Mr. BLOMMER. No. Let me say I agree with the thrust of the legislation. As you know, when you pass legislation, you have to worry about its effect; what the language means.

Mr. NEIER. The problem you raise is just not one that I have given attention to, and I am unwilling to try to speculate off the top of my head.

Mr. BLOMMER. I understand.

Mr. NEIER. I would be very happy on this particular point to submit a written statement to the committee, which tries to deal with these questions. I think, and I agree that these are the kinds of questions that you have to have in mind when legislation is being considered. It is just that I am not prepared to deal with them at this time.

Mr. BLOMMER. I hope you don't think I am being unfair. You have cited this case to the committee.

Mr. NEIER. Right.

Mr. BLOMMER. I would also say there are a number of other common uses in criminal trials of arrest records. In fact some uses are very beneficial to defendants. But let me go on.

As you undoubtedly know, in the District of Columbia, the precinct arrest book is a public record as a matter of law. Where I come from, it's called an arrest log.

If this bill was the law, that book would become secret. Do you think that is a happy result that the arrest book or log should become secret?

Mr. NEIER. Yes, I do.

Mr. BLOMMER. What if a newspaper reporter came into the police station and said, I saw you drag in a man off the street 5 minutes ago, and I want to know his name and what he has been arrested for, and the police reply:

"Federal law prohibits us from telling you who we arrested." Is that a happy result?

Mr. NEIER. I think it's a happy result. The defendant could easily be asked, do you want to tell your name to the newspaper reporter. If he wants to tell his name to the newspaper reporter, then the newspaper reporter would get it. I don't believe that the reporter should get it from any person but the person who has been arrested, or his counsel.

Mr. BLOMMER. Mr. Neier, what about the arrest in the night? What about the arrest at 3 in the morning when no one knows but the police. The Federal law would prevent anyone from knowing. The newspaper can't know. Doesn't making arrests secret acts bother you?

Mr. NEIER. If you have a great deal of experience with newspaper reporters trying to find out information about people who were arrested in the middle of the night in order to protect the rights of those defendants, then it's not an experience that I share. The way in which we should deal with that problem is to provide procedures for quick arraignments, procedures for enabling people to contact counsel, or having counsel made available to them. But not by publicizing their arrest records. The thrust of your question is that it is a protection for persons arrested to make public that person's arrest record.

I doubt if you would have asked that question if you had taken any kind of a survey of persons who had been arrested.

Mr. BLOMMER. Well, I am worried about the fact that the criminal justice system is made open to the public to keep it—it is subject to public scrutiny.

Mr. NEIER. Let me say why it is important to——

Mr. BLOMMER. Let me finish, please. H.R. 188 makes a crucial part of that secret, and that is what bothers me.

Mr. NEIER. Well, it makes it secret for the protection of the defendant. That person is always in a position to waive his right to have the record kept quiet. He can always tell it to a newspaper reporter. He can say, I was arrested, and that way make it public. I don't think that what you're saying really addresses itself to the protection of the person who has been arrested. There is an important reason not to allow the inspection of those logs. There is a very large and very profitable industry operating in the sale and dissemination of records. If the records are not available except from those logs, it is very likely that the people who make a great deal of money in selling records are going to be at the stations examining logbooks to carry on their business. I want to stop that business.

Mr. BLOMMER. Would you say that arraignments should be public?

Mr. NEIER. Yes.

Mr. BLOMMER. What is the crucial difference between the arrest book and the arraignment?

Mr. NEIER. The difference is that if one has access to the arrest book, the process of compiling those records probably is still within the financial capabilities of people who are selling and disseminating these records. If they have to be present in court through all of the arraignment processes and get the information at that particular point, the chances are that it would not be done.

Mr. BLOMMER. Well, I am finished with my questions. I would just like to say, though, there are public considerations involved.

Mr. NEIER. I don't believe that public considerations should endanger the defendant's rights.

Mr. BLOOMER. Well, if H.R. 188 was the law, and an arrest that we are constantly thinking about the burglary of the Democratic National Headquarters happened as it did, it would have been a secret event. Mr. Larry O'Brien that Monday knew who had broken into his headquarters, and he filed a civil lawsuit. If H.R. 188 was the law, he would have found that out much later. He would have found it out in Federal court when these people came to trial. If he would have

called the police department and said "Who was it you found in my headquarters last night," they would have said, "We are prohibited by Federal law from telling you that." I think that you can't always think of the perfect examples of abuse, but I think there are many. I have no more questions.

Mr. EDWARDS. When was the arraignment of these people?

Mr. BLOMMER. Mr. Chairman, this bill would make it a Federal crime for the prosecutor to read the arrest record at arraignment if I read it correctly.

Mr. EDWARDS. No; I don't think so.

Mr. BLOMMER. He would be reading it to the public.

Mr. EDWARDS. Counsel.

Mr. PARKER. Mr. Neier, could I draw your attention to 3108, which has the definitions included in it. I think it defines the term criminal arrest record, down near the bottom line, starting at 23, page 8, as I read that, it says that criminal arrest record specifically is an arrest record and any related data that is compiled by law enforcement agencies for purposes of identifying criminal offenders, alleged offenders, and maintaining summaries of arrest, the nature and disposition of committal charges. I have intepreted that as being what we commonly call a rap sheet.

Mr. NEIER. I would interpret it the same way.

Mr. PARKER. I don't think that applies to information at the time of the arrest that might be secured by a person of the press or anything else. I don't think you are violating or committing a crime unless you disseminate the rap sheet for the purposes of identification.

Mr. NEIER. I responded to a question on the logs which are compiled in the station houses. I would include those logs in the records as described here. I can't imagine how the information set forth at the time of arraignment could be covered by this section.

Mr. EDWARDS. Well, I regret to say we must move along, Mr. Neier. We appreciate your testimony very much.

Mr. BUTLER. Mr. Chairman.

Mr. EDWARDS. Mr. Butler.

Mr. BUTLER. Mr. Chairman, there is something that I wasn't aware of, the sale of lists.

Mr. NEIER. Yes.

Mr. BUTLER. Enlarge on this.

Mr. NEIER. Well, I am talking about the credit bureau industry in the United States. The members of the associated credit bureaus, the trade associations of the industry maintain files on about 110 million persons in this country. The largest corporation in the business, the Retail Credit Corp., maintains files on about 45 million persons. Credit bureaus generally include arrests in the information they provide to potential employers.

Mr. BUTLER. Does this legislation prohibit them from putting arrest information in their file?

Mr. NEIER. This legislation is directed against law enforcement agencies. I assume it would prevent law enforcement agencies from making the information available to credit bureaus.

Mr. BUTLER. All right. Let's assume that the credit bureau stumbles on the information that a person has been arrested. This legislation doesn't prohibit them from putting that information in the file?

Mr. NEIER. It doesn't reach that, as I read it.

Mr. BUTLER. Do you think that is inappropriate?

Mr. NEIER. Well, I think that might have to be different legislation. I think that this legislation, which is directed at the operation of the law enforcement agency would cover a very large part of that problem. The credit bureaus require——

Mr. BUTLER. I understand. It would prohibit their access to much of the information that they have.

Mr. NEIER. Right.

Mr. BUTLER. Your thought is not that this legislation is aimed at that.

Mr. NEIER. I don't see it as doing that much.

Mr. MCCLORY. Would the gentleman yield?

You have mentioned that the newspapers would probably not be hampered because they are pretty resourceful and they have ways of finding out things, whether it is from the police record or not. We would be treading very dangerous ground if we prohibited newspapers from publishing information.

Mr. NEIER. I would have no prohibition governing what newspapers may do. I would have legislation as to what law enforcement agencies would be able to do.

Mr. MCCLORY. They will retain whatever information they are able to secure independently, maybe not because of any records they obtain, but because they talk to the policeman or they talk to the victim, or whatever.

Now, would there be any way to control their keeping the information, for not only the 2 years we are trying to get at, but for any other period?

Mr. NEIER. I would not impose any restrictions upon newspapers, at all.

Mr. MCCLORY. Wouldn't we in a sense, by this legislation, be transferring this record keeping from an official body to some unofficial group, a private group, and nevertheless make it available. I am thinking in terms of a bank which is thinking of hiring a person who has been charged five times with embezzlement. Maybe he got off, but brother, no depositor in the bank wants to have the bank hire somebody that appeared to have a tendency toward embezzlement.

Mr. NEIER. If they could not get these records systematically from law enforcement agencies, I don't know how they could acquire these records on any other basis. As for newspapers and the records they keep, I think they would limit themselves to covering actual trials and arraignments that would be newsworthy. They would not have access to arrest logs.

Mr. MCCLORY. That is wishful thinking.

Mr. EDWARDS. Are there any other questions?

Mr. BUTLER. I think not for the present, Mr. Chairman.

Mr. EDWARDS. Thank you very much.

[The prepared statement of Mr. Neier follows:]

STATEMENT OF ARYEH NEIER, EXECUTIVE DIRECTOR, AMERICAN CIVIL LIBERTIES UNION

The American Civil Liberties Union is a nationwide, nonpartisan organization of more than 200,000 members devoted to the protection of the Bill of Rights. We strongly endorse the spirit of H.R. 188 as an important first step toward

eliminating the "arrest record prison" which has grown up in the shadow of our criminal justice system. There are several ways, however, in which we feel the proposed bill could be strengthened.

While the purpose of maintaining and disseminating arrest records is presumably to enable the nation's law enforcement agencies to control and reduce crime, it is increasingly doubtful that this purpose is served by the practice. In light of all the information now known about the effects of arrest records on those who bear them, the question arises: Is crime controlled or reduced if large numbers of people are prevented from getting jobs, licenses, homes, credit, or admission to schools because of their "records"?

The criminal dossier of an arrested person continues to haunt him even though he has not been proven guilty of any crime. According to the F.B.I., law enforcement agencies make some 8.6 million arrests per year for all criminal acts, excluding traffic offenses. Of those arrested, about 4 million are never prosecuted, or have their charges dismissed. But they cannot escape their arrest records. See F.B.I. Uniform Crime Reports (1971).

The F.B.I. Crime Reports tells a grim story of rising crime rates and staggering rates of recidivism, and of the rearrest of persons previously arrested. We believe that the rising crime rates and the recidivism and the rearrests have something to do with the rising efficiency with which arrest records are maintained and distributed. People maybe forced into crime by their inability to escape the record prison of acts which they have never been proved to have committed.

Most of our specific suggestions of ways in which H.R. 188 could be strengthened stem from our view that an official judgment made about a person on the basis of his arrest record is an unconstitutional punishment which makes him an outcast in our society. Accordingly, it is important to set forth the nature of the invidious discrimination suffered by an arrested person before turning to the remedies offered by H.R. 188.

I. THE MAINTENANCE AND DISSEMINATION OF THE RECORD OF A PERSON'S ARREST NOT RESULTING IN CONVICTION IS A SEVERE AND UNCONSTITUTIONAL FORM OF PUNISHMENT

The probability of a black urban-male being arrested at least once during his lifetime has been estimated to be as high as 90%. For white urban males, the figure is 58% and for all males, it is 50%. See *President's Commission on Law Enforcement and the Administration of Justice, Task Force on Science and Technology*, Appendix J at p. 216 (1967). Fewer than 25% of those arrested per year are found guilty of the offense for which they were arrested and only a little more than another 25% are found guilty of any crime at all. (*Crime in the United States*, F.B.I. Uniform Crime Reports, at Table 17, p. 103 (1969)). Despite their innocence before the law, persons with an arrest record are subjected to the severe, continuing and pervasive punishment that attaches to the commission of a crime, namely the lifelong disabilities of a "criminal record". Furthermore, that disability has the same damaging effect on a person's opportunity for employment and acceptance by society as a conviction record. See, e.g., *President's Commission of Law Enforcement and the Administration of Justice*, at pp. 75, 77 (196E7); Hess & LePoole, *Abuse of the Record of Arrest Not Leading to Conviction*, 13 Crime and Delinquency 494 (1967); *Report of the Committee to Investigate the Effect of Police Arrest Records on Employment Opportunities in the District of Columbia* (hereafter "Duncan Report") (1967). Unlike the conviction record, however, the arrest record is an illegitimate offspring of the criminal justice system, and poses a grave threat to the entire scheme of constitutional protection which our system of justice offers to citizens innocent of legal wrongdoing.

Indeed, the Supreme Court has held that "[t]he mere fact that a man has been arrested has very little, if any, probative value in showing that he has engaged in any misconduct. An arrest shows nothing more than that someone probably suspected the person apprehended of an offense. When formal charges are not filed . . . whatever probative force the arrest may have had is normally dissipated." *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 241 (1957). Furthermore, "arrest without more does not, in law any more than in reason, impeach the intgerity or impair the credibility of a [person]. It happens to the innocent as well as the guilty." *Michelson* v. *United States*, 335 U.S. 469, 482 (1948), See also *Pennex* v. *United States*, 313 F.2d 524 (4th Cir. 1963).

I have annexed to this testimony a copy of an article that I wrote which appeared in *The New York Times Magazine* on April 15, 1973. It attempts to document the multiple injuries which are suffered by persons with arrest records.

In order to provide relief from the punishment and discrimination suffered by persons with arrest records, we suggest that H.R. 188 could be strengthened in a variety of ways.

Specifically, we suggest (1) that the power of Congress to enforce the protection of constitutional rights gives it the authority to prohibit dissemination of arrest records by state and local as well as federal law enforcement agencies, whether or not they are federally assisted; (2) that the prohibition against dissemination should include dissemination to law enforcement agencies and personnel; (3) that the prohibition against dissemination and use should not be limited to records of arrests more than two years old, but should be extended to any arrest resulting in the dismissal of charges, *nolle prosse*, or acquittal; (4) that the relief provided by the bill should be available to any person with a record of an arrest not resulting in conviction, whether or not such a person has ever been convicted of a felony; (5) that the prohibition against dissemination should include dissemination to judges for examination prior to sentencing; (6) that the prohibition against dissemination should not be subject to circumvention by a law enforcement officer upon his successful application to a Federal court; and (7) that not only should a person with an arrest record not resulting in conviction be authorized to deny that he has a criminal record, but also the employer or prospective employer of such a person should be prohibited from asking as a condition of employment whether he was ever arrested. With these specific recommendations in mind we turn to several of the provisions of H.R. 188.

(*a*) § 3101. The first section of the bill provides that arrest records may be disseminated only among cooperating law enforcement agencies. While we applaud the implication that such records may not be used for employment, bonding, licensing, or related non-law enforcement purposes, we believe that the loose dissemination practices of many law enforcement agencies will render § 3101 meaningless. Furthermore, there is no evidence that the use of arrest records not resulting in conviction is a compelling necessity to law enforcement agencies.

The F.B.I. provides a clearinghouse for the vast quantity of arrest data shared by law enforcement agencies throughout the nation. This clearinghouse has little or no effective security. Surveying an enormous array of the improper redissemination of arrest records received by state and local police departments from the F.B.I.'s Identification Division and from the new National Crime Information Center, Judge Gessell in *Menard* v. *Mitchell*, *supra*, observed that "the Bureau could not prevent improper dissemination and use of the material it supplies to hundreds of local agencies [and that] the system is out of effective control." 328 F. Supp. at 727. The record in *Menard* makes it abundantly clear that the F.B.I. is unable to control what happens to arrest records after they leave its files. The Identification Division has accepted any and all law enforcement agencies, however loosely defined, as authorized recipients of arrest records without further investigation. *See* Deposition of Beverly E. Ponder, Chief, Technical Section, Identification Division of the F.B.I., I, at 43–45, 79–80, *Menard* v. *Mitchell*, *supra*; Trial Transcript, at 52–53, 238–39, *Menard* v. *Mitchell*, *supra*. What is perhaps even more disturbing is that in the face of overwhelming evidence of the improper dissemination and unauthorized use of such arrest data in recent years, the F.B.I. has withdrawn dissemination privileges from only six small town police departments in a decade.

Examples of the more recent violations about which the F.B.I. has done nothing include:

The shockingly loose security and dissemination practices of the New York State Identification and Intelligence System which have been carefully documented by the State Comptroller (*Report on New York State Identification and Intelligence System*, Office of the State Comptroller, Division of Audits and Accounts, Report No. AL–St–29–71);

Free access to the District of Columbia Police Department's fingerprint and mug files given to a wide variety of unauthorized persons, including newspaper reporters (International Association of Chiefs of Police, *A Survey of the Metropolitan Police Department* (1966));

The discovery in 1967 that the District of Columbia Police Department was routinely disseminating arrest records on request to a group of approximately 50 businesses (Duncan Report, at 5–6).

Redistribution in disregard of F.B.I. "rules" is by no means limited to these examples. The Duncan Committee found that in St. Louis and Baltimore, police records were regularly released for employment purposes, while in New York City, Los Angeles, San Francisco, Chicago, and Boston, influential employers could obtain records despite police policies or regulations to the contrary. (*Duncan Report*, at 9; see also Hess and LePoole, *supra*, at 498). These indications of widespread dissemination of arrest records by *major* police departments and sheriff's offices that engage in daily exchange of arrest records with the F.B.I.

While the reckless dissemination practices of many law enforcement agencies are a sufficient reason to prohibit them from maintaining arrest records, there is also a lack of any demonstrated compelling necessity to use the records for law enforcement purposes. The classic justification for maintaining an arrest record appears in *Kolb* v. *O'Connor*, 14 Ill. App. 2d 88, 142 N.E. 2d 818, 822 (1957): Even a "minute possibility" that a person's arrest record may help to apprehend him and prevent or solve a future possible crime outweighs the "conjectural harm" that might result from dissemination of the record. As we have seen—and an increasing number of courts have recognized—the harm inflicted by an arrest record is anything but conjectural. On the other hand, the possibility that the record of a single arrest, without a conviction, will be of significant use in law enforcement is indeed minute. Finally, law enforcement authorities in several Western European countries conduct their investigations without the use of arrest records, the maintenance of which is prohibited by statute.

(b) § 3102. Section 3102 includes an absolute prohibition against dissemination of the record of an arrest which is more than two years old, or has been certified for *nolle prosse* by the prosecuting attorney, or has been expunged under state law. While we are in full support of such an absolute prohibition—which presumably includes the exchange of arrest data among law enforcement agencies—we would not limit it to arrests more than two years old or to those certified for no prosecution. For all the reasons we have stated above, an arrest record has no evidentiary value when it does not result in a conviction, and its dissemination should not be arbitrarily permitted under some circumstances and prohibited under others. Indeed, a two year rule is particularly ill conceived, since an acquittal or dismissal of charges by a magistrate or judge will often occur within a two year period following a dragnet arrest of demonstrators.

Subsection (c) of section 3102 permits the dissemination of an arrest record, otherwise prohibited, if the person concerned has a prior felony conviction. We are opposed to this disqualification. First, it imposes an *additional* burden on persons who are the victims of the common police tendency to "round up the usual suspects" on the basis of their conviction records whenever an unsolved crime has been committed. Such persons are often the subject of police surveillance and are sometimes arrested "for questioning" and then discharged. The second reason why the prior conviction disqualification should be eliminated from the bill is that a conviction record is itself a substantial civil disability which need not be augmented by a subsequent arrest record not resulting in conviction.

Subsection (d) of section 3102 introduces an additional limitation on the relief accorded by H.R. 188 by providing that sealed arrest records may be maintained and used by courts. Presumably this subsection contemplates the use of arrest records by judges in making probation and sentencing decisions—a use which we oppose for the same reasons as the American Bar Association. In its 1970 report, "Standards Relating to Probation," the A.B.A. Project on Standards for Criminal Justice recommended that the prior criminal record to be used for probation decisions should "include only those charges which have resulted in a conviction." In reaching this conclusion the Report pointed out that "[a]rrests, juvenile dispositions short of an adjudication, and the like, can be extremely misleading and damaging if presented to the court as part of a section of the report which deals with past convictions." This recommendation does not constitute a sharp departure from the general standards for probation and sentencing decisions which have been laid down by the Supreme Court. In *Townsend* v. *Burke*, 334 U.S. 736 (1948), the Court reversed a court of appeals decision upholding a sentence which was imposed on the basis of patently erroneous assumptions of criminal behavior drawn from the existence of several prior arrests not leading to convictions. *Townsend* was reaffirmed this Term by the decision in *United States* v. *Tucker*, 40 U.S.L.W. 4122 (Jan. 11, 1972).

(c) §§ 3103 and 3104. These two sections provide for the inspection of an arrest record by its subject, and for the remedy of an injunction against the main-

tenance of an erroneous record or its improper dissemination. These provisions mitigate the harm which we believe will result from the various limitations discussed above on the relief provided by the bill. On the other hand, since we are opposed to these limitations because we believe that the maintenance and dissemination of *any* arrest record not resulting in conviction is unconstitutional, we do not feel that the right to correct and inspect an arrest record is a necessary element of the unconditional relief which H.R. 188 should be amended to provide. We would, however, support the inclusion of a statutory cause of action to enjoin the improper dissemination of an arrest record, as provided in Section 3104.

(*d*) § 3105. Section 3105 would enable a law enforcement agency to petition the District Court for an order authorizing the maintenance, dissemination and use of an arrest record otherwise prohibited by the bill. We have serious reservations about the constitutionality of such a provision. At the least, it should be made clear that the "compelling public interest" standard for determining whether a court order should issue could be met only in the following way:

First, the petitioning law enforcement agency would have to show by clear convincing evidence that the person arrested engaged in the action charged by the arrest. Virtually all courts which have considered the question have held that the legitimate law enforcement use of an arrest record, if any, depends entirely on the likelihood that the person arrested engaged in the action charged by the arrest. *Wheeler* v. *Goodman*, 306 F. Supp. 58, 65 (W.D.N.C. 1969). See also *Morrow* v. *District of Columbia*, 417 F. 2d 728, 743 (D.C. Cir. 1969); *Kowall* v. *United States*, 9 Crim. L. Reptr. 2482 (W.D. Mich. 1971); *United States* v. *Kalish*, 217 F. Supp. 968 (D.P.R. 1967); *Eddy* v. *Moore*, 9. Crim. L. Reptr. 2463 (Wash. Ct. App. 1971). Cf. *Menard* v. *Mitchell*, 430 F. 2d, 486, 494 (D.C. Cir. 1970); *Henry* v. *Looney*, 317 N.Y.S. 2d 848 (Sup. Ct. 1971); *In re Smith*, 310 N.Y.S. 2d 617 (Fam. Ct. 1971). Unless this can be shown by clear and convincing evidence, therefore, an arrest record has no greater value for law enforcement purposes than does an entry in the census lists or the telephone directory.

Second, the petitioning agency would have to show that the record it sought to use is particularly probative in revealing a pattern of serious criminal conduct. To do so it would have to show that the prior arrest indicated a *modus operandi* in conjunction with a subsequent offense. A prior arrest for a minor offense or an unrelated offense, for example, would not satisfy the standard even if the arrestee had engaged in the action charged.

(*e*) § 3106. Section 3106 authorizes a person whose arrest record may not be maintained, disseminated, or used under the prohibition of section 3102 to deny that he was ever arrested. We strongly endorse this innovative provision as an important step toward eliminating the employment disabilities which stem from an arrest record. We suggest, however, that there are substantial policy reasons and constitutional grounds for going even further and prohibiting employers from asking whether a person has ever been arrested.

There is a growing body of judicial opinion holding that an employer violates Title VII of the Civil Rights Act of 1964 by asking a black applicant or employee whether he has ever been arrested, since "negroes are arrested substantially more frequently than whites in proportion to their numbers." *Gregory* v. *Litton Systems Inc.*, 316 F. Supp. 401, 402 (C.D. Cal. 1970).

Studies of the discriminatory effects of arrests and arrest records on racial minorities, including Mexican-American and Indians as well as blacks, substantiate the claim upheld by the court in *Gregory* that an inquiry about an arrest record constitutes an employment discrimination on racial grounds within the terms of Title VII. See, e.g. *The Challenge of Crime in a Free Society*, A report by the President's Commission on Law Enforcement and the Administration of Justice, at 44 (1967); *A Report on the Spanish Surnamed and Migrant Population in Iowa*, Iowa State Advisory Committee to the U.S. Commission on Civil Rights, at 30 (Sept. 1970); *Mexican-Americans and the Administration of Justice in the Southwest*, U.S. Civil Rights Commission, at 7 (1970).

Furthermore, in *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 429 (1971), speaking through Chief Justice Burger, the Supreme Court held that Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. . . . If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." In the case of an employment practice of inquiring into an applicant's arrest record, the court in *Gregory* found that "[t]here is no evidence to support a claim that persons who have suffered no criminal convictions but have

been arrested on a number of occasions can be expected, when employed, to perform less efficiently or less honestly than other employees." 316 F. Supp. at 402.

If persons from racial minorities cannot be asked by employers whether they have ever been arrested, the bill under consideration should go beyond the terms of Title VII and extend the prohibition to questions propounded to *any* person without regard to his race. Arrest record discrimination is ultimately based upon status, not race. In light of this analysis, we urge the subcommittee to amend section 3106 of H.R. 188 by adding a provision that would prohibit employers and others from asking any person whether he has ever been arrested. It should be noted that the State of Illinois adopted such a provision last year. *See* Illinois Fair Employment Practices Act, Public Act No. 71–1552, section 7(e), approved September 17, 1971.

(*f*) § 3107. The penalties provided in section 3107 are vital to the enforcement of any statute which emerges from H.R. 188. We would propose extending the criminal penalties to private persons or agencies who circumvent the prohibition of the statute by refusing to employ, bond, or license a person solely on the ground that such person had been arrested but not convicted and had so responded in a question propounded to him in an employment, bonding or license application. Alternatively, a person asked by an employer, or a bonding or licensing agency, whether he had ever been arrested could be authorized to obtain injunctive relief or a cease and desist order against the person or agency asking the question in an employment, bonding or licensing application.

Thank you for the opportunity to appear before the subcommittee today.

[New York Times magazine, Apr. 15, 1973]

"HAVE YOU EVER BEEN ARRESTED"

(By Aryeh Neier)

On Jan. 18, 1970, Paul Cowan was arrested in Brooklyn for possession of Marijuana. Two months later the charge was dismissed. In September, 1970, Cowan moved to Boston. He applied for a license to drive a cab. On Feb. 15, 1971, a hack license was issued, but a week later, on Feb. 22, he was ordered to report to the Boston Police Department's Bureau of General Services and informed that his license was being revoked. The reason: a routine check with the Federal Bureau of Investigation had disclosed that an "open" charge of possession of narcotics was pending against Cowan in New York. He protested that the charge had been dismissed. No good. On March 12, 1971, Paul Cowan received formal notice that his license had been revoked because he was "not a suitable person to be so licensed." Cowan's story is unusual in only one respect. He found out why he lost his job. Most people who are denied jobs because of arrest records are never told the reasons.

In 1967, the President's Commission on Law Enforcement issued a series of comprehensive reports on crime in America that are still considered the definite findings on the subject. The commission found that 58 percent of white urban males, like Paul Cowan, will be arrested at some time during their lives. (The figure for nonwhite urban males is 90 percent, for U.S. males in all categories 50 percent; for all females it is 12 percent.) Like Paul Cowan, many of those arrested are not convicted. In fact, of about 8.6 million persons arrested in 1971 for all criminal acts other than traffic offenses, nearly 4 million were not convicted. They are presumed innocent. In practice, they often suffer consequences as grave as if they had been guilty.

The F.B.I. is the major source of arrest-record information. As a matter of routine, almost all police departments in the country forward to the bureau for filing the fingerprints of persons they have arrested. (All persons fingerprinted upon induction into the armed services are also on record in the F.B.I. fingerprint files.) Testifying in the case of *Menard* v. *Mitchell* in 1970, a bureau official reported that, on the average working day, the bureau received 29,000 sets of fingerprints. Only 13,000 came from law-enforcement agencies. The remaining 16,000 sets were sent in by banks, insurance companies, government employers (municipal, county, state and Federal), licensing agencies and the like. In return, these agencies received from the F.B.I. whatever information it had in its files on the 29,000 persons involved. That's how Paul Cowan's Brooklyn arrest record got to the people who give out hack licenses in Boston.

While the bureau has been very efficient about gathering and disseminating arrest records, it has been fairly careless about including data on the disposition of the cases. In the *Menard* case, the special agent in charge of the F.B.I.'s

Identification Division, Beverly Ponder, got a little testy when questioned about this by a volunteer lawyer for the National Capital Area Civil Liberties Union, Raymond Twohig:

TWOHIG. Does the F.B.I. make any effort to obtain final dispositions where requests are received for arrest records? Before disseminating those arrest records?

PONDER. We urge the contributors [to the F.B.I. fingerprint files] to submit to us final dispositions, but we don't go out and try to pick them up.

Under further questioning, Ponder testified that there is no statistic available within the F.B.I. on the final dispositions that have been recorded in the bureau's files and that he knew of no way to make an intelligent estimate of them. That helps to explain how it happened that the Boston hack-licensing people weren't told that the charges against Paul Cowan had been dismissed.

Some employers are not interested in arrests, only convictions. One such, it was thought, is the Federal Civil Service Commission, Mr. Ponder was asked about that by Twohig:

TWOHIG. Is the F.B.I. aware that recently Federal job-application forms were changed, and the question which asked if the applicant was arrested now asks if he has been convicted?

PONDER. Yes, I am aware of that.

TWOHIG. Do Federal agencies, in particular civil service commissions, receive at present all information about arrests—or only arrests with convictions—when they apply to the F.B.I.?

PONDER. They receive all the material that appears on the identification records.

TWOHIG. And that includes conviction and nonconviction arrests?

PONDER. That is correct.

The circumstances of this case were that Dale Menard, a former Marine, had been arrested by the Los Angeles police for "suspicion of burglary." He was never convicted or even prosecuted. In fact, it is not clear that a crime was committed by anyone. Menard had the misfortune to be sitting on a park bench in a neighborhood where the police had received a telephone complaint about a prowler. With the help of the National Capital A.C.L.U., Menard sued to remove his arrest record from the files of the F.B.I. and to stop the F.B.I. from reporting his record to potential employers. Menard's suit has been in court for more than five years. It has been heard twice by Federal District Courts and twice by the United States Court of Appeals in the District of Columbia, where it is now awaiting decision.

Back in June, 1971, the *Menard* case was the subject of a controversial decision by Federal District Judge Gerhard Gesell. He ordered the F.B.I. to stop distributing arrest records to anyone but law-enforcement agencies and then only for law-enforcement purposes. Gesell found "that Congress never intended to or did in fact authorize dissemination of arrest records to any state or local agency for purposes of employment or licensing checks." He concluded that the arrest-record distribution system "is out of effective control."

Congress acted quickly to overturn the order. A bill introduced by Senators Alan Bible and Howard Cannon of Nevada was passed which made F.B.I. arrest data available to "any non-law-enforcement official or agency" authorized to get the information by state or local law. The two Senators said they were particularly concerned that the information be available to Nevada's gaming industry so that people with arrest records would be kept out.

The case for the bureau's role of maintaining and disseminating arrest records was recently set forth by L. Patrick Gray 3d, acting director of the F.B.I., in a written response to a question from Maryland's Senator Charles Mathias Jr., of the Senate Judiciary Committee, which was considering Gray's nomination as permanent director of the F.B.I. Gray wrote:

"The arrest-record files of the F.B.I. Identification Division as well as those of many state and local identification bureaus are replete with lengthy arrest records of longtime hoodlums and members of organized crime whose arrests never resulted in conviction. Many sex offenders of children are not prosecuted because parents of the victim do not want to subject the child to the traumatic experience of testifying. Others are not tried because key evidence has been suppressed or witnesses are, or have been, made unavailable. The latter situation is not uncommon in organized-crime cases. To prohibit dissemination of such arrest records would be a disservice to the public upon whom they [persons with records] might prey again."

Gray went on to speculate about "the potential school teacher with two prior rape arrests and no convictions" and "a police applicant with a prior Peeping Tom arrest and no conviction." Given these possibilities, "the rationale for disseminating arrest records not supported by convictions is substantial," said Gray.

Protesting this viewpoint, Ralph Temple, the lawyer who recently argued Dale Menard's current appeal, has commented: "That turns the Constitution upside down—it presumes guilt." Temple, who is legal director of the National Capital A.C.L.U., is trying to persuade the U.S. Court of Appeals in the District of Columbia that punishment by record dissemination, without trial and conviction, violates the Constitutional guarantee of due process of law.

Opposition to the dissemination of arrest records is mounting elsewhere. Representative Don Edwards of California and Senators Quentin Burdick of North Dakota and Sam Ervin Jr. of North Carolina are leading a fight to pass legislation prohibiting the F.B.I. from disseminating arrest records that do not result in convictions. Two United States Courts of Appeals have also recently found that questions about arrest records are racially discriminatory. Citing these court decisions, the New York City Commission on Human Rights issued "guidelines" on Jan. 4, 1973, stating that "it will be considered an unlawful discriminatory practice for employers or employment agencies to ask of any applicant or employee any questions relating to arrest records" or to solicit the information from another source. Illinois has passed a law making it an unfair labor practice to deny a job because of an arrest record.

The guidelines of the City Commission on Human Rights were an outgrowth of several days of hearings last year on employment difficulties faced by people with arrest records and people with conviction records. Those hearings were, in part, a result of the commission's earlier hearings on the employment practices of the Board of Examiners of the New York City Board of Education, which licenses teachers for the New York City public schools. The hearings had produced testimony about such things as the denial of teacher licenses to people arrested in civil-rights demonstrations in Mississippi. Another Board of Examiners case involved a young man, David Mills (not his real name), who had been convicted of a misdemeanor in New York City Criminal Court in December, 1969. In February, 1970, Mills applied for a license as a substitute teacher in the public schools. In May, 1970, he was summoned before the Board of Examiners to explain the circumstances of his conviction. At the time, Mills's conviction was on appeal, and he was assured by two examining officers that if it was reversed, he would have no difficulty getting a license.

In October, 1970, the Appellate Court unanimously reversed Mill's conviction "on the law and the facts." Mills immediately took a copy of the decision to the Board of Examiners. He then started to get a runaround. Even though he had taken the license examination the previous February, he was told for the first time that he now needed a "nomination" from a specific high school that wished to employ him. Next, he was told that his application had to be approved by the Board of Education's Department of Personnel. In late November, the Department of Personnel approved the license but the Board of Examiners still refused to issue it, claiming more time was needed to investigate Mills' "criminal" record. Finally, with delay piled upon delay, Mills filed suit against the Board of Examiners to compel it to issue the license. In the face of the lawsuit, the Board of Examiners finally granted Mills his license in March, 1971.

The first court case to be decided on the basis that inquiries about arrest records are racially discriminatory was *Gregory* v. *Litton Systems*, a case brought by the American Civil Liberties Union of Southern California. At first glance, Earl Gregory, a Los Angeles black, seems an unlikely candidate for a test case. He had a record of no fewer than 14 arrests. Gregory had sought a job as a sheet-metal mechanic. Although he was otherwise qualified, he was turned down because "Litton's standard policy," it was stipulated in court, "is not to hire applicants who have been arrested on a number of occasions beyond minor traffic offenses."

Gregory's trial indicated that his arrest record was not unusual. Dr. Ronald Christensen, one of the authors of the Report of the President's Law Enforcement Commission, who appeared as a witness, testified, that a person who has been arrested once tends to accumulate additional arrests during his lifetime, the average for a white man being 7; for a black man the lifetime average is 12.5. Christensen and another prominent analyst of crime statistics, Dr. Marvin Wolfgang, also testified that in one large category of arrests—on "suspicion" or for "investigation"—blacks were arrested about four times as often as whites.

As an indication of how much importance could be attached to these arrests, Dr. Wolfgang cited a study of "investigation" arrests in 1964 in Baltimore, which revealed that 98 per cent of the persons arrested were released without further proceedings. The court also heard extensive testimony about studies which showed that persons who had been arrested on a number of occasions performed as efficiently and honestly on the job as persons who had never been arrested.

Litton Systems argued that the "business justification for considering a person's arrest record in determining whether or not to hire him is the same as considering a record of conviction. . . . It is not a fact, and it cannot be assumed, that all arrests which did not result in conviction are unfounded." The testimony by Christensen and Wolfgang proved to Litton "that people with arrest records are arrest-prone, and that the proneness increases with the number of prior arrests. There is business justification in declining to hire people with arrest records because the employer has a legitimate reason in not wanting to hire people who are more likely to be absent when they are arrested. . . ." While Litton cited no other "business justifications," the firm expressed a certain pique that it was being singled out for attack. An inquiry about arrest records, Litton told the court, "is one of the most common employment practices known to man. Almost anyone who has ever applied for a job has answered this type of question . . . the employer who does not obtain and utilize arrest information in determining whether or not to hire is the exception, not the rule."

Litton's arguments about the frequency with which employers rely on arrest records are supported by a February, 1972, report issued by the Georgetown University Law Center. The report was prepared under a grant from the U.S. Department of Labor. It found that "the existence of arrest records is all-pervasive in our society and that millions of individuals may be hampered in their efforts at finding jobs and pursuing careers because of such records." Most state and county governments inquire about such records on job-application forms, according to the Georgetown report. Sometimes arrest records are absolute barriers to public employment, the report says, but more commonly they restrict applicants to low-skill jobs.

In its first decision in the Dale Menard case, the U.S. Court of Appeals in the District of Columbia cited a study showing that 75 per cent of the employment agencies in the New York area will not accept for referral applicants with arrest records. Another survey cited by the court showed that, of 75 employers, 66 would not consider hiring a man who had been arrested for assault although he had been acquitted.

The fact that Litton's policies were no worse than those of other employers did not deter a Federal court from awarding Earl Gregory $4,400 in damages because of the inquiry about his arrest record. In February, 1973, that judgment was upheld by the U.S. Court of Appeals in California.

The most sweeping action against arrest records was a recent decision by the Supreme Court of Colorado. The court ruled that arrest records of persons not convicted must be expunged unless the police can demonstrate the need to retain a particular record.

Dorothy Davidson, executive director of the Colorado A.C.L.U., was the plaintiff in the suit. She had been arrested in 1968 while trying to act as an observer at a police-hippie confrontation in Denver. (These arrests are an occupational hazard for local A.C.L.U. directors. In 1968, there were similar arrests in four other states. I was the director of the New York A.C.L.U. at the time and was arrested observing an antiwar demonstration in Manhattan's Washington Square Park. None of us were convicted.) The court found expungement of arrest records necessary because "the record here is devoid of any facts showing . . . the ability of the [Denver police] department to keep them confidential."

Only expungement can keep arrest records confidential, as has been demonstrated in New York. In 1964, the New York State Identification and Intelligence System was established. It was not supposed to be available for private employment checks. However, in 1969, the State Legislature passed a law requiring the fingerprinting of all employees in the securities industry, one of the state's largest. Prints are now checked against the six million on file with N.Y.S.I.I.S. and the information is given to the State Attorney General, who makes it available to the employers. In his first report on the program, Attorney General Louis Lefkowitz announced with great pride that several hundred employees had been found to have "criminal records" and that many were fired. About half of those fired had no record of convictions, only arrests. A Federal District Court dismissed

the New York Civil Liberties Union challenge to the fingerprinting and the decision was upheld on appeal.

Fingerprinting of employees had been sought by the securities industry as a means of trying to stop thefts. Fear of crime is always the reason for compiling and disseminating arrest records. The records presumably tell us whom we should fear and thus enable us to shield ourselves from them. The trouble is that people with records don't simply disappear from the face of the earth. They continue to live in our cities, many of them in our black ghettos. Having used their records to keep them out of our places of employment, we still have to live with them. Are they less likely to commit crimes because we can keep them from getting jobs?

Job problems are not the only consequences of arrest records. Consider the case of Mildred Brown. She has lived in a housing project on Manhattan's East Side for 20 years. The New York City Housing Authority recently found that she was "ineligible for continued occupancy on the ground of nondesirability," a finding based in large part on her son's arrest record. While no comprehensive studies have been done on housing problems growing out of records of arrests not followed by convictions, Mrs. Brown's case is not unusual.

Arrest records also affect chances for admission to educational institutions, opportunities for financial credit, and, as Litton's arguments about "arrest-prone" people suggest, they increase the likelihood of rearrest. A young black man in Washington, D.C., recently filed suit to stop police harassment growing out of his arrest record. He had been arrested while a senior in high school in May, 1970. In January, 1971, he was acquitted of a robbery charge because of an apparent case of mistaken identity. He is now a college student and a National Merit Scholarship winner. According to his court complaint, on at least three occasions police have shown his photograph in neighborhoods where crimes have been committed, seeking to have him identified as the criminal in some new crime. Each time this has been done, his family and acquaintances have been interrogated anew.

People with arrest records are natural targets for investigation when new crimes are committed. Inevitably, arrests follow. Being "arrest-prone," therefore, is often a function of having been arrested. The practice is to "round up the usual suspects," as police Capt. Louis Renault (played by Claude Rains) put it in the film "Casablanca."

Each year, law-enforcement agencies grow more efficient in disseminating records. The bureau's Indentification Division which was receiving 29,000 sets of fingerprints daily in 1970, is only a manual system operating through the U.S. mail. Recently, to supplement this service, the bureau established a computerized system, the National Crime Information Center, to speed the exchange of records with local law-enforcement agencies around the country.

Private industry is in the record-keeping and record-selling business in a big way. The biggest firm in the business, Retail Credit Company of Atlanta, has more than 7,000 employees, maintains dossiers on about 45 million people and produces more than 35 million reports a year. The member firms of a trade association known as the Associated Credit Bureaus, which among them do a business of close to $1-billion a year, maintain files on about 110 million Americans. The information in these files is sold to creditors, employers and landlords.

Much of the information sold by the credit bureaus comes from law-enforcement files. There is no indication that the F.B.I. gives any information directly to a credit bureau. However, the F.B.I. has been notoriously loose in policing the further distribution of the records it disseminates. Here is the testimony on this point of Special Agent Ponder at the Menard trial:

Q. Is there any procedure whereby the F.B.I. or any division of the F.B.I. inquires into the uses to which the arrest information is put by contributing agencies?

A. No.

Q. Are any restrictions imposed by the F.B.I. on the use to which that information is put?

A. Yes. Official business only.

Q. Are there memoranda or orders indicating that there is a restriction?

A. It is right on the record itself.

Q. Are there any form letters that are sent to contributing agencies explaining what "official business only" means?

A. Well, in years gone by we have brought this to the attention of contributors, that this information is disseminated strictly for official use only.

The questioning of Ponder took place on Dec. 17, 1970. Subsequently, he supplied for the court record the F.B.I.'s most recent notice on the issue, a

memorandum from the late J. Edgar Hoover dated Oct. 18, 1965. If the records were used for other than "official uses," Hoover warned, "this service is subject to cancellation." No other penalty was mentioned.

The laws of many states provide that juvenile records are confidential. However, they have been as readily available as all other records. The F.B.I., which respects all state and local laws which confer access to records on various agencies disregards state laws governing confidentiality. Special Agent Ponder was asked in the Menard trial, "Are there any differences in dissemination practices with respect to juveniles and adults, of arrest records?" His complete reply was: "No."

The New York State Identification and Intelligence System also gives out juvenile arrest records. When I asked the director of the agency about this, he told me that N.Y.S.I.I.S. understood the law to make the *disposition* of a juvenile-arrest confidential, but not the underlying arrest.

The widespread availability of law-enforcement records has created a pariah class of millions of persons made up of ex-convicts and people arrested but not convicted. That pariah class is the crime problem, or at least a large part of it. Crime is centered in those cities and those parts of cities where people go when they are trying to escape their past records. The time-honored way of escaping was to lie when asked, "Have you ever been arrested?" As law-enforcement agencies and private companies improve the efficiency of their dissemination of records, lying no longer works. The truth about the past record catches up, no matter where a person moves.

Shocking as the notion might be, those lies served an important social purpose. When a man with an arrest record could lie his way into a job, all of us had a little less to fear. Today, when we expose the lie, we simply insure that one more person won't be able to escape his arrest record and integrate himself into society.

Judicial and legislative action to control the use and distribution of arrest records will not have much impact for a long time to come. The records of people arrested in the past have often been so widely circulated as to make it very difficult, if not impossible, to prevent them from continuing to haunt people for years to come. But action has to start sometime, and the best time is now. There is even a small sign that the F.B.I. is concerned. At the hearing last Feb. 28 to decide whether he should be confirmed as F.B.I. director, L. Patrick Gray testified that he had "purged inactive arrest records of individuals age 80 and older from the fingerprint files." All the octogenarians I know who are out looking for jobs are very grateful.

Mr. EDWARDS. The last witness today is a good friend, Mr. John Pemberton, Deputy General Counsel, Equal Employment Opportunity Commission.

TESTIMONY OF JOHN PEMBERTON, DEPUTY GENERAL COUNSEL, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Mr. PEMBERTON. Mr. Chairman and members of the subcommittee, if I could be permitted a small digression to correct the record, I think because of the position of my name and the title with Mr. Neier, I heard him incorrectly introduced as deputy director of the American Civil Liberties Union, and I think he is the executive director.

Mr. EDWARDS. We will certainly make that correction.

Thank you, Mr. Pemberton.

Mr. PEMBERTON. Thank you very much.

I appear here as a delegate of Chairman William H. Brown III of the Equal Opportunity Commission. He regretted his inability to appear this week because of obligations out of the city, and I am grateful on his behalf and mine to the committee for its invitation to receive a statement from the Equal Employment Opportunity Commission.

Mr. Brown's statement has been prepared in writing, and I believe put on file and distributed to the members of the committee, and if I may, I would briefly make a few points that are consistent with it, but would not consist of reading it.

Mr. EDWARDS. Without objection, the entire testimony will be inserted in the record at this point.

[The statement referred to follows:]

STATEMENT OF WILLIAM H. BROWN III, CHAIRMAN, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Mr. Chairman and members of the Subcommittee: I am pleased to be permitted to submit this statement to you in comment on H.R. 188 (to amend Title 28 of the United States Code to limit the dissemination and use of criminal arrest records) in response to the request of the Chairman.

The Equal Employment Opportunity Commission was established by, and assigned responsibility for administering, Title VII of the Civil Rights Act of 1964. That Title prohibits all aspects of employment discrimination based upon race, color, religion, sex and national origin. The Commission is bipartisan in composition and its Members serve five-year terms on a staggered basis.

Title VII was amended by adoption of the Equal Employment Opportunity Act of 1972. By this amendment, Congress extended the coverage of Title VII to State and local governments, as employers, as well as to public and private educational institutions. It also expanded coverage to include employers and unions with 15 or more employees or members, where the earlier threshold had been 25. As amended, a total of some 60,000,000 workers are now brought within the protection of the ban on employment discrimination. Most importantly, the amendment provided authority in the EEOC to seek court enforcement of this law, where private employment is involved, and in the Attorney General to do so where State and local governments are involved. Federal employees and applicants for employment were given a private right of action to enforce their own rights to be free from employment discrimination.

It is in the context of the Congressional mandate that the Equal Employment Opportunity Commission enforce Title VII, that I offer my comments on the civil rights aspect of the use of arrest records for employment purposes.

Relatively early in the development of the substantive law of employment discrimination, the Commission and the courts determined—on the basis of incontrovertible statistical evidence—that arrest record information has a pronounced adverse affect upon minority employment opportunities. The leading court decision is that of the United States District Court for the Central District of California in *Gregory* v. *Litton Systems, Inc.*, 316 F. Supp. 401 (1970), *modified in other respects and affirmed* 472 F. 2d 631 (9th Cir. 1972). That court found:

"2. There is no evidence to support a claim that persons who have suffered no criminal convictions but have been arrested on a number of occasions can be expected, when employed, to perform less efficiently or less honestly than other employees. In fact, the evidence in this case was overwhelmingly to the contrary. Thus, information concerning a prospective employee's record of arrests without convictions, is irrelevant to his suitability or qualification for employment. In recognition of this irrelevance, the County of Los Angeles, a large-scale employer, has ceased to ask for arrest information in applications for employment.

"3. Negroes are arrested substantially more frequently than whites in proportion to their numbers. The evidence on this question was overwhelming and utterly convincing. For example, Negroes nationally comprise some 11% of the population and account for 27% of reported arrests and 45% of arrests reported as 'suspicion arrests.' Thus, any policy that disqualifies prospective employees because of having been arrested once, or more than once, discriminates in fact against Negro applicants. This discrimination exists even though such a policy is objectively and fairly applied as between applicants of various races. A substantial and disproportionately large number of Negroes are excluded from employment opportunities by Defendant's policy [of not hiring applicants who have been arrested 'on a number of occasions' for things other than minor traffic offenses]."

Accordingly, the District Court held (and the Appellate Court affirmed) that the practice of screening applicants on the basis of their arrest records was unlawful.

Subsequently the District Court for the District of Minnesota, in *Carter* v. *Gallagher*, 337 F. Supp. 626 (1971) *modified in other respects and affirmed after rehearing en banc* 452 F. 2d 315 (8th Cir. 1972) *cert. denied* 406 U.S. 950 (1972) reached a similar conclusion under the due process and equal protection clauses of the Fourteenth Amendment in a suit brought against a municipal

Civil Service Commission. That Court further found a similar discriminatory effect in the disqualification of applicants for municipal fire fighter positions who had felony and misdemeanor convictions, and required that any future conviction rejection be based upon a written finding, after notice and opportunity to respond, that the act upon which the conviction was based involved "behavior from which it can be reasonably inferred that . . . the applicant cannot adequately fulfill the duties of a fire fighter."

The *Gregory* decision, I believe, accurately anticipated, and the *Carter* decision accurately followed, the holding of the United States Supreme Court in the leading Title VII case of *Griggs* v. *Duke Power Company*, 401 U.S. 424 (1971). Mr. Chief Justice Burger, writing for a unanimous court in that decision said:

"What is required by Congress is the removal of artificial, arbitrary and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classifications."

H.R. 188, a bill to insure the security and privacy of criminal arrest records, would go far to implement the policy of the law expressed in the cases I have cited. The fact of an arrest, of course, establishes nothing about the person arrested except that some other person has accused him of criminal misconduct —a risk to which all persons are subject but to which members of several minority groups are disproportionately exposed. (In fact, arrests "upon suspicion" usually do not even establish such an accusation.) Large numbers of persons arrested are subsequently released without further proceedings to determine the truth or falsity of such accusations; in the case of arrests "upon suspicion" the proportion which are disposed of without further proceedings may exceed ninety percent. Only the fact of a conviction determines that an individual was responsible for such criminal conduct as to warrant an adverse judgment concerning his or her character.

Despite their irrelevance, records of arrests maintained by the federal government for law enforcement purposes are widely available outside the law enforcement community and are used for non-law-enforcement purposes. They serve a useful law enforcement function, at least as it relates to the apprehension of persons accused of crime. But the dissemination of information concerning these otherwise irrelevant contacts between the individual and the law has developed into a commonplace outside of law enforcement circles. It inhibits, unfairly and without reason, opportunities for employment and for many other forms of participation in the benefits of our society. The mere fact of dissemination has encouraged employers to use the arrest-records inquiry as a screening device among applicants for employment and has effectively limited the opportunities of the victims of this irrational practice to better themselves and to enjoy an equal chance in the labor market.

H.R. 188 properly would limit the dissemination of such information to law enforcement purposes (Section 3101) and the maintenance and dissemination of such information for any longer than is necessary to serve its law enforcement function (Section 3102). Its provision for inspection, and judicial correction of, arrest records will serve a useful function in eliminating error and insuring the enforcement of its general prohibitions (Sections 3103 and 3104). Its provision for law enforcement officers to obtain court orders which would expand the permissible maintenance and use of arrest records will insure against inhibition of necessary law enforcement needs (Section 3105). And it will protect the civil rights of the victims of improper arrest-record practices by, in effect, expunging the record of those arrests which may no longer be lawfully maintained or disseminated and permitting any individual to respond to an arrest-record inquiry with information concerning only those arrests the record of which the act permits to be currently maintained (Section 3106). Its provision for civil actions to recover damages for improper maintenance and dissemination of arrest records is especially laudable as a means of insuring that the policy of the law will be carried out, and its provisions for criminal sanctions is perfectly proper (Section 3107).

I would suggest only:

1. That the exception in Section 3102(c) permitting the maintenance of stale arrest records concerning any person who has been convicted of a felony is unnecessary, in the face of the court orders provision of Section 3105, and harmful especially in the case of arrest records bearing no relationship to the act for which the felony conviction had been obtained.

2. That the provision for civil damages might go farther toward protecting federal employees engaged in the maintenance and dissemination of arrests records if it permitted them to join as co-defendants, or have a separate

recovery over and against, those officers of reporting units (usually State or local police departments) who were responsible for supplying the original arrest record and who failed to supply subsequent information which, under Section 3102(a) (1), (2) or (3), has intervened to make the continued maintenance of the arrest record unlawful.

Despite the clear-cut implications of the holdings in such cases as *Gregory* and *Carter*, discrimination against minorities because of arrest-record screening very seriously affects employment opportunities. H.R. 188 will contribute materially to the improvement of employment opportunities for these victims of discrimination.

Mr. EDWARDS. You may proceed, Mr. Pemberton.

Mr. PEMBERTON. Thank you, Mr. Chairman.

As you know, the Equal Employment Opportunity Commission was established by and assigned the responsibilities for administering title 7, the employment discrimination title of the Civil Rights Act of 1964. That title prohibits all aspects of discrimination based on race, color, religion, sex, and national origin.

The title was amended in 1972 to extend its coverage to State and local governments and public and private education institutions as employers. It was also expanded to cover private employers with 15 or more employees or members. It was reduced from the earlier threshold of 25 employees or members. So as amended, it now covers some 60 million workers within the United States with its ban on employment discrimination.

Most importantly, the amendment provides authority for the EEOC to seek court enforcement of this law where private employment is involved, and the Attorney General to seek court enforcement of this law where State and local governments are involved.

It is in the context of the congressional mandate for the EEOC to enforce title 7, that Chairman Brown's comments are offered for this record. Relatively early in the administration, or at best early in the development of the substantive law of the employment discrimination, the commission and the courts determined on the basis of uncontrovertible statistical evidence, that the dissemination of arrest record information to employers has a pronounced adverse effect on minority employment.

Gregory v. *Litton Systems*, which Mr. Neier cited as affirmed earlier this year was decided by the Federal District Court of the Central District of California in 1970 and was one of the earlier cases to deal with the substantive law of employment discrimination. The decision held that the employer's determination to screen out applicants who had substantial numbers of arrests or multiple arrests in their records had an adverse impact upon members of the minority races or of minority national origin groups.

In *Gregory*, the minority races were in issue, but specific minority national origins may be affected similarly. The screening out had no justification in business necessity, and no job relatedness criteria warranted the employer's decision. The employer's screening out had the effect of discriminating on the basis of race or on the basis of national origin, and because it could not be justified, it was found to be prohibited by Title VII. Interestingly enough, the Federal District Court for the District of Minnesota in *Carter* v. *Gallagher* subsequently reached the same results not only in regard to arrest records but also with regard to automatic conviction record screening. The court required the Minneapolis, Minnesota Civil Service Com-

mission in any future conviction rejection to make a written finding after giving the applicant an opportunity to respond.

The act upon which the conviction was based was called behavior, from which it could be reasonably inferred that the applicant could not adequately fulfill the duties of a firefighter. Thus the principle of law enunciated in these decisions, and I think well established in comparable decisions elsewhere, is that where a screening device has a disparate impact upon members of some particular group under title 7, and it cannot be justified by the business necessity, it is unlawful. I think that these decisions are consistent with the 1971 decision of the Supreme Court in the landmark case of *Griggs* v. *Duke Power Co.*, that is discussed on page 5 of Mr. Brown's statement.

I suggest that H.R. 188 which the committee is considering would go a considerable distance toward implementing the policies of the law expressed in the above decisions. The fact of an arrest, of course, establishes nothing about the person arrested. The dissemination of arrest records outside of the law enforcement agencies, the very evil this bill is aimed at, not only facilitates, but I suggest encourages employers to use arrest records as screening devices.

Mr. EDWARDS. Mr. Pemberton, may I interrupt you?

Mr. PEMBERTON. Certainly.

Mr. EDWARDS. When an employer gets a record of an arrest, the normal employer would consider the disqualifications and evidence of a conviction. Suppose your employer would have 25 applications and 1 or 2 of the applications have a record of arrest. Would the employer make his ordinary investigation with regard to the background of all 25, or do you think he would take the 2 with an arrest record and put them aside?

Mr. PEMBERTON. I think that the fact that the common use of arrest records for other than law enforcement purposes, has had the effect of leading people to equate, if not identify, an arrest record with a conviction record, and this has lent credibility to the business of disseminating and relying on arrest record information. This is undesirable and tends to defeat the policy of the law our agency is seeking to administer.

I suggest that the thrust of this bill, to not only make that non-law-enforcement dissemination prohibited but to eliminate the credentials which the practice gives to reliance upon arrest records, would help us to effect the law we are seeking to enforce. I think that the provisions of the bill are, by and large, well aimed to achieve that limited purpose. However, I do not want to suggest that this bill would cure all evils.

The prior discussion this morning suggested that there may be circumstances in which such information might become available anyway, but this bill would take the imprimatur of the Federal Government making this information available away from the practice. And it would encourage compliance with what the law now requires, which at least to members of the minorities, makes it unlawful to inquire as to arrest records unless you can establish, which no employer has yet established, that a relevant business necessity is served by making that inquiry and pursuing it.

Not only has the Massachusetts bill, which was referred to in the prior testimony, tended to endorse this approach and the act passed in

Illinois, which Mr. Neier's written testimony referred to, but I also have been told that Pennsylvania and Hawaii have in their civil rights acts, similar prohibitions against the use of arrest records in employment screening.

I suggest that section 3106 of the bill which would in effect expunge an individual's public record, the record of arrest no longer permitted to be maintained or disseminated, is particularly useful in this regard, and I think the enforcement mechanisms of the civil damages actions is perhaps one of the most effective means to prevent such dissemination. I think we have learned, and I think employment discrimination laws tend to support this, that civil actions may be a more effective enforcement tool than criminal sanctions, and the existence of this option to enforce a private right may be a better deterrent than the confinement of that enforcement option to the public prosecutor who might have a reason, particularly where law enforcement officials are the potential defendants, not to enforce a nondissemination law vigorously or consistently.

I have a couple of suggestions about the specific provisions. One, which I think Mr. Neier referred to in his testimony, involves section 3102(c) which exempts from the prohibition against dissemination, a criminal arrest record concerning any person who has been convicted of at least one felony under the laws of the United States or of any State. This section may be unnecessary as there is a court order provision in the bill which permits relief from the prohibitions of the act where a legitimate law enforcement need can be shown. I don't think anyone needs to speculate in the case of one felony conviction that relief is necessary. In the case of arrest for acts that bear no relationship to the act for which conviction is obtained, maintenance of a stale arrest record may be harmful and irrelevant.

I would suggest that the provisions of 3102(a)(2) prohibiting the dissemination of arrest records where the prosecuting attorney had agreed that no prosecution is warranted and no criminal arrest records should be kept, would serve its purpose if the first condition alone were met; it would seem to me that where the prosecuting attorney had agreed that no prosecution was warranted, that that would be enough to warrant prohibition of the maintenance of that record. A separate finding by the prosecuting attorney, asking that no criminal arrest record be kept, should not be necessary to invoke the prohibitions of the act.

In the civil damage, section 3107(a), I would think that a useful purpose would be served if the Federal law enforcement officers, who are the potential defendants in the civil action, had a right to join as codefendants or to recover against State law enforcements who were supplying the information they are disseminating where the State people had not produced the information that the further dissemination of the record invokes the prohibition of the act. Thus, if there has been a determination by the prosecutor under 3102(a)(2) that no prosecution is warranted, the statute makes the dissemination of the information unlawful. The practice usually is that the State authority that supplied the information did not tell the Federal authorities about the prosecutor's later determination. Here, it would seem to me that the Federal authorities ought to be entitled to recovery over against the State authorities who failed to supply the Federal authorities with the prosecutor's determination.

I believe the FBI's present regulations require the supply of follow-up information. I believe that this requirement is honored according to FBI complaints, more often than the breach, because the breach makes the Federal officials liable. Under this bill, for civil damages, they ought to be able to look to the persons responsible for any ultimate recovery.

I believe, however, the main thrust of the act will serve a very useful purpose in continuing the improvement of the employment opportunities for those particular victims of discrimination I spoke of above.

I would be happy to answer any questions you may have.

Mr. EDWARDS. Thank you, Mr. Pemberton. This is a very helpful statement. The main thrust of the bill doesn't really have anything to do with, at least so far as its authority is concerned, interfering with police blotters or any of the things we discussed this morning, and quite correctly so. I have no quarrel with what we have been discussing this morning.

The thrust of this legislation is realistically to not get people to rely on, we can't get that anyway, but to substantially improve what Judge Gessell described, and what the Governor of Massachusetts described, as a situation that is out of control.

Mr. PEMBERTON. Yes.

Mr. EDWARDS. It is out of control, and there are a lot of arrest records going all over the country. People that have never been tried; their lives are being severely damaged. Where the rights of privacy and other rights of the individual are threatened, the Federal Government should have no part of denying these rights. There are some rather easy legislative answers to the problem.

Mr. PEMBERTON. The only thing appropriate to object to, is to the Federal Government's contribution to this problem. And the Federal Government has made a contribution, because it's been the assemblers of these arrest records through the FBI and the FBI's permitting their availability, that has lent credence to those who would rely on them.

Mr. EDWARDS. That is correct. And it is correct that the FBI in its collection and dissemination of these records, generally speaking, does a better job than State organizations, with the exception of several States. It doesn't do half as good a job as Western European nations and Canada; it doesn't do half as good a job as the District of Columbia, for example, that had a record dissemination system that was out of control but has passed some very useful laws that are working very well for the dissemination of criminal records which do not interfere with the criminal justice system. These jurisdictions protect the rights of the individual.

Now, the thrust of your testimony, Mr. Pemberton, is that this arrest record information, rather than conviction records, has pronounced adverse effect on minority employment. In other words, this out-of-control situation that I described affects more severely black and brown Americans than anybody else.

Mr. PEMBERTON. That is correct.

Mr. EDWARDS. White America is not as affected or damaged so severely.

Mr. PEMBERTON. Not statistically. There may be many individuals who are, but statistically they are not.

Mr. EDWARDS. What statistics do you refer to, Mr. Pemberton?

Mr. PEMBERTON. I am referring to the kinds of statistics that the district court relied upon in the *Gregory* case. The simple summary set forth in Chairman Brown's quote from it, at the bottom of page 3 and the top of page 4, indicates nearly three times the portion of Negroes have arrest records nationally, as whites. I refer also to the supporting statistical information which shows that the prospect of a Negro being arrested again was perhaps four times that—no, excuse me, that statistics starts with the prospect of an individual, black or white, with a clean record, having during the course of their lifetime acquired arrest records, and I think that figure is about four times for the black as to the whites.

Mr. EDWARDS. The subcommittee will recess for a few minutes until one of the members return.

[Brief recess.]

Mr. DRINAN [presiding]. I had a question whether or not the EEOC was involved in any way in the two cases that you mentioned, the *Gregory* case and the *Gallagher* case of Minnesota.

Mr. PEMBERTON. Mr. Chairman, the EEOC did participate as *amicus curiae* in the *Gregory* case. This was before we had any court enforcement powers.

The EEOC did not participate in the *Gallagher* case. This case did not proceed under Title VII, but under the 14th amendment, because it proceeded against a municipal Civil Service Commission at a time when Title VII did not reach municipal employees.

Mr. DRINAN. I am wondering whether or not you think it realistic to try to propose legislation that would add discrimination on the basis of an arrest record to the jurisdiction of the EEOC.

Mr. PEMBERTON. I hadn't thought of that, Mr. Chairman.

This would be in effect broadening the thrust of the present Title VII law.

Mr. DRINAN. Right.

Mr. PEMBERTON. By permitting——

Mr. DRINAN. By adding this to the discrimination of age, sex, and so forth.

Mr. PEMBERTON. It might well be beneficial to blacks and Chicanos, and others who are already protected by Title VII and by the court-made law interpreting it that we have been referring to, that the present law is not enough to reach the problem. I have no statistics on this, but I have read enough EEOC cases to observe that it's very common for the arrest record inquiry to continue to be made despite Title VII. I would think that the present thrust of the bill to take away the imprimature of Federal approval of the dissemination of this information, even though it may indirectly be made public anyway, would have a more immediate effect. Nevertheless, it's true that your suggestion would reach another class of people.

Mr. DRINAN. Would it be realistic to propose a Federal statute saying that as in Los Angeles County, pursuant to the *Gregory* case, that no private employer may ask an applicant for a job whether or not he has been arrested?

Mr. PEMBERTON. I think that might appropriately be part of the subject matter of this bill.

Mr. DRINAN. What I mean is, could we make that part of the regulations of the EEOC that if you have further jurisdiction deferred by the Congress, could you enact a regulation to the effect that no private employer may ask only for an arrest record. He may presumably ask for a conviction, but he may not say, as thousands of them do now, have you ever been arrested for anything other than a traffic offense?

Mr. PEMBERTON. First of all, the EEOC does not have under its present statute regulatory authority so that the efforts of the Commission have been in the decisions of individual cases that have come before it and the effort to force the court interpretation that I have referred to.

Mr. DRINAN. Going back to my original question, in view of your expert knowledge of this whole area and the rule of Congress on the administration, is it realistic to try to work on this?

Mr. PEMBERTON. I have a doubt that it's desirable to add to the jurisdiction of the EEOC, simply because discrimination based upon the existing five bases of the statute is so overwhelming a problem statistically, that EEOC is being overwhelmed by its administrative burden.

Mr. DRINAN. Well, on a related subject, I wonder if you have had experience in this, that many colleges and universities keep files on the disciplinary students, and many of these colleges, all of them, I suppose, are federally related, they receive Federal assistance. It is realistic to say that they may under no circumstances release the arrest record or conviction record or disciplinary records?

Mr. PEMBERTON. I think that is an abuse that is properly subject to Federal regulation to the extent of the Federal connection which you referred to. It's a real abuse. It's not one which our experience in the EEOC bears any particular relationship to, simply because predominantly the classes of people affected by our law are not the college-educated people.

Mr. DRINAN. On a somewhat related issue, does the EEOC have any power to intervene in the Massachusetts case? I would assume not. You are under the Department of Justice.

Mr. PEMBERTON. We are not the Department of Justice. The problem is that it may not be close enough to our statutory responsibility to permit us to do so.

Mr. DRINAN. Thank you very much. Counsel, do you have questions?

Mr. PARKER. I have no questions.

Mr. BLOMMER. I have some questions.

Mr. Pemberton, Mr. Neier and you have both referred to a statistic, which is very amazing to me, having to do with 90 percent of black urban males will be arrested. Would you explain that statistic?

Mr. PEMBERTON. I think that appears in the record of the *Gregory* case.

Mr. BLOMMER. What were they referring to?

Mr. PEMBERTON. This was a projection from statistics I think for the year 1969 or 1968.

If present arrest rates are projected over the life of those now living and by present arrest rates, 90 percent of the nonwhite city males (not suburban or rural), but only 58 percent of the white males will be arrested at least once. Of suburban nonwhites, 55 percent will be arrested at least once, as opposed to 30 percent of whites. Of rural nonwhite males, 38 percent will have one arrest; 21 percent of whites will have been arrested once.

Mr. BLOMMER. I see.

Mr. PEMBERTON. This is taken from the record in the *Gregory* case.

Mr. BLOMMER. Is that the finding of the court?

Mr. PEMBERTON. I was reading from our own brief *amicus curiae*, I was summarizing it.

Mr. BLOMMER. Is that based on all the urban areas of the United States, or just Los Angeles, or just what?

Mr. PEMBERTON. This was not confined to the area of Los Angeles, it was on the United States as a whole. This was based on the uniform criminal reports.

Mr. BLOMMER. But in other words, that doesn't mean that at any point in time 90 percent of the male urban blacks have arrest records?

Mr. PEMBERTON. No. If you took your statistics when each of us die, you would get these results per projection. This took a statistician to project over the life expectancies of people who were alive in 1968.

Mr. BLOMMER. Let's talk about today. Is there any information as of today, how many male adult urban blacks have arrest records?

Mr. PEMBERTON. No, I don't have that statistic at hand. I would be happy to try to find something.

Mr. BLOMMER. I would appreciate it. My point is that whatever that statistic is, it seems that Mr. Neier's point and your point is that more and more people are being arrested percentage-wise than have been arrested before, and especially more and more male adult urban blacks are being arrested every year than have been arrested before.

Mr. PEMBERTON. The preceding year.

Mr. BLOMMER. Yes.

Mr. PEMBERTON. Not necessarily. Again, the statistical evidence I was relying on largely came from the *Gregory* v. *Litton* case record and relied largely on a 40-year period. I did not find it inserted in there that there was an increase in either the overall statistics or the gap between black and whites over that 40-year period, but there was a consistent difference between blacks and whites over that period.

Mr. BLOMMER. Well, the statistics then stand for what proposition? Start with the fact that an arrest record is a debilitating factor in someone's employment. Is that a factor—becoming more and more debilitating or is it staying the same? I am trying to get a handle on the situation. Is the situation getting worse or is it the same, or how do you view it?

Mr. PEMBERTON. The statistics offered do not undertake to show that the problem was getting worse, only that it's bad, that it's serious, and, that it's disproportionate.

Mr. BLOMMER. Well, another interesting fact about the *Gregory* case, which Mr. Neier pointed out and maybe you can affirm is that Litton Systems, Inc., seemed to ignore a single arrest.

Mr. PEMBERTON. Yes.

Mr. BLOMMER. So that if Gregory had only been arrested once, it wasn't debilitating. As far as the *Gregory* case, he was arrested 14 times, and Litton thought that was too many.

Mr. PEMBERTON. Yes.

Mr. BLOMMER. Is Litton Systems, Inc., typical or atypical in that regard?

Mr. PEMBERTON. I can't be sure. I am aware of the fact that large numbers of employers' screening devices acquire such information. I have less evidence on how the information is used.

Mr. BLOMMER. Well, you approve the Litton System policy—that one arrest is not an automatic exclusion?

Mr. PEMBERTON. I am not sure that *Gregory* is a significant litigation of the screening device. Everything that I have seen endorsed in Mr. Neier's statement, that for people who live in the inner city, at least, one arrest attracts another, that it may not be significant after I have had one arrest, that I collected 13 more.

Mr. BLOMMER. I am not arguing that at all. There seems to be an impression, at least, if one would read our hearing record, that a record of arrests is quite a crippler as far as getting jobs.

Mr. PEMBERTON. It is.

Mr. BLOMMER. In this case of one company, it's not a crippler if the record shows only one arrest.

I am trying to find if that is typical or atypical, that private employers will disregard one arrest.

Mr. PEMBERTON. I could not say or answer your question, because the number of our cases that have been fully investigated is much smaller than the number of all cases. We are aware of what is easy to obtain in an investigation, the employer's application form, and the number of those that ask the question, are very considerable, but the number that we have had to investigate further to find out what use they make of the questions is much smaller. So I don't have that evidence.

Mr. BLOMMER. Well, in another area, not in the private sector, is the crippling effect of arrests on someone who seeks a license from a State.

Mr. PEMBERTON. Yes.

Mr. BLOMMER. And the feeling seems to be that that is a great crippler of your ability to get a license. Have you found that to be true?

Mr. PEMBERTON. I think starting with moral character questionnaires, which, of course, have been dealt with in some Supreme Court decisions and in other litigation. The use of arrest record information has been common and it has had an effect, yes.

Mr. BLOMMER. Well, what about other areas outside of the moral character of lawyers?

Mr. PEMBERTON. Again, I was trying to answer your question from personal knowledge. We do not monitor State licensing agencies. We have not yet established that jurisdiction, and therefore I do not have personal knowledge of the extensiveness of such inquiries or the effects of such inquiries. I mentioned bar examinations because I knew something about bar examinations.

Mr. BLOMMER. Let me point out to you something that is very interesting to me, from our record. A report made, maybe you are familiar with this report, made by a committee to investigate the effects of police arrest records on employment opportunities in the District of

Columbia. That committee was chaired by Mr. Duncan, who testified about that report, and that report, on page 193 of our record, had a very interesting set of facts that I would like to comment on.

I am quoting from page 193:

> The Superintendent of the License and Permit Division, Department of Licenses and Inspection for the District of Columbia government reported there are 35 categories of business which require police recommendations concerning applications for licenses with regard to moral character or suitability otherwise. Among these businesses are such enterprises as nightclubs, bowling alleys, pawnshops, poolrooms, sellers of deadly weapons, and home improvement contractors. It was stated that last year the police department unfavorably recommended 300 applicants for various types of licenses, but that following interviews, conferences, and independent investigations, the Department of Licenses and Inspections declined to follow such recommendations in 200 cases.

Now, the unfavorable recommendations are both of arrest and convictions.

Mr. PEMBERTON. Yes.

Mr. BLOMMER. So that department for one ignores this debilitating factor in two out of three cases.

Mr. PEMBERTON. That sounds much more enlightened than the modest litigation of the Litton Systems, which we were discussing a moment ago.

Mr. BLOMMER. In these two instances, in the case of Litton Inc., a single arrest wasn't harmful, and as far as this D.C. licensing bureau, arrest and convictions doesn't seem to be very crippling. I wonder if you can point out specific examples or provide specific examples of where an arrest is arbitrarily crippling to someone's employment opportunities. I don't think that is in our record.

Mr. PEMBERTON. I don't need to go further than the *Gregory* case. You say that Litton Systems' policy was mitigated because, as a matter of fact, probably they would excuse three arrests. But given the fact that for some classes of poor and disadvantaged people, a single arrest leads to multiple arrests, and a record of multiple arrests may prove no more than that a single arrest did lead to multiple arrests, it would seem to me that any person who has been denied a job based upon anything so irrelevant as an arrest record would be in fact a victim. I can only testify to the fact that many employers are asking the question. The question is irrelevant, but the fact that it is asked suggests that some use is made of it. I suggest that the uses are irrelevant and the people who do answer——

Mr. BLOMMER. Why is it irrelevant?

Mr. PEMBERTON. An arrest establishes at most that somebody is accused of committing a crime, not even that there is probable cause that they did commit a crime, much less that it's beyond a reasonable doubt that a particular person did it. Suspicion arrests, do not even establish that. Suspicion arrests establish that you were there when a dragnet occurred; that the investigating authorities chose to interrogate you in custody rather than out of custody. And that establishes nothing bearing upon your conduct. That ought not to bear upon your ability to perform a job and perform it with safety and integrity.

Mr. BLOMMER. I do have some questions about section 3106 of H.R. 188 which insulates an individual from responding as to his own arrest record under certain circumstances. I won't belabor the point, the use of arrest records in courts, and this is outside of it. I wonder

if you would comment as to the wisdom of allowing someone to deny under oath that he has been arrested; that is, commit perjury. Is this a desirable way to approach this problem? Should that happen?

Mr. PEMBERTON. I think when the law, as I believe it has, inspired, by its practices, debilitating and corrupt practice, it may be necessary for the law to lean over backwards to prevent the continued use of the practice. It might be possible, as I think Father Drinan suggested a moment ago, to prohibit asking the question altogether. It may be effective and may be necessary to direct how the question is answered.

Commonly, of course, employers who ask the arrest record quesmay be effective and it may be necessary to direct how the question is tion, assert, as Litton did, at least in some instances, that they will not screen out persons with such records—though they will deal harshly with what they consider an erroneous answer or an unfruitful answer. If what you are seeking to protect is a matter of privacy, and I think the policy suggested by this bill is that of protecting an interest in privacy, then it would seem to me that it is no more perjury or an offense or any more wrong to protect that privacy by answering an irrelevant question inaccurately than to refuse to answer it.

Mr. BLOMMER. Yes; I was referring to it in another context, that didn't have anything to do with employment. I was referring to someone testifying in court, that he had never been arrested, when he had. I won't pursue that.

I will pursue your suggestion. It might be a much wiser way to approach it. Forbidding the question if it is irrelevant rather than doing it the other way, which would affect all sorts of collateral matters.

Mr. PEMBERTON. No, sir, I am suggesting that to achieve your effect, you would have to do both. You can forbid the question, but I submit the law already forbids the question as Title VII has been interpreted, yet the question continues to be asked. What is a person who is probably broke because he is unemployed, who has applied for a job, going to do against a major corporation that violates that law by asking the question when he is seeking a job? He is not going to take that employer to court. He has no money with which to do so. He is not even going to even call up the local police and say here is this big corporation violating the law. He has got to fill out the application form because he needs a job, and what section 105 deals with is how that person is going to fill out the application.

Mr. BLOMMER. Are you suggesting that the Civil Service Commission routinely is violating the law in its practices as they now exist?

Mr. PEMBERTON. The Civil Service Commission changed its practices a while back happily, before *Gregory* v. *Litton*.

Mr. BLOMMER. They still get the information routinely as to people who are hired, is that correct?

Mr. PEMBERTON. I do not think so. I am a fairly recent Federal employee. I don't remember answering that question myself on form 171.

Mr. BLOMMER. Well, I see what you mean.

The information that they have been arrested has been obtained by the Civil Service Commission regardless of any questions, after they have been hired.

Mr. PEMBERTON. I suspect that it's so readily available that they may well obtain a civil service suitability clearance; I don't know.

Mr. BLOMMER. One final question. Do you see any, or should there be any, policy difference between a purely private corporation like Litton Systems for a federally insured bank or savings and loan?

Mr. PEMBERTON. None whatsoever. My premise is that the arrest record question is irrelevant for any non law enforcement purpose. Now, there may be many circumstances in which a bank or a defense industry would be required to obtain security clearances for its employees, and they must investigate an applicant for employment more thoroughly than a taxi company hiring a taxi driver or the Minneapolis Fire Department hiring a firefighter. The point I am suggesting is that the fact of an arrest record does not help that inquiry. If you must find out whether the applicant has in fact engaged in unlawful conduct, and presumably in particular kinds of unlawful conduct such as theft or embezzlement, or in certain cases of violence to the person, an arrest record is not going to help you find that out. It's going to add irrelevant information to the file, but not relevant information. You must make your inquiry more broadly than that, and at the same time, more narrowing.

Mr. BLOMMER. Well, I have to disagree that it would not help your investigation. I say that because you must be aware of the fact that someone wasn't convicted of the crime he was charged with, often has nothing to do with whether or not he committed the act.

Mr. PEMBERTON. I would adhere to your statement if you dropped the word often. A small proportion of cases involve offenses such as the Miranda offense, which are unrelated to guilt or innocence. Substantial proportions of crimes result in no arrests whatsoever. Other substantial portions of crimes result in arrest for investigations that bear very little if any reason to believe that the person arrested had anything to do with the crime. Of those that do result in dispositions, acquittals or dismissals by the prosecutor for lack of evidence or for other reasons, only a very small proportion of such cases involve the so-called technical legal defenses unrelated to guilt.

Mr. BLOMMER. In that small proportion, then, you wouldn't say it would help the investigation of an applicant by, say, the Defense Department, for example?

Mr. PEMBERTON. Yes. If you're the investigator charged with finding out something about my background, the fact that one case out of 1,000, something about my arrest might be productive. I may well be handicapped—it may well handicap your investigation to seek that information, because this is going to require you to investigate the other 999 cases in which the arrest information is irrelevant. Your time as an investigator, your resources to investigate, ought to be spent more productively than to investigate arrest information.

Mr. BLOMMER. If H.R. 188 becomes law, the investigation which you refer to will have to start from scratch, because the Defense Department will never know that anyone has been arrested.

Mr. PEMBERTON. And I am sure that is desirable, not only for the reasons that we have been discussing here, but for the additional reason that the investigation will be more productive. You would not be wasting the investigator's time going through material 999 times out of 1,000 which will be useless to him.

Mr. BLOMMER. And you balance out the 1 out of 1,000.

Mr. PEMBERTON. Against the social desirabilities of the arrangements that are being proposed.

Mr. BLOMMER. I have no further questions.

Mr. PARKER. I have a couple of questions, Mr. Chairman.

Mr. Pemberton, the standard U.S. Government application, form 57, was recently modified to ask for information concerning all of those arrests that were followed by convictions, rather than asking for all arrests.

Mr. PEMBERTON. Thank you.

Mr. PARKER. But isn't that rendered somewhat meaningless if the same Government agencies turn around, take the fingerprints, and send them to the FBI and get a rapsheet, which they presently can do?

Mr. PEMBERTON. I think so.

Mr. PARKER. So that H.R. 188——

Mr. PEMBERTON. I had to express ignorance of what the practice was. I thought I remembered what the form was.

Mr. EDWARDS. Don't they get the permission from the applicant?

Mr. PARKER. I don't think so.

Mr. PEMBERTON. Mine was 2½ years ago.

Mr. PARKER. Did they ask the FBI for this information? They are part of the Federal agencies.

Mr. PEMBERTON. If you know what their practice is, I can tell you what happened to me.

Mr. PARKER. So really, while this has a laudatory purpose, it's not very meaningful at the moment, unless there was some additional information which would prohibit the dissemination of that rapsheet to the Federal agency, to a nonlaw enforcement agency.

Mr. PEMBERTON. I certainly agree.

Mr. PARKER. Would it be your opinion that the present state of the Federal law is dictated by the cases, the screening of applicants, on the basis of their arrest records is arbitrary, discriminatory, and unlawful, it has nothing to do with whether you have 1 arrest or 14 arrests, the practice of screening is unlawful?

Mr. PEMBERTON. Yes; limited as I suggested in my colloquy with Father Drinan, to those cases where the person being inquired about is a member of a protected class under Title VII, a minority by race or national origin, unless we can produce some other statistics.

Mr. PARKER. I have no further questions.

Mr. EDWARDS. Well, thank you very much. You have been very helpful, and it was nice seeing you again.

Mr. PEMBERTON. Thank you.

Mr. EDWARDS. The subcommittee stands adjourned.

[Whereupon, at 12:30 p.m., the subcommittee adjourned.]

DISSEMINATION OF CRIMINAL JUSTICE INFORMATION

THURSDAY, AUGUST 2, 1973

HOUSE OF REPRESENTATIVES,
CIVIL RIGHTS AND CONSTITUTIONAL RIGHTS
SUBCOMMITTEE OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:10 a.m. in room 2226, Rayburn House Office Building, Hon. Don Edwards [chairman of the subcommittee] presiding.

Present: Representatives Edwards, Sarbanes, Drinan, Rangel, Wiggins, McClory and Butler.

Also present: Alan A. Parker, counsel; Michael H. Blommer, associate counsel; and Arden B. Schell, assistant counsel.

Mr. EDWARDS. Good morning.

I believe we will come to order, since the House has to go into session at 11 o'clock. We are going to have some disruption, I am sorry to say. We never know in advance about this.

We had expected to have Mr. James W. Baldwin, Director, D.C. Office of Human Rights testify, but he could not come, so we welcome Mr. Barry Zanoff, Associate Director for Research and Statistics for the D.C. Office of Human Rights, and it is my understanding, Mr. Zanoff, that you are going to read the statement of Mr. Baldwin, but that if we have any questioning, we will have to get it from him by other means, mail or conversation.

Would you come up to the microphone and proceed?

TESTIMONY OF BARRY ZANOFF, ASSOCIATE DIRECTOR, RESEARCH AND STATISTICS, DISTRICT OF COLUMBIA OFFICE OF HUMAN RIGHTS

Mr. ZANOFF. This is correspondence from Mr. James W. Baldwin, Director of the D.C. Office of Human Rights to Hon. Peter W. Rodino, Jr., Chairman, Subcommittee on Civil Rights and Constitutional Rights of the House Committee on the Judiciary, House of Representatives, Washington, D.C. It is dated August 1, 1974.

DEAR MR. RODINO: The Office of Human Rights, which serves as the enforcement agency for the fair housing and fair employment laws of the District of Columbia and the Equal Employment Opportunity regulations for D.C. Government, welcomes the opportunity to present its views on the civil rights aspects of the use of arrest records as they relate to employment and housing. It supports fully H.R. 188, the bill seeking amendment of Title 28 of the United States Code to provide for the dissemination and use of criminal records in a manner that insures their security and privacy.

It is the position of this agency that the use of arrest records as a criterion in the selection of an applicant for employment or housing has a discriminatory effect upon blacks. An early court decision in an employment discrimination case (*Gegory* v. *Litton Systems, Inc.*) cited statistical evidence that while Negroes comprise 11 percent of the national population, they account for 27 percent of reported arrests and 45 percent of arrests reported as "suspicion arrests." The court in the case found that "any policy that disqualifies prospective employees because of having been arrested once, or more than once, discriminates in fact against Negro applicants. This discrimination exists even though such a policy is objectively and fairly applied as between applicants of various races." This office supports that view.

This office believes, further, that a conviction record of itself should not be an absolute bar to employment or housing but that each case should be weighed on its merits taking into consideration the nature and gravity of the crime and how that might have a bearing on the applicant's ability to perform efficiently or honestly or to be a good tenant. We believe that it is encumbent upon the prospective employer or housing agent to show a business necessity for refusing an applicant, i.e., that such a policy is essential to the safe and efficient operation of the business.

Adoption of H.R. 188 will serve to prohibit the use of arrest records in the selection process of applicants for employment and housing and will have the end result of increasing employment and housing opportunities for blacks.

Thank you for allowing us to respond to this question.

Sincerely,

JAMES W. BALDWIN, *Director.*

Mr. EDWARDS. Thank you very much, Mr. Zanoff, for appearing before us today, and extend our thanks to Mr. Baldwin. Your statement will be made a part of the record, and in the event we have a need for any more information, we will be in touch with your office.

Mr. ZANOFF. Thank you, sir.

Mr. EDWARDS. Our next witness, and our last for today, is Ms. Nancy LeBlanc, assistant legal director, Mobilization for Youth, Inc., New York, N.Y.

Miss LeBlanc, we welcome you. You may proceed.

TESTIMONY OF NANCY LeBLANC, ASSISTANT LEGAL DIRECTOR, MOBILIZATION FOR YOUTH, INC., NEW YORK, N.Y.

Ms. LEBLANC. I am not sure of the procedure you usually follow, and this is the first time I have been invited before the committee.

Mr. EDWARDS. Well, it would be helpful if you read the statement.

Ms. LEBLANC. You want me to read the statement? I am sorry it was not delivered in advance.

Mr. EDWARDS. That is fine. None of us has had a chance to read it yet.

Ms. LEBLANC. No, I realize it was just handed to you.

I am an attorney with and the associate director of MFY Legal Services, Inc., an OEO funded neighborhood legal services program, which provides free legal representation and assistance to indigent people living on the Lower East Side and West Side of Manhattan in New York City. I have been with the program since its inception some 9½ years ago. It started out as a small component of Mobilization for Youth, funded by the President's Committee on Juvenile Delinquency. From the beginning the attorneys were closely involved with the problems of people who have been arrested and the civil as well as criminal aspects that flow therefrom. A major concern of mobilization was the youth in the community and since the community was basically a slum inhabited by poor blacks and Puerto

Ricans, the problem of arrests was very real and of wide concern and impact.

The fact that the youth involved were Puerto Rican or black is a very real one. The use of arrest as a tool for dealing with problems in the ghetto is all pervasive. Many incidents which if they had occurred in a white neighborhod would have resulted in admonishment from the local police or even other adult authority figures, result in arrest in a Puerto Rican or black community. Therefore, black and Puerto Rican youths frequently have arrest records which arise out of situations which in white communities are treated by authority figures as mere "youthful spirits."

The disparate use of arrest records continues into adulthood, where again blacks and Puerto Ricans are frequently arrested under circumstances which would not lead to the arrest of a white. See the background information for the Guidelines on Use of Arrest and Conviction Records as Job Selection Criteria issued January 1973 by the Commission on Human Rights of the City of New York, and several copies of that were submitted to you, where it is pointed out that minority group members are arrested in greater proportion than others.

A black or a Puerto Rican has a difficult enough time when he seeks decent housing or employment. The use of arrest records as a bar to his employment or housing only compounds the problem.

Inherent in the use of arrest records is also the fact that most people are arrested for much more serious crimes than they are eventually charged with or convicted of. However, the arrest record itself usually does not indicate that an arrest, for example, for murder was reduced to a charge of manslaughter 1, and the conviction was for manslaughter 3. Therefore, the arrest record is used as a bar, partly because of the seriousness of the charge when, in fact, it is usually highly exaggerated.

Moreover, despite the fact that a person is presumed innocent until proved guilty, most employers, housing managers, and so forth, consider the fact that the applicant was arrested for a stated reason to be some evidence of guilt, even if the case was later dismissed or he was convicted of a lesser offense.

For example, I have handled a number of cases of people either seeking to be admitted to public housing or who are being evicted from public housing.

In one admission case, the applicant had been arrested five times—only one arrest resulted in a conviction more serious than disorderly conduct. It was for assult 3. Despite this, because the Housing Authority saw an intertwining network of "criminal behavior," the family was denied admission.

In numerous termination (eviction) cases, the Housing Authority sets forth in its "basis for nondesirability" the charges contained in the arrest record. They do this even when they know the tenant was not convicted of those charges.

For example, in one case, the charges included arrest of one of the sons in the family on the charge of possession of narcotic paraphernalia. Needless to say, in New York City at this time, any charge involving narcotics is enough to cause panic and hysteria. However, the Housing Authority's own witness testified at the hearing that the

arrest charge had been dropped and the youth convicted of disorderly conduct. Despite this, the Housing Authority hearing officer found the charge sustained. (The family was found nondesirable, and eviction recommended. There were additional charges also made and sustained. The case is on appeal.)

In another case, the charges of nondesirability included "your son was arrested and charged with having committed robbery at knifepoint." The Housing Authority actually offered proof only that he was convicted of robbery 3. The hearing officer found the charge sustained and recommended eviction. (The case is now on appeal.)

In what I consider one of the grossest examples of the dishonest use of arrest records to cloud the issue, the charges of nondesirability made were:

Your son was arrested on charges of grand larceny, third, on another occasion for grand larceny, second; possession of a dangerous weapon; robbery, second degree; burglary, second degree, rape, first degree; sexual abuse, first degree; and sexual misconduct.

The Housing Authority then admitted, and all they proved was that the son had been convicted of robbery, third degree. However, at the hearing, knowing it couldn't prove any of the charges, the Housing Authority still attempted to introduce evidence of the indictments for the various charges on which the son was arrested. Although the hearing officer recommended the family be placed on probation for a year, the Housing Authority decided to evict. Needless to say, it is on appeal.

All of these examples illustrate how viciously arrest records are used to deny people decent housing, under circumstances where, if the actual conviction record is all that was allowed to be charged, the record would not, on its face, appear very serious or worthy of eviction (or denial of admission).

I should also note that all but one of the above examples involved black or Puerto Rican families.

The use of arrest records to deny people employment is even more invidious because it is more secretive. At least in the housing field, there is provision for a hearing, at which time there is a chance to make a record regarding the actual facts, disposition of the arrest, and so forth. This is not so in the area of jobs.

The usual job application form has a question asking:

"Have you ever been arrested?"

"Have you ever been convicted of a crime?"

Frequently, there is no provision for any explanation. Even if there is, the presumption of guilt which flows from the fact of arrest is always present. Note the facts set forth in an article by Phillip Fishman in the Clearinghouse Review for April 1973. The author noted that 75 percent of the employment agencies questioned in a New York City sampling would not even refer to a job an applicant with an arrest record. The author also went on to note that in the United States, probably three out of four arrests were illegal.

Moreover, since in New York a person between the ages of 16 and 19 may be arrested, but then treated as a youthful offender, a status which is by law not supposed to constitute a crime, or act as a bar to any governmental benefits, having to answer yes to the question regarding the arrest results in being forced to disclose the youthful offender adjudication. Most employers are not prepared to make the

nice distinction between conviction for a crime and adjudication of youthful offender.

If the applicant attempts to protect himself by failing to answer yes to the arrest question, he may later find himself being fired for lying on the application. In one case I had, the man (black) had been arrested when he was about 19. He never went to jail and was uncertain whether the charges had been dropped or not. (Many people who are given suspended sentences are often uncertain whether they were, in fact, convicted or the case was dismissed. Given the chaotic conditions which exist in the lower criminal courts, as well as frequently the language barriers, this is not really as surprising as it sounds.) He discovered that if he answered yes to the arrest question, he never got any further. He finally said no. As a result, he got a good job (in the New York City Parks Department). Then they ran a check and found about his arrest. He was fired for lying on the application form.

Needless to say, there was no relationship whatsoever between the basis for the arrest and his job in the Parks Department. As a result, however, he was forced to go on welfare for a short time until he finally got a job for a private company, paying very low wages, because they took people with arrest records.

The problem this man faced highlights another facet in the whole use of arrest records. The reason for the arrest frequently has no logical bearing on whether a person should be admitted to or allowed to continue in decent housing, or whether a person should be given a particular job.

If a man robs a store in the Bronx, it has no logical connection with his tenancy in public housing on the Lower East Side. If a man is arrested for disorderly conduct, it has no logical bearing on his ability to rake leaves in Central Park, or to fix cars in a garage, or to do any one of a hundred other jobs.

The use of arrest records to in effect say a person is guilty of a crime and therefore can be denied housing or employment is, I think, an evil and vicious practice which should be prohibited by law.

Thank you.

Mr. EDWARDS. Thank you very much.

Ms. LEBLANC. I might add that as I—we were finishing the typing of the statement, one of the other attorneys in our office, the head of our law reform department, walked in and she heard what I was doing, and she said, I have a case just in point on what you are talking about, and she went down and got me some xeroxed copies which I have distributed to the staff for their information. I have brought five copies of it for you, and it says, post office employment.

Mr. EDWARDS. Thank you. We will examine it.

Ms. LEBLANC. It is just a case history—it sets forth the facts of a given case where a person was in fact arrested for possession of marihuana and it was his first arrest, and his records were sealed, provided for by law, but he was still denied employment on the basis of the arrest.

Mr. EDWARDS. It will be made a part of the record, without objection.

[The document referred to follows:]

MEMO RE POST OFFICE EMPLOYMENT

MFY LEGAL SERVICES, INC.,
New York, N.Y., August 1973.

To: All attorneys.
From: Carolyn Heft

David Lansner of the Canal Street office had a client who was denied employment with the Post Office because he indicated on the application form that he had been arrested for possession of Marijuana despite the fact that as a first arrest his records were to be sealed and expunged pursuant to the Criminal Procedure law § 170.56.

Attached is the correspondence which won the client employment without litigation.

CAROLYN M. HEFT.

MFY LEGAL SERVICES, INC.,
New York, N.Y., July 18, 1973.

Re ——— ———, employment applicant.

Mr. WILLIAM F. BOLGER,
Regional Postmaster General
Main Post Office, New York, N.Y.

DEAR MR. BOLGER: On behalf of ——— ———, I am writing about his rejection as an applicant for the position of Letter Carrier in the Postal Service. Mr. ———, an otherwise eligible person with veteran's preference, was interviewed twice for the Letter Carrier position and both times was advised by Mr. John R. Strachan in the letters of January 18, 1973, February 18, 1973 and March 2, 1973, that another eligible person had been appointed without further clarification.

In response to a letter from Congressman John M. Murphy requesting an explanation of this action, Mr. J. A. Matukonis, your Congressional Liaison Officer, stated in his letter of May 21, 1973 that "the New York Post Office is reluctant to employ persons with a history of drug use since they have, in many cases, proven unreliable."

We take the position that the denial of employment to Mr. ——— on the presumption implied in Mr. Matukonis' letter is an unjustifiable and arbitrary action. In all candor, Mr. ——— disclosed in response to a question on your application form about prior arrest, that he had been arrested for possession of marijuana on September 29, 1972. There are clear grounds based in New York State law and a recent court decision why Mr. ——— should not have answered this question in the affirmative as he did, and, *a fortiori*, since he volunteered unnecessary information, why it should not be used to deny him employment. Further, in fact, it should be clear to you that an arrest for possession of marijuana is not a basis for presuming or concluding that the person has any history of drug use, without conceding that such a history can be a basis for another conclusive presumption that use at some time means the person is unreliable. In fact, there is no indication of any drug history for Mr. ———.

Upon reviewing the facts with Mr. John MacKay, Regional Coordinator, Equal Employment Office, for the U.S. Postal Service, he indicated in a conference with Mr. ——— and Diane Giacalone, an M.F.Y. law student interne, that he would attempt to have the case reopened with an eye to providing Mr. ——— with employment. For the past three weeks, Mr. MacKay has been making efforts to have the case reopened. Ms. Giacalone, on Mr. ——— behalf, has been in frequent contact with Mr. MacKay over this period and while he has been unable to obtain any action from you or Mr. Dravin, Manager of Personnel, he has been extremely helpful and cooperative.

Since Mr. ——— continues to be denied employment without cause with the Postal Service because of a decision made about six months ago, we seek a prompt determination of his employment application. Under N.Y.S. Criminal Procedure Law 170.56, Mr. ——— status is identical to that of a person who has never been arrested. All records of his arrest and subsequent court proceedings, including his fingerprints, are sealed, and totally unavailable to any person. It is as if the arrest never took place and the records do not exist. Since this statute enacts the legislative policy that for first arrests for possession of marijuana the entire incident should be completely expunged from the person's record, it is improper to use the arrest so expunged as a basis for administrative action or denial of employment.

Now that the law and circumstances have been brought to your attention, your action should be favorable to Mr. ———. On the event we do not hear from you promptly, I will have to advise my client to take further action to obtain a final determination of his case.

Very truly yours,

CAROLYN M. HEFT.

U.S. POSTAL SERVICE,
New York, N.Y., July 24, 1973.

CAROLYN M. HEFT, ESQ.,
MFY Legal Services, Inc.,
New York, N.Y.

DEAR MS. HEFT: Your letter of July 18, 1973 to Mr. William F. Bolger, Regional Postmaster General, has been referred to me.

Please be advised that Mr. ——— was started on the process of employment in the New York Post Office today and assuming that he is physically fit etc., he will become an employee of the New York Post Office effective Saturday, July 28.

We are advising you of the above for your information but please understand that we may not agree with all of the statements contained in your letter of July 18.

Sincerely,

C. V. ROWLAND,
Assistant Regional Postmaster General for Employee and Labor Relations.

Mr. EDWARDS. The cases that you tell us about would not be criminal records, arrest records, or rapsheets, as they are called, from the FBI? This information——

Ms. LEBLANC. This is from the New York City Police Department.

Mr. EDWARDS. It was my understanding that access to criminal records in New York is limited by law to qualified criminal justice agencies and specific agencies as listed in the law, and does that include the Housing Authority? It must.

Ms. LEBLANC. I think through the Housing police, probably. I might say that you will never know that they were limited—to specific groups because they are commonly accessible.

Mr. EDWARDS. Yes, I believe roughly the law is supposed to limit the dissemination of arrest records to qualified criminal justice agencies and specific agencies, as listed in the law. Also, the Attorney General can advise the New York Stock Exchange on whether to hire an individual based on his arrest record. The agencies and employees sign a statement acknowledging the fact that it is unlawful to disseminate criminal information to those unauthorized to receive it.

However, the Housing Authority in New York could receive FBI records if it is authorized by local law. I do not think there would be any disagreement on that. However, I think in addition to what goes on in these housing applications, your testimony is that arrest records are used widely by employers who are interviewing prospective employees.

Ms. LEBLANC. Right.

Mr. EDWARDS. Where do you suppose these employers get the arrest records?

Ms. LEBLANC. It is my impression that there are some agencies where the employers can get information through the same way you can do a credit check on someone. I do not know actually how they do it.

Mr. EDWARDS. Let us presume that there was a requirement that criminal records that are furnished to the Housing Authority have to be conviction records or arrest records with final disposition on the face of it. Would that improve the situation?

Ms. LeBlanc. Not really, because as you will note from a number of the cases that—examples I gave, they in fact knew what final disposition of it was. They used the facts put forth in either the indictment or the arrest in an attempt to persuade the person who was hearing the charges that it was really much more serious. It is clear, you see, there is a very simple attitude, and there may be some justification for it. It still undermines our judicial system. People are often guilty of much more than they are convicted of. Therefore, without independently knowing, there would be a difference if the housing authority would independently prove that somebody committed an act if later the case was dismissed in court, because there was a technical objection where you could not convict for the crime, but if you could give independent evidence, since in a civil proceeding the preponderance of the evidence is a lower standard than beyond a reasonable doubt in a criminal case. You could prove your case in a civil court.

They do not do that. They do not bring in some one to prove independently the facts that gave rise to the arrest, which were not later really encompassed within the final conviction. They simply try to use the fact that the arrest says it is for these purposes. They do not prove, in fact, the truth of the charges contained in the arrest, and the conviction is for something considerably less.

They usually come in with the certified court records of the conviction. There is not any question that they know what the conviction is for. Now, occasionally, they also, a number of times, commence a case once there is an arrest, but before there has been any disposition of the case, which we objected to, needless to say.

Mr. Edwards. What do you think the practice ought to be?

Ms. LeBlanc. Well, I do not think that they should have access to the arrest records at all. It seems to me that the fact of an arrest should be——

Mr. Edwards. Or conviction?

Ms. LeBlanc. As to the conviction, once a person is convicted, insofar as the conviction, I think a conviction would constitute a public record. I suppose you would have to say they would have to have access to a conviction, but I don't think they have to have access to what goes behind the conviction; that is, what the original charges were. The housing authority is in a peculiar position, because frequently the arrest occurred on their own project by one of their own housing employees. In New York, the housing authority maintains its own police force. So they know when an arrest has occurred, because their own staff has been the arresting officer. I do not know if that is true in most cities.

Mr. Edwards. Mr. Wiggins.

Mr. Wiggins. Do you have any comment on the bill before this committee, H.R. 188?

Ms. LeBlanc. I must admit I have never seen the bill, Mr. Wiggins. When I received the invitation to speak before the committee, the bill was not included, and I have been so busy, and I did not think to write out a letter and ask you.

Mr. Wiggins. Well, we appreciate your general observation in any event. The bill addresses itself primarily to the dissemination of arrest records and that process of dissemination which occurs through public agencies.

Ms. LeBlanc. Yes.

Mr. Wiggins. Do you think if we were to prohibit that dissemination there would develop a private means of collecting information from the public records which would supplant the public dissemination of these records? Probably in the nature of a credit system?

Ms. LeBlanc. I would suspect there would be some development. It probably would not be as widespread as the use of the dissemination of the public agencies. I am sure that some people would eventually develop a system for collecting the data, if you are willing to pay enough for it. It might not as heavily affect some of our clients, because it might not be worthwhile for some of the people whom our employments seek. The employers would probably pay the necessary fees to get access to this information. But even preventing dissemination through the public agencies would be of great benefit because so many of the—for example, a lot of our clients seek employment through Federal or city or governmental agencies, and if they were prohibited from this sort of casually passing out information or receiving information, particularly the fact that family court records are supposed to be sealed, and never open to the public. But what happens in terms of juvenile delinquency records? They are records that are easily available.

Mr. Wiggins. Do you have objection to a statute which would permit dissemination of arrest records even without a disposition to police agencies for law enforcement purposes?

Ms. LeBlanc. Yes, because of the assumption of the arrest, even though there is no disposition. Some guilt is attached, some presumption, the arrest itself is some evidence that a person has committed a wrongdoing, and if he was later acquitted or if the case was dismissed, the real problem is when the case is dismissed on a technical reason, rather than acquitted on a trial by jury.

Mr. Wiggins. Now, the person's right to employment is dependent upon his freedom from wrong proved beyond a reasonable doubt. Perhaps his freedom from wrong or his involvement, let us put it this way, may be established by something less than a reasonable doubt standard, and be very well relevant to an employer's desire to employ that individual.

Ms. LeBlanc. If you stated employment was a right which somebody would have if they had a right to apply for the job, if they were denied that job, had the right to have a hearing whether or not the employer was a private employer or a public employer, so that the employer would be forced to establish the logical relationship between the arrest, so that he would be forced to go beyond the arrest, doesn't prove anything except the fact that the man was arrested. There is no forum where this man can indicate where the facts would be forced—the employer would be forced to prove something beyond a reasonable doubt that in fact the person committed these acts.

Mr. Wiggins. I cannot admit that the fact of an arrest proves nothing. There are obviously many illustrations of which an arrest is bottomed on no facts whatsoever.

On the assumption it's a lawful arrest, it's bottomed upon probable cause, reasonable doubt, which may be relevant, and maybe even though those facts should not be proved beyond a reasonable doubt.

Ms. LeBlanc. Since there is really no forum for the proving of those facts, and since if there was no conviction resulting from the arrest,

you have no basis for having the arrest, for knowing that the arrest was in fact based on real probable cause. You merely put yourself in a particular bind.

Mr. WIGGINS. Do you object to an employer, absent an arrest record, asking a prospective employee the question, have you been arrested?

Ms. LEBLANC. Yes.

Mr. WIGGINS. Would you object to him asking a prospective employee if he has ever been in trouble?

Ms. LEBLANC. Yes.

Mr. WIGGINS. What germane and relevant facts would you allow, then?

Ms. LEBLANC. I wouldn't say have you ever been in trouble, I mean, so broad. You could say that my wife hit me in the head this morning. It was pretty rough, and I'm in trouble, too. You know, the point would be, questions that directly relate to the activities relevant to the job, and there is really never an attempt to tie one to the other. If you were hiring a man to drive a truck, say I would think it would be appropriate to ask him if he had ever been involved in any accidents or any kind of legal situations involving driving. That turned out that he had been arrested three times for running a red light, and every time he goes around a corner, he takes off the back end of somebody whose car is parked a little too close, that is relevant. You would not want him driving your truck.

But if he was driving a truck, and was arrested for disorderly conduct, that constitutes being in trouble, that is really having no relevancy.

Mr. WIGGINS. I understand that it might be difficult to find out the nature of that trouble unless you ask the first general question, whether he has been in trouble, and follow through with the second question.

Ms. LEBLANC. Maybe the more important thing is the employer should be required to think about what trouble would be relevant to his job that he is offering, and ask questions specifically relating to the job.

Mr. WIGGINS. Would you object to an employer asking a question whether or not he has been convicted of a crime?

Ms. LEBLANC. Fundamentally, I object. I do not think I can legally object.

Mr. WIGGINS. Well, I think you could make just as strong a legal objection on one point as on the other, because the law is pretty vague in this field.

Ms. LEBLANC. As to what constitutes a conviction, I think the New York City guidelines, while they would let you ask, they would not let you base your refusal of employment on the conviction unless there is a rational relationship between the nature of the conviction and the job. If somebody was convicted for stealing or embezzling, and if he was looking for a job which would put him in the position where he could easily continue his career as an embezzler, you would not want to hire him.

Mr. WIGGINS. I am not a large employer. I have about seven or eight people on my staff. Would I be limited in any way to going into this inquiry with any member of the staff?

Ms. LEBLANC. I think you should be limited to those things which I say are relevant to the job that you are asking them to do.

Mr. WIGGINS. What about a person's drinking habits?

Ms. LEBLANC. I think that certainly can be very important on the job, and that is probably more relevant to me than many questions on conviction for a crime or arrest. Because if a person has a drinking problem, that can really affect his performance on the job.

Mr. WIGGINS. Well, I have a little hang-up here. If I can ask a person, without knowing the answer, whether that person has been involved in a problem area which may rise to the magnitude of simple misconduct, it would seem inconsistent to me to be denied the right to ask a person about another problem area which does rise to the magnitude of criminal misconduct.

Ms. LEBLANC. It does not seem to me that the fact that someone has been involved in criminal conduct could ever act as a bar to his being able to participate in the rest of society. If one—if the conviction of a crime is to mean that one could be in effect put off on Devil's Island and, you know, sealed off from the rest of the world, fine. But as long as that is what the result is not supposed to be, then it does not seem to me that the conviction or the arrest is something that ought to be publicly discussed or something that is always held up to the person when he is attempting to do those things which a normal citizen is entitled to do, such as have a nice place to live or have a job.

The irony of it is that the person is forever being barred because of his criminal record. Not getting a job, that will probably encourage him to go back into criminal activities.

Mr. WIGGINS. If that argument is valid, the real problem is with the employer misusing the information in his hiring decision.

Ms. LEBLANC. That is right.

Mr. WIGGINS. I have no further questions, Mr. Chairman.

Mr. EDWARDS. Mr. McClory?

Mr. MCCLORY. We have the LEAA Conference Report, which is going to be the first thing up there.

Mr. EDWARDS. Well, Mr. Wiggins and I have three bills that are coming out of this committee, coming up the first thing, so Mr. Drinan, will you take the Chair?

Mr. DRINAN. [presiding]. All right, I will.

I want to thank you for your coming and for your helpful testimony, and to point out that most of the questions that Mr. Wiggins asked are not contained in H.R. 188. This provides that there be no dissemination of arrest records by any Federal officials, and then also the person on whom the arrest is had, that he has access to everything that is on that particular record.

But let me come back to your testimony and to this letter that you shared with us, and this gentleman, Mr. Matukonis, the congressional liaison officer, wrote to Congressman John Murphy and he said that the New York office is reluctant to employ persons with a history of drug use since they have, in many cases, proven unreliable.

Well, I write to this Mr. J. A. Matukonis all of the time, and in my judgment, and I would like to have your thoughts on this, Congressman John Murphy got this word from Mr. Matukonis, because it was not until your letter that Mr. Bolger, that actually this man, got the job to which he was entitled.

Ms. LEBLANC. That is right.

Mr. DRINAN. I just want to know, what are we going to do about Mr. Matukonis, who told Congressman Murphy, I am acquiescing in

the New York Post Office process of not employing persons with a history of drug abuse. It is not a history of drug abuse, it is a misstatement.

Ms. LEBLANC. That was the real outrageous situation.

Mr. DRINAN. I am going to write to Mr. Matukonis and to the Post Master General, whoever he is, and if this is the type of treatment that I am getting from this Mr. Matukonis, unbeknownst to me, then my faith in him has been sharply eroded.

Do you people, may I ask, plan to take any further action with regard to this matter? This gentleman is entitled, as I read the letter, to this job as of early that year, and he was put on the payroll apparently on Saturday, July 28. I am wondering whether or not you people thought of asking for retroactive pay, or something like that.

Ms. LEBLANC. I must say—it is not my case, it is our office's case, and it only came to my attention late yesterday afternoon. It was not in reference to my statement, but I think your suggestion is excellent, and I do not know whether they considered it, but I am going to point it out to Miss Heft, when I get back.

Mr. DRINAN. I think that Congressman John Murphy would be interested. I do not want to be vindictive about this thing, but we are told by the Post Office to write to this Mr. J. A. Matukonis, and we do, or at least if we write to somebody else, he gets the letter. If this is the letter that he sent on May 21 to Congressman John Murphy, it seems to me outrageous, and I suppose that Congressman Murphy wrote back to his constituent saying, here is what the congressional liaison officer has said, and if it were not for you people this gentleman would still be without a job.

Ms. LEBLANC. Right.

Mr. DRINAN. I wonder whether you would say the statute as such, or the regulations in New York City, theoretically are sufficient to protect the rights of people? I am familiar with the statute, and apparently there have been abuses, but would you say that the statute, the legal machinery, is not adequate?

Ms. LEBLANC. I must admit I do not know. It is not an area which I have directly looked at, studied the New York statute. My particular involvement has always been with housing and it did not occur to me to read the New York statute to find out what—I know the abuse is so widespread, and one would suggest there must be something wrong with the statute.

Mr. DRINAN. It does not follow that they are abused.

Ms. LEBLANC. Maybe that requires—sometimes you have good laws, if there is not an enforcement provision, or an outside enforcement provision. In other words, if you discover the material is always being leaked, perhaps there ought to be a specific provision for a way in which you could go in and have the statute enforced.

Mr. DRINAN. Mr. McClory.

Mr. MCCLORY. The House is meeting at 11 o'clock.

I do not know whether I have time to ask a series of questions that I was inclined to ask because of the early convening of the House.

You have quite a background of legal service for young people and programs financed by the OEO. I was intrigued by your earlier service in the mobilization for youth, which you say was funded by the President's Commission on Juvenile Delinquency.

Ms. LeBlanc. That was President Kennedy, of course.

Mr. McClory. And you are appearing here today on behalf of the MFY legal services in New York City.

Ms. LeBlanc. Yes.

Mr. McClory. We have enacted—we have passed in the House the Legal Services Corporation Act which would restrict lobbying activities of these publicly founded corporations that would sort of impinge on your future appearances.

Ms. LeBlanc. I think, Mr. McClory, I think the bill is terrible. But no offense to you. I hope you voted against it. But I was, in fact, invited to speak here by the committee, and therefore I do not think it would constitute lobbying activities.

Mr. McClory. I am just asking whether it would impinge on your future activities.

Ms. LeBlanc. It would impinge on some of our activities, although we do not do a great deal of lobbying work. I have done some lobbying for housing legislation, trying to get more money.

Mr. McClory. You quoted somebody as contending that in New York three-fourths of the arrests are illegal.

Ms. LeBlanc. That was the United States, not New York City.

Mr. McClory. In the United States, three out of four are illegal?

Ms. LeBlanc. I did not bring that article with me.

Mr. McClory. Would you think instead of just outlawing the use of all arrest records, authority be created for correcting arrest records and court records to insure that they are accurate?

Ms. LeBlanc. Well, I suppose it certainly would be appropriate if the person is arrested and the arrest results in a dismissal, you know, in not a conviction, that the arrest records should be expunged.

Mr. McClory. I think we have alluded to an earlier type of situation where a person hired, for instance in your office, and has some access to funds, but without knowledge of the fact that the person had been arrested for embezzlement or shoplifting or various types of offenses, that would suggest dishonesty or a temptation to appropriate somebody else's funds. That would be a highly important inquiry to make.

Ms. LeBlanc. It would be important if the person was to have any kind of a conviction which would allow him to have access to funds. We recently had such a situation and it was very bad because he stole money, but it certainly would be important to know if a person had a history of stealing so that you would be able to put the person in a position where he would not have access to funds.

Mr. McClory. You make a very broad statement here, which I do not know whether you support with statistics, that there is indiscriminate arrest of Puerto Ricans and blacks. If whites involved this same conduct they would not be arrested at all.

Ms. LeBlanc. In many instances.

Mr. McClory. A double standard. Are you able to support that by any figures?

Ms. LeBlanc. There have been a number of reports or studies that speak in those terms.

The guidelines, very shortly, within a matter of weeks, the New York City Commission on Human Rights is going to—they are presently under preparation, they had days of hearings looking into this

whole problem, the use of arrest records and the use of conviction records. But they looked at it from the standpoint that the discriminatory effect on blacks and Puerto Ricans. I had a conversation with them, and it is not available to the public yet, that document would be of interest to you, in terms of background material for some substantiation.

Mr. McCLORY. I had it brought to my attention, especially in the Chicago area, that the blacks are the ones who are the principal complainants.

Ms. LEBLANC. Right.

Mr. McCLORY. Many offenses are swept under the rug or disregarded. Police tolerate a fairly large volume of law violations, so as not to appear as discriminatory against the blacks or members of the black community. Have you heard that?

Ms. LEBLANC. That is also true, that many people, for example, feel that it is obvious the drug situation is going on. Drug trafficking is going on in a small community so that, you know, everyone in the community knows that right down there on the corner, drugs are being traded back and forth, and in fact, the police are either in on a payoff, or they are simply ignoring it because it is too awkward to get involved. The situation, particularly with young people or groups gathered, or where there is kind of a youthful malicious type, or a youthful spirited type of thing, the allegations that the police ignore usually relate to more serious types of crime against other people in the ghetto community.

Mr. McCLORY. Both situations are true, but they relate to different facts.

Ms. LEBLANC. Yes.

Mr. McCLORY. Thank you very much.

Mr. DRINAN. Thank you very much, Congressman McClory.

Congressman Sarbanes.

Mr. SARBANES. I do not have any questions.

Mr. DRINAN. All right. Congressman Rangel.

Mr. RANGEL. Thank you for coming, and I am aware of the fine work your organization has been doing in New York City.

My question is, If a person is arrested and convicted of a crime and imprisoned and serves either the time set by the court, or is subsequently discharged or paroled, do you believe he has paid his debt to society?

Ms. LEBLANC. Yes.

Mr. RANGEL. And if, in fact, he has paid this debt, like any other debt, do you not believe that it should be considered like any debt, it should not be considered as an impediment—for him to lead a life as an ordinary citizen?

Ms. LEBLANC. I would say generally yes, but within the framework of a direct relationship—if there was a direct relationship between the job you were offering somebody and the crime for which he was convicted. One would have a right to take that into consideration, and if he was convicted of stealing and the job you wanted to hire someone for is cashier at a supermarket, I think it would be appropriate for you to take that into consideration.

Mr. RANGEL. Your answer is that after you have served your time, you have partially paid your debt to society, and that you would

continue to pay that debt if there is any connection with the crime charged in the job opportunity offered?

Ms. LeBlanc. I guess you could say that.

Mr. Rangel. So if we really are going to be honest——

Ms. LeBlanc. I think if we are going to be honest, Mr. Rangel, you have to stay within the framework of a time period, say, 5 years ago, a person had been discharged from prison for stealing and there had never been any arrest of criminal activity since then, never had any other series of arrests or convictions.

Mr. Rangel. I am not going to debate, and I am not saying that my position is a correct one, but there is one thing that bothers American citizens in this country, and that is the hypocrisy of the language that we use. I think what you would say is that the defendant or the convict does not, in fact, pay his debt to society, but partially pays that debt, or further, that perhaps after some established period, he is discharged, then perhaps the debt could be considered fully paid.

Ms. LeBlanc. I think that would probably would be more honest in terms of what the situation is.

Mr. Rangel. And the same, I guess, would apply if we say that when a person is arrested, that constitutionally he is protected with the cloak of innocence, that this is not so. Has this been your experience?

Ms. LeBlanc. It certainly has been my experience. There is no question whatsoever that the fact that he was arrested is considered to be proof to some degree that he is guilty of something.

Mr. Rangel. So if a person was arrested and subsequently the charges were dismissed, or after going to trial he was acquitted, then if there is a presumption of innocence, why should anyone have to explain his innocence?

Ms. LeBlanc. I had—you and I are in full agreement on the arrest record, absolutely. I think perhaps the one way of dealing with it is simply expunge all records once the person is—the case is dismissed or does not result in a conviction.

Mr. Rangel. Or, in the alternative, let's be at least honest in the language that we use as it concerns those that are arrested and those that go to jail. I think legislative bodies on the local and national level set these on a standard; it really puts the employer in a bind. If in fact the Federal Government does not abide by the presumptions in our Constitution, then we cannot expect a higher standard from the private sector.

Ms. LeBlanc. A couple of years ago the Federal Government finally wiped out the question on the application for Federal employment which said: Have you ever been arrested?

Mr. Rangel. Thank you so very much for taking time out to share your thoughts with us.

Ms. LeBlanc. You are most welcome.

Mr. Drinan. Thank you very much, Congressman Rangel.

Congressman Sarbanes.

Mr. Sarbanes. I want to apologize for not being here to hear your statement. I looked through it very quickly, so if I ask a question that is repetitious, I hope you will forgive me.

I was interested in the housing authority which you discuss in some detail, and give some examples of how they get arrest records.

Ms. LeBlanc. Frequently they get them as a result of the arrest having taken place by their own housing employees. In New York City, the New York City Housing Authority has their own police force. It's believed that they have a tie-in, and I cannot tell you for sure that they do; they have a tie-in to the local precincts, and somebody tells them who has been arrested. They have been arrested by the local precincts, and the precincts notify the project manager.

Mr. Sarbanes. Do they, to your knowledge, receive arrest records from the Federal Bureau of Investigation with respect to people who are either seeking public housing or are in public housing and are being considered for eviction?

Ms. LeBlanc. I do not know. The reason I do not know is I have never had a case in all of the cases that I have handled in the housing authority that involved anything except an arrest by the local police force. I do not know if they get it from the FBI.

Mr. Sarbanes. Well, you handle these cases. Are you allowed to see the arrest records?

Ms. LeBlanc. Yes.

Mr. Sarbanes. On which the housing authority is basing their contention?

Ms. LeBlanc. Yes. They submit it as their evidence. The housing authority is required to have something—a due process hearing before they can evict the tenant. At the hearing, they submit the arrest records, and also certified copies of the court convictions.

Mr. Sarbanes. Now, do those records reflect, as I understand from what you said, the arrest made by the housing authority's own police force, which I take it implies some central recordkeeping at least within the housing authority administration, and the arrest records made by the New York City Police force.

Ms. LeBlanc. The New York City Housing Authority police are like the transit police. They funnel through the New York City Police so that when they arrest somebody, well, they will then go through the precinct.

Mr. Sarbanes. Now, I am interested to know whether these arrest records that are used reflect, let us say, arrests made anywhere in New York City, or are they isolated only to the particular housing project or is it the immediate vicinity as it may affect one of the residents in the surroundings?

Ms. LeBlanc. If they are using the arrest records from their own housing police, it has to be on housing authority project ground. They use those, or they use the New York City police records, which would be anywhere in the city of New York. They do not necessarily relate—no necessary relationship exists between the tenancy and the arrest. They may introduce evidence of arrest in a project in the Bronx for a tenant who lives in the Lower East Side.

Mr. Sarbanes. And they may also introduce evidence of an arrest not in a project?

Ms. LeBlanc. That is correct.

Mr. Sarbanes. It comes through the police force, and it is totally separate geographically? So there is some sort of system established.

Ms. LeBlanc. Yes.

Mr. Sarbanes. Within the New York City Police Department and the housing authority, which coordinates and correlates these records

and makes them available as these cases are heard, with respect to either admission or remaining in the housing project?

Ms. LeBlanc. Right.

Mr. Sarbanes. Do you have any more detail on how that system works or it is put together, or anything of that sort?

Ms. LeBlanc. No, I do not. I know in the case of juvenile delinquency, what they call cards, the housing authority police were listed as one of the agencies who were to receive the information, and if the person—if the kid was given a youth division card, they live in public housing, the housing authority would be automatically notified.

Mr. Sarbanes. You point out in some of your testimony that in some of these hearings, of course, one of the things that makes the youth's arrest of such concern, that much of what appears turns out to be erroneous.

Ms. LeBlanc. Yes.

Mr. Sarbanes. Or was subsequently—many of the charges were dropped or eliminated or reduced, and so forth.

Ms. LeBlanc. Right.

Mr. Sarbanes. Does this system which provides these arrest records for these hearings also have a procedure when these things are pointed out that it is corrected so that at least in subsequent incidents that a part of the person's record is, in fact, accurate or correct?

Ms. LeBlanc. Well, let's put it this way. They do not have a regular system for following through on arrest records. When they are, in fact, going to try to evict someone, they will check with the court to find out what happened to the case, and that is how they get the conviction records. They always have the actual court records. The person's record in the public housing, however, will continue forever to have—they have a chart, or rather a folder on every tenant, or family, who lives in public housing. That tenant folder will continue to hold forever the information regarding the arrest or charge on which he was arrested.

Mr. Sarbanes. Will that be corrected if one of these hearings, you point out, if part of it is erroneous?

Ms. LeBlanc. They will correct it to the extent of putting in as one of my examples says, putting in the fact that a person was convicted of something far less. They do not, however, remove the fact that the arrest was for all of these other charges, none of which he was convicted of, and again, the problem of presumption, the fact that the arrest is some evidence that the acts occurred, and that always goes with you, with the arrest record, and that means that every time a person looks down, they sort of ignore what he was convicted of. They look at the person for what he was arrested for.

Mr. Sarbanes. Thank you very much.

Mr. Drinan. Thank you very much, Mr. Sarbanes.

Mr. Butler.

Mr. Butler. Thank you, ma'am, for being with us today. It has been very helpful to me.

I understand that your background in the legal services, does not include any criminal representation. Your specialty is in housing?

Ms. LeBlanc. My area of specialty is in civil.

Mr. Butler. Does MFY provide criminal representation?

Ms. LeBlanc. We used to when we were funded on the President's Commission. We got special funding from the Ford Foundation, and

we maintained a small staff of attorneys. At the present time, we have one lawyer who handles mostly youthful offender-type cases.

Mr. BUTLER. But your area is housing?

Ms. LEBLANC. My area is housing. I have done a lot of other things, but Iam considered an expert in housing.

Mr. BUTLER. And your contact with employment problems is also direct?

Ms. LEBLANC. Except for a couple of cases. Over the years, as the program has grown larger, we have been able to do more specialization. In the early days, we had four lawyers, and of course you may have had an area of specialty, but you also handled everything that came through the door. Also, since I was probably the most experienced, if it was an unusual case, I took it.

Mr. BUTLER. In other words——

Ms. LEBLANC. Also, you find problems are interrelated. The employment case which I use as an example was also originally—it originally arrived in my office as a housing case. They were having problems with the housing authority, and you know, you get the problem regarding the rent, you know, it was salary, and so forth.

Mr. BUTLER. Based on your observations of the housing authority, is it fair to say that the opportunities of housing are not adequate to meet all of the needs?

Ms. LEBLANC. Absolutely true.

Mr. BUTLER. And there is tremendous competition for the housing?

Ms. LEBLANC. Yes.

Mr. BUTLER. Based on your experience, now, what information or what criteria would you suggest would be a fair index as to the desirability of a tenant in public housing?

Ms. LEBLANC. If you are talking about someone who wants to get in, or he is already in——

Mr. BUTLER. I am looking at it from the point of view of the man who has to decide who to admit to these limited opportunities.

Ms. LEBLANC. In my opinion, decent housing should be made available, in effect, on a first come, first served basis, within a framework of absolute need. Those people in most need of housing, and I might say the housing authority does, in fact, have a priority schedule, and it is based on need. In other words, people who are being relocated in the urban renewal area or because their building has been condemned, because they have become unfit for human habitation——

Mr. BUTLER. Those are the needs?

Ms. LEBLANC. Those are the needs. Within that framework, it seems to me a person who has the need and if they are of low income, they ought to be given housing on a first come, first served basis, and not be disqualified because they are "nondesirable."

Mr. BUTLER. All right. Continuing along that line, what is undesirable about a person who has been previously convicted of a crime, regarding eligibility for housing?

Ms. LEBLANC. In my opinion, he is not undesirable. The Housing Authority will, in fact, consider the person not eligible for public housing if he has been convicted of a crime, of a serious nature, which includes robbery and up, within the last 5 years. Now, what has happened as a result of the promulgation recently of that regulation is that anyone who has been convicted of a crime within the last 5 years

need not bother to apply. The people at the lower echelon just take the 5-year guideline and automatically say——

Mr. BUTLER. What I am searching for is—isn't the fact that the person who has been convicted within the past 5 years pretty much an indication that this person is prone in that direction and that, in effect, the undesirability shown by that conduct is what you expect of him on the premises. Also the relationship and the influence and the contacts that he would have with the remainder of the tenants might be undesirable? Isn't it a little unfair to those other people who find themselves in a situation of need and are therefore having to seek public housing to be joined as tenants in the same area with people who are prone in the direction of crime? Aren't their needs to be considered also in the determination of who is desirable and who is not desirable?

Ms. LEBLANC. I think not. The reason I think not is if you say because somebody lives in decent housing, he is entitled to have everybody who might be considered by some standard undesirable excluded, what you are saying is that someone who is so unfortunate as not to be able to get into decent housing because there are not enough built, also he will have his problem of living in indecent housing compounded by being forced, by having all of the undesirables living in the indecent housing along with him. Because clearly, people have to live somewhere. We are not at this point prepared to ship people off to a desert island because they have got a criminal record. If you don't let them into decent housing, they are going to be living in the slums down the street, with all of the other decent families that cannot get into the housing, because there is not enough being built anyway. Besides which, the fact of someone having a criminal record does in no way certainly—there is certainly no effort on the part of the housing authority to indicate the necessary relationship between whether or not they would be a good tenant.

Mr. BUTLER. Well, that really brings me to what I want to ask. What studies have actually been made as to the relationship of an arrest record or conviction record as to the desirability or undesirability? I know we have your opinion that the fact that a man robs a store in the Bronx has no relationship to his tenancy, but has any effort been made to find this out on a scientific basis?

Ms. LEBLANC. I do not know of any such study.

Mr. BUTLER. But you are satisfied a man who robs a store in the Bronx is not going to be an undesirable tenant?

Ms. LEBLANC. No. In that particular case, the family had lived in public housing for something like 14 years, and there was no record of any kind of activity against any person in public housing, any of his neighbors, et cetera. So it seems when the person is already in public housing, it is fairly easy in many circumstances to prove there is not any necessary relationship. People living on the floor, they will say, you know, they are a nice family, they were not trouble, et cetera.

Mr. BUTLER. Well, that was a specific case.

Ms. LEBLANC. Yes.

Mr. BUTLER. Now, let me ask you generally, you are familiar with the law of New York with reference to arrest records in the State of New York?

Ms. LEBLANC. No, I am not.

Mr. BUTLER. Well, then you do not know whether the law actually requires that the arrest record be forwarded to the FBI or not?

Ms. LEBLANC. That I do not know.

Mr. BUTLER. And you would not know whether the law requires any followup?

Ms. LEBLANC. Right. I know when you get a yellow sheet, down at criminal court, when someone is arrested, and when they are taken down to criminal court, they pull the yellow sheet. The yellow sheet, which is kept by the court, which is a list of all the arrests, frequently did not provide the disposition even though the case might be quite old.

Mr. BUTLER. Would it be an imposition on you, since you have the contacts, to really give us exactly what the law is in New York on what they are required to do with their records, and whether there is any requirements that they follow up? If any efforts or studies have been made by the legislature in regard to this?

Ms. LEBLANC. You want to know what the law is in New York, what New York must do, or are the records forwarded to the FBI?

Mr. BUTLER. Yes, ma'am. That is our inquiry. I am satisfied that the first loophole we have got to close is what actual information goes into the FBI records. I want to know in at least 50 instances what the law is, but I will not burden you with but one.

No further questions.

Mr. DRINAN. Thank you very much.

Counsel?

Ms. SCHELL. I have no questions.

Mr. BLOMMER. I have a line of questioning.

First, I want to get your testimony clear. You believe that an employer should be allowed to know of an arrest of a job applicant if the arrest is directly related to the job he is applying for?

Ms. LEBLANC. No.

Mr. BLOMMER. You think that should be——

Ms. LEBLANC. I do not think that an arrest record should ever be used to deny a person a job, because if one is to be entitled to the information in regard to the arrest——

Mr. BLOMMER. Under any circumstances?

Ms. LEBLANC. Right.

Mr. BLOMMER. Mr. Wiggins asked you about where the problem lies, and I believe you agreed the problem lies with the misuse of the information by employers.

Ms. LEBLANC. Yes.

Mr. BLOMMER. Is that correct?

Ms. LEBLANC. Yes.

Mr. BLOMMER. You would not say an arrest means nothing?

Ms. LEBLANC. Well, actually, I think an arrest means something, and I do not think that, given the presumption of innocence, ought to be allowed to mean nothing, because obviously it means something to most people.

Mr. BLOMMER. Well, let us take a case of a felony. We have testimony before this committee from a number of people who should know. The former Attorney General Katzenbach said he believed that arrests for felonies are rarely made without probable cause. Would you agree with that?

Ms. LeBlanc. In New York, I think they probably are, because arrests—but that probably may relate to the way in which arrests are made in New York.

Mr. Drinan. Would the gentleman yield?

What substance has Mr. Kliendienst had for that, just to quote——

Mr. Blommer. Mr. Katzenbach.

Mr. Drinan. Just to quote him or anybody?

Mr. Blommer. He was the Attorney General of the United States.

Mr. Drinan. We have had a lot of them. I do not see the point. I am sorry. Just because he says it, most felonies——

Mr. Blommer. I am asking her opinion. Excuse me.

Mr. Butler. Mr. Chairman, I would like to have him pursue this line of questioning, because after all, her opinion is the same as yours and of course, we should have the benefit of her judgment on this.

Mr. Drinan. Well, I want to know if he had further substantiation of that line of questioning.

Continue. I am sorry.

Mr. Blommer. You said you do or you do not agree with Mr. Katzenbach?

Ms. LeBlanc. That is based on probable cause?

Mr. Blommer. That is based on probable cause.

Ms. LeBlanc. No.

Mr. Blommer. You believe that felony arrests are not based for the most part on probable cause?

Ms. LeBlanc. On probable cause if the felony occurs; yes. I would say that in most cases, people are charged with crimes by the police that they cannot prove, and that it is done deliberately so they have room for plea bargaining when they get to court.

Mr. Blommer. So you disagree with Mr. Katzenbach?

Ms. LeBlanc. Yes.

Mr. Blommer. So you do say——

Ms. LeBlanc. I could not say this is true on a national basis.

Mr. Blommer. I am only asking your opinion for New York.

Ms. LeBlanc. In terms of New York City, I have seen a number of people who have been arrested, and I have seen a lot of records, and I can tell you that my impression is that they are usually arrested and charged originally with a serious crime, which is in nine-tenths of the cases, reduced to a lesser crime, and when they get down to court, they do not have the evidence to hold them for a felony, and they arrest them at a higher level, so they will have a place to bargain down to get a plea of guilty.

Mr. Blommer. Well, what I am really getting at is that the problem is that employers do not understand all of this. When they see that someone has been arrested for bank robbery, they believe there is something there that makes them not want to hire that person. It is because they do not understand what the arrest means, and it should mean nothing. What is your objection, then, to the dissemination among the police community of those records? Would you say the police community also does not understand what it means?

Ms. LeBlanc. The police community uses—the police community will use the fact that there have been arrests as a basis for keeping their eye on certain people because they have been arrested.

Mr. BLOMMER. And you believe that the police should not have the information, so that they then could not keep their eye on the people who have been arrested?

Ms. LEBLANC. Not if the person was not convicted. Why should a person be subjected to this for the rest of his life because he was arrested and not convicted?

It's one thing to circulate the fact that you have got people in the community that have been convicted of this, that, and this is a list of their convictions, so you might want to be aware of the fact that somebody in the neighborhood has been convicted 6 times of raping people, or something, but the fact that he has been arrested for it, but never convicted of it, does not seem to me to be a correct basis for the arrest record.

Mr. BLOMMER. No one should know that?

Ms. LEBLANC. That is right. I think arrest records should be expunged.

Mr. BLOMMER. My last question is this, Do you know whether all of the police precincts in Manhattan use an arrest book? If someone is brought in and placed under arrest, they put in his name and what he is arrested for and the number of his cell?

Ms. LEBLANC. Yes.

Mr. BLOMMER. Do you believe that should be a public document?

Ms. LEBLANC. No.

Mr. BLOMMER. Is it a public document?

Ms. LEBLANC. I do not know.

Mr. BLOMMER. You believe that should not be available to the public?

Ms. LEBLANC. Right.

Mr. BLOMMER. What about an arraignment?

Ms. LEBLANC. Arraignments are public.

Mr. BLOMMER. I am asking whether they should be.

Ms. LEBLANC. I think—it's so inherent in the criminal court system, that I have never really thought about it.

Mr. BLOMMER. Well, the only issue there is that someone has been arrested. They are public. The man is charged with a crime. He pleads. That means nothing. Should that not be private? Isn't he prejudiced by the fact being made public?

Ms. LEBLANC. I really cannot respond to that. I never thought seriously about the possibility of making an arraignment in private. I would probably want—before I gave such an opinion——

Mr. BLOMMER. What is the crucial difference between the arrest book and the arraignment as far as information going to the public?

Ms. LEBLANC. Well, one of the things is that at the point of the arraignment, at that point, of course, the cases have then been looked at by a district attorney who has looked at it with a greater discretion of what the facts are. The person is assigned an attorney at that point.

Mr. SARBANES. Would the gentleman yield at that point?

Mr. BLOMMER. I am finished.

Mr. SARBANES. What percentage of the cases you talk of considerably, of just general use of arrest records as a disciplinary tactic, what percentage of the people who, if you have any idea, would have been entered in the station book as having been arrested, since they were arrested by the police, and brought in, and that entry must be made at that time, I gather——

Ms. LeBlanc. Right.

Mr. Sarbanes [continuing]. Would subsequently go on to the arraignment stage with respect to that offense that was entered in the station book? I assume there would be a considerable falloff, would there not?

Ms. LeBlanc. I am not sure. A number of them get washed out before they are actually arraigned. A lot of it would depend on the type of case they were arrested on, and say, if it was a result of a demonstration, they would probably wash out most of them before they get them to criminal court.

But I really do not know.

Mr. Drinan. Thank you very much, ma'am, for your testimony, and I am sorry that the House met earlier, and some of our colleagues had to go, but your testimony was valuable and we are grateful.

The hearing is adjourned.

[Whereupon, at 11:23 a.m., the hearing adjourned.]

DISSEMINATION OF CRIMINAL JUSTICE INFORMATION

WEDNESDAY, SEPTEMBER 26, 1973

HOUSE OF REPRESENTATIVES,
CIVIL RIGHTS AND CONSTITUTIONAL RIGHTS
SUBCOMMITTEE OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:05 a.m., in room 2226, Rayburn House Office Building, Honorable Don Edwards [chairman of the subcommittee] presiding.

Present: Representatives Edwards, Sarbanes, Drinan, Wiggins, McClory, Butler, and Lott.

Also present: Alan A. Parker, counsel; Michael W. Blommer, associate counsel; and Arden B. Schell, assistant counsel.

MR. EDWARDS. The subcommittee will come to order.

This morning we begin hearings on H.R. 9783, to regulate the collection, storage, and dissemination of information by criminal data banks established or supported by the United States.

In the 92d Congress, this subcommittee began consideration of a bill, H.R. 13315, that would regulate the use of criminal arrest records to insure their security and privacy. The abuse of these arrest records proved to be extensive. Employment, credit, licensing, and other decisions have hinged on the existence of an arrest record. This meant that people who were arrested, but not convicted, often were treated with as much or more disdain than the actual criminal.

It was during the course of the inquiries that the members of this subcommittee had the opportunity to observe the operation of the National Crime Information Center (NCIC). We visited there and learned that the system is maintained at the national level by the FBI, although at the beginning the LEAA had administered the system and was more State/local oriented in its control.

Any Federal, State, or local law enforcement agency which fed information into the system could freely extract any information to fill their needs. In addition, NCIC records were searched as a part of the identification service that the FBI provides for agencies of Federal and State Governments and other authorized institutions which seek the information for employment purposes. This concept is expanding. With a massive infusion of funds, the system promises to provide a direct link to all 50 States by 1975.

Yet this extensive system that has such far-reaching effects on people's lives is loosely operated on a statement of principle by its Advisory Policy Board. And this Board is made up 100 percent by law enforcement representatives. That alone dramatically points up a conflict of interest. The idea that the police can police themselves to

provide for the security and privacy of our citizens while under the pressure of increasing crime is ridiculous. Other interests have to have a spokesman.

We can no longer assume that the necessary precautions for the security and privacy of our citizens will be observed without Congress exercising its responsibility to legislate parameters for the operation of these computer data banks. This becomes more apparent with the realization that the State of Massachusetts felt compelled to fill this legislative void with a strong statute controlling access to files on its citizens. In such strong conflict is this statute with the meager efforts of the NCIC Advisory Policy Board to protect privacy that the State of Massachusetts has refused to tie-in with NCIC.

Now, it is my pleasure to yield to our colleague, the distinguished gentleman from Massachusetts, Mr. Drinan.

Mr. DRINAN. It is a pleasure to welcome here Mr. Arnold Rosenfeld, a former student of mine at Boston College Law School, and a graduate of Bowdoin College in 1962.

He has a very distinguished career since his graduation from law school. He is now the chairman of the Massachusetts Criminal History Systems Board, and he is an executive director of the Governor's Committee on Law Enforcement, where he was a very effective administrator of the LEAA fund for Massachusetts. He was also a member of the National Task Force on Community Crime Prevention.

Mr. Rosenfeld used to be a constituent of mine in Acton, Mass., until the powers that be separated him from my constituency.

I want to congratulate him on everything he has done. He has served the deputy assistant attorney general in Massachusetts, and was largely instrumental in bringing about the developments mentioned by the chairman. And I want to say, Mr. Rosenfeld, my congratulations and that of the committee on the victory yesterday that you are going to announce, whereby the Federal Government actually yielded to the legitimate and just requests of Massachusetts.

I would like to say that we planned it this way, so that we would be happy on this occasion, but we do not have that type of power with the Department of Justice, although I am beginning to suspect that we have more power than we may imagine.

Mr. Rosenfeld, you are most welcome, and I yield back to the chairman.

Mr. EDWARDS. Well, thank you very much, Mr. Drinan. And I, too, heard about the decision of the Department of Justice just a few minutes ago, and I am looking forward not only to your testimony, Mr. Rosenfeld, but to your background information on this very important lawsuit.

I believe you also have the statement of Hon. Francis W. Sargent, Governor of the Commonwealth of Massachusetts, which you would like to submit for the record at this point?

Mr. ROSENFELD. That is correct, Mr. Chairman.

Mr. EDWARDS. Without objection, it will be included in the record at this point.

[The prepared statement of Gov. Francis W. Sargent follows:]

STATEMENT BY GOVERNOR FRANCIS W. SARGENT

Thank you for this opportunity to present my thoughts on the need to regulate criminal data banks and H.R. 9783 in particular.

The United States is among the last of the advanced nations of the "Free

World" to address itself to the challenge raised by the information technology revolution of the past several decades to our democratic institutions.

Sweden, for example, has passed into law strong, comprehensive measures to protect all Swedish citizens against any possible encroachment caused by personal data banks. West Germany has established a federal office of a "Hessischer Datenschutzbeauftragter," as ombudsman "watchdog" agency to safeguard the rights and privacy of its citizens.

Across our northern border, four of the ten Canadian provinces have already moved to protect their citizens against possible abuse of data banks used for employment, credit and insurance purposes. And their federal government is expected to pass legislation to cover the security of information stored in personal data banks and the right of citizens to inspect information contained on themselves.

Throughout the Western World, there has been widespread debate and national sensitivity to this admittedly complex matter.

We are just beginning to raise these issues in this country. The recent Health, Education and Welfare study report, *Records, Computers and the Rights of Citizens*, was a tentative, but excellent first step.

H.R. 9783 is another.

Though H.R. 9873 addresses itself only to criminal data banks, these constitute at this time a very great threat to our social and legal institutions.

In addition, criminal data banks, particularly the expanding Computerized Criminal History Program of the National Crime Information Center, as administered by the Federal Bureau of Investigation, are in immediate need of regulation in order to protect individual rights and privacy guaranteed us as American citizens.

Information from these criminal data banks can help destroy a person's life, and certainly limit a person's options if abused. The harm, for example, of an arrest record available for checking by a government or private employer is incalculable.

The President's Commission on Federal Statistics, completed in 1971, documents that a job applicant who lists a previous arrest faces "at best a second trial in which, without procedural safeguards, he must prove his innocence; at worst the listing of the arrest disqualifies him per se."

And as you know, existing criminal data banks contain other derogatory information, with no check as to its accuracy, on thousands and thousands of individuals who have never even been arrested, much less convicted of a serious crime.

Let me state at the outset, however, I vigorously support the application of computer technology to aid the crime-fighting capacity of the Federal Bureau of Investigation and all other law enforcement agencies. But I believe we can have effective law enforcement without sacrificing any of our rights and privacy.

Let me explain.

In Massachusetts we have utilized computer technology to build a modern, efficient computerized criminal offender data bank. This bank links the records of our courts, our probation, corrections and parole departments with those of our state and municipal police.

With this system, the histories of criminal offenders are available at a touch of a finger to those officials who have a need for this information.

Unlike the program of the National Crime Information Center (NCIC) and its component systems across the country, this does not include officials of credit rating bureaus, real estate or employment agenices, Insurance companies, educational institutions, or even myself, Governor of the Commonwealth of Massachusetts.

(For this committee's information, I attach a list of all those agencies denied access to our system, as well as those granted access.)

As important, the information in our system does not include raw intelligence data on "suspected shoplifters," persons with overdue parking tickets, individuals with a history of mental disturbances (who are not criminals), children who have exhibited "delinquent tendencies" in grade school, students thought to have participated in college disturbances, or "potential troublemakers."

Nor does our system include data on persons arrested but not convicted in a court of law.

Unfortunately, all of the above data is to be found in existing criimnal data banks, most of them hooked up to the NCIC.

A 1971 Law Enforcement Assistance Administration report found that half of the 108 computer projects underway at that time were collecting data on "potential troublemakers."

Let me repeat, not in Massachusetts.

In fact, I recently signed into law legislation which specifically provides for the sealing of all arrest records wherein the defendant has been found not guilty by a court or jury, or a no bill has been returned by the grand jury, or a finding of no probable cause has been made by the court.

Such sealed records, by this law, are prohibited to operate to disqualify a person in any examination, appointment or application for public employment. In addition, private employers are required to inform all applicants for employment in writing that any applicant for employment with a sealed record may answer "no record" with respect to an inquiry relative to prior arrests or criminal court appearances.

Further, again by this law, no non-law enforcement agency may be informed that such sealed records even exist.

(I attach a copy of this law, Chapter 322 of the Acts of 1973, for this committee's information.)

Our criminal data bank—though closed to those non-law enforcement agencies without specific statutory authority for access—are open to inspection by individuals on whom data is contained.

If an individual or his lawyers find any data contained to be incorrect or incomplete, a procedure is established by law to correct the data or purge it from the file.

And more, our system's safeguards go beyond limiting what information can go into our computer and who has access to it.

Again, unlike the NCIC, our system is governed by an independent board whose only duty is to safeguard the system's overall integrity. And we have a "Privacy and Security Council" which serves as a citizen watchdog to insure the system is not abused or abusive.

In short, I believe our criminal data bank strikes a proper balance between protecting individual rights and privacy on the one hand and providing an effective crime-fighting tool on the other without compromising either. I believe that any criminal data bank that does not have similar safeguards constitutes an intolerable and unnecessary threat to our privacy and rights—no matter how well intentioned, no matter for what worthy goals it has been established.

H.R. 9783 generally does address itself to these safeguards. For this reason, I support this legislation for what it attempts to accomplish, though I would like to take this opportunity to touch upon a few areas where I think this legislation could be strengthened.

1. Because of the very loose understanding of what defines "criminal" data, as demonstrated by the variety of data in existing criminal data banks, this legislation should provide a blanket prohibition of all data except that specifically agreed upon and spelled out in legislation.

2. Because the misuse or abuse of these sensitive data banks can seriously affect the rights and privacy of our citizens, this legislation should include regulations of privately as well as publically financed criminal data banks.

I have been informed, for example, of a privately maintained criminal data bank for various private companies and businesses where data is collected from an exhaustive newspaper clipping service. I am sure I do not have to inform this committee of the additional problems raised by such a data bank. Newspapers are just not the most accurate vehicle for collecting such information.

3. Because the nature of data included in any criminal data bank will vary, regulations, especially pertaining to access, must vary accordingly.

For example, raw intelligence information should not be mixed with other criminal history data, nor be shared with the same constellation of officials.

Arrest information should be handled differently from information on arrests followed by convictions. Information on criminal offenders who have been convicted of violating the law repeatedly should be treated differently from information on first offenders. Finally, information on misdemeanor convictions should be employed differently from felony convictions.

4. Because a right is not enough if the means to achieve it are too difficult or costly, this legislation should establish a procedure spelled out in law for individuals to have data on themselves expunged or corrected.

5. The Attorney General should not only be required to act within a reasonable time period to formulate rules and regulations under the federal register procedures to carry out the provisions of this legislation, but should be required to consult with and seek the advice of professionals outside the area of law enforcement.

As I wrote the Attorney General last June, I have serious doubts that internal controls and self-policing by line operating agencies or administrators can guarantee the integrity of something as sensitive and potentially abusive as an interfacing national/state criminal data bank system.

6. Finally, not only should the agencies that contribute data into a criminal data bank be responsible for the accuracy of that data, but the agency which administers the entire system should share similar responsibility and liability.

It may very well prove to be the case that such strictures might make it difficult for the Criminal History Program of the NCIC to operate in its present form. I don't believe this should deter us. If a nationally centralized criminal data bank cannot be secured that protects individual rights and privacy, then that system ought to be abandoned.

I know that this committee will hear a lot more testimony from witnesses more expert than myself. The chairman of our Criminal History System Board, Mr. Arnold Rosenfeld, will testify before you. He can go into more details and fill in the specifics of my remarks.

Though I am not an expert in this matter, I do know when the citizens I serve are concerned. And no recent issue has stirred as much concern and comment in my state as the threat posed by inadequately regulated and safeguarded criminal data banks.

And from outside of Massachusetts, I have received letters and telegrams on the same subject from citizens from every state represented by members on this committee.

It is for this concern that Massachusetts has become the only state in the nation to refuse to join the NCIC until safeguards are instituted by the Justice Department or the Congress to protect individual rights and privacy affected by this program.

Despite substantial threats of federal retribution, despite a law suit filed against the Commonwealth by the Justice Department, despite the loss of several thousand defense related jobs, despite all of this, Massachusetts will not compromise the rights and privacy of her citizens in the name of technological progress.

On behalf of all citizens of this country, I urge this committee to strengthen H.R. 9783 where necessary and report it out favorably.

Thank you.

CHAPTER 322.—THE COMMONWEALTH OF MASSACHUSETTS, IN THE YEAR ONE THOUSAND NINE HUNDRED AND SEVENTY-THREE

AN ACT RELATIVE TO THE SEALING OF FILES IN CERTAIN CRIMINAL CASES

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

Section 1. Chapter 276 of the General Laws is hereby amended by inserting after section 100B, inserted by chapter 404 of the acts of 1972, the following section:—

Section 100C. In any criminal case wherein the defendant has been found not guilty by the court or jury, or a no bill has been returned by the grand jury, or a finding of no probable cause has been made by the court, the defendant may, on a form furnished by the commissioner of probation, request that the commissioner seal said court appearance and disposition recorded in his files. The commissioner shall comply with such request and he shall notify forthwith the clerk and the probation officers of the courts in which the proceedings occurred or were initiated who shall likewise seal the records of the proceedings in their files.

In any criminal case wherein a nolle prosequi has been entered, or a dismissal has been entered by the court, except in cases in which an order of probation has been terminated, and it appears to the court that substantial justice would best be served, the court shall direct the clerk to seal the records of the proceedings in his files. The clerk shall forthwith notify the commissioner of probation and the probation officer of the courts in which the proceedings occurred or were initiated who shall likewise seal the records of the proceedings in their files.

Such sealed records shall not operate to disqualify a person in any examination, appointment or application for public employment in the service of the commonwealth or of any political subdivision thereof.

An application for employment used by an employer which seeks information concerning prior arrests or convictions of the applicant shall include in addition

to the statement required under section one hundred A the following statement: "An applicant for employment with a sealed record on file with the commissioner of probation may answer 'no record' with respect to an inquiry herein relative to prior arrests or criminal court appearances." The attorney general may enforce the provisions of this section by a suit in equity commenced in the superior court.

The commissioner, in response to inquiries by authorized persons other than any law enforcement agency or any court, shall in the case of a sealed record report that no record exists. After a finding or verdict of guilty on a subsequent offense such sealed record shall be made available to the probation officer and the same, with the exception of a not guilty, a no bill, or a no probable cause, shall be made available to the court.

House of Representatives, May 16, 1973.
Passed to be enacted:

THOMAS W. MCGEE,
Acting Speaker.

In Senate, May 16, 1973,
Passed to be enacted:

———, ———,
President.

Approved, May 29, 1973:

FRANCIS L. SARGENT,
Governor.

APPLICANTS *NOT* APPROVED FOR CERTIFICATION BY THE MASSACHUSETTS CRIMINAL HISTORY SYSTEMS BOARD

1. February 26, 1973: Henry Clay, Executive Secretary, Council Chamber, State House, Boston (requesting continuation of receipt of information from the Dept. of Probation).
2. May 15, 1973: Paul R. Spinney, Assistant Adjutant General, The Adjutant General's Office, Boston (requesting access to criminal offender record information).
3. April 17, 1973: Richard A. Magri, Asst. Legal Counsel, Massachusetts Department of Mental Health (requesting access to criminal offender record information).
4. July 23, 1973: Donald W. Westwater, Director of Legal Services, Department of Public Welfare, Boston (requesting access to criminal offender record information).
5. February 26, 1973: Harold Turner, Chairman, The Alcoholic Beverages Control Commission, Boston (requesting access to criminal offender record information).
6. February 26, 1973: John G. Ryan, Commissioner of Insurance, Department of Banking and Insurance, Boston (requesting access to criminal offender record information).
7. May 10, 1973: Walter H. Nolan, Executive Secretary, Massachusetts Commission Against Discrimination (requesting access to criminal offender record information).
8. May 15, 1973: William E. Perrault, Executive Director, Massachusetts State Lottery Commission (request access to criminal offender record information).
9. May 31, 1973: Board of Selectmen, Town of East Longmeadow, Massachusetts (requesting access to criminal offender record information).
10. July 23, 1973: Austin S. Prendergast, Chairman, Office of License Commissioners, Lynn, Mass. (requesting access to criminal offender record information—background checks on applications for liquor licenses).
11. May 23, 1973: Joseph F. Martin, Clerk, Lynn City Council (requesting access to criminal offender record information about enumerators employed in Lynn reevaluation program from Police Chief Scribner).
12. May 18, 1973: Walter J. Kelliher, Mayor, Malden, Mass. (requesting access to criminal offender record information).
13. May 10, 1973: Sister Mary Patricia, Nazareth Child Care Center, Jamaica Plain, Mass. (requesting access to criminal offender record information in the Probation Index).

14. February 26, 1973: Mary C. Byrne, Director of Placement Services, Boston Children's Service Association (requesting access to criminal offender record information, i.e., probation reports).
15. February 26, 1973: Irving I. Medoff, President, Jewish Big Brother Association, Boston (requesting access to criminal offender record information).
16. February 26, 1973: Cornelius M. Hegarty, Director of Casework Services, The New England Home for Little Wanderers (requesting access to criminal offender record information).
17. February 26, 1973: Kenneth Kopel, Executive Director, Family Services Association of Greater Lawrence (requesting access to criminal offender record information from the Department of Probation).
18. February 26, 1973: Robert M. Myers, ACSW, Executive Director, Children's Aid and Family Service of Hampshire County, Inc., Northampton (requesting access to criminal offender record information).
19. February 26, 1973: Anne W. Cochintu, Executive Director, Parents' and Children's Services, Boston (requesting access to criminal offender record information from the Department of Probation).
20. January 30, 1973: Messrs. Neil Caravan and Robert Roberts, Fall River Welfare Service Office, Division of Family & Children's Services, Department of Public Welfare (requesting access to criminal offender record information).
21. February 26, 1973: John P. McMorrow, Director of Personnel, Boston Redevelopment Authority (requesting access to criminal offender record information—probation reports).
22. April 13, 1973: Rachel T. Renaud, Director, Adoption Services, Catholic Charities, Worcester (requesting access to criminal offender record information).
23. April 17, 1973: Thomas J. Connelly, Executive Director, Brookline Housing Authority (requesting access to criminal offender record information).
24. February 26, 1973: William F. McLaughlin, M.D., Superintendent, Department of Mental Health, Metropolitan State Hospital, Waltham (requesting access to criminal offender record information).
25. April 13, 1973: F. Bliss Winn, Jr., Administrative Vice President, The Truesdale Hospital, Fall River (requesting access to criminal offender record information).
26. June 20, 1973: Stephen F. Urban, Jr., Supervising Physician, Methadone Maintenance Program, Providence, R.I. (requesting access to criminal offender record information regarding a specified individual).
27. May 10, 1973: Joyce A. Field, Employment Manager, Wesson Memorial Hospital, Springfield (requesting access to criminal offender record information).
28. May 18, 1973: Robert E. Avey, Veterans Administration Hospital, Bedford (requesting access to criminal offender record information—court records).
29. May 10, 1973: Francis E. Guiney, Executive Director, Department of Health and Hospitals, Boston (requesting access to criminal offender record information).
30. February 26, 1973: Dr. Martin Markey, Methadone Maintenance Treatment Program, The Providence Hospital, Holyoke (requesting access to criminal offender record information for research purposes).
31. February 26, 1973: Anne V. Cronin, Director, Division of Personnel Services, Beth Israel Hospital, Boston (requesting access to criminal offender record information from Dept. of Probation).
32. February 26, 1973: Jessie A. Lazaro, State Hospital Administrative Assistant, Department of Mental Health, Fernald State School, Waverly (requesting access to criminal offender record information).
33. February 26, 1973: John L. Quigley, Commandant, Soldiers' Home, Chelsea (requesting access to criminal offender record information).
34. February 26, 1973: Vernon R. Durbroch, Chairman, Board of Registrars of Voters, Everett (requesting access to criminal offender record information).
35. February 26, 1973: James H. Kelly, Fire Commissioner, Boston (requesting access to criminal offender record information).
36. February 26, 1973: Anthony A. LaRocca, Hooper-Holmes Bureau, Boston requesting public information on a court case).
37. June 27, 1973: F. G. Grabowski, President, Atwood Security Systems, Inc., W. Springfield (requesting access criminal offender record information).

38. April 17, 1973: Brad J. Buck, Manager, Watts Security System, Inc., Boston (requesting access to criminal offender record information).
39. April 13, 1973: Wesley C. Crawley, Vice President, The Fall River National Bank (requesting access to criminal offender record information).
40. June 11, 1973: Alfred J. Riel, District Claims Manager, Farm Bureau Insurance Services, Rockville, Conn. (requesting access to criminal offender record information—court records).
41. May 23, 1973: W. E. Wilson, Supervisor, Aetna Life & Casualty, Springfield (requesting access to criminal offender record information).
42. April 13, 1973: Duncan Aspinwall, President, Standard Service Bureau, Inc., Boston (requesting access to criminal offender record information).
43. May 2, 1973: Personnel Manager, Carl Subler Trucking, Inc., Wilmington (requesting access to criminal offender record information—release of information requested by individual).
44. May 31, 1973: Jack Dashosh, Esq., House Counsel, Vornado, Inc., Garfield, N.J. (requesting access to criminal offender record information—police record checks).
45. June 5, 1973: Frank L. Uman, Esq., President, Hampden County Bar Association, Springfield (requesting access to criminal offender record information).
46. May 14, 1973: George C. Decas, Esq., Middleboro (requesting access to criminal offender record information on specified individual).
47. May 10, 1973: Richard L. Lehman, Esq., Detroit, Mich. (requesting access to criminal offender record information regarding a specified individual).
48. April 17, 1973: Arthur E. Schoepfer, Harvard Legal Aid Bureau (requesting access to criminal offender record information on a specified individual).
    June 11, 1973. Irving Perry, Springfield (requesting access to criminal offender record information—certification not required as individual merely requesting public information on a court case).
    July 25, 1973: Donald Ashley, Springfield (requesting access to criminal offender record information—certification not required as individual merely requestig public information on a court case).
49. July 25, 1973: R. S. Palmer, Jr., Commander, U.S. Coast Guard, Boston (requesting access to criminal offender record information).
50. July 25, 1973: John F. Palmer, Chief, U.S. Navy Recruiting, Quincy (requesting access to criminal offender record information on a specified individual).
51. May 10, 1973: Kent L. McDaniel, Major, USAF, Chief, Security Police, Department of the Air Force, Bedford (requesting access to criminal offender record information).
52. May 2, 1973: Henry P. Beltmarmini, LTC, AGC, USAR, Adjutant General, Department of the Army Boston (requesting access to criminal offender record information).
53. May 9, 1973: James T. Dedloff, CPT, AGC, Adjutant, AFEES, Department of the Army, Boston (requesting access to criminal offender record information).
54. May 2, 1973: Philip C. Garber, Major, FA, USAR, Executive Office, Department of the Army, Roslindale (requesting access to criminal offender record information).
55. May 2, 1973: Lt. J. L. Scovill, USN, Navy Recruiting Station, Cambridge (requesting access to criminal offender record information).
56. May 2, 1973: Walcott J. Becker, Machinist Mate Chief, U.S. Coast Guard Recruiting Office, Lawrence (requesting access to criminal offender record information).
57. May 2, 1973: John D. P. Fuller, Jr., Lt. Col., USAF, Commander, Department of the Air Force Recruiting Detachment 109 (ATC), Bedford (requesting access to criminal offender record information).
58. May 2, 1973: James L. Davis, Jr., Major, Infantry, Executive Office, Department of the Army, Boston (requesting access to criminal offender record information).
59. May 2, 1973: Chief Robert J. Yered, U.S. Coast Guard Recruiting Office, Boston (requesting access to criminal offender record information).
60. June 1, 1973: Capt. Lawrence O. Short, USAF, Lackland A.F.B., Texas (requesting access to criminal offender record information on specified persons).
61. May 9, 1973: C. A. Hatfield, LCDR, USCG, Senior Investigating Office, Department of Transportation, U.S. Coast Guard, Boston (requesting access to criminal offender record information).

62. June 19, 1973: Capt. Lawrence O. Short, USAF, Lackland A.F.B., Texas (requesting access to criminal offender record information on a specified individual).
63. May 2, 1973: Phillip E. Stanley, Chief, U.S. Coast Guard Recruiting Office, New Bedford (requesting access to criminal offender record information).
64. May 18, 1973: R. B. Bender, SSGT, USMC, Marine Officer Selection Office, Cambridge (requesting access to criminal offender record information on a specified individual).
65. July 30, 1973: Capt. Lawrence O. Short, USAF, Lackland A.F.B., Texas (requesting access to criminal offender record information on a specified individual).
66. May 21, 1973: Homer C. Huff, SSG, U.S. Army Recruiting Station, Renton, Wash. (requesting access to criminal offender record information on a specified individual).
67. May 21, 1973: Paul E. Dupuis, Recruiting Officer, Enlisted Programs Division, Naval Air Station, South Weymouth (requesting access to criminal offender record information on a specified individual).
68. February 27, 1973: Charles V. Middleton, Chief, Air Transportation Security Division, ANE-90, Department of Transportation, F.A.A., Burlington (requesting access to criminal offender record information).
69. May 23, 1973: Ferris J. Howland, Director, N.E. Region Federal Aviation Administration, Burlington (requesting access to criminal offender record information).
70. June 12, 1973: G. Wesley Allen, Senior Assistant Counsel, U.S. Postal Service, Eastern Region, Philadelphia, Pa. (requesting access to criminal offender record information).
71. May 14, 1973: Talbot DeG. Bulkley, Acting Regional Director, Small Business Administration, Boston (requesting access to criminal offender record information).
72. May 15, 1973: J. Fred Buzhardt, General Counsel of the Department of Defense, Washington, D.C. (requesting access to criminal offender record information on behalf of Defense Investigative Service).

THE COMMONWEALTH OF MASSACHUSETTS

CRIMINAL HISTORY SYSTEMS BOARD—JULY 12, 1973

List of Agencies Certified by the Criminal History Systems Board to Receive Criminal Offender Record Information:

1. State police, municipal police, district police, police marshals.
2. District and municipal courts, the Superior Court, including the criminal clerks, the Appeals Court, the Supreme Judicial Court.
3. Boston Housing Court.
4. Probate courts, only so far as is necessary for sentencing persons for contempt, for neglect violations, for support violations, and the like.
5. Juvenile courts.
6. Department of the Attorney General.
7. Office of the Commissioner of Probation and local probation offices.
8. District Attorneys.
9. Parole Board.
10. Department of Youth Services.
11. Department of Correction.
12. Sheriffs and the Penal Commissioner of the City of Boston.
13. County training schools.
14. Plymouth County Identification Bureau.
15. Special prosecutors hired by cities and towns.
16. Bail commissioners.
17. Masters in chancery.
18. Massachusetts Defenders Committee.
19. Massachusetts Bay Transportation Authority police.
20. Law Enforcement Division, Department of Natural Resources.
21. Advisory Board of Pardons and Commutations.
22. Special Police who are certified by the State Police.
23. Registry of Motor Vehicles.
24. U.S. Army Intelligence.

25. U.S. Naval Intelligence.
26. U.S. Bureau of Customs.
27. Federal Bureau of Investigation, U.S. Department of Justice.
28. U.S. Internal Revenue Service.
29. U.S. Immigration and Naturalization Service, U.S. Department of Justice.
30. Bureau of Narcotics and Dangerous Drugs, U.S. Department of Justice.
31. U.S. Postal Officers Inspectors.
32. New England Organized Crime Intelligence System.
33. Federal Bureau of Prisons, U.S. Department of Justice.
34. New England Strike Force.
35. U.S. Parole Board.
36. U.S. District Courts, Courts of Appeals and Supreme Court, U.S. Probation and U.S. Court Clerks.
37. U.S. Secret Service.
38. Federal Protective Service of the General Services Administration.
39. United States Marshals.
40. Massachusetts Capitol Police.
41. Fraudulent Claims Board, Division of Insurance.
42. Welfare Audit Fraud Squad.
43. Division of Legal Medicine, Department of Mental Health.
44. Criminal History Systems Board, Criminal History System Advisory Committee, Security and Privacy Council.
45. Roxbury Defenders Committee.
46. Alcoholics Safety Action Program.
47. Committee on Law Enforcement and the Administration of Criminal Justice.
48. U.S. Bureau of Alcohol, Tobacco and Firearms.
49. Boston Licensing Board for the purposes of M.G.L. c. 138 sec. 12.
50. Office of the Commissioner of Veterans Services for the purposes of M.G.L. c. 115 sec. 5.
51. Boston Veterans Services Department for the purposes of M.G.L. c. 115 sec. 5.
52. Board of Registry of Real Estate Brokers and Salesmen for the purposes of M.G.L. c. 112 sec. 87AAA.
53. Massachusetts Division of Civil Service for the purposes of M.G.L. c. 31 sec. 17.
54. Office of Investigations of the General Services Administration.
55. Division of Corporations of the Office of the Massachusetts Secretary of State for the purposes of M.G.L. c. 180 sec. 5.
56. U.S. Department of Labor for the purposes of the Labor Management Reporting and Disclosure Act.
57. Naval Investigative Service Office—New York.
58. U.S. Civil Service Commission for the purposes of 5 U.S.C. 7313.
59. Bureau of Special Investigations of the Department of Corporations and Taxation.
60. Food and Drug Division of the Massachusetts Department of Public Health pursuant only to the authority of M.G.L. c. 94C sec. 12(a)(3).
61. Air Force Office of Special Investigations.
62. Office of Security, U.S. Department of State for the purposes of 5 U.S.C. 7313.
63. The Licensing Board for the City of New Bedford for the purposes of M.G.L. c. 138 sec. 12.

CRIMINAL HISTORY SYSTEMS BOARD, SEPTEMBER 5, 1973

Agencies Not Authorized Access to CORI

Office of the Inspector General, U.S. Department of Agriculture.

TESTIMONY OF ARNOLD R. ROSENFELD, CHAIRMAN, CRIMINAL HISTORY SYSTEMS BOARD, COMMONWEALTH OF MASSACHUSETTS

Mr. EDWARDS. Mr. Rosenfeld, again we welcome you, and you may proceed with your statement.

Mr. ROSENFELD. Thank you, Mr. Chairman, and thank you, Mr. Drinan.

I would like to thank this committee for the opportunity to appear before it and to express my opinions on these important issues. I have had the opportunity to examine the proposed legislation, H.R. 9783; and before commenting specifically on this bill, I would like to make some general statements.

The development of information systems by criminal justice agencies has expanded substantially since 1967. There are basically three reasons for this.

First, the President's Crime Commission analyzed the use of data by criminal justice agencies, back in 1967, and pointed out its value both as a management and as an apprehension and rehabilitation tool, and proposed major changes in its use. These proposals have become the basis for development of both manual and computerized information systems.

Second, substantial Federal funding has become available as a result of the Omnibus Crime Control and Safe Streets Act in 1968. While State and city agencies were reluctant to commit their own financial resources to support information system development, they were willing to allocate Federal funds that they otherwise might not have obtained.

Third, the results of the technological revolution—characterized especially by the use of computers and data systems in business and industry—was finally transferred to the law enforcement and criminal justice communities. While in 1964, only one major police department, St. Louis, Mo., utilized a computer, by 1972, LEAA could report that over 400 computer and information system facilities were in operation, or in the development stages, throughout the country.

In Massachusetts, like in most other States, criminal justice agencies have begun the development of information systems. There are several local computerized police information and data handling systems, and the courts have a system in the process of development. The principal State system, which encompasses the major State criminal justice agencies and which will serve local agencies as well, consists of criminal histories, offender-based transaction statistics, and management information. While planning began as early as 1967, and I might point out it was then attorney, State Attorney General Elliot Richardson, serious implementation efforts were not undertaken until the past 2 years.

In many ways, the Massachusetts experience has been unique simply because, from the beginning, we have seriously established rigid requirements for system security and the protection of the privacy of the individual. These requirements have made it extremely difficult to develop that system. In many ways, effectiveness is constrained by privacy considerations. But in our judgment, such considerations are so important, they cannot be avoided and cannot be diluted.

Congress and the States must deal with a number of problems in regulating criminal justice information systems. Let me outline what I consider to be the most significant of these problems and relate them to the bill under consideration today.

First, you must carefully define exactly what is going to be regulated. In Massachusetts, we took the approach of regulating criminal offender

record information. Under our statute, this means records and data compiled by criminal justice agencies for purposes of identifying criminal offenders and of maintaining, as to each such offender, a summary of arrests, pretrial proceedings, the nature and disposition of criminal charges, incarceration, rehabilitation, and release. We specifically avoided, and it is stated so in the statute, such things as intelligence, analytical and investigative reports, and other related materials.

Yet, as all encompassing as this statute appears, it leaves many unresolved issues for the public and criminal justice agencies to interpret, such as what is meant by criminal offender record information. For example, sentencing information might include evaluative materials prepared by probation officers or district attorneys. Or, release information might include the parole officer's evaluation.

On one hand, this type of information is part of the individual's record. On the other hand, individuals preparing such information might not be so frank or candid if they thought that the individual, as part of inspecting his own record, might become cognizant of their evaluation of him.

H.R. 9783, attempts to regulate both data banks and data. The definition of these terms is not entirely clear and seems to include intelligence and investigative matters which, in my opinion, should not be mixed with history information subsequent to the initiation of criminal proceedings. Such broad definitions result in two problems: Making the data system ineffective and making organization and management impossible.

A second major area of concern is who will set the policy and determine the utilization, access, and dissemination of this data. In Massachusetts, we have established the criminal history systems board composed of 15 criminal justice agencies who make up the prime collectors and users of that information. The board represents all parts of the criminal justice system—police, courts, corrections, and others.

At the national level, the NCIC is presently under the direction of the FBI and the Department of Justice. There is no representation of other criminal justice agencies which, at least in the area of criminal offender record information, may be making greater use of data than police agencies. Nor is there adequate representation of the States and cities who are both the primary users and collectors of information. As far as we can tell at this time, there seems to be no intent at the national level to obtain broader representation.

Police alone should not regulate this information. A broader policy board should be established by the Congress to set the policy and make the rules and regulations governing this system at the national level. And, as a prerequisite for joining the system, each State should be required to establish similar policy boards. H.R. 9783 is silent on this matter and should be changed.

A third issue concerns the establishment of an independent review of security and privacy matters. Again looking to the example of Massachusetts, we have an independent security and privacy council representing the public, State, and local government, and criminal justice system. This council's function is to examine all questions concerning security and privacy of the system, to conduct such inquiries and investigations as it deems necessary, and to review individual cases.

A similar council at the national level would be invaluable in terms of insuring that the system contained adequate security and privacy safeguards, and that if it didn't that the issues would come to the public's attention.

H.R. 9783, while placing stringent privacy protections on maintenance of data, does not establish a vehicle for policing the data banks. Let me add that the security and privacy council in Massachusetts, just by being in operation, causes the criminal history systems board to constantly look at security and privacy issues over the shoulder for fear that the security and privacy council is going to find something they are doing wrong. And the board, which is made up of only criminal justice agencies, has become very, very sensitive to security and privacy matters as a result of having the council overlooking its function.

It has also established a system by which the council actually sits in on all of its deliberations, and is able to offer its opinion even though it does not have a vote.

Mr. EDWARDS. Does this council have a paid staff?

Mr. ROSENFELD. No; the council does not have a paid staff. The members of the council actually do a substantial amount of work themselves, and use students from Harvard, from some of the other law schools.

Mr. EDWARDS. And Boston College I trust?

Mr. ROSENFELD. Yes; as a matter of fact, Boston College was nice enough, just recently, to offer us a student to work for the council free of charge.

Fourth, certain minimum criteria should be established by the Congress for an information system. Most of these issues are dealt with in H.R. 9783. These criteria should deal with the types of information placed on a system, the accuracy of that information, and who should have access to it.

Probably the most difficult issue to resolve is what information should be included in an information system. On the one hand, we are concerned with reducing the deleterious effects on the individual to a minimum. On the other hand, if we don't put on enough data, some very expensive systems will not be utilized by those agencies which need them the most.

In dealing with criminal histories, the major point of dispute is arrest records which are not followed by a conviction. These could include arrests in which there is no court appearance, and in which there is a court appearance but also a dismissal, a nolle prosequi, a continuance without a finding, or a not guilty finding.

The police, for the most part, insist on the value of this information in the conduct of investigations or as useful for determining a person's dangerousness. It is also useful as a management tool, so that the system may be properly monitored. We found, for example, in a recent spot check, that 20 percent of those whose records were converted, had instances of arrests not followed by a court appearance. This shocked even the police on our board, and it raises serious questions about arrest practices in some police departments in Massachusetts.

Mr. DRINAN. Mr. Chairman, may I interrupt there? I am not sure I understand the thrust of that.

What do you mean 20 percent of those who records were converted?

Mr. ROSENFELD. We have converted approximately—we checked the records on 1,000 people who were serious felons for the most part. In all cases, they were serious felons, and 20 percent of those records, there were arrests made of those people, of those people, and it stopped right there. There were never processed any further in the system, which means they were being released at the police station level.

The idea of arrest is that there is sufficient probable cause, and that a person should be brought to court as a result of the situation.

Mr. DRINAN. Well, the national statistic is higher though. As I recall in hearings last year, only 25 percent of all arrests eventually result in a conviction.

Mr. ROSENFELD. That is a conviction. I am saying they were not even brought to court.

Mr. DRINAN. All right.

What do you mean by "were converted"?

Mr. ROSENFELD. We are converting our records on this, the computer, and it is the process of conversion.

Mr. DRINAN. And these are instances of arrests not followed by any court appearance?

Mr. ROSENFELD. Any court appearance at all, that is right.

Mr. DRINAN. All right. Thank you.

Mr. ROSENFELD. And I think on doublechecking on that, what we found was that, for example, it was the abuse of arrest practices by local police departments; they were making mass arrests, they were taking in everybody on the street, and then releasing them, or in the cases of certain types of crimes, they would just pick up everybody that had ever been arrested for that type of crime, or convicted of it before.

And that raised real problems, I think, in terms of what kinds of actions the police actually do take.

Mr. DRINAN. All right, fine. Thank you. Please proceed.

Mr. ROSENFELD. It is less difficult to resolve what types of information are included if two other main concerns are dealt with effectively. The first is insuring that the information is accurate. In Massachusetts, we do this through double- and triple-checking data and records, as well as by establishing certain minimum identifiers. We allow the individual to check and challenge his own records, a process I shall discuss further later.

The second concern which alleviates some of the problems of types of information to be included is limitation on access and dissemination. It is critical that those agencies which should have access to records and to whom data should be disseminated are clearly defined. In Massachusetts, we limit information to criminal justice agencies and to other agencies authorized by statute to have access.

Mr. EDWARDS. Mr. Rosenfeld, at that point, may I ask you a question?

Mr. ROSENFELD. Yes.

Mr. EDWARDS. And to other agencies authorized by statute to have access. Do you mean State statutes?

Mr. ROSENFELD. State or Federal statutes.

Mr. EDWARDS. Specifically authorized?

Mr. ROSENFELD. Specifically authorized.

Mr. EDWARDS. Well, suppose you might disagree with the statute? Suppose a State statute in Florida, in any State, authorizes the licensing, or just authorizes access for a garbage collector?

Mr. ROSENFELD. The way we are dealing with it is first of all with Massachusetts if it is a statute we accept the statute, the Massachusetts statute, on the basis that our legislature has the primary responsibility.

Mr. EDWARDS. That your legislature would be responsible?

Mr. ROSENFELD. That is right. In the Federal, we also assume that at the Federal level. With other States, we require the agencies to submit a specific request indicating what their statutes say, and what the justification is, and we rule on those on any other States.

So we do not give automatic approval to other States. We just do to the Federal and Massachusetts laws.

Mr. EDWARDS. As I recall, the only Federal statutes there are would allow you to provide criminal records to banks and savings and loan associations.

Mr. ROSENFELD. I have not known of those having been pointed out. The only thing—it is a very confusing and difficult area, because most statutes do not say you shall have access to criminal records. What they do say is, for example, there is the Labor Department which says that a person may not hold an office in a labor union if he has been convicted of a felony. On that basis, we will give the U.S. Department of Labor access to records only for the purpose of checking that.

We put the limitation to specifically what the statute is. The U.S. Civil Service Commission has a statute saying that certain people cannot hold civil service positions if they have been convicted of riot or civil disorder or something like that. We will allow them to check for that purpose only. And that same thing is true with all other statutory authorizations.

Mr. EDWARDS. Very good.

Mr. WIGGINS. Well, now, excuse me, sir. How do you limit their inquiry for that purpose only?

Mr. ROSENFELD. By notifying them that that is the only purpose for which they can request information, and we also notify all agencies that that is the only purpose for which they can request information, and that when they do request the information, for example, if it is on an individual who purportedly is going to get an office in a labor union, they will only be able to ask, for example, if it specifies drug information, or if it specifies a felony. The holding agency is supposed to only give them that information. They do not give them a complete record back.

Mr. WIGGINS. Well, now, if we are talking about a labor official, who by statute may not hold an office if convicted of a felony, the request for the records must come to your agency, and by regulation you would confine the inquiry only to felonies?

Mr. ROSENFELD. Right.

Mr. WIGGINS. If your records revealed a long history of felony arrests but no disposition, how would you report back to the agency?

Mr. ROSENFELD. There were no felony convictions.

Mr. WIGGINS. And a similar response would be in the case in the event of the civil service illustration you used?

Mr. ROSENFELD. That is right. Previously, prior to the time our statute went into effect, they got a complete copy of the record, which showed everything on it.

Mr. EDWARDS. Suppose the felony arrest had just been 3 weeks ago?

Mr. ROSENFELD. It would not be reported to that kind of an agency because it asked only for convictions. We assume in all of these instances that these agencies are also conducting their own background check, and that is something that is very difficult in terms of trying to discuss with them. Many agencies have utilized the criminal records as a simple way to conduct the background checks, and they do not bother to do anything else.

We feel that that is not proper, that they ought to be doing their own background check, and a lot of this information is going to be available to them from other sources.

Mr. EDWARDS. I think that that is an appropriate answer.

Go ahead.

Mr. WIGGINS. Well, is it really, Mr. Chairman? It seems to me that you are compromising your position, Mr. Rosenfeld. You do not much care that they have the information as long as they do not get it from you?

Is it not the possession of the information that is the vice, not where they get it?

Mr. ROSENFELD. No. But my point, Congressman, is that if the person is under arrest for some kind of—for a felony, for example, and a proper background check is done on the individual by checking his employer, by checking his history, and everything like that, other than his criminal record, that they will probably find that kind of information out.

Now, I am not saying in that that it might not be useful to them. What I am saying is that the problem that criminal records present is a very different kind of problem. It is a problem of, in many instances, arrests without any supporting convictions, unsupported material in there, and there are a lot of other things that are in there. And it is a record somebody just sticks into a file, and it becomes a permanent part of the thing.

You cannot stop people from accepting rumors, I do not think. Why feed it?

Mr. WIGGINS. The potential for harm in evaluating information is apparent to all of us. But in order to conduct an exhaustive inquiry into personal misconduct, which may be relevant to employment for example, you have got to start somewhere. And the fact of an arrest may be a very significant lead to one to make a further inquiry as to facts surrounding that.

You would not give them that lead, of course, but you would not object to them finding it out some other way?

Mr. ROSENFELD. Well, in most instances if they did find out about an arrest or a court, for example, the arrest by itself really does not come, in my mind, should not carry any weight to someone unless there has been a followup court case, in which something has occurred. And there is nothing in our law that prohibits any agency from going to court and actually getting a copy or a record of that court case. That is public information, a public record, information, within Massachusetts.

We are determined to prohibit people from having access to just simply records on individuals. In other instances, they are going out and actually checking a specific case. In this instance, you are really giving them a freeway into the privacy of the individual, and that is what we are trying to protect against.

Mr. WIGGINS. An easy way.

Mr. ROSENFELD. A very easy way, and sometimes with unsupported materials.

Mr. WIGGINS. You may proceed.

Mr. ROSENFELD. As I said, in Massachusetts, we limit access to criminal justice agencies and others authorized by statute. We also limit secondary access, which is an even more critical issue, because it is in this gray area that most abuses occur.

Let me explain what I mean by secondary access. Under most data systems, access is limited to certain agencies. Once the information goes to that agency, it is left to their discretion as to what is done with it. In most instances, criminal justice agencies realize the deleterious effects of criminal offender record information on an individual, and are careful about to whem they make these records available.

But there are too many instances in which persons who are friendly with the local police, or the major businesses in a small community, or a credit company, have, through one means or another, obtained such information which they consider to be of value in doing a credit check, an employment security check, or just checking on their neighbors. This was not the intent in the establishment of criminal justice information systems.

This data is collected to assist criminal justice agencies in apprehending, processing, and rehabilitating offenders. Using it in any other way should be carefully limited to those instances in which it is absolutely necessary and/or unavailable through other sources.

This decision clearly will cause certain Federal and State agencies, employers, banks, credit companies, and others, more difficulty in finding out information which they believe is necessary to make their decisions. But this was never the purpose of collecting that information and the potential abuses of this information far outweigh the benefits to be gained.

The issue of secondary access is even more pronounced when one considers national systems. Let me assume that a State like Massachusetts establishes rigid criteria for access to criminal justice information. Let us also assume that the State of Rhode Island does not. If we join a national system which does not regulate secondary access at its level or which does not require States joining that system to regulate secondary access, we have criteria which can be avoided and, in effect, made null and void. It is a simple matter for a business operating in Rhode Island to obtain the information through one of their local police or probation departments via a national system, and Massachusetts, under that system, would have no way to protect its citizens from an invasion of privacy.

Section 3 of H.R. 9783 is very rigid on this matter. In fact, too rigid, in my opinion. It only allows access to officials of criminal justice agencies. There are other agencies with legitimate purposes, however, and these authorized by statute may be justified in having limited access. In addition, criminal justice agencies must be carefully defined, as our experience has demonstrated the difficulty of making judgments without careful definitions.

There are two major criteria with which this committee should be concerned. One would be to insure that there are methods by which violations of access, dissemination, and secondary access could be properly regulated and punished. There must be adequate penalties

established including suspension from the system, revocation of use of the system, as well as criminal penalties including fines and imprisonment. Section 6 of this bill does a good job of addressing itself to the question of penalties.

The other major issue to which I refer is to enable the individual to examine his own record, to challenge that record, and if the record is proven to be inaccurate, to obtain changes in that record. Again, it is essential that the Congress establish this policy and place the burden of responsibility on specific agencies to take action.

In Massachusetts, each individual has the right to inspect his record. If he believes it to be inaccurate, he may request the agency in charge of the record to modify it or otherwise change it. If the agency declines to act, the individual may request a hearing before the security and privacy council. If the council finds the record to be inaccurate, it submits its recommendations to the Criminal History System Board and the board is empowered to order that the change be made.

If the board does not act to the satisfaction of the aggrieved person, court remedies, including equitable relief, are provided. Section 4 of this bill does not, in my opinion, go far enough in specifying the court of action for obtaining a remedy.

It is crucial that there be Federal leadership through legislation and administrative regulations to deal with these issues. While the Massachusetts experience is far from complete, it is our opinion that we have established the necessary standards for the operation of an effective criminal justice information system with the necessary built-in protections to insure that, except for unusal instances, the security of the system and the privacy of the individual will be guaranteed.

We hope that the Congress and this committee, in its consideration of this legislation, will establish the same rigid standards and strict criteria for Federal and State systems which will contain criminal justice information on individuals.

This proposed legislation takes important steps in the directions I have tried to summarize today. The sensitivity of the drafters to protection of the individual is obvious; and I applaud Representative Edwards for his support of these issues. At the same time, I would caution this committee that the legislation must be carefully balanced between protection of the individual and protection of society. The line is difficult to draw, but we must make the effort.

I would also like to mention before finishing about the court suit, which is in the Governor's statement primarily. The Justice Department did announce yesterday through its Boston office a statement by the Deputy Attorney General and the U.S. attorney for Boston that they were withdrawing the suit against Massachusetts brought to force the State to give information to the Federal agencies. They also indicated as part of that statement that they were in agreement with the Massachusetts position on restricting information on the security and privacy matters, and that they were preparing, they were advising Federal agencies to go to Congress to get specific authorization for any access that they did need, and that the legislation which they were drawing up would reflect this viewpoint.

So we are hopeful that some of the efforts we have made in the Commonwealth will payoff, and that the position of the Justice Department is in the process of change.

I would like to thank you again for the opportunity you have given me to express my views before this committee. I will now be happy to answer any questions you might have.

Mr. EDWARDS. Thank you very much, Mr. Rosenfeld, for your very helpful statement, and our thanks to the Governor for his statement also.

I would like to yield to the gentleman from Massachusetts, Mr. Drinan.

Mr. DRINAN. Thank you very much, Mr. Chairman.

I want to thank you, Mr. Rosenfeld, and may I suggest that you give us, as soon as possible, the statement of the Government yesterday on what they intend to do, so that this record can be complete.

Going back to one of the points you made on page 4, you say that H.R. 9783 attempts to regulate both data banks and data, but the definition of these terms is not entirely clear, and seems to include intelligence and investigative matters. I am not entirely certain of that because on page 2 of the bill it says that the term data means any information on the allegedly criminal activities of any person, or pertaining to the apprehension, adjudication, confinement, or rehabilitation of any person on account of any such activities. And then you drop down to section 2, No. 1, that that consent must be information recorded by an officer or employee of the criminal justice agency in the performance of official duty, and that, too, it must be under the laws of its origin, open to public inspection.

Now, in your judgment that seems to include intelligence and investigative matters which should not be mixed with history information. Well, I am not certain of that. I defer to your judgment that you know this much more intimately than I, but I am wondering whether, Mr. Chairman, you or counsel could speak to that, whether or not Mr. Rosenfeld has a point that this definition is not narrow enough to exclude intelligence and investigative matters which should not be mixed with history information?

Mr. PARKER. I can speak for the draftsmanship. It was intended to exclude intelligence information by the fact that it was not open to public inspection.

Mr. ROSENFELD. I think one of the difficulties we found is interpreting our laws to the satisfaction of everybody and so that they are effective. And, for example, in that instance when you get to the issue of apprehension, unless you deal with the time an actual arrest is made, apprehension includes all of the investigative activities that go to leading to arrest as well.

When you are talking about being recorded by officers or employees of the criminal justice agency, they are doing that. The matter of open to public inspection confuses me a little bit because, for example, our criminal records are not open to public inspection; and so that criteria would not apply, for example, in our State. And so, it could conceivably include investigative matters in that way.

Mr. DRINAN. Well, Mr. Chairman. I would make the point that we ought to be very careful about this. I think Mr. Rosenfeld has put his finger upon an apparent weakness or ambiguity rather in the law, and the legislative record shows we mean to exclude all evaluative material.

Now, Mr. Rosenfeld, on another key point, on the whole question of giving this information to agencies beyond criminal justice agencies, now, as you say, this bill is narrow in that regard. And I think the burden is frankly on agencies other than criminal justice agencies that they need this, and that would be in the public interest. I am not persuaded of that.

Would you elaborate on your conviction, apparently, that agencies beyond criminal justice agencies deserve to have this information?

Mr. ROSENFELD. Well, the basis on which we did it is really what I would say, what we would call a public interest basis. It is my judgment, and I think that of the legislature in Massachusetts, that the Congress and the legislative agencies certainly have, if they feel a labor union official can make a law to the effect that he should not hold office if he has been convicted of a felony; that there should be some method by which the agency responsible for policing that law should be able to find out that type of information.

Now, I do not know any other way to verify that kind of information other than to go to a criminal record system. And if that is the case, then I would say that those agencies ought to be given that kind of information out of those records.

Now, what I do say at the same time is that it ought to be very limited just as to exactly what they get. And as I mentioned, Congressman Edwards, what happened previous to the passage of our statute in Massachusetts is that the central probation records files, and they have a very difficult time in trying to sort out anything in there, and people would ask them whether anybody had been convicted of a felony, and what they would get back was a copy of the whole record. That I think is wrong. I think that should not be done.

What has been done is to set up a system, and to guarantee that only the information that is requested will be provided. Now, that does not make a lot of the agencies feel right. But I do not see that they need anything else other than exactly what the legislature tells them they have to have.

Mr. DRINAN. Would you say the U.S. Civil Service Commission has a right to all of this? There are 3 billion Federal employees, and there are roughly 300,000 or 400,000 who apply for a Federal job every single year, and they go to the FBI as a routine.

If this became law, and this information is restricted only to convictions, would you feel that the U.S. Civil Service Commission has a right, or should know whether this man who is applying to be a janitor has a conviction?

Mr. ROSENFELD. We had a great deal of difficulty when they appeared before us in trying to resolve that and I do not think we have successfully dealt with it. We gave the U.S. Civil Service Commission access on the basis of the types of crimes that they cited in their statute, which they said persons could not hold civil service office if they had been convicted of these types of crimes.

I would say they should be able to get access to find that out. The problem comes in that the Civil Service Commission does not just take the information and keep it. They transfer it to the agencies and we notified them that they were not allowed to do that in this instance; they were only allowed to tell the agency whether or not the person was in violation of the statute or not in anyway.

We have not been able to check to see what has actually now happened, as to whether they are giving the information or not. What it does is the statute, by its very nature, and by the very nature of the Civil Service Commission, violates the secondary access rules. And I do not know the answer to that problem. I think that is one of the more difficult ones.

I would say they should be given the access, they should be able to report whether or not there is any conviction, and that should be the extent of it.

Mr. DRINAN. Well, I take it that the Small Business Administration now, under the agreement that you reached yesterday, will not have access to this?

Mr. ROSENFELD. That is right.

Mr. DRINAN. And the 80 people in Massachusetts who have applied for the loan under SBA presumably can get that loan today?

Mr. ROSENFELD. Hopefully.

Mr. DRINAN. Hopefully.

On the question of secondary access, you have thought about it a great deal and you have guidelines here. But I am still unconvinced that we ought to allow any secondary access.

Now, what sort of access would you allow? Would it be credit agencies and so forth?

Mr. ROSENFELD. No, I agree with you. I would not allow any secondary access. We totally prohibit secondary access. What I was saying was that it has to be regulated and specifically stated, that you are not allowed to give it out secondarily.

Mr. DRINAN. Did the Government agree to that yesterday, in effect, in principle?

Mr. ROSENFELD. Yes, yes.

Mr. DRINAN. They did?

Mr. ROSENFELD. Yes.

Mr. DRINAN. They did? All right.

And so, did they state yesterday that this would now be a norm, and that the guidelines that they will issue or the law that they will request from the Congress, they will say that any State that wants to get all the goodies from the FBI files must forbid secondary access?

Mr. ROSENFELD. Not at all. All they said was in very general terms, that they were in agreement with us in principle, and they would be drafting legislation, which would reflect this. They did not go into any detail as to exactly how they would implement this, and they have not published any regulations to implement the law, or any of their requirements for local States that I am aware of.

Mr. DRINAN. Did they, from your summary of what they said, suggest that the Congress would have to do that?

Mr. ROSENFELD. Yes, they did, and they also suggested that they would advise Federal agencies that if they felt that they should have access to records, that they should go to the Congress to get that legislative authorization, No. 1; and No. 2, that they should be very careful that they absolutely need it before they even went in the first place.

Mr. DRINAN. This is a welcome development.

I am also troubled, Mr. Rosenfeld, at all of these computers that once they get something on you, like you did not pay a bill or something, they never forget, and they transmit it to all types of people. So, I

think we have a fundamental question here when the FBI files are more and more automated, what information do we put in initially, because once you put it in there, it is always there.

So, do we not need to put into the statute or to the regulation exactly what can be put down?

Mr. ROSENFELD. I would say so, but I think that it does not always have to be there. If you provide very specific procedures for getting rid of information, for example, through the—the Governor pointed out in his statement about a new feeling of arrest records in the State of Massachusetts. You can have purging of files if it is so ordered by an appropriate agency.

There are a number of ways to get information out of a system, and you can also make sure that the system is set up so it keeps records of where it has provided information in the first place. But these procedures have to be very carefully drawn, and they have to be specified as to who has the authority to order these changes.

One of the problems with the FBI is that they say that they do not regulate the local systems, they do not regulate, they cannot control what is in the Army's files, they cannot control what is in Massachusetts' files. I think if there is going to be a national system, somebody ought to be controlling what goes into that file and what comes out, and what is purged and what is not purged.

Mr. DRINAN. Well, is H.R. 9783, on pages 3 and 4, adequate with respect to this matter? The bill says that arrest records of an individual that are at least 2 years old are destroyed. Records of any conviction that are 10 years old with no subsequent convictions, that is destroyed; and no criminal data bank shall collect or maintain any information on a juvenile.

And then we do not even get into the question, and would you agree with this on page 4, that no criminal data bank shall collect or disseminate any information for any offense for which the maximum penalty is less than 6 months or a fine of not more than $100?

Now, that excludes all of the so-called junk, some traffic offenses, and so on. Would you go along with that?

Mr. ROSENFELD. Yes, I would. We excluded all traffic offenses and drunkenness charges, and the real minor crimes.

On anything that is a serious crime, I think the Supreme Court used the 6 months as a basis, and our council did, as well.

Mr. DRINAN. The supreme court in Massachusetts?

Mr. ROSENFELD. No, the Supreme Court of the United States in determining the seriousness; so, I would go along with that. I think that one of the problems here is, and I am not exactly—and I may be inaccurate on this, but when I looked through it, I recalled that you were talking about records of conviction if it is 10 years old and no later conviction is on record. I do not know if that takes into account, for example, someone who has been in prison for 10 years.

Is there an exception made there? I did not notice it.

Mr. DRINAN. The records of any conviction, if the conviction is 10 years old and no later conviction is on record; I would assume that it would.

Mr. ROSENFELD. And I think that those, you know, someone who has been in prison for 10 years, you might want to keep a record on him at the time he gets out.

Mr. DRINAN. That is a good point.

Mr. EDWARDS. We duly note that observation.

Mr. ROSENFELD. I also think that there probably has to be a great deal more put in on page 3 on the section C where you talk about what outdated data is. I think that you can be much more specific about other things on outdated data. For example, on No. 1, arrest records that are at least 2 years old, if no other arrest; I think there are other occurrences that a person goes through in the system. For example, you might want to limit that to arrest records which are 2 years old if the person has not been processed any further in the criminal justice system, but if he has, you might want to maintain that arrest record if it is over 2 years old.

Mr. EDWARDS. If the gentleman would yield, on page 3, line 21, the 10-year purging provision, it was the intention of the drafters that it be 10 years after leaving the jurisdiction of the court.

Mr. ROSENFELD. In any event, I think that there are a lot of specific things that have to be done in terms of how records are kept, the actual processing of a person through the criminal justice system, and all of those instances are important.

Now, if there is an arrest which is not followed by a conviction or is followed by, for example, the Massachusetts sealing of records; let me just point out that this was just enacted this year, and it provides that in a criminal case where a defendant has been found not—well, not guilty by a court, and no bill has been returned, or a finding of no probable cause has been made, then the file will be sealed in a criminal case where a nolle prosequi has been entered or a dismissal has been entered, except in cases where an order of probation has been terminated, and it appears that substantial justice would best be served, and directs the clerk for the court to seal the records, and it provides for other types of things like that.

I think all of those are very complicated issues, nad have to be dealt with in accordance with what the process of system is. But you want to make sure that you do not lose records that are going to be of some value to people in the system for effective law enforcement. On the other hand, you do not want to keep records in there which are unsupported.

There are a lot of ways a record can be unsupported more than is specified in this statute.

Mr. DRINAN. Well, one last question on a related matter. Would you elaborate on your conviction and experience on what the contention of the police is as you note on page 6? The police insist on the value of this information; namely, the arrest record in the conduct of investigations, information useful for determining the dangerousness of a person.

Mr. ROSENFELD. Right.

Mr. DRINAN. Do you subscribe to that, or do you think that we are correct in saying that the arrest record in and of itself has no usefulness, or at least that it should not be promulgated?

Mr. ROSENFELD. Well, I suppose I would take somewhat of a middle position, which is I think that the information ought to be collected, and it ought to be very carefully determined as to—it should be collected from a management standpoint if none other, but then I think it also might be considered to be allowed to go to certain types of investigative units.

The police argument essentially is that some people are arrested and may be dangerous, but for one reason or another a conviction is not obtained against the individual. If they stop him on the street, they can check through the computer to find out, and the computer tells them nothing about the individual, says, you know, there is nothing on there, because you have eliminated any arrest that was not followed by a conviction. Then, he may not be aware of the dangerousness, and you end up with a real problem assuming, and we have had the experience in Massachusetts, where someone has been stopped and the policeman has been shot as a result of him not being aware of that. If he is aware that the fellow has been arrested a couple of times for assault with a dangerous weapon, or for some other type of crime like that, even though he was not convicted, then at least he will be careful in approaching the individual in the first place. And I think that there is a lot of merit to that argument.

The problem is as to what other use is this going to be put, that type of information, if it is not limited, and on balance, is it going to be worth giving to them? And I think in my mind, at least on balance, we should provide them with enough information to make sure that the police themselves are protected in situations like that.

On the other hand, they should not be—it should not be allowed to go out unrestricted, on any unrestricted basis.

Mr. DRINAN. Well, you are probably opening the dike that will erode the system. How can you isolate certain arrests that indicates that a person is dangerous, a previous arrest for the possession of a dangerous weapon?

Mr. ROSENFELD. Well, you could select certain types of crimes, for example, violent crimes and say that any arrest for those types of crimes would be given to certain selected individuals on certain occasions, so that in those instances if it was other types of crimes, like lesser misdemeanor or nonviolent types of crimes, then you could possibly say that that information would not be put out.

Mr. DRINAN. Is this not violating your own principles though, that a large number of arrests are totally without merit and justification?

Mr. ROSENFELD. It is to a certain extent. I am also of the opinion though that we have to strike a balance on the principles to make sure that we provide effective law enforcement. I think it is very difficult to do, but that is one of the balances, I guess, I would strike.

Mr. DRINAN. Does H.R. 9783 have that balance?

Mr. ROSENFELD. I do not think so. I do not think it does.

Mr. DRINAN. Thank you very much, Mr. Rosenfeld. Thank you. I yield back to the chairman.

Mr. EDWARDS. Mr. Wiggins.

Mr. WIGGINS. Thank you, Mr. Chairman.

Mr. Rosenfeld, we have before us Gov. Francis Sargent's testimony, which I think has been made a part of our record [see p. 146]. Appended to that testimony is a long list of names and dates which are described as, in one case, applicants not approved for certification, and on the other hand agencies which are certified. I take it you have reviewed these, have you not, Mr. Rosenfeld?

Mr. ROSENFELD. Yes; I have.

Mr. WIGGINS. Looking over this list of those who were not certified, I see many of them are Federal officials seeking information, appar-

ently, but not certainly, in connection with their Federal duties. A common illustration throughout is the recruiting officer who apparently seeks information with respect to an applicant for enlistment into one of the branches of the service. Those applicants have been fairly uniformly turned down.

On the other page, we have agencies which are certified and you include, well, just by way of illustration, I think there is a naval investigative service, or something that relates to official investigations.

What are the standards by which you authorize in one case, and you turn down in another?

Mr. ROSENFELD. The standard in those instances is whether or not the actual agency that has applied is a criminal justice agency, or not. For example, the naval investigative services does criminal investigations for the Navy, and we carefully have limited in granting them access that they will only utilize the information for criminal investigations, not for the purposes of recruiting or any other purposes.

Mr. WIGGINS. Well, then if a duly authorized, duly constituted criminal investigative agency were to seek information on behalf of Navy recruiting, that would not be a proper inquiry?

Mr. ROSENFELD. No.

Mr. WIGGINS. The long and the short of it is you do not feel that criminal information is relevant to the Navy in its recruiting practices?

Mr. ROSENFELD. There is no law that says that you cannot go into the service if you have been convicted of a crime, and if the military was able to point out to us that Congress had said that, then we would have abided by that. But under the circumstances, that is just a policy that the military has, and they have always checked people's criminal records.

Mr. WIGGINS. I see. I see.

Now, some of those agencies, which have been approved in your State, are of the type that constantly or frequently are cited to us as the gross abusers, real estate brokers and salesmen. Are you honoring those requests because that is authorized pursuant to Massachusetts law?

Mr. ROSENFELD. That is right.

Mr. WIGGINS. And you are not second-guessing the legislature?

Mr. ROSENFELD. We do not feel that it is appropriate for us to overrule the State legislature.

Mr. WIGGINS. But you have no hesitancy in overruling the policy of the Department of Navy, for example?

Mr. ROSENFELD. No; the Department of Navy, it is not statute. It is their own regulations, and we would have a question about overruling the Congress, but not the Department of Navy, I guess.

Mr. WIGGINS. Well, my counsel here has pointed to something. The basic document is correspondence from Fred Buzhardt, who has gone now on to greater things, when he was General Counsel to the Department of Defense. The letter is addressed to you, and it is dated January 29, 1973.

I have not read the letter, but attached to it is a memorandum of law, and that memorandum points to a section of the United States Code, title 10, and I will quote only one line: "No person who has been con-

victed of a felony may be enlisted in any armed force." Now, let us accept for purposes of argument that that is the law.

Do you feel that that does not——

Mr. ROSENFELD. No, I would——

Mr. WIGGINS [continuing]. Authorize the request of information to a recruiting officer?

Mr. ROSENFELD. No. I would feel that it would, and that had not been pointed out to us by recruiting, and I missed that in Mr. Buzhardt's letter. What he was writing to us about was the Defense investigative services at the time that he was Counsel to the Defense Department, and was trying to point out that they were a legitimate criminal investigative service for the Defense Department, which they never really did point out to us.

I was not aware of that part, and I did not think it relevant to the Defense Department itself in their own investigations.

Mr. WIGGINS. Well, you might jot down this citation for your own future reference.

Mr. ROSENFELD. Yes. What was it?

Mr. WIGGINS. It is title 10, United States Code; section 504 is the section from which I just read.

Mr. ROSENFELD. Thank you very much.

Mr. WIGGINS. I have no further questions of this witness, Mr. Chairman.

Mr. EDWARDS. The subcommittee, Mr. Rosenfeld, as I have mentioned before, visited the FBI, and the Acting Director was kind enough to show us around, show us where the manual arrest records are kept, and then across the hall where they have the computers that belong to the NCIC. And the NCIC was described to us as having a number, providing a number of services, that I am sure that none of us would have a problem with, such as fugitives, wanted fugitives, missing persons, stolen cars, stolen securities, things like that, that would really be very important to have a computerized national network about. You agree there?

Mr. ROSENFELD. Yes, I do, very much so.

Mr. EDWARDS. But then, and I am sorry I did not know it when we visited NCIC, that they had already moved into phase 2 of the program, which they moved into, I guess, around 1970; and that is the operational exchange of computerized criminal histories with the States. That is where we get into some difficulty, and I presume that that is where the State of Massachusetts found problems.

Mr. ROSENFELD. Right.

Mr. EDWARDS. Not with the exchange of information, the instant location, or the identification of a stolen car, or something. That did not bother you?

Mr. ROSENFELD. No. The NCIC computer contains, as you say, a lot of information which we are hooked into and provide to them on a regular basis; gun registration, stolen cars, stolen property, missing and wanted persons.

Mr. EDWARDS. That really must be a very——

Mr. ROSENFELD. That is for the most part, other than the outstanding warrants and the fugitives and things like that, that does not deal with individuals' or offenders' records, although there is rap sheet information that is contained in the NCIC computer. But that would be part

of a criminal history. The rap sheet really contains personal information on the individual in the record.

Mr. EDWARDS. Well, the criminal history program is the one that you are concerned about, and I am sure this committee is concerned about it, too.

Mr. ROSENFELD. That is right.

Mr. EDWARDS. There also has to be a fingerprint card file submitted, too. How do you submit a fingerprint card to a computer? With a formula?

Mr. ROSENFELD. No, you can put it—it is a picture right on the card.

Mr. EDWARDS. Oh, I see. The entire card goes through the computer, and then comes out on the other side?

Mr. ROSENFELD. What we do in Massachusetts is we take the records in the Department of Probation, doublecheck them against corrections in the Department of Public Safety's Bureau of Identification to verify the fingerprints at that point for the same offender.

Mr. EDWARDS. Take the formula of the fingerprints and run that through?

Mr. ROSENFELD. Right, and we put that all on one card, and that goes through the computer as an identifier. That is one of several identifiers that we use.

Mr. EDWARDS. Well, the problem elsewhere has been with these computers, like in Kansas City, that were in Lenaxa, Kans., where a white, middleclass suburb of Kansas City was found to be offering businessmen and real estate agents the opportunity to check prospective employees, and renters through their system, to keep an idea on who was coming to town. That would be something that would concern us very much, or this kind of information, if this kind of information got in.

And again in Kansas City, it was feeding its computer the names of councilmen, judges, and other municipal leaders, and adults and juveniles and people with a history of mental disturbances. That would cause some serious problems.

Well, what is going to eventually lead you, lead the State of Massachusetts, into going back and attaching itself to the NCIC system? What prerequisites do you have?

Mr. ROSENFELD. Well, we feel that if the national system is established, is conducted in a way which is consistent with the principles that I have tried to set out here today, and by the Congress or by the Justice Department, that we will be able to go on. I do not think the problem is as great as it was before. It seems to us that the Justice Department is interested at least in discussing it.

We have met with FBI officials on several occasions. We are insuring that our system is compatible with the national system, so that we are able to go on at any time, and we are using exactly the same codes. We are meeting all of the national requirements in terms of our minimum identifiers and fingerprints, and in terms of an effective law enforcement interest being able to get that information.

One of the problems with the information is that it is not complete at all. For example, in our State police agencies, no one requires them to send information in on what happens, or court agencies, and it is all just done as a matter of course, if they want to do it.

So you probably only have a 50-percent chance of finding out what you want to anyway with the system, but hopefully if they set it up with the proper safeguards, we will go on to it. We expect to.

Mr. EDWARDS. The problem is that it would not necessarily be solved if the FBI improved its own practices.

Mr. ROSENFELD. No.

Mr. EDWARDS. They would have to be improved in the 50 States also?

Mr. ROSENFELD. That is right. The regulations, in our view, have to be applied as requirements for the States to join the system. It is not enough to just set a national policy for the national system. It has got to be done, required that each State and local system have the same policies and be required that they have these policies before they join them.

Mr. EDWARDS. Well, of course, there are a number of Western European countries that already have adopted a similar system to Massachusetts, and there are a great number of communities and counties in the United States who on their own have moved ahead and have the same types of safeguards that Massachusetts has instituted.

The gentlemen from Maryland, Mr. Sarbanes.

Mr. SARBANES. If two or three other of the larger States were to adopt a Massachusetts-type statute, that would almost compel the Federal Government to change the way the system worked, would it not?

Mr. ROSENFELD. I would say if California and New York decided to go that way by themselves, that they would essentially cause the national system to be useless without those two States.

Mr. SARBANES. That is right. So I mean to what extent do you think the fact that Massachusetts will not participate has led to a softening in the attitude that you have encountered by the officials of the Department of Justice and the FBI in an effort to make the system comprehensible?

Mr. ROSENFELD. Congressman, I honestly do not know. I think it is the feeling of the Governor and the attorney general of our State that the fact that we have taken this position has had substantial impact on them, and that the fact of the amount of publicity that has been generated, the fact that it has been brought to the public's attention—for example, the Governor, I know that the Governor's mail has run very, very strongly in favor of this position. People are very much concerned, especially in the light of Watergate of other instances of abuses on the use of information, that they feel that people are very concerned about this, that it has had an impact, the fact that we have taken this position.

Mr. SARBANES. Of course, so much of your work force up there is oriented toward computers and information systems, so that they probably appreciate the dangers that are inherent in it. That may be one reason for the level of citizen awareness on this issue being so high in the State of Massachusetts.

I have no other questions.

Mr. DRINAN. Mr. Chairman?

Mr. EDWARDS. Mr. Drinan.

Mr. DRINAN. Related to this precise issue, the level of employment is also high in defense related things. And I have constituents who have been precluded from a job until yesterday, apparently, or today,

because the Commonwealth of Massachusetts has declined to release any records on them.

And in the Governor's statement he said there are several thousand defense-related jobs which have been held up. What would be the custom or regulation on that now, if Raytheon or AVCO is about to hire this engineer, and a Government regulation says he has to have an FBI check? What will happen?

Mr. ROSENFELD. If it is a regulation, well, the FBI could do a check, but they would be unable to check or utilize that for the criminal offender's record, or utilize the criminal offender's record for that purpose.

Mr. DRINAN. And that has been agreed to?

Mr. ROSENFELD. Yes..

Mr. DRINAN. By the Government?

Mr. ROSENFELD. Yes. Well, the FBI agreed to follow that anyway. The primary use that they want of it is criminal investigations, and that is a legitimate use.

Mr. DRINAN. Well, suppose this person is going to get information effecting the national security and needs a security clearance. Is that precluded by the agreement yesterday?

Mr. ROSENFELD. I do not know. I do not know what the answer to that is. All we have at this point is a statement from the Justice Department, and we are going to have to figure out the details of exactly how it is going to be implemented.

Mr. DRINAN. Well, coming back to the question of the initial hiring of a person, let us say by Raytheon or by the Federal Government; do you think that in some cases anyway, that we should say to this individual that you have to yield a bit on your right to privacy, and that the Government agency does have a right to get background information on you? Will we come to that where the person must agree to it ahead of time, so to speak?

Mr. ROSENFELD. Agree to let them see his record, you mean. We preclude that.

Mr. DRINAN. You do?

Mr. ROSENFELD. Yes. The individual is not allowed to give out the information, because it puts him under an involuntary situation, and we do not feel that that is proper; so that is precluded under our statute. Again, I think that if the need to do a security check on them is present, that they ought to check his background by using other methods, using other methods, and not by going through his criminal records.

Mr. DRINAN. I thank you.

Mr. EDWARDS. Mr. McClory.

Mr. MCCLORY. As you know, in the amendments to the Law Enforcement Assistance Act, we took some steps to improve the procedure which you appear to have improved in Massachusetts.

In your testimony you state that there should be some Federal leadership along this line. Do you feel that the Federal Bureau of Investigation should assume responsibility for completing arrest records?

Mr. ROSENFELD. If they are going to run the system, I think that they should, yes, and I think the Congress should require them to do that.

The problem with the LEAA amendments is that while it definitely

goes in the right direction, it does have qualifying language. I think it says where feasible.

Mr. McCLORY. Exactly. Well, it relates only to instances where the recordkeeping is supported through LEAA funds, for one thing. What would be the mechanism by which the FBI would undertake to see that, or compel that records of arrest are supplemented in every State and local police agency?

Mr. ROSENFELD. Well, the way I would suggest is by making requirements for joining the national system. I think that almost all law enforcement criminal justice agencies certainly see the value of being part of a national system, and the FBI is responsible for getting that up at this time; and by setting very stringent requirements for going on that system, they could insure that the States and other agencies that were tied into that system meet those requirements. Otherwise, they could not get the information that they want at the national level.

Mr. McCLORY. Do you have any idea how large an undertaking that would be, how expensive an effort?

Mr. ROSENFELD. I can imagine, because just dealing with it in one State is very, very difficult. On the other hand, I think that we have to try to provide that. We are doing it, very frankly, with the assistance of LEAA money, where they have allocated a substantial amount of money for this purpose. And I know that they are interested in making sure, for example, that the proper system of audits and other things are set up.

In my view, Congressmen, if you are not prepared to set the thing up right, we probably ought not to do it at all, and maybe we ought to look at this issue right at the beginning as to whether it is really worth all of the money to go through to set the system up. But the dangers that are inherent in that kind of information are very, very extreme.

Mr. McCLORY. Do you have any view on the period of time within which records might be destroyed or eliminated by the FBI, for instance, if a person's arrest record is sent in and there is no followup for, say 2 or 3 years? Do you feel that that record should be expunged?

Mr. ROSENFELD. I would go for a much shorter time than 2 or 3 years. I would say there should be an automatic check on what happened to a guy after 6 months, and the local police department or somebody ought to be able to tell you where he was.

Now, if he was dismissed and sent home, then I think it should be gotten rid of at that point. If the person is still in the criminal justice process, then regardless of how long it takes, that record ought to be maintained.

Mr. McCLORY. And do you have an opinion as to the period of time within which all records of arrests, including disposition of cases, should be expunged?

Mr. ROSENFELD. I would say that depending on, for example, I think with misdemeanors, if there has been no further action with respect to that person for a period of 5 years, then that probably ought to be expunged. And on a felony, I would say the 10-year figure that is in the statute is a reasonable one.

Mr. McCLORY. What about capital cases?

Mr. ROSENFELD. I would either treat those as felonies or not get rid of them at all. You might want to keep those. I do not know exactly

how I would stand on that. I have not really examined it that closely.

Mr. McCLORY. In an embezzlement case, you would be willing, even though there is a conviction, that that would be expunged after 10 years?

Mr. ROSENFELD. Ten years following the person's last contact with the criminal justice system, so that would mean 10 years after he was released from prison and there was no further activity with that individual. If he were arrested again though, I would say that that would reconstitute the record and keep it going for another period of time.

Mr. McCLORY. And you do not have any feeling that this would interfere, that the expungment of records within that timeframe would interfere with the criminal prosecution?

Mr. ROSENFELD. No; we have been discussing, in Massachusetts, the idea of after a certain period of time, instead of expunging records, to put them in a closed file that is only triggered open if the person is subject to another conviction at a later time, and then the record can only be used at that point in sentencing. But up until that point, it would not be triggered, and that is just under discussion right now. We have not made an affirmative decision, but that is one alternative.

Mr. McCLORY. Thank you.

I have no further questions.

Mr. EDWARDS. Mr. Butler.

Mr. BUTLER. Thank you.

I appreciate your testimony.

The mechanics of the process are not altogether clear to me. For example, how did you make the transition to this system? What did you do with your old records, and how did you bump them into the new system, and did you purge what was bad, and how did you verify?

Mr. ROSENFELD. Well, we have not tried to get rid of everything that we had previously, and we are still in the process of changeover. But what we did was, we selected as a base file 50,000 records on the basis of active criminal records, and we selected those on the basis of new ones coming in which were court appearances on which there was a conviction for a serious crime. That forms a base file of 50,000 records, and then any new activity as it comes in is placed on the file.

Instead of trying to get rid of the old file, what we are just doing is taking it as an individual comes into the files, when it goes to his old file, and we take that.

Mr. BUTLER. So you really have a dual system running now?

Mr. ROSENFELD. That is right.

Mr. BUTLER. That would be the transition you would recommend to the FBI?

Mr. ROSENFELD. I do not think it is possible to get rid—go through it, and get rid or everything. It would just be a fantastic expense, and probably would not be worth the effort to try to purge records.

We have approximately 5 million annually kept records in Massachusetts.

Mr. BUTLER. My next question is directed to how you go about updating on an individual. I mean, do you have an automatic followup on an arrest, and it immediately goes into your record? Right?

Mr. ROSENFELD. Right.

Mr. BUTLER. Now, what is the next step? Do you have to go back and make inquiries, do you require the locality to report a followup within a given time, or what is your process for updating each arrest?

Mr. ROSENFELD. Well, when an arrest is reported, then we follow it up after a certain time period, which is 3 months in our State. If there is no further action on that record, we will go back and check with the police department as to what happened with it.

Mr. BUTLER. So, inquiry comes from you, not from the locality, following it up automatically?

Mr. ROSENFELD. That is right. But if there is further action, in each instance there should be a complete case sooner or later as to what happened, and either the person is dismissed from the system for one reason or another, or there is a conviction and he goes further in the system, so you are able to check that.

If you get to a point of information where, for example, the person is arraigned and nothing else happens, we will go back to the court to determine why they did not submit any further information on it.

Mr. BUTLER. Now, what happens in the event that he is acquitted? Is that record removed?

Mr. ROSENFELD. Well, that is the statute that I just read which deals with that, and it allows, under State law, for the record to be sealed.

Mr. BUTLER. Well, I am trying to find out the mechanics of what you do when an acquittal comes in. Do you automatically pull that out of your information?

Mr. ROSENFELD. Not right now, we do not. We have not set all of the final rules for exactly how we are going to handle what you call sealing, expunging, purging, and closing. We have not carefully defined those enough to actually take action on sealing at this point.

Mr. BUTLER. How do you treat nolle pleas?

Mr. ROSENFELD. We have a category that puts it right down as that kind of plea.

Mr. BUTLER. How do you treat juveniles in your system?

Mr. ROSENFELD. We do not. We exclude juveniles from this system. The only juveniles that are included in this system in Massachusetts, if you are between 14 and 17, and a juvenile is anyone under 17 in Massachusetts; but if you are between 14 and 17 and the court so determines, they may try you as an adult.

In those instances, we maintain records on the individual, and all other instances where a person is tried as a juvenile. We do not maintain—there is a separate system which is very much unregulated at this time. We are in the process of trying to draft regulations, legislation which would regulate that as well. We have not finished that yet.

Mr. BUTLER. In the State of Massachusetts, if you want a little privacy, you had better be an adult. Is that right?

Mr. ROSENFELD. That is right.

Mr. BUTLER. The next question is what about data from other jurisdictions?

How do you handle that in terms of verification and followup?

Mr. ROSENFELD. We have not developed a system on that yet. We are in the process of working out regulations on that.

Mr. BUTLER. Dealing with secondary access, which I judge to be a situation where you have a patsy that comes in and gets the informa-

tion for me, and then I have access to it secondarily, your theory, feeling is that that ought to be what? Prohibited?

Mr. ROSENFELD. Yes.

Mr. BUTLER. What sanctions would you have to enforce that?

Mr. ROSENFELD. We have in our statute sanctions of fine and imprisonment.

Mr. BUTLER. For passing the information on?

Mr. ROSENFELD. Yes, and obtaining it; both.

Mr. BUTLER. How does that work out?

Mr. ROSENFELD. Well, first of all, we would have—there would have to be an investigation undertaken to determine just what happened. But the way the statute is, any person who willingly requests or obtains or seeks to obtain criminal offender records under false pretenses, or willfully communicates, or seeks to communicate criminal offender records to any agency or person, except in accordance with the provisions of sections 168 to 175, or any member or officer or employee or agencies of the board, the advisory council or et cetera who willfully falsifies information or any records shall be subject to a fine of $5,000, imprisonment in the house of corrections, 1 year.

Mr. BUTLER. Have you had any convictions on that?

Mr. ROSENFELD. We have had no reports on it yet, although I have gotten some telephone calls from people asking questions, what are the penalties for doing that. We have notified all local police departments and all holders of information as to what the penalties are. And people, it seems to us that as a result of the statute, and the notifications that we have made, that people have become very careful, because we get telephone calls all day long asking for interpretation as to who can have access, and who cannot.

Local city councils or mayors want to know whether in licensing taxi drivers, they are worried about what if the guy is a sex offender, and they want to be able to get the criminal records; and we do not allow that until we get a statute. And there is no statute in Massachusetts saying that you cannot hold a taxi license if you are a sex offender or anything like that.

Mr. BUTLER. That is comforting. I do not believe I have any other questions.

Mr. EDWARDS. Mr. Lott.

Mr. LOTT. Thank you, Mr. Chairman.

Mr. Rosenfeld, first I would like to say that I certainly appreciate your remarks, particularly with regard to the balance that is so badly needed between the protection of individuals and the protection of society. And I am concerned that under this type of legislation that the protection of society could be endangered, where you indicated that you thought maybe the balance was the other way, if I understood you correctly.

Is that correct?

Mr. ROSENFELD. Yes.

Mr. LOTT. For instance, did I understand you to say that for employment in defense installations, which could involve a security risk job, you do not think that this man's criminal record should be made available?

Mr. ROSENFELD. No; I think that they should. I have no problem with them doing a detailed background investigation, but I think that

the criminal record, unless it is so specified by an appropriate legislative body, that we should not allow access to our records for that.

The problem is one of how do you draw the distinction, and we have drawn the distinction by saying the appropriate legislative body is the one who can draw that distinction. They can say when it is appropriate or not, and we are going to go by what they say, and also by saying that criminal justice agencies, which we feel that is what the information is maintained for in the first place, is to assist them; but when you begin to get—the Federal agencies are a very good example where, for the most part, they are set up in some instances by very broad legislation, and then given enormous powers of self-regulations. And every single one of them has regulated themselves to have access to criminal records, almost.

The Small Business Administration has, the Defense Investigative Services, and that is completely different. It was not even established by the Congress. It was established by an executive order and a Defense Department order, and then they went and they did not have the regulation. They came to us and we told them it was possible that we may interpret their regulations to be sufficient, Federal regulations which have the force of law, may be sufficient to meet our criteria.

At that time, we were not clear on it, and we had asked for an opinion of our attorney general. So, they changed their regulations the next day, and they published it in the Federal Register. And they came back and they said, we now have the regulations. Now, give us the access.

Well, at the same time our attorney general had ruled the regulations were not sufficient any way to meet our statutory requirements, but that is the problem I think, and State agencies are in the same position where they may pass their own regulations. And if we abide by that, anybody is going to have access, and the limitations are not going to be effective.

Mr. LOTT. A question with relation to the bill. On page 5 of your statement you state that a policy board should be established by the Congress to set the policy and make the rules and regulations governing this system at the national level. Perhaps this relates to some of the questions that Mr. McClory was asking a while ago.

Is that practical considering the volume, the number of things that they would have to try to make judgments on?

Mr. ROSENFELD. I think it is definitely not only possible, but we do it within our State, and it would be the same type of thing where they would be setting the policies about access and dissemination, interpreting the statute, setting regulations on different procedures that have to be followed. It seems to me that ought to be done by a broad policy board that understands all of the issues as they apply to the States; for example, to local government, to all parts of the functional criminal justice system.

Right now, it is a totally police-oriented system.

Mr. LOTT. You are recommending a general broad policy-type board? It would not be getting into specific instances?

Mr. ROSENFELD. They would not be getting into these things, and they presumably would have a director to handle the day-to-day problems like that. But they would set policies for him to follow.

Right now our Criminal History Systems Board does that in Massachusetts. We have promulgated a research of regulations to protect people from misuse of research data. We are in the process of doing complete regulations governing the conduct of the system itself as to what are the specific procedures that ought to be followed. And we have in there, and there are a lot of things to take into consideration when you are developing those kinds of regulations, things that criminal agencies can point out to you, probation departments, courts, and right now none of that information is being provided to the FBI.

And it seems to us, you know, regrettably, they do not care. They do not seem to care about that, and when they call their meetings, it is representatives of police agencies totally. Those are the only ones who now have the terminals that go into the NCIC, and the State policy agencies and some local police agencies.

And for example, even though we have a statute saying that our board regulates this information in Massachusetts, the FBI does not even bother going to us. They just call the Commissioner of Public Safety in our State, and ask him to come down to a meeting. They do not bother with us.

And as far as their board, they have a policy board, and we are represented by someone from New Jersey that we never even had a say in, whether he was selected or not. He was just picked by them to represent the Eastern States.

So, I think that that places us in a very difficult position and does not give them a proper view.

Mr. LOTT. On page 10 of your testimony, with reference to section 4 of the bill, you say you do not think section 4 of the bill goes far enough in specifying the course of action of obtaining remedies with regard to the individual's rights to see records relating to him and what the remedies are for correcting the records if there is an error.

What do you recommend in that regard?

Mr. ROSENFELD. Well, I would say that it ought to say exactly, for example, who has responsibility, that someone is authorized to order that changes be made in a system, or in a data bank, and that there ought to be alternative court remedies provided for in the legislation, if the person is dissatisfied with the action taken.

Under this bill, it seems to me that if they refuse to do something for you, there is not a heck of a lot you can do. I suppose you can go to the Federal courts.

Mr. LOTT. What do you do in Massachusetts on this?

Mr. ROSENFELD. We have specifically set up a process for a person to follow, which includes going to the agency. And if he is not satisfied by the agency, then he goes to the Security and Privacy Council. If he is not satisfied by the Security and Privacy Council, he goes to the board. If he is not satisfied there, we provide superior court equitable relief.

Mr. LOTT. There is an area that does concern me, and I would like to see us have something specific as to what a person could do to get this remedy.

Thank you very much.

Mr. DRINAN. Mr. Chairman?

Mr. EDWARDS. Yes.

Mr. DRINAN. Mr. Rosenfeld, I am still bothered by the question of the allegedly dangerous person, and as I understand your position, it would be this; that if a person has been arrested for some offense that would be classified as violent, and that he might, therefore, be a dangerous person, even if that person has been adjudged completely innocent, even if it was a misidentification, even if the case is completely dismissed, it is your position that law enforcement officials should have, through the teletype, access to the fact that he was, in fact, once arrested for a violent crime?

Mr. ROSENFELD. My position was that that would be a possible way that the system ought to make an exception, one on which we have not come to any firm decision, nor have I in my own mind. I am just saying that that might be the type of thing that might be useful, and it might be valuable to certain law enforcement people, and therefore, we ought to consider making that available, but I just cannot give you a straight answer.

Mr. DRINAN. That would be precluded by the law signed by Governor Sargent of Massachusetts on May 29, 1973, would it not? Under that any defendant who has had his charges dismissed, or a finding of no probable cause, that defendant may seal this record, and that record is sealed forever, and forever until or unless he has another conviction.

So, this law violates something that you say would be desirable, yes? So, under Massachusetts law the availability of that information is not there?

Mr. ROSENFELD. No, it is not.

Mr. DRINAN. Are you dissatisfied with the law that Governor Sargent signed? Do you think this is unfair to the police?

Mr. ROSENFELD. I think that some of the information that might be available would be valuable to the police and could enhance the effectiveness of the system and enhance police activity.

Mr. DRINAN. But the privacy of this individual who was unjustly arrested——

Mr. ROSENFELD. If he was, Congressman. I think you are making an assumption there.

Mr. DRINAN. Yes, I am.

Mr. ROSENFELD. That he was unjustly arrested, and that is not necessarily true.

Mr. DRINAN. But it was completely dismissed?

Mr. ROSENFELD. But cases are dismissed even when there are instances where for one reason or another, where the person still might be dangerous, or might have committed the act. And my point is that in those instances, you are putting the officer in jeopardy, and I think that if there is careful limitations placed on it that it might be more important to protect the individual law enforcement officer than what might be the detrimental effects on the individual when he is arrested.

Hopefully, all that is going to come out of it is that the officer is going to be very careful in approaching the person. That does not mean he is necessarily going to shoot him or anything, or violate the man's civil rights.

Mr. DRINAN. No; but the officer would be much more likely to arrest that individual.

Mr. ROSENFELD. Well, a previous arrest would have been for probable cause——

Mr. EDWARDS. Under your system, if you would yield at that point?

Mr. DRINAN. Yes.

Mr. EDWARDS. Under the Massachusetts system, the officer can get the criminal record just with the name check, because obviously he has not caught the guy.

Mr. ROSENFELD. No. What would happen is, for example, if he was driving behind a car, and he radioed in the license plate, and it came back that either it was a stolen car, or that the license plates belonged to so-and-so, and here's his record, and it shows——

Mr. EDWARDS. Now, you are saying, Massachusetts has a criminal identification file by name, is that correct?

Mr. ROSENFELD. Oh, yes.

Mr. EDWARDS. Oh, it does? The FBI does not, you have to have a fingerprint card apparently with the FBI to get a criminal record. Is that correct, but you have a name——

Mr. ROSENFELD. No; you can get it by name through the FBI.

Mr. MCCLORY. Would the gentleman yield?

Mr. DRINAN. Yes.

Mr. MCCLORY. May I ask this question? Does the arrest record of the dangerous person get destroyed after a particular period of time under the Massachusetts system?

Mr. ROSENFELD. Not at this time, no.

Mr. MCCLORY. Are you recommending that it should be destroyed after a particular, fixed period?

Mr. ROSENFELD. Well, under the statute, if the arrest is not followed by a subsequent—if it is followed by a dismissal or a not guilty, or an acquittal or something like that, it says that the record will be sealed is the term, and that means that it is put aside in a special way.

Mr. MCCLORY. But that field record would be available though in the event of an arrest of a person for a serious crime at any subsequent period of time?

The sealed record is never destroyed, is it?

Mr. ROSENFELD. No, it is just sealed, and can be ordered unsealed by a court at a later time. There are other—you see, the difficulty is when you get to sealed, purged, expunged, do you destroy the record completely, or do you just keep that in a separate area, and there is a lot of danger in keeping them, I think.

Mr. WIGGINS. Would you yield if you are through?

Mr. MCCLORY. I yield.

Mr. WIGGINS. How is the record once sealed unsealed and for what reason?

Mr. ROSENFELD. It can be unsealed by court order.

Mr. WIGGINS. For what reason?

Mr. ROSENFELD. If the individual is subsequently arrested and convicted of a crime, it can then be used for sentencing purposes.

Mr. WIGGINS. All right. That is one reason, and I can understand that. Any other?

Mr. ROSENFELD. Not that I am aware of.

Mr. WIGGINS. I cannot imagine a situation for police investigative purposes where it would be subject to being unsealed.

Mr. ROSENFELD. No, it is not.

Mr. WIGGINS. Only for sentencing?

Mr. ROSENFELD. Right.

Mr. WIGGINS. All right.

Mr. SARBANES. Was the Massachusetts legislation opposed by, in a vigorous fashion, the law enforcement officials in Massachusetts?

Mr. ROSENFELD. Not at all. They were part and parcel of it. It was drafted after 18 months of meetings with all law enforcement agencies, representatives of law, major law enforcement agencies of the State, and submitted in a bipartisan leadership submission, and supported by the criminal justice agencies in the State.

Mr. SARBANES. And has its workings met generally with their support and approval?

Mr. ROSENFELD. Yes.

Mr. DRINAN. Mr. Rosenfeld, would you be able to tell us anything about the attitude of Mr. Clarence Kelly on this question? I have before me an article from the National Observer of June of this year related to his confirmation proceedings, and as you undoubtedly know, the Civil Libertarians in Kansas City brought action against him when he was police chief, and apparently he did arrange that certain names would be dropped from the FBI file or the NCIC, and he has statements here in his confirmation proceeding which appear to be ambiguous.

Would you be able to tell us has he made any commitment, or in view of the Federal agreement yesterday, what commitment would he have made to comply with the standards we have been talking about?

Mr. ROSENFELD. I have no idea what his involvement was in it, and we have not discussed it with him at all.

Mr. DRINAN. Could you tell me what to do with a particular constituent that is involved in this system? He is a student at a college in New York. He was driving with a person who picked him up when he was a hitchhiker, another student, and he was stopped by the State police in New York. And they found marihuana in the back seat, which the driver had, unbeknownst to his passenger.

The passenger, my constituent, was arrested, fingerprinted twice, held in jail for 24 hours until he got bail, and then totally, all of the charges were totally dismissed when the local magistrate discovered that he was just a hitchhiker, he knew nothing about this at all, and yet, this boy and his parents are deeply concerned that now he has this arrest record. And in the FBI, they have his fingerprints, and they have asked me as their Congressman to expunge this.

How do I do it?

Mr. ROSENFELD. Well, you know, New York has a very sophisticated criminal justice information system, and I honestly do not know how the New York statutes read in dealing with that issue. So, I cannot provide any good advice on that, I am afraid.

Mr. DRINAN. All right. Maybe it is an unfair question. This boy has a lawyer in Buffalo who has worked on this, and I assure you that the whole thing is outrageous the way the Federal Government has treated this individual and his parents, who are very responsible people. And he is caught up in this thing, and he wants to be a Federal official or a Government employee some day, and he is just haunted by the fact that this is going to be there forever, and there is no way by which he or his lawyer can get any satisfaction from the Federal or State officials.

This was transmitted and it has passed into history, and he has no way of regaining even the presumption of innocence.

Mr. EDWARDS. We would have in mind adjourning this in order for all members to get to the floor at noontime. We think it might be an interesting session.

Mr. Parker.

Mr. PARKER. I have just one quick question, Mr. Chairman.

Mr. Rosenfeld, what is referred to as the FBI/NCIC, the National Crime Information Center, is actually operated by the Department of Justice, and the agency through which they operate is the FBI. Is that correct?

Mr. ROSENFELD. Correct.

Mr. PARKER. It was the FBI who set up what is called the NCIC Policy Advisory Board?

Mr. ROSENFELD. Yes.

Mr. PARKER. That is the Board that you alluded to earlier when you said that the member who represents you was from the State of New Jersey, and you had no hand in picking him?

Mr. ROSENFELD. Right.

Mr. PARKER. Do I understand your position to be that if you were setting up a national crime information center that you would have some agency other than the FBI operating it?

Mr. ROSENFELD. I think it still could be the FBI, but I would put it under—I would probably want to set up an independent agency within the Department of Justice, but if not, I think at least the FBI should have a separate policy advisory board made up, under which the statute said that certain people had to be represented, and that it would be left to the Attorney General or the Director or whoever. I guess the Attorney General would be the appropriate official.

Mr. PARKER. My question really goes to the fact that there is really a great difference between an advisory board and policy board, which really sets the policy. And what your statement means is that you believe that either it ought to policy board directing how the FBI should operate it, or there should be a separate agency set up within the Justice Department to operate this?

Mr. ROSENFELD. Right.

Mr. PARKER. Thank you very much.

Mr. EDWARDS. Mr. Blommer.

Mr. BLOMMER. I have several questions. Thank you, Mr. Chairman.

I am very interested in the definition section in your statute because we face a common problem in defining criminal justice agency.

Mr. ROSENFELD. Right.

Mr. BLOMMER. Now, you used the descriptive words "principal function in enforcing the criminal laws." I think we could summarize the next three sections. The bill pending before this subcommittee also says principal function.

Now, have you set out any guidelines or regulations as to the definition of principal?

Mr. ROSENFELD. Yes, we have. And I would say if I were doing it over again, we would not use the words principal function. It has been disaster.

Mr. BLOMMER. It is a little unclear.

Mr. ROSENFELD. What we have done is we have gotten some draft regulations that essentially identify the specific criminal justice agencies, as to those agencies, and I cannot remember the exact language, and I am sorry I did not bring it with me. I will send it down.

But it identifies specific operational agencies as opposed to such agencies as police agencies conducting investigations, performing law enforcement functions, prosecution agencies; and what we try to do because a lot of other agencies fit into that, for example, like the State planning agency from LEAA, would fall within this definition, and they have no need for that kind of information, and local deliquency prevention agencies would fall in here. They have no need for that kind of information.

The alcoholism treatment agency might fall within this. They have no need for that information. We have tried to further define it. I do not have the exact language, and I cannot recall it.

Mr. BLOMMER. Well, you have authorized access by the Internal Revenue Service to your system.

Mr. ROSENFELD. Right.

Mr. BLOMMER. Under what basis? How is the justification made?

Mr. ROSENFELD. It was on the basis of investigating tax, criminal tax violations.

Mr. BLOMMER. In other words, you consider the Internal Revenue Service a criminal justice agency?

Mr. ROSENFELD. We consider that actually there is a division in the Internal Revenue Service, if I am not mistaken, that does criminal investigations.

Mr. BLOMMER. Well, I am aware of that, but you do not specify that division, the Intelligence Division. You just say the Internal Revenue Service.

Mr. ROSENFELD. It should have been the Intelligence Division. That is an error.

Mr. BLOMMER. The Bureau of Customs and the Alcohol, Tobacco and Firearms Division fall into that same category. But you have allowed access on the basis that they are criminal justice agencies?

Mr. ROSENFELD. That is right.

Mr. BLOMMER. Are you not still plugged into the FBI fingerprint identification system?

Mr. ROSENFELD. Yes; we are.

Mr. BLOMMER. You are?

Mr. ROSENFELD. Yes.

Mr. BLOMMER. Now, as I read your statute anyone that you transmit information to that then transmits that information to someone else that is not authorized to receive it is then in violation of your statute?

Mr. ROSENFELD. Yes.

Mr. BLOMMER. I have a great problem then understanding why the FBI is not an egregious violator of your statute. Certainly you know that, for instance, they transmit rap sheets to the Small Business Administration and to all of the other Federal agencies that receive them pursuant to their official functions, pursuant to regulations, pursuant to Executive order.

Where am I going wrong in that assumption?

Mr. ROSENFELD. Well, up to this point, we are not able to go out and check that. We have notified them that here is what the Massachusetts

law states. We have notified them that we expect them to comply with that, and they have indicated that they would.

Mr. BLOMMER. They have indicated that they would?

Mr. ROSENFELD. That is right.

Mr. BLOMMER. But I am correct in saying that if the FBI sends rap sheets, that contain information that comes from you, to the Small Business Administration, to the Defense Department and so on down the line, they would be in violation of your statute?

Mr. ROSENFELD. That is right.

Mr. EDWARDS. May I interrupt there?

If the small town of Tunerville, Mass. had a local ordinance licensing babysitters, can they get a rap sheet from the FBI? Does that violate your statute? Can they send direct for it?

Mr. ROSENFELD. They send the information indirect though, too.

Mr. BLOMMER. That would not violate your statute.

Mr. ROSENFELD. Yes; it would.

Mr. BLOMMER. They have access pursuant to statute, is that not correct?

Mr. ROSENFELD. That is correct.

Mr. EDWARDS. But say that this is Federal law that says that they can receive, that the Turnerville city clerk, under its ordinance, can receive, get a rap sheet from the FBI. I think he could then receive it.

Mr. ROSENFELD. I am not clear on that.

Mr. BUTLER. Excuse me.

Well, basically I think you, in response to my question, you all really have not had any experience with him this secondary access statute is going to be enforced?

Mr. ROSENFELD. No. Right now, we are relying on good faith. What we expect to be doing is have a staff which will, among other things, be able to police the system. We are also asking people to keep records on who information is provided to, and I do not know if we can ever truly police it completely.

Mr. BLOMMER. Well, let me ask you a question on that. Does your statute require the FBI to give special attention to all of their fingerprint cards that come from Massachusetts?

Mr. ROSENFELD. No.

Mr. BLOMMER. Well, does not your statute require that the FBI make a notation or a record of who they transmit information to?

Mr. ROSENFELD. No. As of right now, that has no impact on them. We have a new State statute that says that all fingerprints are supposed to be sent to the Massachusetts Bureau of Identification; for example, and they will be transmitted from there to the FBI. That does not occur at this point.

First of all, we do not get their fingerprints at the State bureau of identification; and second, they do not transfer them to the FBI. In many instances, information is transferred directly from our local police agencies to the FBI. We do not know what the FBI has on the Massachusetts records at this time. The FBI does not really know. They do not know how they can vertify it with us. There is not verification set for the national system, or for our system right now as far as their records are concerned.

So, if somebody goes to get an FBI rap sheet, I really cannot tell you what they are going to get out of them.

Mr. BLOMMER. Well, going behind administrative problems to your statute, which seems, in section 170, to require that the FBI keep a record that your board can review as to who they are transmitting the information to.

Mr. ROSENFELD. We are asking them to. We have asked them to do that, yes.

Mr. BLOMMER. And have they agreed to it?

Mr. ROSENFELD. Yes.

Mr. BLOMMER. They have?

Mr. ROSENFELD. But we have not gone and changed that record any place.

Mr. BLOMMER. The FBI has agreed to keep a record of who they——

Mr. ROSENFELD. Who they transmit to.

Mr. BLOMMER. One last question. Inspection by someone of his own record raises the question of employer blackmail, and you have addressed it. You say, that in your statute that is prohibited.

I wonder if you could point out the section?

Mr. ROSENFELD. Well, the same provision that prohibits secondary access, it also includes having the individual, or the individual can obtain his own record, but he cannot give someone secondary access to it.

Mr. BLOMMER. I see.

Mr. ROSENFELD. Do you want me to get the——

Mr. BLOMMER. No; I understand what you are saying now.

Mr. ROSENFELD. Do you understand what I mean?

Mr. BLOMMER. Yes; I understand.

I have no more questions.

Thank you, Mr. Chairman.

Mr. EDWARDS. If there are no more questions, again, we thank you, Mr. Rosenfeld, and again express our thanks to the Governor. You have really been a great help to the committee. It has been very encouraging for the committee to discover the State of Massachusetts and its enlightened views in this area, because we are certainly working toward a better system on a national basis.

The committee stands adjourned until Monday at 10 o'clock in this same room.

[Whereupon, at 11:55 a.m., the hearing was adjourned until 10 a.m., Thursday, October 11, 1973.]

DISSEMINATION OF CRIMINAL JUSTICE INFORMATION

THURSDAY, OCTOBER 11, 1973

HOUSE OF REPRESENTATIVES,
CIVIL RIGHTS AND CONSTITUTIONAL RIGHTS
SUBCOMMITTEE OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 2:45 p.m. in room 2237, Rayburn House Office Building, Hon. Don Edwards [chairman of the subcommittee] presiding.

Present: Representatives Edwards, Drinan, Wiggins, and McClory.

Also present: Alan A. Parker, counsel; Michael W. Blommer, associate counsel; and Arden B. Schell, assistant counsel.

Mr. EDWARDS. The subcommittee will come to order.

Today we are continuing hearings on H.R. 188, to amend title 28 of the United States Code to provide for the dissemination and use of criminal arrest records in a manner that insures their security and privacy.

We have previously heard testimony from different sectors of the community that supported the premise that the use of arrest records is abused. Raw criminal arrest records are, indeed, finding their way into the private employment, credit, and housing areas. Decisions based on these records are having far-reaching effects on citizens who have committed no wrong. They are entrapped by a "record prison" and are pronounced "guilty" daily.

This subcommittee is fully aware of this country's need for effective law enforcement and we respect and commend the job being performed day by day. Our intentions never are to tie the hands of these dedicated law enforcement officers.

Our interest is to strike a balance between the necessity of law enforcement agencies legitimately to gather and maintain this kind of information and the individual's right of privacy and the right to be free of systematic abuse because of these records. Neither interest should be served to the real detriment of the other.

Today we have a very special guest who will testify from our home State, Mr. Wiggins and I, of California and it is with great pleasure that for the purpose of introduction I yield to the distinguished ranking Republican of the subcommittee, Mr. Wiggins of California.

Mr. WIGGINS. Thank you, Mr. Chairman.

Chairman Edwards and members of the subcommittee, it is my pleasure to introduce our witness today, Chief Allen W. Sill of the city of West Covina, Calif.

West Covina is a city, the principal city within my congressional district. It is a medium-size suburban city. To my knowledge this is

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the first time we have had a law enforcement officer testifying before this subcommittee who represented a basically suburban city and is able to advise us of the problems of suburbia in dealing with crime.

Chief Sill is a man with a distinguished record of public service and certainly many credentials in the law enforcement field. I note that he is a graduate of my school, the University of Southern California. He is also a graduate, Mr. Chairman, of the FBI National Academy.

He serves at the present time as president of the Peace Officers Association of Los Angeles County and is a past president of the California Police Chiefs Association.

I should note that Chief Sill is the chief executive officer of a firm which includes 153 personnel at the present time and is recognized in his area, in the southern California area, as a most distinguished and able law enforcement officer.

Chief Sill, we welcome you to Washington and this subcommittee and we welcome your testimony.

TESTIMONY OF ALLEN W. SILL, CHIEF OF POLICE, WEST COVINA, CALIF.

Mr. SILL. Thank you, very much, Mr. Wiggins.

If I may, I will read the statement I prepared if that meets with your approval?

Gentlemen, I would like to preface my remarks by expressing my appreciation for being afforded the opportunity to testify before this body on what is obviously a vital piece of legislation which if enacted in its present form will have far-reaching effects on the citizens of this country and the law enforcement agencies charged with the responsibility of protecting their lives and property.

You will note from my résumé that has been submitted with my written remarks that I have been in the field of law enforcement since 1946. With the exception of 7 years with the California Highway Patrol, all of this service has been with a local police agency that could be considered either small or medium-sized. An observer might wonder why a "small city" police chief is called to testify before a congressional committee—why instead isn't the police commissioner of New York or Philadelphia sitting here before you as they have so many times in the past? The answer to me is obvious. America is made up of small cities and small city police agencies.

As an example, in the State of California there are over 400 police agencies responsible for various facets of law enforcement within carefully defined jurisdictions and boundaries. Of these 400 agencies, 327 are cities with less than 100,000 population. This scenario is repeated in each of the 50 States and also perhaps you might admit that a "small city" police chief is as representative of American law enforcement as the officials cited in my remarks.

I submit these introductory remarks because it is imperative that this committee understand that when Congress enacts laws which encompass local law enforcement agencies, you are really dealing with the West Covinas of America and not just the Chicagos, New Yorks, and San Franciscos.

Let's start by analyzing the need for your bill. Are there abuses within the system that warrant such legislation? I'm sure there are, just

as there are abuses within the military, postal and national park systems and with local garbage collection processes and zoning practices. Rightfully Congress could legislate policy governing Federal agencies, but is it necessary for Congress to mandate policy and procedure for the thousands of police agencies throughout the land? I question the wisdom of such action.

As you are aware, the U.S. Supreme Court does a more than adequate job in setting case law that affects all police agencies when and where abuses have been brought to light. The legislators of each State annually pass thousands of laws to insure that the rights and the well-being of their constituents are safeguarded and where they miss mark, county and city legislative bodies fill the gap with ordinances.

Not to be overlooked are the Supreme Courts of each State which frequently create law through their decisions.

However, in each instance cited above, with the exception of the U.S. Supreme Court, we are talking about local legislators and officials who are not as far removed from the daily activities and needs of their constituents as the members of Congress might be. So if there are instances of abuse practiced by local law enforcement agencies, then it seems only reasonable to me that local legislation, not Federal, is the answer. Should these local legislators fail, history has shown us that it won't be long before the Supreme Court will set the law for them.

Abandoning that posture for the moment, let's look at what legislation such as H.R. 188 means to the average police agency.

I am sure that you are acutely aware of the severe money crunch that local governments find themselves in. Needed streets and sewage systems can't be built because the funds aren't there in most cases—even the major cities had to come begging to the Federal Government for help and some relief was accomplished through revenue sharing funds after a lengthy battle in the Halls of Congress. In spite of these welcome funds, many cities still find themselves in a severe money crisis and west Covina, Calif., can stand up and be counted with New York, N.Y., as being one of those cities.

For the past 3 consecutive years I have asked for and justified additional manpower to police my city in budget requests to the city council. Yet I have not had one officer added to my seriously overburdened department—not because the city council isn't sympathetic—there just aren't any funds—the tax well has run dry. Still, not a month goes by that some new program or law isn't passed on to us from the State or Federal level that mandates compliance.

On recent point in fact is a new statistical reporting program required by the Federal Bureau of Investigation concerning juvenile offenders. Did any money come with this new program so I might hire the necessary clerical help to comply? No, not 1 cent and that is the case in almost every instance.

It was interesting to note from transcripts of previous testimony before this committee that there was a strong inference that most law enforcement records systems are computerized and mechanized. Not so. Most agencies are still computing statistics and processing records by the tedious manual methods devised years ago. This is not by choice. When moneys are available these "frills" have to be bypassed to purchase much needed field equipment so the police officer can do his job on the street in a more responsive manner.

The impact of H.R. 188 would be considerable upon the average agency. Each item of required recordkeeping, each check and balance system takes time and people and that is what we don't have.

If I might be permitted to quote from the recently released report by the National Advisory Commission on Criminal Justice Standards and Goals, the volume "Report on Police", page 576:

> An examination of the record section of almost any police department will reveal inadequate physical facilities, clerical staffs with little specialized training, and records storage and duplicating equipment strained beyond reasonable limits. The apparent key to any reliable criminal justice information system is that information must be complete and must be shared. The high degree of criminal mobility has completely outstripped the ability of the law enforcement community to keep accurate and accessible identification and criminal history records.

Yet, in spite of our limited resources, we do manage to protect the rights of the accused as well as the rights of the victims and witnesses. Our arrest records are not public documents open to all. Only duly authorized representatives of law enforcement agencies have a right to see those records and only with regard to official business.

The integrity of these files is zealously guarded because of our moral commitment to keep the contents private as well as a civil liability attached to any misuse.

If the subject of the records wishes to inspect his file for errors, he may do so by State law and the procedure permits the validity of the records to be challenged. It also provides a procedure that negates capricious challenges instigated to satisfy the personal whim or self-serving motives of the defendant.

California has long since legislated laws that permit arrest records to be sealed or expunged under certain conditions. So in effect, what I am saying is that while abuses may exist, the State of California has legislated steps to safeguard the rights of all concerned and the agencies of that State abide by those laws.

I am sure you have gathered by now that I am opposed to H.R. 188 and feel it will be an unnecessary burden added to law enforcement, requiring more hours of our valuable time needed to accomplish our basic mission.

One of the first things in the bill which leaps out at me is "federally assisted law enforcement agency." It appears to me that you gentlemen represent a "locally assisted Federal Government." Those of us who pay taxes are the ones who support the Federal Government. Just because it was politically expedient to give money to law enforcement is no reason that you should then level controls on those agencies.

In West Covina we've never been the recipient of a grant under LEAA and I'm rather glad about it under these circumstances. So if this bill passed it would not affect us in the way it would the multitude of cities which took a couple of thousand dollars to upgrade a radio system or to buy some gas masks. However, it seems to me that once the door is opened, it would be an easy task to amend the law and include all law enforcement agencies.

With respect to the individual sections of your proposed legislation, I would offer the following comments.

Under (3103), inspection of records is already available under California law. Keeping a list of who has seen the record would be most difficult and not in the best interest of good law enforcement.

It would let the arrestee know what law enforcement agency might be currently investigating him.

(3104) Who is to say what is correct on an arrest file? Certainly an investigator will not put down false information for his own purposes. He may have notations about certain leads and witnesses from whom he gained information. It would place these people in possible jeopardy of their lives. It would also create more and more court time and officer's time to answer such a petition. The arrestee could also use this as a harassing tactic against the officer or department.

(3105) The reference to a Federal court in this section would create severe hardships on agencies located some distance from such a court. If anything, it should be incumbent upon the arrestee to go to the court to have the record sealed or expunged.

(3106) If a person has his arrest record sealed by a court there is no problem; we are living with that now; why turn it around and lay the responsibility on local jurisdiction?

(3107) You are making the law enforcement officer's job tough enough now without laying a penalty on him for this kind of business. Please remember, that we are supposed to be the good guys. We are on your side and cops take their lumps when they are wrong. It is not unusual for an officer to be prosecuted for criminal wrongdoing or sued civilly or subjected to departmental disciplinary action for minor infractions.

In conclusion, I would like to refer back to my opening remarks wherein I stated that this legislation would have a far-reaching effect on the citizens of this country. The information provided by police records systems such as we have in California keep the convicted sex deviates from securing employment in our schools and parks where they would be exposed daily to their favorite victims, children; it prevents convicted organized crime figures from gaining a "legal" hold in Government positions of trust and influence and keeps convicted drunk drivers out of the driver seats of schoolbuses. Passage of H.R. 188 would, to a great degree, eliminate the ability of police agencies to provide this information and would indeed have a far-reaching effect on the citizens of this country.

Thank you.

Mr. WIGGINS. Thank you, Mr. Chairman, for yielding to me to ask the first series of questions of our witness.

Chief Sill, would you please describe the arrest record information which is available to your department at the present time?

Mr. SILL. Would this be on a case arrest that we might have made?

Mr. WIGGINS. Just discuss in general the arrest information that you find to be available to you at the present time.

Mr. SILL. If I were to go to my records system and pull out any arrest file, what I might find in the case of one arrest would be, of course, a booking system, a property slip, a property of the file of the cause of arrest, and a rap sheet from the California State Department of Justice.

Mr. WIGGINS. Do I understand you have your own internal departmental records system keeping?

Mr. SILL. Yes; we do.

Mr. WIGGINS. Of arrests your department has made?

Mr. SILL. Yes.

Mr. WIGGINS. In addition to that you have access to a State of California records system?

Mr. SILL. Yes.

Mr. WIGGINS. And what is that called?

Mr. SILL. CII, the criminal identification investigation section of the State department of justice.

Mr. WIGGINS. In addition to that I take it that you do have access to the FBI files?

Mr. SILL. Yes; we do.

Mr. WIGGINS. Now, given that fact, Chief Sill, I do not know that I share with you your confidence that you are not covered by this bill because it is possible that, since you are the recipient of arrest information from a Federal agency, that you may well be subject to the strictures and to the provisions of the bill. I won't debate that with you but I do want to suggest to you that it's possible, that this bill would reach into West Covina even though you have not accepted any LEAA funds.

I would like you to tell the committee, Chief Sill, how you use arrest data, the records, in the performance of your police mission in West Covina.

Mr. SILL. Well, the primary purpose, of course, is to keep a record of the fact that a certain person came into our custody.

If it is a one and only arrest over a long period of time, why, the file will sit there in our files. As a matter of fact we have been involved in a microfilming program whereas the older they get, they are put on microfilm.

Mr. WIGGINS. Do you keep them indefinitely?

Mr. SILL. Yes; we do.

Mr. WIGGINS. Does the State of California impose any law upon your department with respect to the length of time which you may or must keep records?

Mr. SILL. Yes, sir; it does. We are not permitted to destroy these records.

Mr. WIGGINS. You must keep them?

Mr. SILL. Yes.

Mr. WIGGINS. And I take it you keep them whatever the disposition of that arrest?

Mr. SILL. That is true.

Mr. WIGGINS. All right, please go ahead. You were describing your use of these records?

Mr. SILL. The record would be kept for any future use that we might have. Now on most of the arrests, the large majority of the arrests we find they are one-time arrests. In our particular city where we are primarily a commercial and residential community we have many arrests for shoplifting because people come to the stores in our community and shoplift and are arrested usually by the store security people and then turned over to the police department.

So we are only a receiving agency under those circumstances but we do keep the arrests on file.

Mr. WIGGINS. Now you indicated in your direct testimony that the records that you maintain are not open to the public but are used only for official police business?

Mr. SILL. That is true.

Mr. WIGGINS. Are there any exceptions to that general rule?

Mr. SILL. Only if we were to receive a subpena duces tecum from the court. We would find it or we would provide that information on a motion of discovery by defense counsel also.

Mr. WIGGINS. Yes; but I am not speaking about court-ordered production but let me give you some illustrations.

Mr. SILL. All right.

Mr. WIGGINS. Do you refer to your own arrest records with respect to prospective job applicants with the police department?

Mr. SILL. Oh, indeed we do.

Mr. WIGGINS. OK, so you use them for employment purposes with the police department?

Mr. SILL. Not only the police department but for any person applying for a position with the city.

Mr. WIGGINS. The city of West Covina?

Mr. SILL. Yes.

Mr. WIGGINS. And I take it that that would include nonlaw enforcement-related employment?

Mr. SILL. Yes; it could be a typist in the planning department.

Mr. WIGGINS. Do you request from out-of-city sources timely, the California records source and the FBI source a rap sheet with respect to job applicants for other positions in the city?

Mr. SILL. Yes; we do. We fingerprint all applicants for employment in the city and if there is nothing on file as an example with the CI, we don't get a rap sheet. We just get a little card back indicating that there was nothing in-file and the fact that those fingerprints are now on file and, in fact, on future rap sheets indicate that the person was an applicant for a position.

Mr. WIGGINS. Now apart from the city employment is there any other agency which has requested information and which you have honored that request?

Mr. SILL. Yes; we may be called by another police agency who are doing a background investigation on an applicant of their own and they send in the fingerprint card and the rap sheet comes back and it may indicate that this person was arrested in our community. And of course they are interested in finding out the reason and what the circumstances were upon the arrest.

Mr. WIGGINS. Well, do you cooperate with investigations conducted by schools?

Mr. SILL. No.

Mr. WIGGINS. Banks?

Mr. SILL. No.

Mr. WIGGINS. Credit agencies?

Mr. SILL. No.

Mr. WIGGINS. Rather than run through the list, do you cooperate with anyone else other than a municipality?

Mr. SILL. No; or a governmental agency. That would be with the State and with the various agencies of the State. I might add we cooperate with the alcoholic beverage control or if there might be some investigator for the district attorney's office, the attorney general's office, just any agency, any lawful agency.

Mr. WIGGINS. Governmental agency?

Mr. SILL. We provide this information and in return when we want that kind of information, we get it.

Mr. WIGGINS. Does the city of West Covina impose standards of conduct upon license applicants for certain commercial activities?

Let's say—and I don't know if it is possible to have a massage parlor in the city of West Covina?

Mr. SILL. I hope not.

Mr. WIGGINS. Well, I hope not too but I don't know whether or not it is legally possible but some cities I understand have been concerned about the background of young ladies operating such parlors and, before you get a license, you have to be cleared as to your background. That is just an illustration.

Mr. SILL. Yes.

Mr. WIGGINS. Now, does the city of West Covina impose such standards for licensing on any commercial activity?

Mr. SILL. Yes; we do.

Mr. WIGGINS. What are they?

Mr. SILL. Taxicab operators for one thing, people that travel from door to door who are looking for business licenses—we impose it for that kind of operation. A city like ours with many residential homes is really subject to residential burglaries. We are also concerned with persons who may have backgrounds of sexual deviation, concern with their going up and knocking on people's doors.

Mr. WIGGINS. Well, if a criminal investigation were made of such a person and it were revealed he had an arrest record for sexual misbehavior such as you describe, is it the policy or the law of the city of West Covina that he be denied a license?

Mr. SILL. No.

Mr. WIGGINS. Well what is the policy?

Mr. SILL. The policy is we would make recommendations to the city clerk as to whether this person should be issued a license because many times if we do find something we don't stand just on the rap sheet and we might go to whatever city it was that made the arrest and inquire of them as to the circumstances of that arrest.

Mr. WIGGINS. And what policy considerations cause you to look into the background of taxicab drivers?

Mr. SILL. Well, a city ordinance requires it. I guess that perhaps, in some period of time back, there were some unhappy associations with certain taxicab drivers that might have been eliminated had proper screening been done or at least it might have given us the knowledge that these people might be dangerous.

Mr. WIGGINS. But in each case you or your department is responding because there is a law, and in this case a local ordinance which requires you to conduct such background checks?

Mr. SILL. Right.

Mr. WIGGINS. Mr. Chairman, I have some other questions, but I think we probably ought to operate under the 5-minute rule.

Mr. EDWARDS. I join my colleague from California in complimenting you on your statement, Chief Sill.

How does your procedure work, is there a counter where someone who wants to look at an arrest record comes up and fills out a piece of paper?

Mr. SILL. No, there is a counter but we have no way of showing a person an arrest record unless it is another law enforcement agency.

Perhaps it might be some other agency doing a background investigation for an applicant that they might have.

Mr. EDWARDS. No, I am thinking of the assistant to the City Clerk, for instance, who comes to the counter with a name on a card and says this person, this John Smith is an applicant for a gardener in the city park and he wants to know under the ordinance if the department will check the FBI and the Sacramento records and you own records and furnish the information with regard to the existence of a criminal record?

Mr. SILL. That is usually done in interdepartmental mail. The request comes down with the information requested and we review it and if we find that there is nothing deletorious about it why we send it back. If we find from our investigation that perhaps there is something to be concerned with why we will let them have that information.

Mr. EDWARDS. That is from your investigative files or from your criminal record files or are they one?

Mr SILL. Whatever we might get and wherever we might get it. We have several different files in the police department.

May I digress for a moment to explain a police department records system so that you may have some idea of what we are doing?

We have about four basic files that we utilize. One is what we call our DR file, which is short for daily report. In other words, if someone were to call in and make a report on a stolen automobile, why the officers would go out, take the report, make the investigation, and it would be filed with a specific number. In our case ours would go, DR–73 and then whatever number chronologically takes up in 73. So we have a specific place to go.

This is a basic file.

We have also the arrest file which includes all of the people who are physically arrested. They have a number which we give them and an ID number.

We have another file, which is an accident file, a traffic accident file.

And then we also have a card file, which is the cross-reference so that we can find information from the three files that I have just described. And we put cards in there for victims, witnesses, informants, and defendants.

We do that so that hopefully if someone should question us—they might say that I was a witness in a case at some particular time—we do that so that we could go to the card file and pull it out and have it. This is all done, incidentally, manually. We have no data retrieval system, no mechanical thing. We have no computerization.

We are contracting with an agency that computes our statistics for us. The source cards are made up by our desk officer and each month they are processed to this company and then we get back the information on how many arrests were made and what beat and what the activity of each officer was. But that is about the only thing we have under any kind of data retrieval system.

And then we have some other files, you know, warrant files. Some other larger communities become more elaborate in their record system and they have such things as scar files, in other words, scars of suspects. They might have data files. They might have van files. With the advent and popularity of people putting a name on the side of a van, well, they have these files so if these become important, some agencies keep files along that line. Some have even tattoo files.

But what I have related to you is what I think and I am sure is the basic file system of most police departments our size and smaller.

Mr. EDWARDS. That is very helpful. You have a connection by computer or electronically with the State records system of Sacramento, don't you?

Mr. SILL. That is only for wanted persons. And we can get information such as items of property which have been stolen. We can get from the Department of Motor Vehicles information. You see it all comes under this criminal information system we have.

Mr. EDWARDS. And you then type into it a question like do you have any records on John Jones who was born May 6, 1972, Sacramento, Calif., is that correct?

And almost instantaneously then the information will come back "need more" or "have record" or "no record" or something like that?

Mr. SILL. Well, I wish it were instantaneous. Many times the system is down and we have some period of time to wait for that information, but that is available to us.

Mr. EDWARDS. Right. And getting back to this hypothetical applicant from your city, now the clerk opens the letter, opens the mail and here is a fingerprint card inside?

Mr. SILL. No.

Mr. EDWARDS. Just the name?

Mr. SILL. You see, they would send the information that they are requesting. We would search our files and any files which we felt we want to check, for instance, perhaps the warrant file to see if the person had a warrant outstanding or was wanted someplace, that kind of information we would forward back. And if there was some kind of information in there that he had had a number of any robbery arrests we may include that fact to them and recommend perhaps that this person not be hired or that he may have had arrests for sexual deviation.

Mr. EDWARDS. But you don't check through with the FBI because you don't have the fingerprint card?

Mr. SILL. That is correct, unless they could give us something on the name and physical description. If we had a name, a birthdate, the color of hair, eyes, size, weight, you could perhaps eliminate it down to that.

Mr. EDWARDS. On this personnel card that you might have on this man, this Mr. John Jones, there could be a reference to an investigative file?

Mr. SILL. Yes.

Mr. EDWARDS. And you would look at that file too? Now would you provide that information to the assistant county clerk who is thinking of employing this person or who is making the investigation?

Mr. SILL. Well, actually, let's break this up. First of all, the clerk wouldn't be doing this for an applicant for employment. That would be handled through the personnel department. The city clerk handles these items which refer to people seeking licenses in the community.

Mr. EDWARDS. Well then, the personnel department would make the inquiry of you?

Mr. SILL. Yes.

Mr. EDWARDS. And then you would find the name on the card, in the card file you described and it refers you to still another file where

there was a brief investigation made by a local detective of this particular person or someone of the same name on a possible sexual crime. Now, would that information be passed back to the personnel office?

Mr. SILL. Yes, it would.

Mr. EDWARDS. Even though the man was never arrested or just an investigation was made?

Mr. SILL. Oh, no. I would think we would have to have an arrest or something stronger than just suspicion. We have many cards in our file which we call FI cards, meaning field interrogation cards that officers may write at various times of the day or night because a person might be acting suspiciously and they might want to make a record of the fact that he was at a certain place at a certain time but this is for information only and it is not considered arrest information at all.

Mr. EDWARDS. Suppose on this card there had been some information that this man was suspected of being a subversive?

Mr. SILL. No.

Mr. EDWARDS. You have three letters, say, from people that he was suspected of subversive activities?

Mr. SILL. No.

Mr. EDWARDS. That would not be transferred back to the personnel office?

Mr. SILL. No.

Mr. EDWARDS. Why not?

Mr. SILL. Because there was no arrest. It would only be suspicion. I don't think a person should be held accountable for something which he didn't do, and I don't think that information would be necessary.

Mr. EDWARDS. Since you don't have fingerprint cards, wouldn't it be possible to make a mistake and transmit information back?

Mr. SILL. I would say that is a possibility. That is a possibility but a very rare one.

Mr. EDWARDS. Are the juvenile records included in the same group of records?

Mr. SILL. Yes, they are.

Mr. EDWARDS. Suppose the person was arrested at 15 for a minor felony; now, would that information be passed to the personnel office?

Mr. SILL. No, because we feel that once a person passes that arbitrary age of 18, he has a new slate.

Mr. EDWARDS. Well, I presume that through Sacramento you are connected with the NCIC for fugitives and stolen cars?

Mr. SILL. Yes, we are.

Mr. EDWARDS. I would like at this time to yield to the gentleman from Massachusetts.

Mr. DRINAN. Thank you very much for coming all of this way to help us on this problem, and I am glad California is more advanced with regard to some matters that you mentioned here than many other States, including my own.

On page 2 you state that you would concede that there are abuses within the system that warrant such legislation, and you say that, "I am sure that there are."

Well, Chief, how would you describe the problems, and what would be your proposed solution to it?

Mr. SILL. Well, within any system, within any records systems in any department, as long as there are people who have the availability of that system, they may go to that system and take the information from it and provide it to someone in spite of the fact that we may have our departmental policy against it, and that is why I say that there can be abuses to the system.

I do know that there are perhaps some areas in California where we are really not really that much different from anybody else where this does occur and it is an abuse.

I really couldn't suggest how this could be remedied. As long as there is someone who has availability of those files, abuse is possible.

The thing is, just as it is on income tax, for example, we would like to think that everyone when they file their 1040 form, includes all the income that they have, and we would like to think they don't enlarge on the amount of deductions that they are taking, but certainly it is not a perfect system, and I don't think that even much as we try and much as the Federal Government tries to make it so, it isn't. We had ample evidence just yesterday, didn't we?

Mr. DRINAN. Well, Chief, I think that you recognize the problem that is there, and we turned up with this particular remedy to a facet of it. This bill. Now, not all States are as advanced in their secrecy of the file as you have suggested California is. But this is a solution. I wonder if you discuss with your fellow law enforcement personnel this problem and what would be a proposed solution they feel that they could live with?

Mr. SILL. Well, we have in California a series of meetings called the attorney general's zone meetings, where the attorney general of the State has, I believe, six or seven zones where he meets with the police chiefs and sheriffs of these areas, so that we don't have to travel too far to get to the meetings. And the attorney general and his subordinates attend these meetings. Now, the last one that we had, this problem was brought up, and the attorney general is proposing some legislation regarding this matter that you are talking about, that I think we could live with. And that is, I believe 10 years; that is, I believe purging a record system after 10 years. We believe really 2 years is not a sufficient time to keep the factor of recidivism out of the picture. It would be possible under this bill to be arrested every 2 years, I mean; and then every 25 months; and, of course, the arresting agency would then have no idea of what the background was.

Mr. DRINAN. Do you think that the mere arrest record, assuming that there is no conviction that follows, do you think that the police have a right to have that?

Mr. SILL. Well, you know there are cases, Mr. Drinan, where that information is extremely valuable, and let me cite one.

Our courts in California, because we have been so overburdened with the population increase, our courts have really been jammed, and the State legislature has tried to keep enough courts and enough judges available for people to handle these cases, but the most expedient way to handle this is to sort of look down on some arrests. As a matter of fact, in California it is unlawful to possess marihuana. And I can recall just 10 years ago when it would be no problem if we were making a check of an automobile and arrested someone, found marihuana seeds on the floor of the vehicle, to make an additional charge of possession

of marihuana. It is now to the point where if you do find someone or arrest someone that has three sticks of marihuana—that is, three marihuana cigarettes in his possession—it isn't enough so that the district attorney will give us a complaint. You see, he wants four or five or six. The same is true with your possession of dangerous drugs. So that information is valid even though the arrest—well, you see, we come to the situation where the arrest is lawful because the law hasn't been changed, and the more possession of marihuana is still sufficient to cause an arrest, but the district attorney will not give us a complaint. So it is really not right to destroy that kind of information even though the man has not been convicted. It is an indication of what he has done in the past.

I believe in many instances it is important to investigating officers to have this information available to them.

Mr. DRINAN. Well, it may be that that is where you would differ with the authors of this particular bill. I think the thrust of the bill is to say that 75 percent of all arrests do not eventuate in a conviction, then the person at a moment in time has a right to have that arrest completely and totally expunged and that no dissemination of that arrest shall be made by Federal officials or federally assisted agencies. So you are saying apparently as I understand you that that arrest in your judgment should remain there forever and should be available to a law enforcement official?

Mr. SILL. Well, I am not sold on forever, Mr. Drinan. A reasonable length of time I think would be perhaps 10 years. I think perhaps 10 years might be long enough if there have been no arrests during that period of time. I see reason for example, of purging a file on a drunk driving arrest. Now many people could have been arrested for drunk driving but only some unfortunates who happen to come under the scrutiny of a police officer on patrol and arrested and it may be the first time he has ever been arrested and he may never be arrested again for this. And I see no reason to keep that in the file. I see no reason merely for the sake of volume of the files.

I know for instance that our State department of justice is really becoming inundated with arrest files and information and they want to purge it and I can't say that I blame them but I do think that there has to be some reasonable period of time where law enforcement has a chance to do its job with the information that they collect.

Mr. DRINAN. Well, Chief, the resourceful person of an arrest, where this arrest has been discharged or dismissed without a conviction, he may under your law 8501.7 go and have that completely sealed or expunged. But it is only the resourceful person who does that and those wealthy enough to have a lawyer who will do that. But for young people or poor people or minorities they have their arrest records actually available to everybody but the more resourceful person doesn't.

Mr. SILL. Well, I don't know. With the system we have of public defenders in California, legal assistance is really not that hard to come by.

Mr. DRINAN. Well, do you have any rate, any number on the number of people who actually go and seek the sealing up or expunging of the arrest records?

Mr. SILL. We don't have many in our department. It really isn't a difficult thing to do. The municipal court—a municipal court judge can forward an order to seal the records.

Mr. DRINAN. You say that an arrest record is available to other law enforcement officers?

Mr. SILL. It is available to other law enforcement agencies. It isn't available to anyone who wants to walk in and say, what did Johnnie Jones ever do, and then we would give him that information because we would not give him that.

Mr. DRINAN. On pages 8 and 9 you speak of convicted sex deviates, convicted crime figures, convicted drunk drivers, and then you assume that somehow the enactment of H.R. 188 would make it more difficult to carry out the basis of that law that you say there. I am sure that you understand we are not talking about convicted people. We are talking about those arrested and not convicted. So I am not certain that the last sentence, your last sentence, follows from the examples you give there.

Just one last question. What do your fellow officers think? They recognize the problem and as you say, there is a problem and you disagree with this particular proposed resolution of it but is there any consensus emerging among people about this problem? Do you talk about this problem? I am sure that you get a lot of cases where people are arrested and then it is dismissed and you have to tell them how to go about this. California has its own problems and you spoke from your background, your great background there, but I am just seeking for help for this committee now. Now would you suggest or what would you suggest we do about it? It is a national problem that many people are very involved in and have an interest in and the FBI itself recognizes there may be an injustice in this broadside dissemination of the arrest records. But what should we do?

Mr. SILL. First of all, Mr. Drinan, let me relate to section 3102(a)(1) relating to an arrest record that occurred more than 2 years before the date of such dissemination and concerning which there is no prosecution pending in court. Now I would assume if I read that and I am not a lawyer sir and I am sorry for that but that indicates to me that it is a convicted person. If he has been arrested, it doesn't say that he hasn't been convicted. So that would mean to me that every arrest record beyond 2 years is going to have to be whether they were convicted or not is going to have to be purged.

Mr. DRINAN. Well, all right, then that may be an interpretation of this law, but rising to the larger question now, would you have any suggestions as to how we can reach this broad problem on a national basis? We have supervision of the Federal Government of the Department of Justice and of the FBI here in this subcommittee and in this Judiciary Committee and here is a real honest problem and we are looking for a solution and that is why we have the honor of having you here today to utilize your skills. I am just saying do you have any suggestions? If you have any we would be welcome to hear it.

Mr. SILL. Well, I appreciate that, sir, and I am very happy to be here. As I said before it is really an honor and the first time it has ever happened to me and I am very proud of the fact that I am here.

I would like this problem should be handled in each individual State and the States should be encouraged to enact laws.

I think we will see something come from California that is perhaps not as broad as this here, but something which we can live with in our State.

As for the time, whether it is 2 years or 10 years, Mr. Drinan, I would prefer that it be about 10 years. But I think if States were encouraged perhaps by some kind of grant of money to each State if they set up such a system and if they want to set up such a system you know, I think we should have a carrot on a stick type thing that we have used quite frequently and I would think that would accomplish the purpose. Now whether you want to set up the parameters of this thing by Federal legislation, I believe it is up to you but I think that is the way it ought to go.

I do have to say, sir, it just kinds of galls me to think that the Federal Government is looking in on local police operations. We have tried to be realistic in our approach and we really respect the privacy of arrest records. I can't stress that too much and I would severely discipline a person in my department who was found to give information of this kind to someone who really didn't have it coming, in other words, that's what our department's policy is and I would be pretty strong on it.

Mr. DRINAN. Thank you very much sir.

Mr. EDWARDS. Mr. McClory?

Mr. MCCLORY. Thank you very much. Chief Sill, in addition to your pride at being here and testifying here at this hearing I want to tell you that we are very proud to have you here today.

Mr. SILL. Thank you.

Mr. MCCLORY. And we appreciate your contribution. Your contribution is extremely important to this committee.

I don't know that you are taking the most popular side of this issue. The Nation seems to be concerned on the behalf of individuals who may be prejudiced, or the abuses that may occur in certain instances, by the misuse of arrest records. But nevertheless it is my experience—and you have supported it through your appearance here today—that police departments and law enforcement agencies at the community level are indeed not only there to investigate crime but to protect the rights of individuals. And it is that important function which contributes to the stability and the tranquility of life in the community.

We have a vote on the floor of the House so I will be limited in my questioning of you. I would like to say the misuse or the abuse seems to be primarily in the use of arrest records which are incomplete. Frequently the arrest records do not show the disposition of the case or the innocence of the person arrested.

Now do you not feel a Federal law requiring that all records of arrests should be complete and show the disposition of the case following the notation arrest would be a good idea?

Mr. SILL. Yes, I definitely do. It would be a great help to us in our investigation to know this.

We do that—and I hate to keep referring to California, Mr. Chairman, but it is the only area that I know——

Mr. MCCLORY. That is all right. This is your chance today, sir.

Mr. SILL. Well, we do have a form which was established in the State Department of Justice which takes care of this and follows the

defendant from the time we arrest him through all of his court appearances. In other words, it would go from the police department to the first level court, the municipal court, if it were a preliminary hearing then to the superior court, and anywhere along the line that information in other words, where the case was dismissed, well then, this abstract should then be forwarded to the State Department of Justice and that would meet our original fingerprint file. And on most wrap sheets that I have seen you see there will be one line across the side that says that this particular person was arrested on a suspicion of robbery and perhaps the next line down—maybe entered 4 or 5 weeks later—may come along and say dismissed at the preliminary hearing or dismissed on a motion by the defense counsel.

Mr. McCLORY. We should make that requirement uniform as to all arrests.

Mr. SILL. I would think so.

Mr. McCLORY. Thank you, Mr. Chairman.

Mr. EDWARDS. Well, Chief, thank you very much. We would like to work with you for at least another half hour but I can see that the floor is going to make it impossible. But your testimony has been very valuable to us and I join our colleagues in thanking you very much for being here.

Mr. WIGGINS. Thank you, Chief, very much. I apologize for the necessity of abbreviating your testimony.

Mr. SILL. Well, I realize the business that you gentlemen are in is very important and I appreciate this opportunity.

Mr. EDWARDS. Fine. Your statement will of course go in the record.

[The prepared statement of Allen W. Sill, Sr., follows:]

STATEMENT OF ALLEN W. SILL, SR.

Gentlemen: I would like to preface my remarks by expressing my appreciation for being afforded the opportunity to testify before this body on what is obviously a vital piece of legislation which if enacted in its present form will have far reaching effects on the citizens of this country and the law enforcement agencies charged with the responsibility of protecting their lives and property.

You will note from my résumé that has been submitted with my written remarks that I have been in the field of law enforcement since 1946. With the exception of seven years with the California Highway Patrol, all of this service has been with a local police agency that could be considered either small or medium-sized. An observer might wonder why a "small city" Police Chief is called to testify before a Congressional Committee * * * why instead isn't the Police Comissioner of New York or Philadelphia sitting here before you as they have so many times in the past? The answer to me is obvious. America is made up of small cities and small city police agencies.

As an example, in the State of California there are over 400 police agencies responsible for various facets of law enforcement within carefully defined jurisdictions and boundaries. Of these 400 agencies, 327 are cities with less than 100,000 population. This scenario is repeated in each of the 50 states and also perhaps you might admit that a "small city" Police Chief is as representative of American law enforcement as the officials cited above.

I submit these introductory remarks because it is imperative that this Committee understand that when Congress enacts laws which encompass local law enforcement agencies, you are really dealing with the West Covinas of America and not just the Chicagos, New Yorks, and San Franciscos.

Let's start by analyzing the need for your bill. Are there abuses within the system that warrant such legislation? I'm sure there are, just as there are abuses within the military, postal and national park systems and with local garbage collection processes and zoning practices. Rightfully Congress could legislate policy governing Federal agencies, but is it necessary for Congress

to mandate policy and procedure for the thousands of police agencies throughout the land? I question the wisdom of such action.

As you are aware, the United States Supreme Court does a more than adequate job in setting case law that affects all police agencies when and where abuses have been brought to light. The legislators of each state annually pass thousands of laws to insure that the rights and the well being of their constituants are safeguarded and where they miss the mark, county and city legislative bodies fill the gap with ordinances.

Not to be overlooked are the Supreme Courts of each state which frequently create law through their decisions.

However, in each instance cited above, with the exception of the U.S. Supreme Court, we are talking about local legislators and officials who are not as far removed from the daily activities and needs of their constituants as the members of Congress might be. So if there are instances of abuse practiced by local law enforcement agencies, then it seems only reasonable to me that local legislation, not Federal, is the answer. Should these local legislators fail, history has shown us that it won't be long before the Supreme Court will set the law for them.

Abandoning that posture for the moment, let's look at what legislation such as H.R. 188 means to the average police agency.

I am sure you are acutely aware of the severe money crunch that local governments find themselves in. Needed streets and sewage systems can't be built because the funds aren't there in most cases * * * even the major cities had to come begging to the Federal Government for help and some relief was accomplished through revenue sharing funds after a lengthy battle in the halls of Congress. In spite of these welcome funds, many cities still find themselves in a severe money crisis and West Covina, California, can stand up and be counted with New York, New York, as being one of those cities.

For the past three consecutive years I have asked for and justified additional manpower to police my city in budget requests to the City Council. Yet I have not had one officer added to my seriously overburdened department * * * not because the City Council isn't sympathetic * * * there just aren't any funds * * * the tax well has run dry. Still, not a month goes by that some new program or law isn't passed on to us from the State or Federal level that mandates compliance.

One recent point in fact is a new statistical reporting program required by the Federal Bureau of Investigation concerning juvenile offenders. Did any money come with this new program so I might hire the necessary clerical help to comply? No, not one cent and that is the case in almost every instance.

It was interesting to note from transcripts of previous testimony before this Committee that there was a strong inference that most law enforcement records systems are computerized and mechanized. Not so. Most agencies are still computing statistics and processing records by the tedious manual methods devised years ago. This is not by choice. When monies are available these "frills" have to be bypassed to purchase much needed field equipment so the police officer can do his job on the street in a more responsive manner.

The impact of H.R. 188 would be considerable upon the average agency. Each item of required record keeping, each check and balance system takes time and people and that is what we don't have.

If I might be permitted to quote from the recently released report by the National Advisory Commission on Criminal Justice Standards and Goals, the volume "Report on Police", page 576:

"An examination of the record section of almost any police department will reveal inadequate physical facilities, clerical staffs with little specialized training, and records storage and duplicating equipment strained beyond reasonable limits."

"The apparent key to any reliable criminal justice information system is that information must be complete and must be shared. The high degree of criminal mobility has completely outstripped the ability of the law enforcement community to keep accurate and accessible identification and criminal history records."

Yet, in spite of our limited resources, we do manage to protect the rights of the accused as well as the rights of the victims and witnesses. Our arrest records are not public documents open to all. Only duly authorized representatives of law enforcement agencies have a right to see those records and only with regard to official business.

The integrity of these files is zealously guarded because of our moral commitment to keep the contents private as well as a civil liability attached to any misuse.

If the subject of the records wishes to inspect his file for errors, he may do so by state law (see Penal Code Sections 11120 through 11127 attached), and the procedure permits the validity of the records to be challenged. It also provides a procedure that negates capricious challenges instigated to satisfy the personal whim or self-serving motives of the defendant.

California has long since legislated laws that permit arrest records to be sealed or expunged under certain conditions. (See Penal Code Section 851.7 and 1203.4 attached.) So in effect, what I am saying is that while abuses may exist, the State of California has legislated steps to safeguard the rights of all concerned and the agencies of that State abide by those laws.

I am sure you have gathered by now that I am opposed to H.R. 188 and feel it will be an unnecessary burden added to law enforcement, requiring more hours of our valuable time needed to accomplish our basic mission.

One of the first things in the bill which leaps out at me is "Federally assisted law enforcement agency." It appears to me that you gentlemen represent a "locally assisted Federal Government." Those of us who pay taxes are the ones who support the Federal Government. Just because it was politically expedient to give money to law enforcement is no reason that you should then level controls on those agencies.

In West Covina we've never been the recipient of a grant under L.E.A.A. and I'm rather glad about it under these circumstances. So if this bill is passed it would not affect us in the way it would the multitude of cities which took a couple of thousand dollars to upgrade a radio system or to buy some gas masks. However, it seems to me that once the door is opened, it would be an easy task to amend the law and include all law enforcement agencies.

With respect to the individual sections of your proposed legislation, I would offer the following comments.

Under (3101), Inspection of records is already available under California law. Keeping a list of who has seen the record would be most difficult and not in the best interest of good law enforcement. It would let the arrestee know what law enforcement agency might be currently investigating him.

(3104) Who is to say what is correct on an arrest file? Certainly an investigator will not put down false information for his own purposes. He may have notations about certain leads and witnesses from whom he gained information. It would place these people in possible jeopardy of their lives. It would also create more and more court time and officer's time to answer such a petition. The arrestee could also use this as a harassing tactic against the officer or department.

(3105) The reference to a Federal Court in this section would create severe hardships on agencies located some distance from such a court. If anything, it should be incumbent upon the arrestee to go to the court to have the record sealed or expunged.

(3106) If a person has his arrest record sealed by a court there is no problem; we are living with that now; why turn it around and lay the responsibility on local jurisdictions?

(3107) You are making the law enforcement officer's job tough enough now without laying a penalty on him for this kind of a business. Please remember that we are supposed to be the good guys. We are on your side and cops take their lumps when they are wrong. It is not unusual for an officer to be prosecuted for criminal wrongdoing or sued civilly or subjected to departmental disciplinary action for minor infractions.

In conclusion, I would like to refer back to my opening remarks wherein I stated that this legislation would have a far-reaching effect on the citizens of this country. The information provided by police records systems such as we have in California keep the convicted sex deviates from securing employment in our schools and parks where they would be exposed daily to their favorite victims, children; it prevents convicted organized crime figures from gaining a "legal" hold in government positions of trust and influence and keeps convicted drunk drivers out of the driver seats of school buses. Passage of HR 188 would, to a great degree, eliminate the ability of police agencies to provide this information and would indeed have a far-reaching effect on the citizens of this country.

ARTICLE 5—EXAMINATION OF RECORDS

SECTIONS 11120-11127

11120. "Records" defined. As used in this article, "record" with respect to any person means the master record sheet maintained under such person's name by the Bureau of Criminal Identification and Investigation, and which is commonly known as "arrest record," "criminal record sheet," or "rap sheet." "Record" does not include any other records of the bureau.—Added, Stats. 1971, Chap. 1439.

11121. Function and intent. It is the function and intent of this article to afford persons concerning whom a record is maintained in the files of the bureau such reasonable opportunity to examine the record compiled from such files, and to refute any erroneous or inaccurate information contained therein as is consistent with the requirements and functions of the bureau.—Added, Stats. 1971, Chap. 1439.

11122. Application to examine records. Any person desiring to examine a record relating to himself shall obtain from the chief of police of the city of his residence, or, if not a resident of a city, from the sheriff of his county of residence, or from the office of the bureau, an application form furnished by the bureau which shall require his fingerprints in addition to such other information as the bureau shall specify. The city or county, as applicable, may fix a reasonable fee for affixing the applicant's fingerprints to the form, and shall retain such fee for deposit in its treasury.—Added, Stats. 1971, Chap. 1439.

11123. Fee. The applicant shall submit the completed application directly to the bureau. The application shall be accompanied by a fee of five dollars ($5) or such higher amount, not to exceed ten dollars ($10) that the bureau determines equals the costs of processing the application and making a record available for examination. All fees received by the bureau under this section are hereby appropriated without regard to fiscal years for the support of the Department of Justice in addition to such other funds as may be appropriated therefor by the Legislature.—Added, Stats. 1971, Chap. 1439.

11124. Determination of availability and time when record may be examined. When an application is received by the bureau, the bureau shall determine whether a record pertaining to the applicant is maintained. If such record is maintained, the bureau shall inform the applicant by mail of the existence of the record and shall specify a time when the record may be examined at a suitable facility of the bureau. Upon verification of his identity, the applicant shall be allowed to examine the record pertaining to him, or a true copy thereof, for a period not to exceed one hour. The applicant may not retain or reproduce the record, but he may make a written summary or notes in his own handwriting.—Added, Stats. 1971, Chap. 1439.

11125. Procedure when applicant is imprisoned. If the applicant is imprisoned in the state prison or confined in the county jail, his application shall be through the office in charge of records of the prison or jail. Such offices shall follow the provisions of this article applicable to cities and counties with respects to applications and fees. When an application is transmitted to the bureau pursuant to this section, the bureau shall make arrangements for the applicant to examine the record at his place of confinement. In all other respects, the provisions of Section 1124 shall govern the examination of the record.—Added, Stats. 1971, Chap. 1439.

11126. Procedure when the accuracy or completeness of the record is questioned. (a) If the applicant desires to question the accuracy or completeness of any matter contained in the record, he may submit a written request, to the bureau in a form established by it. The request shall include a statement of the alleged inaccuracy or incompleteness in the record, and specify any proof or corroboration available. Upon receipt of such request, the bureau shall forward it to the person or agency which furnished the questioned information. Such person or agency shall, within 30 days of receipt of such written request for clarification, review its information and forward to the bureau the results of such review.

(b) If such agency concurs in the allegations of inaccurateness or incompleteness in the record, it shall correct its record and shall so inform the bureau, which shall correct the record accordingly. The bureau shall inform the applicant of its correction of the record under this subdivision within 30 days.

(c) If such agency denies the allegations of inaccurateness or incompleteness in the record, the matter shall be referred for administrative adjudication in accordance with Chapter 5 (commencing with Section 11500) of Part 1, Division 3,

Title 2 of the Government Code for a determination of whether inaccuracy or incompleteness exists in the record. The agency from which the questioned information originated shall be the respondent in the hearing. If an inaccuracy or incompleteness is found in any record, the agency in charge of that record shall be directed to correct it accordingly. Judicial review of the decision shall be governed by Section 11523 of the Government Code. The applicant shall be informed of the decision within 30 days of its issuance in accordance with Section 11518 of the Government Code.—Added, Stats. 1971, Chap. 1439.

11127. Implementation of this article. The Bureau shall adopt all regulations necessary to carry out the provisions of this article.—Added, Stats. 1971, Chap. 1439.

CHAPTER 2—Control of Crimes and Criminals.

Section 11150–11196

Article 1. Release of Persons Convicted of Arson.—§ 11150–11152.
Article 2. Report of Injuries by Hospitals.—§ 11160–1162.
Article 3. Uniform Act for Out-of-State Parolee Supervision.—§ 11175–11179.
Article 4. The Western Interstate Corrections Compact.—§ 11190–11196.

§ *851.7 Petition to seal court records by person arrested for misdemeanor while a minor; grounds; exceptions*

(a) Any person who has been arrested for a misdemeanor, with or without a warrant, while a minor, may, during or after minority, petition the court in which the proceedings occurred or, if there were no court proceedings, the court in whose jurisdiction the arrest occurred, for an order sealing the records in the case, including any records of arrest and detention, if any of the following occurred:

(1) He was released pursuant to paragraph (1) of subdivision (b) of Section 849.

(2) Proceedings against him were dismissed, or he was discharged, without a conviction.

(3) He was acquitted.

(b) If the court finds that the petitioner is eligible for relief under subdivision (a), it shall issue its order granting the relief prayed for. Thereafter, the arrest, detention, and any further proceedings in the case shall be deemed not to have occurred, and the petitioner may answer accordingly any question relating to their occurrence.

(c) This section applies to arrests and any further proceedings that occurred before, as well as those that occur after, the effective date of this section.

(d) This section does not apply to any person taken into custody pursuant to Section 625 of the Welfare and Institutions Code, or to any case within the scope of Section 781 of * * * *the Welfare and Institutions* Code, unless, after a finding of unfitness for the juvenile court or otherwise, there were criminal proceedings in the case, not culminating in conviction. If there were criminal proceedings not culminating in conviction, this section shall be applicable to such criminal proceedings if such proceedings are otherwise within the scope of this section.

(e) This section does not apply to arrests for, and any further proceedings relating to, any of the following:

(1) Offenses for which registration is required under Section 290.

(2) Offenses under Division 10 (commencing with Section 11000) of the Health and Safety Code.

(3) Offenses under the Vehicle Code or any local ordinance relating to *the* operation * * *, stopping, standing, or parking of a vehicle.

(f) In any action or proceeding based upon defamation, a court, upon a showing of good cause, may order any records sealed under this section to be opened and admitted in evidence. The records shall be confidential and shall be available for inspection only by the court, jury, parties, counsel for the parties, and any other person who is authorized by the court to inspect them. Upon the judgment in the action or proceeding becoming final, the court shall order the records sealed.

(*Amended by Stats.* 1970, c. 497, p. 978, §1.)

1970 AMENDMENT. ADDED SUBD. (f).

1. In general

Application of this section providing that any minor who has been arrested for a misdemeanor, treated as an adult, but not convicted of offenses, may at

any time petition court to order the record in the case be sealed, and of Welf. & Inst.C. § 781 providing that a juvenile court record may be sealed when juvenile reaches his majority or upon expiration of five years from data on which jurisdiction of juvenile court terminates does not devolve upon any invidious discrimination between youths of different ages. T. N. G. v. Superior Court of City and County of San Francisco (1971) 94 Cal. Rptr. 813, 484 P. 2d 981, 4 C. 3d 767.

A juvenile who has been temporarily detained by juvenile court authorities and subsequently released without further proceedings does not become subject to a record which should be described as an "arrest or detention" record; in filling out forms for applications for educational or occupational opportunities such a juvenile need not state that he has been "arrested" or "detained." Id.

Limiting relief afforded by this section of having records, including records of arrest, sealed to minors who have been arrested for a misdemeanor and denying it to minor who has been arrested for a felony is not an arbitrary and capricious distinction. McMahon v. Municipal Court of Burbank Judicial Dist. Los Angeles County (1970) 85 Cal.Rptr. 782, 6 C.A. 3d 194.

Provisions of this section using the term "21 years of age" or any similar phrase is, as the result of Stats. 1971, ch. 1748, deemed to mean "18 years of age" and sealing of records under this section would only apply in cases where the person was under 18 years of age at the time of his arrest. 55 Ops. Atty.Gen. 173, 4-21-72.

The sealing of records of felony arrests of minor is not permitted under this section but is appropriate under § 1203.45, except for the described narcotic, sex, or vehicle offenses. 54 Ops. Atty. Gen. 107, 6-29-71.

The record sealing provisions of this section and § 1203.45 do not apply to arrests of persons over the age of 21 nor for the described narcotic, sex, or vehicle offenses. Id.

Records of a detention may not be sealed under this section if the offenses involves the described narcotic, sex, or vehicle offenses. Id.

§ 851.6 Release of person arrested without warrant; issuance of detention certificate; form

In any case in which a person is arrested without a warrant and is released without being formally charged with a crime pursuant to paragraph (1) of subdivision (b) of Section 849, such person shall be issued a certificate, signed by the releasing officer or his superior officer, describing the action as a detention. The Attorney General shall prescribe the form and content of such certificate.

(Added by Stats. 1969, c. 1117, p. 2180, § 1.)

§ 851.7 Petition to seal court records by person arrested for misdemeanor while a minor; grounds

(a) Any person who has been arrested for a misdemeanor, with or without a warrant, while a minor, may, during or after minority, petition the court in which the proceedings occurred or, if there were no court proceedings, the court in whose jurisdiction the arrest occurred, for an order sealing the records in the case, including any records of arrest and detention, if any of the following occurred:

(1) He was released pursuant to paragraph (1) of subdivision (b) of Section 849.

(2) Proceedings against him were dismissed, or he was discharged, without a conviction.

(3) He was acquitted.

(b) If the court finds that the petitioner is eligible for relief under subdivision (a), it shall issue its order granting the relief prayed for. Thereafter, the arrest, detention and any further proceedings in the case shall be deemed not to have occurred, and the petitioner may answer accordingly any question relating to their occurrence.

(c) This section applies to arrests and any further proceedings that occurred before, as well as those that occur after, the effective date of this section.

(d) This section does not apply to any person taken into custody pursuant to Section 625 of the Welfare and Institutions Code, or to any case within the scope of Section 781 of such code, unless after a finding of unfitness for the juvenile court or otherwise, there were criminal proceedings in the case, not culminating in conviction. If there were criminal proceedings not culminating in conviction, this section shall be applicable to such criminal proceedings if such proceedings are otherwise within the scope of this section.

(e) This section does not apply to arrests for, and any further proceedings relating to, any of the following:

(1) Offenses for which registration is required under Section 290.

(2) Offenses under Division 10 (commencing with Section 11000) of the Health and Safety Code.

(3) Offenses under the Vehicle Code or any local ordinance relating to operation or stopping, standing, or parking of a vehicle.

(Added by Stats. 1967, c. 1373, p. 3223, § 1.)

§ *1203.45 Petition for order sealing records*

(a) In any case in which a person was under the age of 21 years at the time of commission of a misdemeanor and is eligible for, or has previously received, the relief provided by Section 1203.4 or Section 1203.4a, such person, in a proceeding under Section 1203.4 or Section 1203.4a, or a separate proceeding, may petition the court for an order sealing the record of conviction and other official records in the case, including records of arrests resulting in the criminal proceeding, and including records relating to other offenses charged in the accusatory pleading, whether defendant was acquitted or charges were dismissed. If the court finds that such person was under the age of 21 at the time of the commission of the misdemeanor, and is eligible for relief under Section 1203.4 or Section 1203.4a, or has previously received such relief, it may issue its order granting the relief prayed for. Thereafter such conviction, arrest, or other proceeding shall be deemed not to have occurred, and the petitioner may answer accordingly any question relating to their occurrence.

(b) This section applies to convictions which occurred before, as well as those which occur after, the effective date of this section.

(c) This section shall not apply of offenses for which registration is required under Section 290 of this code, to violations of Division 10 (commencing with Section 11000) of the Health and Safety Code, or to misdemeanor violations of the Vehicle Code relating to operation of a vehicle or of any local ordinance relating to operation, standing, stopping, or parking of a motor vehicle.

(e) [1] This section does not apply to a person convicted of more than one offense, whether the second or adidtional convictions occurred in the same action in which the conviction as to which relief is sought occurred or in another action, unless:

(1) One of the offenses includes the other or others; or

(2) The other conviction or convictions were for (i) misdemeanor violations of Chapters 1 (commencing with Section 21000) through 9 (commencing with Section 22500) or Chapter 12 (commencing with Section 23100), Chapter 13 (commencing with Section 23250), or Chapter 14 (commencing with Section 23340) of Division 11 of the Vehicle Code, other than Sections 23101 through 23108 and Section 23121, or (ii) violation of any local ordinance relating to operation or stopping, standing or parking of a motor vehicle; or

(3) The other conviction or convictions considered of any combination of (1) and (2).

(Added by Stats.1961, c. 2054, p. 4280, § 1. Amended by Stats.1965, c. 1856, p. 4293, § 1; Stats.1967, c 1373, p. 3224, § 2.)

§ *1203.45 Petition for order sealing records; exceptions*

(a) In any cast in which a person was under the age of * * * *18* years at the time of commission of a misdemeanor and is eligible for, or has previously received, the relief provided by Section 1203.4 or 1203.4a, such person, in a proceeding under Section 1203.4 or 1203.4a, or a separate proceeding, may petition the court for an order sealing the record of conviction and other official records in the case, including records of arrests resulting in the criminal proceedings and records relating to other offenses charged in the accusatory pleading, whether defendant was acquitted or charges were dismissed. If the court finds that such person was under the age of * * * *18* at the time of the commission of the misdemeanor, and is eligible for relief under Section 1203.4 or 1203.4a or has previously received such relief, it may issue its order granting the relief prayed for. Thereafter such conviction, arrest, or other proceeding shall be deemed not to have occurred, and the petitioner may answer accordingly any question relating to their occurrence.

(b) This section applies to convictions which occurred before, as well as those which occur after, the effective date of this section.

(c) This section shall not apply to offenses for which registration is required under Section 290, to violations of Division 10 (commencing with Section 11000)

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[1] So in original. The insertion of letter designations in the 1967 amendment omitted any reference to a subd. (d).

NOTE.—Italic indicates changes or additions by amendment.

of the Health and Safety Code, or to misdemeanor violation of the Vehicle Code relating to operation of a vehicle or of any local ordinance relating to operation, standing, stopping, or parking of a motor vehicle.

(d) This section does not apply to a person convicted of more than one offense, whether the second or additional convictions occurred in the same action in which the conviction as to which relief is sought occurred or in another action, except in the following cases:

(1) One of the offenses includes the other or others.

(2) The other conviction or convictions were for the following:

(i) Misdemeanor violations of Chapters 1 (commencing with Section 21000) to 9 (commencing with Section 22500), inclusive, or Chapters 12 (commencing with Section 23100) to 14 (commencing with Section 23340), inclusive, of Division 11 of the Vehicle Code, other than Sections 23101 to 23108, inclusive, or Section 23121.

(ii) Violation of any local ordinance relating to the operation, stopping, standing, or parking of a motor vehicle.

(3) The other conviction or convictions consisted of any combination of paragraphs (1) and (2).

(e) In any action or proceeding based upon defamation, a court, upon a showing of good cause, may order any records sealed under this section to be opened and admitted into evidence. The records shall be confidential and shall be available for inspection only by the court, jury, parties, counsel for the parties, and any other person who is authorized by the court to inspect them. Upon the judgment in the action or proceeding becoming final, the court shall order the records sealed. (Amended by Stats. 1970, c. 497, p. § 2; Stats. 1972, c. 579, p. —,§ 38.)

Mr. EDWARDS. The committee is adjourned.

[Whereupon, at 3:40 p.m. the subcommittee recessed, subject to the call of the Chair.]

DISSEMINATION OF CRIMINAL JUSTICE INFORMATION

TUESDAY, FEBRUARY 26, 1974

HOUSE OF REPRESENTATIVES,
CIVIL RIGHTS AND CONSTITUTIONAL RIGHTS
SUBCOMMITTEE OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10 a.m., in room 2141, Rayburn House Office Building, Hon. Don Edwards [chairman of the subcommittee] presiding.

Present: Representatives Edwards, Waldie, Drinan, Wiggins, McClory, and Butler.

Also present: Alan A. Parker, counsel; Arden B. Schell, assistant counsel; and Michael W. Blommer, assistant counsel.

Mr. EDWARDS. Good morning. The subcommittee will come to order.

The statement of Mr. Rodino will be placed in the record.

[The prepared statement of Hon. Peter W. Rodino, Jr., follows:]

STATEMENT OF HON. PETER W. RODINO, JR., CHAIRMAN OF THE HOUSE COMMITTEE ON THE JUDICIARY

Mr. Chairman, members of the Subcommittee on Civil Rights and Constitutional Rights, thank you for your courtesy in extending to me this time to submit for your consideration some personal thoughts and views on the subject of your present hearings.

The subject of individual privacy is one that has occupied thoughts since the inception of our country and the drafting of our Declaration of Independence, our Constitution and the Bill of Rights. Times have certainly changed; technology has progressed, but the basic rights so carefully, indeed painstakingly debated, drafted and decided some 200 years ago, have not changed and are just as important today as then.

It is doubtful if the framers of our Constitution were able to fantasize or imagine the Twentieth Century marvels of electronics, flight, telecommunications or even the immensity of our population with all of its attendant problems. It was certainly easier in a sense to be private and to insure one's own privacy in the Eighteenth and Nineteenth Centuries. But, the necessity of that individual right to privacy is no less important or basic today.

Growth, as we know, has brought its problems: the problem of society to cope with its own unmanageable size, the incessant choices to be made in balancing between the individual's rights and the rights of society as a whole. The subject of your hearings and of this pending legislation is a classic example of that delicate balancing act.

Everyone recognizes, and I support the theme, that law enforcement agencies need efficient and effective information to aid them in pursuit of their duties. The mobility and complexities of interstate crime and criminals also demands a national crime information center. But it seems to me that the rapid expansion of our capabilities, knowledge in the area of electronics, computers, and our worship of the gathering of statistics and information is presently out of balance with our concern for the individual's right of privacy. Our technology has outdistanced our ability to preserve these basic rights and is in danger of perma-

nently outstripping it if we do not restore and provide for the maintenance of that delicate balance.

I was, therefore, pleased when your Chairman, Mr. Edwards, introduced early in the 92d Congress, H.R. 13315 (the predecessor of the present H.R. 188), which I cosponsored, to being what has been a most important dialogue and study in this area. Hearings held in the 92d Congress dealing with security and privacy in the dissemination of criminal arrest records (Serial No. 27) were of great help and assistance in formulating, I am sure, the thinking which has now gone into the three major proposals before you. It focused attention and raised the questions which now you address yourselves to solving.

You have under consideration four bills: H.R. 188 and H.R. 9783, introduced by Mr. Edwards, addressed to providing for the dissemination and use of criminal arrest records in a manner that insures their security and privacy and would regulate the collection, storage and dissemination of information by criminal data banks established or supported by the United States. To add to these bills we now have H.R. 12574, submitted by the Department of Justice and on which you shall hear testimony from the Attorney General of the United States William B. Saxbe. There is also before you H.R. 12575, this is the House version of the bill introduced by Senator Sam Ervin in the Senate which is the product of a great deal of study by the Senate Subcommittee on Constitutional Amendments. I was pleased to introduce both of these pieces of legislation to present to this Committee the parameters of legislative thinking so that we can now move forward with protective legislation to safeguard the usage of computerized State and Federal crime files.

I know that a great deal of effort has already been expended in this area by this Subcommittee who over two years ago began its exploration of the problems inherent in a virtually unregulated and unfettered system of criminal justice information. Now the opportunity is present to complete your considerations and finalize a statutory solution. Everyone is now at last agreed that a legislative solution to the problem is at hand. I shall not delve into the intricacies and complexities of the legislative language itself. It will require much patience to hammer out the exacting language necessary in this type of legislation for it cannot be overlooked that this legislation will be the first time that standards will be imposed on the F.B.I., and on the thousands of user agencies across the country.

There is no question, however, that it must be done. Our legislative efforts must keep pace and be as sophisticated as the technology which we must control.

Mr. EDWARDS. We have a new member of the subcommittee, our colleague, Congressman Latta, who is not here today, but the subcommittee welcomes him anyway.

This morning we will continue hearings on the regulation of criminal justice information systems to insure the individual's rights to privacy. This subcommittee will take under consideration the four major pieces of legislation that reflect the work and study done in this area by the Congress and this administration. Our task now is to strike a balance among these varying approaches to the problem that will reflect an affirmative attitude towards the protection of the constitutionally guaranteed right to privacy.

Until today our deliberations were confined to H.R. 13315, the predecessor of H.R. 188 and H.R. 9783, which I had introduced during the 92d Congress and the first of the 93d Congress. H.R. 13315 was one of the first introductions to the Congress of the potential and real abuses in the dissemination of criminal justice information. It was during these thorough hearings that the subcommittee and I became aware of the growing employment of computers throughout this country to dispense criminal justice information. We also became aware of the fact that these automated systems were operating virtually unregulated.

This knowledge prompted my introduction of H.R. 9783 as a complementary bill to H.R. 188. I felt that the problem demanded the

commencement of an active dialog. The best vehicle for such a dialog is a piece of legislation to which one can react and so that bill became that vehicle.

Last session we began our hearings on the entire criminal justice information system and its proposed regulation. Our opening witness was Mr. Arnold Rosenfeld, director of the Massachusetts Criminal History Systems Board, which at that time had decided that Massachusetts would not join the National Criminal Information System operated by the Federal Bureau of Investigation because of what Massachusetts expressed as a lack of security regarding collection, storage, and dissemination of information and the violation of individual's rights inherent in that lack of security.

For over 2 years this subcommittee has been studying the problem through hearings and staff work. The focus of our deliberations is now expanded by the introduction of two more pieces of comprehensive legislation in this area. H.R. 12574 is the long-awaited administration version of acceptable regulation of the National Crime Information Center and all other criminal justice information systems throughout the country.

H.R. 12575 is the culmination of the work and wisdom of Senator Sam Ervin on Federal data banks, computers, and the Bill of Rights which has developed over the past several years. The Senator has long been a champion for the constitutional rights of the individual. We are indebted to his perseverance and personal involvement in the struggle to assure us all of continued freedoms under the law.

The problem before us is becoming acute. The technological advancements in computer science has developed not only an ease in obtaining information, but also an insatiable appetite by public and private agencies to collect every possible piece of knowledge on every possible citizen. We are aware that the services of the National Crime Information Center are now used only to a small degree in the everyday operations of our State and local criminal justice agencies. But the use of this system is blossoming and the kind of information collected is changing character. Previously there has been a reluctance to promulgate regulations that would in any way restrict the wok of law enforcement agencies. Our search is not for restrictions but for an honest appraisal of necessity so that infringement on the privacy of the individual is kept to a minimum.

The policy board of the National Crime Information Center is made up entirely of criminal justice officials. This dramatically points up the inherent conflict of interest in allowing this massive system, that affects the lives of every citizen, to regulate itself. Congressional regulation and oversight is mandated.

Our hearings into this area, particularly on criminal arrest records exposed the fact that much of this information was disseminated with nonchalance. There is an extensive body of evidence and statistics that indicated Federal and private agencies, private industrial employers and credit bureaus, among others, have had ready access to these records. Through much of the testimony it became apparent that the employment, credit, and housing of thousands were daily adversely affected by the existence of these arrest records. When a broad reaching system has a great potential for abuse, Congress has an obligation to protect the rights of individuals. We must try to

balance the needs of the whole society against the needs of each individual part.

So today it is with great pleasure and gratification that we welcome as our first witness in this continuing series of hearings, the Attorney General of the United States, the Honorable William B. Saxbe.

Mr. Attorney General, we are looking forward with great anticipation and interest to your testimony, but before hearing your statement let me say it is a pleasure to yield to my colleague from California, Mr. Wiggins.

Mr. WIGGINS. Thank you, Mr. Chairman.

Mr. Saxbe, we all welcome your appearance here. This is one of your first appearances before a congressional committee since you assumed the important duties of Attorney General. I am going to reserve all of my questions until after your testimony, but let me observe at the outset the bill that the administration is sponsoring is to some, unacceptable. However, let me at least acknowledge this, that it is a more moderate compromise approach to a very difficult problem than many of its predecessors, and I commend you and your staff and the other executive agencies which have worked in the development of this bill for their research and suggestions. I look forward to your testimony, Attorney General Saxbe.

Mr. EDWARDS. Mr. Attorney General, you may proceed any way you wish.

TESTIMONY OF HON. WILLIAM B. SAXBE, ATTORNEY GENERAL OF THE UNITED STATES

Mr. SAXBE. Thank you, Mr. Chairman.

Mr. Chairman, Mr. Wiggins, members of the subcommittee, it is a pleasure to appear here today to testify on the very important issue of the control of data in criminal justice information systems. The Justice Department has long been aware of the need to deal with this issue and in 1971 it submitted to Congress the Criminal Justice Security and Privacy Act of 1971, H.R. 10789 and H.R. 10892.

The administration is strongly committed to the need to protect the rights of privacy of the citizens of this country. The President highlighted this in his state of the Union message. On this past Saturday, as you may know, the President announced the appointment of a Cabinet level committee chaired by the Vice President to examine the broad issue of privacy as it applies to health records, tax records, social service records and the like. I am a member of that committee, and it will hold its first meeting this afternoon.

I am also aware, Congressman Edwards, of your long-standing interest in this field, notably the bills you yourself introduced, H.R. 188 and H.R. 9783, and the exemplary efforts of you and the members of your subcommittee in seeking legislation in this area. I come in a spirit of cooperation and hope that together we can develop legislation which strikes a proper balance between the legitimate and vital information needs of the criminal justice system and the constitutional rights of persons affected by the collection and dissemination of criminal justice information.

The legislation under consideration by your subcommittee reflects a strong concern for the security and privacy of data contained in

criminal justice information systems. It deals effectively with the fundamental issues involved.

Mr. Chairman, it is important now more than ever that this Congress be concerned with the security and privacy of data in criminal justice information systems.

The problems we are dealing with goes beyond the setting of curbs on invasions of privacy. The problem also involves the defining and limiting of the uses of criminal justice information.

An arrest, for example, can be the result of mistaken identity. An individual can be subject to arrest and have no connection with any criminal activity. It should be noted, of course, that under current procedures, which have been in effect for a number of years, it is relatively easy for such an individual to have the record of such an arrest expunged.

However, people are often denied employment on the basis of mere arrest records—records which are provided by criminal justice information systems. This is fundamentally unfair and must be stopped.

Furthermore, with the many advances in computer technology which have occurred in recent years there is a substantial danger that the rights of privacy of individuals could be infringed upon by our criminal justice information systems, and while there is no overwhelming evidence of such abuse, nevertheless the potential for such abuse does exist.

In the past a criminal justice agency's capacity to collect, store, and disseminate data was limited. Many systems were manual in nature and the very inefficiency of these systems was one of the chief protections of individual privacy, even recognizing that these systems because of their manual nature were difficult to update and contained inaccurate information which was sometimes used to the detriment of an individual.

Scattering of data, no linkage of files and inefficient means for accessing data all served to reduce the scope and effectiveness of pre-computer information systems. The widespread use of computers and sophisticated interstate transmission networks, including potential satellite transmission for connecting these computers, has removed much of the protection the inefficiency of previous systems may have provided to personal privacy.

The age of computers has led to qualitative as well as quantitative changes. It has markedly increased the operational utility of those records by permitting instantaneous response to the needs of criminal justice to reduce crime and improve the performance of the criminal justice system. It has facilitated the development of statistics derived from such information for planning, evaluation and general improvement of the criminal justice system.

The use of computers has greatly increased the ability of Government to acquire, store, retrieve, and disseminate information about individuals. The ease with which computers handle data has led to a growing tendency to gather more and more data. With the large amount of data available there has been a tendency to seek new uses for it, such as investigative leads, post conviction sentencing, and so forth. While these changes increasingly threaten the individual's right to privacy, the development of legislative safeguards have not kept

pace. As the National Advisory Commission on Criminal Justice Standards and Goals recognized in its Report on the Criminal Justice System:

> No longer is it possible to rely on the inefficiency of information systems for protection of privacy. Computer-based information systems require conscious planning for protection of personal privacy. Constraints must be imposed on the system to insure that the highest practicable level of protection is obtained.

The legislation pending before this subcommittee seeks to correct this situation.

Jurisdictional basis for the bill:

Much of the data in criminal justice information systems is transmitted in interstate commerce. There is no doubt that the Federal Government can regulate its use under the commerce clause of the Constitution. Nor is there any doubt that the Government can regulate its own systems and systems for which it provides funds.

Part of the citizen's right of privacy is lost through engagement in criminal activities. The facts of his arrest, trial, and conviction are all matters of public record. Arrests appearing on police blotters, grand jury indictments, and records of court proceedings are matters of public information. The degree to which a citizen's right should be lost or modified by contact with the criminal justice system, particularly where arrest does not lead to conviction, is a matter which this legislation seeks to define.

Mr. Chairman, I would now like to outline some of the key provisions of the Department's bill. It is not my intention to present an in-depth discussion and analysis of the highly technical provisions of this bill. I will leave that to the later witnesses from the Law Enforcement Assistance Administration and the Federal Bureau of Investigation.

For some time it has been apparent that comprehensive Federal legislation is needed to deal with the complex issues of the utilization and the dissemination of data in criminal justice information systems.

In 1970, Congress passed legislation calling on the Law Enforcement Assistance Administration to develop legislative proposals for assuring the security and privacy of data contained in criminal justice information systems funded by LEAA. In 1971, the Department of Justice presented to the Congress legislation regulating the non-criminal-justice uses of criminal justice information. Legislation was also introduced by Members of Congress to deal with this issue.

The bill which the Department has just submitted to Congress is a refinement of the earlier bills submitted in 1971 and 1972. It embodies many of the principles in those bills, as well as in the bills introduced by individual Members of Congress, such as yourself, Mr. Chairman. It also includes many of the excellent recommendations of the National Crime Information Center Advisory Board, Project SEARCH, as well as many of the recommendations developed by the National Advisory Commission on Criminal Justice Standards and Goals in its Report on the Criminal Justice System.

The Department's legislation will assure the security and privacy of data contained in criminal justice information systems. Within this context it also regulates the legitimate uses of intelligence by criminal justice agencies.

Before proceeding further, it is important, I think, to note the connection between the security and privacy of information.

As the scope of criminal justice information systems increases and as they become more automated, new problems arise. A lapse in the security of criminal justice information systems can cause serious damage to law enforcement operations. Security is compromised, for example, when an unauthorized person can add to, change, or delete data in the system or when extracts of information within the system can be used for private motives or personal gain. Security, as used in the legislation, refers to protection of the system against unintended or accidental injury or intrusion. Privacy on the other hand refers to protection of the interest of the people whose names appear for whatever reason in any criminal justice information system. It is, of course, readily apparent that where a system does not have the proper security there is a grave danger that individual rights of privacy may be compromised.

System operations are interrelated with the privacy issue. Systems must meet security standards which guard against unauthorized access to data within them. The Department's bill deals with this issue by providing that complete and accurate records be kept of access and use made of any information in the system. The bill also provides that programs must be included for the training of system personnel so that they are aware of the requirements for uses to which information can be put and persons to whom it can be disseminated. This is most important since direct access to information is available only to authorized persons or employees of a criminal justice agency. Standards must be developed to guard against unauthorized access to data. These are important provisions.

SUMMARY OF KEY PROVISIONS

The vital issue of the type of information which can be maintained in a system is comprehensively addressed. It is important to note that the Department's bill defines categories of criminal justice information: Offender record, offender processing and intelligence information. Each type of criminal justice information must be kept separately and there are different standards as to the dissemination of such data. The Department's legislation recognizes that there are legitimate needs for arrest data by criminal justice agencies. Arrest data, even without a conviction, will give leads to law enforcement officials. Such data can identify a pattern of possible criminal activity which ultimately can lead to a conviction. Use by non-criminal-justice agencies of raw arrest data without dispositional information is, of course, prohibited.

H.R. 12574, the Department's bill, recognizes that an individual has the right to review criminal offender record information regarding himself contained in a criminal justice information system for the purposes of challenge and correction. A right, I might add, that has already been recognized by Department of Justice regulations. He has a right of administrative review where the agency responsible for the original entry does not take appropriate steps to correct or revise the record. We believe that it is important that under no circumstances should an individual be required to divulge this information to anyone.

Another key provision is the sealing of criminal offender record information under specified circumstances. This means that a record is closed and the information is not available to anyone either inside or outside the criminal justice community. The exceptions are the individual himself, on order of a court, or by a specific determination which must be made by the Attorney General. Such determinations could include authorization to unseal an individual's record when that individual is arrested for a serious offense. If the individual is not convicted of the offense for which he is arrested, then the record would be resealed.

One of the other bills requires purging of information so that there is no trace that the information ever existed; no criteria are established for such purging. I believe that such a provision goes beyond what is required. There may be times when a record would need to be reopened, as for example when a convicted person later seeks collateral review of his conviction. To foreclose the possibility by destroying all traces that an individual ever had a record would be unwise.

Use of intelligence information must be strictly limited and subject to stronger regulations than other types of criminal justice information. The Department's bill recognizes this and sets forth very stringent requirements and controls over collection and dissemination of such information. First, such information may only be compiled by a criminal justice agency and it may only be collected for the purpose of criminal investigation and analysis. Such information can only be used for a criminal justice purpose and a need for the use must be established. The only exception is where such use is necessary for reasons of national defense or foreign policy.

Another key provision is the requirement for accuracy, updating and completeness of information. The bill places primary responsibility on each participating agency to assure that the criminal offender record information it contributes is accurate and complete and regularly and accurately revised to include dispositional and other subsequent information.

The Department's bill requires regulations promulgated by the Attorney General. It is my belief that from the standpoint of administrative efficiency there must be one individual directly responsible for the issuance of detailed and technical regulations. Under existing law, I already possess this authority. Indeed, on February 14, pursuant to my authority, joint proposed regulations were issued governing the dissemination of criminal record information maintained by the Federal Bureau of Investigation and criminal justice agencies receiving funds directly or indirectly from the Law Enforcement Assistance Administration. A different approach is in another proposal before you that a broad-based Federal board be established to administer the act.

Finally, the responsibility for the collection and dissemination of criminal justice information lies with the criminal justice agency. Therefore, it is just as important to require that the storage facilites be under the management control of a criminal justice agency. A controversy exists between law enforcement and other governmental agencies over the need for dedicated computer systems. Administrative agencies generally have a strong preference for a shared system while law enforcement officials feel strongly that a system should be dedi-

cated solely to criminal justice. The legislation requires that management control be in a criminal justice agency. It requires that regulations be issued prescribing standards and procedures for the security of criminal justice information. Lacking management control over system operators and programers, law enforcement officials cannot assure that the data is properly protected.

IMPACT ON THE FEDERAL GOVERNMENT

This legislation will, of course, have a major impact on the operations of many agencies of the Department of Justice, including the Law Enforcement Assistance Administration, the Criminal Division, the Federal Bureau of Investigation, the Drug Enforcement Administration, the Federal Bureau of Prisons, the Parole Board, and the Immigration and Naturalization Service. All of these either fund, support, or utilize criminal justice information systems.

To the degree that a State criminal justice information system fails to comply with this legislation, LEAA may not fund that system. To the degree that the FBI or DEA procedures, for example, do not comply with the legislation, these agencies will need to change their procedures. New security procedures will need to be established by the component agencies of the Department. Regulations insuring the rights of privacy will need to be developed.

In preparing this legislation the Department of Justice sought to take into account the concerns of various divisions within the Department and other Federal interests. As I indicated earlier, we sought to strike a balance between legitimate criminal justice needs such as those raised between component agencies of the Department and the need to protect the citizens' right to privacy. I am satisfied that this has occurred, and the proper balance has been struck.

There is one area I would like to bring to your attention because I think it needs further exploration, and I think that Congress is the proper forum in which this exploration can take place. The area I refer to is that of noncriminal justice use of criminal justice information—both arrest and conviction information.

Congress, for example, has passed a law prohibiting the Federal Government from employing anyone who has been convicted of a crime arising out of a civil disorder. If the Federal Government is to follow this congressional mandate, Government agencies investigating potential employees must have access to information which is now in criminal justice information systems—information which because of the lapse of time between the conviction and the application for employment may be sealed under the legislation submitted by the Department. Thus, Congress must decide whether this restriction on employment is to continue or whether it should be an exception to the need to secure the privacy of criminal justice information.

Congress should address the specific instances or classes of noncriminal justice uses of criminal justice information which Congress feels it would be appropriate to allow and those which should be barred. The Department's legislation, for example, already sets up two classes of permissible noncriminal justice use—national defense and foreign policy. Traditionally, the Government has been given a broad mandate to take appropriate action to protect national defense and foreign policy interest and this legislation seeks to continue that policy. It

should be noted that the legislation uses the narrower words "national defense," not "national security."

There are other instances or classes of noncriminal justice use which you may wish to consider including employment checks on State and local government employees and credit information checks. When the FBI testifies, they will address this issue more specifically.

I would also like to observe that in the drafting of this legislation the Department tried to accommodate the concerns of other Federal departments and in many instances this was possible. The area of noncriminal justice use of criminal justice information presented the greatest difficulty and disagreement, and I would hope that you will seek the views of other agencies such as the Treasury Department, the Civil Service Commission, and the Defense Department in your hearings on this important issue of the security and privacy of criminal justice information systems.

In conclusion, I would like to observe once again that the time has come for establishing, by legislation, standards for assuring security and privacy of data contained in criminal justice information systems.

The Department of Justice has long been concerned with this area. In 1969, it initiated funding of work by the Project SEARCH group which led to the development of its Technical Report No. 2 on Security and Privacy of Criminal Justice Information Systems and in the development of model State laws and regulations dealing with the security and privacy of criminal justice information systems. The NCIC Advisory Policy Board has also been active in developing and, along with the FBI, implementing security and privacy standards. Most recently, the National Advisory Commission on Criminal Justice Standards and Goals in its Report on the Criminal Justice System has stated such standards. I have recently issued proposed regulations in this area on which we are now receiving public comment. But the actions and regulations of a single department cannot do the job; comprehensive legislation is needed.

Efficient law enforcement and the protection of privacy are fundamental values but in certain instances there values come into conflict. This legislation is aimed at promoting full consideration of these values and their possible conflict.

Mr. EDWARDS. Thank you very much, Mr. Saxbe. We certainly welcome this bill.

And do you think that we are going to have the support of the Department of Justice and the FBI for this particular piece of legislation?

Mr. SAXBE. You are not going to have full support on all issues. There are differences of opinion within the Justice Department on some things. And in keeping with what I consider to be the best way that Congress can make these decisions, I have asked them to candidly state their opposition to the various sections of this bill if they feel in opposition. For me to say that there is complete agreement on this legislation within the Justice Department would be untrue.

And I might add that there is genuine concern for some of these areas. However, these are limited and specific areas. The entire Justice Department supports the concept of a bill along these lines and hopes that this Congress will be able to bring the best one out.

Mr. EDWARDS. Well, the bill certainly goes a long way in achieving the aims that many people throughout the United States have sought. I can see some problems in the bill. For example, on page 8, on line 10, it states "Criminal justice information can be disseminated pursuant to Executive order." Now, is that a loophole in the bill? Can we just be overwhelmed with Executive orders that would provide exceptions to the bill and exemptions from the operations of the legislation?

Mr. SAXBE. No; I don't think so. It certainly is not intended that way. The exemption is put in there simply for purposes of accommodating the specific situations that might arise and I don't think we could entirely comprehend all those situations. There is certainly no intention to make loopholes that would make it more difficult to enforce it.

Mr. EDWARDS. One of the real abuses of the system today is that the FBI will send out rap sheets to banks, savings and loans, which incidentally have been authorized by statute, and to State licensing agencies just upon demand. And these can be used for employment purposes, in situations such as the licensing of babysitters, or massage parlor operators, or taxicabs. Would this bill restrict that or by saying on page 8 that the information can be used for noncriminal purposes "if expressly authorized by Federal or State statute," do you think that means that a State, say California, can enact a statute that will authorize municipalities to obtain, through the NCIC or by mail from the Federal Bureau of Investigation, arrest records, rap sheets, and so on, for any local licensing purpose you can conceive of?

You can see what a large field this would open up and it exists today. That is one of our big problems.

Mr. SAXBE. But I might add that this is a protection to the individual also. Now, whether a State would see fit to make available criminal offender record information for the purpose of licensing municipal taxicab drivers or for anything else from Federal Bureau of Investigation records is a remote possibility. But if there is a municipal requirement or a State requirement that before a man can be licensed as a barber or a taxi driver or whatever it may be, that he not have been involved in an arrest on a felony charge or anything else, they are going to obtain this information if there is a State statute expressly authorizing it.

Now, it is also a fact that if this information is properly put together and updated, it is better that it be received in that manner than for them to go and search the dockets at the courthouse, which they would do, and then find an unsubstantiated arrest record or to find something else with absolutely no followup on it. Because if they are charged with this responsibility, they are either going to get from this man an affidavit that he has never been involved, and if he has been, it points out to him that he can be brought in on a criminal charge for falsifying the affidavit, or they will go to the court dockets. Is it not better to get this information from criminal justice agencies, if the State so decides, if it has been properly collected, updated, and authenticated?

Just by making it unavailable through the criminal justice agencies at the State level or the Federal level doesn't mean that they are not

going to obtain this information. We are dealing with public records.

Mr. EDWARDS. Well, we have no problem with public records, Mr. Attorney General. That is something that any citizen can examine, like court dockets and court proceedings. The problem is that when this information is pumped into a data processing system on a nationwide basis, the rights of people can be seriously impaired. If the information furnished is strictly a raw arrest record with no disposition because it might have been the wrong person or he might have been acquitted or the prosecutor might have found after an arrest that he didn't have a case, it could be very damaging to him.

Mr. SAXBE. But we are in this bill trying to protect against that by making a requirement that there be dispositional data. Now, if you bar the city of San Francisco from getting information off of their computer—and they have a computer now in the city of San Francisco showing arrest records that we have probably funded in part, so we could say to them "Why, you can't give an arrest record off of this computer"—and then if the taxi driver goes in for licensing, I think that it is much to be preferred that they get this information that must be constantly updated from that computer within the city. And we are not talking about any national intelligence network here. We are talking about what happens when the city of San Francisco is seeking criminal offender record information and saying it is better they get it from a properly regulated criminal history system rather than saying, "Well, we can't get it from there and so we will have to go down to the courthouse and check the dockets."

Ninety-five percent or higher of this use of criminal offender record information is on a strictly local basis. The idea that when a man is picked up for most crimes, particularly crimes of violence which has to do only with the local law—and I am talking about murder, rape, assault, aggravated assault, and all of these things—these are just all State laws, and the idea is they are not going to go on a national NCIC to get a particular rundown on this man. They are going to go to the records at the courthouse and see what he has.

When you get into certain specific categories that the NCIC is used for, like contraband, fugitives, all of these things, automobile theft, then, yes, the NCIC will come into play, particularly on the fugitives.

Mr. EDWARDS. Thank you.

Mr. Wiggins?

Mr. WIGGINS. Thank you Mr. Chairman.

Mr. Attorney General, I am going to ask you a series of questions which are not intended to delve into the specifics of this bill, but I would like to explore with you certain concepts and obtain your views with respect to these concepts.

First of all, coverage of this act. As you know, it is intended to apply to systems operated by the Federal Government, systems which are operated by the State and local government and funded by the Federal Government, and it is intended to apply to intrastate systems and intended to apply to purely local systems if they exchange information with other covered systems.

I am prepared to admit for purposes of argument that there is a constitutional power vested in Congress to regulate these activities, but my question goes to the wisdom of exercising that power. You understand, sir, that the bill before us will involve the Federal regu-

lation of literally all criminal justice systems in the United States, including those at the local level, and will place you in the position of writing regulations affecting these local systems. Now, do you think that is a wise exercise of power in keeping with the spirit of federalism?

Mr. SAXBE. I don't see how it can be done in any other manner, and particularly in the intrastate use of this information. However, as I replied to Mr. Edwards' question, 95 percent or more of this is intrastate. However, by permitting State legislatures to adopt statutes for uses outside the criminal justice area, we do give substantial flexibility.

Mr. WIGGINS. I frankly do not share with you the view that there will remain a substantial body of intrastate exchanges which will be unregulated. As those systems become more sophisticated and more easily accessible to units of local government, the routine exchange or solicitation of information from the FBI for criminal records, I think, will inevitably involve your agency in regulations affecting every police department in America. It is a step that we shouldn't take lightly.

Mr. SAXBE. I didn't mean to leave the impression that I didn't think it wouldn't go into that. I believe that we must have broad regulations.

The LEAA has spent on communications alone $326 million. Practically all of this is at the local and State levels. So you are going to have difficulty in finding any computerized system that hasn't got a tremendous input of LEAA money.

Mr. WIGGINS. Do you appreciate, Mr. Attorney General, that under this legislation you will be placed in the position of writing regulations which will impact many other Federal agencies apart from the Department of Justice? I think that is inevitable here because there are many agencies of government which have traditionally at least had access to criminal justice information.

Do you think that it is going to create tension and friction within the Federal Establishment to have one of the executive branches; namely, the Attorney General, impose its will on other coequal executive branches?

Mr. SAXBE. I think that there is always that probability or that possibility. However, the criminal justice information is at the core of a great many of the other intelligence and other information gathering agencies. We have at the present time a working arrangement with Civil Service, for instance.

The Civil Service demands information on these people that they hire for Government employment. Now, if we are going to deny them access to criminal information, criminal history anyway, they are just going to start their own files.

However, I believe the Attorney General must deal with this because he is the one most close to it and can best promulgate these regulations.

Mr. WIGGINS. I appreciate that point of view. Now, Mr. Attorney General, in general the availability of information is restricted to the criminal justice system with two exceptions determined by you in the case of national defense and foreign policy.

I am wondering if it is within the purview of the criminal justice system to include the right of your agency to look to the information within its own possession in connection with your employment prac-

tices? And to carry the question a bit further, is it meant to include the right of a police department to check the criminal histories of prospective applicants to become policemen? Is that considered by you to be within the purview of the criminal justice system?

Mr. SAXBE. Yes.

Mr. WIGGINS. Is access to information by the Secret Service, for example, within the purview of the criminal justice system?

Mr. SAXBE. Yes.

Mr. WIGGINS. Now, as you know, there are many agencies of government involved with civil remedies, which at least relate to possible criminal misconduct. A good illustration might be the SEC, which is a civil function and it is also possible for fraud prosecutions to be generated there. Is the SEC within the purview of the criminal justice system?

Mr. SAXBE. Yes, and primarily because we are the enforcement arm of the SEC and through our own operators would have this access.

Mr. WIGGINS. Could you give access to an agency within the SEC involved only in civil prosecutions?

Mr. SAXBE. The information would be available to the SEC and, as a Government agency, it would be entitled to it. Now, I might add that there are many statutes, particularly you mention the SEC, on licensing which require certain information only available through the criminal justice channels before they could be licensed.

Mr. WIGGINS. Well, now, when information is confined to a criminal justice purpose and you explain that it can be used by an agency for a non-criminal-justice purpose. I think it is important at least that we establish some legislative history on this or perhaps work with the language itself to make it clear that it is your judgment that information within a criminal records system, intelligence system or other system, can be used by Federal agencies for a non-criminal-justice purpose.

Mr. SAXBE. The ones you have named are easy.

Mr. WIGGINS. Well, I have a longer list but, no, I will not read them.

Mr. SAXBE. The ones you get real difficulties on are those like welfare——

Mr. WIGGINS. Of course.

Mr. SAXBE [continuing]. And as you expand out, it gets extremely difficult. And this is where it is going to have to be determined by legislation.

Mr. WIGGINS. Now, with respect to the Federal statutes, State statutes and Executive orders which may provide an expressed exemption, you have the authority under the proposed statute to determine the accuracy of that exemption. I am concerned about your interpretation of the words expressly provided by statute. Is it your intention, Mr. Attorney General, to interpret those words so as to require a reenactment of the statutes in order to make them expressly applicable to this bill?

Mr. SAXBE. This is one of the great concerns to us, and particularly at the State level, because many of the State statutes go back 100 years or more and specifically require some item of criminal justice information, which would be outside the normal scope of this act. And I am not settled on an opinion on this, but I know that it would cause great confusion at State levels unless they can somehow wrap it up.

Mr. WIGGINS. Unless Congress clarifies the meaning, you mean? And I would hope that in its legislative history we do not impose upon all the units of State and local government the duty of reenacting all of their existing statutes in order to mention expressly this statute so as to comply with that provision.

Mr. SAXBE. I agree.

Mr. WIGGINS. Mr. Attorney General, there is a section in this bill dealing with the sealing of information for a certain period of years, 7 years in the case of a felony and 12 years with respect to a misdemeanor. If you are referring to the bill itself, in the section that commences on page 14, section 9, that refers to this. And I am wondering about the impact of such a provision upon existing State laws dealing with recidivism, for example, and the right of a judge to have access to prior information, which is just a historic right of a judge to have access to prior arrest data and sentencing.

In California there is with a misdemeanor, like petty theft, where if you are convicted a second time, under the California statutes it can become a felony. Statutes of this sort are throughout the Federal system.

Now, if there is a sealing, does it means that we are in effect repealing those State statutes so as to apply only to recent priors as distinguished from ancient priors?

Mr. SAXBE. This does not prohibit this information by means other than a computer. In other words, there could be availability under the present system; however, it seems to me that, as we run into some very difficult areas here, and as the FBI is going to testify later on, this is going to be one of the most difficult things to solve in this.

Now, one of the things I am going to point out that the FBI tells you is that, for instance, in this latest shooting in Baltimore, this would have prevented the identification of this man that did the shooting. The unavailability of criminal fingerprint records, for instance, will be a real hardship on law enforcement people as far as perhaps fingerprint records for other purposes than criminal activity.

Mr. WIGGINS. Well, just——

Mr. EDWARDS. Could I ask for more information on that? Would the gentleman yield?

Mr. WIGGINS. Yes.

Mr. EDWARDS. We have great difficulty in finding specifics in this area, Mr. Attorney General. Now, you have a specific example of where this legislation would have interfered with law enforcement in Baltimore at Friendship Airport. Would you elaborate?

Mr. SAXBE. The man had two misdemeanor arrests. These were for picketing here in Washington. Under the policy of not picking up misdemeanors and for minor crimes of this nature, the FBI had made no record of these.

Mr. EDWARDS. Well, you certainly don't disagree with that, Mr. Attorney General?

Mr. SAXBE. Oh, no.

Mr. EDWARDS. You don't want the FBI records for misdemeanors?

Mr. SAXBE. So they had no criminal records on this man. Now, the only way that his body was identified was by going back to the World War II military records on his fingerprints.

Mr. EDWARDS. Well, thank you. That really doesn't have anything to do with interfering with the criminal justice system.

Mr. SAXBE. Well, what it would have to do would be the sealing of criminal fingerprints and certainly some exemptions would have to be made on this, it seems to me, to make it a workable tool. But the FBI will testify more fully on that.

Mr. WIGGINS. The final question, Mr. Attorney General. I would like to have your view, just as a matter of policy, just as an original proposition, whether in the Federal Government by regulation it should preclude a State from punishing an individual more severely if he has a prior conviction more than 7 years old, for example?

Mr. SAXBE. Well, one thing that you can always do is to unseal a file if there is a criminal act. And I don't think that the Federal Government through this legislation or any other activity should try to dictate to a State the way that they handle their criminal enforcement. And this is what you are suggesting, it seems to me, when the severity of the sentence is based upon 5 to 7 years.

In other words, these lengths of time, they are rather arbitrary. We know that criminal careers, as a rule, last between 5 and 7 years, but we also know that the risk of a man being involved in further crime decreases rapidly after age 30. Perhaps there should be a minimum age put on the sealing because the criminal activities that we are talking about are 5 years after the final entry in his file; that is, whether released from prison or released from parole just terminations of entries in his file. It is not 5 years after an arrest or 7 years after an arrest.

Mr. WIGGINS. To give effect to the policy which you just enunciated, Mr. Attorney General, will require a modification of section 9 (c) (1) and (2) because it is much more restrictive than you just indicated would be wise, and I tend to share your view on that.

Mr. SAXBE. All right.

Mr. WIGGINS. I yield the balance of my time, Mr. Chairman.

Mr. EDWARDS. Mr. Waldie?

Mr. WALDIE. Mr. Attorney General, will you explain to me on page 7 of your proposed bill, where you deal with the availability or accessibility to criminal intelligence information, an instance when such information would be "necessary for performance of the statutory function of the non-criminal-justice component?"

Mr. SAXBE. This would be primarily, I believe, in security checks.

Mr. WALDIE. Where would criminal intelligence information be necessary in a security check? That is raw data, unsubstantiated data, unverified data, and where would that be?

Mr. SAXBE. In national defense or foreign affairs areas exemptions.

Mr. WALDIE. Well, I don't see an exemption set forth on page 7. It just says "non-criminal-justice component" of any agency information is necessary for the performance of a statutory function.

I noted in your remarks, you talked about an exemption. You talked about limiting access for this for national security or foreign affairs—well, not national security, national defense or foreign affairs. But I don't see that limitation on page 7.

Mr. SAXBE. Well, the other statutory function, and this is by congressional directive, would be the SEC, the Internal Revenue Service, for instance.

Mr. WALDIE. Well, it would be practically any agency, wouldn't it, that said, "We need this information for a statutory function." For example, you have a working arrangement, and you described it, with the Civil Service Commission. I presume that fits under section 3 on page 7. What is their accessibility to criminal intelligence information?

Mr. SAXBE. They have no accessibility at the present time.

Mr. WALDIE. Well, do you provide it to them under your working arrangement?

Mr. SAXBE. We do not.

Mr. WALDIE. What do you provide them?

Mr. SAXBE. We provide criminal history information and recently—I believe it is under the 15 ratings—they handle their own. They don't even come to us.

Mr. WALDIE. You mean they gather their own information?

Mr. SAXBE. Yes.

Mr. WALDIE. Where do they get it?

Mr. SAXBE. Well, this is one of the problems. The more severe you make this bill, the more proliferation of agencies, whether it is a taxi licensing board or the Civil Service, that are going to accumulate their own, and this is what the Civil Service has been doing.

Mr. WALDIE. Is this right? Because the Department of Justice is careful with statistics and criminal information records the Civil Service doesn't use you any more and goes about it themselves, in other words?

Mr. SAXBE. Yes, after the 15 rating. Well, as the difficulty of obtaining criminal justice information from the law enforcement agencies increases and the statutory pressure which is put on by Congress demands this, they set up their own files.

Mr. WALDIE. Well, then, if we pass this bill, no matter how tough we make it, no matter how strong we make it, in fact we may not only be controlling access to information that we are seeking to control, but we may be causing its proliferation?

Mr. SAXBE. Well, you could do it the other way and just take off the requirement that they can't hire anybody that has a civil disturbance conviction.

Mr. WALDIE. Of course, we should do that, but that is only one aspect of it. I presume that all the agencies that find these restrictions to be burdensome could go gathering information themselves without being subject to this act?

Mr. SAXBE. That is the problem that you would have if you make it too difficult for the taxi licensing board in San Francisco, for instance.

Mr. WALDIE. Well, is that a correct statement of the law? Could Federal agencies that find the restrictions that we place in this bill or your bill too burdensome for them to comply with, could they gather information themselves and not have to be subjected in terms of security to the provisions of this bill?

Mr. SAXBE. Yes, but at the same time we are asking all of the departments to come in, like HEW, and set up their own limitations. And this is what the Commission which was established by the President is presumably doing.

Mr. WIGGINS. Would the gentleman yield?

Mr. WALDIE. Yes.

Mr. WIGGINS. Mr. Attorney General, I am not certain that you are correct in that. This act is not limited to the Justice Department. This act is rather limited to any Federal criminal justice system, whether that system has been established by an agency apart from the Department of Justice or not. And I think it probably has a greater reach than you just indicated.

Mr. SAXBE. It has a greater reach, but there is still a capability for information on employment and other things that extend beyond criminal justice.

Mr. WIGGINS. If so, it might well be in violation of this act. That was my point, of this bill, if it becomes an act.

Mr. WALDIE. Well, I think it should be in violation of the act. It is your understanding that the act has at least addressed it, but under that there would be the capabilities of agencies in the Federal Government to avoid the restrictions that you are proposing by gathering intelligence information and criminal justice information themselves?

Mr. SAXBE. Only under the same restrictions that we would have to deal with.

Mr. WALDIE. I thought you just said they would not be subject to restrictions. I thought you said if we made the restrictions too burdensome and onerous, they would avoid them by operating independently?

Mr. SAXBE. We are talking about criminal record information.

Mr. WALDIE. Well, we are not talking about that. We are talking about criminal intelligence.

Mr. SAXBE. No—well, criminal intelligence is not available to them.

Mr. WALDIE. Well, why isn't it available to them?

Mr. SAXBE. We are talking about criminal history information.

Mr. WALDIE. Why isn't criminal intelligence available to any agency that sets up its own investigators to go out and secure raw data by talking to neighbors, by talking to anybody they want? That is what criminal intelligence is, isn't it?

All right, if that is what it is, how do we preclude them from doing that? First, if they do it, how do we control that information? Second, if the Civil Service Commission doesn't like dealing with you because you are too tough on the information, so they send out their own investigators to do investigations and gather the raw files of hearsay material of angry people about the applicants or whatever, you know the type of stuff we are talking about, what control do we have over that information?

Mr. SAXBE. If the Congress determines that no one to be hired shall——

Mr. WALDIE. No, I am not even talking about hiring them now.

Mr. SAXBE. All right, but you asked——

Mr. WALDIE. I know that if we eliminate that law, they wouldn't do it for that purpose.

Mr. SAXBE. How do you demand a certain competency? How do you determine competency? Don't you inquire about the man?

Mr. WALDIE. Well, look, I am not even suggesting they shouldn't inquire.

Mr. SAXBE. And this isn't criminal.

Mr. WALDIE. But if they inquire, what do we do with the information? We are trying to control that information they get.

Mr. SAXBE. And that information goes in that civil service file, which is restricted.

Mr. WALDIE. But would it be restricted under this act?

Mr. SAXBE. It is not criminal justice information.

Mr. WALDIE. It is criminal intelligence information.

Mr. SAXBE. It is not criminal intelligence information.

Mr. WALDIE. Well, I am talking about criminal intelligence information.

Mr. SAXBE. Well, if it is criminal intelligence, it would be under this act.

Mr. EDWARDS. If the gentleman would yield at that point——

Mr. WALDIE. Yes.

Mr. EDWARDS [continuing]. We had no problem with criminal intelligence information. It is not a part of any dissemination that is made by the FBI or by the NCIC.

Mr. SAXBE. That is correct.

Mr. EDWARDS. Except in the case of fugitives or in a very limited area and we certainly would not tolerate the broadening of the dissemination of information to include anything that the gentleman from California was referring to. However, one of the chief problems with the dissemination of rap sheets—and I will take, for example, to a bank in San Francisco—is that the bank will get, especially for minorities where they are involved, 5- or 6-year-old arrests with no dispositions whatsoever. The man might have been acquitted. Perhaps there was no prosecution. He might have been completely innocent, but the bank wouldn't hire this black kid or brown kid. They will just use the rap sheet as a conviction record.

We want the bank to go out and make their own investigations. That is what a responsible bank should do when it is about to hire somebody.

Mr. WALDIE. Mr. Saxbe——

Mr. SAXBE. We are talking primarily here today about arrest records.

Mr. WALDIE. During the confirmation hearing of the Vice President, there was testimony that a representative from the Attorney General's office came to his office and provided him with summaries of files, and I would presume these were intelligence information files, dealing with Justice Douglas. I don't know if you recall that testimony or that incident?

Mr. SAXBE. No, I don't.

Mr. WALDIE. Well, let me set it up for you. You can examine it to determine its accuracy as a hypothetical.

A Member of Congress was seeking to impeach, for example, a Justice of the United States and then pursuant to that effort he is seeking data in the hands of the Department of Justice to assist him in determining the existence of impeachable offenses. He asked the Department of Justice for their cooperation and a representative of the Department is sent to his office with summaries of intelligence data, not arrest records, intelligence data, stories of involvements of underworld figures that were related and stories of involvement in bars

in Washington, just pure unsubstantiated raw data. Now, was any law violated at that moment?

Mr. SAXBE. I don't know whether the law was violated, but certainly a public trust was violated.

Mr. WALDIE. Would this law, had it been in effect at that time, prohibit the Department of Justice providing any information of that nature to any Member of Congress?

Mr. SAXBE. I believe it would provide a penalty on it.

Mr. WALDIE. If it does not, should it not?

Mr. SAXBE. I think that Congress can make such provisions for accessibility as they care to. However, it would be my suggestion that this information be available only to law enforcement agencies and based on a need to know.

Mr. WALDIE. Would information in the hands of the Department of Justice that bears upon the impeachment of a President be available to Members of Congress?

Mr. SAXBE. Well, I think that the criminal justice information in regard to an impeachment could only arise from a properly constituted body. In other words, this committee or the House of Representatives and——

Mr. WALDIE. Would information in the possession of the Department of Justice upon any alleged impeachable offenses of the President be available to the Judiciary Committee?

Mr. SAXBE. We have at the present time made available to the Special Prosecutor——

Mr. WALDIE. I understand that, but that is not the question.

Mr. SAXBE. The information on impeachment would be supplied, I am sure, if there was such information that was of value.

Mr. WALDIE. Finally, does the President have access to all of the files in the Department of Justice? If the President or one of his people sought information on any file in the Department of Justice, would it be provided to him or his authorized representative?

Mr. SAXBE. I have always considered the question of accessibility to intelligence files be based entirely on a need-to-know basis——

Mr. WALDIE. Suppose the President said he had a need to know, would you question that?

Mr. SAXBE [continuing]. And not only mine, but the President's. And I think they have to be jealously guarded. I think as Attorney General, certainly I feel that it would be an invasion of someone's personal rights if I went in and examined a file without a substantial and authenticated need to know.

Mr. WALDIE. The determination of that standard is vested in you, I presume?

Mr. SAXBE. That is correct.

Mr. WALDIE. So that if White House staff people sought access to any files in your possession, you would make that determination?

Mr. SAXBE. I would.

Mr. WALDIE. If, in fact, a need to know is possessed?

Mr. SAXBE. That is correct.

Mr. WALDIE. Would the Director of the FBI be able to make that determination absent your permission?

Mr. SAXBE. Well, the Director of the FBI of course is the keeper of these files and I am sure he operates on a day-to-day basis on this. He daily makes this determination.

Mr. WALDIE. So that he can make that in lieu of referring to you?

Mr. SAXBE. That is correct. However, on any question where there is an issue involved, I would expect him to contact me.

Mr. WALDIE. I have no further questions, Mr. Chairman.

Mr. EDWARDS. Mr. McClory?

Mr. MCCLORY. Thank you, Mr. Chairman.

I want to welcome here this morning my old friend, our esteemed Attorney General, and to commend him on his testimony here this morning, his statement, and his propounding on this highly significant legislation, which I think characterizes the interest of the Attorney General in the human values, in the protection of human rights, which are inherent in this important measure which is before us. And I think that the testimony you have given here this morning, Mr. Attorney General, gives clear evidence of your straightforward unequivocal manner in which you are handling this office and certainly demonstrates here that you are indeed your own man.

Mr. SAXBE. Thank you

Mr. MCCLORY. And I admire and respect you for it. I am concerned insofar as this legislation is concerned as being very, very far reaching. Let me say a little more far reaching than I would want to support since I find portions of the bill which I feel would be better omitted as we move rather dramatically into this whole area of individual privacy.

And I judge that there will be differences of opinion insofar as the future testimony that the committee will receive? You have recommended that we receive testimony from the Civil Service Commission, from the FBI, and other agencies of Government. I judge that the points of view, the position of these other agencies has not been reconciled before the bill was drafted or before your appearance here before the committee. Is that correct?

Mr. SAXBE. That is correct. And I think that in something as important as this, they shouldn't—that I shouldn't limit the input because within the Justice Department I have diverse groups. I have the LEAA, which primarily represents the urban and State systems of organization of information, and then the FBI which represents the Federal standard of information usage.

Mr. MCCLORY. I know the question has been raised as to whether or not your testimony jibes entirely with the provisions of the bill and I think that I regard your testimony as indicating the intention of your office and perhaps also justifying some modification of the legislation which we are considering today.

Mr. SAXBE. I might add at the point that, having some experience with the legislative process, I felt that it was in the best interests to put forward a pretty stiff bill that would give the committee something to chew on and which we think we can live with, and which I think is the maximum.

What you are running up against at all times is that you are in danger of having a bill which puts an unnecessary burden on law enforcement when we have no substantial complaints at the present time on the difficult job of controlling crime in this country, which is demanded by the people of this country, and giving certain opportunities or advantages to the criminal that are not now present.

And this is the time when there is public clamor for more toughness in law enforcement. This is the fine line that we walk here.

Mr. McCLORY. I judge that in our effort to protect the rights of individuals in the criminal justice system that at the same time you are not undertaking to limit or restrict any private investigations, which are contemplated or even the activities of other departments or agencies of Government which desire to secure background information with respect to prospective employees. Is that correct?

Mr. SAXBE. That is correct. And again we are walking the fine line where there could be danger in saying "Well, we cannot give you this information"—and I am talking about, for instance, the tax licensing boards or any licensing or policing control board—and putting them inadvertently in the business of collecting criminal history. There is always that danger.

Mr. McCLORY. Part of this bill, section 5, I believe, grants to the offender himself the authority to receive information in the hands of a criminal justice agency. It makes reference to "processing information." I am only concerned in this respect that we do not want to limit investigative reports or activities which might reflect on the right to probation or parole or pardon or something of that nature and for that matter I wouldn't want to limit the right of a prosecutor to secure information from all kinds of sources. Now, I judge that it would not be your intention that the files, the private files of a prosecutor, for instance, should be made available to an offender at any stage of the proceeding or its private confidential reports secured by a parole officer or a probation officer could be ordered revealed to the offender. Am I correct in that?

Mr. SAXBE. That is correct. And there is a safeguard there that it can only be done by a court and limited to that which the court will do. Now, there is no absolute bar there, as there is on criminal intelligence, and there are some who feel that this goes too far. You will get testimony on this, because the surest way to dry up presentencing information——

Mr. McCLORY. Right.

Mr. SAXBE [continuing]. And parole information is to make it available. You will go to a person and sincerely inquire as to this man's behavior for instance, and if he felt that was going to be made available to that man, he probably wouldn't tell you. Now, this perhaps could be tightened up. We think that we can live with it the way it is, because a judge will not violate the confidence of a person who has genuinely given such information.

Mr. McCLORY. Well, I am sure that intent should be built into this legislation. There is just one more question I want to ask. That is this: A large part of the President's message on the subject of privacy related to the highly sophisticated and automated systems that we have and I know we have them now and I think perhaps part of this problem arises because of their malfunctioning or their indiscriminate operation.

I notice that in the measure introduced by the chairman, I think it corresponds to Senator Ervin's bill, that there is provision that where information is gathered by an automated system, for instance with regard to an arrest record, that there should be a nonautomated or a physical check made with regard to that before dissemination and also with regard to criminal justice information there is a requirement that where such an automated system is maintained, that you must go back

to the original source to determine—well, no, I mean with regard to the criminal justice intelligence information system, it shall not be maintained under an automated system.

Now, do you think perhaps those are good safeguards to prevent this sort of information getting out, to prevent tapes of automated data processing information getting out?

Mr. SAXBE. I think in a way it is an admission, by saying that, that you can't hope to control this information and to control any kind of computerized information. And I just don't believe this is beyond our capability. I believe that they can be controlled. They are well controlled at the present time. I have personally visited a number of agencies using this information. The control is tight and it is good today. Improvement can be made.

There is too much information. One place made an inquiry on just criminal arrest information and there was 19 feet of tape that came out. This kind of thing builds up and you get duplication. It does take intelligent attention, but I think this can be handled. And I would hope that we just don't draw a line that we have to go back to entering it in longhand in a ledger someplace because that is the only way we can lock it up at night. I don't believe that is necessary.

Mr. MCCLORY. Thank you very much, Mr. Attorney General.

Mr. EDWARDS. Mr. Drinan?

Mr. DRINAN. Mr. Attorney General, on June 15, 1971, in the decision of *Menard* v. *Mitchell*, the Justice Department was required to virtually do all that is being done now. What, if anything, have you added to the bill that is proposed that was not required by this court decision 2½ years ago?

Mr. SAXBE. I can't answer that. I don't know.

Mr. DRINAN. Would you concede *Menard* v. *Mitchell* did impose a duty on the FBI and the Justice Department not to disseminate criminal arrest records to law enforcement agencies or to civil agencies?

Mr. SAXBE. I am not familiar with the case.

Mr. DRINAN. Well, it is astonishing that the Attorney General doesn't know a relevant case that happened 2½ years ago. The case came down and a lot of us have wanted the implementation of that.

I suppose we should be glad that finally we have something of implementation. But in your statement, Mr. Attorney General, it seems you have begged the essential question of whether or not you will in fact hold up all arrest data until some disposition comes in. On page 9 you state that the legislation "recognizes that there are legitimate needs for arrest data by criminal justice agencies. Arrest data, even without a conviction, will give leads to law enforcement officials."

So the burden is only on them to say that we have to have this essential arrest record. And I have constituents who have considered this and we all know citizens who have been arrested illegally. Seventy-five percent of all arrests don't eventuate in a conviction. And you are telling us, are you, that the Department is going to disseminate arrest data even if they have no disposition whatsoever?

Mr. SAXBE. That is correct.

Mr. DRINAN. And what are the legitimate needs and how is that justified?

Mr. SAXBE. There is legitimate need because at the present time arrest data is necessary for police departments. And with the prevalence

and ease of getting bond, a man can hold up a bank in Norfolk and within a week be out and hold up a bank in Washington. And with no information coming from Norfolk on an arrest record, he could be out on bond and hold up another one in New York. This does happen.

Now, if you deprive law enforcement people of vitally available arrest records on serious crime—and I am not talking about minor crime, I am talking about serious crime—you give the criminal a decided advantage. And I don't think the people of this country want to give the criminal a decided advantage.

Mr. DRINAN. Does an arrest without any conviction destroy the presumption of innocence?

Mr. SAXBE. Does it what?

Mr. DRINAN. Destroy the presumption of innocence. Should a man who has been arrested have his presumption of innocence destroyed? And if the police have an arrest record for something that may have been dismissed or has not yet been adjudicated, should they be able to conclude from that that this man is probably guilty of this particular offense?

Mr. SAXBE. I think if a man was caught in a bank with a gun and a sack of money and was arrested and then turned loose on bond, that it is a fact of life and that should be known to the police in that area.

Mr. DRINAN. Another point, Mr. Attorney General, is on the bottom of page 2 and top of page 3, where you say "Under current procedures, which have been in effect for a number of years, it is relatively easy for such an individual to have the record of such an arrest expunged." And from personal experience as a Member of Congress trying to help a constituent, I know that is not so. I hope that this proposal will in fact make it so, but right now it is very, very difficult frankly to get any arrest record expunged.

I had some difficulty with the exemptions or exceptions in the proposed bill. National defense is supposedly narrower than national security, but whatever narrowness comes in is destroyed in my judgment by saying foreign policy area. Do you suggest that the Attorney General should by reason of this very vague term foreign policy be able to make an exemption to the statute that is designed to protect privacy? And what do you mean by foreign policy?

Mr. SAXBE. I am talking about diplomatic connections, the very delicate area of negotiations, the employment of people in that area of this country's activities.

Mr. DRINAN. Would you suggest, sir, that it should be spelled out? It is not really typical language in a statute to just use foreign policy. That is very, very broad.

Mr. SAXBE. It could very well be.

Mr. DRINAN. Mr. Attorney General, this touches upon the basic rights of civil rights and civil liberties. Has the Civil Rights Division of the Department of Justice been asked to come in and comment on this bill? If so, would their views be made available to the committee?

Mr. SAXBE. They have been asked to comment, and they were represented on the final group that polished this bill. They can and will be prepared to testify before this subcommittee.

Mr. DRINAN. If this bill had been in effect at the time of the May Day Demonstrations, would this bill have prevented a recording on a permanent basis of the arrests of those individuals? They have to go to court, you know, to expunge their records. Would this bill have helped them?

Mr. SAXBE. I don't believe so, because this has to do with the criminal records as finally determined. They would have been on that docket regardless of this bill, and they would have not been removed from that docket as a result of this bill.

Mr. DRINAN. In the light of the May Day demonstrators, why do you say in your statement categorically that, "It is very easy to expunge an arrest record"?

Mr. SAXBE. Because they did get it expunged.

Mr. DRINAN. After they went to court.

Mr. SAXBE. After they went to court.

Mr. DRINAN. You say, sir, you openly state, that it is "very easy." You state, "It should be noted that under present procedures, which have been in effect for a number of years, it is relatively easy for such an individual to have the record of such an arrest expunged." What are the current procedures? Are they spelled out? I am unaware of them.

Mr. EDWARDS. Would the gentleman yield at that point?

Mr. DRINAN. Yes.

Mr. EDWARDS. Thank you. I think that the bill does add something to the situation with regard to the arrests that the May Day demonstrators had, and in a major way. For example, if there was an inquiry made for noncriminal information with regard to any of them, there would have been no arrest record transmitted by the FBI, because your bill provides that the arrest records cannot be disseminated in non-criminal-justice purposes if the individual is acquitted, if the charge is dismissed, if the prosecution has been abandoned, or 1 year has elapsed. Insofar as for a criminal investigation, then, no, then the information would have been transmitted throughout the country unless 7 years had passed.

Mr. DRINAN. Thank you, Mr. Chairman.

Mr. Attorney General, this bill has been around apparently for 2 or 3 or 4 months now in the Department of Justice. Is there any reason why the President did not necessarily mention this bill and endorse it at least in general principles?

Mr. SAXBE. I don't know.

Mr. DRINAN. Could the new Cabinet level committee oppose this bill in whole or in part?

Mr. SAXBE. We haven't met. We are going to meet in our first meeting today.

Mr. DRINAN. All right. Thank you very much, Mr. Saxbe. I don't mean to be overly critical, but a lot of us have been waiting a long time and some of us were involved in that court decision 2½ years ago. I suppose in these days we should welcome any lessening of lawlessness, but as I see it you are now saying we will in fact comply with this court decision, and I welcome that approach. And I assure you that this subcommittee, along with the Department of Justice, will work, hopefully this year, for a bill to guarantee privacy.

Mr. SAXBE. Thank you. I might point out that case is on appeal at the present time. That court decision is on appeal and we will await the outcome, but I hope to move past that and this bill is part of it.

Mr. DRINAN. Have you authorized the Solicitor General to continue that appeal against the basic rights of individuals?

Mr. SAXBE. No.

Mr. DRINAN. Well, why are you appealing it? If you are in agreement with the substance of the lower court, why are you appealing?

Mr. SAXBE. I am not entirely in agreement, I am sure, and it is customary to appeal these cases to get the final word.

Mr. DRINAN. Why aren't you in agreement?

Mr. SAXBE. Sir?

Mr. DRINAN. I don't understand why you are not in agreement. It seems to me the bill you have proposed and the statement you have made actually endorse in essence everything that *Menard* v. *Mitchell*, against your predecessor, has said. I don't understand why you are still appealing it. It bothers me.

Mr. SAXBE. The Government is not appealing the case.

Mr. WIGGINS. Mr. Chairman, since *Menard* v. *Mitchell* has been mentioned and since the gentleman from Massachusetts may have inadvertently misinterpreted it, I move that the text of this case be made a part of the record at this point.

Mr. DRINAN. Thank you very much.

Mr. EDWARDS. So ordered.

[The document referred to follows:]

[Testimony resumes on p. 282.]

DALE B. MENARD, APPELLANT, *v.*
JOHN N. MITCHELL AND JOHN EDGAR HOOVER. No. 22530

UNITED STATES COURT OF APPEALS,
DISTRICT OF COLUMBIA CIRCUIT.

ARGUED OCT. 21, 1969.
DECIDED JUNE 19, 1970

Suit to compel Attorney General and FBI Director to remove from FBI criminal identification files plaintiff's fingerprints and accompanying notation regarding his arrest and detention, without further prosecution, by California police. The United States District Court for the District of Columbia, Aubrey E. Robinson, Jr., J. denied plaintiff's motion for summary judgment and granted defendants' motion, and plaintiff appealed. The Court of Appeals, Bazelon, Chief Judge, held that in view of possible adverse effect on plaintiff of maintenance of records and of possibility of dissemination of records, mere fact that plaintiff had been arrested did not justify maintenance of his fingerprints and record, but that record was insufficient to warrant summary judgment for either party.

Judgment reversed and case remanded.

1. COURTS ⟸528

Action to compel removal of plaintiff's fingerprints and accompanying notation of California arrest from FBI criminal identification files was not appropriate for transfer to California, although arresting officers were presumably still in California, where plaintiff resided in Maryland and might be unable to prosecute suit in California and other information and witnesses were presumably more accessible in District of Columbia than in California. 28 U.S.C.A. § 1404(a).

2. UNITED STATES ⟸41

That defendant had been detained for two days by California police and released without judicial hearing, that FBI maintained record of his detention

indicating date of arrest, charge, disposition, etc., and that federal officers had no knowledge of any crime committed by plaintiff or incident to his detention did not establish that records were outside fair reading of term "criminal records" in statute authorizing FBI to maintain criminal records. 28 U.S.C.A. § 534(a)(1). (See publication words and phrases for other judicial constructions and definitions.)

3. FEDERAL CIVIL PROCEDURE ⟸2481

Record in action to compel Attorney General and FBI Director to remove plaintiff's fingerprints and accompanying notation regarding his detention by California police from FBI's criminal identification files were insufficient to warrant summary judgment for plaintiff. West's Ann.Cal.Pen.Code §§ 849(b), 11115; 28 U.S.C.A. § 534(a)(1).

4. CRIMINAL LAW ⟸1222

In view of possible adverse effect on plaintiff of FBI's maintenance of record of his California arrest and detention, without further prosecution, and of possibility of dissemination of record mere fact that plaintiff had been arrested did not justify maintenance of his fingerprints and record of his detention in criminal identification files. Wests' Ann.Cal.Pen.Code § § 849(b), 11115; 28 U.S.C.A. § 534(a)(1).

5. LIBEL AND SLANDER ⟸ 7(3)

Accusation that individual has been arrested for crime is actionable per se at common law.

6. ARREST ⟸63(4)

Even if no probable cause existed at time of arrest, one is not generally entitled to relief if probable cause has subsequently been developed.

7. FALSE IMPRISONMENT ⟸ 7(5)

Suit for false arrest may not normally be maintained if arrest was followed by conviction, regardless of validity of arrest at time it was made.

8. CONSTITUTIONAL LAW ⟸208(1)

Government may not, wittingly or unwittingly, engage in wanton defamation of individuals and groups, and there is limit beyond which government may not tread in devising classifications that lump innocent with guilty.

9. UNITED STATES ⟸47

Government agency may not escape responsibility for improper use of materials disseminated by it simply because improper use is not mandatory and is in fact made by third party.

10. UNITED STATES ⟸125(24)

Action against government officers is not suit against United States if action complained of is not within officers' statutory powers or, if within those powers, only if powers, or their exercise in particular case, are constitutionally void.

11. UNITED STATES ⟸125(28)

Action against Attorney General and FBI Director to compel removal of plaintiff's fingerprints and accompanying notation from criminal identification records was not unconsented suit against United States where plaintiff alleged that action complained of was not within statutory powers or that exercise of any statutory power was constitutionally void.

12. ARREST ⟸63(4)

Arrest may be made if there is probable cause to believe that offense has been committed and that person to be arrested committed it.

13. ARREST ⟸ 58

Use of power to arrest in order to inflict summary punishment is unconstitutional.

14. CONSTITUTIONAL LAW ⇐ 73

Those responsible for investigating and prosecuting criminal activity should have primary responsibility for determining what information will be most helpful in carrying out their task and so long as they do not infringe rights of individuals, courts may not interfere.

15. FEDERAL CIVIL PROCEDURE ⇐ 2481

Record in action to compel Attorney General and FBI Director to remove plaintiff's fingerprints and record of his California arrest and detention from criminal identification files was insufficient, for lack of information on such questions as use and dissemination of information in files, to warrant summary judgment for defendants. 28 U.S.C.A. § 534(a)(2).

Mr. Noah Menard, Washington, D.C., for appellant.

Mr. Thomas C. Green, Asst. U.S. Atty., with whom Messrs. David G. Bress, U.S. Atty., at the time the brief was filed, and Joseph M. Hannon, Asst. U.S. Atty., were on the brief, for appellees. Messrs. John A. Terry and Julius A. Johnson, Asst. U.S. Attys., also entered appearances for appellees.

Before Bazelon, Chief Judge, and McGowan and Robinson, Circuit Judges.

BAZELON, Chief Judge:

This is a suit to compel the Attorney General and the Director of the Federal Bureau of Investigation to remove appellant's fingerprints and an accompanying notation regarding his detention by California police from the FBI's criminal identification files. According to his complaint, appellant was picked up without probable cause and held for two days by the Los Angeles police. Never accorded a judicial hearing on the legality of his detention, he was finally released when the police were "fully satisfied" that no basis existed for charging him with crime. Subsequently, the FBI obtained appellant's fingerprints and the additional information at issue, which it maintains in its criminal identification files.[1]

According to the complaint, the information retained is misleading and incomplete; and it will become available, to appellant's detriment, to law enforcement officers, potential employers, and other persons. Accordingly, appellant seeks to have it purged from the files.[2]

[1] Both sides moved in the District Court for summary judgment; appellant's motion was denied, and appellees' was granted. On this appeal, the parties agree that the case was ripe for decision on the cross-motions for summary judgment; they differ only as to the proper outcome. For the reasons hereafter set forth, however, we believe that final decision should have awaited a more complete factual development. Consequently, we remand the case for trial.[3]

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[1] According to appellees' answers to interrogatories propounded by appellant, the files originally contained a card bearing appellant's name and fingerprints and the following notation:

Date Arrested or Received—8–10–65
Charge or Offense—459 PC Burglary
Disposition or Sentence—8–12–65—Released—Unable to connect with any felony or misdemeanor at this time.
Occupation—Student
Residence of Person Fingerprinted—Saticoy & Canoga, Canoga Park

After the present complaint was filed, the entry under "Disposition or Sentence" was changed to read:

8–12–65—Released—Unable to connect with any felony or misdemeanor—in accordance with 849b(1)—not deemed an arrest but detention only.

Surprisingly, according to appellees' answers the card appears to contain no indication of the source of the information or the state in which the incident took place.

[2] Appellees have admitted that their files contain a record of appellant's detention; the contents of the file, as set forth in note 1 *supra*; and that they know of no crime committed by appellant or incident to his detention. The remaining allegations of appellant's complaint were denied, and have not been the subject of affidavits filed by either side in the case.

[3] Language in appellees' brief could be read to suggest that, since the incident underlying the present suit took place in California, transfer of this litigation to a federal district court in that state might be appropriate. *See* 28 U.S.C. § 1404(a) (1964). Whatever might be the situation in other circumstances, the present record does not indicate that transfer would be appropriate. It appears that the only witnesses present when appellant was taken into custody were appellant and two arresting officers. Although the officers are presumably still in California, appellant, who has the burden of proof, presently resides in Silver Spring, Maryland. Furthermore, also relevant at trial will be information regarding the practices of the FBI in desseminating its criminal identification records, *see* notes 33–36 *infra* and accompanying text, and witnesses regarding these matters would presumably be

In support of his motion for summary judgment, appellant did not rely upon the full breadth of his complaint. Instead, he reasoned as follows. Appellees admit that their files contain a card bearing appellant's fingerprints and a notation indicating that he had been picked up by the California police and released without formal charges being lodged against him. A California statute provides that, with exceptions not here relevant, such a procedure is proper only if the police are satisfied "that here is no ground for making a criminal complaint against the person arrested."[4] Subsequently, the incident "shall not be deemed an arrest but a detention only."[5] Appellant strenuously argues that the FBI has statutory authority to maintain in its criminal identification files only "criminal" records; that the material at issue cannot, in light of the California statute referred to, fairly be characterized as a "criminal" record;[6] and that therefore it must be removed from the FBI's files.[7]

[2, 3] Assuming that the FBI's statutory authority is limited as appellant suggests,[8] we do not believe that the facts established on the motion for summary judgment[9] are such as to bring the records of appellant's detention outside of a fair reading of the term "criminal records." For we cannot say that Calif. Penal Code, § 849(b)(1), the provision relied upon, was intended to limit the substantial element of discretion normally exercised at the intake stages of the criminal process in deciding who, of the many persons who may be guilty of criminal activity, shall be formally charged and prosecuted.[10] Release under § 849(b)(1) does not necessarily imply that investigation has exonerated the one arrested; it is proper if—

(1) further investigation exonerated the arrested party, (2) the complainant withdrew the complaint, (3) further investigation appeared necessary before prosecution could be initiated, (4) the ascertainable evidence was insufficient to proceed further, (5) the admissible of adducible evidence was insufficient to proceed further, or (6) other appropriate [reasons].[11]

Despite the statutory difference in denomination,[12] therefore, nothing established on the motion for summary judgment would differentiate the incident

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more accessible in the District of Columbia than in California. Appellant's choice of forum is itself entitled to some weight. And finally, it might well be that appellant, who appeared *pro se* in the District Court, would be unable to prosecute his suit were it transferred to the West Coast. *See generally* Van Dusen v. Barrack, 376 U.S. 612, 643–646, 84 S. Ct. 805, 11 L. Ed. 2d 945 (1964); Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 67 S. Ct. 839, 91 L. Ed. 1055 (1947) (prior law; doctrine of *forum non conveniens*); 1 J. Moore, Federal Practice § 0.145(6) (2d ed. 1964).

[4] Any peace officer may release from custody, instead of taking such person before a magistrate, any person arrested without a warrant whenever:

(1) He is satisfied that there is no ground for making a criminal complaint against the person arrested. Any record of such arrest shall include a record of the release hereunder and thereafter shall not be deemed an arrest but a detention only.

Calif. Penal Code, § 849(b)(1) (West Supp. 1970). A like procedure is proper if the arrest was for intoxication, or if the arrest was for a misdemeanor and the person arrested has signed an agreement to appear in court at a designated time. Id. § 849(b)(2), (3).

[5] Calif. Penal Code, § 849(b)(1) (West. Supp. 1970).

[6] *Cf.* Wheeler v. Goodman, 306 F. Supp. 58, 65 (W.D.N.C. 1969).

[7] Appellant does not question the authority of the FBI to maintain a record of his detention for other purposes—for example, with an eye towards investigation of the arresting officers under 18 U.S.C. § 242 (1964). The FBI does not, however, seek to justify retention of the record on this ground.

[8] When the FBI was first explicitly authorized to maintain a system of criminal records in 1930, the Division of Identification and Information was specifically limited to the acquisition and preservation of "criminal identification and other crime records." 5 U.S.C. § 340 (1964), *repealed*, Pub. L. No. 89–554, § 8(a), 80 Stat. 632, 648 (1966). Present authority is grounded upon 28 U.S.C. § 534(a)(1) (Supp. IV, 1969), which simply directs the Attorney General to "acquire, collect, classify, and preserve identification, criminal identification, crime, and other records." That section, however, was enacted by Pub. L. No. 89–554, § 4(c), 80 Stat. 611, 616 (1966). Section 7(a) of the Act, 80 Stat. 631, states that "The legislative purpose in enacting sections 1–6 of this Act is to restate, without substantive change, the laws replaced by those sections on the effective date of this Act."

[9] All that was established for that purpose was that appellant had been detained for two days by the California police and released without a judicial hearing; that the FBI maintained a record of his detention; the contents of the record, *see* note 1, *supra*; and that appellees had no knowledge of any crime committed by appellant or incident to his detention.

[10] *See, e.g.*, W. LaFave, Arrest 63–164, 300–318 (1965); J. Skolnik, Justice Without Trial 71–90 (1966); Goldstein, Police Discretion not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice, 69 Yale L.J. 543 (1960); Note, Prosecutor's Discretion, 103 U. Pa. L. Rev. 1057 (1955); *cf.* Dixon v. District of Columbia, 129 U.S. App. D.C. 341, 394 F. 2d 966 (1966).

[11] Calif. Penal Code, § 11115 (West Supp. 1970).

[12] Except perhaps for consequences under California law, it is questionable whether the statute's command that such incidents shall be deemed "detentions" only has a significant effect in practice. Appellant's FBI file did not originally differentiate what had happened to him from an ordinary arrest, *see* note 1 *supra*. A letter from the California Department of Justice, attached as an exhibit to appellant's motion for summary judgment, refers in the first paragraph to "your arrest" before stating, in the second paragraph, that "you

involving appellant from any other arrest and release without charge. Appellant does not suggest that Congress intended to deny the FBI power, in some circumstances at least, to maintain records of an arrest not followed by the filing of formal charges. "On summary judgment the inferences to be drawn from the underlying facts contained in [the supporting] materials must be viewed in the light most favorable to the party opposing the motion." [13] Accordingly, appellant's motion for summary judgment was properly denied.[14]

II.

[4] Appellees, on the other hand, would have us uphold the award of summary judgment in their favor on the theory that, once it be admitted that appellant was arrested by the California police, they are justified in maintaining his fingerprints and a record of his detention in the criminal identification files of the FBI.[15] We do not find the question so simple.

[5] Information denominated a record of arrest, if it becomes known, may subject an individual to serious difficulties. Even if no direct economic loss is involved, the injury to an individual's reputation may be substantial.[16] Economic losses themselves may be both direct and serious. Opportunities for schooling, employment, or professional licenses may be restricted or nonexistent as a consequence of the mere fact of an arrest, even if followed by acquittal or complete exoneration of the charges involved.[17] An arrest record may be used by the police in determining whether subsequently to arrest the individual concerned,[18] or whether to exercise their discretion to bring formal charges against an individual already arrested.[19] Arrest records have been used in deciding whether to allow a defendant to present his story without impeachment by prior convictions,[20] and as a basis for denying release prior to trial or an appeal;[21] or they may be considered by a judge in determining the sentence to be given a convicted offender.[22]

[6, 7] Adverse action taken against an individual because of his arrest record is premised upon certain assumptions regarding the meaning of an arrest.[23]

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were * * * not deemed to have been arrested." Finally, appellees' brief refers to appellant's "local arrest record" (p. 1) and "his arrest" (p. 16 n. 24), and justifies retention of the material at issue because of the "need to permit retention of arrest and identification data." (p. 17).

[13] United States v. Diebold, Inc., 369 U.S. 654, 655, 82 S. Ct. 993, 994, 8 L. Ed. 2d 176 (1962); *see* Adickes v. S. H. Kress & Co., 398 U.S. 144, 153, 90 S. Ct. 1598, 1606–10, 25 L. Ed. 2d 142 (1970).

[14] Appellant also argues that Calif. Penal Code, § 849(b)(1) (West Supp. 1970) was intended to prohibit the sending of "detention" records by the California authorities to the FBI, and that the state policy expressed thereby should be enforced by a federal court against federal officials. Even if California law could control the FBI's authority to maintain arrest records, *compare* United States v. Georgia Public Service Commission, 371 U.S. 285, 292–293, 83 S. Ct. 379, 9 L. Ed. 2d 317 (1963), this argument overlooks Calif. Penal Code, § 11115 (West Supp. 1970), which clearly contemplates that such records may be sent to the FBI: for § 11115 requires that, if such a record has been sent, certain followup information must be transmitted as well.

[15] Appellees also argue that the instant suit must be dismissed as an unconsented suit against the United States. *See* note 36 *infra*.

[16] At common law, the accusation that an individual has been arrested for crime is actionable *per se*. Hanson v. Krehbiel, 68 Kan. 670, 75 P. 1041 (1904); Brewer v. Chase, 121 Mich. 526, 80 N.W. 575 (1899). And *see, e.g.*, N.Y. Times, July 17, 1966, at 54, col. 7, referring generally to persons whose fingerprints are sent to the FBI after arrest as "criminals."

[17] A survey by the New York Civil Liberties Union indicated that 75% of New York area employment agencies would not accept for referral an applicant with an arrest record. Sparer, Employability and the Juvenile Arrest Record 5 (Center for the Study of Unemployed Youth, New York University) (pamphlet). Another survey of 75 employers indicated that 66 of them would not consider employing a man who had been arrested for assault and acquitted. Schwartz & Skolnik, Two Studies of Legal Stigma, 10 Social Prob. 133 (1962). At the very least, an arrest record is likely to lead to further investigation; and if it is convenient to fill the job before the investigation is complete, the applicant is effectively denied employment because of his record. *See* Hess & Le Poole, Abuse of the Record of Arrest Not Leading to Conviction, 13 Crime & Delinquency 494, 496 (1967).

[18] LaFave, *supra* note 10, at 287–289.

[19] *Id.* at 141–142.

[20] *Cf.* Suggs v. United States, 132 U.S. App. D.C. 337, 340, 407 F. 2d 1272, 1275 (1969).

[21] Russell v. United States, 131 U.S. App. D.C. 44, 45, 402 F. 2d 185, 186 (1968); Rhodes v. United States, 275 F. 2d 78, 81–82 (4th Cir. 1960) (Sobeloff, C. J.).

[22] *See, e.g.*, the sentencing transcript in United States v. Isaac, 299 F. Supp. 380 (D.D.C. 1969).

[23] This may be so more often than we would like to think. The American Bar Association's Advisory Committee on Sentencing and Review strongly recommended the exclusion from presentence reports of any mention of charges not leading to conviction:

Arrests, juvenile dispositions short of an adjudication, and the like, can be extremely misleading and damaging if presented to the court as part of a section of the report which deals with past convictions. If such items should be included at all—and the Advisory

Insofar as these assumptions differ from reality, the adverse actions will have an erroneous basis.[24] We do not understand appellees to be asserting, for example, that they would be entitled to maintain, use, or disseminate the records at issue if no arrest had ever taken place. Yet it is not obvious to us why a different rule should obtain if the arrest was made without probable cause. There is, to say the least, serious question whether the Constitution can tolerate any adverse use of information or tangible objects obtained as the result of an unconstitutional arrest of the individual concerned.[25] Even if an unlawful arrest may, for some purposes, subsequently be legitimized by the later development of incriminating information,[26] it is hard to see how an arrest not based on probable cause, followed by complete exoneration of the person arrested,[27] could be used to support any adverse inferences whatsoever regarding him. We do not understand appellees to be suggesting that the uses made of appellant's arrest record will be benign; in consequence, if appellant can show that his arrest was not based on probable cause[28] it is difficult to find constitutional justification for its memorialization in the FBI's criminal files.

[8–11] Even if the arrest was made with probable cause, it does not necessarily follow that no relief may be warranted. Particularly if the FBI has actual knowledge that further investigation exonerated appellant,[29] it may be under a duty at the very least to supplement its files to indicate that fact.[30] Of course no system of records may reasonably be expected to contain every scrap of information about a particular incident, and presumably the FBI is vested with substantial discretion in determining how detailed their criminal identification files shall be. Yet it is clear that the government may not, wittingly or unwittingly, engage in wanton defamation of individuals and groups,[31] and there is limit beyond which the government may not tread in devising classification that lump the innocent with the guilty.[32] Of course the point at which that limit has been passed may vary with the extent to which the information may be disseminated; that is, a record may be sufficiently complete for some purposes but woefully inadequate for others. The present record gives no indication of the extent to which appellant's record may be disseminated, within or without the govern-

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Committee would not provide for their inclusion—at the very least a detailed effort should be undertaken to assure that the reader of the report cannot possibly mistake an arrest for a conviction.

American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Probation § 2.3, at 37 (Tent. draft 1970).

[24] Even if the assumptions are accurate, an arrest record may be used in ways that should be difficult if not impossible to tolerate. Presumably the fact of arrest indicates some possibility that the individual concerned engaged in the criminal activity with which he was charged. Investigation may disclose whether he has or not. Yet so long as there exists an employable pool of persons who have not been arrested, employers will find it cheaper to make an arrest an automatic disqualification for employment. *See* Heee & LePoole, *supra* note 17, at 496.

[25] Davis v. Mississippi, 394 U.S. 721, 89 S. Ct. 1394, 22 L. Ed. 2d 676 (1969); Silverthorne Lumber Co. v. United States, 251 U.S. 385, 40 S. Ct. 182, 64 L. Ed. 319 (1920). Needless to say, federal officials may not escape this principle by reliance on the fact that the unlawful arrest was made by state officials. Elkins v. United States, 364 U.S. 206, 80 S. Ct. 1437, 4 L. Ed. 2d 1669 (1960).

[26] For example, even if no probable cause existed at the time of arrest, one is not generally entitled to release if probable cause has subsequently been developed. Albrecht v. United States, 273 U.S. 1, 5–6, 47 S. Ct. 250, 71 L. Ed. 505 (1927) (Brandeis, J.). Similarly, a suit for false arrest may not normally be maintained if the arrest was followed by conviction, regardless of the validity of the arrest at the time it was made. *See* Restatement (Second), Torts §§ 119, 121; Restatement, Torts §§ 653, 658.

[27] Appellant claims that he was originally picked up simply for proximity to evidence indicating that a crime might have been committed. The investigation which followed, he says, did not merely exonerate him from commission of a crime that had actually occurred, but in fact showed that the crime for which he was arrested had never taken place.

[28] And that probable cause was not later developed. This qualification may not be necessary to obtain deletion of appellant's fingerprints. Davis v. Mississippi, *supra* note 25.

[29] Under Calif. Penal Code § 11115 (West Supp. 1970), if appellant's record was sent to the FBI by California authorities, those same authorities are responsible for informing the FBI of the reason for appellant's discharge. However, although appellees appear in their brief to represent that the information came to them from the California police, they denied this allegation in appellant's complaint, and a letter to appellant from the California Department of Justice, attached as an exhibit to his motion for summary judgment, denies that California officials forwarded his fingerprints to the FBI.

[30] That is, although the FBI may be under no duty in the first instance to go beyond the information sent them by local police departments, if they have done so it may be incumbent upon them to make use of the information so acquired. *Cf.* Cafeteria and Restaurant Workers Union, etc. v. McElroy, 367 U.S. 886, 898, 81 S. Ct. 1743, 6 L. Ed. 2d 1230 (1961). The extent of the FBI's knowledge of the incident should be examined on remand.

[31] Watkins v. United States, 354 U.S. 178, 187, 77 S. Ct. 1173, 1 L. Ed. 2d 1273 (1957); Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 153, 71 S. Ct. 624, 95 L. Ed. 817 (1951).

[32] Compare Boorda v. Subversive Activities Control Board, 137 U.S. App. D.C. 653, 421 F. 2d 1142 (1969), cert. denied, 397 U.S. 1042, 90 S. Ct. 1365, 25 L. Ed. 2d 653 (1970).

ment,[33] or of the uses to which it may be put.[34] Even if we assume that the cryptic reference on appellant's fingerprint card to release "in accordance with 849 (b)(1)" would be understood by police, it is questionable whether it would be understood by potential employers or the general public. If appellant can show that his record may, as he alleges, be widely disseminated,[35] it may well be that he has a right to limit its dissemination or to require its amplification.[36]

[12] We do not underestimate the magnitude of the problems suggested by the present record. It is certain that, every year, a multitude of persons guilty of no criminal activity are arrested and charged with crime. An arrest may be made if there is "probable cause" to believe that an offense has been committed and that the person to be arrested committed it. Since "probable cause" necessarily implies substantially less than absolute certainty,[37] it follows that a significant number of those arrested will not in fact have committed the offense for which they have been detained.[38]

[13] But this by no means exhausts the scope of the problem. Many individuals have unjustly acquired arrest records without even the excuse of an honest and unavoidable mistake by the police. In the District of Columbia alone, literally thousands of persons were once arrested "for investigation" and then released;[39] but their records often remain.[40] Dragnet arrests are at best matters of recent memory.[41] Even worse are those occasions, far more common than we would like to think, where invocation of the criminal process is used—often with no hope of ultimate conviction—as punitive sanctions.[42] Hippies[43] and civil rights workers[44] have been harassed and literally driven from their homes[45] by repeated and unlawful arrests, often made under statutes unconstitutional on their face.[46] Innocent bystanders may be swept up in mass arrests made to

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[33] By statute, appellant's record is subject to dissemination to "authorized officials of the Federal Government, the States, cities, and penal and other institutions." 28 U.S.C. § 534(a)(2) (Supp. IV, 1969). The Attorney General has issued a regulation making clear that, in his view, dissemination is not limited even to government officials of one kind or another; the list of authorized recipients includes government agencies in general; most banks; insurance companies; and railroad police. 28 C.F.R. § 0.85(b) (1970).

[34] A government agency may not escape responsibility for improper use of material disseminated by it simply because the improper use is not mandatory and is in fact made by a third party. National Student Ass'n v. Hershey, 134 U.S. App. D.C. 56, 412 F. 2d 1103 (1969).

[35] It may even be that this information would be released to the press were appellant subsequently to be charged with crime. 28 C.F.R. § 50.2(b)(3)(i) specifically authorizes release of age, employment, marital status, and "similar background information" regarding defendants, and § 502(b)(4) explicitly authorizes release of federal criminal conviction records. Arrest records are nowhere mentioned; their release is neither explicitly authorized nor banned.

[36] Appellees' final contention is that the present suit must be dismissed as an unconsented suit against the United States. Dugan v. Rank, 372 U.S. 609, 83 S. Ct. 999, 10 L. Ed. 2d 15 (1963); Malone v. Bowdoin, 369 U.S. 643, 82 S. Ct. 980, 8 L. Ed. 2d 168 (1962); Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 69 S. Ct. 1457, 93 L. Ed. 1628 (1949). These cases, however, make clear that an action against a government officer is not a suit against the United States if the action complained of is "not within the officer's statutory powers or, if within these powers, only if the powers, or their exercise in the particular case, are constitutionally void." Malone, supra, 369 U.S. at 647, 82 S. Ct. at 983, quoting Larson, supra, 337 U.S. at 702, 69 S. Ct. at 1467. Such is precisely the claim made in the present case.

[37] *See, e.g.*, Hinton v. United States, 137 U.S. App. D.C. 388, 390–391, 424 F. 2d 876, 878–879 (1969) and cases cited.

[38] Presumably, the guilty are more likely to be prosecuted than the innocent. In consequence, one would expect that the class of individuals arrested but not prosecuted would contain a substantially lower proportion of guilty persons than the class of all persons arrested.

[39] During the years 1961 and 1962, more than 6,800 persons in the District of Columbia were arrested "for investigation." About 6,000 of those arrested were released without being charged with any offense whatsoever. Report and Recommendations of the Commissioners' Committee on Police Arrests for Investigation 97–102 (1962).

[40] *Id.* at 67–68. We have no information with respect to the extent to which records of such arrests were transmitted to, and retained by, the Federal Bureau of Investigation.

[41] As recently as 1958, police seeking three "stocky" young blacks who had robbed a restaurant rounded up some ninety suspects; sixty-seven of these were held overnight before being released. The one man finally charged with the offense was not among those originally rounded up. *See* Trilling v. United States, 104 U.S. App. D.C. 159, 172 n. 11, 260 F. 2d 677, 690 n. 11 (1958) (opinion of Bazelon, J.).

[42] *See, e.g.*, LaFave, *supra* note 10, at 146–147, 149–150, 471–482.

[43] Wheeler v. Goodman, 208 F. Supp. 935 (W.D.N.C. 1969); Hughes v. Rizzo, 282 F. Supp. 881 (E.D. Pa. 1968).

[44] *E.g.*, Dombrowski v. Pfister, 380 U.S. 479, 80 S. Ct. 1116, 14 L. Ed. 2d 22 (1965); United States v. McLeod, 385 F. 2d 734 (5th Cir. 1967); McSurely v. Ratliff, 282 F. Supp. 848 (E.D. Ky. 1967) (three-judge court).

[45] Wheeler v. Goodman, *supra* note 43.

[46] *E.g.*, Dombrowski v. Pfister, *supra* note 44; Wheeler v. Goodman, 306 F. Supp. 58 (W.D.N.C. 1969) (three-judge court).

clear the streets either during a riot or during lawful political demonstrations.[47] Use of the power to arrest in order to inflict summary punishment is, of course, unconstitutional:[48] but even if the arrest was made lawfully and with the to see why he should be subject to continuing punishment by adverse use of his "criminal" record.

[14, 15] The very seriousness of the problem underscores the necessity for a clear and complete factual record as a basis for adjudication.[50] We are not unaware of many considerations which might lead to the conclusion that the maintenance of arrest records is a matter properly committed to the discretion of the Department of Justice, subject of course to such rules as Congress and the President may see fit to impose.[51] But such discretion, assuming it exists, may not be without limit. Particularly troublesome is the possibility, by no means eliminated on the present record, that information in the FBI's files may be used for many other than the law enforcement purposes for which its retention may be justified.[52] The short of the matter is that the facts established on the cross-motions for summary judgment were simply inadequate for proper resolution of the complex questions presented. Accordingly, the judgment of the District Court granting appellees' motion for summary judgment is reversed and the case remanded for trial.

So ordered.

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[47] *See, e.g.*, Report of the National Advisory Commission on Civil Disorders 72 (1968); Report of the Chicago Riot Study Committee 43 (1968); D. Walker, Rights in Conflict (1968); Comment, The Administration of Justice in the Wake of the Detroit Civil Disorder of July 1967, 66 Mich. L. Rev. 1542, 1628–1629 n. 411 (1968); Comment, Criminal Justice in Extremis: Administration of Justice During the April 1968 Chicago Disorder, 36 U. Chi. L. Rev. 455, 479–483 (1969). *See also* the fact situations disclosed by, *e.g.*, Brown v. Louisiana, 383 U.S. 131, 86 S. Ct. 719, 15 L. Ed. 2d 637 (1966); Cox v. Louisiana, 379 U.S. 536, 85 S. Ct. 453, 13 L. Ed. 2d 471 (1965); Edwards v. South Carolina, 372 U.S. 229, 83 S. Ct. 680, 9 L. Ed. 2d 697 (1963).

Recently, a protest march on the Watergate Apartments in the District of Columbia resulted in the arrest of over 140 persons. On subsequently reviewing the evidence, Assistant Corporation Counsel Robert H. Campbell concluded that many of the persons arrested were guilty of nothing and in fact were "trying to move on" when they were arrested. Assistant Corporation Counsel Thomas Johnson noted that in several cases, the persons arrested were students on the campus of George Washington University who were "doing nothing and got arrested." Washington Post, February 20, 1970, at A1, col. 7; Feb. 21, 1970, at B4, col. 1; Feb. 28, 1970, at A7, cols. 1, 2.

[48] United States v. Price, 383 U.S. 787, 799, 86 S. Ct. 1152, 16 L. Ed. 2d 267 (1966).

best of intentions,[49] if the person arrested has been exonerated it is difficult to

[49] *Cf.* Hill v. United States, 135 U.S. App. D.C. 233, 418 F. 2d 449 (1968); Hutcherson v. United States, 120 U.S. App. D.C. 274, 281, 345 F. 2d 964, 971 (Bazelon, C. J., concurring), cert. denied, 382 U.S. 894, 86 S. Ct. 188, 15 L. Ed. 2d 151 (1965).

[50] United Public Workers of America (CIO) v. Mitchell, 330 U.S. 75, 86–91, 67 S. Ct. 556, 91 L. Ed. 754 (1947).

[51] Obviously, those responsible for investigating and prosecuting criminal activity should have the primary responsibility for determining what information will be most helpful in carrying out their task; and so long as they do not infringe the rights of individuals, the courts may not interfere. Similarly, those responsible for maintaining a system of information must bear the responsibility in the first instance for assuring that inaccurate or misleading information is not used to an individual's detriment. Appellant here alleged that prior to filing the instant suit he had sought relief from appellees but had been told that they had "no authority" to do as he requested. We would urge the Department of Justice to clarify and make public its views regarding its own authority to correct or delete information in its files; and should it find that it has such authority, to devise procedures whereby complaints such as the present one may be handled at an administrative level.

Any such procedure would be a substantial improvement over a remedy that required any individual anticipating adverse consequences from an inaccurate record to bring a lawsuit in order to protect himself. But we must recognize that, without more, even a full system of administrative remedies cannot be the final answer. Realistically, the FBI cannot be expected to investigate the facts underlying every arrest or detention reported to it; the most it can do is examine the report on its face and, perhaps, investigate further if a complaint is received from the individual concerned. For most of those arrested—too poor, too ignorant, and often too disheartened to complain—the only adequate remedy may lie either in severely curtailing any use of records of arrest, or in eliminating altogether their maintenance in a file associated with the individual's name.

[52] For example, New York State recently passed a statute requiring all employees of securities firms to be fingerprinted, and providing that the fingerprints so obtained be transmitted to the state's Attorney General "for appropriate processing." New York State Laws 1969, ch. 1071, codified as N.Y. General Business Law, § 359–e(12) (McKinney's Consol. Laws, c. 20, Supp. 1969). As a result of this statute, several hundred employees have been found to have "criminal records" and dismissed from their employment: half of those fired had no record of convictions, but only of arrests. New York Times, February 5, 1970, at 1, col. 2; Wall Street Journal, February 5, 1970, at 17.

It appears that the "appropriate processing" is carried out by the New York State Identification and Intelligence System, which is apparently one of those state agencies authorized to receive information from the FBI's files. 28 U.S.C. § 534(a)(2) (Supp. IV, 1969). Since no New York statute provides for automatic dismissal of a securities employee with a past arrest record, presumably the information must be passed on to the employer before an individual may be fired. Although 28 U.S.C. § 534(b) (Supp. IV, 1969), provides that the exchange of records authorized by § (a)(2) is "subject to cancellation if dissemination is made outside the receiving departments or related agencies," we have no indication that this provision is regarded as mandatory or whether it is in fact ever enforced.

DALE B. MENARD, PLAINTIFF, *v.* JOHN MITCHELL ET AL., DEFENDANTS. CIV. A. No. 39-68. UNITED STATES DISTRICT COURT, DISTRICT OF COLUMBIA. JUNE 15, 1971

Suit to compel Attorney General and FBI director to remove from FBI criminal identification files plaintiff's fingerprints and an accompanying notation regarding his arrest and detention, without further prosecution, by California police. A motion by defendants for summary judgment was granted by the United States District Court for the District of Columbia, Aubrey E. Robinson, Jr., J., but judgment was reversed and the case remanded, 139 U.S. App. D.C. 113, 430 F.2d 486. On remand, the District Court, Gesell, J., held that where there was probable cause for the suspect's arrest, the court would not order expungement of the arrest record but disclosure to anyone other than employees of the FBI, officials of any agency of the United States government in the event the plaintiff applied to such agency for employment and officials of any governmental law enforcement agency would be enjoined.

Prayer for expungement denied; certain injunctive relief granted; order in accordance with opinion.

1. ARREST ⇐63(4)

Where police received prowler complaint and found suspect, fitting description, who lay on park bench and nearby was wallet belonging to someone else and containing $10 and officers had reason to believe that wallet had been discarded by suspect as he saw officers approaching him, officers had probable cause to arrest suspect.

2. CRIMINAL LAW ⇐1222

Conduct of government, such as wide dissemination of arrest records, that clearly invades individual privacy by revealing episodes in person's life of doubtful and certainly not determined import cannot be permitted unless compelling public necessity has been clearly shown. 5 U.S.C.A. § 7311; 28 U.S.C.A. § 534; U.S.C.A. Const. Amend 4.

3. CONSTITUTIONAL LAW ⇐70(1)

Congress, and not courts nor executive, absent very special considerations, should detremine ab initio the question of public necessity for governmental conduct, such as wide dissemination of arrest records, which clearly invades individual privacy by revealing episodes in person's life of doubtful and certainly not detremined import; only congressional action taken on basis of explicit legislative findings demonstrating such public necessity will suffice. 5 .S.C.A. § 7311; 28 U.S.C.A. § 534; U.S.C.A. Const. Amend. 4.

4. CRIMINAL LAW ⇐1222

Statute under which fingerprint identification functions were delegated to FBI was designed to facilitate coordination of law enfrocement activities of federal and local governments and was not intended or effective to authorize dissemination of arrest records to any state or local agency for purposes of employment or licensing checks. 5 U.S.C.A. § 7311; 28 U.S.C.A. § 534; U.S.C.A. Const. Amend. 4.

5. CRIMINAL LAW ⇐1222

FBI is without authority to disseminate arrest records outside federal government for employment, licensing or related purposes, whether or not the record reflects a later conviction. 5 U.S.C.A. § 7311; 28 U.S.C.A. § 534; U.S.C.A. Const. Amend. 4.

6. CRIMINAL LAW ⇐1222

Where there had been probable cause for plaintiff's arrest, court would not order expungement of his arrest record in fingerprint division of FBI, but disclosure to anyone other than employees of FBI, officials of any agency of the United States government in event plaintiff applied to such agency for employment and officials of any governmental law enforcement agency would be enjoined. 5 U.S.C.A. § 7311; 28 U.S.C.A. § 534; U.S.C.A. Const. Amend. 4.

7. CRIMINAL LAW ⇐1222

United States executive order limited by judicial decisions was, in permitting use of FBI fingerprint records for purposes of governmental employment, proper exercise of President's responsibilities in name of national security, in view of

many civil service and other built-in safeguards protecting misuse of such information, and government's discreet use of such information was not infringement upon any constitutional right asserted by person whose fingerprinting resulted from arrest on probable cause. 5 U.S.C.A. § 7311; 28 U.S.C.A. § 534; U.S.C.A. Const. Amend. 4.

R. Raymond Twohig, Jr., Georgetown Legal Intern Program, Washington, D.C., for plaintiff.

Joseph Hannon, Asst. U.S. Atty., for defendants.

MEMORANDUM OPINION

Gesell, District Judge.

Plaintiff has brought this action to expunge his arrest record contained in the Fingerprint Identification files of the Federal Bureau of Investigation. That record reads as follows:

Date arrested or received: 8/10/65
Charge or offense: 459 PC Burglary
Disposition or sentence: 8/12/65
Unable to connect with any felony or misdemeanor—in accordance with 849b (1)—not deemed an arrest but detention only.
Occupation: student

Originally the matter was presented to another Judge of this Court on cross-motions for summary judgment and defendants prevailed. The Court of Appeals reversed and remanded for the taking of testimony after expressing interest and concern with issues suggested by the pleadings which the Court apparently felt had not been fully developed in the record. Menard v. Mitchell, 139 U.S.App.D.C. 113, 430 F. 2d 486 (1970). Accordingly, further evidence was taken at a full hearing and the issues have been briefed and argued.

Menard, age 19 at time of arrest and subsequently an officer in the Marine Corps, contends that his arrest in Los Angeles was without probable cause and that future dissemination of the above arrest record, now in the files of the FBI, may impede his employment opportunities and subject him to an increased risk of being suspected and arrested for crimes on other occasions. He seeks expungement of the record or, in the alternative, strict limitations on its dissemination by the FBI.

Before considering the merits of the expungement issue raised, it is appropriate to set forth complete findings on two subjects indicated by the Court of Appeals as matters for particular inquiry on remand: the procedures and practices of the FBI with respect to maintaining arrest records and the circumstances of Menard's arrest.

I. THE PROCEDURES OF THE FBI IDENTIFICATION DIVISION

Fingerprint and arrest records such as Menard's are under the jurisdiction of the Federal Bureau of Investigation's Identification Division. This Division, which has been in existence since 1924, functions under the Attorney General, and proceeds by authority of 28 U.S.C. § 534, which reads as follows:

§ 534. Acquisition, preservation, and exchange of identification records; appointment of officials

(a) The Attorney General shall—

(1) acquire, collect, classify, and preserve identification, criminal identification, crime and other records; and

(2) exchange these records with, and for the official use of, authorized officials of the Federal Government, the States, cities, and penal and other institutions.

(b) The exchange of records authorized by subsection (a)(2) of this section is subject to cancellation if dissemination is made outside the receiving departments or related agencies.

(c) The Attorney General may appoint officials to perform the functions authorized by this section. Added. Pub.L. 89-554, § 4(c), Sept. 6, 1966, 80 Stat. 616.

The Attorney General has made a series of rulings interpreting the statute. These are largely codified in 28 C.F.R. § 0.85(b) which provides that the Director of the FBI shall:

"Conduct the acquisition, collection, exchange, classification, and preservation of identification records, including personal fingerprints voluntarily submitted on a mutually beneficial basis, from law enforcement and other governmental agencies, insurance companies, railroad police, national banks, member banks of

the Federal Reserve System, FDIC-Reserve-Insured Banks, and banking institutions insured by the Federal Savings and Loan Insurance Corporation; provide expert testimony in Federal or local courts as to fingerprint examinations; and provide identification assistance in disasters and in missing persons type cases including those from insurance companies."

The FBI Identification Division has some two hundred million sets of fingerprints on file. These records are maintained in separate criminal and applicant files. Fingerprints are submitted to the Bureau by federal, state, and local agencies on a reciprocal basis. Law enforcing agencies, primarily local police and sheriff's offices, submit prints of arrested persons in order to receive information on the person's prior criminal involvement. The Bureau reports its findings and maintains the fingerprint card so submitted, along with the accompanying arrest data, in its criminal file. Information on the subsequent disposition of each arrest is posted if received from the submitting agency. The information so recorded is cryptic and formal, without explanation or elaboration. Juvenile arrests and convictions, when submitted by local agencies, are treated the same as similar adult data. The criminal file currently contains information on some sixty million arrests of approximately nineteen million people.

Fingerprint cards are also received from agencies of the state and federal governments and others who seek information on an individual's record of criminal involvement in connection with permits, licenses, and employment clearance. After check against the criminal file, these cards are maintained in the applicant file for future reference. The Division also receives hundreds of "name check" requests from contributing and non-contributing sources, including an occasional Congressman, asking for the criminal record of an individual by name without submitting any fingerprints for comparison. Many of these cannot be processed because of inadequate identification of the person named, particularly where common names are involved. Where possible, however, and where the inquiring agency gives what the FBI considers a legitimate reason for the request, these inquiries are processed.

The volume of work of the Division is enormous, requiring about 3,300 employees. The Division receives an average of 29,000 fingerprints a day for processing, of which about 13,000 are received from law enforcing agencies in connection with arrests.

The Division, broadly speaking, considers any state, city or county official to be authorized to receive information if the agency has something to do with law enforcement or if it is authorized by statute, ordinance, or rule to fingerprint applicants for employment or for a permit or license. The laws and ordinances of various local areas vary widely. Some areas do not require fingerprinting for practically any purpose while others have highly detailed fingerprinting requirements for varied and often quite minor occupations. Examples are listed in Appendix A. The record contains a long list of state and local governments and a large number of different licensing authorities who by law or regulation are required to take fingerprints as part of their licensing duties.

The division maintains a current list of contributing or participating state and federal agencies which now numbers between 7,000 and 8,000. Of these, approximately 3,750 are local police departments and sheriff offices. Criminal record data is not sent directly to private employers, except in a few instances such as 390 banks insured by the F.D.I.C. and certain hospitals.[1]

As far as the Federal agencies are concerned, Executive Order 10450 of April 1953, 3 C.F.R. 936 (1949–53 Comp.), 5 U.S.C. § 7311, requires a check of the FBI fingerprint files on practically all applicants for employment in the Federal Government whether or not engaged in law enforcement. The Civil Service Commission and the Military account for the highest volume of fingerprints submitted to the Bureau.

Given the very general nature of its purported authority the Bureau has proceeded cautiously. It investigates the authority of local agencies to require fingerprints and insists that detailed forms be filled out by contributors showing the purpose for which fingerprints are to be submitted. The Attorney General advises in doubtful situations. The Division has carried out its work in a responsible, meticulous manner. Nonetheless, the end result is most unsatisfactory. While the Division has vigorously sought to develop complete records and particularly to learn of dispositions resulting from each arrest, this effort has not been successful due to the failure of arresting agencies to send in follow-

[1] Insurance companies are aided in necessary identification work but are not furnished criminal record data by the FBI.

up data on forms provided. Some police departments do much better than others in this regard, but the Division has no sanctions and must be satisfied with what it can get by persuasion since the whole system functions on a voluntary basis. Even more troublesome is the fact that the Division has little opportunity to supervise what is actually done with the arrest records it disseminates. It requires that a proper purpose be stated by the agency requesting information but what is in fact done with the information as a practical matter cannot be constantly checked. It is apparent that local agencies may on occasion pass on arrest information to private employers. The Division makes no regular inspection to prevent this, for it has neither funds nor sanctions, and accordingly responds only to complaints. In a few instances police departments have been restricted, and in other instances when complaints were received personnel or administrative changes were demanded by the FBI and put into effect.

The FBI does not supply an individual with his arrest record except under rare special circumstances. The reasons are apparently two: the difficulty of obtaining definite identification of the person requesting the record, and fiscal considerations. There is no sure procedure for finding an arrest record by name only. A clear set of fingerprints is required for matching purposes. Thus as a practical matter an individual must submit his prints to get a check made of his record. This is cumbersome. Moreover, the Division is already so hard-pressed that it cannot now meet the demands on it from all local agencies. A regular system of servicing individuals requesting their personal arrest records would require an estimated $110,000 per annum, plus appropriations for at least six additional employees.

Any agency that forwards fingerprint arrest data to the Division may request the Bureau to remove the data from the file and return it. This the Bureau does automatically, retaining no copies and without inquiring to the reasons underlying the request. Thus control of what arrest or criminal data remain in the files rests in every case (except where an arrest on Federal charges is involved) with the local arresting authority. In 1970 over 8,000 arrest records were returned by the FBI to local authorities. Some thirteen states, including California, have laws or procedures for authorizing this form of expungement in varying circumstances. In addition some states have laws limiting the type of arrest data that can be forwarded routinely to the Bureau.

Against this background, which was more fully developed in the record in an effort to supply the type of data requested in the decision of the Court of Appeals, it is possible to turn to the issues presented by this particular lawsuit.

II. THE CIRCUMSTANCES OF THE ARREST

[1] Menard was arrested on suspicion of burglary by two officers of the Los Angeles Police Department. The arrest occurred around 4:00 a.m. on August 10, 1965. The police had earlier that morning received a complaint of a prowler at a sanatorium located in a high crime area. The prowler was reported looking in windows and at the back parking lot of the institution. Checking on this complaint, the police obtained a description of the man and proceeded to patrol the area. A short distance away they saw an unkempt, unshaven man fitting the description, dressed in dark clothing lying on a park bench. That man was Menard. Near him on the ground was a wallet belonging to someone else containing $10. The officers had reason to believe the wallet might have been discarded by Menard as he observed the officers approaching him through the park. The arrest was made without knowledge of any specific burglary [2] but on the basis of the prowler complaint, the suspicious presence of the wallet, and the general circumstances outlined above Menard's arrest was with probable cause. Ker v. California, 374 U.S. 23, 34–35, 83 S.Ct. 1623, 10 L.Ed.2d 726 (1963); Jackson v. United States, 112 U.S.App.D.C. 260, 302 F. 2d 194, 196 (1962); People v. Fischer, 49 Cal.2d 442, 317 P.2d 967, 970 (1957).

Menard was booked at the precinct after the Watch Commander reviewed the facts and circumstances reported by the officers. He was fingerprinted and his prints with a notation of his arrest were sent to the Bureau in accordance with regular procedures. After further investigation, Menard was released in accordance with the provisions of the California Penal Code, the police being "unable to connect with any felony or misdemeanor at this time." Plaintiff and his

[2] Burglary is defined under the California Penal Code § 13–459 as follows:
Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building * * * with intent to commit grand or petit larceny or any felony is guilty of burglary.

family then sought by lengthy correspondence with the Los Angeles Police Department to have the record expunged by the Police Department but were finally advised on May 31, 1966, that removal of the record would be possible "only upon order of a court of competent jurisdiction." This was confirmed by correspondence with the Bureau which took the position that the Bureau had no authority to determine what fingerprints should be in the FBI files.

III. EXPUNGEMENT

The Government argues persuasively that a district court is without authority to make a determination of probable cause where a state arrest is concerned, and that in any event the Court should in such cases exercise its discretion and not intervene, leaving Menard to pursue his expungement remedies in the California state courts. There is substantial authority and much common sense supporting this position.

The FBI simply records in its files information supplied by other agencies, and is in no position to make an independent investigation of the circumstances of an individual's arrest by state authorities or later developments in his case. Nor is a Federal District Court in a position to litigate the merits of arrests made by state authorities far away from its jurisdiction, as the problems of proof in this case demonstrate. The Bureau uniformly honors requests by contributing agencies that a record be removed from the FBI files and returned to the agency. Whatever the issue as to the legality of an arrest record, an action for its expungement cannot be maintained unless administrative remedies are first exhausted; and where these efforts are unsuccessful, as were Menard's, resort should be had in the first instance to the state courts. This procedure is strongly suggested if not compelled by recent cases which hold that federal courts should refrain from interfering with a state's administration of its own criminal laws, and should abstain from deciding issues of local concern until they are first presented to the state courts. See e.g., Younger v. Harris, 401 U.S. 37, 43–44, 91 S.Ct. 746, 27 LEd.2d 669 (1971); Fay v. Noia, 372 U.S. 391, 417–420, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963); Buechold v. Ortiz, 401 F.2d 371, 373 (9th Cir. 1968); Ganger v. Peyton, 379 F.2d 709, 710 (4th Cir. 1967). The fact that the Court has made the factual determination of probable cause in this case arises solely from the specific directions given on the remand and should be no precedent for the future.

The Court of Appeals apparently felt that a finding of probable cause was relevant to a determination of the question whether Menard's arrest record is a "criminal record" of the type which the Bureau is authorized to maintain under 28 U.S.C. § 534. Analysis demonstrates, however, that the question of probable cause has little to do with the merits of the underlying controversy. An arrest whether made with or without probable cause is to be sure a fact, but one that proves nothing so far as the actual conduct of the person arrested is concerned. An arrest without probable cause may still lead to conviction and one with probable cause may still result in acquittal. Under our system of criminal justice, only a conviction carries legal significance as to a person's involvement in criminal behavior. As the Supreme Court stated in Schware v. Board of Bar Examiners, 353 U.S. 232, 241, 77 S.Ct. 752, 757, 1 L.Ed.2d 796 (1957):

"The mere fact that a man has been arrested has very little, if any, probative value in showing that he has engaged in any misconduct. An arrest shows nothing more than that someone probably suspected the person apprehended of an offense. When formal charges are not filed against the arrested person and he is released without trial, whatever probative force the arrest may have had is normally dissipated." [Footnote omitted.]

Other cases have held that arrests without convictions may not legally be used as the basis for adverse action against an individual. In Gregory v. Litton Systems, Inc., 316 F.Supp. 401 (C.D. Cal. 1970), the practice of an employer in denying employment to persons with arrest records was found to violate Title VII of the Civil Rights Act of 1964. The court made factual findings that such a practice disqualified a higher proportion of blacks than whites, and that "information concerning a prospective employee's record of arrests without convictions, is irrelevant to his suitability or qualification for employment." 316 F.Supp. 401, 403. *See also* United States v. Kalish, 271 F.Supp. 968, 970 (D. Puerto Rico 1967).

Relying on these general principles, Menard argues that in the absence of a conviction, the maintenance and use of his arrest record for any purpose whatsoever violates several constitutional guarantees—the presumption of innocence,

due process, the right to privacy, and the freedom from unreasonable search under the Fourth Amendment. There are few precedents which deal directly with these issues. Those that do exist usually involve special circumstances such as dragnet arrests or arrests under patently unconstitutional statutes. *See, e.g.*, Wheeler v. Goodman, 306 F.Supp. 58 (W.D.N.C. 1969); Hughe v. Rizzo, 282 F.Supp. 881 (E.D. Pa. 1968). Others have granted relief on motion ancillary to a pending criminal proceeding, calling upon general equity principles or local rules rather than constitutional considerations. *See, e.g.*, Morrow v. District of Columbia, 135 U.S.App.D.C. 160, 417 F.2d 728 (1969); United States v. Kalish, 271 F.Supp. 968 (D. Puerto Rico 1967); Irani v. District of Columbia, 272 A.2d 849 (D.C.App. Jan. 27, 1971).

Each of Menard's constitutional arguments makes certain assumptions about the uses to which his arrest record will be put. As the Court of Appeals noted, it is a fact subject to ready judicial notice that dissemination of an arrest record may place substantial obstacles in the way of a person's opportunity for employment or advancement, and may also affect aspects of law enforcement and judicial action. No court has yet examined the legality of FBI practices with respect to the dissemination of arrest records. It is appropriate, therefore, to deal fully with those issues before reaching any expungement claims. The Court is required to determine under what circumstances, if any, arrest records not reflecting a later conviction may be disseminated by the Bureau either within or outside the Federal Government.

IV. DISSEMINATION OF ARREST RECORDS

Throughout the years Courts have sought to preserve a citizen's right to privacy against changes in our culture and developing modes of governmental regulation. As early as 1886 the Supreme Court stated in Boyd v. United States, 116 U.S. 616, 630, 6 S.Ct. 524, 532, 29 L.Ed. 746 (1886), that privacy is inherent in our constitutional form of government. Referring to earlier British precedent the Court noted that privacy was a sacred right, stating:

"The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach further than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employes of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offence,—it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. * * *"

A moment's thought demonstrates the wisdom of this precept, as of course many subsequent decisions and commentators have noted.[3] While conduct against the state may properly subject an individual to limitations upon his future freedoom within tolerant limits, accusations not proven, charges made without adequate supporting evidence when tested by the judicial process, ancient or juvenile transgressions long since expiated by responsible conduct, should not be indiscriminately broadcast under governmental auspices. The increasing complexity of our society and technological advances which facilitate massive accumulation and ready regurgitation of far-flung data have presented more problems in this area, certainly problems not contemplated by the framers of the Constitution.[4] These developments emphasize a pressing need to preserve and to redefine aspects of the right of privacy to insure the basic freedoms guaranteed by this democracy.

A heavy burden is placed on all branches of Government to maintain a proper equilibrium between the acquisition of information and the necessity to safeguard privacy. Systematic recordation and dissemination of information about individual citizens is a form of surveillance and control which may easily

[3] *See especially* A. Miller, The Assault on Privacy (1971), and his voluminous notes and citations.

[4] See President's Commission on Law Enforcement and the Administration of Justice, Task Force Report: Science and Technology, at 74–77 (1967). Dealing specifically with arrest records, the Commission noted three serious problems in their use:

The record may contain incomplete or incorrect information.

The information may fall into the wrong hands and be used to intimidate or embarrass.

The information may be retained long after it has lost its usefulness and serves only to harass ex-offenders, or its mere existence may diminish an offender's belief in the possibility of redemption.

inhibit freedom to speak, to work, and to move about in this land. If information available to Government is misused to publicize past incidents in the lives of its citizens the pressures for conformity will be irresistible. Initiative and individuality can be suffocated and a resulting dullness of mind and conduct will become the norm. We are far from having reached this condition today, but surely history teaches that inroads are most likely to occur during unsettled times like these where fear or the passions of the moment can lead to excesses. The present controversy, limited as it is, must be viewed in this broadest context. In short, the overwhelming power of the Federal Government to expose must be held in proper check.

[2, 3] Menard, formerly a responsible officer in the Marine Corps, will in all likelihood not be hurt by his arrest record as it now stands, but as a citizen he has the right to question the largely uninhibited distribution of information about this episode in his past. Where the Government engages in conduct, such as the wide dissemination of arrest records, that clearly invades individual privacy by revealing episodes in a person's life of doubtful and certainly not determined import, its action cannot be permitted unless a compelling public necessity has been clearly shown. Neither the courts nor Executive, absent very special considerations, should determine the question of public necessity *ab initio*. The matter is for the Congress to resolve in the first instance and only congressional action taken on the basis of explicit legislative findings demonstrating public necessity will suffice.

[4] This brings under pointed analysis the import of the legislation under which the Attorney General has delegated fingerprint identification functions to the Bureau. The statute previously quoted, 28 U.S.C. § 534, must be narrowly interpreted to avoid the serious constitutional issues raised by Menard and noted by the Court of Appeals. Viewed in this light, it is abundantly clear that Congress never intended to or in fact did authorize dissemination of arrest records to any state or local agency for purposes of employment or licensing checks.

The statute read as a whole is obviously designed only to facilitate coordinated law enforcement activities between the federal and local government, that is, to assist arresting agencies, courts and correctional institutions in the apprehension, conviction and proper disposition of criminal offenders. Neither the statute nor the debates[5] so much as mention employment, and it is beyond reason to assume that Congress intended that this confidential quasi-investigative data should be handed to anyone who under authority of local ordinance or statute was authorized to take a fingerprint from an applicant for a position in public or private employment. At the time the statute was passed and since, there is no rational or uniform system among the states and local governments for obtaining fingerprints from applicants, and the compelling necessity of federal action to supply criminal information cannot be established by the whim or intolerance of any local board of selectmen.

The principal faults in the present system may be briefly indicated:

(1) State and local agencies receive criminal record data for employment purposes whenever authorized by local enactment. These enactments differ state-by-state and even locality-by-locality within a particular state. See Appendix A. Thus there is no pattern that finds justification either in terms of overall law enforcement objectives or by category of employment.

(2) The Bureau cannot prevent improper dissemination and use of the material it supplies to hundreds of local agencies. There are no criminal or civil sanctions. Control of the data will be made more difficult and opportunities for improper use will increase with the development of centralized state information centers to be linked by computer to the Bureau.

(3) The arrest record material is incomplete and hence often inaccurate, yet no procedure exists to enable individuals to obtain, to correct or to supplant the criminal record information used against them, nor indeed is there any assurance that the individual even knows his employment application is affected by an FBI fingerprint check.

(4) The demands made of the Division for employment data have so increased that the Bureau now lacks adequate facilities to service new applicants who fall within its own vague standards of eligibility.

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[5] The legislative history is exceedingly spare. The discussion which did take place in Congress only emphasizes the limitation of the Identification Division to criminal law enforcement purposes. 72 Cong. Rec. 1989 (71st Cong., 2d Sess., Jan. 20, 1930).

(5) In short, with the increasing availability of fingerprints, technological developments, and the enormous increase in population, the system is out of effective control. The Bureau needs legislative guidance and there must be a national policy developed in this area which will have built into it adequate sanctions and administrative safeguards.[6] It is not the function of the courts to make these judgments, but the courts must call a halt until the legislature acts. Thus the Court finds that the Bureau is without authority to disseminate arrest records outside the Federal Government for employment, licensing or related purposes whether or not the record reflects a later conviction.

(6. 7) When the statute is thus construed there is no difficulty in upholding it for the limited purpose that was intended. There is a compelling necessity to furnish arrest data to other law enforcing agencies for strictly law enforcement purposes. Arrest records are available in uncovering criminal conduct, they play a significant role in the prosecutor's exercise of discretion, they greatly aid in setting bond, determining sentences and facilitating the work of penal and other institutions of correction. When arrest records are used for such purposes, they are subject to due process limitations within the criminal process, and misuse may be checked by judicial action. The same safeguards are not present when an arrest record is used for employment purposes, often without the knowledge of the person involved. Menard's arrest record will not be expunged where its dissemination outside the Federal Government is limited to law enforcement purposes.

This leaves open for consideration the Federal Government's use of these records for purposes of governmental employment only. Executive Order 10450, *supra*, limited as it has been by previous Court decisions, must be recognized as a proper exercise of the President's responsibilities in the name of national security. There are many Civil Service and other built-in safeguards which protect misuse of this information. It cannot be passed on to private employers, including Government contractors. The Government's discreet use of this information already in its possession for its own limited employment purposes in aid of national security cannot be said to infringe any constitutional right asserted by Menard. While the point is of no consequence in his particular case, the Court ventures to suggest that the Executive Order should be re-examined in the light of present conditions and can in several respects be made more consonant with fair play, particularly if all applicants for federal service receive a personal copy of their record in time to correct or explain any data therein contained.

Menard's prayer for expungement is denied. His arrest record may not be revealed to prospective employers except in the case of any agency of the Federal Government if he seeks employment with such agency. His arrest record may be disseminated to law enforcement agencies for law enforcement purposes. An appropriate order to this effect is attached.

The foregoing shall constitute the Court's findings of fact and conclusions of law.

Appendix A

Sample of persons required to be fingerprinted by state or local statute, ordinance or rule

Glendale, Arizona:

Taxicab drivers and operators; transient, itinerant or traveling merchants, peddlers, private detectives, solicitors or canvassers, massage parlor operators, and employees.

Denver, Colorado:

Any applicant for a driver's license.

District of Columbia:

Auctioners, fortune tellers, hackers, junk dealers, mediums, parking lot attendants, pawnbrokers, second hand dealers, solicitors, vendors; operators of billiard parlors, bowling alleys, detective agencies, massage establishments, pool rooms, shooting galleries; ABC licensees.

Town of Manalapan, Florida:

Every person employed in any club, any place handling liquor, beer or wine in any form, motels, hotels, apartment houses, health spas, hospitals, and all newspaper carriers over the age of sixteen years, service station employees, special

[6] An extended discussion of the problem and some reasonable recommendations for legislation were made in the Task Force Report on Science and Technology. President's Commission on Law Enforcement and Administration of Justice, pp. 74–77 (1967).

police officers, nurses, boat captains and crew members, town employees, estate maintenance employees, including lawn men, gardners, and caretakers, and all domestic servants in the town.

State of Idaho:

All real estate salesmen and brokers.

State of Maryland:

Pari-mutuel employees and stable employees, including but not limited to foremen, exercise boys and grooms.

Springfield, Missouri:

Female entertainers performing in establishments serving intoxicating beverages.

State of Nevada:

Every applicant for a license to practice medicine.

State of North Carolina:

Applicants for admission to the Bar.

Provincetown, Massachusetts:

All non-residents seeking employment.

NOTE: The Synopsis prepared by the Reporter is printed herewith, preceding the opinion, as a convenience for readers, and is not part of the opinion.

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1768

DALE B. MENARD, APPELLANT

v.

WILLIAM B. SAXBE,

Attorney General of the United States and
CLARENCE M. KELLEY

Decided April 23, 1974

Suit to compel Attorney General and Federal Bureau of Investigation Director to remove from FBI criminal identification files plaintiff's fingerprints and an accompanying notation regarding his arrest and detention, without further prosecution, by California police. After remand, 139 U.S.App.D.C. 113, 430 F.2d 486, the United States District Court for the District of Columbia, 328 F.Supp. 718, declined to order expungement, but limited distribution of the record. The plaintiff appealed. The Court of Appeals held that the plaintiff alleged a cog-

nizable legal injury, that the courts have power to expunge arrest and criminal records, that, in general, actions to expunge such records should be maintained against the local law enforcement agencies involved, that plaintiff's suit against the FBI was proper insofar as it attacked alleged abuses unique to the FBI role as record keeper, that the FBI had no authority to retain plaintiff's arrest warrant once it was informed by the California police that the police encounter was not deemed an arrest but only a detention, that the FBI is statutorily precluded from maintaining in its criminal files as an arrest record an encounter with the police that has been established not to constitute an arrest but that the FBI is not prohibited from maintaining neutral identification records.

Remanded with instructions.

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1768

DALE B. MENARD, APPELLANT

v.

WILLIAM B. SAXBE,
ATTORNEY GENERAL OF THE UNITED STATES AND
CLARENCE M. KELLEY

Appeal from the United States District Court
for the District of Columbia

Decided April 23, 1974

Ralph J. Temple, with whom *Howard Adler, Jr.*, *Bruce P. Saypol*, *R. Raymond Twohig*, *Noah Menard*, *Robert A. W. Boraks*, *Thomas C. Arthur*, *Warren C. Nighswander* and *Keith S. Watson* were on the brief, for appellant.

James F. McMullin, Assistant United States Attorney with whom *Harold H. Titus, Jr.*, United States Attorney, *John A. Terry*, Assistant United States Attorney and *Joseph M. Hannon*, Assistant United States Attorney at the time the brief was filed, were on the brief, for appellees.

Before: LEVENTHAL and ROBB, *Circuit Judges* and GASCH,* *United States District Judge* of the United States District Court for the District of Columbia.

Opinion for the Court filed by *Circuit Judge* Leventhal.

LEVENTHAL, *Circuit Judge:* Appellant Dale B. Menard brought this action praying that the files of the Federal Bureau of Investigation by purged of all information relating to his detention by the Los Angeles police on August 10, 1965. In prior proceedings before this court, we reversed summary judgment in favor of appellees because of the "necessity for a clear and complete factual record as a basis for adjudication." Menard v. Mitchell, 139 U.S.App.D.C. 113, 430 F.2d 486 (1970). On remand, the District Court, after a full trial, declined to order expungement, but limited distribution of Menard's record to Federal and state law enforcement agencies and agencies of the Federal Government for the purposes of employment.[1] Menard v. Mitchell, 328 F. Supp. 718 (D.D.C. 1971). We hold that Menard is entitled to an order directing the FBI to remove his record from its criminal files, and therefore remand.

I. THE ARREST

At the time of his arrest, Dale Menard was a 19-year-old college student spending the summer working in Los Angeles. On the evening of August 9, 1965, he visited with friends in the vicinity of Sunland Park, a recrea-

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* Sitting by designation pursuant to 28 U.S.C. § 292(a).

[1] However, in P.L. 92-184, 85 Stat. 642 § 902, passed December, 1971, Congress effectively overruled a portion of the District Court's decree by expressly authorizing dissemination to: "officials of federally chartered or insured banking institutions to promote or maintain the security of those institutions, and, if authorized by the Attorney General, to officials of State and local governments for purposes of employment and licensing . . . ."

tional area in Los Angeles. At approximately 11:30 p.m., Menard walked to the park to wait for a friend who had arranged to pick Menard up and drive him to his room in a Los Angeles suburb (JA 165-69). The friend failed to arrive at the agreed time, and in the early hours of August 10th, after dozing on a park bench and then walking across the street to look through the window of a rest home in search of a clock, Menard returned to the bench to wait once more. See Joint Appendix (JA) 169-71.

At approximately 3:00 a.m., Menard was approached by two Los Angeles police officers (JA 171-73), who questioned him about a prowler report from the rest home. They also confronted him with a wallet they evidently had found on the ground near the park bench. (JA 179, 308). The wallet contained $10 and bore the name and address of an individual who lived about three miles from Sunland Park. (JA 175, 219-220). Despite Menard's insistence that he knew nothing of the wallet, and despite the subsequent arrival of Menard's friend, who corroborated his account, Menard was placed under arrest, booked and fingerprinted at the stationhouse, and held in police custody for over two days. No criminal complaint was ever filed; no evidence was found indicating that the wallet had been stolen; and no information was adduced that tied Menard to any crime. Nevertheless, the Los Angeles police routinely forwarded to the FBI a fingerprint card, containing Menard's fingerprints and the notation that he had been arrested for burglary and two days later "Released—unable to connect with any felony or misdemeanor at this time." The FBI has retained a record of Menard's arrest.[2]

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[2] Originally the record read as follows:
Date Arrested or Received—8-10-65
Charge or Offense—459 PC Burglary
Disposition or Sentence—8-12-65—Released—Unable to connect with any felony or misdemeanor at this time.

A few months later, Menard's mother wrote the FBI to inquire whether any record had been kept of the encounter; the Bureau referred her to the California authorities. Correspondence continued for over a year, with the FBI, the Los Angeles police, and the California Department of Justice each taking the position that it was powerless to effect the removal of the record from the FBI's files.

However, on January 16, 1968, after the complaint in this action had been filed earlier in the month, the FBI had a special agent review the Los Angeles police file.[3] By April 1968 the FBI record was changed, "upon decision of Federal Bureau of Investigation and United States Attorney's Office." [4] The entry for "Disposition or sentence" originally read: "Released—unable to connect with any felony or misdemeanor at this time." As changed, the FBI record shows that two days after Menard was arrested, he was "Released—Unable to connect with any felony or misdemeanor—in accordance with 849b(1) —not deemed an arrest but a detention only." Although

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Occupation—Student
Residence of Person Fingerprinted—Saticoy & Canoga Canoga Park

The record was amended so that the entry "Disposition or Sentence" now reads:

8-12-65—Released—Unable to connect with any felony or misdemeanor—in accordance with 849b(1)—not deemed an arrest but detention only.

[3] "On January 16, 1968, the arrest record of Dale Bruce Menard, Los Angeles Police Department (LAPD) Number 760 111-M, was reviewed by a Special Agent of the FBI." Defendants' Answers to Plaintiff's Second Interrogatories, Item 6, filed November 30, 1970.

[4] Defendant's Answer filed April 12, 1968, to Plaintiff's Interrogatory #3, served March 26, 1968.

the change entry does not say so specifically, it presumably referred to California Penal Code § 849(b)(1).[5]

Unable to obtain relief expunging his arrest record through the administrative processes, Menard turned to the courts.

II. Operations of the Identification Division of the FBI

The record developed in the trial court subsequent to our order of remand presents information concerning the Identification Division of the FBI, which has maintained fingerprint and arrest records since 1924. The Attorney General is authorized to maintain identification files by 28 U.S.C. § 534, which provides:

> § 534. Acquisition, preservation, and exchange of identification records; appointment of officials
>
> (a) The Attorney General shall—
>
> (1) acquire, collect, classify, and preserve identification, criminal identification, crime and other records; and
>
> (2) exchange these records with, and for the official use of, authorized officials of the Federal Government, the States, cities, and penal and other institutions.
>
> (b) The exchange of records authorized by subsection (a)(2) of this section is subject to cancel-

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[5] Calif. Penal Code § 849(b)(1) (West Supp. 1970) provides:

> Any peace officer may release from custody, instead of taking such person before a magistrate, any person arrested without a warrant whenever:
>
> (1) He is satisfied that there is no ground for making a criminal complaint against the person arrested. Any record of such arrest shall include a record of the release hereunder and thereafter shall not be deemed an arrest but a detention only.

lation if dissemination is made outside the receiving departments or related agencies.

(c) The Attorney General may appoint officials to perform the functions authorized by this section.

The practice of the FBI in implementing the statute reflects a series of positions taken by the Attorney General over the years. These have been codified in 28 C.F.R. § 0.85(b), which provides that the Director of the FBI shall:

> Conduct the acquisition, collection, exchange, classification, and preservation of identification records, including personal fingerprints voluntarily submitted, on a mutually beneficial basis, from law enforcement and other governmental agencies, insurance companies, railroad police, national banks, member banks of the Federal Reserve System, FDIC-Reserve-Insured Banks, and banking institutions insured by the Federal Savings and Loan Insurance Corporation; provide expert testimony in Federal or local courts as to fingerprint examinations; and provide identification assistance in missing persons type cases, including those from insurance companies.

The Chief of the Technical Section of the FBI's Identification Division described the Division as a "central depository for fingerprints submitted to us on a volunteer basis." (JA 482). These records are maintained in separate criminal files and "applicant" files. The FBI's criminal files consist of those prints submitted in connection with an arrest or conviction. The FBI's applicant files consist of prints submitted in conjunction with induction into the armed services, applications for government employment, or other activity pursuant to which local authorities deem it appropriate to require fingerprinting to determine whether the applicant has a criminal record. The records are not sorted or cross-referenced in any way, nor is there special treatment of records of juveniles. (JA 88-9).

The Bureau also maintains a file containing only the name of the individual and his prints.[6] Primary contributors to this file, which is used for identification purposes only, are tourists, who submit their prints as they tour FBI facilities. (JA 656-57). This information may be made available to private groups, such as insurance companies, for the sole purpose of establishing identity, often in the case of missing or deceased individuals. (JA 629-630).

Two hundred million fingerprint cards are currently on file with the FBI, of which 19 million relate to criminal activity. (JA 511). Fingerprints are submitted to the Bureau by Federal, state and local agencies, on standard cards issued by the FBI (JA 10, 12, 201). The Bureau checks its records when it receives a fingerprint card and reports back to the contributing agency any prior arrests or convictions contained in its files.

The FBI disseminates records to contributing agencies throughout the country. For each "applicant" fingerprint card submitted to it by an "authorized agency" [7] the Identification Division runs an automatic identification check (JA 46-7). If there is no prior arrest or conviction record, the FBI returns the fingerprint card with the notation, "No arrest record F.B.I." (JA 471). If "criminal" fingerprint cards have previously been submitted, the contributing agency receives a copy of the records of the individual's prior arrests. (JA 46-7, 54-5, 74, 95-6). Where "criminal" cards are submitted, the Bureau notes

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[6] The record does not tell us what name is given to these files, and we shall for convenience refer to them as general identification files.

[7] "Authorized agencies" include all agencies of the federal government, all state and local law enforcement agencies, and all state and local agencies authorized by statute or regulation to submit fingerprints to the FBI. JA 489, 631, 641-42.

the information and sends the law enforcement agency such information as the FBI has.

The Division also receives hundreds of "name check" requests from "legitimate sources," including congressmen and contributing agencies, asking for criminal records with only the subject's name given as identification. Whenever possible, the Division honors these requests. The number of such "name checks" was estimated to be "in the hundreds" per day (JA 464).

During Fiscal 1970, the Identification Division processed 29,000 fingerprint cards daily, of which 13,000 were arrest submissions and another 16,000 non-criminal submissions from the approximately 8,000 contributing agencies (JA 457-58; 11, 466). "The workload in the Division has reached the point," testified Beverly E. Ponder, Chief of the Technical Section, in the spring of 1972, that "we cannot handle any more work." (JA 645) However, some relief was expected when the Bureau occupies new quarters (JA 646).

Fingerprint arrest records are removed by the FBI from the files of the Identification Division when the contributing agency so requests. No inquiry is made as to the reasons supporting the request of the local agency for the return of the record. (JA 649). During fiscal 1970 over 6,000 records were returned in this manner, and that "is a growing statistic" (JA 650). The FBI retains its arrest records even where the record indicates that the arrestee was released without being charged,[8] since it is the FBI's firm policy that "The FBI does not have the authority to decide which fingerprints submitted by law enforcement agencies should be returned. Such a decision rests solely with the original contributor of finger-

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[8] See JA 21.

prints." [9] If the FBI makes the arrest, it will remove the arrest cards from its files "on a court order only" (JA 22).

With the apparent exception of the Bureau's action in altering plaintiff's record in the instant case,[10] the FBI has never returned a fingerprint record on its own motion. Moreover, the Bureau will not amend, alter, or even reveal a record at the instance of a private individual, (JA 22-28), taking the position not only that the decision to expunge must be made at the local level, but also that disclosure to an individual of the contents of his record will not be permitted, "inasmuch as data contained in our files is confidential and cannot be furnished to private individuals." [11]

If a person inquires whether the FBI has fingerprints on file, no search is made except in what is considered a "justified cause"—the case of a missing person, or a problem of someone trying to settle an estate (JA 23). Other persons—*e.g.*, those concerned about job prospects or possible Government employment—are not told whether a card exists, but are simply referred to the agency which supplied the fingerprints. (JA 26). This policy is adhered to even if the inquiry is made by someone who does not remember the circumstances of his being fingerprinted, or even whether he was fingerprinted (perhaps because he was inebriated, see JA 28, or conceivably a victim of amnesia). Under its practices, the FBI is not concerned about an inaccuracy, beyond suggesting that

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[9] Plaintiff's Exhibit #2: Letter of July 15, 1966, from John Edgar Hoover to Mrs. Anita B. Menard.

[10] See note 2, *supra*, and accompanying text.

[11] Plaintiff's Exhibit #12; Letter of March 18, 1966, from John Edgar Hoover to Mrs. Anita B. Menard.

the individual contact the local agency (JA 27-30).[12] These practices of the FBI have evolved over time. They are not reflected in any memorandum of procedures or regulation (JA 33).

III. Propriety of Action Against the FBI

Menard seeks the elimination of his arrest record from the FBI's files and rests his claim on a broad base of legal doctrine. It is claimed that retention of his record violates the Fourth and Fifth Amendments of the Constitution, subjects him to harsh penalties without being accorded due process of law, denies him the equal protection of the laws, and violates his rights to privacy.

Appellant is naturally concerned that the incident in which he was, by happenstance, subject to police detention has led to his becoming the subject of a criminal file. The first legal issue that arises is whether he has merely suffered personal distress, or whether there is legal injury.

Although Menard cannot point with mathematical certainty to the exact consequences of his criminal file, we think it clear that he has alleged a "cognizable legal injury." Finley v. Hampton, 154 U.S.App.D.C. 50, 54, 473 F.2d 180, 184 (1972). See also Laird v. Tatum, 408 U.S. 1 (1972). In Sullivan v. Murphy, —— U.S.App. D.C. ——, 478 F.2d 938, *cert. denied*, 414 U.S. 880 (1973), this court held that an action for expungement

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[12] Mr. Ponder also testified (JA 27): If there is some problem involved and he is challenging the accuracy of the record, then we are certainly going to assist in getting this inquiry answered and answered promptly and properly." In the instant case, the Bureau did not assist Mrs. Menard in contacting the California authorities, but merely suggested that she do so. With the California authorities insisting that they were powerless to act, the result was a bureaucratic standoff.

of arrest records is justiciable. On a careful review of the jurisprudence we concluded, see 478 F.2d at 968: "The principle is well established that a court may order the expungement of records, including arrest records, when that remedy is necessary and appropriate in order to preserve basic legal rights." This court, like other courts,[13] held that unlawful maintenance of records of arrest results in "injuries and dangers" that are "plain enough," 478 F.2d at 790, and that "this threat is not dissipated, or rendered insubstantial or illusory, by the fact that the arrest was not followed by a prosecution." 478 F.2d at 962 (footnote omitted).

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[13] For illustrations of the doctrine that courts may, in appropriate circumstances, order the expungement of criminal records see, *e.g.*, Sullivan v. Murphy, —— U.S.App.D.C. ——, 478 F.2d 938 (1973) (mass arrests where procedures rendered judicial determination of probable cause impossible); United States v. McLeod, 385 F.2d 734 (5th Cir. 1967) (expungement of arrest records ordered when court determined that arrests were for sole purpose of harrassing civil rights workers); Bilick v. Dudley, 356 F. Supp. 945 (S.D.N.Y. 1973) (expungement of arrest record ordered when court found that arrests were without probable cause and had overtones of harrassment of group because of political beliefs); Hughes v. Rizzo, 282 F. Supp. 881 (E.D.Pa. 1968) (expungement ordered where arrests were for purpose of harrassing "hippies"). Discussion of the disabilities flowing from a record of arrest as an appropriate ground for judicial relief appear not only in the *Menard* case previously before this court, as Menard v. Mitchell, 139 U.S.App.D.C. at 117-18, 430 F.2d at 490-91; but also in Sullivan v. Murphy, *supra*, Morrow v. District of Columbia, 135 U.S.App.D.C. 160, 417 F.2d 728 (1969); Kowall v. United States, 53 F.R.D. 211, 215 (W.D. Mich. 1971); Bilick v. Dudley, 356 F. Supp. 945, 951 (S.D. N.Y. 1973); Wilson v. Webster, 467 F.2d 1282, 1283-84 (9th Cir. 1972); Davidson v. Dill, 503 P.2d 157, 159 (Colo. 1972); Eddy v. Moore, 5 Wash. App. 334, 487 P.2d 211, 216 (1971).

We are not here concerned with the issue of "applicant" files, which present separate and different considerations.

The judicial remedy of expungement is inherent and is not dependent on express statutory provision, and it exists to vindicate substantial rights provided by statute as well as by organic law, United States v. McLeod, 385 F.2d 734 (5th Cir. 1967). Thus, for example, both this court and the District Court for the District of Columbia have ordered the expungement of records of police action taken in flagrant violation of the Fourth Amendment. In Sullivan v. Murphy, *supra*, we required expungement of records of mass arrests where established procedures broke down so that there was no showing of probable cause. And in Gomez v. Wilson, 323 F. Supp. 87 (D.D.C. 1971), the District Court, Chief Judge Curran, required the return of "any and all such Police forms, indexes, and cross-indexes connected with the [plaintiff] and this case" where it found that the police had twice stopped plaintiff, questioned him as to his activities, and filled out a vagrancy observation form when they had no articulable suspicion that he was engaged in any illegal activity.[14]

The disabilities flowing from a record of arrest have been well documented: There is an undoubted "social stigma" involved in an arrest record.[15] "[I]t is common knowledge that a man with an arrest record is much more apt to be subject to police scrutiny—the first to be

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[14] Although plaintiff appealed, that portion of the District Court's order that required expungement was not appealed by the Government and so became final. See Gomez v. Wilson, ——U.S.App.D.C. ——, 477 F.2d 411, 414 n.10 (1973).

[15] That a record of arrest is a "record involving social stigma," see United States v. Dionisio, 410 U.S. 1, 10 (1973), quoting from Judge Friendly's opinion in United States v. Doe (Schwartz), 457 F.2d at 488 (2d Cir.).

See also Thompson v. Washington, —— F.2d ——, in which this court pointed out (slip opin. at 17): "And Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971), establishes that a person's interest in his own reputation merits procedural due process protection." No. 71-2049 (December 10, 1973).

questioned and the last to be eliminated as a subject in any investigation." [16] Existence of a record may burden a decision whether to testify at trial.[17] And records of arrest are used by judges in making decisions as to sentencing, whether to grant bail, or whether to release pending appeal.[18]

The arrest record is used outside the field of criminal justice. Most significant is its use in connection with subsequent inquiries on applications for employment and licenses to engage in certain fields of work. An arrest record often proves to be a substantial barrier to employment.[19] It appears, *inter alia*, that Menard's FBI

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[16] Davidson v. Dill, 503 P.2d 157, 159 (Colo. 1972).

[17] Menard v. Mitchell, 430 F.2d at 491.

[18] See, *e.g.*, Russell v. United States, 131 U.S.App.D.C. 44, 402 F.2d 185 (1968) (record of arrests may be used to determine whether appellant may be released pending appeal); United States v. Cifarelli, 401 F.2d 512 (2d Cir.), *cert. denied*, 393 U.S. 987 (1968) (in imposing sentence, trial judge may consider evidence of other crimes for which defendant was not convicted); Jones v. United States, 113 U.S.App.D.C. 233, 307 F.2d 190 (1962), *cert. denied*, 372 U.S. 919 (1963) (pre-sentence report may include, and judge may consider, records of charges not leading to convictions); 23 D.C. Code § 1321(b) (permits judicial officer, in determining the conditions of pre-trial release, to take into account defendant's "past conduct, . . . record of convictions, and any record of appearance at court proceedings").

[19] See, *e.g.*, Menard v. Mitchell, 430 F.2d at 488, n.17:

> At the very least, an arrest record is likely to lead to further investigation; and if it is convenient to fill the job before the investigation is complete, the applicant is effectively denied employment because of his record.

See also, *e.g.*, Report of the Committee to Investigate the Effect of Police Arrest Records on Employment Opportunities in the District of Columbia (1967); Miller, The Closed Door: The Effect of a Criminal Record on Employment With State

record was supplied, subsequent to the filing of the complaint in this case, to the Marine Corps and the National Agency Check Center.[20]

The jurisprudence on expungement of arrest records has developed, thus far at least, in actions brought against appropriate officials of the government whose officers had responsibility for making the arrest, initiating the arrest record, maintaining the arrest record, and determining the consequences, as in maintaining prosecutions. There arises for consideration the significance of the circumstance that in the action before us it is the Los Angeles police who made the arrest for a violation of state law, and who initiated the arrest record, while the defendants are officials of a federal agency whose involvement and responsibility turn on the receipt, maintenance and dissemination of the allegedly invalid arrest record.

Ultimate disposition of an action against a records agency based on maintenance and dissemination of unlawful arrest records would require decisions on a number of issues, and the interlacing of multiple stands of law. There would be issues such as whether the preservation of constitutional rights embraces, as a corollary, a strict liability like that which pervades the related field of responsibility of publication of libels,[21] a responsibility based on the extent of knowledge in hand or imputable, or on a duty to make inquiry.

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and Local Public Agencies (Georgetown University Criminal Law Institute, 1972).

[20] Defendants' Answer, filed Nov. 30, 1970, to Item 3 of Plaintiff's Second Interrogatories.

[21] See, e.g., Prosser, Torts, § 113, p. 766 ff. The author refers, *inter alia*, to rulings "that there may be an affirmative duty to remove a publication made by another, where for example the defendant's bulletin board is used for the purpose."

We think sound principles of justice and judicial administration dictate that in general actions to vindicate constitutional rights, by expungement of arrest records maintained notwithstanding release of the person and absence of probable cause for arrest, be maintained against the local law enforcement agencies involved.[22] The primary duty of executive inquiry into the facts of distant arrests is a burden assigned more appropriately to the local agency whose officials made the arrest than to the FBI. Further, an official finding that an arrest is tainted by illegality stigmatizes the local enforcement agency to some extent—apart from the possibility of damage actions—and should be avoided where an alternate course is available. If the local law enforcement agency is a party to the action, it will have opportunity, in instances where it considers the claim improper, to present effectively its version of events and support its denial of relief.

In general, the role played by the FBI's Identification Division is derivative, and relief granted solely against the FBI in this context may be incomplete. The offending "arrest record" remains in the files of the local law enforcement agency, and a question arises whether the person involved would be obligated to advise future employers and others that he had been arrested. With the local enforcement agency as defendant, complete relief can be granted, both to obtain such action on local records as may be needed, and to have local authorities request

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[22] This includes the agencies and officials with responsibility for making the arrest, initiating an arrest record, maintaining an arrest record, determining appropriate disposition, whether, *e.g.*, there has been exoneration. If more than one agency is involved there may be multiple defendants; indeed, it may be that a single action may be maintainable against state and federal officials as well as the initiating local agency.

the return of records.[23] Such requests are always honored by the FBI.[24]

We are also reluctant, in the absence of a need greater than that established by this record, to concentrate in the Department of Justice the burden of overall litigation over maintenance of arrest records. Of the 19 million criminal prints on file with the Identification Division, it is impossible to predict how many would be the subject of dispute. We are concerned with the possible effects of a concentration of burden not only on the FBI[25] and the Department of Justice, but also on this court and the District Court for the District of Columbia.

Our conclusion should not be taken to reflect a judgment of the insubstantiality of Menard's claims. On the contrary, the gravity of those claims underscores the need

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[23] Provision of local venue will also interrelate with evolving state and local procedures to cope with this problem. For example, California's statutes provide for determination in some instances that an arrest is deemed solely a detention. (See fn. 5). An action against the local police could at least raise the question whether in such case they are not obligated, by fair implication of the state law, to withdraw whatever "arrest" record was sent to the FBI.

New York has recently adopted a procedure which does not formally qualify the arrest but inhibits the generation of the record that leads to legal injury. Under this procedure, if an arrested person brought to the stationhouse makes satisfactory explanation to the arresting officer, the latter must order a release without any stationhouse booking, N.Y. Crim. Proc. Law § 140.20(4) (McKinney 1971). Presumably this also gives room to the supervising police office to exercise discretion to modify the initial decision to arrest.

[24] See JA 649: Testimony of Special Agent Beverly Ponder, Chief of the Technical Section of the Identification Division:

> Q: If a police department asks it [the fingerprint record] back, you send it back, no questions, is that correct?
>
> A: That is correct.

[25] See JA 645.

for their adjudication between the appropriate parties. Conventional doctrines of venue may operate to localize the forum, but will not interfere with a call on cognizant Federal courts in the venue when administrative remedy is unavailing.

IV. Duties Unique to the FBI

Insofar as Menard's action attacks abuses of the Identification Division in its unique role in the information network, suit against the Bureau is proper. What began modestly in 1924 is now, in the words of the District Judge, "out of effective control." [26] Due primarily to the Bureau's limited resources, there is no followup to assure that records of arrest frequently are amended to show an ultimate non-criminal disposition. There are no controls on the accuracy of information submitted by the contributing agencies.[27] The Bureau exercises little supervision and control over contributing agency uses of the records the FBI disseminates.[28] We are not now called

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[26] 328 F. Supp. at 727.

[27] The Bureau does not check assertions of purpose, for example, that appear on the face of the submitted card. (JA 668).

[28] The FBI does not inquire into the uses made of arrest records it sends to contributing agencies. (JA 55). All records, however, are stamped with the notation that only authorized use is permitted; but "authorized use" is not defined on the stamp. Contributing agencies may disseminate records to other contributing agencies, but dissemination to agencies that are not authorized by the FBI to receive records is not an "authorized use." (JA 82). However, the FBI does not send a list of authorized agencies to its contributing agencies. *Id.* Despite newspaper reports and other external indication of misuse of arrest records, the Bureau will not investigate alleged misuses of records unless presented with a direct complaint (JA 499-500, 507) of which there are about four or five yearly. (JA 120).

upon to evaluate these practices of the FBI. However, this case does call upon us to take into account that the FBI's function of maintaining and disseminating criminal identification records and files carries with it as a corollary the responsibility to discharge this function reliably and responsibly and without unnecessary harm to individuals whose rights have been invaded. The FBI cannot take the position that it is a mere passive recipient of records received from others, when it in fact energizes those records by maintaining a system of criminal files and disseminating the criminal records widely, acting in effect as a step-up transformer that puts into the system a capacity for both good and harm.[29]

The process of the Identification Division for sifting out submissions to determine what it retains in its criminal files[30] is one that requires more attention. If the form is correct,[31] the FBI will place in its criminal files virtually any information from local agencies arguably related to criminal activity.[32] The FBI returns to the

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[29] Although the record before us does not contain data concerning the computerization of the FBI's records, it does reveal that a computerization program is proceeding apace, increasing the Division's effectiveness, and enhancing its capacity for both good and harm.

[30] Special Agent Ponder testified that "we have a large screening process." (JA 690). The first operation upon receipt of a card is to check that it contains all relevant information, including "person to be notified in case of emergency." (JA 658).

[31] The Identification Division is quite strict in demanding adherence to the requirements that the fingerprint card be completed as indicated. For example, the card requires that the contributing agency indicate the reason for which the record is requested. If that information is not included, the card is returned without an accompanying record. (JA 667).

[32] If the card indicated an arrest with the disposition "dismissed," the FBI would nonetheless retain the card for its files. (JA 21).

local agencies 10 percent of the criminal cards submitted when there are illegible fingerprints or incomplete data on the fingerprint form.[33] But if the form is satisfactory and purports to record an arrest, the FBI makes no further inquiry and forthwith makes an entry in a criminal file.

In Menard's case, after his complaint was filed, the FBI had a Special Agent review his Los Angeles arrest record,[34] and it then amended the FBI record "upon decision of Federal Bureau of Investigation and United State's Attorney's office." [35] The change was a significant one. The FBI record continues the reference to an "arrest" on August 10, 1965. But it amends the "disposition" on August 12, 1965. A statement was added: "in accordance with [Calif. Penal Code] § 849b(1)—not deemed an arrest but detention only." [36] Even more sig-

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[33] See JA 18.

[34] See note 3, *supra.*

[35] Defendant's Answer filed April 12, 1968, to Plaintiff's Interrogatory #3, served March 26, 1968.

[36] Section 849(b)(1) authorizes a peace officer to release an arrested person from custody if "[h]e is satisfied that there are insufficient grounds for making a criminal complaint against the person arrested." Section 849(c) provides that after such release "such arrest shall not be deemed an arrest, but detention only."

Section 11115 provides:

> In any case in which a sheriff, police department or other law enforcement agency makes an arrest and transmits a report of the arrest to the Bureau of Criminal Identification and Investigation or to the Federal Bureau of Investigation, it shall be the duty of such law enforcement agency to furnish a disposition report to such bureaus whenever the arrested person is transferred to the custody of another agency or is released without having a complaint or accusation filed with a court.

[Continued]

nificant, the original notation that the Los Angeles police "were unable to connect with any felony or misdemeanor at this time" was amended to drop "at this time."

This was done after Menard filed his complaint asserting that no crime at all had been committed. And in the lawsuit the Government expressly adopted the plaintiff's Statement of Material Facts as to Which There Is No Material Issue (filed, June 18, 1968) that "defendants know of no crime committed by anyone incident to plaintiff's detention" (adopted by defendants on July 2, 1968). Nevertheless, Menard's record remained in the FBI's criminal files, along with the mass of arrest records, subject to dissemination in the same way as all arrest records.[37]

Having been informed that Menard's encounter with the Los Angeles police authorities was purely fortuitous, the FBI had no authority to retain this record in its criminal files along with the mass of arrest records. This

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If either of the following dispositions is made, the disposition report shall so state:

* * * *

(b) "Detention only," when the detained party is released pursuant to paragraph (1) of subdivision (b) of Section 849. In such cases the report shall state the specific reason for such release, indicating that there was no ground for making a criminal complaint because (1) further investigation exonerated the arrested party, (2) the complainant withdrew the complaint, (3) further investigation appeared necessary before prosecution could be initiated, (4) the ascertainable evidence was insufficient to proceed further, (5) the admissible or adducible evidence was insufficient to proceed further, or (6) other appropriate explanation for release.

[37] When the FBI is asked by an appropriate agency whether a person has a criminal record, it focuses on whether or not the person has an "arrest record." The inquiry card will be returned to the agency without any information only if the FBI certifies "no arrest record" (JA 471).

is simply not consistent with the FBI's duty, corollary to its function of keeping identification records, to take appropriate measures to assure that this function is discharged responsibility and that the records are reliably informative.

We note that we are focusing here on the FBI's "arrest records" and "criminal files," and we do not prohibit the maintenance of neutral identification records. When the FBI is apprised that a person has been exonerated after initial arrest,[38] released without charge and a change of record to "detention only," the FBI has the responsibility to expunge the incident from its criminal identification files. The change of the FBI record to record the lack of connection of Menard with any crime and the characterization of the apprehension of Menard by the Los Angeles police as "in accordance with [California Penal Code] § 849(b)(1)" "deemed [not] an arrest but a detention only" indicates a local determination to that effect,[39] responsive to the FBI's own inquiry of the local authorities.[40]

The FBI cannot turn aside its responsibility by claiming that it is powerless to act absent a specific and formal request from the Los Angeles police for withdrawal of the record. Dependence on other agencies may be sound enough for a practice born of expedience, but it may not be made rigid, like a rule of law, in neglect or defiance of basic rights. While the Congressional program con-

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[38] In the circumstances at bar, the FBI's investigations gave it information equivalent to a formal notation by California police pursuant to § 1115 of the California Penal Code, that "further investigation exonerated the arrested party."

[39] This is a fair implication, taking into account general FBI practice, although the record does not specifically state on what basis the FBI amended the record.

[40] See footnote 36.

templates a major role for the local authorities, it does not contemplate Bureau abdication to the local authorities. The statute itself confirms the principle of FBI responsibility in section 534(h), providing for cancellation of exchange privileges if local agencies make records available to unauthorized users, and the Bureau recognizes its obligation to review this participation by local authorities.[41]

The Identification Division has the responsibility for maintaining an appropriate separation of the various files it is authorized to establish, and for preventing the criminal identification files, subject as they are to dissemination, from containing inappropriate material. This appears from the legislative history.[42] Congress intended

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[41] While this is the stated policy of the Bureau, it has not aggressively policed use of its records, see note 28 *supra*, and has in fact, since 1924, suspended the privileges only of six local law enforcement agencies, none of them major departments. (JA 507).

[42] In the limited debate attendant to the statute's original enactment, Congressman Cochran of Missouri questioned the broad authority being given the FBI to collect fingerprints. Congressman Graham of Pennsylvania, Chairman of the House Judiciary Committee, which had reported the bill favorably, replied:

> I would like to say that what the gentleman from Missouri has been saying has no application whatever to the matter of fingerprints. This has nothing to do with the bureau of the Department of Justice where criminal records are kept so as to be available anywhere in the United States.
>
> There are two classes of information that is gathered. One is criminal records, and another is the information that is gathered about criminals that is not a matter of record. That they do not give out, but the criminal records they do give out. That information is gathered for the department itself and its agents, in order that they more effectually do their work.

[Continued]

to differentiate "criminal identification" from other information that the FBI is authorized to gather. We think it equally clear that the distinction intended by Congress should be drawn with regard to record of an encounter with law enforcement agencies that did not result in arrest.[42] Although it is information that may aid FBI personnel to "more effectively do their work," it is not information that the FBI may maintain in its criminal files "so as to be available anywhere in the United States." The FBI has an obligation, enforced by our ruling, to take account of responsible information, even though not cast in the form of an express request from the local agency for return of the record, that the "arrest" record previously submitted did not communicate an information properly retained by the Bureau in its criminal files as an arrest record. Our ruling is in no way onerous, for the Identification Division has a sizeable screening

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72 Cong. Rec. 1989 (71st Cong., 2d Sess., Jan. 20, 1930).

Initial statutory authorization was limited to the acquisition and preservation of "criminal identification and other crime records." 5 U.S.C. § 340 (1964), *repealed*, Pub. L. No. 89-554, § 8(a), 80 Stat. 632, 648 (1966). Under the present statute, the Attorney General is directed to "acquire, collect, classify, and preserve identification, criminal identification, crime, and other records." 28 U.S.C. § 534(a). That section, however, was enacted by Pub. L. No. 89-554, § 4(c), 80 Stat. 611, 616 (1966). Section 7(a) of the Act, 80 Stat. 631, states that "The legislative purpose in enacting sections 1-6 of this Act is to restate, without substantive change, the laws replaced by those sections on the effective date of this Act."

[43] A similar claim was raised by appellant when this case was first before us, but was rejected on the grounds that it was not established by "the facts established on the motion for summary judgment." For this and other reasons, the case was remanded in order to develop "a clear and complete factual record as a basis for adjudication." Menard v. Mitchell, *supra*, 430 F.2d at 489, 494.

staff,[44] and substantial detriment to the individual is at stake.[45]

An arrest is distinct from other interactions between citizen and police. An arrest "is the initial stage of a criminal prosecution." [46] When coupled, as here, with custody, it renders permissible a complete search of the person, assuming probable cause for the arrest, although such a search absent an arrest runs afoul of the Fourth Amendment.[47] In contrast stand many other encounters between police and citizen, even in the course of criminal investigation, that do not have the quality of an arrest and its characteristic as the opening of a criminal chapter. "The police talk to too many people in the course of a day . . . [in] routine police investigation" to insert either a requirement of formality binding on the police,[48] or to permit the encounter to be memorialized as an arrest. It would be monstrous to suppose that all persons questioned by the police, many of them "cooperative and law abiding citizens" [49] could properly be enshrined, for reasons of bureaucratic practice, in the FBI's criminal records. The same principle applies when a person is subject by the police to detention short of an arrest, for as the stop-and-frisk cases make clear, a police detention may be justified

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[44] See note 30, *supra*.

[45] See notes 15 to 20, *supra*, and accompanying text.

[46] Terry v. Ohio, 392 U.S. 1, 25-26 (1968). See also United States v. Robinson, 42 U.S.L.W. 4055 (U.S. December 11, 1973).

[47] United States v. Robinson, 42 U.S.L.W. 4055 (U.S. December 11, 1973).

[48] [Vance] Allen v. United States, 129 U.S.App.D.C. 61, 64, 390 F.2d 476, 479 (1968).

[49] *Id.*

by a mere "suspicion" that falls short of the probable cause required by the Constitution for an arrest.[50]

We need not decide whether or to what extent the Constitution forbids the Government from contributing to the harm to the individual that may attend maintenance of a criminal file showing, as an arrest, what was only a chance encounter.[51] We need not reach this question, for we place our decision on statutory grounds. There is a settled rule for statutory interpretation to avoid serious constitutional issues [52] and this properly has some application in the case at bar. But even without the support of this doctrine, we think it plain that 28 U.S.C. § 534 precludes the Identification Division from maintaining in its criminal files as an arrest record an encounter with the police that has been established not to constitute an arrest.[53]

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[50] Terry v. Ohio, *supra*, note 46.

[51] Compare Constantineau v. Wisconsin, *supra* note 15.

[52] *See, e.g.*, Richmond Co. v. United States, 275 U.S. 331, 346 (1928); Thompson v. Washington, cited *supra* note 15, slip opin. at 13.

[53] We are concerned with the judicial role of determining what is required by the statute (and Constitution). While in this case we are required to disapprove the action of the Department of Justice, we think it appropriate to take note that subsequent proposals of that department are congruent with the premises of this opinion. We refer to the regulations concerning the dissemination of criminal record data recently proposed by the Department of Justice, 39 Fed. Reg. 5636 (Feb. 14, 1974). These reflect the Department's judgment that records subject to dissemination should be limited to those arising out of serious interaction between the individual and law enforcement authorities. They further note that only "serious and/or significant violations" are includible in criminal record information systems (§ 20.32). The term "criminal offender record information" is defined in § 20.2(c) to include "only . . . identifying data and notations of arrests." This excludes mere detentions. This meaning does not depend on negative implication, for the regulations

We are not in this case enjoining the FBI from maintaining Menard's fingerprints in its neutral non-criminal files, provided there is no reference of any kind to indicate that the prints originated in a source for criminal files. We do not discern any reasonable claim of legal injury from being included in such general identification files, which also include, *e.g.*, the prints voluntarily submitted by tourists,[54] and which are not translated into the FBI's centralized "rap sheets" reporting to all participating agencies on a person's criminal record. However, our order does protect Menard from the injury portended by inclusion of his record and prints in the FBI's centralized criminal files, for their continued inclusion in those files is, in our view, inconsistent with the intent of Congress.

Indeed, as we pointed out in Sullivan v. Murphy, *supra*, —— U.S.App.D.C. at ——, 478 F.2d at 973: "the chief threat to the individual who has been unlawfully arrested arises from the inclusion of his records in the police department's *central* criminal files" (emphasis added), as contrasted with a mere stationhouse record, which is needed to avoid secret police arrests (and harassments and shakedowns) and to protect police against un-

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go on to provide a specific exclusion of arrests for loitering and "suspicion." This insures that those who are arrested but as to whom the police are "unable to connect with any felony or misdemeanor" (the words of Menard's record) to not find themselves with a criminal record subject to full dissemination.

[54] The FBI's practice of maintaining fingerprint files for purposes other than preservation of criminal records, is related in the record before us, JA 629-30, 656-57. The statute provides separately, for authority to preserve "identification" and "criminal identification" records, see 28 U.S.C. § 534(a)(1). The regulation refers, inter alia, to "personal fingerprints voluntarily submitted" by banks, insurance companies, etc. and to a FBI mission to "provide identification assistance in missing persons type cases." 28 C.F.R. § 0.85(b).

founded lawsuits. Absent clear expression of legislative intent, we cannot conclude that Congress intended the individual to be threatened by inclusion in the central criminal files, which are kept to facilitate indexing and future reference.[55]

The case is remanded to the District Court with instructions to enter an order directing appellees to remove appellant's record from their criminal files.

So ordered.

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[55] While, as already noted, this order would not prohibit inclusion of Menard's record in the general identification files (*supra* note 6), we do not purport to decide whether such inclusion is appropriate under the FBI's regulations pertinent to establishment of those files. That question is not before us.

Mr. EDWARDS. Mr. Butler?

Mr. BUTLER. Thank you, Mr. Chairman.

Mr. Attorney General, I want to thank you for your testimony and commend you on your statement and congratulate you on your long tenure in office and yield back the balance of my time.

Mr. SAXBE. Thank you.

Mr. EDWARDS. Thank you. Well, Mr. Attorney General, I have studied the Department's bill with some care and I find it a modest bill. It certainly doesn't go as far as Senator Ervin's bill or my bill would go, but for the life of me I can't see where it would interfere with law enforcement agencies in any part of the United States. Certainly there are jurisdictions who have stricter rules. My own county in California has much stricter rules than are envisioned by this bill. Certainly your own regulations that you are holding hearings on are just about as strict as this bill.

Mr. SAXBE. Basically this bill, yes.

Mr. EDWARDS. That is correct. I also have traveled and studied in other countries and Western nations generally have much stricter rules than are provided in this particular bill. I don't think that anything that was said today, and I would be glad to yield to an of my colleagues on this, would indicate anything that you have in this bill would deter the enforcement of the criminal justice system of the United States.

Counsel?

Mr. WIGGINS. Before he asks questions, I don't wish my silence to indicate my agreement. There is clearly one provision of the criminal code I am thinking of.

Mr. EDWARDS. I would be disappointed if you hadn't spoken up.

Mr. SAXBE. I might add at this time that I wouldn't have sent this bill up if I didn't think we could live with it. There are differences of opinion, and I would think the subcommittee would want to hear what these differences are, but the basic concept of this bill is to provide the ability for the criminal justice system to operate and at the same time not to invade this area of individual privacy more than is necessary. Obviously, anytime that you arrest a man, you invade his individual privacy, but we hope to strike a line that will preserve as much as possible his privacy.

Mr. EDWARDS. Thank you.

Counsel?

Mr. PARKER. Thank you. I have some areas I want to explore.

Mr. Attorney General, one of the pieces of legislation that is pending before the subcommittee would give the overall responsibility for the promulgation of rules and regulations in the operation of criminal justice information systems to a Federal information systems board. You touched on that yourself this morning in your remarks and indicated that you felt that this rulemaking, that this power ought to be retained within the Attorney General's Office. At the present time, the only advisory or policy board that I know of is the National Crime Information Center Advisor Policy Board, which is comprised 100 percent of law enforcement personnel or officers.

There is an old adage that says civilians ought to control the military, and I wonder if this is analogous in terms of law enforcement. Isn't that the same, that civilians ought to control law enforcement

and it would be a much better and broader based board for rulemaking power if a cross-section of society were recognized on the board and we had people who were well versed in privacy and constitutional law aboard?

You recently proposed rules. Your rules do not touch the makeup of that board. Could you comment on that for me?

Mr. SAXBE. Well, I personally feel that any board should have public members. It is just an attitude that I have had as long as I have been in politics.

The present rulemaking capacity, which resides in the Justice Department, of course, is operated in the name of the Attorney General but comprises a tremendous number of people that have an input on this. And it would continue that way.

Mr. PARKER. Thank you. One other area that I want to touch on quickly is that the bill proposed by the Department of Justice provides a section dealing with sealing that says manual systems may be exempted from full compliance with the sealing of criminal offender record information when that compliance is not feasible because of their manual nature.

Now, the larger manual system, I guess, in the whole world is the FBI manual system. Is that language designed to exempt the FBI from the provisions of this bill?

Mr. SAXBE. Yes, primarily on the fingerprints.

Mr. PARKER. It is?

Mr. SAXBE. Yes.

Mr. PARKER. Thank you.

Mr. EDWARDS. Mr. Blommer?

Mr. BLOMMER. Thank you. I have several short questions, Mr. Attorney General, that I——

Mr. WALDIE. I am sorry, but I wish to ask about that last answer. I must have not heard it. This bill has no application to the FBI?

Mr. SAXBE. We are talking about the manual records, and the question that we are up against is whether or not the fingerprint file, which is used for many purposes other than criminal, would be sealed. Now, it is believed that the fingerprint file should not be sealed because you can destroy the tremendous usefulness to not only law enforcement, but just for the purposes of identification.

Mr. WALDIE. Is that the only source of fingerprint files, the FBI?

Mr. SAXBE. That is correct. There has been no way that these can be recorded mechanically or electronically at the present time. They are working on a system, which they hope to have in operation. Presently, we have 60 million fingerprint files, which are handled manually.

Mr. BLOMMER. Mr. Attorney General, your bill provides that anyone can see his own rapsheet, which you call "criminal record information," and appeal its correctness to the agency that maintains it, and then you provided administrative review of that decision, and then you further provide that the individual if he disagrees can go into Federal court. And you further provided that the States have to agree with that.

I just wondered if you are absolutely wedded to the proposition that these cases have to end up in court? Wouldn't a full administrative review of this decision be adequate?

Mr. SAXBE. I don't think that it would stand up under a real due process challenge if you didn't wind up in court. That is the reason it is in there. The originating agency must correct that. No one else can correct it. And if the originating agency, just because perhaps a personal reason, refused to correct it, the man must have means of forcing that agency. That is the reason there. Then once you start an administrative appeal, you have to give full access to the system. I think it would be true whether it was in there or not.

Mr. BLOMMER. I see your point. Let me ask you a question about the Immigration and Naturalization Service. As you know, they have a number of statutory functions; for instance, to require them to make investigations of people who aren't in the United States or who may have only been here a short time. They make heavy use of the FBI rapsheet system. Now, does your bill cut that off, or does it allow the Immigration and Naturalization Service to use the rapsheets?

Mr. SAXBE. It would be by Executive order permitting them to use it. We are in the same boat there that we are with the Civil Service. At the beginning, it would have to be followed up by an order permitting them.

Mr. BLOMMER. Well, you know of no reason why they can't continue as they are now?

Mr. SAXBE. No, and I would fully expect them to.

Mr. EDWARDS. Would you yield at that point?

Mr. BLOMMER. Yes.

Mr. EDWARDS. I think it would make one change, and that would be that the Immigration Service would get a conviction record rather than just a rapsheet with a whole bunch of arrests and with no dispositions except for the 1-year matter that I mentioned, because any arrest within a year would be shown, but any arrest with no disposition prior to that would not.

Mr. SAXBE. They would get better records.

Mr. EDWARDS. It would be a much fairer method, would it not, without 20- or 30-year-old arrest records that might never have gone to trial because he might have been entirely innocent, and they would be automatically eliminated under your bill?

Mr. SAXBE. That is true.

Mr. BLOMMER. Well, lately, Mr. Attorney General, the FBI uses their criminal files for some non-criminal-justice purposes that I think we could call "public service purposes," since they have a disaster squad, for instance, where they identify victims by their fingerprints, and they have a missing persons function. You don't have any objection as a matter of policy for the FBI to continue with those programs, do you?

Mr. SAXBE. That would be one of the exemptions. There are several exemptions.

Mr. BLOMMER. Thank you.

Mr. EDWARDS. Did you wish to add anything?

Mr. WIGGINS. We are having a discussion as to whether or not criminal intelligence data might be available to the Immigration and Naturalization Service, and as I read the act, I think it might be made available to them.

Mr. SAXBE. That is correct.

Mr. WIGGINS. Do you agree with that?

Mr. SAXBE. I do and again on a very strictly construed need to know.

Mr. WIGGINS. Well, it says "if necessary for the performance of a statutory function," so it could be a statutory function, but in any event I didn't want you to be understood as restricting your answer to the previous question that they would have access only to criminal record information.

Mr. EDWARDS. Well, I think the bill isn't too clear because it does say in another part that "arrest record information may not be used for non-criminal-justice purposes," and this would be non-criminal-justice purposes, but I don't think we have to resolve that at this time.

Any further questions by members of the committee?

[No response.]

Well, we thank you very much for your coming down here today. We appreciate your testimony, Mr. Attorney General.

Mr. SAXBE. Thank you.

Mr. EDWARDS. The subcommittee meets again on Thursday, at 2 p.m. to hear Mr. Clarence Kelley, the Director of the FBI, in this same room.

Thank you.

[Whereupon, at 11:55 a.m., the subcommittee was in recess, to reconvene on Thursday, February 28, 1974, at 2 p.m.]

DISSEMINATION OF CRIMINAL JUSTICE INFORMATION

THURSDAY, FEBRUARY 28, 1974

HOUSE OF REPRESENTATIVES,
CIVIL RIGHTS AND CONSTITUTIONAL RIGHTS
SUBCOMMITTEE OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 2 p.m., in room 2141 Rayburn House Office Building, Hon. Don Edwards [chairman of the subcommittee] presiding.

Present: Representatives Edwards, Waldie, Drinan, Rangel, Wiggins, McClory, and Butler.

Also present: Alan A. Parker, counsel; Michael W. Blommer, associate counsel; and Arden B. Schell assistant counsel.

Mr. EDWARDS. The subcommittee will come to order.

This afternoon the Subcommittee on Constitutional Rights and Civil Rights of the House Judiciary Committee continues its hearings on several bills having to do with the maintenance and dissemination of arrest records, a subject that we have been concerned with for more thn 2 years, and we are most certainly delighted to have with us the distinguished Director of the FBI, Mr. Clarence M. Kelley.

I am a former FBI agent myself but I am not sure if I was before your time. I was one in 1940 and 1941 in Grand Rapids, Mich., and New York City.

Were you with the FBI in those days?

TESTIMONY OF CLARENCE M. KELLEY, DIRECTOR, FEDERAL BUREAU OF INVESTIGATION, DEPARTMENT OF JUSTICE, ACCOMPANIED BY FLETCHER D. THOMPSON, ASSISTANT DIRECTOR, IDENTIFICATION DIVISION; AND WASON G. CAMPBELL, ASSISTANT DIRECTOR, COMPUTER SYSTEMS DIVISION

Mr. KELLEY. October 7, 1940.

Mr. EDWARDS. 1940? I came in in September of 1940, so we might have passed in the night.

But you weren't stationed in New York?

Mr. KELLEY. No, sir.

Mr. EDWARDS. Inspector Connolly was the head up there in those days.

Mr. KELLEY. Yes, I remember him well.

Mr. EDWARDS. A tough guy.

Mr. Wiggins.

Mr. WIGGINS. Mr. Chairman, thank you for yielding.

I merely want to welcome our very distinguished guests and look forward to your testimony.

Thank you for being here.

Mr. EDWARDS. Mr. Kelley, I understand that you are going to read the first part of your statement. It is a very excellent statement that you were kind enough to send us yesterday which all of us have had the opportunity to review, and I want to say in advance that I compliment you on the statement and the spirit in which it has been presented to this committee.

It is very much to your credit, to your staff's credit and to the credit of the FBI that you understand as sensitively as you do the problems that you face in the area of recordkeeping, arrest recordkeeping and dissemination thereof.

I wonder before you start your statement if you could introduce for the purposes of the record the two gentlemen with you?

Mr. KELLEY. Yes, sir; on my right, Mr. Chairman, is Fletcher D. Thompson, Assistant Director in charge of the Identification Division, and on my left is Wason G. Campbell, Assistant Director in charge of the Computer Systems Division.

Mr. EDWARDS. Very good.

We might have a problem with votes on the floor. We are going to try to continue the hearings right through the votes with some of us leaving and going to vote and coming back because we don't want to delay these important proceedings.

I was wondering if the gentleman from Massachusetts or New York have opening statements.

Mr. DRINAN. No. I want to thank the distinguished Director and look forward to your testimony.

Mr. EDWARDS. Mr. Rangel.

Mr. RANGEL. Thank you for being here.

If in the course of your conversation you could clear up something that was raised on the floor today as to whether or not Members of Congress are being tapped by your Department, I would personally appreciate it.

Thank you for coming forward.

Mr. EDWARDS. Would you like to dispose of that item before we get into the statement?

Mr. RANGEL. It was revealed by a Member of Congress today that he held in his hand or was held by a court statement that was given by now Attorney General Saxbe that in fact his office had been wiretapped and he had been under surveillance in terms of national security and this flew into the face of your predecessor's remarks that his department had tapped on Member of Congress or Member of the Senate, as well as the former Attorney General's statements. It is my understanding from my colleague that the affidavit submitted by Attorney General Saxbe indicates that not only was it tapped by the FBI but it was also done at the direction of the President of the United States.

So without getting into the details, I just was wondering whether or not you knew or whether you could make the same type of statement, that apparently seems to be false, that you know of no Member of the House or Senate whose telephone is being tapped.

Mr. KELLEY. I know of no Member of the House or Senate whose telephone is being tapped. Right.

Mr. RANGEL. So that since this very same statement had been given not too long ago by Mr. Hoover, obviously it is now in direct conflict with the affidavit submitted by now Attorney General Saxbe, so that I would like to mention, because it would be unfair to you and my colleagues if this apparent discrepancy was not at least looked into.

Mr. KELLEY. All right. I will look into it.

Mr. RANGEL. Thank you very much.

[The following information was supplied subsequent to the hearing:]

Mr. Kelley subsequently informed, after examination of FBI records, that at no time had the telephone(s) of any member of the House or Senate been tapped by the FBI. Since the affidavit of the Attorney General in the Podell case has been sealed against out of court discussion, Mr. Kelley does not know the exact contents of that affidavit; however, based on information supplied by the FBI to Department of Justice for the preparation of that affidavit, Mr. Kelley believes that the affidavit does not conflict with his statement.

Mr. EDWARDS. Please proceed with your statement, Mr. Kelley.

Mr. KELLEY. Mr. Chairman, I understand that there might be a need for more time for discussion. Would you like to have me forego the reading of the statement?

Mr. EDWARDS. I believe that you had intended to read the first 15 pages?

Mr. KELLEY. Yes, sir, that is my intention.

Mr. EDWARDS. I think it would be of assistance to the committee to follow that plan.

Will you proceed.

Mr. KELLEY. Mr. Chairman and members of the subcommittee, I appreciate this opportnuity to offer you my views, and to participate in the development of needed legislation on this important issue, the balancing of the protection of individual rights with law enforcement needs in formulating legislative controls on criminal justice information systems.

I want to make clear that I support the formalization and clarification of controls on criminal justice information systems. I am in complete agreement with the ultimate objectives of the bills we are going to discuss today; namely, the protection of the individual whether he be an accused who is innocent, one who is acquitted, or one who is convicted, against improper use of information collected by criminal justice agencies.

We are all concerned with the unwarranted use of criminal justice information, whether it be used to improperly deny an individual employment opportunities or credit availability, or whether it follow him through life to the detriment of his reputation, even after his rehabilitation.

On the other hand, we should be careful that our zeal in protecting the rights of such individuals, however long overdue and necessary this protection may be, does not blind us to the sometimes competing rights of other individuals; namely, the public at large, especially the victims of crime. I am concerned that certain segments of these bills will deny to law enforcement valuable information necessary to fulfill

its responsibilities to protect the rights of those other individuals against criminal activity.

There is also an indication in H.R. 12575 and H.R. 9783 that, rather than attempt to regulate the use of computerized criminal justice data, it is easier and more desirable to prohibit the use of advancing technology by law enforcement. While some may argue that this assures a greater degree of protection against unwarranted use of such information, it certainly hamstrings law enforcement when it has a legitimate need for such information.

A blanket prohibition against using modern technology by criminal justice agencies, in any area, whether detection or prevention of crime, or use of information systems, smacks of "evening the sides" between offender and law enforcement, and makes the administration of criminal justice something of a game.

Criminal justice agencies should be encouraged to employ any technological advance which would make the criminal justice system more efficient, fair, and effective, while still protective of individual rights. Blanket prohibitions appear to be the result of little effort to effect necessary balances.

My appearance here today is to support, not to oppose, the objectives of these bills. The FBI participated in the preparation of H.R. 12574. I support the objectives and most provisions of the bills, so I will not address myself to those portions of the bills with which I agree or feel no clarification is necessary.

However, there are certain segments of the bills which, while admittedly aimed at the unwarranted use of criminal justice information, could severely restrict or preclude the effective use of criminal justice information by law enforcement to investigate and prosecute criminal activity.

It is those portions which I will discuss today in my prepared testimony and request that they be clarified, modified, or omitted. Because I have limited my statement to such portions of these bills, I do not want it interpreted that the FBI is opposed to these bills specifically, or to measures to define or expand the protection of individual rights against unwarranted Government activity generally. Nothing could be further from the truth.

What we are discussing here today is the use and dissemination of criminal justice information, after it is accumulated, and regardless of how it is accumulated. I hope at some future time to have an opportunity to discuss with you, or other committees of the Congress, the more basic issue of the need for, and standards for, collection of information, as it relates to individual rights.

There are several bills currently pending before Congress on this elemental issue, and there is a great deal of public and congressional concern over the scope and methods of criminal justice information and national security intelligence collection.

I share that concern, and want to assist in forging a balanced policy on that issue which will insure the maximum degree of individual civil liberty, consonant with the protection of the safety and security of society, which is to say, the protection of the civil liberties of all in the United States.

The legislation under consideration today presents several important issues in which I am vitally interested.

The first is sealing. These bills provide for the sealing of criminal offender record information, even against criminal justice agencies. Record information is to be sealed after a stated period of time during which the individual has been free from the jurisdiction or supervision of any criminal justice agency.

The objective of these measures appears to be the protection of an individual from having his record follow him after he is rehabilitated. While studies indicate that the majority of criminal recidivism occurs within a time frame short of the time periods enumerated in some of the bills, all criminal recidivism does not.

If only 10 murderers or kidnapers repeated their crime outside the statutory time frame, is not this enough to warrant criminal justice agencies access to offender records which may provide leads in subsequent murder or kidnaping investigations?

For example, during a kidnaping investigation, while the victim is still a hostage, the investigation may develop several suspects. An examination of past criminal records can produce information which reflects that one or more suspects have been involved in similar criminal activity. This could narrow the investigation and would lead to a detailed examination of their modus operandi, as contained in what the bills define as criminal intelligence files, which could produce invaluable information in deciding how to cope with the case, and might result in saving the victim's life.

Mr. EDWARDS. I believe we will follow the procedure today where we can interrupt you and discuss particular portions.

The administration bill that we are primarily discussing today provides that after 7 years of clean behavior without any connection with the criminal justice system, without any criminal activity on the part of a person who has been convicted of a crime, then his record would be sealed.

Now, you obviously think that period of 7 years is too short a time. The theory of the 7 years, of course, is to encourage people to rehabilitate themselves so that after 7 years of good behavior they can go back to being useful citizens.

Do you think a 10-year period would be better, a 15-year period, or is it the view of the FBI that there should not be any sealing of records at any time?

Mr. KELLEY. I think there should not be any sealing. The present policy of the Bureau insofar as the sealing of records can be best defined by Mr. Thompson.

Mr. THOMPSON. We have no sealing procedures as such. We are the repository of arrest data for law enforcement throughout the country. There are some 21 million individuals represented in our criminal files. We expunge a record at the request of the contributor. We expunged some 18,000 last year. When we expunge a record we notify each agency and department to which we had sent a copy of that record.

We also have a purging procedure whereby the record of a person over 80 years of age is removed from our files.

Mr. EDWARDS. Very good.

Could you address yourself to the rather modern idea of corrections, that we should encourage people to rehabilitate themselves and if they are clean for a certain period of time that their criminal record doesn't come back to haunt them at a later time?

Mr. THOMPSON. Yes, sir.

After reviewing this bill we selected at random a number of fingerprint cards received by the identification division over a 2-day period. I have some examples which demonstrate law enforcement's continuing need for offender record information. Under the proposed legislation these records would have been sealed.

Mr. EDWARDS. I think it would be very important if you would furnish those.

Do you propose to do it now or do you propose to submit them for the record later?

Mr. THOMPSON. I will be glad to do either. I can summarize them now.

Mr. EDWARDS. Summarize them now. This is a very important part of the testimony.

Mr. THOMPSON. The first case concerns one individual whose arrest record dated back to 1940 for theft, robbery, carrying a concealed weapon, and eventually for murder in 1945. He received a sentence of 15 years for the murder. It is not known when he was released from incarceration, but some 24 years later, in 1969, he was arrested for assault with intent to murder and received a 3-year sentence.

In November 1973 he was arrested again for murder and now is serving a 45-year sentence.

Mr. EDWARDS. May I interrupt there. I don't think the rule really would apply because you are talking about sentencing and that the judge should have this information at sentencing; is that correct?

Mr. THOMPSON. Yes, sir. The court should have that information; however, it is not clear to me——

Mr. EDWARDS. That information would certainly be available to the judge. We are just talking about the dissemination of this record through a criminal justice system record like that of the FBI.

Mr. THOMPSON. I gather that if there were some way, Mr. Chairman, for the judge to know that the record had been sealed that it would be in his authority to have it opened. It is not clear to me how he would know that this record was on file and had been sealed. In addition, sealing presents other practical problems in the criminal justice process prior to the sentencing phase. The proposed legislation seems to preclude a law enforcement officer from having pertinent criminal information for his protection when arresting a man with a sealed record of violence.

Mr. EDWARDS. I believe I understand.

Do you have another case there?

Mr. THOMPSON. Yes, sir; I have numerous cases.

A second case involves an individual convicted and sentenced to 16 months to 5 years for carrying a concealed weapon in 1941. He was paroled in 1942 and discharged from parole in 1944. He committed several minor offenses between 1943 and 1945, and 11 years later he was arrested for gambling.

He was last arrested in 1973 for unlawful use of a weapon, the same type of crime he had committed in 1941.

Another subject was convicted for violation of the National Motor Vehicle Theft Act, which is interstate transportation of a stolen motor vehicle. Following his arrest in 1960, he received a 3-year suspended sentence. Ten years later, in 1970, he was convicted for carrying a

concealed weapon. He has since been arrested for possession of marihuana, and was last arrested in January 1974 for larceny of an automobile, the same type of crime he was sentenced for some 14 years earlier.

Mr. EDWARDS. Well, thank you.

I think that you should submit the rest of those for the record. But then I think that both of us, the committee members and the Department of Justice, ought to consider whether or not there is ever going to be a time that records are sealed as to what impact it would have on encouraging people to be rehabilitated, because after all that is the theory and perhaps we can have a further communication on this subject—or does any member of the committee desire to comment?

[Following are 10 additional examples submitted by Mr. Thompson:]

1. Subject's record dates back to 1959 for assault and robbery. As a result of a grand larceny arrest in November, 1963, he was sentenced to Sing Sing Prison from 1.3 to 2½ years. Some nine years later he was convicted for possession of heroin and has subsequently been arrested for burglary and possession of heroin and was last arrested 1–25–74 for narcotic violation.

2. This individual has an arrest record dating back to 1929 under many different aliases for charges ranging from petit theft to possession of narcotics and fugitive from justice. He has served several jail terms and on 6–17–65 he completed his sentence for violation of parole and on 1–28–74, more than eight years later, he was arrested for burglary.

3. This individual was convicted in 1959 for grand larceny and received three years' probation. Eleven years later he was arrested and charged with willful murder and the charges were subsequently dismissed. He was last arrested 1–29–74 for carrying a concealed deadly weapon.

4. Subject's criminal record began in 1920 when he was convicted of breaking and entering and larceny. During the period 1924 to 1959 he was arrested on numerous occasions under various aliases for both misdemeanors and felonies. In 1959, with a record of 5 prior felony convictions, he was sentenced 6 months to 5 years for theft of vehicle and failure to stop and render aid after an accident. He was paroled 6–26–62. Nearly 12 years later on 2–8–74 he was arrested for bank robbery.

5. Subject was convicted of a felony in 1928 and was incarcerated in a Federal institution. In 1933 he was convicted of a misdemeanor. According to his FBI identification record he did not come in contact with a criminal justice agency again until 1972 when he was arrested for petty theft. In 1973 he was arrested for burglary.

6. Subject was convicted in 1956 of larceny of automobile and received a 2-year suspended sentence. He was convicted of carrying concealed weapon in 1957; interstate transportation of a stolen motor vehicle in 1957; and escape from a Federal reformatory in 1959. As a juvenile he was incarcerated until he reached his majority on 1–1–61. Some 10 years later on 10–16–71 he was arrested for suspicion of forgery and conspiracy, and on 12–21–73 for drunk driving on highway.

7. This individual was convicted of several crimes during the period 1942 to 1953 for petty larceny, interstate transportation of motor vehicle and grand larceny. In 1965 was convicted of selling fireworks and received a sentence of 6 months. Eight years later he was convicted of theft from interstate shipment following his arrest in 1973.

8. This individual's arrest record dates back to 1933. In 1945 he was sentenced to 10 years for highway robbery. In 1956 he was again charged with armed robbery but charge changed to grand larceny and he was sentenced to 7 years. He escaped 2–2–57 and was captured on 1–4–64 and returned to prison. It is not known when he was released but in 1973 he was arrested in another state for carrying a weapon and the unlawful use of a weapon.

9. This individual was arrested several times during the period 1940–1945 for violation of Child Welfare Act, assault and battery, neglect of minor children and assault with intent to kill. In 1946 subject was convicted of attempted

atrocious assault and received sentence of 7 years. Some 28 years later subject was arrested for possession of lottery slips.

10. Subject's first arrest came to the attention of the FBI when he was arrested in 1944 for impersonation and was released to the probation authorities. He was next arrested in 1956 and confined to a Post Stockade for AWOL. In 1957 he was convicted of manslaughter and received sentence of 10–20 years. It is not known when he was released from prison but later in 1973 he was arrested and charged with rape, sodomy and unlawfully imprisonment.

Mr. DRINAN. Shall we vote now?

Mr. EDWARDS. I am going to go. Mr. Wiggins is coming right back and he is going to continue. We will be right back. We will declare a brief recess.

[Brief recess.]

Mr. EDWARDS. The subcommittee will come to order.

You may proceed, Mr. Director. We are very sorry for the interruption.

Mr. KELLEY. Further, proponents of the sealing propositions appear not to have understood, or to have given little consideration to the mechanics of identification procedures and investigative techniques.

For example, if sealing contemplates physically removing rap sheets and fingerprint cards from current files and depositing them in a closed or sealed file section so as not to be available for current day-to-day use, the result could be as follows: When a police department submits fingerprints lifted from the scene of a murder and asks the identification division (either of the FBI or of its own department) to compare the prints with those of several suspects, the prints of one of the suspects, who happened to be the murderer, could be sealed and thus not available for comparison.

Another example, dealing directly with offender record information, as opposed to fingerprint comparison, is the case of a police officer on his way to make an arrest of an individual for embezzlement, a white collar type of crime.

If that individual's sealed record reflects a long list of violent assaults and/or past commitment to a mental institution, even though these events may have occurred more than 7 years prior, I feel the lack of this information unneccessarily increases the risk to the safety of that officer and third parties, because the officer is not alerted to take special precautions.

Under the provisions of these bills it is not clear how an identification division will be able to maintain records. If an individual with a prior criminal record is arrested and uses a new alias, the only positive method of identification is comparison of his fingerprints with those submitted from previous arrests filed as to the classification, not name.

If these prior arrest fingerprints are sealed from current day-to-day use, there will be no way to learn of his prior record, effect positive identification, and, if felt necessay, petition for unsealing.

If such fingerprint cards are sealed and only a name index of fingerprint cards which are sealed is maintained, the use of a new alias would be all that is necessary to preclude location of that record.

The unsealing provisions of these bills are meaningless, unless it is intended that sealing does not apply within the identification divisions of the FBI and respective criminal justice agencies. You are then confronted with the proposition that the sergeant in charge of the identification division of a police department cannot inform an inves-

tigative officer of the same department of the contents of a sealed record, and must require that officer to get a court order or a "specific determination of the Attorney General" to unseal the record. Is this a realistic expectation; especially in the case I mentioned earlier of the planned arrest of an embezzler with a sealed record of violence?

Members of the subcommittee, there is a continuous need for criminal justice agencies to have unfettered access to prior criminal records for subsequent investigations and for the safety of their personnel and innocent bystanders.

Some of these bills provide that a criminal record is to be sealed within a certain time after an arrest if there has been no conviction during that period, no prosecution is pending, and the individual is not a fugitive.

In some proposed legislation no mention is made of subsequent arrests. The fact that no prosecution is pending or that the individual was not convicted and is not a fugitive should not automatically lead to the conclusion that the arrest was faulty or unfounded.

Failure to prosecute or convict could have been caused, and often is caused, by refusal of witnesses to testify either of their own volition, or because they were threatened or murdered, or because evidence was destroyed.

Under some provisions it would appear that each arrest of a violent child molester would be sealed on, for example, its fifth anniversary, even though there had been subsequent arrests for similar offenses, as long as no witnesses had been willing to testify against him.

I am completely opposed to sealing any criminal justice information against criminal justice agencies. The likelihood of abuse of such information, as long as it is confined within criminal justice agencies, appears to be so minimal in contrast to the value of this information for criminal justice purposes that I unequivocally urge you to omit any restrictions on criminal justice agency access to any type of criminal justice information.

Mr. EDWARDS. May I interrupt you at that point?

I am not in any wide disagreement with a lot of the things that you have been pointing out by the sealing of records even though the administration bill, the Department of Justice bill provides for sealing after 7 years in the interest of rehabilitation.

Now, would you have an objection to the sealing after 7 years, or 10 years, of a conviction record, where the information is going to other than criminal justice, a police agency?

In other words, do you feel there should be no sealing whatsoever as long as the information is kept within the community of law enforcement? Is that correct?

Mr. KELLEY. I am opposed to sealing against the criminal justice family. Are you speaking of record checks for banks and other noncriminal justice agencies?

Mr. EDWARDS. I don't think we want to get into that yet because the bill provides a completely different formula for noncriminal agency use.

But you do believe that a record should only be sealed upon death or upon the age of 80. Is that correct?

Mr. KELLEY. That is right.

Mr. EDWARDS. Go ahead.

Mr. KELLEY. The sealing of certain criminal justice information against noncriminal justice agencies is a major public policy question which must be given serious consideration by the Congress. Personally, I agree with the position of the Department of Justice as stated before this subcommittee in 1973 that:

A person's criminal history is extremely important in assisting Federal employers to make well informed decisions about whom they hire. If a certain Government agency is attempting to fill a position in its payroll office, we believe that the agency has a right, in fact a duty, to determine if an applicant has been convicted of embezzlement.

We are also (concerned with the prohibition on) the use of (criminal offender) records for employment screening in certain vital and sensitive industries in the private sector, such as banking and securities. In such industries, the screening of applicants is a proper and necessary procedure designed to maintain the integrity of these institutions, and to preserve the public confidence in them.

Mr. EDWARDS. If I may interrupt you there.

You have no problem then with the Department of Justice bill, H.R. 12574, which provides that, in the cases you are referring to, employment cases—a noncriminal justice use of a criminal record—that this record cannot be used if the individual was acquitted, the charge dismissed, prosecution abandoned, or more than 1 year has elapsed from the arrest and no active prosecution is pending?

This is the provision in the Department of Justice bill for cases where the criminal record is being used for employment or for licensing or some reason other than law enforcement?

Mr. KELLY. Right. I might substantiate that by saying that I was chief of police of Kansas City, Mo., for many years and we instituted, during my tenure in office, a rule that in response to employment checks we gave nothing except convictions. I feel this practice is proper.

Mr. MCCLORY. Mr. Director, do we have any statistics upon which to base the conclusion or the assumption that a person employed, an embezzler who commits his crime in private employment while he is with a banking firm or security firm or financial office of some kind, is much more apt to commit the crime because he has a prior police record than a person who commits this embezzlement for the first time?

Mr. KELLEY. I cannot answer you from a statistical standpoint. Unfortunately our rehabilitative measures are not as effective as they should be, not due to the fault of the person at whom they are directed. He is unfortunately placed in the position where people are not kind to him and don't encourage him and many times he might fall prey to a reissue, so to speak, of his former activities.

I do know personally of many cases where this has happened. I connot give you any statistics on recidivism, but I do know of many cases where offenders have reverted to criminal activity.

Mr. MCCLORY. Thank you.

Mr. EDWARDS. Proceed.

Mr. KELLEY [reading]:

* * * Many jurisdictions require a fingerprint check before issuing licenses to purchase firearms or to be a private detective, a pharmacist or an attorney. While we recognize that there can be abuses of this procedure, we do not believe that the public good would be advanced by eliminating the use of these records altogether for licensing purposes. I submit that there are certain categories of individuals that must be thoroughly investigated before a license is issued because

of the nature of the activity which the license sanctions. The public deserves this protection and we would be remiss to deny it.

Therefore, we would prefer to permit a wider dissemination of criminal arrest records (to noncriminal justice agencies, but with restrictions).

* * * (The restrictions detailed require that all noncriminal justice agencies with a valid non-law enforcement purpose for using criminal justice information obtain that information only through a law enforcement agency under provisions of law and approved by the Attorney General by regulation). By valid non-law enforcement purposes, we have in mind such activities as employment stability and security within the Federal Government and Federal industries in the private sector.

H.R. 188 and H.R. 9783, on the other hand, provide for the purging of certain criminal justice records. This is excessive since there may be many reasons, some beneficial to the subject of the record, for later having this material available.

For example, if someone were accused of having been convicted of murder 10 years earlier, there would be no record for him to prove that he had been acquitted.

Mr. EDWARDS. There would be a record in the court proceedings, in the docket, and that, of course, is public information and would have nothing to do with the purging of the criminal justice records.

Mr. KELLEY. Mr. Campbell has a comment he wanted to make in that regard.

Mr. CAMPBELL. I believe, Mr. Chairman, it would depend on your definition of a criminal justice record. It is conceivable that the expungement could go to the court record itself.

Mr. EDWARDS. None of these bills provide for that, Mr. Campbell, to my knowledge.

Does anybody want to dispute that—the court records themselves?

Mr. WIGGINS. Mr. Chairman, I think that it is indeed possible that the definition of criminal justice information systems extends to court records. I realize there is perhaps dispute with respect to that but if we are dealing with the administration bill before us, for example, I think that the definition of processing information is adequate to include material which is in the criminal justice system.

I don't wish to resolve that issue but I think our definitions are broad enough possibly to reach that far.

Mr. EDWARDS. I am sure all in the committee would agree it would not be our intention to have this legislation have anything to do with court dockets or trial court information or proceedings that have traditionally been open to the public.

Mr. KELLEY. May I resume?

Mr. EDWARDS. Yes; please.

Mr. KELLEY. Another issue I would like to discuss is that of dedicated versus shared information systems. I feel that any legislation dealing with control of criminal justice information systems should specifically and unequivocally provide that every system is to be under the control of a criminal justice agency, and that no criminal justice information system should share equipment, facilities, or procedures with any noncriminal justice system.

Wherever a shared system exists, there is always the risk that the noncriminal justice agency which shares the system could accidentally or intentionally obtain access to the criminal justice information contained in the system.

The collection and computerization of criminal intelligence information is also made an issue in these bills. I do not feel that any criminal justice agency should include criminal intelligence information in a system to which direct, unchecked access is given to other agencies, even though they be criminal justice agencies.

Extremely sensitive criminal intelligence information is received from informants. Much of this information is so singular in nature that it would severely jeopardize the source's security if any participating agency could access the computer without demonstrating a need to know such information to the contributor.

As a further example of the dangers of unchecked multiagency access to computerized intelligence, take the case wherein an informant supplies information that certain law enforcement officials are taking bribes to allow bookmaking in a particular city. If their department has unchecked, direct access to the computer in which this intelligence is stored, this could jeopardize any effective investigation, and the safety of the informant.

Often raw intelligence information is volunteered by complaints or informants that law enforcement is not in a position to authenticate. The unfettered distribution of this type of information, which may be inaccurate or false, could unjustly embarrass individuals and subject law enforcement to well-founded criticism.

A facile and superficial answer to these arguments might be, do not put such information in a multiagency direct access computer. This raises the more basic question, how does an agency decide what intelligence to put into such a computer?

I foresee dissatisfaction with such a system on the part of every agency which feels it is fully contributing intelligence information, but feels that other participating agencies are holding back. This could eventually lead to the situation where only very low level intelligence, of little value to anyone, would be included in such a system.

However, there should be no prohibition on a criminal justice agency utilizing any method of advanced technology to improve its efficiency and effectiveness. I feel any criminal justice agency should be permitted to computerize intelligence information for its own use.

This would make that criminal justice agency more effective and more efficient in its own jurisdiction. The agency, with in-house computerized intelligence information, could then disseminate that intelligence information to any other criminal justice agency which demonstrates a need for the specific information requested.

I might again point out from personal experience that the Kansas City Police Department has a unit known as the intelligence unit, and its members are the only ones to whom intelligence information is available, unless others display good solid reason for needing that information. In that city—where they have a complete computerization of the arrest files—in the event a subject is stopped by an officer other than one from the intelligence unit and the computer prints out information about the man, it does not include information in the intelligence file.

On the other hand, the computer is programed so that an alert goes to the intelligence squad and they are the only ones who know that the person stopped is the subject of an intelligence file. The intelligence

squad subsequently might see fit to contact that officer and say, Why were you making inquiry about this particular individual?

In other words, I feel this type of material should be very closely guarded and be kept carefully to avoid the things that can happen with careless distribution of the information.

Criminal offender processing information, as defined in H.R. 12574, could include information similar to criminal intelligence information; for example, information provided confidentially to an investigator conducting presentencing investigation or to a prison official. For the same reason that criminal intelligence information is not available to the individual to whom it pertains, I feel that criminal offender processing information should not be available to the individual to whom it pertains.

These bills provide for an individual to obtain access to his own criminal offender record and also provide procedures for him to challenge that record. I support these provisions.

Mr. WIGGINS. May I interrupt at that point.

We have to be careful, of course, in using our words here when the words involve such major differences in meaning.

When you say criminal offender information, are you referring to criminal offender processing information, that the individual should have access to that criminal offender processing information; or are you restricting it to the record information?

Mr. KELLEY. I am considering in this particular reference his so-called rapsheet, his record of arrest.

Mr. WIGGINS. Record information. And I have to note, as you have noted, Mr. Director, that the administration bill does provide individual access to particular criminal offender processing information if pursuant to a court order.

If one lets his mind wander it would seem possible for an individual to file an action contesting the accuracy of criminal processing information perhaps as bearing upon the sentence which he received, and through normal civil discovery procedure rules having full access to that data even though his action is later found to be without merit and in the course of this action could well compromise all of the individual informants who contributed to the development of that packet of information.

Wouldn't you agree with that, Mr. Director?

Mr. KELLEY. I will look into this.

[Subsequent to the hearing, Mr. Kelley submitted the following statement:]

Section 14 of the Administration Bill provides a civil cause of action to anyone who alleges that criminal justice information has been maintained, used or disseminated in violation of the Bill. The Bill specifically deals with accuracy and completeness of information only with respect to offender record information. Entries into an offender record are based only on public events—arrest, conviction, incarceration, release, and the like. A suit contesting the accuracy of offender record information would require access only to public records of the events upon which the entries are based—police blotters, court and prison records—not to intelligence files.

It would appear that civil discovery of offender processing and intelligence files could be made only upon allegation of violations of Section 5, involving noncriminal justice use, such as dissemination to noncriminal justice agencies. The original complaint would have to allege misuse in a specific case involving specific information in specific circumstances. It would appear that any related discovery could be limited to the specifics of the case alleged.

Mr. EDWARDS. Proceed.

Mr. KELLEY. Currently the FBI provides copies of offender record information to the individual to whom it pertains upon proper identification. I believe that any legislation, however, which provides for the right of individual review should clearly specify that any action taken to correct a record should be taken against the originating agency of the challenged entry, rather than against the agency from whom a composite record was obtained.

For example, if an individual contests an arrest entry by the Washington Metropolitan Police Department, corrective action should be sought directly from that department rather than the FBI, which furnished the individual his composite record.

Mr. DRINAN. May I ask a question at that point?

It seems to me, Mr. Kelley, that you are putting an impossible burden upon the individual who has been arrested somewhere in New England or in California. If he goes back to the originating agency, in all probability they will say that the officer no longer works here or we are not going to change the circumstances, and I have been through that on many occasions with a constituent and they simply refuse any remedy.

What happens in that case? Why can the FBI, as you are suggesting, just say we don't guarantee anything about these records, we just disseminate them, and if you have any grievance or any correction to make you go back to the originating agency?

By the mere fact that you are disseminating thousands, millions of these records, it seems to me you are putting some warranty on them.

Mr. KELLEY. May I have Mr. Thompson answer that, Congressman?

Mr. DRINAN. Yes.

Mr. THOMPSON. Congressman Drinan, the concept of our identification division is that it is the central repository for arrest information; this has been going on for 50 years—this year is our 50th anniversary. Under the concept that we are the repository, we cannot vouch for the accuracy of the information other than to state that we are disseminating the exact information which was furnished to us.

I think it would be highly presumptious for us at the request of a subject writing in and saying that this charge of murder was later changed to manslaughter for us to change the records without having an authorization or court order from the place where this record originated.

Mr. DRINAN. That is not the question, sir.

The question is this:

What is going to happen when somebody goes back to Buffalo or to Miami and they absolutely refuse to change the records, if the record went into an arrest and that arrest is totally disposed of later?

As you know, better than 75 percent of all arrests don't result in conviction. There are thousands and millions of people out there who have an arrest without any conviction. They in many, many cases are unable to get the local person to add something on to correct the FBI file.

It seems to me that the whole purpose of this bill, and as you may know, this subcommittee has been down to the files of the FBI on

several occasions, we have had extensive hearings on this matter, and the whole point is to protect the privacy of individuals.

Errors are going to occur. Inadequate records have been disseminated. Mr. Patrick Gray, then the Acting Director, told us that for years and years Philadelphia refused to send in any disposition of the arrest records and yet the FBI sent out the arrest records of thousands and hundreds of thousands of people and thereby injured their reputations.

So it seems to me that you can't say that the States or the people involved in this thing have to accept the entire burden. The burden has to be upon the FBI if in fact they disseminate the information that is given to them.

Mr. THOMPSON. I cannot answer all of your generalities, Congressman Drinan, but I——

Mr. DRINAN. Just answer the question.

Mr. THOMPSON. I would submit to you that the same court that convicted this individual should certainly be available to him——

Mr. DRINAN. I am talking about the 75 percent of the people who were not convicted, and I have been in correspondence with Mr. Kelley about a constituent of mine who was arrested and 2 days later the arrest was completely set aside because this was all the question of association with another individual who may have been guilty.

I have written to Mr. Kelley and he responded very promptly and very nicely in October 1973, and that individual, a constituent, still does not have his record out of the FBI files and he wants to apply for Federal service and I know that unless we do something rather soon he is going to be prejudiced, and there are thousands like him.

Mr. THOMPSON. I can assure you when the request comes in from the contributing agency that record will be expunged pursuant to our procedures. With reference to this record——

Mr. DRINAN. That is not the point. The point is he is having difficulty, like other people, with the originating source and the originating source says we are not going to change the record; the record says you were arrested, there was disposition, we have no form to send into the FBI. They are not going to move at all.

Mr. THOMPSON. I can assure you if the originating agency does not change the record that we will not.

Mr. DRINAN. Therefore, you are saying that this individual under your proposal and what Mr. Kelley just wrote has absolutely no remedy and you don't want him to have a remedy?

Mr. THOMPSON. No, sir.

Mr. DRINAN. You want him to exercise whatever remedy is in the Administration——

Mr. THOMPSON. I am saying his remedy is in the court of law as is any other citizen's remedy, and with reference to dispositions I can assure you that while the situation is not as good as we would like it to be, it is much better than it was.

We have encouraged agencies through the years to submit dispositions on cases. We are receiving now about 11,000 arrest records per day from agencies throughout the country. We are receiving approximately 8,700 dispositions per day. In addition, some dispositions are on fingerprint cards when they come in initially. Thus, in more than 8,700 out of the 11,000 submissions we are getting the dispositions.

Mr. DRINAN. Except there are still millions of people for whom you have arrest records and if there is no disposition you disseminate the arrest record and in 75 percent of those cases they had no conviction.

Mr. THOMPSON. We have no statistics as you do.

Mr. DRINAN. I have no statistics. I have been looking for them for months.

How many arrest records without any convictions are being disseminated day after day to the detriment of American citizens by the FBI?

Mr. THOMPSON. You use the term percentage of 75 percent.

Mr. DRINAN. That is in the President's Law Enforcement Commission report of 1969 or 1970.

Mr. THOMPSON. I have no such statistics.

Mr. DRINAN. I have here the hearings we had in this committee.

Could you tell me how many millions of people have arrest records without any disposition recorded by the FBI, yet the FBI goes on, year after year, disseminating millions of arrest records and not knowing whether these were false arrests or not?

Mr. THOMPSON. I don't have statistics on that.

Mr. DRINAN. I think it is essential that we have them. This legislation is aimed, among other things, at that particular problem. If you don't have any statistics then what can we take to the American people, as the Congress is supposed to protect their right of privacy?

My constituent was arrested and it was an illegal arrest and that is down somewhere on a police blotter or in a court and he has been unable to get the FBI to set aside this illegal arrest.

Mr. THOMPSON. We would welcome legislation, Congressman Drinan, to require that dispositions be submitted. We have encouraged law enforcement agencies through the years to submit dispositions. As I say, the situation is much better than it was, but we have no penalty that we can impose. We urge the contributors to submit dispositions.

Mr. DRINAN. That is not the question.

Would you welcome legislation that would require you not to disseminate arrest records until or unless you get a disposition?

Mr. THOMPSON. Well, that is what this his all about.

Mr. DRINAN. That is what you are opposed to.

Mr. THOMPSON. There are many reasons why——

Mr. EDWARDS. If you will yield for a moment.

The administration legislation provides that arrest records that are not conviction records cannot be disseminated for noncriminal justice purposes if the individual is acquitted, the charge is dismissed, abandoned or 1 year has elapsed.

That does take into a great extent the noncriminal justice use.

Now, my colleague from Massachusetts refers to a naked arrest record with no disposition that has been, year after year, disseminated all over, very unfairly sometimes, to criminal justice agencies, to parole boards, judges, and to the criminal justice system, generally.

Your bill, the administration bill, puts no time limitation at all. I presume that the 7-year period would again take effect. So the Justice Department bill certainly takes care of the matter with regard to noncriminal use, but not, as Father Drinan pointed out, for the criminal justice use; that is correct?

Mr. THOMPSON. I believe that is correct, Congressman.

Mr. EDWARDS. And you are also saying that you would not necessarily resist an amendment that would make it mandatory, somewhere along the line, or that would at least encourage the obtaining of dispositions?

Mr. THOMPSON. That is correct. However, if records without dispositions are not to be disseminated, we would have to come to you for a considerable increase in manpower to do this. This is a volume operation of approximately 20,000 to 25,000 a day. Many rap sheets are rather lengthy. If we reviewed each one of them to delete arrests without dispositions it would cause a great administrative problem, but certainly we will do whatever the legislation requires.

Mr. MCCLORY. You would favor, would you not, that part of this legislative proposal which would impose upon criminal justice agencies which gather and furnish criminal offender record information, and take part in the criminal justice information system, legislation which would require them to complete their record insofar as disposition of the proceedings is concerned, would you not?

Mr. THOMPSON. Yes.

Mr. MCCLORY. You want legislation that would impose on the local criminal justice system the obligation to complete the records, especially if they are going to participate in any funds under LEAA?

Mr. THOMPSON. We would welcome that. Anything that would require them to send in more dispositions we would welcome that.

Mr. MCCLORY. For the purpose of enforcing the law, it seems to me to be that certain statistics and certain information that you have compiled in connection with your report on crime careers, it is interesting to point out that 92 percent of the persons arrested for criminal activity had their case disposed of, dismissed or they were acquitted in the trial, so a very high percentage of recidivism occurs with regard to the individual who was acquitted in the trial of his case.

Is that correct?

Mr. THOMPSON. Yes.

Mr. MCCLORY. So that this information of an arrest in and of itself, even though there was an acquittal, is important information in enforcing the law, isn't it?

Mr. THOMPSON. Yes; it is, and as the Director has pointed out, there are many reasons why a person may have been acquitted.

As you know and I know, it does not mean in every case that the man was completely innocent but it may have meant that somebody, the only witness, was murdered, or it may have meant that somebody was afraid to testify or somebody died.

Mr. MCCLORY. What you are saying applies frequently in the case of individuals involved in organized crime who through their own machinations and their political connections contrive to be acquitted even though they continue to pursue their life of crime; is that correct?

Mr. THOMPSON. Unfortunately I know that from personal experience and I know the Director does from his work in Kansas City as chief of police.

Mr. WIGGINS. I am going to interrupt your testimony to ask you a question about an area of the administration's bill which you do not touch on in your direct testimony.

On page 19 of the administration's bill there is a section 14 which is entitled, Civilian Criminal Remedies to the Individual.

I want to lay a fact situation on you and then ask you a question with respect to these civil remedies.

Your agency, the FBI, maintains criminal intelligence information with respect to organized crime figures, does it not, Mr. Director?

Mr. KELLEY. We do maintain that yes.

Mr. WIGGINS. And I believe it would be your view that such information should be disclosed to the organized crime figures themselves, that it would prejudice informants and be terribly disruptive of law enforcement?

Mr. KELLEY. Correct.

Mr. WIGGINS. Now the section in question permits a civil cause of action by any individual with respect to whom criminal justice information is maintained.

Now, as you know, under the act the term criminal justice information is the broad term to include intelligence information. I gives a right of action to such individual if he alleges a violation of the act.

The act says, in section 7, that it is a violation for the agency to fail to assure accuracy and completeness.

Now, let me suppose that a principal Mafia figure filed a civil action in the U.S. District Court alleging that the FBI had failed to assure the accuracy and completeness of criminal justice information with respect to him, and in particular your intelligence information, and promptly after the filing of that civil action instituted discovery procedures, which are authorized in a civil action; namel, to find out what those criminal justice information records may in fact be.

Now if that is authorized, under the language of the administration's bill, and I believe that it is authorized, that would be terribly disruptive of your agency, would it not?

Mr. KELLEY. Yes sir.

Mr. WIGGINS. I would like, Mr. Director, that you consider the problem which I have just discussed and perhaps ask some of your staff to reflect upon it further and if they concur that such a civil action would be permissible, then to give this subcommittee the benefit of its thinking on what kind of restrictive language would be appropriate to add to the act to prevent a Mafia figure from instituting a civil action, not for the purpose of winning it, but for the purpose of conducting discovery as a part of that civil action.

Mr. KELLEY. We will do that, Congressman.

Mr. WIGGINS. Thank you.

[Subsequent to the hearings, Mr. Kelley submitted the following statement:]

Section 14 of the Administration Bill provides a civil cause of action to anyone who alleges that criminal justice information has been maintained, used or disseminated in violation of the Bill. The Bill specifically deals with accuracy and completeness of information only with respect to offender record information. Entries into an offender record are based only on public events—arrest, conviction, incarceration, release, and the like. A suit contesting the accuracy of offender record information would require access only to public records of the events upon which the entries are based—police blotters, court and prison records—not to intelligence files.

It would appear that civil discovery of offender processing and intelligence files could be made only upon allegation of violations of Section 5, involving non-

criminal justice use, such as dissemination to noncriminal justice agencies. The original complaint would have to allege misuse in a specific case involving specific information in specific circumstances. It would appear that any related discovery could be limited to the specifics of the case alleged.

Mr. EDWARDS. Very well, proceed, Mr. Director.

Mr. KELLEY. Further, I feel that stiff penalties for alteration and subsequent use of a criminal record by anyone who has obtained a copy via these review provisions should be added to such legislation.

H.R. 12575 provides for the creation of a Federal information systems board and a Federal information systems advisory committee. As the bill is currently written, it would create an independent agency with centralized control over all information systems, both Federal and State, and apparently would not be limited to criminal justice information systems.

For anyone who is concerned over the possible creation of a master mechanism to control, administer, and provide access to all types of information anywhere recorded about a particular individual, this concept should be highly objectionable.

In my view, it is preferable to have independent information systems dealing with specific topics such as criminal justice, social security, taxes, welfare, et cetera, under the sole direction of those directly concerned with the activities for which the information is used.

The board which is contemplated under this bill would have representatives of the public, unrelated to criminal justice; however, the bill does not specify in any detail what the qualifications of these individuals are to be.

The board concept appears to be akin to the civilian review board concept that some have attempted to impose on local police departments, and as such implies that criminal justice agencies are incapable of fairly administering a criminal justice system.

I reject that implication, and I hold up as an example of effective, fair, and efficient multi-State and Federal cooperation on a criminal justice information system, the National Crime Information Center.

Finally, I note that some provisions of these bills preclude even indirect access by noncriminal justice agencies to criminal offender record information.

Mr. BUTLER. Along this line, Mr. Director, I would like to develop for my own information just exactly what noncriminal use there is of the information which you have collected from time to time. I have made available, I think, to the committee the annual statistical report of your Identification Division for fiscal year 1973.

Do you have a copy of that report?

Mr. THOMPSON. I have a copy of it.

Mr. BUTLER. Do you have a copy of it?

Mr. THOMPSON. Yes, sir.

Mr. BUTLER. Let me ask you some questions about that then, if I may.

Mr. THOMPSON. Yes, sir.

Mr. BUTLER. Let us refer to the fingerprint statistics and explain to me what these figures mean in terms of who makes use of your information and where it comes from.

Mr. THOMPSON. Yes, sir, I will be glad to.

This is the annual statistical report for fiscal year 1973. It shows total fingerprint cards received during the year of 6,034,310, for an

average daily receipt of slightly over 24,000—24,234; and total latent fingerprint cases received, 36,123.

Latent fingerprint examination is a service that we perform for both local police departments and Federal agencies. Our experts then go out and testify in court concerning their findings. Correspondence and name checks received totaled 4,640,927. We now have as of the end of the fiscal year, 1973, 159,345,941 fingerprint cards on file; index cards, in our possession number about 167.5 million.

There are more index cards than there are fingerprint cards because some people have aliases.

Then fugitives identified through the receipt of these fingerprint cards, 40,642.

Mr. BUTLER. Mr. Chairman, may we put this in the record?

Mr. EDWARDS. Yes; without objection.

[The information follows:]

EXPLANATION OF ENTRIES APPEARING IN THE FIRST COLUMN ON THE ANNUAL STATISTICAL REPORT OF THE IDENTIFICATION DIVISION FOR FISCAL YEAR 1973 RELATING TO CIVIL FINGERPRINT STATISTICS AND THE CORRESPONDING FIGURES IN THE SECOND COLUMN

The figures appearing opposite Army, Air Force, Navy and Marine represent the number of fingerprint cards received from the Department of Defense of individuals who were fingerprinted in connection with military enlistments. The figures opposite U.S. Coast Guard represent the number of fingerprint cards submitted in connection with enlistments in the Coast Guard and applicants for Merchant Seaman's Documents which are issued by the U.S. Coast Guard. The figures opposite Security indicate the number of fingerprint cards submitted by the U.S. Civil Service Commission of applicants for civilian employment with the U.S. Government. The figures opposite Alien represent the number of individuals fingerprinted in connection with alient registration and their fingerprints submitted to the FBI by Immigration and Naturalization Service. The figures opposite Miscellaneous Applicants reflect the total number of fingerprint cards received from the Department of Defense in connection with security clearances; the Immigration and Naturalization Service of individuals applying for naturalization and adjusted immigration status; applicants for employment with Federally chartered banking institutions; and state agencies in connection with employment and licensing. The purpose of a submission of the fingerprints by these contributors is to determine if the individuals fingerprinted have an arrest record in the files of the FBI Identification Division.

The figures opposite Personal Identifications represent the number of fingerprint cards submitted by citizens in the United States for filing in the civil file for identification purposes.

Annual Statistical Report—Identification Division—Fiscal Year 1973

Fingerprint cards received	6,034,310
Daily average fingerprint cards received	24,234
Corres-name checks received	4,640,927
Latent fingerprint cases received	36,123
Fingerprint cards in possession	159,345,941
Index cards in possession	167,486,882
Fugitives identified	40,642
Workdays this fiscal year	249
Wanted notices in file	[1] 120,977
Number of contributors	7,710
Estimated number of persons represented in:	
Criminal files	20,669,221
Civil files	39,605,655
Total	60,274,876

[1] Includes 41,562 parole and 12,127 probation violators.

FINGERPRINT STATISTICS

Type	Total received	Daily average gross received	Illegible returns	Net for search	Total in possession
Criminal	3,253,119	13,064.74	364,823	2,879,746	69,699,033
Deceased	20,260	81.37	2,549	17,711	[1] 6,879,303
Civil:					
Army	254,339	1,021.44	81,358	172,981	27,531,148
Air Force	55,381	222.41	7,110	48,271	2,512,672
Navy	115,355	463.27	23,368	91,987	9,806,664
Marine	57,326	230.23	15,025	42,301	2,562,926
U.S. Coast Guard	30,075	120.78	3,794	26,281	927,401
Security	312,058	1,253.25	60,430	251,628	8,587,743
Alien	266,485	1,070.22	54,976	90,554	11,540,501
Miscellaneous applicants	1,647,123	6,614.95	317,098	[2] 1,330,025	11,412,151
Personal identifications	22,789	91.52	2,609	0	5,783,972
Subtotal	6,034,310	24,234.18	933,140	4,951,485	157,243,514
Adjusted [3]					+2,102,427
Total	6,034,310	24,234.18	933,140	4,951,485	[4] 159,345,941

[1] Includes 4,087,268 prints of deceased persons and 2,792,035 of persons 75 years of age and over.
[2] This figure consists of approximately: 117,595 from banks; 90 from companies operating as common carriers; 576,209 miscellaneous applicants from law enforcement agencies; 636,131 governmental applicants exclusive of security.
[3] Includes 8,953,223 civil servie; 28,507 maritime, but does not include 6,879,303 deceased.
[4] Of this figure 35,702,604 prints are recorded on microfilm.

Mr. BUTLER. Without dwelling at length on the figures they will now be in the record.

Can you explain, for example, what percentage of these statistics are criminally related, totally received?

Mr. THOMPSON. We received 3,253,119 criminal prints.

Mr. BUTLER. All right, sir, turning to the items below that column, explain to me, in that column, explain if you will for the record what use the Army, for example, would make of this information.

Mr. THOMPSON. We receive points on persons entering the Army and other military services. From the Army we received 254,000 fingerprint cards. Air Force——

Mr. BUTLER. Without going into the figures, why is this information of value to the Army, the Air Force, Navy, and Marines?

Mr. THOMPSON. When an individual goes into the service we search for arrest records and furnish this information to the military under the agreement.

Mr. BUTLER. Why would they want that information?

Mr. THOMPSON. Well, it is of interest to them to know whether a person has an arrest record, since he may be disqualified for military service because of a prior arrest record.

Mr. EDWARDS. Under the administration bill the Army would only be entitled to conviction records, except with the 1-year exception.

Mr. BUTLER. I understand that.

Now, going to the further classification, security. Who are we referring to there?

Mr. THOMPSON. These are prints that are submitted to us by other Government agencies. We receive fingerprint cards under Executive Order 10450 from all branches of the Federal Government either for employment or security checks.

This is a service that we give to other Federal agencies, not only the arrest record but also name checks for information from our files.

Mr. BUTLER. Now, the category alien.

Mr. THOMPSON. When aliens register, their fingerprints are checked and any arrest record is furnished to the Immigration and Nationalization Service.

Mr. BUTLER. Now, you have a category which is a substantial one, miscellaneous applicants.

Mr. THOMPSON. These are checks of our arrest files for other Federal and State agencies for information which may be of interest to them.

Mr. BUTLER. Does this include law enforcement agencies?

Mr. THOMPSON. Yes, sir.

Mr. BUTLER. And governmental applications for other purposes than security?

Mr. THOMPSON. Yes.

Mr. EDWARDS. I believe that under the administration bill, again, that the dissemination of these records would be limited to those authorized by Federal law. These disseminations that you refer to are presently authorized specifically by Federal law but under the bill they would not be; is that correct?

Mr. THOMPSON. It is my understanding that under the proposed legislation it would take separate legislation to have us continue this service.

Mr. EDWARDS. That is right.

Mr. BUTLER. Separate legislation outside the proposed bill?

Mr. THOMPSON. Yes, sir.

Mr. BUTLER. All right. I yield back.

Mr. DRINAN. Mr. Kelley, I wonder if you would comment personally upon the discrepancy that I find between your testimony on page 14 here and the bill endorsed by the administration and testified to and supported by the Attorney General of the United States 2 days ago? I find discrepancies.

You say, apparently, that the Federal Information Systems Board, that you "shoot down" here, would not be limited to criminal justice information. It clearly and specifically is.

Second, you say that it could get into social security, taxes and welfare, and that is obviously wrong, as one may see by reading page 23 of the administration bill.

Third, you say that there is no detail about the qualifications of the individuals and yet the bill specifies that the Attorney General shall be one as well as two members designated by the President as representatives of other agencies. It says three shall be directors of statewide criminal justice information systems or members of the Federal Information Systems Advisory Committee at the time of their appointment, and the remaining three shall be private citizens well versed in law privacy, constitutional law and information systems technology.

Fourth, you analogize this to the civilian review board and I find no analogy there whatsoever.

So I ask you the central question: I assume that the FBI is under the Department of Justice and under the Attorney General. The Attorney General pledged his cooperation to work with us after all these years that we have been striving on this matter of privacy and now I find that the Director of the FBI tears apart essential requisites, essential elements of a bill endorsed at least in principle by the Attorney General. I wonder if you would comment on that.

Mr. KELLEY. Congressman Drinan, I have been in this business for almost 34 years.

Mr. DRINAN. You haven't been Director of the FBI.

Mr. KELLEY. I have been Director of the FBI just a few months but I still remain a member of a law enforcement family. When I come to the point where I can't speak what I honestly feel, I will get out.

I feel this way and that is why I say it the way I do.

Insofar as the protection of individual rights I stand on my record. I do not subscribe to any procedures which deny people individual and inalienable rights: I defy anyone to look into my record to make a determination otherwise, and I have worked in some situations where there could well have been, without any problem, such rights violated.

You spoke of the fact that you thought we should purge from our records an arrest where the man says I was arrested but I was subsequently released, the charge is wrong, or something of that type.

Congressman Drinan, I would like to have the perception that would enable me or these men to say this is correct. Many people come to us speaking but not telling the truth. We must rely on the local department or the court to straighten out the matter. I don't think we have the power to do that.

It might well be that a board looking this over might say this is something that should be done, irreparable harm might be there. I stand squarely behind law enforcement. I think it has grown up. I think law enforcement personnel are well capable of handling this business.

I think they, more acutely than most groups, feel the need to protect individual rights all through the criminal justice process.

Mr. DRINAN. That is all very interesting but it is not responsive to the question that I asked. You do go back to a previous question and compound the difficulty for me, frankly.

All I say is that I am astounded that the Attorney General came in here 2 days ago and endorsed in principle this concept of H.R. 12575. He didn't endorse every principle but he did in an essential area, title 3, and you say that this is a civilian review board.

I ask the question again: Who makes policy concerning something as fundamental as this?

Mr. KELLEY. The Attorney General——

Mr. DRINAN. Thank you.

Mr. KELLEY [continuing]. Is certainly the man who is in charge and directs policy within the Department of Justice.

Mr. DRINAN. Thank you, sir.

Mr. WALDIE. Mr. Director, I apologize for being late and some of the questions I may ask you have already been covered.

I am most interested in terms of this whole field. The issue of Presidential power related to the Federal Bureau of Investigation and the Department of Justice and what restrictions, if any, are presently in existence on the ability of a President to command the services of the Bureau. If this bill imposes any restrictions, are there insufficient restrictions at the present time?

In that regard, if a President were to come to you and ask for access to any of your files, are you of the opinion that you have the power to refuse him access?

Mr. KELLEY. Yes, sir. I have the power to refuse. He has the power to remove.

Mr. WALDIE. Exactly.

[Laughter.]

Mr. WALDIE. Exactly.

Given that situation, is your power to refuse a real strict power?

Mr. KELLEY. Insofar as I am concerned, yes.

Mr. WALDIE. The President, apparently, if news reports are correct, and I don't know that they are, although I think the President has conceded that is so, had his brother surveilled and electronically tapped, or not his brother tapped but his phones tapped electronically.

[Laughter.]

Mr. WALDIE. I presume the only agency that could do that in the Government is the FBI. Am I incorrect in that regard? Is there any other agency that goes around tapping phones and surveilling people, domestically, other than the FBI, for the President?

Mr. KELLEY. For the President? It would take an involved answer but I would say that under title 3 of the Omnibus Crime bill that can be sought by the narcotics people and by others. Yes, they can wiretap under the Omnibus Crime bill.

Mr. WALDIE. Well, if the President wanted his brother tapped, is there any agency other than the FBI that he would call on for that purpose?

Mr. KELLEY. I do not know whom he would call upon, but I do know he did not make this request of the FBI.

Mr. WALDIE. Are you presently engaging in any such activities for the President?

Mr. KELLEY. No, sir.

Mr. WALDIE. Have you, to your knowledge, since you have been the Director, engaged in such activities?

Mr. KELLEY. No, sir.

Mr. WALDIE. To your knowledge, has the Bureau in your predecessor's administration engaged in any such activities for the President?

Mr. KELLEY. No, sir.

Mr. WALDIE. To your belief, in fact, the Bureau has never engaged in such activities?

Mr. KELLEY. I cannot answer that. I was out for 12 years and I know nothing——

Mr. WALDIE. If the Bureau had, in fact, been engaged in tapping the President's brother's phone and engaging in surveillance of his activities, would the Bureau's records reflect that fact?

Mr. KELLEY. I think so.

Mr. WALDIE. Would a request of you as to whether they do, in fact, reflect that fact bring a response?

Mr. KELLEY. Such a response would be channeled to the Attorney General's office and I could not give you a definitive answer as to what that response would be.

Mr. WALDIE. During the effort by Vice President, then Congressman Ford to impeach Justice Douglas, he testified before our committee, during his confirmation hearings, that he had sought the cooperation of Attorney General Mitchell in receiving any information in the hands of the Department of Justice involving connections of Justice Douglas with organized crime.

Documents were then provided him that contained raw unsubstantiated data that, I presume, are the equivalent of intelligence information.

Mr. KELLEY. The equivalent of what?

Mr. WALDIE. Of intelligence, criminal intelligence information.

Mr. KELLEY. Thank you.

Mr. WALDIE. Those documents were provided him by, or the summary of those documents were provided him by a representative of the Department of Justice, not of the Bureau.

It was stated, if my recollection serves me correctly, that they were obtained by the Bureau or from the Bureau by the Department of Justice as organized crime files.

Do you provide files to the Department of Justice on organized crime?

Mr. KELLEY. We do when they come to the prosecutive stage.

Mr. WALDIE. Prior to that time do you?

Mr. KELLEY. Sir?

Mr. WALDIE. Prior to that time?

Mr. KELLEY. Yes, sir. In the task force operations, yes.

Mr. WALDIE. What controls, if any, do you have over the materials and contents of those files once they leave the Bureau?

Mr. KELLEY. The regular control is that reports are to be maintained confidentially and there are criminal penalties for unauthorized disclosure. But generally we rely on the confidentiality regulation.

Mr. WALDIE. I don't really know at this point, but I suspect that the Bureau, in fact, was not at fault in the incident that I had discussed; I think it was the Department of Justice. The Bureau had provided them the information; they, in fact, breached the security that normally surrounds that sort of information.

Now, does the President have the ability to ask the assistance of the Bureau in any special investigations that he himself desires to have conducted?

Mr. KELLEY. I would assume that he has the capability of asking anything. As to whether or not it would be followed, then you have a decision which must be made, evaluating and inquiring.

Mr. WALDIE. Let me ask it this way then.

During your tenure as Director of the FBI, has the President sought of you or of your department special investigative functions on cases where he himself has expressed the desire to receive the information solely and exclusively?

Mr. KELLEY. No, sir.

Mr. WALDIE. To your knowledge, has that occurred in the history of the Department? To your knowledge?

Mr. KELLEY. To my knowledge, no.

Mr. WALDIE. You understand my sensitivity in asking these questions and that is to the question of the political activity of the Department, if any, or its utilization for political purposes.

I understand that former Director, not Patrick Gray but former Director J. Edgar Hoover, maintained that the political involvement of the FBI would be absolutely prohibited under his jurisdiction, and I presume you adhere to the same principles.

But then we find ourselves confronted with allegations, as yet unsubstantiated, of involvement of the FBI.

I personally believe that the surveillance that was undertaken on the President's brother must have been undertaken by the FBI. I don't know who else could have done it, and I will be making a request of you to determine if in fact that was done by the FBI.

But there was a charge made on the floor of the House, to which I understand some allusion has been made earlier—the charge was made today by a Representative that in fact his phones apparently were tapped and that he was under surveillance as a threat to national security. That was the affidavit filed in court by Attorney General Saxbe.

I presume if that in fact had been done, that was done by the Federal Bureau of Investigation? Would I be asking you to breach any confidence if I asked you if you had any awareness of the incident involving Congressman Podell?

Mr. KELLEY. Absolutely none, sir.

Mr. WALDIE. Are there any files in the Federal Bureau of Investigation involving Members of Congress?

Mr. KELLEY. There are files wherein Members of Congress have been involved in an application for some job, yes. There are files regarding some charges made and investigations conducted relative to illegal activity.

Insofar as a dossier or anything else you want to use as a description of it, Congressman, I have not personally gone through our files but I have been assured time after time there is none, and there is none now being maintained, I will tell you that.

Mr. WALDIE. If there are any files then it is my understanding that they would only have been accumulated on the basis of a job investigation that had a reference to a Congressman who may have been the applicant or under consideration, or the other possibility would be if that Congressman had been accused of criminal conduct and the FBI was investigating that criminal conduct?

There would be no file whatsoever, as has been constantly and frequently alleged, that involves personal backgrounds of Congressmen in order to influence their positions as Members of Congress?

Mr. KELLEY. I know of none.

Mr. WALDIE. There are none, to your knowledge, that are sealed out of view and sight of you or anyone else?

Mr. KELLEY. I can only say I know of none.

Mr. WALDIE. But I want to press you a little bit further than that. I want to make certain you have made an affirmative effort to ascertain their existence or nonexistence. Have you done that?

Mr. KELLEY. I have, yes.

Mr. WALDIE. You have been informed there are none in existence?

Mr. KELLEY. Yes, sir.

Mr. WALDIE. That is satisfactory to me.

I yield to Mr. Rangel.

Mr. RANGEL. Thank you.

Mr. Kelley, I want to follow this same line of questioning in order to ascertain just how much investigation is done by your Bureau that is noncriminally related.

In connection with the Members of the Congress, the Congressional Record indicates on February 26 that three Members of Congress

instituted a lawsuit against the Bureau requesting or demanding, if you will, copies of their dossiers, the political records, if any.

Congressman Koch for one introduced into the Congressional Record what he received from your office and he indicates that it was turned over by you.

Are you aware of any lawsuit where three Members of the U.S. House of Representatives sued your department for any information you may have in connection with their backgrounds?

Mr. KELLEY. Yes, sir.

Mr. RANGEL. Did I understand you to say that you knew of no records being kept on Members of Congress except those that are represented to be job applications?

Mr. KELLEY. No, sir, that is not correct. Perhaps it is a matter of semantics. I understood you were talking about an investigation which we then put into a file. There is incidental information which is supplied us from time to time which is filed as a matter of fact.

Mr. RANGEL. We are talking about noncriminal investigations?

Mr. KELLEY. Yes, sir.

Mr. RANGEL. Who would supply——

Mr. KELLEY. May I just interrupt you a second. Investigation is the term you used. I am talking about just information which might be submitted to us——

Mr. RANGEL. Let me say this. That the information submitted by Congressman Koch has on the top of it—of course it is reprinted U.S. Government memorandum, and it has the name of Mr. Bishop and Mr. A. Jones who I assume, as a former U.S. prosecutor, would be the names of the agents.

Would that type of language normally be on Federal Bureau of Investigation records? Mr. Koch has the original documents that he received?

Mr. KELLEY. Yes, sir.

Mr. RANGEL. So I am going to assume that you turned over some documents to him?

Mr. KELLEY. Yes, sir.

Mr. RANGEL. If these are in fact the documents, on one of these things it indicates a check of Bureau indices reflects no references identifiable with Koch. That appears to me to be an investigation and not a collection of memoranda data.

Mr. KELLEY. You mean the checking of our records is an investigation?

Mr. RANGEL. Well, Mr. Kelley, I don't know what you call an investigation and I don't want to get involved in semantics. Maybe we will change the whole thing. Because my law enforcement background indicates when I say check out somebody with the FBI I am talking about criminal investigation; I am talking about investigation.

Perhaps you would help me in my thinking as to why you or your predecessors would check out references with a particular Member of Congress?

Mr. KELLEY. I understood that there was a problem which was surfaced during the hearing of Mr. Gray about a checking of Congressmen who were coming aboard, having been newly elected, and that at that time a check as you describe it was made of our records.

Mr. WALDIE. You mean a newly elected Congressman, because he is just newly elected, is checked by the FBI?

Mr. KELLEY. No, sir; I don't mean that.

Mr. WALDIE. What did you say?

Mr. KELLEY. Again let us use the term investigation and an investigative file prepared as differentiated from a check of the files. It is my understanding from——

Mr. WALDIE. Do you do anything when a newly elected Congressman is sworn in—does that come to your attention even?

Mr. KELLEY. Yes

Mr. WALDIE. Why?

Mr. KELLEY. It did at that time. It does no longer.

Mr. WALDIE. Why?

Mr. KELLEY. I cannot tell you except that in the testimony—are you familiar with the testimony?

May we ask Mr. Bowers?

Mr. WALDIE. Mr. Bowers has been here I guess for a long time. He may be familiar with the practice.

When a newly elected Congressman was sworn in why did that come to the attention of the FBI?

Mr. EDWARDS. Identify yourself for the record.

Mr. BOWERS. David W. Bowers, inspector, FBI.

This program that you are referring to was a program which had been in existence in the FBI for quite a number of years. It was instituted back in the early 1950's by the people who were responsible for carrying on the liaison with Congress, who wanted to know who the new Members were as they came in.

Mr. WALDIE. Who were the people who wanted to know that?

Mr. BOWERS. I don't recall the name. This predates——

Mr. WALDIE. You mean military liaison?

Mr. BOWERS. Congressional.

Mr. WALDIE. Liaison with?

Mr. BOWERS. FBI liaison with Congress.

Mr. WALDIE. FBI liaison people wanted to have a check of the new Members by the FBI?

Mr. BOWERS. FBI liaison wanted to know who the new Members were so they would know whom to call on.

Mr. WALDIE. Wait a minute. What did you do to find out who they were, did you go beyond the Congressional Directory to find out who they were?

Mr. BOWERS. The newspapers generally identified the new Members of Congress.

Mr. WALDIE. Exactly. So what did you do beyond that to find out who they were? What kind of reports did you accumulate on them?

Mr. BOWERS. At that time the field offices were asked to furnish whatever information they may have from public records concerning these individuals.

Mr. WALDIE. Did they talk to people, the field offices?

Mr. BOWERS. No, sir; they were asked to furnish information from public records as to the background.

Mr. WALDIE. And that was kept in the FBI files?

Mr. BOWERS. If the man was elected to Congress; yes.

Mr. WALDIE. You mean that was kept on all candidates?

Mr. BOWERS. No, sir.

Mr. WALDIE. What do you mean if he were elected to Congress?

Mr. BOWERS. If he were elected then the information was kept in-file.

Mr. WALDIE. It is obvious he was elected or you wouldn't be collecting the information, or am I wrong there?

Mr. BOWERS. That is right.

Mr. WALDIE. You didn't collect the information on candidates, did you?

Mr. BOWERS. At that time they were collecting information on major candidates for Congress.

Mr. WALDIE. The FBI was? That was kept. Where are those files now?

Mr. BOWERS. The information is part of the general files of the FBI.

Mr. WALDIE. Where would be the file, for example, on Gene McCarthy?

Mr. BOWERS. It would be part of the general files of the FBI, if there is information on him.

Mr. WALDIE. Well, there would be, would there not? He was a major candidate for President of the United States. You would have kept a file on him.

Mr. BOWERS. Not because he was a candidate for President of the United States.

Mr. WALDIE. Why would you have kept a file on him?

Mr. BOWERS. Pardon?

Mr. WALDIE. Why would you have kept a file on him?

Mr. BOWERS. We don't keep files on people just because they are candidates for President of the United States.

Mr. WALDIE. But do you keep them because they are candidates for Congress?

Mr. BOWERS. No; we maintain information on the background of those people who were newly elected to Congress.

Mr. WALDIE. Well, you also said you kept it on candidates for Congress.

Mr. BOWERS. We collected it; we didn't keep it.

Mr. WALDIE. What did you do with the information you collected on candidates who were unsuccessful?

Mr. BOWERS. It was destroyed.

Mr. WALDIE. Would we be able to have a look at any of those files that you have compiled on newly elected Congressmen?

Mr. BOWERS. I think that has been denied on several occasions.

Mr. WALDIE. Has it?

Mr. BOWERS. Yes, sir.

Mr. WALDIE. Well, now, can we have it denied today, Mr. Kelley? Will this committee be able to look at the files that were compiled by your predecessor, not by you, the responsibility, if any responsibility, being his, not yours?

Mr. MCCLORY. If you would yield?

Mr. WALDIE [presiding]. I won't yield. The fact of the matter is I won't yield.

Mr. Kelley, will you be able to provide the committee, if the committee asks for it——

Mr. MCCLORY. Who is the presiding officer?

Mr. WALDIE. I am the presiding officer.

Mr. McCLORY. Will you recognize me to interpose an objection. I want to interpose an objection. We are trying to protect rights of privacy and I want to protect the rights of privacy of Members of Congress as well. I want to make that point before the question is answered.

Mr. WALDIE. You can make the objection when I have made the question.

Mr. Kelley, would you provide me, as a one-time newly elected Member of Congress when that practice was in existence, with a copy of the file that was compiled to assist FBI liaison in dealing with me on the Hill?

Do you wish to pose an objection about my privacy?

Mr. McCLORY. You are asking for your own file?

Mr. WALDIE. Yes.

I guess he has no objection.

Can you answer the question?

Mr. KELLEY. I will refer this, Congressman, to the Attorney General for the action that he deems advisable to take.

Mr. WALDIE. Please do.

Mr. RANGEL. Mr. Director, did you not turn over the files of Representatives Rosenthal, Bingham, and Koch?

Mr. KELLEY. Yes, sir.

Mr. RANGEL. Was that a decision made by you?

Mr. KELLEY. No; I went through the Attorney General.

Mr. RANGEL. You are not telling me, sir, that you maintained files or checks or gathered information on major candidates for liaison purposes, are you?

Mr. BOWERS. That was the primary purpose, the only purpose at the time.

Mr. RANGEL. Could you tell me how candidates for public office could possibly be of any assistance to the Federal Bureau of Investigation liaison?

Mr. BOWERS. The candidates weren't but once they became Members of Congress they could be.

Mr. RANGEL. You mean you investigated?

Mr. BOWERS. No, sir, we did not investigate.

Mr. RANGEL. How do you collect information on any American citizen? Please, sir, I haven't finished. How do you collect or how do you check on a candidate that is running for public office.

Mr. BOWERS. From his campaign literature.

Mr. RANGEL. How did you do it? Would you have campaign literature that I had in central Harlem? How would it get to your files?

Mr. BOWERS. I have no idea whether we have any of your campaign literature or not.

Mr. RANGEL. How would it get to the FBI files, just as a gathering of information?

Mr. WALDIE. The field agent did the work.

Mr. BOWERS. The agents in the field were requested to furnish background information concerning the major candidates.

Mr. RANGEL. Who would determine which candidates you wanted to gather information on?

Mr. BOWERS. Well, all major candidates.

Mr. RANGEL. I don't understand what is a major candidate.

Mr. BOWERS. Let us substitute then the identity of the two major political parties.

Mr. RANGEL. Would it be a candidate running for a seat in the House of Representatives?

Mr. BOWERS. Yes, sir, or Senator.

Mr. RANGEL. This was to assist your Bureau, in fact, just in case the person was elected?

Mr. BOWERS. That is right.

Mr. RANGEL. Now, I would like to join with Congressman Waldie in making a formal request for any information of a noncriminal nature or not violative of any criminal investigation that you may have as it relates to me, or any campaigns I may have had for public office, and that you discuss it with the Attorney General, Mr. Director.

Mr. WALDIE. May I ask one more question at this point?

By what authority do you destroy any files that you keep?

Mr. BOWERS. The authority to destroy files has to come from the Archivist.

Mr. WALDIE. Did you get authority from the Archivist to destroy the files of unsuccessful candidates?

Mr. BOWERS. They were not files. It was just information which had been collected and was not part of the file.

Mr. WALDIE. How do we make that distinction? Are you able, then, to destroy any information you desire if you categorize it as not a file? Did Mr. Gray violate any laws when he burned? I guess—would that have been a file?

Mr. BOWERS. Information gathered in this regard was incorporated into FBI files through the preparation of a memorandum on the successful candidate. No such memorandum was prepared on the unsuccessful candidates and the newspaper clippings, campaign literature, and data extracted from city directories, Who's Who, and other public reference books concerning them were destroyed. Mr. Gray did not burn anything relating to this matter. He apparently has admitted burning some other material furnished him in an unrelated matter.

Mr. WIGGINS. Can you announce what our intention is? That is the second bell.

Mr. WALDIE. The hope was the chairman would be back by the second bell. He hasn't made it and we had better recess and go answer the rollcall.

Mr. BOWERS. If I could.

Mr. WALDIE. Wait until we get back.

Give some thought to the authority for destroying files and when we must keep what the FBI gathers.

[Brief recess.]

Mr. EDWARDS. We are going to try to finish by 4:30. I expect there are going to be some more votes and again, Mr. Director, we all apologize for these interruptions. They are very irritating, but we do appreciate your putting up with them.

I wonder, Mr. Director, if you would like to finish your statement, please.

Mr. KELLEY. Yes, sir.

I feel that there are several legitimate needs for some noncriminal justice agencies to have access to this type of information; for example, for processing applicants for various State and Federal Government

positions, for determining suitability for access to classified and sensitive information, et cetera.

The Congress also agrees that criminal record information should be available to some noncriminal justice agencies, as exemplified by Public Law 92–544, which, in general, provides for dissemination of such record information among various State and Federal agencies and financial banking institutions.

The extent of access to be given or denied noncriminal justice agencies to offender record information is a serious public policy question, which must be given serious consideration before any legislation is enacted.

The reconciliation of the conflict between the individual's privacy rights and the public's informational needs is a complicated problem. As you know, the President has recently established a Domestic Council Committee on the right of privacy. We will work with him and the committee in their efforts to develop specific recommendations to insure that individual privacy is protected notwithstanding the impact of what the President referred to as the information revolution and the advance of technology.

Members of the subcommittee, that is the conclusion of my prepared remarks, and I and my associates will be pleased to attempt to answer any questions you may have.

Mr. EDWARDS. Thank you, Mr. Kelley.

Mr. Waldie.

Mr. WALDIE. You were about to describe under what authority you can destroy information that has been gathered in your official capacity.

Mr. BOWERS. Mr. Waldie, I would like to offer, if I may, a very detailed written outline on this entire program, including the legal authority and all that, which was put into the record of Mr. Gray's information hearing. If we could submit that for the record.

Mr. WALDIE. I would appreciate that.

Mr. BOWERS. I think it would give you the answer.

Mr. WALDIE. With particular reference to the authority to destroy information that has been gathered in your official capacity?

Mr. BOWERS. That is all included in that information.

[The information follows:]

[Testimony resumes on p. 329.]

HEARINGS BEFORE THE COMMITTEE ON THE JUDICIARY, U.S. SENATE, 93D CONGRESS, 1ST SESSION, ON NOMINATION OF LOUIS PATRICK GRAY III, OF CONNECTICUT, TO BE DIRECTOR, FEDERAL BUREAU OF INVESTIGATION

Senator ERVIN. On October 27, 1972, you publicly stated in an official release that since around 1950 the FBI has gathered and maintained so-called biographical data on Members of Congress and candidates for Congress. When did you and how did you first learn of this practice?

Mr. GRAY. Senator Ervin, you will recall that you sent me a letter on this subject, a very thorough letter. In fact the questions were designed to probe, and they did probe, and I sent a response to you. I have not asked your permission but I would now ask your permission and the permission of the chairman that a copy of this letter be inserted in the record.

Senator ERVIN. You made a very full response to my request for information on this point. I think it would be illuminating and would obviate some of my questions if my letter to Mr. Gray and his reply to me were inserted in the record, Mr. Chairman.

The CHAIRMAN. It will be admitted at this point.

Mr. GRAY. Thank you, sir.

[Mr. Gray subsequently submitted the following documents for the record:]

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS,
Washington, D.C., November 3, 1972.

Hon. L. PATRICK GRAY III,
Acting Director, Federal Bureau of Investigation,
Washington, D.C.

DEAR MR. GRAY: As you know, in the course of the Subcommittee's study of government data collection, I have sent a number of letters, beginning in June, 1970, asking the Justice Department and the FBI to detail all of their programs of data collection respecting individuals not employed by the Federal Government, and certain programs involving those persons as well. Since the responses I have received so far from the Department and the Bureau were presumably intended to be complete replies to my requests, I am concerned about the existence of yet another program, that respecting Congressmen and Senators, which was not alluded to in past correspondence from the Department or the Bureau.

In any case, I am extremely disturbed by press reports and a statement distributed by your office on October 27 concerning a Bureau program involving the collection of information on incumbents and candidates for federal office. Although the reports are contradictory and extremely sparse in detail, it appears that the Bureau has regularly been compiling information on elected Representatives and Senators and on their opponents for decades. The statement and other documents released from your office states that the practice in one form or another started as far back as 1950, and presumably had two purposes; to assist the Bureau in its Congressional relations and to aid in protecting the persons concerned against "violent offenses" against them.

These stated justifications require elaboration. It is my understanding that the Bureau, as an agency within the Justice Department, relies on the Attorney General's office for its Congressional relations. And, to my knowledge, crimes against federal legislators were not made federal offenses until 1968. In any case, it is not immediately apparent how the program could have assisted the Bureau in performing either of these two functions.

Because of these and other unresolved issues surrounding the program, I should like your response to the following questions:

1. When was the program begun? Was it instituted by formal or informal directive? By whose order in the Bureau? the Justice Department? elsewhere? Please supply copies of the directives which ordered the initiation of this program. Please supply copies of all Department and Bureau directives, orders, regulations, "routing slip directives," and other written instructions describing the program, its purposes and the responsibilities of Bureau agents in carrying it out, including those of January 13, 1972, August 7, September 13 and September 19, 1972.

2. List the persons or categories of persons about whom information was collected under the program. Please list separately those members of the 92nd Congress about whom information was and was not collected under this program. List separately those nonincumbent candidates for federal office about whom information was and was not collected. What has been the policy respect to the disposal or destruction of information collected upon persons after they are no longer Members of Congress, or candidates for office? Is the information retained or destroyed? If the information is retained, how many separate individuals had files maintained on them in the Bureau as of October 27? What was the reason for retaining information on persons no longer Members of Congress or candidates?

3. Under what authority was it initiated and conducted? Under what authority has the Bureau been charged with investigating "violent offenses" committed against each of the categories of persons included under the program before 1968? after 1968? Please supply copies of Departmental and Bureau regulations under which it was authorized, together with citations and copies of the statutory and other authority from which the authority stems.

4. Please describe in detail the types of information collected, the sources relied upon, and the methods used for collecting the information. Include, of course, both covert and overt collection methods. Please supply copies of all instructions to Bureau employees governing the kinds of information desired, and methods of collecting such information. Please explain the terms "readily available sources," "reference publications," "local files" and "local publications," and identify representative examples of each. What information in "local files" was used, and how was it collected? What kinds of biographic data was collected? What sources,

not readily available to the public or not published, were used? Please submit copies of representative "dossiers" or collections of information on incumbents and candidates prepared under this program, suitably sanitized to protect the identity of the individuals involved, but in sufficient detail to enable the Subcommittee to determine the scope, methods, and contents of the program.

5. Please describe the uses to which the information was put, both as a matter of regulation and as a matter of tradition or practice. Please submit copies of all regulations, directives or instructions governing use and access to this information. List also the names or titles of all individuals within the Bureau, the Justice Department, and other government offices, including the White House, who were authorized or who in practice actually did have access to such information from time to time. List also all persons by name or title not connected with the above offices, who were authorized or did, in fact, have access to such information.

6. Please describe how this information was stored or maintained. For example, was it in field offices or in Washington Headquarters; in separate dossiers, or as part of other records such as the "Crime Record"; separate from the general files or as part of them; in manual files or in other form?

7. Please describe your efforts since taking office to determine the existence of such a program. Did you require into the possible existence of such a program prior to this weekend? What was the result of your inquiry? To what do you attribute the discrepancy, if any, between the results of your earlier inquiry and the information which has just come to light? Do you feel the inquiry or the reply was inadequate? Do you plan any administrative action as a result? If so, what?

8. What will become of the program in question? Please submit copies of all directives and instructions which will govern future collection and retention of information on elected federal officials and other persons subject to this program. Will the existing files be destroyed? Please state when and in what manner. Will any copies be retained, either by the Bureau or by any other officer or official of the Government? Are any copies of such files held elsewhere than in the Bureau, to your knowledge? Will subjects of these files be informed of the existence of contents of files on them, or be permitted to review them prior to their destruction?

9. Does the Bureau have any program of collecting information on federal elected officials, other than the one under inquiry? If so, please answer the above questions for each such program. Are similar programs in effect for candidates of other federal offices, either elected or appointed? For state offices, such as governor or state representative, or for local offices? If so, please answer the above questions for each such program.

I am also disturbed about press reports of requests from members of the White House office, John Ehrlichman for one, that the Bureau collect and supply information to assist in the presidential campaign. These reports refer to an order issued in your name on September 8 and returnable on September 11. The report, in *Time* magazine of Monday, October 30, is enclosed.

I would appreciate a detailed response to the allegations contained in this article, plus copies of the supposed order and any similar ones issued during the time you have been Acting Director. I would also appreciate copies of any other requests, oral or written, from officials in the Justice Department, the White House, or elsewhere in the Executive Branch for information of a similar nature or for a similar purpose, whether or not the request was complied with. Please include a description of the Bureau's response in each case, together with copies of relevant documents, directives, etc.

I appreciate that the above responses may take some time to prepare. Under the circumstances, I know you can understand the importance of a prompt and comprehensive reply to this inquiry. May I request that you respond as quickly as possible with the information you have readily at your command, saving further replies as more information becomes available.

With kindest wishes,

Sincerely,

SAM J. ERVIN, JR.,
Chairman.

JANUARY 12, 1973.

Hon. SAM J. ERVIN, JR.,
U.S. Senate, Washington, D.C.

DEAR SENATOR ERVIN: I regret that my illness followed by surgery has delayed this response to your letter of November 3, 1972. Also, I am grateful to have this opportunity to set forth the facts concerning the reports that for some years the FBI has been collecting biographical data on Congressional candidates.

In the release I made concerning this particular program on October 12, 1972, I stated it was being discontinued because it is not essential to FBI operations, and "I believe it is obvious that it can be misinterpreted easily as a program to investigate Congressmen and Congressional candidates." A copy of that release is enclosed for your reference.

Not only was the program misinterpreted, but so was my release. For example, the pages from "Time" magazine of November 6, 1972, which you enclosed with your letter contained the following paragraph:

"Gray revealed last week that he is discontinuing a 22-year FBI practice of maintaining biographical data on Congressional candidates. He said that the information had been used mainly to help check out any threats made against them."

Neither of those sentences is accurate. I did not say the FBI would stop maintaining biographical data on Congressional candidates. Such a statement would imply that FBI personnel could not even maintain copies of the "Congressional Directory," copies of "Who's Who," or even daily newspapers which contain biographical data on Congressional candidates. Neither did I say that the information had been used mainly to check out threats made against the candidates. I stated the purpose of the program was to provide briefing material for FBI officials who might desire it before calling on newly elected Congressmen and Senators, adding that later it became apparent the information could be of use in investigations dealing with offenses against Members or Members-elect of Congress under the provisions of Public Law 91-644.

A number of the news accounts I saw concerning my announcement of October 27, 1972, contained implications that the FBI was compiling secret dossiers on Members of Congress and the inference could easily be drawn from these accounts that there was some sinister motive involved. The FBI's record, I believe, leaves no doubt that it has been in the forefront of protecting individual freedoms rather than trying to encroach upon them.

Your understanding that the FBI relies on the Department of Justice for its Congressional relations is accurate insofar as legislative matters are concerned; however, due to the many inquiries and requests for information which we receive from Members of Congress, it has been necessary to maintain a Congressional Service Unit within the FBI to respond to these requests. Assaults on Federal legislators were not made Federal offenses until 1971; however, Federal legislators, like all citizens have been covered for many years under laws such as those regarding kidnaping and extortion. But let me reiterate, the information collected under the program in question was gathered to assist FBI officials responsible for rendering services to the Congress.

Before responding to your questions, let me describe for you the program that I ordered discontinued and how it operated. I believe this will greatly enhance the understanding of this matter.

Around 1950, the officials of the FBI then responsible for dealing with the Congress decided it would be most beneficial to them if they had some biographical data on newly elected Members and a knowledge of any prior contacts by FBI representatives with these new Congressmen and Senators. Initially, they orally requested FBI field office officials to furnish the desired information. In 1960, the practice was begun of requesting such information by sending routing slips to the various FBI field offices. This has been followed each election year since that time.

The information was gathered for our own internal use and not in response to any regulation or statute. At first, information was sought only on nonincumbent candidates for Congress. In 1960, the requests were expanded to include nonincumbent candidates for Governorships, since FBI officials also felt their contacts with Governors could be enhanced by some prior knowledge of the individual's background.

No investigation was conducted to secure this information, and no investigative file was opened either in the field offices or at FBI Headquarters. The biographical information was collected by individual Agents covering the home area of the candidate. It was gathered from local newspapers, campaign brochures, and reference books such as city directories or books which publish biographical information—all sources readily available to the general public. This information was augmented by a summary of any data already in the files of the field office. This might include correspondence exchanged with the candidate; memoranda concerning personal contacts; results of investigations involving the candidate, either as a subject, a victim, a witness, or a reference; or information voluntarily submitted to the FBI.

The material collected by the field office was sent to FBI Headquarters where it would be held until the results of the election were known. If the candidate was defeated in his bid for office, all of the material submitted by the field office would be promptly destroyed and no record of it kept. If the candidate was successful, a memorandum summarizing the material submitted by the field office would be prepared. Into this summary memorandum also would be incorporated a brief abstract of any information already contained in the files at FBI headquarters.

Here again, the information might include correspondence exchanged with the candidate; memoranda concerning personal contacts; results of investigations involving the candidate, either as a subject, a victim, a witness, or a reference; or information voluntarily submitted to the FBI. The raw material forwarded by the field office would be destroyed, and only the summary memorandum would be retained and incorporated into FBI files.

Now to your specific questions.

1. When was the program begun? Was it instituted by formal or informal directive? By whose order in the Bureau? the Justice Department? elsewhere? Please supply copies of the directives which ordered the initiation of this program. Please supply copies of all Departmental and Bureau directives, orders, regulations, "routing slip directives," and other written instructions describing the program, its purposes and the responsibilities of Bureau agents in carrying it out, including those of Januay 13, 1972, August 7, September 13 and September 19, 1972.

The program was begun around 1950 on an informal basis and apparently on oral instructions of a former Assistant to the Director. Copies of the only written instructions we are able to locate concerning this program are enclosed. These include the routing slips sent to various FBI field offices this year under dates of January 13, August 7, September 13, and September 19, 1972, and routing slips sent to various FBI field offices in 1970 under dates of July 12 and October 6, 1970. The latter two items were retained only as samples, and no copies of such communications to the field offices sent out in prior years have been retained.

2. List the persons or categories of persons about whom information was collected under the program. Please list separately those members of the 92nd Congress about whom information was and was not collected under this program. List separately those nonincumbent candidates for federal office about whom information was and was not collected. What has been the policy with respect to the disposal or destruction of information collected upon persons after they are no longer Members of Congress, or candidates for office? Is the information retained or destroyed? If the information is retained, how many separate individuals had files maintained on them in the Bureau as of October 27? What was the reason for retaining information on persons no longer Members of Congress or candidates?

Information was sought under this program on major nonincumbent Congressional candidates. Biographical data was collected on each Member of the 92nd Congress who had not previously served in the Congress. No data was collected on incumbents since biographical data on them is published in the "Congressional Directory." Congressional candidates were the only candidates for Federal office on whom biographical data was collected. If the candidate was defeated, no information concerning him collected under this program was retained, the information being promptly destroyed as soon as results of the election were confirmed. Data collected on successful candidates was summarized in a memorandum prepared for the information of FBI officials which subsequently became a part of the FBI's general files. Preparation of such memoranda was started in late 1954. The so-called "raw material," which generally was in the form of newspaper clippings, campaign brochures, or excerpts therefrom, was never made a part of FBI records and has been destroyed. Information collected in this program on all present Members of Congress as well as former Members going back about 20 years is maintained in FBI records. The FBI does not have authority to destroy information contained in its records, and this applies whether the person is a Member of Congress, a candidate, or a private citizen.

3. Under what authority was it initiated and conducted? Under what authority has the Bureau been charged with investigating "violent offenses" committed against each of the categories of persons included under the program before 1968? After 1968? Please supply copies of Departmental and Bureau regulations under which it was authorized, together with citations and copies of the statutory and other authority from which the authority stems.

The program was not in response to any statute or regulation. It was begun informally on oral instructions from an official of the FBI whose purpose was to obtain biographical data to assist him and other FBI personnel in carrying out their responsibilities in dealing with Members of Congress. As to the authority under which the FBI has been charged with investigating violent offenses committed against persons included under the program, I already have referred to Public Law 91-644 enacted in 1971. Also, as I mentioned earlier, Members of Congress and candidates have been covered, as have all persons, under Federal laws dealing with such crimes as kidnaping and extortion. As previously indicated, the only written instructions we were able to locate concerning this program are the routing slips sent out to the field offices in 1970 and 1972.

4. Please describe in detail the types of information collected, the sources relied upon, and the methods used for collecting the information. Include, of course, both covert and overt collection methods. Please supply copies of all instructions to Bureau employees governing the kinds of information desired, and methods of collecting such information. Please explain the terms "readily available sources," "reference publications," "local files" and "local publications," and identify representative examples of each. What information in "local titles" was used, and how was it collected? What kinds of biographic data was collected? What sources, not readily available to the public or not published, were used. Please submit copies of representative "dossiers" or collections of information on incumbents and candidates prepared under this program, suitably sanitized to protect the identity of the individuals involved, but in sufficient detail to enable the Subcommittee to determine the scope, methods, and contents of the program.

The information requested from the field offices was biographical in nature together with a summarization of any data which might already be in the field office files. The biographical data came from news articles, campaign literature and stadard reference publications such as "Who's Who" and Martindale-Hubbell. Frequently, the information was submitted merely by forwarding copies of the news articles or campaign literature to FBI Headquarters or by copying the pertinent data from the news articles or the reference publications. No covert collection methods were used. The routing slips previously referred to contain all the instructions sent to the field offices regarding this program. "Readily available sources" means those public sources which are available to any citizen such as newpapers, magazines, and campaign literature. "Reference publications" means such items as "Who's Who," Martindale-Hubbell, and city directories. "Local files" refers to the files of the FBI field offices. "Local publications" means newspapers and other periodicals published in the local area. Information in "local files" could be the results of prior investigations concerning the candidate in which he may have been a subject of the investigation, the victim of some crime being investigated, or a witness or reference interviewed. The information could concern previous contracts between the candidate and FBI representatives, or it could be information volunteered to the FBI. The kind of biographical data collected is the same type as that which is published about Members of Congress in the "Congressional Directory," and I know of no sources, except for local and Headquarters FBI files, not readily available to the general public which were used in the collection of this data. I am not at liberty to furnish copies of the summary memoranda prepared from the material collected under this program; however, I can advise you that I am giving serious consideration and study to the ultimate disposition of the summary memoranda prepared as the end product of this Congressional Relations program.

5. Please describe the uses to which the information was put, both as a matter of regulation and as a matter of tradition or practice. Please submit copies of all regulations, directives or instructions governing use and access to this information. List also the names or titles of all individuals within the Bureau, the Justice Department, and other government offices, including the White House, who were authorized or who in practice actually did have access to such information from time to time. List also all persons by name or title not connected with the above offices, who were authorized or did, in fact, have access to such information.

As indicated, the primary use of the information gathered under this program was to assist FBI personnel responsible for contacts with the Congress. It was helpful to them to know what, if any, prior experience the newly elected Members might have had concerning law enforcement activities or of any prior contacts they may have had with FBI personnel. Likewise, it was important to know if the new Member had been the subject of any prior FBI investigation, such as an applicant investigation, or had been the victim of any crime investigated by the FBI. There are no special regulations or instructions governing the use of and access to this information. All FBI personnel have access to information in the files of the FBI if they need the information in connection with their official

functions. No information in FBI files is available to anyone outside the FBI unless through official dissemination to another Executive Branch agency as part of the results of an investigation or in answer to an official inquiry regarding a specific individual. Our dissemination policy is the same with respect to all persons whether they be public officials or private citizens—the information is disseminated outside the FBI only in connection with official investigations or in response to official inquiries. Therefore, it is not possible to identify by name or title all of the individuals who might have access to such information.

6. Please describe how this information was stored or maintained. For example, was it in field offices or in Washington Headquarters; in separate dossiers, or as part of other records such as the "Crime Records;" separate from the general files or as part of them; in manual files or in other form?

The information gathered under the program in question was recorded in a single summary memorandum which was incorporated into the general records of the FBI at FBI Headquarters.

7. Please describe your efforts since taking office to determine the existence of such a program. Did you inquire into the possible existence of such a program prior to this weekend? What was the result of your inquiry? To what do you attribute the discrepancy, if any, between the results of your earlier inquiry and the information which has just come to light? Do you feel the inquiry or the reply was inadequate? Do you plan any administrative action as a result? If so, what?

I must assume that this question is directed to the statement made by me on numerous occasions to the effect that I had not located any secret files or political dossiers within the files of the FBI. I did not specifically ask the Assistant Director of the Crime Records Division if his Division maintained secret files or political dossiers, nor did I ever ask anyone in the FBI if we maintained files on Congressional or other political candidates. My inquiries were directed solely to the maintenance of secret files or political dossiers and these were made to all members of the Executives Conference of the FBI on several occasions when the subject came up for discussion and to the senior officials of the Files and Communications Division of the FBI on numerous occasions.

Not one of us in the FBI ever considered that the summary memorandum, the product of the program I terminated on October 27, 1972, constituted a secret file or a political dossier. It is for this reason that I believe the existence of this program was not reported to me in response to my inquiries. I have ordered a thorough inquiry into this matter, and I am now in the process of completing my review of the entire matter.

8. What will become of the program in question? Please submit copies of all directives and instructions which will govern future collection and retention of information on elected federal officials and other persons subject to this program. Will the existing titles be destroyed? Please state when and in what manner. Will any copies be retained, either by the Bureau or by any other officer or official of the Government? Are any copies of such files held elsewhere than in the Bureau, to your knowledge? Will subjects of these files be informed of the existence or contents of files on them, or be permitted to review them prior to their destruction?

The program was discontinued on October 27, 1972, and all information which had been collected under it this year was promptly destroyed. My instructions in this regard were issued orally, not in writing. I am giving serious consideration and study to the ultimate disposition of the summary memoranda prepared based on the information collected under this program.

9. Does the Bureau have any program of collecting information on federal elected officials, other than the one under inquiry? If so, please answer the above questions for each such program. Are similar programs in effect for candidates of other federal offices, either elected or appointed. For state offices, such as governor or state representative, or for local offices? If so, please answer the above questions for each such program.

The FBI has no program to collect information on Federal elected or appointed officials and this particular program has been terminated. Where there is a requirement for an official investigation, the FBI will collect such information, such as for a Presidential appointment. As previously indicated, the Congressional program was expanded in 1960 to include nonincumbent candidates for Governor; however, this Congressional program has been terminated.

In response to the allegations in the "Time" Magazine article you referred to in your letter, I enclose for your information a copy of a memorandum setting forth the facts and circumstances as we know them.

Sincerely yours,

L. PATRICK GRAY, III,
Acting Director.

U.S. DEPARTMENT OF JUSTICE,
FEDERAL BUREAU OF INVESTIGATION,
Washington, D.C., October 27, 1972.

For immediate release.

"The FBI is not investigating and has not investigated Members of Congress or Congressional candidates," Acting FBI Director L. Patrick Gray, III, declared today. "The only exceptions have been where a Member was alleged to have violated a Federal law or where the Member is being considered for a top-level Government appointment.

"It has just come to my attention," he said, "that since 1950 personnel at FBI Headquarters responsible for dealing with Congress have, as a matter of routine practice, gathered biographical data on major candidates for the House of Representatives and the Senate from newspapers, magazines, campaign literature, and various reference publications. FBI Field Offices from time to time have been requested, by means of a routing slip directive, to assist by providing information that was readily available from local files and local publications.

"Initially, the purpose of this was to provide briefing material for FBI officials who might desire it before making a call on a newly elected Congressman or Senator. In short, the routine was a part of the Congressional relations program of the FBI. Later, following the enactment of Public Law 91–644 dealing in part with violent offenses against Members of Congress and Members of Congress-Elect, it became apparent that such information would be of immediate use in following investigative leads arising in the event such an offense were to be committed against a Member or a Member-Elect of Congress.

"I became aware of this program," Mr. Gray continued, "as a result of inquiries alleging that an FBI Agent in Lorain County, Ohio, had been making inquiries about the background of the Democratic candidate for Congress in Ohio's 13th District. This Agent's inquiries were not authorized, and were in violation of specific instructions that the gathering of information on Congressional candidates is to be made from readily available published sources only, and not through any outside inquiries. The FBI is conducting an internal administrative investigation of this Agent's actions to determine why this instruction was not followed.

"At the same time," Mr. Gray continued, "because the program of gathering briefing material on Congressmen and Congressional candidates has been brought to my attention through this incident, I have given consideration to the need for such a program. Such a program is not essential to FBI operations, and I believe it is obvious that it can be misinterpreted easily as a program to investigate Congressmen and Congressional candidates. Therefore, I have decided to terminate this program as of today."

FBI ROUTING SLIPS

JANUARY 13, 1972.

Re coming elections

Primaries will be held this year in each state to nominate candidates for Congress (House and Senate) and some Governors. Pertinent background information and data from your files on major non-incumbent candidates in your district should be forwarded informally by routing slip, not letter, to Crime Records as soon as they are nominated. Under *no* circumstances should you make outside inquiries such as checks of credit bureaus or newspaper morgues. Public source material readily available to you and data from your files will suffice. Continue to furnish pertinent data as it develops between the primary general election. Also be alert for any special elections to fill Congressional vacancies and submit pertinent data on the major candidates before the election date. These matters must always be handled *with extreme discretion* to avoid the implication that we are checking on candidates.

AUGUST 7, 1972.

Re Bu r/s January 13, 1972: Coming elections

By r/s of 1–13–72 you were requested to furnish pertinent background information from public sources as well as data from your files regarding nonincumbent candidates for Congress. It has now been over a month since the primary in your state was held, and we have not received the requested information. Please submit this information within three weeks from the date of this r/s. Make *no* outside inquiries such as checks of credit bureaus or newspaper morgues concerning this matter.

SEPTEMBER 13, 1972.

Re coming elections

Attached is a copy of the routing slip sent your office regarding nonincumbent candidates. Information has not been received from your office although it

is noted the primary in your state has been held. Please submit the necessary information to reach Crime Records Division by 10–1–72.

SEPTEMBER 19, 1972.

Re coming elections

Attached is a copy of the routing slip sent your office regarding nonincumbent candidates. It is noted the primary in your state has been held. Please submit the necessary information to reach Crime Records Division by 10–9–72.

AUGUST 12, 1970.

Re National Elections Crime Research Section

Primary elections have been or are being conducted in each State to choose candidates for the forthcoming November elections for all House members and for certain Senators and Governors.

You are requested to furnish background data and any information in your files re major nonincumbent candidates for Senate, House and/or Governor, in those districts covered by your office. This matter should, of course, be handled extremely discreetly and the information should be submitted to the Bureau on a strictly informal basis as soon as the pertinent data is available.

OCTOBER 6, 1970.

Re National Elections Crime Research Section, re my routing slip Aug. 12, 1970

Inasmuch as all primary elections have now been held, it is requested that you expedite transmittal of background data and any information in your files regarding major nonincumbent candidates for Senate, House and/or Governor in those districts covered by your Office. Bear in mind that this matter should, of course, be handled extremely discreetly and that the information should be submitted to the Bureau on a strictly *informal* basis as soon as possible.

MEMO

JANUARY 12, 1973.

Re Information for campaign trips: Events and issues

Under date of September 1, 1972, Geoff Shepard of the White House staff, prepared a memorandum for the Deputy Attorney General on the subject of "Information for Campaign Trips: Events and Issues." This requested two categories of information: (1) identification of the substantive issue problem areas in the criminal justice field; and (2) a list of events relating to the criminal justice area that would be good for John Ehrlichman to consider doing. The memorandum indicated an interest in this information in 15 specified states. It requested the information by close of business on September 7, 1972.

Under date of September 8, 1972, the Deputy Attorney General forwarded to Acting FBI Director L. Patrick Gray, III, a copy of the White House memorandum requesting an evaluation of the question. This noted that the White House deadline already was passed and asked for a response as quickly as possible. (A copy of this memorandum and a copy of the White House memorandum are attached.)

The memorandum from the Deputy Attorney General was received in the office of the Acting Director of the FBI at 10:32 a.m., on September 8, 1972. Mr. Gray was out of Washington at the time and the matter was handled by his Executive Assistant, David D. Kinley. He forwarded it to the Assistant Director of the Crime Research Division, Thomas E. Bishop. Mr. Bishop discussed the matter with Acting Associate Director W. Mark Felt, and thereafter Mr. Bishop had one of his subordinates prepare a teletype to 21 FBI Field Offices which he approved to be sent late on September 8, 1972, setting a deadline of the opening of business on September 11, 1972. This teletype set out virtually verbatim the text of the request in the White House memorandum of September 1, 1972.

The material received from the Field Offices in response to the teletype was summarized into a memorandum on September 11, 1972, which was approved by Messrs Bishop, Felt and Kinley and was then delivered to the office of the Deputy Attorney General late on the same date. The information supplied by the Field Offices required no investigation to obtain it—it was information readily available within the Field Offices pertaining to forthcoming meetings and conferences on matters of similar interest in law enforcement and criminal justice fields.

Mr. Gray was out of Washington during the entire period of September 8 to 11, 1972, returning to the city after 7 p.m., on September 11, 1972. His first knowledge of this matter was on the late afternoon of September 12, 1972.

Personnel involved in the handling of this project have stated they did not question the propriety in complying with the request since it dealt with information of a broad nature concerning police and the criminal justice system, since it had been requested by the White House, and since the request had come through the offices of the Deputy Attorney General and the Acting Director.

U.S. GOVERNMENT,
September 8, 1972.

To: L. Patrick Gray, Director, FBI.
From: Ralph E. Erickson, Deputy Attorney General.
Subject: Information for Campaign Trips: Events and Issues (Attached. White House Memorandum.)

Would you undertake to evaluate the questions asked of us by John Ehrlichman in the attached memorandum and give me the benefit of your response.

Although we are beyond the due date of this memorandum already, please make your response as quickly as possible.

THE WHITE HOUSE,
Washington, September 1, 1972.

Memorandum for: the Deputy Attorney General.
Subject: Information for campaign trips: Events and issues.

In order for John Ehrlichman to give the President maximum support during campaign trips over the next several weeks, the following information is required for each of the states listed at Tab A.

(1) Identification of the substantive issue problem areas in the criminal justice field for that particular state. Please limit yourself to problems of sufficient magnitude that the President or John Ehrlichman might be expected to be aware of them. Brevity is the key, and often all that is necessary is to flag a sensitive problem so it can be avoided or more extensive preparation can be undertaken should we choose to speak about it.

(2) A list of events relating to the criminal justice area that would be good for John Ehrlichman to consider doing. For each suggested event, the following items should be indicated:

(A) Purpose of the event.
(B) The nature of the group or institution involved.
(C) The content of the event.
(D) Names of specific people who can be contacted for the purpose of setting it up (together with titles, addresses, telephone numbers, etc).
(E) All trade-off factors to be considered in scheduling the event.

I am receiving separate materials from both LEAA and DALE, so you should omit any consideration of problems in the area of Federal aid or drugs. I would expect your list of problems to be fairly brief, but there are certainly criminal justice problems (such as the Fort Worth Five) that we should flag for the President.

I know this is rushing you, but I need the information by close of business, Thursday, September 7, 1972.

Thanks, Ralph.

GEOFF SHEPARD.

California (San Francisco and Los Angeles).
Connecticut.
Florida.
Georgia (Atlanta).
Illinois (Chicago).
Massachusetts.
Michigan.
Missouri (Kansas City).
New Jersey.
New York City.
Ohio.
Pennsylvania (Philadelphia and Pittsburgh).
South Dakota.
Tennessee.
Texas (San Antonio).

Mr. GRAY. I first learned of the program to collect biographical information on congressional candidates on October 26, 1972, when we learned at FBI Headquarters that an agent in Elyria, Ohio, contrary to specific instructions, had con-

tacted a newspaper in that area requesting information on a candidate. I promptly obtained the complete facts concerning this program and immediately ordered that it be discontinued. A press release concerning this matter was made the following day, October 27, 1972, and this is included with the material enclosed with my letter to you, Senator Ervin, of January 12, 1973, which has been submitted for the record.

Concerning the request sent to 21 FBI field offices in September 1972, seeking information of possible interest to the White House in the law enforcement and criminal justice field, also discussed in my letter to you of January 12, 1973, Senator, I first learned of that in a staff meeting. I believe it was 5 o'clock on Tuesday, I would have to remember the date that I set it forth, I have the letter to you, Senator, and I can get it from there rather than picking a wrong date.

The important point I think——

Senator ERVIN. I believe you wrote the letter on January 12, 1973.

Mr. GRAY. Yes, but when I learned of it was the Tuesday following my return from a week long trip. I had gone the preceding week to Butte and Anchorage, was out on travel all that week. I want to be very sure about these answers, that is why I want to take the time. I have got the information here and just need to refresh my recollection.

I went on a trip to Anchorage, Alaska, to visit the field office there, to visit the Seattle field office, the Portland field office, speak in Spokane, Wash., to the Washington State Bar Association, visit the field office at Butte, Mont., and the dates of all those were around the month I think of September, and I will pin it down here. Yes, and I came back, it was on the 12th of September in a meeting with my personal staff in the afternoon that I learned about this. This was the first indication that I had of it.

Senator ERVIN. I think it might be helpful to the committee if you could indicate in an extremely brief fashion the nature of the information in the dossiers, or whatever you chose to call them, relating to Congressmen and candidates for Congress which had been collected by the FBI under this practice.

Mr. GRAY. Right. The idea was started, conceived in 1950, was pursued actively from 1954 on, and the idea was generated by those who were then in charge of meeting with Members of Congress and handling requests from Members of Congress and providing information to Members of Congress.

The concept of the operation was to go into a district, acquire the names of the individuals who were candidates, and acquire public source information regarding those individuals as well as any information in the files of the FBI at the division level, regarding any contacts that these individuals might have had with the FBI—to bundle all this public source material together, send it back to FBI headquarters where it was distilled and a summary memorandum prepared if the individual was elected. No summary memorandum was prepared if the individual was not elected, and all public source material acquired was destroyed. So that all you had, if you had an incumbent, or rather a candidate running in a given district, we would gather that material on him. Then if this candidate was elected, public source material on him would be distilled into a summary memorandum and that would be sheet No. 1 or sheets No. 1 through however long the memorandum was regarding this individual. Our people were in what was then called the Crime Records Division would utilize that in making their contacts with the Members.

Senator ERVIN. What was done with the data that was related to the candidates who lost?

Mr. GRAY. They were destroyed, Senator.

Senator ERVIN. Destroyed.

Did the summary which was made from these files indicate whether there had been investigations into the personal conduct or the political views of the candidates or Members?

Mr. GRAY. No. The only information we had was the public source information that we acquired or any information that we might have on the individual that was contained in the FBI files at the division level or at the headquarters level. Now, if that individual as a private citizen had been the subject of a FBI investigation; yes, sir, that would be contained in the summary memorandum.

Senator ERVIN. But, if he had not been the subject of a prior investigation it would not be?

Mr. GRAY. No, sir, and we did not conduct any investigation of these individuals who were candidates in a given district.

Senator ERVIN. Now, of course, this practice had originated long before you became Director?

Mr. GRAY. Yes, sir, that is correct, Senator.

Senator ERVIN. And your investigation of the history of the practice satisfied you that this information was gathered for the benefit of those FBI in the dealings between Congress and the FBI.

Mr. GRAY. Yes; sir. Right here at the national level men like Inspector Dave Bowers, who conducts this kind of relationship with the Congress, who really—really it is a congressional services unit and that is what I have changed it to in the reorganization. Those men are doing that now and are in what we call today the congressional services unit.

Senator ERVIN. As I understand from your letter and other public statements made by you, this practice has been discontinued and the FBI relies upon such things as the "Congressional Quarterly" and other public information for any information of this character?

Mr. GRAY. Right. I shut it down over the recommendations of the people in the Bureau that it be continued and I said absolutely not, it will not be continued. It is too readily subject to misinterpretation and we don't need it.

U.S. DEPARTMENT OF JUSTICE,
FEDERAL BUREAU OF INVESTIGATION,
Washington, D.C., June 22, 1973.

Hon. EDWARD I. KOCH,
House of Representatives,
Washington, D.C.

DEAR CONGRESSMAN KOCH: Your letters of June 5, 1973, has been received. I am sorry I can add no additional information to that previously furnished to you by Mr. L. Patrick Gray, III. As you know, I am bound by the same restrictions which precluded his furnishing the information you requested.

Specifically, records within the terms of 44 U.S.C. section 3301 must be destroyed in accordance with the provisions of 44 U.S.C. sections 3302–3303a. These provisions require the submission of records proposed for destruction to the Administrator of General Services for his approval. This law, of course, can be clarified simply enough if Congress desires and your proposal is certainly an alternative.

Cordially,

WILLIAM D. RUCKELSHAUS,
Acting Director.

Mr. WALDIE. Then, one other line of inquiry.

Do you gather information for any reason at all on members of the press, other than when you are in the midst of a criminal inquiry involving a member of the press? Have you ever conducted any inquiry involving the press to get background on them for liaison or any other reason?

Mr. BOWERS. To my knowledge there has never been any investigation on any member of the press except where it involved an allegation of criminal activities——

Mr. WALDIE. Whether it involved an allegation that that person was seeking a job?

Mr. BOWERS. That is right.

Mr. WALDIE. For example, there was a contention that one of the network television people was investigated by the Federal Bureau of Investigation. When it was determined that, in fact, he had been it was alleged that he was under consideration for a job.

Mr. BOWERS. Yes.

Mr. WALDIE. Are you familiar with it?

Mr. BOWERS. I think I know the case to which you refer.

Mr. WALDIE. So, when you would receive an application or a request from the President or from the White House staff that they were con-

sidering so and so for a job, would you then commence an investigation as to his capabilities for the job, or whatever you do about a job applicant?

Mr. BOWERS. Yes; a specific request from the White House or from any of the Government agencies which do request us to investigate people that they are going to appoint, we would do the investigation.

Mr. WALDIE. If the request was, will you investigate Walter Cronkite, and that investigation request came from the White House, and that was the extent of it, what would your response be to a request of that nature?

Mr. BOWERS. Unless it showed that it was an investigation for a job I don't think the request would be honored in any respect.

Mr. WALDIE. I see.

OK, I have no further questions.

Mr. EDWARDS. Mr. McClory.

Mr. MCCLORY. May I ask this. We have been inquiring about the right to see individual files and being a Member of Congress do you have a file that you have put together on me?

Mr. BOWERS. I am sure we have information in our general files concerning you, sir. We have exchanged a lot of correspondence with you through the years.

Mr. MCCLORY. I am talking about, I guess, the regular FBI file containing information about individuals that results from an investigation.

Mr. BOWERS. To my knowledge we have no such file on you because I don't believe we have ever done an investigation on you.

Mr. MCCLORY. Tell me this. When you mentioned about the FBI file that you have with regard to candidates for Congress or for persons elected to Congress, you said that that contained information secured from public sources.

Mr. BOWERS. That is right.

Mr. MCCLORY. If we talk about campaign literature, campaign literature would be public information freely and generally distributed, wouldn't it?

Mr. BOWERS. That is right.

Mr. MCCLORY. And, of course, court records are public records, vital statistics records, and that sort of thing would also be the type of public record which would come to your attention?

Mr. BOWERS. The information that was gathered in that respect, Congressman McClory, was strictly background information, not court records or checks of anything like that, but just background information.

Mr. MCCLORY. Tell me this: In connection with a regular FBI investigation of a candidate or an appointee to a public office which requires a security check of some kind, or confirmation by the House of Representatives or the Senate, you conduct a broad type of investigation in which you confer confidentially with the friends and neighbors and others that might have some knowledge concerning the applicant. Is that right?

Mr. BOWERS. Yes, sir.

Mr. MCCLORY. Now, that is not the type of investigation that you conduct with regard to any Member of Congress or candidate for Congress, is it?

Mr. BOWERS. Let me emphasize again, Congressman McClory, we did no investigation per se at all in this. It was merely a collection of public record information. City directories, Who's Who, Martindale Hubbell, campaign material.

Mr. MCCLORY. Now, I also would like to know that you don't give any preferential treatment to Members of Congress. In other words, if a Member of Congress is arrested or if he is tried or if he is convicted, as has been the case with respect to some Members of Congress, you don't seal those records or you don't destroy those records or you don't fail to keep those records, do you?

Mr. BOWERS. No, sir.

Mr. MCCLORY. In other words, Members of Congress are treated substantially the same as other persons in which you might have an interest as the Federal Bureau of Investigation or as a Government agency?

Mr. BOWERS. Treated just like a citizen.

[Laughter.]

Mr. MCCLORY. And if I wished to have my individual file you will be willing to furnish that to me, too, will you, Mr. Director?

Mr. KELLEY. Yes, sir.

Mr. EDWARDS. I am going to have to interrupt. Mr. Rangel is going to leave.

Mr. MCCLORY. That same request was made by the other gentlemen.

Mr. RANGEL. The response was different. The Director said you would get your file and mine has to be discussed with the Attorney General.

Mr. KELLEY. We will refer it under the same circumstances.

Mr. MCCLORY. You will treat me the same as Congressman Rangel; any request will receive the same attention or lack of attention?

Mr. KELLEY. Yes, sir.

Mr. DRINAN. There was a minor candidate in my election campaign and he is going to be disappointed they didn't have a file on him.

Mr. EDWARDS. We are honored to have our colleague from New York with us, Ms. Holtzman.

We are going to have to adjourn at the second bell, which is just about to ring.

We perhaps will send you some written questions, since we probably have some more things we want to discuss with you, and perhaps we can have a meeting or two with you.

With the stated exceptions you generally are in favor of the Department of Justice bill.

Mr. KELLEY. Yes, sir.

Mr. DRINAN. On that, if I may, I would hope that is so, Mr. Kelley. I read very diligently last night and this morning all of the pages that you kindly gave to us. As I read on page 1, my heart was happy that you said that you were in complete agreement with the ultimate objectives of these bills but, in all candor, you seem to go along and cut the heart out of all of these bills.

You disagree and reject virtually every major proposition in H.R. 12575.

I would like, if you are willing, to have another hearing when we are not so interrupted and we could go through each section. I am afraid as I read, and I have read it carefully, that you really set aside

and downgrade and openly reject every major proposition made in the bill so warmly endorsed 2 days ago by the Attorney General.

Mr. EDWARDS. Thank you very much, Mr. Kelley and gentlemen. We are adjourned.

[Whereupon, at 4:20 p.m. the subcommittee adjourned to the call of the Chair.]

DISSEMINATION OF CRIMINAL JUSTICE INFORMATION

TUESDAY, MARCH 5, 1974

HOUSE OF REPRESENTATIVES,
CIVIL RIGHTS AND CONSTITUTIONAL RIGHTS
SUBCOMMITTEE OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 2 p.m., in room 2237, Rayburn House Office Building, the Honorable Don Edwards [chairman of the subcommittee] presiding.

Present: Representatives Edwards, Drinan, McClory, and Butler.

Also present: Alan A. Parker, counsel; Arden B. Schell, assistant counsel; and Michael W. Blommer, associate counsel.

Mr. EDWARDS. The hearing will come to order. We are continuing our hearing this afternoon on security and privacy of criminal justice information systems. The subcommittee is attempting to balance legislatively the necessity for collecting and disseminating this information and the individual's right to privacy. We are most fortunate today to receive testimony from representatives of the two organizations that have had the most impact in this area: The Law Enforcement Assistance Administration and Project SEARCH.

Project SEARCH was conceived by the Law Enforcement Assistance Administration to develop a national system for interstate exchange of criminal histories. The original demonstration project was supported by $16 million of LEAA discretionary and institute grants. Twenty States participated to share criminal histories through a computerized central data index.

The major assignment of the SEARCH group was to develop standard, computerized, criminal history records, summaries of which could be filed in a centralized index. The project, under the direction of one of our witnesses today, Mr. Hawkins, recognized the potential for abuse on matters of security and privacy in such a centralized system and produced numerous recommendations to safeguard these systems. The recommendations are part of the Report of the Committee on Security and Privacy of Project SEARCH which was submitted on May 25, 1970. A great body of expertise lies in Project SEARCH. We are most interested in hearing Mr. Hawkins' comments on these bills, as they will be invaluable in our deliberations.

Our first witness today is Mr. Hawkins. He comes from my home State of California where he is now the assistant director of the California Department of Justice and chairman of Project SEARCH.

Mr. Hawkins, we welcome you and we look forward to your comments in this area. We do understand that you have an airplane to catch, and so we will move along as best we can.

Mr. Hawkins, would you proceed?

TESTIMONY OF O. J. HAWKINS, ASSISTANT DIRECTOR, CALIFORNIA DEPARTMENT OF JUSTICE, AND CHAIRMAN, PROJECT SEARCH, ACCOMPANIED BY PAUL WORMELI, PROJECT COORDINATOR, PROJECT SEARCH

Mr. EDWARDS. Would you identify the gentleman with you?

Mr. HAWKINS. The gentleman on my right is another Californian, Mr. Paul Wormeli, who is the project coordinator for Project SEARCH.

I appreciate the honor, and I know Mr. Wormeli does, of appearing before the subcommittee to testify on these very important matters, and I commend the Chair for its interest and concern in the prior legislation which you have introduced and have before you at this time.

In the interest of time, Mr. Chairman, I would like to submit my written statement. I could read the whole thing, but a very selfish motive, I suppose, is to try to catch an airplane to try to get back to California, which I am sure the Chair would appreciate.

Mr. EDWARDS. Mr. Hawkins, we can submit the whole statement for the record, and you can summarize it.

Is that OK?

Mr. HAWKINS. Fine.

Mr. EDWARDS. Without objection, that will be done in that way.

[The prepared statement of Mr. Hawkins follows:]

[Testimony resumes on p. 341.]

STATEMENT OF O. J. HAWKINS, ASSISTANT DIRECTOR, CALIFORNIA DEPARTMENT OF JUSTICE, CHAIRMAN, PROJECT SEARCH

Mr. Chairman and members of the Subcommittee, I appreciate the honor of appearing before you to testify on the very important matters of dissemination of arrest records and security and privacy considerations affecting criminal justice information systems. I appear as a spokesman both of the California Department of Justice, of which I am Assistant Director, and of Project SEARCH, of which I am Chairman. Appearing with me is Mr. Paul Wormeli, who is the Project Coordinator for Project SEARCH and directs the staff that provides technical support for the Project.

Project SEARCH was established in 1969 under a grant from the Law Enforcement Assistance Administration, and initially developed and demonstrated an interstate network of computerized systems to exchange criminal histories among seven cooperating states, served by a computerized national index. The prototype system was quite successful and led to a decision by the Attorney General in December 1970 to establish a national operational system to be managed by the Federal Bureau of Investigation. This system is now the Computerized Criminal History component of the National Crime Information Center, usually referred to as NCIC–CCH.

I am pleased to say that Project SEARCH remains extensively active in research and development projects related to many aspects of the application of advanced technology to criminal justice information systems. Included among our current activities are such projects as developing standards for crime reporting, designing a national criminalistics information system, developing model information systems for corrections and the judiciary, and testing prototype equipment for improving the state of the art in taking fingerprints.

SEARCH has now expanded to include all 50 states and the Project Group—the policymaking body of SEARCH, which I represent today—now includes an executive appointee from each of the states, the District of Columbia, the Virgin Islands and Puerto Rico. Every one of these representatives is actively involved in some aspect of criminal justice in his state and has been appointed by his Governor to represent the criminal justice system of the state.

I believe it is accurate to say that the group includes some of the most experienced and knowledgeable people in this field in the Nation.

From the beginning, the states participating in Project SEARCH were sensitive to the problems of security and privacy that arose from the operation of the prototype computerized criminal history exchange system. For that reason, SEARCH very early established a standing Committee on Security and Privacy to study the problems and to make recommendations for dealing with them. The Committee has published three documents on the subject of security and privacy of criminal information systems, with which I believe you are familiar. One of the documents, entitled "Security and Privacy Considerations in Criminal History Information Systems," was printed as part of this Subcommittee's 1972 hearings on arrest record bills. The other two documents are a model State act and model State regulations to implement the recommendations of the Security and Privacy Committee. These three documents have now been reprinted in one volume and I will be happy to supply copies of this volume if you wish. The Committee has recently published a fourth document entitled "Terminal Users Agreement for CCH and Other Criminal Justice Information." This example agreement between central computer agencies and terminal user agencies contains provisions designed to enforce security and privacy safeguards. I have a copy with me if you wish to receive it for the hearing record, Mr. Chairman, and I shall be glad to supply additional copies.

Before turning to a discussion of specific provisions of the bills, I would like to make a few general remarks about the subject of legislation to regulate criminal justice information exchange systems.

Some of the states have already adopted strong privacy and security legislation, notably Massachusetts, Alaska and my own State of California. California, for example, has actively sought to protect individual privacy in the criminal history area. In California, criminal history information can be released only to persons authorized by state statute. The subject of a criminal record has the right to review it and to have errors corrected. The California Department of Justice has been given the responsibility of establishing and enforcing statewide standards for criminal record security and privacy. Full and accurate disposition reporting is required by our statutes and the California Department of Justice has established realistic record purging and record retention policies. I might add that virtually all of these laws and policies have been developed and sponsored with the cooperation of California criminal justice officials.

Many other states presently are actively considering such legislation. The bills currently under consideration in the states take many forms and propose varying approaches to the problems. I believe there is a need for a federal law to assure some degree of uniformity in the laws of the states and to settle some of the uncertainty that now exists as to what will be required or permitted in the way of state action to implement security and privacy safeguards, and what standards new state and local systems will have to meet.

Some of the states that now have or are working on legislation to protect personal privacy from potential abuses of automated systems are concerned when their information is disseminated to other states without proper safeguards. Hopefully, federal legislation will provide the catalyst that will spur all of the states to prompt action so that uniform safeguards will exist throughout the Nation.

With respect to the form that such federal legislation should take, there are several important points that I urge you to keep in mind. First is the overriding need of the criminal justice system for information—information that is timely, accurate and responsive to the needs of the various components of the criminal justice community. Numerous studies, beginning with the 1967 Report of the President's Commission on Law Enforcement and Administration of Justice and continuing through the Report of the National Advisory Commission on Criminal Justice Standards and Goals released last year by LEAA, have documented the heavy dependence of the criminal justice system on information about how the system works and about the people involved in the system. Before stopping a suspicious vehicle, a police officer should know whether it is stolen, who the owner is and whether he is wanted by the police or has a criminal record that might indicate that he is dangerous. Before admitting a defendant to bail, a magistrate should have information about his background and previous criminal record, if any. Before sentencing a convicted offender, a judge should have information about his criminal background. The same kind of information should be available

to correctional officials considering whether or not to release an offender on parole.

Until relatively recently, criminal justice information systems were, in most cases, inadequate to meet these operational needs of criminal justice agencies. Moreover, as I am sure the officials at LEAA will agree, lack of sufficient information about the operation of the criminal justice system has been one of the chief obstacles to improving the system.

In the past few years, however, we have experienced a substantial increase in the number, size and efficiency of criminal justice information systems throughout the country. Great emphasis has been placed on the development of systems for compiling and exchanging individual criminal histories or "rap sheets" because of the utility of this kind of information at all stages of the criminal justice process. Most of these systems are still manual, but some of the larger ones are automated at least in part and some of them are becoming quite sophisticated and efficient.

Of course, as you have pointed out in numerous statements, Mr. Chairman, this increased efficiency has compounded security and privacy problems. In a real sense, the inefficiency of the old manual systems was the greatest protection of individual privacy. Files were scattered and access and dissemination was limited and slow. The computer has changed all that. The modern automated systems are characterized by rapid access and rapid dissemination. Although this might increase the potential damage of an inaccurate or incomplete criminal record, it is important to note that automated systems have provided security and privacy safeguards that were not possible in manual systems.

It is also important to keep in mind that these new systems dramatically increased the effectiveness of law enforcement. Computerized criminal justice information systems are essential to the effective administration of criminal justice and their use should be encouraged and facilitated as well as regulated by law. These systems can be operated in such a way as to meet all of the legitimate information needs of criminal justice agencies while providing adequate system security and protection against unreasonable invasions of personal privacy. Laws on security and privacy need not be so strict as to stifle the effectiveness of the systems. To deny to these systems the great benefits that derive from the technological advances in the field of information systems that have occurred in recent years would be a setback for the equitable administration of justice in our society.

We further urge you to consider that most of the criminal history systems in use today are for the most part manual systems and this will be true for many years to come. In fact, since the computerized NCIC–CCH system is in limited operation in only a few states, the only existing national system for exchanging criminal histories is the manual fingerprint identification system operated by the F.B.I. Care should be taken that a law designed primarily to deal with security and privacy problems growing out of national computerized systems not impose restrictions and requirements with which manual systems cannot possibly comply. Such a law should not contain provisions of general application that would unduly restrict many other forms of day-to-day operational recordkeeping, such as police blotters, court record and corrections records that do not present serious privacy risks.

With those general observations, I would like to discuss the major provisions of the bills pending before the Subcommittee. The views and recommendations I shall offer are those agreed upon by the SEARCH Project Group and represent the consensus of representatives from all of the states. With certain exceptions that I shall point out they also represent the views of the California Department of Justice.

Dr. Robert Gallati, former chairman of the SEARCH Security and Privacy Committee, testified before this Subcommittee in 1972 and presented the views of Project SEARCH on H.R. 13315, a bill identical to H.R. 188. Dr. Gallati's testimony generally reflects the present position of Project SEARCH on H.R. 188, and, for that reason, I will not discuss that bill in detail. In any case, since the subject of H.R. 188—dissemination of arrest records that do not result in convictions—is dealt with in the other three bills, I will discuss that subject in commenting on the relevant sections of those bills.

H.R. 9783, H.R. 12574 and H.R. 12575 deal in general with security and privacy considerations of criminal justice information systems. Both H.R. 12574 and H.R. 12575, the bill developed by the Department of Justice, are more comprehensive than H.R. 9783. For convenience, my discussion will follow the section-

by-section format of H.R. 12574, but will include comments on the provisions of the other bills. I will not comment on all of the provisions, but rather only those I consider to be the most important. Of course, Mr. Wormeli and I will be pleased to respond to questions about any provisions of any of the bills.

PURPOSE AND JURISDICTION

Both H.R. 12574 and H.R. 12575 set forth Congressional findings that support the legislation, state the general purpose of the legislation and recite the bases for Federal jurisdiction. There is no similar provision in H.R. 9783. I believe a purpose and jurisdiction section is advisable, particularly since it provides an opportunity to stress the value of criminal justice information systems to law enforcement while recognizing the need for proper safeguards to protect individual privacy. I also think it is helpful to set out clearly the bases for Congressional jurisdiction to legislate on this subject.

ACCESS AND USE

Both H.R. 12574 and H.R. 9783 limit direct access to criminal records to authorized officers or employees of criminal justice agencies. H.R. 12575 also includes such a limitation, but provides further, in section 201(b), that, beginning two years after enactment of the Act, criminal justice information may be collected by and disseminated to only those criminal justice agencies that are "expressly authorized to receive such information by Federal or State statute." A strict interpretation of this provision would probably require most states to enact legislation authorizing specific criminal justice agencies to receive criminal justice information. We do not see the need for this requirement and we suggest that it be modified to permit criminal justice agencies to receive criminal justice information required for the purpose of their statutory responsibilities, or, as H.R. 9783 provides, for the purpose of official duties. This would permit dissemination to agencies that have a clear need for such information to carry out statutory responsibilities even though the statute might not expressly authorize such dissemination. This approach provides an adequate limitation without requiring additional legislation in most states.

H.R. 12574 and H.R. 12575 limit the kind of criminal record information that may be made available for purposes other than criminal justice activities. H.R. 12574 permits criminal histories and offender processing information to be made available for non-criminal justice purposes if such purposes are "expressly authorized" by federal or state statute, or by federal executive order in the case of criminal histories. The Attorney General is authorized to determine whether statutory authorizations are explicit enough to comply with the bill's intent. H.R. 12575 would permit only conviction records to be made available for non-criminal justice purposes if "expressly authorized" by state or federal statute.

H.R. 9783, on the other hand, limits dissemination of criminal records strictly to law enforcement officials, except for audit purposes and for research if individual names are deleted. This limitation would have the effect of nullifying numerous laws in every State that authorize the release of criminal records to such non-criminal-justice agencies as school boards and licensing agencies.

Project SEARCH recommends that criminal history information be available for non-criminal-justice purposes if "explicitly authorized" by state or federal statute. We would not limit available records to conviction records, as H.R. 12575 does, but we recommend that no information would be available concerning any individual who has not been convicted of at least one serious offense and has no such offense actively pending against him. A serious offense is one punishable by more than six months' imprisonment. This would help to preclude an individual's being unduly prejudiced by minor offenses.

We believe this is a reasonable approach to a very difficult and controversial problem. In effect, it is left to the States to authorize non-criminal-justice uses of criminal records by explicit legislative enactments. Many states, my own State of California among them, already have examined this problem and have set standards for licensing agencies and similar agencies to follow in accessing and utilizing criminal records. Many other states are moving in this direction. For a summary of these developments, I refer you to the September issue of "Offender Employment Review," published by the American Bar Association, which notes that 17 states have begun or completed such reviews and that similar action is being encouraged in other states.

H.R. 12574 delays the effective date of the bill for one year after enactment, thus affording the states a year in which to review the matter of non-criminal-justice dissemination and to enact necessary explicit statutory authorizations. We strongly endorse this delay and recommend an amendment to extend the period to two years, since many state legislatures do not meet every year. Project SEARCH also would amend the provision of H.R. 12574 that authorizes the Attorney General to determine whether statutory authorizations are explicit enough to meet the bill's intent. We would prefer that these determinations be left to the states through some appropriate state procedures.

The views I have expressed on this subject are those of Project SEARCH. The Attorney General of California will write to the Subcommittee to express the views of the State on this subject.

ARREST RECORDS

Probably the most controversial subject dealt with in the bills is the matter of maintenance and dissemination of arrest records where no conviction results from the arrest. We are well aware of the concern of the Chairman and members of the Subcommittee with this issue. Both H.R. 188 and H.R. 9783, as we understand them, would address the problem by limiting arrest records strictly to criminal justice uses, and providing that they may not be used even within the criminal justice community if prosecution is formally abandoned or if no conviction results within two years and the case is not then under active prosecution. This would include cases that result in acquittals, dismissals or other dispositions in favor of the arrested individual.

We agree with these bills to the extent that they prohibit non-criminal-justice dissemination of arrest records without convictions. However, we believe that there are valid criminal justice uses for such arrest records and we urge the Subcommittee to consider carefully the provisions of H.R. 12574 that would permit such uses within limitations, although we would add additional limitations, as I shall indicate. H.R. 12574 provides that, with limited exceptions, arrest records may not be disseminated for non-criminal-justice purposes if the individual is acquitted, the charge is dismissed, prosecution is abandoned or no conviction has resulted within a year and the case is not still under active prosecution. The bill would permit criminal justice use of these arrest records, even where an acquittal or dismissal results, for a period of five years, at which point the records would be sealed, under section 9(b)(3), if the individual has not been convicted of another offense and is not under prosecution or a fugitive. Any such arrest record would have to include a notation of the disposition if one has been reported and recipients would have an obligation to make a new inquiry each time the record is used to assure that it is up-to-date.

Project SEARCH endorses this provision, but we would add two exceptions. The first exception would be cases where an early determination is made not to file a complaint or initiate prosecutive action on the charge for which the arrest was made. This is the *Menard* case situation, and arrest records of that kind should be promptly expunged. The other exception would be in the case of a first offender whose arrest results in an acquittal or other favorable disposition or does not result in a conviction within two years. With these two exceptions designed to cover the most prejudicial cases and other provisions of the bill designed to assure that arrest records are kept accurate and up to date with notations of dispositions, we believe general criminal justice use of arrest records may safely be permitted.

We believe there are valid and necessary criminal justice uses for such records. The Subcommittee already has heard testimony from a witness from Massachusetts of instances where police officers in that state have been killed or injured after stopping individuals who might have been approached more cautiously if the officers had been aware that the individuals had arrest records indicating that they were dangerous even though they had never been convicted. Arrest records also provide investigative leads in identifying suspects where there is no other information source available for the investigator to utilize.

These views on arrest records are those of Project SEARCH. The Attorney General of California will submit separate written views on this subject on behalf of the State.

REVIEW BY THE INDIVIDUAL

All of the bills permit the individual to inspect his criminal history record for the purpose of challenge or correction and provide for correction in appro-

priate cases. This is an extremely important safeguard against inaccurate and incomplete records. We endorse the provision included in both H.R. 12574 and H.R. 12575 that an individual who has obtained a copy of his record may not be required or requested to show or give it to anyone else. This is necessary to keep prospective employers or others from requiring individuals to obtain for them copies of criminal history records to which they are not entitled under the bill.

H.R. 12575 contains a requirement not included in either of the other bills that we believe is important. Subsection 207(b)5 provides that any criminal record disseminated after its accuracy or completeness has been challenged shall include a notation informing the recipient of the challenge. That subsection also requires that any corrective action taken as a result of a challenge shall be communicated as soon as practicable (which means "immediately" in automated systems) to every criminal justice information system or agency that has received the erroneous information. In view of the notice requirement in the first part of the subsection and other provisions of the bills requiring recipients to make frequent inquiries of systems to assure that information previously obtained is still accurate and current, we do not believe it is necessary to require that notice of corrections be given to each individual criminal justice agency that has received erroneous information. Compliance with such a requirement would probably be impossible for manual systems and unnecessary although technically feasible in automated systems. A better technical solution is to require that the most recent data be obtained and utilized in any decision made regarding the offender, perhaps with the proviso that records under challenge be so annotated.

INTELLIGENCE SYSTEMS

Section 208 of H.R. 12575 provides that criminal intelligence information shall not be maintained in criminal information systems that contain criminal histories, arrest records or other information on individuals resulting from arrest, detention or adjudication. Although it is not as clear, H.R. 12574 requires the same separation of intelligence files by excluding criminal record information from the definition of intelligence information. We agree with this separation requirement although we think it should be made clear, either in the bill or at some appropriate place in the legislative history, that this does not preclude the maintenance in intelligence files of non-systematic references to arrests and convictions, so long as the two systems are kept separate and are not linked together in any way that would permit access to one system through the other.

Section 208(b) of H.R. 12575 prohibits automated intelligence systems. There are no provisions in that bill concerning manual intelligence systems, except for the requirement that they be kept separate from criminal record systems. H.R. 12574 permits automated intelligence systems, but places some limits on dissemination and use of intelligence information obtained from either manual or automated systems. Section 5(c) provides that, with limited exceptions, intelligence information may be used only for a criminal justice purpose and only where a need for such use has been established. The exceptions permit national defense of foreign policy uses and permit a State or federal agency that has both criminal and non-criminal components to make intelligence information compiled by the criminal component available for statutory functions of the non-criminal component.

The SEARCH position is more restrictive than H.R. 12574 but not as restrictive as H.R. 12575. It permits automation of intelligence systems, but it imposes stricter limitations on such systems, both manual and automated, than are contained in either bill. Since it is not lengthy, Mr. Chairman, I would like to read the position adopted by Project SEARCH:

> (*a*) Criminal intelligence information regarding an individual may be entered into a criminal justice information system only if grounds exist connecting such individual with known or suspected criminal activity. Such systems shall review individual criminal intelligence files at least every two years to determine whether such grounds continue to exist, and shall immediately destroy all copies of criminal intelligence information relating to any individual as to whom such grounds do not exist.
>
> (*b*) Access to and use of criminal intelligence information, including access by means of terminals or other equipment in the case of automated

systems, shall be limited to law enforcement agencies, and, within such agencies, to components and individual officers or employees thereof determined by the agencies to have a need and a right to criminal intelligence information.

(c) No automated interstate criminal intelligence information system shall provide for dissemination of full criminal intelligence information records by means of remote computer terminal access to computerized data bases containing such full records. Intelligence information disseminated by such means shall be limited to data sufficient to provide a register or index of the identities of individuals included in the systems and the names and locations of law enforcement agencies possessing criminal intelligence files relating to such individuals.

This position was agreed upon after a day-long debate by the Project Group. The group also voted to instruct me to stress in my testimony the very strong consensus among SEARCH representatives that intelligence systems are vital to law enforcement and should not be denied the benefits deriving from technological advances. Automated systems should be permitted, even on an interstate basis, because of the usefulness of such systems in investigating organized crime and other form of criminal activity that crosses state lines. The controls imposed on intelligence systems should be strict, particularly in limiting dissemination to criminal justice officials as we have proposed. Such protections are necessary both for the subject and for the data in the system.

We strongly urge this Subcommittee to invite the testimony of knowledgeable police intelligence witnesses to explore this very difficult problem and devise a legislative solution that will facilitate the continuance of intelligence systems under appropriate safeguards.

ACCURACY AND COMPLETENESS

As we have pointed out before, one of the most important factors in the protection of the rights of individuals about whom criminal histories are maintained is the accuracy and completeness of the records. This is, of course, also an important factor in the usefulness of the records to criminal justice agencies. Both H.R. 12574 and H.R. 12575 include generally similar provisions designed to insure that records are accurate, complete and up to date, both in criminal record systems and in the hands of recipients. H.R. 12574 places the initial burden of assuring that information is accurate, complete and kept up to date on the agency initially contributing the information to the system. It also requires all criminal justice agencies, including courts and correctional authorities to cooperate by contributing data on court dispositions and other steps in the criminal justice process. This is an important provision, since in some states incomplete data for criminal histories has resulted from the failure of some courts and correctional agencies to contribute dispositional data. Both bills require recipients of records to check back frequently by means of new inquiries of the system to assure that information they have previously obtained is up to date. The effect is to encourage accuracy and updating from both ends of the system, contributor and recipient, and we think this combination will be most effective.

Both bills provide for periodic inside and outside audits to assure that criminal history information is accurate and complete, and both provide for either the purging or sealing of old conviction and arrest records if the individual has been free of contact with the criminal justice system for specified periods. H.R. 12574 includes a provisions in the record-sealing section that we think is quite important, and is set out more explicitly than somewhat similar provisions in H.R. 12575. Subsection 9(c)(1) provides that manual systems may be exempt from full compliance if full compliance is not feasible. Automated systems can be programmed to review conviction records at frequent intervals to identify those that are seven or five years old and determine whether the individual subsequently has been arrested or convicted or is otherwise under the control of the criminal justice system. But this would be virtually impossible for most manual systems. Manual systems should, however, be required to purge or seal an outdated record if a request for sealing or dissemination of it is received, either from the individual or from a criminal justice agency, and it is then determined that the criteria for purging or sealing have been met. We suggest that similar exemptions for manual systems be added to the various provisions of the bill that require that complete records and lists be kept of the

sources of information, of requests for information and dissemination. An automated system can be designed to keep these records; but most manual systems cannot comply.

PRECEDENCE OF STATE LAWS

I will comment on only one other aspect of the bills, an aspect I consider to be the most important raised by the legislation—the relationship between state and federal laws.

Like most State officials, I am extremely sensitive about federal laws that overrule state laws, or Federal laws that condition federal funding of state and local activities. For that reason, I strongly favor the provision in both H.R. 12574 and H.R. 12575 concerning the precedence of state laws over the federal law, although I think they do not go far enough.

Both bills provide that State laws that afford greater protections than the federal law shall not be affected by the federal law so far as intrastate system operations are concerned, but use of records that are obtained through interstate systems shall be governed in every case by the federal law and implementing regulations. I would go further and permit a state law on this subject to be fully effective within the state, both as to records originating in the state and those received from other states through interstate systems, so long as the law contains adequate security and privacy protections.

It is true that many states do not have adequate laws on this subject and perhaps some of them will not act any time soon. However, many states do have excellent laws and others have laws on this subject under consideration. I have described the laws and policies in California. You are already familiar with the Massachusetts law, which, incidentally, is essentially the model Act developed by Project SEARCH. Alaska also has enacted the model Act, and other States are considering that or similar laws.

In my view, Mr. Chairman, neither the interstate nature of some of these information systems nor the federal funding that has gone into them justifies the enactment of a federal law and the promulgataion of federal regulations that will in effect nullify adequate state laws on the subject of security and privacy of criminal history records. I also ask that you consider the possible impact of the administrative and procedural problems imposed by federal laws. I urge you to limit the application of any bill you report to these States that do not now have adequate laws to protect the privacy of individuals and do not enact such laws within a reasonable period. Perhaps if you delay the effective date of the federal law for two years that will spur most States to act. After that time the federal law would be effective in those states that have not enacted their own laws.

For the same reasons, I do not favor the provision of H.R. 12575 that would prohibit participation in interstate systems by states that do not establish information systems boards within two years after enactment of the legislation. I believe maximum latitude should be given to each state to decide what mechanism it wishes to establish to implement the safeguards required by the legislation.

Mr. Chairman, that concludes my prepared testimony. Mr. Wormeli and I will now be pleased to respond to any questions you or members of the Subcommittee may have.

Mr. HAWKINS. If I can make a few comments from my statement and apologize if they appear not too be in too good an order, I am just improvising. Project SEARCH, which did start in 1969 under a grant from the Law Enforcement Assistance Administration, was originally charged with two tasks. One was to develop better criminal statistics for all of the States, and the second was to study the feasibility of a prototype or model system for the exchange of criminal histories.

Among the seven States that were participants at that time, the feeling was that the prototype for the project was successful. In fact, within 3 weeks of the first SEARCH group meeting which started with six States, we went to seven. Later, we grew to 15, 20, and now 50 States plus Washington, D.C., the Virgin Islands, Puerto Rico, plus four representatives appointed by LEAA. One of the things that SEARCH recognized was that problems in dealing with security and privacy that were both potential and actual and we created a security

and privacy committee. They have produced several documents which I think, if the committee does not have, it would be more than pleased to have. The main one was technical report No. 2, dealing with those issues.

I think in fact that the former chairman of that security and privacy committee, Dr. Gallati, did appear before this committee and testify in relationship to the SEARCH position in 1972. I feel that the SEARCH group has done a great deal in this, and in my remarks I touch on the importance of their work and I think one of the important facets that I would like to summarize is for criminal justice use of the information. Mr. Chairman, we feel that this must not be unduly restricted for criminal justice purposes, for law-enforcement purposes, and in my role as speaking for the attorney general of California and the Department of Justice, if I fluctuated between these two, I ask your forgiveness, but this is the thing that we are concerned with in the State of California—and I do have some existing laws that I would like to leave with the committee that deal with security and privacy, and that restrict the dissemination of these records only to people entitled to them by California State statutes.

I think the second major item I would like to address myself to is the fact that the States must play, in fact, we must have control, I will be so strong to say, of any interstate system that controls the movement of criminal history data. I think that in both bills there is some discussion regarding the board of information, and I would submit that perhaps the committee should look at the possibility of having at the Federal level such a board, and perhaps an advisory group to deal with the Federal agency problems of security and privacy, but for the interstate exchange of information, the States should have a voice in controlling the interstate movement, and within the State, each State should be allowed to choose the type of vehicle or system that it feel best meets its needs. And I cite that in Massachusetts where you have a board of criminal record information, and that undoubtedly works very well in that State. In California our legislature considered this and decided to vest regulatory authority in the Attorney General with, of course, the legislature constantly looking at the activity, and the progress, the rules, and regulations that are required.

We touch on criminal intelligence information in my statement which is an item in both bills, and I could refer you specifically to page 14, which deals with the position of SEARCH on intelligence systems.

We believe that there is a definite need for automated intelligence information. We also believe there is a definite need to restrict this type of information very, very closely, and the SEARCH position was that the system be reviewed every 2 years and that information which is not pertinent be removed.

We also recommend a pointer or index system for this criminal intelligence information, and I might cite that the way we envision this is indicated by a SEARCH-developed prototype IOCI or interstate organized crime intelligence model. Those persons that are involved in and assigned to intelligence work would be able to refer to an automated interstate index from which they would obtain only the location of information files, not the data base of information itself.

From that point there would be a manual interface between the inquirer and the person and agency holding that information so that the person making the inquiry must satisfy the person with that information that he is lawfully entitled to it and does have a need. Now, this would not include giving police agencies total access to this information, even within their own department, but only those assigned to the intelligence function.

I have hurriedly touched on many of these items here, and I presume, Mr. Chairman, with that short, perhaps inadequate, briefing on some of the items in the written statement, that I am ready to answer any questions that you would like to ask me.

Mr. EDWARDS. Well, thank you very much, Mr. Hawkins. We will accept the additional information you have for the record.

The Attorney General and the Director of the FBI have both testified on these three bills, and I think it is accurate to say that both the Attorney General and the Director of the FBI expressed support generally for the Department of Justice bill, H.R. 12574. You are acquainted with that bill.

Mr. HAWKINS. Yes, sir.

Mr. EDWARDS. The Director of the FBI, however, disagreed with all three bills in one particular area, and that has to do with the sealing of records in the Department of Justice bill after 7 years in the case of a felony. The administration bill says that records can be sealed in 5 years after a conviction for which the maximum penalty is less than 1 year and in 5 years for arrest records, generally, if there is no conviction.

Now, do you agree or disagree with the theory of sealing?

Mr. HAWKINS. I think first that it is the term I have to disagree with, Mr. Edwards, perhaps, if for no other reason, because of the State law that I am used to in California. When we define sealing in California, it pertains to those juvenile records that are closed by court order and it does not pertain to criminal records of adults.

Now, in the package of material that I will furnish you are the proposed rules and regulations regarding purging and retention of criminal records as established by the attorney general of the State of California. It follows somewhat the same provisions as the bill.

Now, in relation to SEARCH, the SEARCH position was that arrest records that do not result in conviction within 2 years must be destroyed if the person has no prior conviction and conviction records must be removed when outdated 10 years for a felony and 5 for a misdemeanor.

Mr. EDWARDS. That is SEARCH's recommendation, but that is not a part of California law.

Mr. HAWKINS. No; it is not. There is a difference here.

Mr. EDWARDS. So Project SEARCH would agree that there is some social benefit in a definite period of total disinvolvement with the criminal justice system and after that particular period, whatever it might be, there is a social reason for sealing records, correct?

Mr. HAWKINS. Yes; and also I do not want to mislead you. The California proposal also calls for destruction of records, but we would have no interim sealing provision. Destruction would take place after 5 years, 7 years, in some cases life, but other records would be destroyed when the subject reaches 70.

Mr. EDWARDS. Is California going to do that?

Mr. HAWKINS. Yes; we are in the process right now.

Mr. EDWARDS. You are destroying felony convictions after what period of time?

Mr. HAWKINS. We will destroy them after 10 years of no activity at age 70.

Mr. EDWARDS. And misdemeanor records?

Mr. HAWKINS. Either 5 years or 7 years.

Now, a good many of the misdemeanor offenses in California we do not even receive or enter into our arrest records, such as intoxication, drunk arrests, or violation of city and county ordinances.

Mr. EDWARDS. Now this, of course, does not mean a destruction of the court records. It means a destruction of your record of the record.

Mr. HAWKINS. Yes. The court records are not touched.

Mr. EDWARDS. The court records are still there if anybody wants to look at them.

Mr. HAWKINS. Yes.

Mr. EDWARDS. What does Project SEARCH think should be done with naked arrest records with no disposition?

Do you believe that every effort should be made?

Mr. HAWKINS. Well, we believe, and I think this is carried out quite vigorously in most of the States that I am acquainted with, and with the SEARCH position, and I think with the FBI position on the bulletins they have sent out, that every effort has to be made to get adequate disposition data for every arrest. And I know we have in California a large program for that under the Law Enforcement Administration's Comprehensive Data System. This type of information is very vital and mandatory also.

And so I think that a real effort is being made and the requirements are there for total and complete disposition reporting.

Mr. EDWARDS. Well, both Mr. Kelly and the Attorney General would agree with you, I think, with regard to the FBI records, but there is no provision in the law or in any of these bills to require that.

How are we going to do it on a nationwide basis? How are we going to insist that dispositions be provided to the agencies providing information?

Mr. HAWKINS. Well, I assume that there could be several vehicles to accomplish this. One would be that in the NCIC computer, criminal history record, that if a State contributing a record to NCIC does not within a period of time provide a disposition or a notation that the person is a fugitive or still under court trial, awaiting court trial or some other valid disposition, and the actual disposition had occurred, then you could remove it from the file.

Mr. EDWARDS. What provision do you have in Project SEARCH to restrict the use of criminal records for noncriminal justice purposes?

Mr. HAWKINS. We basically stated in our position paper that the info should be used for noncriminal purposes only when there was a specific State or Federal statute.

Mr. EDWARDS. How about a city of San Jose statute?

Mr. HAWKINS. I am talking about a State statute.

Mr. EDWARDS. Mr. Parker.

Mr. PARKER. Thank you, Mr. Chairman.

Mr. Hawkins, just prior to the hearing I gave you a copy of a letter which had just been received which raises a question which I would like to discuss with you.

One of the arguments that we have heard is that we should do nothing by way of any legislation which would restrict the technology and the advantage of the technology that would be gained by the use of computerization in terms of police information and arrest record information and so forth. I am just going to use this letter as an example, but it cites some facts. It is from an individual who lives in the city of San Francisco who was in a San Francisco police station just to request information. There was another person in the station attempting to get their car released because it had been towed away from a tow-away zone, which is very prevalent in the city of San Francisco, as we all know. They made a routine check, apparently. I am just paraphrasing all of this, because it is in a letter, and the writer doesn't know that the facts are totally accurate, but that routine check against the data bank in Sacramento reported out that there had been an arrest and a warrant for an arrest of that individual which had been outstanding for 2 years. The facts were that he had, in fact, been arrested under that warrant based on tracking him down by virtue of that car license number. He was subsequently cleared in court of any involvement in the actual crime.

Now, he was placed in the position, according to the facts in the letter, of being rearrested, having to get somebody to try to post a $10,000 bond and informing his family that he was in jail. He was worried that his employer, who had some kind of problem, would hear that he had been arrested. All of this because, somehow, the data center in Sacramento returned information that did not include the information that he had been already arrested and cleared on this.

Now, is there any protection or device in the technology to prevent that kind of thing from happening?

Mr. HAWKINS. Well, we make a sincere effort and go to a considerable amount of effort to avoid this type of thing. Based on his statement, it strikes me that probably what he is referring to is that he had been listed in a wanted person file, that is, that there had actually been a warrant issued by a judge for his arrest for some charge, and that this in turn had been entered into the State data bank. It may have been in the Alameda County data bank—I am not sure from the statement. It says the State data bank, however, in Sacramento.

It is the responsibility, of course, of the agency that enters that data to clear it when the person is no longer wanted or the item is not reported stolen. The mere fact of it being computerized doesn't change the outcome; it still could have happened in a manual file, if they would have checked that file, if they had not cleared that information there.

I think that we have—I know, as an example, people working with the field constantly try to impress on them and to instruct them and to work with them on clearing this type of information from the system. Also, I think NCIC prints on a scheduled basis a list of agencies and who they have entered into the wanted person file, and in turn this is given to the State and we check with those agencies and ask, is this person still actually wanted.

One of the other things we try to impress on the users of the system is that this type of information is an investigative lead and that they should use their judgment and treat this as investigative information.

Mr. PARKER. One of the thrusts of the legislation, of course, is to try to balance the use of this information. It seems to me, I am not being facetious, that the record of arrests or the record of the warrant always seems to get into the system, and rather quickly. But with the follow-up record, that it has been cleared or that the person has been acquitted, always the blame is then laid on the user agency, which somehow does not follow it up. Somehow we are going to have to address ourselves to legislation which will see that the follow-up information is there.

Do you have any suggestions in terms of sanctions or use with respect to the user agency to make sure that these matters are cleared up as promptly as the information is fed in in the first instance?

Mr. HAWKINS. Well, I think a continuing effort, of course, is required that may not necessarily be reflected in legislation, but could be a requirement by statute, and if there is sanction, I do not know whether it is against the city itself or whether it is against the chief of police, or whether it is against the terminal operator who entered the data in, or whether it is against the court. Where you put the sanction I think can be troublesome.

I think education, training, and constant auditing and monitoring of the system will eliminate this type of problem to a great extent. If I say it can be eliminated forever, I am sure somebody could prove me wrong.

Mr. PARKER. Mr. Hawkins, Project SEARCH is a group of State representatives who are designated by the Governors of the various States.

Mr. HAWKINS. Yes, sir, they are.

Mr. PARKER. Are all of the representatives from all the States representatives from criminal justice agencies?

Mr. HAWKINS. Yes; they are all representatives of criminal justice. They are police, they are judges, they are prosecutors, they are State planning agency people. They are police, obviously, at city, county, State level. We have quite a mixture of people involved.

Mr. PARKER. Does Project SEARCH have any position or have they considered whether perhaps the regulative boards, or even in agencies or a designation such as your own, should have some representation from the civilian community?

Mr. HAWKINS. Yes. I think that this possibility has been considered, and I think that there is a great deal to be said for it. It depends on what the role of the board actually is, Mr. Parker.

Mr. PARKER. I think three of the four bills before us refer to Federal and State statutes, and also to executive orders, as a reason to be exempt from the dissemination regulations in certain instances.

Do you believe that access to certain criminal information should be based on executive order or should be limited to Federal and State statute?

Mr. HAWKINS. I think it should be limited to Federal and State statute.

Mr. EDWARDS. Mr. Blommer.

Mr. BLOMMER. Thank you, Mr. Chairman.

Mr. Hawkins, what is your profession, sir? Are you a policeman or a prosecutor?

Mr. HAWKINS. Well, basically police, sir.

Mr. BLOMMER. You are basically a policeman?

Mr. HAWKINS. With the State attorney general's office in the Department of Justice. I am not a city policeman.

Mr. BLOMMER. You are a State policeman.

Mr. HAWKINS. Yes, sir.

Mr. BLOMMER. I would like to ask you some questions about sealing records which for the sake of clarity let's just say making them nonavailable by any technical means.

Did I understand you to say that Project SEARCH favors making criminal justice records nonavailable to the police at some arbitrary point in time?

Mr. HAWKINS. Yes. Well, Project SEARCH favors that the information, the criminal history record information be available to police during the period or the lifetime of that record, as long as it is kept.

Mr. BLOMMER. That is right, but you do not keep it after a certain period of time.

Mr. HAWKINS. We recommend with some qualifications that arrest records that do not result in conviction be destroyed within 2 years.

Mr. BLOMMER. Well, let's talk about felony records first.

When are the felony records going to be made nonavailable to the police?

Mr. HAWKINS. Well, if they were convicted——

Mr. BLOMMER. Convicted felons.

Mr. HAWKINS. After 10 years for a convicted felony, following the last date of being connected with the system; that is, on parole, probation, something like that.

Mr. BLOMMER. What is the reason for that? Why should those records not be available to the police?

Mr. HAWKINS. Well, that is the other side of the coin. When I say SEARCH adopted this, it was not without a great deal of discussion and consideration of the other side of the issue; some do not think that they should ever be destroyed.

Mr. BLOMMER. Well, I would like you to enunciate for the committee, though, the argument that won. What is the reason that records of felonies should not be—should be made unavailable to police? I would like to know the reason for it.

Mr. HAWKINS. I will let Mr. Wormeli talk for a minute.

Mr. EDWARDS. If you will yield for a moment, they are available to the police in the original records in the court. They are just talking about the information system.

Mr. BLOMMER. Absolutely right, Mr. Chairman.

Mr. WORMELI. I think the arguments boil down to two.

First of all, there have been a large number of studies indicating that recidivism occurs, if it is going to occur, within the first 3 to 5 years after a conviction. If a man is going to repeat, he will do so rather soon. If not, his basic behavior has probably changed, and that is the second reason. People in the criminal justice system feel that change in behavior should result in their giving that man a new start, if you will, in his relationships with society.

Mr. BLOMMER. Well, let me follow up.

Am I to understand that the records, because they might be of little use, are somehow offending that man by their existence?

Mr. WORMELI. They may well offend that man by their existence if they are used to make a judgment about him particularly outside of the criminal justice agency.

Mr. BLOMMER. No, no, no. I am talking about police officers.

Now, how will information of, let's say, a 20-year-old felony conviction be used to prejudice someone by a police officer?

Mr. WORMELI. Well, it may not.

Mr. BLOMMER. But how could it be? If we are going to destroy them, there has got to be a reason to change existing policy, Mr. Wormeli, and I wondered, we are now going to embark upon a new idea, and that is sealing or destroying records.

If we are going to do that, there has to be a good reason. How will the police officer prejudice someone?

Mr. WORMELI. I would not necessarily say that SEARCH stated that the police officer would prejudice someone. Something may occur in the courts or by a correctional agency or a presentence investigation that is based on data that is very old and likely to be of little value, let alone prejudicial.

It is not just a question——

Mr. BLOMMER. Well, let me just ask this.

Are not the police and the courts and the probation officers expert at reading criminal records? Are they not capable of looking at a 20-year-old arrest record and saying, this does not mean anything?

Why should the Congress of the United States make that judgment?

Mr. WORMELI. That is not the perspective that SEARCH approached it from. It was more, I think, the other side of the coin. The committee that worked on this had police officers of long experience in this field; their opinion was that since this data is of so little value, and since it is so costly to maintain and since many of those old records are so incomplete anyway, that they are wasting a great deal of time and money and energy keeping systems with people in them who have died or who have not been involved in criminal justice for 70 years, and that it is of no value to them. They prefer not to have it, rather than to take the other perspective of talking about the risk of a prejudicial action.

Mr. BLOMMER. Let me ask you, Mr. Hawkins, about another area. The administration bill, H.R. 12574, provides that certain records that are identified as criminal offender processing information may be available to the person to whom the record refers, and the defintion is any record of the criminal justice agency after an arrest. So we are talking about, I believe, memorandums of presecutors, presentence reports, parole board reports.

Are you in favor of giving people subject to the jurisdiction of the criminal justice system in this regard access to all the reports that are written about them?

Mr. HAWKINS. Well, no. You were referring to the administration bill, were you not?

Mr. BLOMMER. That is right. Page 7, it is 5(d)(1) or 5(d)(2).

Mr. HAWKINS. This is bail reports, presentencing reports, trial reports, and so forth?

Mr. BLOMMER. Right.

Mr. HAWKINS. I personally would not be in favor of releasing that, no.

Mr. BLOMMER. Does Project SEARCH have a position on that?

Mr. HAWKINS. No, I do not think we addressed ourselves to that type of information.

Mr. BLOMMER. Let me ask you another question that is related. Section 14(a)(2) creates a civil cause of action for any individual with respect to whom criminal justice information has been maintained, disseminated, or used in violation of this act. Criminal justice information means all policemen.

Is there any law in California that allows someone to see a criminal intelligence report, for example, about him?

Mr. HAWKINS. No, not criminal intelligence; no. He can see his criminal history record.

Mr. BLOMMER. Well, he cannot see—you have members of organized crime, I am sure, in California. Those people cannot come in and review their record, can they?

Mr. HAWKINS. No, they cannot.

Mr. BLOMMER. Would you favor that?

Mr. HAWKINS. No.

Mr. BLOMMER. I have one last question, Mr. Chairman.

I believe the State of California has a law that allows people to review the summaries of their criminal history for the purpose of correction?

Mr. HAWKINS. Correct.

Mr. BLOMMER. And you also provide in that law, or you do not provide, that the individual can get a copy of his record. Is that right?

Mr. HAWKINS. That is correct. They cannot have a copy.

Mr. BLOMMER. Now the administration bill says they can have a copy?

Mr. HAWKINS. Correct.

Mr. BLOMMER. Would you think the California law would be wiser, or the administration proposal?

Mr. HAWKINS. Well, I really believe that probably the California law is wiser. I think that there is a potential for abuse against the very thing we are trying to protect—the individual's privacy. I think the main purpose of the individual is that if there is an error in that record, it gets corrected, rather than walking around and showing it. If there is a provision for a copy to be given, I think there should be further language that it be an offense to alter or amend or change the copy that he obtained.

Mr. BLOMMER. Well, would it not be easier just to not subject that individual to either pressure or the chance to abuse the record?

I take it the State of California allows them to copy down what is there, and if you disagree, you can take action to correct it.

Is that right?

Mr. HAWKINS. Yes. He makes application to see his record. And, of course, we must identify him, and he reviews the record, and if he finds what he believes is an error, we have a form on which he cites all the information that he can give to correct that.

We in turn, then, forward that to the agency, and ask them to make a full explanation and correct the record, if that is the case. But he does not get a copy of the record.

Mr. BLOMMER. Well, your view is that that system is adequate to protect the individual and to see that the record is correct?

Mr. HAWKINS. Yes; it has worked very successfully for us.

Mr. BLOMMER. Thank you.

I have no more questions.

Mr. EDWARDS. Mr. Drinan.

Mr. DRINAN. Thank you, Mr. Chairman.

Thank you, Mr. Hawkins, for coming. I did not have the opportunity to review your paper last night. I reviewed it here, and let me try to clarify something for my own purposes.

On page 10, you state that "we recommend that no information would be available concerning any individual who had not been convicted of at least one serious offense." And then you continue on page 11 and 12.

Do I understand rightly that you are recommending that arrest records never be available in the case of an individual who had not been convicted of a serious crime, and that all arrest records be withheld until or unless this person had one serious conviction?

Am I correct to date?

Mr. HAWKINS. Well, Mr. Drinan, I believe that on page 10 that I am expressing Project SEARCH's viewpoint in relation to dissemination of criminal history information for noncriminal justice purposes. That would not be a restriction within criminal justice use itself, sir.

Mr. DRINAN. But at the bottom of page 11, you say that "both of these bills would address the problem by limiting arrest records strictly to criminal justice uses," and then on the next page, 12. Tell me what you would do with the first arrest record that comes in when it does not fall into the exception that you mentioned at the bottom of page 12; namely, the Menard exception? But this is an individual who is a first offender, for whom there is no prior arrest.

What happens to that arrest record?

Can it be disseminated for criminal law purposes?

Mr. HAWKINS. If there was a conviction, of course, I would say that it would be disseminated for criminal justice use, if it was a conviction.

Mr. DRINAN. No; it is a first offender, and there is no conviction. It is merely an arrest.

Mr. HAWKINS. Then it would be for criminal justice use but within criminal justice only. For noncriminal justice use the SEARCH position was that it would not be disseminated.

Mr. DRINAN. But you see the hazards, do you not, of disseminating these arrest records when 75 percent of all arrests do not result in a conviction? So 75 percent of all these arrest records are first offenders that are going out for a period of 2 years and could do inestimable damage to this individual.

Mr. HAWKINS. Well, I think, Mr. Drinan, that the thing I tried to clarify is that, for law enforcement and criminal justice, the criminal history record is the one document that is common to all elements of criminal justice. It is used by the police. It is used by the prosecutor. It is used by the courts.

Mr. DRINAN. But it is not a criminal record. He does not have a criminal record. He is just arrested, and he is not going to be, 75 percent of these people who are arrested are never going to be, convicted. Yet

you are allowing their names and their identity and their alleged crime to get out onto that teletype all over the country.

Mr. HAWKINS. For criminal justice use, yes, sir.

Mr. DRINAN. But these people are not going to be criminals. The disposition will be innocent, or it will be dropped. You make one exception for the *Menard* case, where the officer the next day makes an early determination not to file a complaint or initiate action on the charge for which the arrest was made. You admit that the law binds you there, because somebody went to court, and the court said to Menard that you cannot do that. And arrest records in that situation should be promptly expunged.

But what about the fellow who is not quite so lucky, and no early determination is made? It takes 3 months or 6 months for the judge to get around to it, or the prosecutor. You are going to penalize him, because he will be down in criminal justice records, and all types of offices all over the country will be getting his name. His name and his serial number will be in all types of data processing things and who knows whether he can ever get it retrieved.

So how do you explain that his privacy has been invaded?

Mr. HAWKINS. Well, of course, Mr. Drinan, I suppose I could cite many cases of while it is this person's first arrest and second arrest and he is out on bail awaiting trial, he is still committing other crimes.

Mr. DRINAN. But I am not talking about anybody who has been convicted. I am not talking about anybody necessarily out on bail. He may or may not be out on bail.

But what about the presumption of innocence? But I thought that when we said he has an arrest, and he has to stand trial, well, that he is presumed to be innocent. But you already have his name floating all over the country, all over the world, I suppose, in this criminal data process, and he is presumed to be guilty.

Mr. HAWKINS. Well, I guess I am not making myself clear.

Mr. DRINAN. It is all too clear.

Mr. HAWKINS. I assure you, it is not going all over the world to any and everybody. In our State, it is very closely restricted, and I think it is in other places.

Mr. DRINAN. I have a constituent who was arrested once, and then he was stopped for allegedly speeding. And the man went back and telephoned or wired somebody, and he came back and said, you have got an arrest for breaking and entering. That arrest had already been disposed of, and it had never been corrected. He tried to explain this, but he was arrested, and he was very humiliated, and it came out in the paper. I think that is an outrage, and I am protecting the privacy of that man, and you have no remedy for that man.

Is that right?

You say that you do not want to protect the privacy of that particular constituent?

Mr. HAWKINS. I never said that once, Mr. Drinan.

Mr. DRINAN. Why, he is victimized, and you have no remedy for it. He was arrested, and the arrest got into the system. The arrest was disposed of, and he was innocent, and no one sent the information back, or it had not been sent back yet. And he was humiliated and embarrassed; his privacy was invaded and his reputation was diminished in the community.

Mr. HAWKINS. Well, I think I state at the bottom of page 11 that this will include cases that result in acquittals and dismissals or other dispositions in favor of the arrested individual.

Mr. DRINAN. What page is that?

Mr. HAWKINS. At the bottom of page 11.

Mr. DRINAN. All right.

After he gets this disposition, that is all right. But in the interim, you allow his name and the arrest to go out to anybody in the law enforcement community.

Is that right?

Mr. HAWKINS. Yes, sir. And it is also in every newspaper sometimes, and in other documents, too, that we have no control over.

Mr. DRINAN. Well, that is something else. I have some serious difficulties with that, and you know how these bills go and you know what Menard said. I am inclined to think that if we eventually have to accept that as the law, or as the compromise, then there will be another *Menard* case where the plaintiff will urge the court to go further to protect privacy.

Well, I thank you for your comments, and I am particularly pleased to see on page 18 and 19, you do cover manual systems. I am not certain that the Attorney General or the head of the FBI wanted to protect, or felt that they could protect, manual systems. But you at least say that, as I gather here—tell me again what you say precisely about manual systems.

Mr. HAWKINS. On page 18, subsection 9(c)(1) provides "A manual system may be exempt from full compliance, if full compliance is not feasible. Automated systems can be programed to review conviction records of people and to identify those that are 7 or 5 years old. Manual systems should however, be required to purge or seal outdated records if the request for sealing or dissemination of it is received either from the individual or from the criminal justice agency, and it is then determined that the criteria for purging or sealing have been met." That is basically what I am saying.

Mr. DRINAN. Well, could you give me some kind of an estimate how many names of arrested and convicted people are still in manual systems and how many are in the automated?

Mr. HAWKINS. Throughout the United States?

Mr. DRINAN. Just a rough figure.

And more importantly, I suppose, when will the manual systems sort of merge into the automated?

Mr. HAWKINS. Well, I think, of course, that within each State this is going to depend on the progress they are making in automating the system and trying to purge it. In our State, we have purge criteria—and we will give you these documents—where we are purging old records out. Hopefully within 3 to 4 years we will have the manual systems shut down.

Mr. DRINAN. Thank you very much, sir.

Mr. HAWKINS. Thank you, sir.

Mr. EDWARDS. Mr. Butler.

Mr. BUTLER. No questions, sir.

Mr. EDWARDS. Mr. McClory.

Mr. MCCLORY. Thank you, Mr. Chairman.

Is there, in the bill sponsored by Senator Ervin, there is a recommendation that with respect to certain types of information, that they should be where they are retained in an automatic data processing operation, that there should be a manual or a physical contact with the data before its being released under certain circumstances.

Do you think that is feasible at all?

Mr. HAWKINS. That is criminal intelligence information?

Mr. MCCLORY. Yes. And I think it is with respect to criminal intelligence information, and I believe with respect to certain other classifications.

Mr. HAWKINS. If I understand it, Mr. McClory, I think it is criminal intelligence information. And I would say, yes, I think it is practical. I think it is logical. I think it is beneficial to the individual, and I think it is beneficial to the intelligence people working in the field.

Mr. MCCLORY. Where the intelligence information is released, it should not just be ground out through the computer but it should have some physical or some manual or some personal interface?

Mr. HAWKINS. Yes.

Mr. MCCLORY. That would provide much greater protection against the indiscriminate or accidental or inadvertent misuse?

Mr. HAWKINS. Correct.

Mr. WORMELI. Project SEARCH developed that point of view, particularly with respect to that data which is very sensitive and contains, for example, the reports of informants or other allegations that are not matters of public record.

Mr. MCCLORY. The Director of the FBI indicated that it was not feasible to do that.

Do you think it is feasible to handle that, the release of such information, without——

Mr. HAWKINS. Well, I think that in the SEARCH prototype system of the IOCI, as it is called, the Interstate Organized Crime Intelligence—and I must emphasize this is criminal intelligence, not criminal history or criminal processing and so forth—that what you have is a pointer system, or an index. And those people that are authorized to have access to that index would learn who to contact to get the detailed information.

In turn, then, the inquirer must satisfy the person holding that data that they are legitimate, intelligence people, who have a real need for this. And then the information will be given.

I would not advocate that any police department could have it, or any criminal justice agency could have it just by a manual, or terminal inquiry, but only those involved in the intelligence assignments.

Mr. MCCLORY. Thank you.

That is all, Mr. Chairman.

Mr. EDWARDS. Thank you, Mr. McClory.

Mr. Hawkins, a man gets arrested for a felony, is tried, and is found innocent. Do you think that record should be disseminated to anybody?

Mr. HAWKINS. Well, I have mixed feelings, Mr. Chairman. I think there are times that this is the only way that he has of showing that he was found not guilty.

Mr. EDWARDS. Well, that would be in the court record. We have no problem there.

What about in an automated file like the FBI or your State file?

Mr. HAWKINS. I think it is to his advantage also that the criminal justice people also know that he was found not guilty. It is protection to him.

Mr. EDWARDS. All right.

Suppose he is arrested 4 or 5 years later, and the prosecutor cannot decide whether or not to prosecute, so he gets his criminal record and he finds the man was arrested and tried for a felony and found innocent by 12 of his peers. So the prosecutor says, quite naturally, well, this is a pretty bad guy. I am going to go ahead and prosecute him.

Do you think that is fair?

Mr. HAWKINS. Well, I would certainly think it would not be fair, and I would be surprised if that is a common practice, merely on the basis that he had been tried and found not guilty, then to decide to file criminal charges against him, I would hope that he was going to prosecute him on the basis of the evidence that he has to try the man, not on the basis of a criminal history record.

Mr. EDWARDS. Do you see a possibility of discrimination against minorities in the dissemination of conviction records and arrest records?

Mr. HAWKINS. Well, I suppose that there can be cases cited, but I really do not, Mr. Chairman. In my experience in California—and I am sure it is true in other States—the officers are inquiring against an individual's record for a purpose. We do not, I believe, have police officers or court officials or prosecutors or correctional people just haphazardly making inquiries against the system to see what they can get out of the system. A police officer must have, and generally has, a need for that information pertaining to a particular individual. He just does not ask all the way down the file.

We would not print it out to him if he did. He must ask, do you have something on Bud Hawkins, and he has a need for that. But he does not say, give me all of the Hawkinses in the file and let us see what we can make out of that. He has either a complaint, he has a witness, or he has somebody or some evidence or some indication that satisfies him that he should make an inquiry to determine what this person's criminal history record is. And sometimes it may very well clear that individual.

Mr. EDWARDS. How do you people in Sacramento proceed to require that this police department in Santa Clara County provide you with a disposition of cases?

Mr. HAWKINS. Well, we have several techniques. One is that, of course, we have the law that requires it, and we have a disposition tickler system, you might say, on the automated file.

Now, we also have the Bureau of Criminal Statistics, which are concerned only with statistics. But in arriving at statistics they receive disposition data for particular cases and they have field staff to go out and followup so that we do get the dispositions. So we have people working with the agencies, with the courts, with the police, to get the dispositions in.

Mr. EDWARDS. Well, you have seen these rap sheets that the FBI sends out, and there are not an awful lot of dispositions on them.

Mr. HAWKINS. And we have someone in our own files.

Mr. EDWARDS. Well, how would you suggest that this committee draft legislation to insure that these records of the FBI that are sent out all over the country have dispositions?

Mr. HAWKINS. Well, I suppose that any agency contributing to the FBI file must, by law—and I am not too sure, they may not have; I am not clear on this, Mr. Edwards. But there may be State laws that they must submit a disposition to the FBI, or that the FBI would return the record to them.

Mr. EDWARDS. We promised Mr. Hawkins that he could get out of here at 3 because he has to catch a plane.

Are there any other questions?

Mr. DRINAN. One other question.

Going back to the Chairman's series of questions, I am troubled that you apparently feel that the individual who has been arrested for a felony and who has been acquitted by a jury that his dossier is going to remain in that file forever.

Is there a moment in time, after 1 year or 5 years or 10 years, when you say that Mr. John Jones has a right not to be in the file?

Mr. HAWKINS. Yes. We say that under the SEARCH concept that criminal arrest records may not—well, here, where am I again? Arrest records that do not result in convictions—that is one item—conviction records must be removed when outdated, 10 years for a felony.

Mr. DRINAN. Why 10 years?

Mr. HAWKINS. And 5 for a misdemeanor.

Well, this was the consensus of the SEARCH group at that period of time, sir.

Mr. DRINAN. Do you have any statistics that will justify that?

Mr. HAWKINS. I think that gets back to the 7-year period of recidivism. Now, there are problems in some States that require a prior conviction for a misdemeanor to result in a felony being charged. There are requirements for the issuing of gun permits in some States, where some States prohibit the issuance of a gun permit or their purchase of a weapon.

Mr. DRINAN. That is not your problem at all, sir. That is the problem of the States, and that is totally irrelevant to what you are doing here. If he wants to get a gun permit, it says right there, "Have you ever been convicted of a felony?", and he has to tell them all. So you cannot justify the preservation of that record by any other collateral situation.

How do you justify the 10 years where he can be hurt by this, where law enforcement people and other people can get ahold of this and he can be damaged in a number of ways?

Mr. HAWKINS. Well, I have no data to give you, Mr. Drinan, here at this time.

Mr. DRINAN. Well, suppose it is a crime where there is no recidivism at all, a tax felony, and he did not pay his taxes? I mean, you cannot justify that on recidivism, so why 10 years?

Mr. WORMELI. Mr. Drinan, if I might. The studies show a continually smaller increase in recidivism over time, and it is frankly just a matter of judgment. The Project SEARCH people discussed it. Some saw the studies that showed that recidivism goes from perhaps 63 percent to 61 percent in going from 3 to 5 years, and it is a

very small change. There is a continual but very small increase which gets less and less as you increase in time.

Mr. DRINAN. But there is no recidivism among people that do not pay their tax.

How do you justify that?

Mr. WORMELI. I would not particularly address a solution just to those who do not pay their taxes. I think the people that were developing this rationale were looking at individuals convicted of violent crimes and people that continue to repeat those violent crimes.

Mr. DRINAN. Well, it goes to nonviolent crimes too. It goes to a lot of things.

Mr. WORMELI. Well, if the Congress in its wisdom wishes to decide to exclude income tax nonpayment from those particular categories of offenses, that is certainly your prerogative. I think the people in SEARCH felt that for those convicted of felonies 10 years was, in their judgment, arbitrary judgment, a reasonable time period. And it was arbitrary.

Mr. DRINAN. One last question for Mr. Hawkins, before he has to go.

Repeating the question of the chairman, how can we compel the FBI or the Department of Justice to get dispositions?

The other day we had testimony where it was suggested that they would welcome a law requiring those who benefit by this system to give dispositions. As I recall, that was the testimony of the man with Mr. Clarence Kelly. But we cannot compel the States to do that.

But what about a law to the effect that the FBI simply has to get these dispositions, and after a moment in time, they cannot disseminate anything unless they have gotten some disposition from the local community?

Mr. HAWKINS. Well, Mr. Drinan, I think that I would agree that possibly a Federal law could be passed that would state that those who contribute to the Federal system, and NCIC files must provide dispositions to the Bureau. The only other way would be to have the FBI, I assume, put a lot of people in the field gathering the disposition itself from the courts, the prosecutor, and the police agencies.

Mr. DRINAN. Well, if this information is [illegible]redly so valuable to the police officers out there, then if they were told that you have to have dispositions if you want to have all of our goodies, it seems to me they would shape up pretty quickly, if it is that valuable.

Mr. HAWKINS. I think they are shaping up, Mr. Drinan, I really do.

Mr. DRINAN. Well, that remains to be seen. I went down to the FBI files, and they could not give me the evidence the other day as to the number of people for whom they have an arrest and for whom they have no disposition. They threw up their hands. They have no statistics. So I have not seen any hard evidence that the number of people in that no man's land is diminishing.

Do you have information?

Mr. HAWKINS. Well, I have in our State.

Mr. DRINAN. California must just lead the way in privacy.

Mr. HAWKINS. Well, we would like to think we do.

Mr. DRINAN. Well, I know you do. That is why I had hoped that your testimony might be a bit more firm on privacy. But I thank you for coming.

Mr. HAWKINS. Thank you, sir.

Mr. EDWARDS. I certainly agree with what Mr. Drinan said about California and Massachusetts.

Mr. Blommer.

Mr. BLOMMER. Are you an employee of the state police of California?

Mr. HAWKINS. I am assistant director of the California Department of Justice, which is headed by the attorney general of the State.

Mr. BLOMMER. Well, let me ask you this. When somebody wants to be a state policeman in California and they apply, does the state police check their records before they hire them?

Mr. HAWKINS. Yes, sir.

Mr. BLOMMER. What records do they check?

Mr. HAWKINS. They check the Department of Justice records and in turn, we probably check the FBI files.

Mr. BLOMMER. Do you check your criminal intelligence files?

Mr. HAWKINS. Not for the state police. No; I don't think so, unless they were signed, and our state police is a little bit different of what you conceive of state police. But for work in our own shop we would check our criminal intelligence file plus our criminal instrument file.

Mr. BLOMMER. In other words, if they have access to criminal intelligence information you would check that file to see if they are mentioned as an informant, or somebody's brother.

Mr. HAWKINS. Well, we would be more interested rather in the informant in what the subject did that way of interest to us.

Mr. BLOMMER. But if you checked and the rap sheet shows positive for arrest but no dispositions, you then automatically disqualify that man or do you investigate?

Mr. HAWKINS. We would get the disposition and we would look into the circumstances of what the arrest was about and why.

Mr. BLOMMER. Would you give him a chance to explain what happened.

Mr. HAWKINS. Absolutely.

Mr. BLOMMER. Thank you.

Mr. PARKER. I have just one quick question, Mr. Hawkins. You mentioned a while ago that if a request came in for Bud Hawkins, that is what you would send, but you would not send all the Hawkinses. What if your files contained 56 records on O. J. Bud Hawkins? How would you know which one to send?

Mr. HAWKINS. If they asked for just that name, we would print back that there are too many Bud Hawkins and we would ask them to print back better identifiers. If they could not, they would not be able to get a file from us.

Mr. PARKER. Let's say they gave you a multiple number of identifiers that boiled down to four records. Would you send the four or ask for more information?

Mr. HAWKINS. No. We would send the four.

Mr. EDWARDS. Thank you very much, Mr Hawkins and Mr. Wormeli. Your contribution has been huge and you certainly should be complimented for your leadership in Project SEARCH. This committee has gotten a great deal of benefit out of it.

Mr. HAWKINS. Well we thank you, sir, and the committee.

Mr. EDWARDS. Now our next witness is Richard W. Velde, Deputy Administrator of LEAA.

Before becoming a Deputy Administrator of LEAA, Mr. Velde served as an associate Administrator of Law Enforcement Assistance. Previously, he has served as minority counsel to the Senate Subcommittee on Criminal Law and the Senate Subcommittee on Juvenile Delinquency.

Mr. Velde, it is a pleasure to see you again.

TESTIMONY OF RICHARD W. VELDE, DEPUTY ADMINISTRATOR FOR POLICY DEVELOPMENT, LAW ENFORCEMENT ASSISTANCE ADMINISTRATION

Mr. VELDE. Thank you very much, Mr. Chairman. I have with me several of my associates in the Law Enforcement Assistance Administration. If you do not mind, I will just have them stay where they are, and if I get into trouble, I might ask them to bail me out.

I do have a prepared statement, Mr. Chairman. It is somewhat lengthy. I would be pleased to submit it in its entirety for your record. There are also some exhibits, which are even longer. I would not want to necessarily clutter up the record with all of them. For the information of the subcommittee I would be glad to submit them. Then you may or may not want to insert them in the record.

Mr. EDWARDS. Without exception, they will be accepted either for the file or for the record.

Mr. VELDE. My statement, Mr. Chairman, is divided into two parts: First, is a general description of LEAA's systems programs; and second, is a discussion of the pending bills.

With your permission, I would summarize the first part of the statement in two or three sentences, and that is that LEAA has a very substantial commitment to assist State and local government in the development of criminal justice information systems.

Out of about $2.1 billion which it currently recorded in our grants management information system, about $325 million has been invested by the States through block grants or through our discretionary grants in the establishment and improvement of these information systems.

So you can see there is a tremendous investment on our part. We are dedicated to this effort because we know that timely, accurate, and complete information is the lifeblood of criminal justice, not only for operational needs at the police level, but for decisionmaking throughout the entire criminal justice process. It is true not only of operations but of management, planning, and evaluation and research.

We are deeply committed to the advancement of this science and its application to criminal justice.

Now with your permission, I would skip to page 11 of my statement, which begins the discussion on the pending bill.

The relationship between privacy and governmental information gathering is one of accommodation and compromise. The question is not merely whether public or private interests want to know, but how important it is that such interests have access to information in the light of an individual's rights of privacy. That is the underlying factor in the dissemination provisions which have been addressed in the Department of Justice bill, H.R. 12574.

It is important to note that criminal justice information is separated into three categories: Criminal offender record information, criminal intelligence information, and criminal offender processing information. Each type of data is treated separately insofar as access and use is concerned. Both H.R. 12574 and H.R. 12575 categorize different types of criminal justice information and deal separately with each. H.R. 9783 does not separate the different types of criminal justice data. We prefer the treatment provided by the Department's bill.

Mr. EDWARDS. Did you help write the bill, Mr. Velde?

Mr. VELDE. Mr. Chairman, a task force assigned by the Attorney General's office had responsibility for drafting the current Justice bill. LEAA did have one of its staff attorneys represented on this task force, but not as an LEAA spokesman.

LEAA was given an opportunity to comment on the drafts of the bill after they had been prepared and we did so. I might add that the current bill, as is pointed out in my statement, does contain many of the features and contents of a prior bill which the Law Enforcement Assistance Administration submitted to the last Congress in response to a legislative mandate in our 1970 amendments. But the bill was not drafted by LEAA. It was drafted at the Department level.

Mr. EDWARDS. Thank you.

Mr. VELDE. Criminal justice intelligence information, except for the narrowly limited situation involving national defense or foreign policy, may only be used for a criminal justice purpose and only when the need for the use has been established by potential users.

Intelligence systems are defined to include investigative reports as well as reports of informants. Because a capability to assess the reliability of the information is required, it should not be disseminated outside of the criminal justice community. It must also be strictly controlled. Your own bill, H.R. 9783, would only permit the collection of information that arises directly from the apprehension, adjudication, confinement, or rehabilitation of a person charged with a crime and therefore would apparently prohibit the collection of intelligence information, H.R. 12575, the Ervin bill, would leave this area void of control except to prohibit the inclusion of intelligence information in an automated system. There is no provision in H.R. 12575 for the regulation of manual intelligence systems. The Justice bill, however, does deal with the question of intelligence systems and, recognizing the legitimate law enforcement need for such information, sets forth stringent controls with effective penalty provisions against unauthorized disclosures or misuse. Information from the news media or other public sources would be exempt from the provisions of this bill. Law enforcement personnel should be free to gather information in the public domain as other citizens, keep such records and freely exchange them without being subject to criminal penalties.

Criminal offender processing information, a second major category, includes information, such as detailed reports identifiable to the individual and compiled by criminal justice agencies, for the purpose of processing the individual from the time of arrest to the time of release from supervision. This processing information has restrictions placed on it so that it may be used for a criminal justice purpose and only when a need for use has been established. In other words, criminal

justice agencies will be required to reexamine their use of this information in light of a "need to know" standard.

The Justice bill also provides that if a use is expressly authorized by either a court order or a Federal or State statute, criminal offender processing information may be used for a noncriminal-justice purpose. H.R. 12575 has a similar access and use provision.

This provision should be carefully considered. Processing information should not be subject to discovery or other attacks in civil litigation authorized by other provisions of the pending bills.

Mr. EDWARDS. Mr. Velde, may I interrupt you at that point?

Mr. VELDE. Surely.

Mr. EDWARDS. Suppose a State has a whole group of laws that provide that criminal records are available to local municipalities for the licensing of barbers, ditch diggers, babysitters, you name it.

Mr. BUTLER. Massage parlors.

Mr. EDWARDS The administration bill would authorize that?

Mr. VELDE. We are discussing two categories of information. In the normal case where criminal justice information is made available for that purpose, it is criminal record information, as opposed to processing information, where authorized by Federal or State statute, and in the case of the Justice bill, Federal Executive order. Record information would be made available for this purpose if expressly authorized. Criminal processing information would have much stricter use made.

Mr. EDWARDS. Do you approve of the authorization by Executive order?

Mr. VELDE. At the Federal level, we support the Justice bill in that regard.

Mr. EDWARDS. You do not think it would get out of line?

Mr. VELDE. There is a potential for abuse, yes, sir. We think the potential is far outweighed, however, by the uses, particularly with respect to national defense and in the foreign policy area.

Mr. EDWARDS. Could you give us another example of how it would be used, please?

Mr. VELDE. Yes. In the organized crime area, for example, principals of organized crime are often active on a multinational level. In other words, principals of an organization in a city might have investments in the Caribbean, for example, in gambling enterprises or other investments in hotels or entertainment of one kind or another. We think there is a legitimate use to share this kind of information with foreign governments who may be penetrated, if you will, by organized crime elements from the United States.

Also, in the area of highjacking and other terrorist activities, these often cross international boundaries. That kind of information should be exchanged. In some cases this is provided for by Executive order. Also, by Federal statute as well.

Mr. EDWARDS. Of course, some President could use it for political purposes, as well.

Mr. VELDE. There is that danger. I think it is a minimal one, when balanced with legitimate needs for this kind of information.

Mr. EDWARDS. Only the President can issue an Executive order. Is that correct?

Mr. VELDE. That is correct.

Mr. EDWARDS. And do you think that the Attorney General would require some justification or some explanation of the Executive order?

Mr. VELDE. Yes, sir. That is provided for, that all of this information would be exchanged under the Justice bill, under the regulation of the Attorney General. In that respect, as far as civil discovery action, we do not favor section 14 of the Justice bill, which would authorize civil discovery of criminal processing information.

Criminal offender record information is information consisting only of identifying data and notations of arrests, nature and disposition of criminal charges, and post conviction status.

Criminal offender record information is also provided with safeguards. But here the need-to-know criteria is not employed. There is a recognition that the use of offender record information is a legitimate and universally used tool of law enforcement agencies which would not require a specific need to know criterion.

These are reasonable rules in light of criminal justice needs.

The dissemination of criminal offender record information for noncriminal-justice purposes is restricted to situations where there is a Federal or State statute or an Executive order which expressly provides for such use. The Ervin bill limits noncriminal justice dissemination to conviction records where there is a State or Federal statute expressly authorizing such use.

When an arrest has not led to a conviction or other disposition, section 8 of the Justice bill prohibits a dissemination to a noncriminal justice agency except in specifically defined circumstances. We support this provision over the one provided in the Ervin bill, which would limit arrest records to employment purposes at a criminal justice agency and when the particular arrest data is used to commence or adjudicate criminal proceedings.

In other words, we think the Ervin provision is somewhat narrowly drawn in this respect. Arrest data is needed by a criminal justice agency for many purposes. We are in agreement that arrest data not followed by a conviction after a prescribed period of time should not be used for noncriminal justice purposes. However, there is a different capacity to evaluate such information existing in the law enforcement area as opposed to the nonlaw enforcement area. A law enforcement official is trained to interpret and use such information. To deprive him of a necessary tool where the element of damage is minimal would be an unjustified limitation.

Mr. Chairman, if I may expand in this regard, there are three particular situations where arrest data is a valuable law enforcement tool: In the organized crime category where many cases, because of the potential of intimidation of witnesses or bribery and corruption of public officials, you oftentimes have arrests but no other disposition of the case; in sex offenses, also; and in cases similar to organized crime, in the narcotics area, because of the organization and the money at its command, very often arrest data is valuable.

In fact, 2 years ago, we made a major grant, $10 million to the city of New York to set up a special narcotics enforcement effort, because it turned out in the preceding year there were 75,000 felony arrests for narcotics offenses in New York City, but less than 100 convictions.

Mr. EDWARDS. I do not necessarily have an area of disagreement or agreement with you on this subject. I will make up my mind a little

bit later. But what you are saying is that, in some of these cases, you are going to treat arrest records as conviction records?

Mr. VELDE. No; not as conviction records, but to be made available for criminal justice purposes, for investigation and other criminal justice needs.

Mr. EDWARDS. You would let a judge see them, or a district attorney?

Mr. VELDE. That is correct.

Mr. DRINAN. Will the gentleman yield on that?

Mr. EDWARDS. Yes.

Mr. DRINAN. I have difficulty with your segregating these people, but I can see your problem. But are you suggesting that in organized crime, you have the same situation where you have a lot of violent or very serious crimes and few dispositions, as you have in narcotics, and how can you really legitimately say that we have to have these arrest records?

You are once again presuming, as the Chairman has said, that the arrest record means more than the arrest.

Mr. VELDE. In this limited situation, yes, sir, that is our feeling.

Mr. DRINAN. And on sex offenders, how do you justify it on sex offenders?

What happens there?

Mr. VELDE. Well, there, because of the difficulty in prosecuting the case, particularly if children are involved and the family does not want to expose the child to the rigors of a court trial or the embarrassment involved, the case is just not prosecuted.

Mr. DRINAN. Except you are assuming there is a recidivism that may or may not be there.

Mr. VELDE. There is a potential for recidivism. Many jurisdictions would support this.

Mr. DRINAN. I do not know if you can document that. You may or may not be able to. But I just wonder how you can tear privacy apart and say that, in these areas, we think that the arrest is particularly helpful.

Mr. MCCLORY. Would the gentleman yield?

As I recall, at our last hearing I had before me the FBI records which showed that 92 percent of the people arrested for serious crime had a prior arrest record, which would indicate that just the arrest record would indicate that there was a person apt to be involved in a crime at a later time.

Mr. DRINAN. Well, I think that in that case, if I might say that, this would not be applicable, because he already has almost lost his rights. His arrest and his conviction are in the system. And if they pick him up again, well, it is right there. But I am talking about the person who has one arrest and a disposition that is favorable, and yet he is in the system forever. And if he is in these three categories, you say that the arrest means more than arrest for some other crime.

Mr. VELDE. There is a balancing of interests here, and the Justice bill is not unmindful of the right of privacy of an individual who is not only arrested but convicted, as well. The Justice bill provides for no nonlaw-enforcement dissemination and very limited criminal justice dissemination. In fact, section 7 provides for no dissemination after 5 years.

Mr. EDWARDS. Seven years, is it not, for a felony? No disposition on an arrest record for 7 long years. That seems like a long time.

Mr. VELDE. Five years for an arrest without a disposition.

Mr. DRINAN. One further point, Mr. Velde. In section 8, you were talking about section 8, do you have any difficulties with the words of the administration bill that the Attorney General may waive all of these rights for reasons of national defense or foreign policy?

Mr. VELDE. Yes; we do have reservations about that. It is not in this statement, but we support the provision of the bill, with reservations. And, as I indicated just a minute ago, we think in these areas there have been many instances where this information ought to be shared.

Mr. DRINAN. Well, I heard you a minute ago, but it did not prove anything.

What do you mean reasons of national defense or foreign policy? I mean, that is pretty broad.

Mr. VELDE. Organized crime activities in the Caribbean would be concerned with foreign policy.

Mr. DRINAN. Well, why do they not say something like that? Just for reasons of defense or foreign policy, what is he talking about?

That has no norms or anything. It is not even language that is used in the statute. "For reasons of foreign policy,"—no one can even define our foreign policy. How does it get into a statute?

And you say you accept it with reservations. Well, tell us about the reservations.

Mr. VELDE. Congressman, I think first of all, legislative history such as is being made here today——

Mr. DRINAN. Right. I want to get some right now.

Mr. VELDE [continuing]. Would be helpful to the Attorney General, or whatever authority would have the responsibility under the legislation.

Mr. EDWARDS. Can you finish this after the quorum call? I think we will have to be able to come right back.

Mr. VELDE. Surely.

Mr. EDWARDS. Excuse us.

[A brief recess was taken.]

Mr. EDWARDS. The committee will come to order, and without objection, Mr. Velde's suggestion that his entire testimony be entered into the record is accepted.

[Testimony resumes on p. 370.]

[The prepared statement of Mr. Velde follows:]

STATEMENT OF RICHARD W. VELDE, DEPUTY ADMINISTRATOR FOR POLICY DEVELOPMENT, LAW ENFORCEMENT ASSISTANCE ADMINISTRATION

Mr. Chairman, I appreciate the opportunity to appear before your subcommittee today to present the views of the Law Enforcement Assistance Administration on the proposed legislation before you to regulate the collection, storage, and dissemination of criminal justice data.

Long standing customs and practices are now being challenged. This has led to uncertainty that is impeding the orderly development of criminal justice information systems. It is most appropriate and necessary therefore that definitive uniform standards covering the collection, maintenance and dissemination of all criminal justice information be established. The Law Enforcement Assistance Administration supports the concept that the collection and exchange of criminal justice data is vitally needed by criminal justice agencies to reduce crime and to

improve the quality of justice. It is equally our view that this need must be consonant with the requirement that the interests of the individuals about whom the information refers be safeguarded.

Mr. Chairman, the legislative proposals before you are comprehensive. Your long interest in this subject is demonstrated by the bills you have introduced to regulate criminal information systems, notably H.R. 188 and H.R. 9783 introduced during the last session of Congress and the Justice bill, H.R. 12574, introduced during this session.

I am pleased to be here to comment on the pending bills. However, before beginning, I would like to review the Law Enforcement Assistance Administration's involvement in the area of criminal justice information systems.

Quick and accurate data is vitally needed in the day-to-day operations of criminal justice agencies. The President's Crime Commission in its 1967 report "The Challenge of Crime in a Free Society" stated that:

"An integrated national information system is needed to serve the combined needs of the national, State, regional and metropolitan or county levels of the police, courts and corrections agencies, and of the public and the research community. Each of these agencies has information needed by others; provides a means for collecting it, analyzing it, and disseminating it to those who need it."

LEAA and its predecessor agency have funded a large number of programs for the automation of criminal justice records. Our investment, including block and discretionary funding, is more than $300 million dollars through FY '73. In 1966, for example, the Office of Law Enforcement Assistance, the predecessor of LEAA, provided $97,000 to the FBI to conduct a feasibility study and do design work on a computerized national crime data system. This system became the National Crime Information Center (NCIC). The NCIC system was given more than $10 million during the ensuing years. Tens of millions of dollars more have been spent by the States in the support of State systems linked with the NCIC.

In 1968, LEAA was created by the Omnibus Crime Control and Safe Streets Act with a mandate to assist State and local governments improve their criminal justice systems, institutions, facilities, and programs.

From its earliest beginning, LEAA began to receive grant applications from States seeking funds to develop State criminal justice information systems. LEAA conducted an initial review of State capabilities and determined that there was a central need for the development of a uniform format for criminal history records, one that could be used by all elements of the criminal justice system—police, courts, and corrections. Project SEARCH resulted from this review. SEARCH, an acronym for System for Electronic Analysis and Retrieval of Criminal Histories, began on June 30, 1969. It was designed to develop a prototype computerized criminal history exchange system. Its goal was to provide participating criminal justice agencies with information about offenders in a matter of seconds.

It attempted first to develop common data elements for the automation of criminal histories, then to have an on-line demonstration of the interstate exchange of this data. SEARCH demonstrated that the capability existed to make statewide and nationwide criminal coordination possible through State and local efforts. The success of SEARCH demonstrated forcefully that State governments could assume responsibility for complex technical programs and perform with efficiency and dispatch.

In 1968 there were just ten States in this country with some kind of State-level criminal justice information systems. By 1970 this had increased to 30 States, and today all States have operational systems on the State level serving at least one component of the criminal justice system.

Project SEARCH has been involved in the development of security and privacy policy in criminal justice information systems since the project began. The original members of the Project Group that directs SEARCH activities were sufficiently aware of the implications of a national coordinated system for the exchange of criminal histories to cause security and individual privacy rights to be among the first issues addressed in the project. Almost immediately after the formation of the project, an ad hoc committee was formed to consider the extent to which Project SEARCH should address these issues. The ad hoc committee was transformed into a standing committee on security and privacy within the first three months of project activity, and it is still active.

The original Committee on Security and Privacy stated a series of objectives in the fall of 1969: (1) to develop a code of ethics that could be followed by participating States in the exchange of computerized criminal offender record data, (2) to prepare security and privacy regulations governing the operation

of the prototype criminal history system to be developed by Project SEARCH, and (3) to conduct a thorough study of the security and privacy implications of a national computerized criminal offender information system, leading to policy recommendations governing the establishment and operation of such a system.

The committee soon developed a basic (minimum) set of regulations governing the operation of the prototype criminal history exchange system. These regulations were adopted by the Project Group and incorporated into the operations manual for the prototype system. They included provisions for the control of data entered into the system, access to the system via terminals during the demonstration period, and restrictions on the usage of data obtained from the prototype system.

LEAA's interest in privacy has by no means been limited to our involvement with SEARCH. In January 1971, for example, a notice was sent to all State planning agency directors to make them aware of their privacy responsibilities in funding organized crime programs. Also in 1971 the following special condition was added to the award which funded each State's comprehensive plan:

"The grantee agrees to insure that adequate provisions have been made for system security, the protection of individual privacy and the insurance of the integrity and accuracy of data collection." Similar language was subsequently incorporated into LEAA's guidelines as a "general condition" applicable to all grants from 1971 to date.

In May 1972 LEAA took another significant step in the area of security and privacy; it established the Comprehensive Data System (CDS) program. This is a $40 million dollar discretionary grant program now in its third year of implementation. At the inception of CDS, Project SEARCH's recommendations were fully incorporated into the CDS guidelines. The present guidelines also require participating States to fully address the recommendations of the National Advisory Commission on Criminal Justice Standards and Goals report. It is important to note here that all of LEAA's discretionary and categorical funds for criminal history systems are funded through the CDS program. Thus all funds over which we have direct control are now subject to these restrictions.

The major LEAA effort to encourage the completeness and accuracy of criminal histories while placing limits on their dissemination has been the Offender Based Transaction Statistics/Computerized Criminal History module of our Comprehensive Data System developed by our National Criminal Justice Information and Statistics Service. This program was established in recognition of the State's need for statistical data for program planning and evaluation. Tracking an arrestee from the time of arrest until he leaves the criminal justice system and recording the fact and data of each official action in his case permits the development of statistical data that describes the working of the criminal justice system in precise detail.

The recording of such official transactions when completed with a standard identification of the individual—in this case the FBI number—is precisely the same information needed to develop a criminal history record.

All LEAA discretionary funds now going into the development of the FBI's computerized criminal history (CCH) effort are channelled through the CDS program.

The CDS guidelines require CCH grantees to adhere to the rules defined in SEARCH's Technical Report No. 2. Recommended System Policies Related to Security and Privacy contained in this report were entered in the Congressional Record by Senator Kennedy during debate on Section 524 of the 1973 Crime Control Act. The CDS guidelines also incorporate the Model State Act and the Model Administrators Regulation proposed by SEARCH.

Several States have already adopted the Act and the Regulation—notably California, Alaska, Iowa and Massachusetts—and bills are pending in other legislatures. The CDS program represents a major part of our security and privacy initiative during the past two years.

As of now 33 States have indicated their desire to participate in the program by submitting CDS plans. We will submit a typical CDS plan for your information. Twenty-four of these States have had their plans accepted and are now beginning to implement them. However, Mr. Chairman, I would not like to leave the impression that all of these States now have secure information systems which protect the rights of individuals. Many States are merely in the early stages of planning.

In the 1971 amendments to our enabling legislation, LEAA was directed to recommend legislation with respect to promoting the integrity and accuracy of crim-

inal justice data collection, processing, and dissemination systems funded in whole or in part by the Federal Government. LEAA drafted legislation, which was introduced in the 91st Congress. The proposed legislation was not acted upon.

This past summer, the Crime Control Act of 1973, which extended LEAA funding authority, included an amendment requiring that the collection, storage and dissemination of criminal histories take place under procedures designed to insure that all such information is kept current therein and that security and privacy are adequately considered. Proposed regulations have been established for public comment. Public hearings are also being held. While these regulations are limited to criminal record information, they are consistent to the maximum extent possible with the legislative proposal, H.R. 12574, submitted by the Department of Justice. These draft regulations are attached as an exhibit to this statement.

It should be noted that LEAA's concern for the privacy rights of individuals extends beyond the problems involving criminal histories. It was at our request that Section 524(a) was added to the Crime Control Act of 1973. This provision provides LEAA with the statutory authority to assure the protection of persons who are subjects of statistical and research information.

In the area of criminal justice intelligence LEAA, pursuant to a specific legislative mandate in Section 301(b)(5) and general authority of the Omnibus Crime Control and Safe Streets Act, has been assisting States to upgrade and improve intelligence functions, especially in the organized crime field. Organized criminal activity characteristically cuts across the jurisdictional lines of criminal justice agencies. It involves forms of criminal conduct that are difficult to combat. In organized crime the code of silence, intimidation, and the ability to corrupt and influence require methods to respond to this difficult area of law enforcement. The creation of organized crime intelligence networks offers a resource to improve the apprehension of organized crime members. The President's Commission on Law Enforcement and the Administration of Justice emphasized that criminal justice agencies know entirely too little about the methods and organization of such criminal activities. A number of organized crime information systems have received LEAA funds. However, the agency recognized long ago the sensitivity of these systems and their potential for abuse. Therefore, we have taken great care to insure that systems we have funded respect the privacy rights of individuals.

An example of this concern is the Interstate Organized Crime Index project. This system provides participating agencies with a means of exchanging valuable information.

For this project individual privacy has been protected at many levels. First, participating agencies must be members of the Law Enforcement Intelligence Unit, which has strict membership requirements. Only after a thorough investigation is a person or agency admitted to membership. Secondly, *no* non-IOCI dissemination of data is permitted. Moreover, data in the automated system is limited to information already in the public domain, the media, etc. Information from informants and field investigation reports is not permitted to be exchanged through the index.

The final grant for the prototype system required a full evaluation with a special emphasis on security and privacy. Before any operational system is funded this evaluation will be carefully examined.

I will be submitting for the record a detailed description of LEAA's major funding efforts for criminal justice information systems.

Now, Mr. Chairman, I will present our views on the pending bills. I will concentrate on the two most recent bills—H.R. 12574 and H.R. 12575.

The relationship between privacy and governmental information gathering is one of accommodation and compromise. The question is not merely whether public or private interests want to know, but how important it is that such interests have access to information in the light of an individual's rights of privacy. That is the underlying factor in the dissemination provisions which have been addressed in the Department of Justice bill, H.R. 12574.

It is important to note that criminal justice information is separated into three categories: criminal offender record information, criminal intelligence information and criminal offender processing information. Each type of data is treated separately insofar as access and use is concerned. Both H.R. 12574 and H.R. 12575 categorize different types of criminal justice information and deal separately with each. H.R. 9783 does not separate the different types of criminal justice data. We prefer the treatment provided by H.R. 12574, the Department's bill.

Criminal intelligence information, except for the limited situation involving national defense or foreign policy, may only be used for a criminal justice purpose and only when the need for the use has been established by potential users.

Intelligence systems are defined to include investigative reports as well as reports of informers. Because such information requires the capability to assess the reliability of the information, it should not be disseminated outside of the criminal justice community, and it must be strictly controlled. Your own bill, H.R. 9783, would only permit the collection of information that arises directly from the apprehension, adjudication, confinement or rehabilitation of a person charged with a crime and therefore would apparently prohibit the collection of intelligence information. H.R. 12575 would leave this area void of control except to prohibit the inclusion of intelligence information in an automated system. There is no provision in H.R. 12575 for the regulation of manual intelligence systems. The Justice bill, however, does deal with the question of intelligence systems and, recognizing the legitimate law enforcement need for such information, sets forth stringent controls with an effective penalty provision against unauthorized disclosures. Information from the news media or other public sources should be exempt from the provisions of this bill. Law enforcement personnel should be free to gather information in the public domain, keep such records and freely exchange it without being subject to criminal penalties.

Criminal offender processing information includes information, such as detailed reports identifiable to the individual and compiled by criminal justice agencies, for the purpose of processing the individual from the time of arrest to the time of release from supervision. This processing information has restrictions placed on it so that such information may be used for a criminal justice purpose and only when a need for use has been established. In other words, criminal justice agencies will be required to reexamine their use of such information in light of a "need to know" standard.

The Justice bill also provides that if a use is expressly authorized by a court order or a Federal or State statute, criminal offender processing information may be used for a non-criminal-justice purpose. H.R. 12575 has a similar access and use provision.

This provision should be carefully considered. It should not be subject to discovery or other attacks in civil litigation authorized by other provisions of the pending bills.

Criminal offender record information is information consisting only of identifying data and notations of arrests, nature and disposition of criminal charges and post conviction status.

Criminal offender record information is also provided with safeguards. But here the need-to-know criteria is not employed. There is a recognition that the use of offender record information is a legitimate tool of law enforcement agencies which would not require a specific need to known criterion.

These are reasonable rules in light of criminal justice needs.

The dissemination of criminal offender record information for non-criminal justice purposes is restricted to situations where there is a Federal or State statute or an executive order which expressly provides for such use. H.R. 12575 limits non-criminal-justice dissemination to conviction records where there is a State or Federal statute expressly authorizing such use: H.R. 9783 would prohibit a dissemination for a non-criminal-justice use under all circumstances. We believe H.R. 9783 is much too restrictive in this regard.

ARREST NOT FOLLOWED BY CONVICTION

When an arrest has not led to a conviction or other disposition, Section 8 of the Justice bill prohibits a dissemination to a non-criminal-justice agency except in specifically defined circumstances. We support this provision over the one provided in H.R. 12575, which would limit arrest records to employment purposes at a criminal justice agency and when the particular arrest data is used to commence or adjudicate criminal proceedings. This is too narrowly drawn. Arrest data is needed by a criminal justice agency for many purposes. We are in agreement that arrest data not followed by a conviction after a prescribed period of time should not be used for non-criminal-justice purposes. However, there is a different capacity to evaluate such information existing in the law enforcement area as opposed to the non-law-enforcement area. A law enforcement official is trained to interpret and use such information. To deprive him of a necessary tool where the element of damage is minimal would be an unjustified limitation. H.R. 188, which deals exclusively with arrest records,

also recognizes the need for such data by law enforcement agencies and allows such dissemination for law enforcement purposes for a period of up to two years after an arrest.

SEALING OF RECORDS

The provisions for outdated criminal justice information in the various bills have the common element of removing such material because it no longer has sufficient value to warrant retention. However, H.R. 12575 goes beyond the sealing of records and requires purging so that there is no trace of the information or even an indication that such information was ever compiled. H.R. 9783 requires the destruction of outdated data. We would oppose an arbitrary destruction of such criminal justice information.

It should also be noted that H.R. 12575 sets forth no criteria for a determination as to when a record should be purged rather than sealed.

H.R. 12575 uses the felony/non-felony distinction to calculate the period of time that must elapse before a record is sealed; H.R. 12574 refers to imprisonment in excess of one year or conviction of an offense for which the maximum penalty is less than one year. The latter is preferable language, as it would be technically very difficult for an interstate system to keep records of every jurisdiction's felony and non-felony classification in order to be aware when the proper period of time had elapsed for a sealing or purging of records to go into effect. It is also important that the agency directly responsible for compliance provide notification to all systems when records are corrected, sealed or updated through the inclusion of dispositional information.

Although we support fully the sealing provision in H.R. 12574, we would suggest that an additional provision be added so that when the individual involved is subsequently arrested for a crime, there is a provision for his records to be reopened for the purpose of prosecution and disposition of that offense. If the arrest does not terminate in a conviction, the records should be reclosed pursuant to other provisions of the bill. If a conviction does result, then, of course, the records would remain open. This could probably be accomplished by the provision in H.R. 12574 that allows access to sealed records upon a specific determination of the Attorney General. However it should be statutorily provided. It should also be appropriate for sealed records to be made available to criminal justice agencies for their own employment checks and to check fingerprints in sealed records for identification purposes.

COMPLETENESS AND ACCURACY

Section 7 of H.R. 12574 is a most important provision. It is necessary that all criminal justice agencies, including courts and corrections, assume responsibility for completeness and accuracy of criminal offender record information. Each agency has a responsibility to contribute offender record information as an individual progresses through the system. We are not only speaking of the police information systems. We must think in terms of courts and corrections as well. Existing court systems are often inadequate. As stated by the National Advisory Commission on Criminal Justice Standards and Goals in its Court report, courts have not kept pace with technological advances in data processing. This is a critical problem in getting dispositional entries. A model is now being developed for court information systems in a joint project by the Institute of Judicial Administration and Project SEARCH.

Only the complete cooperation and action by each criminal justice agency involved will ensure accurate and up-to-date records. H.R. 12574 recognizes this, and requires that necessary steps be taken to achieve such compliance. In some States this may necessitate the enactment of State laws to make reporting mandatory by all criminal justice agencies. This is essential, not only to protect individual rights, but also as a tool of criminal justice planning, management and evaluation. Complete record keeping, such as the Offender-Based Transaction Statistics System contemplates, makes possible the description of system dynamics in a timely and comprehensive fashion.

RIGHT OF REVIEW BY THE INDIVIDUAL

Each bill, H.R. 9783, H.R. 12574 and H.R. 12575, makes a provision that the individual about whom a record is kept has the right of inspection.

The bills exempt intelligence information from such examination. However, H.R. 12575 allows the inspection of the correction and release information and so would H.R. 9783, as such data is not separately identified. Such informa-

tion includes reports by corrections personnel and others knowledgeable about the subject individual. The knowledge that it can easily be reviewed would hamper the free flow of information. For this reason H.R. 12574 would allow review by the individual of offender processing information only pursuant to a court order or statute. If such information is being utilized during a revocation proceeding, for example, it would in my view be proper for an individual to review the information or portions of it a the judge's discretion for the purpose of challenge or correction. But because of the limited use of such information, a right of review at all times would not be in the best interest of law enforcement.

SANCTIONS—JUDICIAL REVIEW

H.R. 9783, H.R. 12574 and H.R. 12575 contain similar administrative remedies and sanctions. We concur in the intent of these provisions. However, where court action is concerned, it is our strong recommendation that in the case of a State operation, remedies for violations should be pursued through the State courts rather than the Federal courts and only after administrative remedies have been exhausted. It is also important that a defense of good faith reliance upon the provisions of the statute or of applicable regulations be available in a criminal action or civil action for damages.

MANAGEMENT CONTROL IN CRIMINAL JUSTICE AGENCY

We support the provision of the Justice bill that would require management control of a criminal information system in a criminal justice agency. This is necessary to guard against unauthorized access to data and also necessary to protect system security. As was stated in the National Advisory Commission on Criminal Justice Standards and Goals in its report *Criminal Justice System:*

". . . the control of and responsibility for the collection, storage, and dissemination of criminal history records lies with law enforcement agencies . . . Lacking management control over system operators and programers, law enforcement officials cannot assure legislators that the data is properly protected."

REGULATION AND CONTROL

We support the provisions of H.R. 12574 which vests regulatory authority in the Attorney General. It is necessary to have uniform regulation of information and intelligence systems.

However, we recognize that there are opposing views on this issue, both with respect to Federal and State systems. If this subcommittee gives consideration to other approaches, we offer the following observations. H.R. 12575 proposes a three-tiered board and advisory committee structured to regulate and even operate these systems. A federal board could be a workable alternative for federal systems. But we would recommend, based on five years of experience with Project SEARCH, that a group of State representatives designated by the Governors of the several States would be an appropriate and effective vehicle to regulate interstate systems. The group should be created by Federal law and given a federal charter so as to be able to promulgate and enforce meaningful regulations and controls over systems within their jurisdiction. Project SEARCH has fully demonstrated that State representatives can manage complex technical and policy issues and systems of this kind.

With respect to intrastate systems, this should be a matter of State legislative policy, consistent with minimum standards set forth in the federal legislation, as is the case in the regulation and control of electronic surveillance. The SEARCH model bill provision for a State control board, which is contained in H.R. 12575 and has been adopted in Massachusetts might be an appropriate solution. However, we would not object to the recently passed California law which places regulatory powers in the State Attorney General. But this is a matter best left to the States.

EFFECTIVE DATE

H.R. 12574 sets an effective date of one year after enactment. Consideration should be given to making some provisions of the Act effective two years after enactment. This time frame is suggested because of the difficulty we perceive in a State's ability to conform in a shorter period of time. Privacy considerations cannot be tacked on to an automated system but must be

integrated into the software design. Special attention must be given to designing facilities which house criminal justice information files to reduce the possibility of physical damage to the information. Steps which should be taken include having facilities with heavy duty, non-exposed walls, perimeter barriers, detection and warning devices, and watertight facilities. This takes time and money. To assure system security and accuracy and completeness of records audits must be conducted regularly. Audit trials will require added record keeping responsibility. Mandatory reporting will require that all criminal justice agenices, including courts and correctional authorities, contribute accurate data on court dispositions and other steps in the criminal justice process. Those criminal justice agencies with inadequate or obsolete reporting systems must be given time to bring their data processing up-to-date. Programers, computer operators and others working in the area must be trained. In fact, two years may not be enough to respond to these new requirements.

Mr. Chairman, thank you for allowing me the opportunity to express the LEAA's views on these comprehensive legislative proposals. I would be pleased to answer any question you or your committee would wish to direct me to.

Mr. EDWARDS. Mr. Velde, will you proceed?

Mr. VELDE. Yes, sir. I am beginning again at the first full paragraph on page 15, under the heading "Sealing of Records."

The provisions for outdated criminal justice information in the various bills have the common element of removing such material because it no longer has sufficient value to warrant retention. However, H.R. 12575 goes beyond the sealing of records and requires purging so that there is no trace of the information or even an indication that such information was ever compiled. H.R. 9783 requires the destruction of outdated data. We would oppose an arbitrary destruction of this criminal justice information.

It should also be noted that H.R. 12575 sets forth no criteria for a determination as to when a record should be purged rather than sealed.

The Ervin bill uses the felony/nonfelony distinction to calculate the period of time that must elapse before a record is sealed. The justice bill refers to imprisonment in excess of 1 year or conviction of an offense for which the maximum penalty is less than 1 year.

The latter is preferable language, as it would be technically very difficult for an interstate system to keep records of every jurisdiction's felony and nonfelony classification in order to be aware of when the proper period of time had elapsed for a sealing or purging of records to go into effect.

I might give an example, Mr. Chairman. The criminal code of New Jersey has a statutory classification of minor and major misdemeanors. An individual may receive a prison sentence up to 3 years for a "minor" misdemeanor offense. Therefore, you could get into some very technical questions of law as to what is a felony or is not a felony if you had to look to the criminal code provisions of every State jurisdiction.

It is also important that the agency directly responsible for compliance provide notification to all systems when records are corrected, sealed, or updated through the inclusion of dispositional information.

Although we support fully the sealing provision in H.R. 12574, we would suggest that an additional provision be added so that when an individual involved is subsequently arrested for a crime, there is a provision for his records to be reopened for the purpose of prosecution and disposition of that offense. If the arrest does not terminate in a conviction, the records should be reclosed pursuant to

other provisions of the bill. If a conviction does result, then of course, the records would remain open.

This could probably be accomplished by the provision in H.R. 12574 that allows access to sealed records upon a specific determination of the Attorney General. However, in our view, it should be statutorily provided. It should also be appropriate for sealed records to be made available to criminal justice agencies for their own employment checks and to check fingerprints in sealed records for identification purposes.

I believe, Mr. Chairman, that the Attorney General and the FBI have also testified along these same lines.

Mr. EDWARDS. Mr. Velde, the Director of the FBI testified that he would not be in favor of any provision for sealing or expungement of records, except by the arresting agency.

Mr. VELDE. Except for criminal justice purposes. For non-criminal-justice purposes, that is a different situation. I think that falls short of the FBI position in that regard, and we would not favor it. We would favor sealing for certain criminal justice purposes, but not for others. And the unsealing, in effect, we would favor only in those circumstances which I have just identified.

Next, with respect to completeness and accuracy, section 7 of the Justice bill is a most important provision. It is necessary that all criminal justice agencies, including courts and corrections, assume responsibility for completeness and accuracy of criminal offender record information. Each agency has or should have a responsibility to contribute offender record information as an individual progresses through the system. We are not only speaking of the police information systems. We must think in terms of courts and corrections as well. Existing court systems are often inadequate.

As stated by the National Advisory Commission on Criminal Justice Standards and Goals in its courts report, courts have not kept pace with technological advances in data processing. This is a critical problem in getting dispositional entries. A model is now being developed for court information systems in a joint project by the Institute of Judicial Administration and Project SEARCH, a $2.5 million effort involving court administrators and court systems of 11 States.

Only the complete cooperation and action by each criminal justice agency involved will insure accurate and timely records. The Justice bill recognizes this, and requires the necessary steps be taken to achieve such compliance.

Mr. EDWARDS. Well, how does it require it?

Mr. VELDE. It requires that, wherever possible, disposition would be added to the arrest record. And of course it places more stringent controls on the bare arrest records.

Mr. EDWARDS. Well, it does not really require it.

Mr. VELDE. I would refer you to section 7, Mr. Chairman.

Mr. EDWARDS. Yes, sir. Each agency is required to insure that the criminal justice agency to do this?

Mr. VELDE. Yes, sir. Each agency is required to ensure that the information it contributes is accurate and complete, and that it is regularly and accurately revised to include dispositional and other subsequent information.

Mr. EDWARDS. So, it requests these agencies to do it. I mean, I am not trying to be technical, but it just asks them to please keep the information up to date and to send in dispositions.

Mr. VELDE. The individual who is the subject of a criminal justice record of one kind or another also has civil and criminal remedies available. We feel this may also be a spur to insure completeness and accuracy and updating.

Mr. EDWARDS. That is helpful. Thank you.

Mr. VELDE. Only the complete cooperation and action by each criminal justice agency involved will insure accurate and timely records. The Justice bill recognizes this, and requires that necessary steps be taken to achieve such compliance. In some States this may necessitate the enactment of State laws to make reporting mandatory by all criminal justice agencies.

I believe, Mr. Chairman, this is true with respect to certain court systems where there is no mandatory reporting legislation. There is a general indifference to the making of dispositional data available in some circumstances.

Mr. EDWARDS. Well, LEAA is giving grants.

Mr. VELDE. To encourage this, yes, sir. And the regulations that we have promulgated also encourages this as well.

Mr. BUTLER. Will the gentleman yield?

Mr. EDWARDS. Yes.

Mr. BUTLER. What sort of a project are we talking about in terms of getting this sort of legislation out of the States?

How many of them are in a position presently to make State reporting laws mandatory?

Mr. VELDE. Just off the top of my head, Congressman, I believe that around 15 or 16 States have some form of mandatory reporting legislation.

Mr. BUTLER. So this is a pretty big step in itself?

Mr. VELDE. Yes; it is. LEAA does have a program which I described in the first part of my statement, and which I submitted for the record, a comprehensive data systems effort. One of the key elements is to encourage a State to pass mandatory State reporting legislation and to provide discretionary funds to assist criminal justice agencies in complying with the State law that is passed.

But this is an incentive, a carrot on our part, if you will. There is no Federal statutory requirement.

Mr. BUTLER. I understand that. I just am concerned about the mechanics of State recordkeeping procedures adjusting to mandatory reporting. I think it is probably a bigger step than we thought about.

Mr. VELDE. Yes, sir. In some cases it is a traumatic series of events and there is great difficulty, not just with court systems, but local police departments and county sheriffs, correction agencies at all levels—State, county, and local—in meeting the reporting requirements.

Mr. BUTLER. You see, this concerns me because you go on to say that this is essential to effectively carry forward this program.

If this is an essential first step, it is an awful long ways away.

Mr. VELDE. Yes, sir. But there is a substantial body of experience in the States which indicates that it can be done, has been done, and therefore we recommend it should be done.

Mr. BUTLER. Thank you.

Mr. VELDE. Complete recordkeeping, such as the offender-based transaction statistics system contemplates and makes possible the description of system dynamics in a timely and comprehensive fashion.

This is key not only for criminal justice operations, but for planning, management, and resource allocation and evaluation as well.

From LEAA's standpoint this is an essential ingredient in developing comprehensive information concerning what is actually happening in criminal justice, and this is vital to comprehensive planning and resource allocation.

Each pending bill has a provision that the individual about whom a record is kept has the right of inspection.

The bills exempt intelligence information from such examination. However, the Ervin bill allows the inspection of offender processing information and so would H.R. 9783, as such data is not separately identified. Such information includes reports by corrections personnel and others knowledgeable about the subject individual.

The knowledge that it can easily be reviewed might hamper the free flow of information. For this reason the Justice bill would allow review by the individual of offender processing information only pursuant to a court order or statute. If processing information is being utilized during a revocation proceeding, for example, it may in my view be proper for an individual to review the information or portions of it at the judge's discretion for the purpose of challenge or correction. But because of the limited use of such information and the often sensitive sources from which it is derived, such as reports of correctional officials or family and friends of the individual, a right of review at all times would not be in the best interest of law enforcement. For example, it would inhibit a candid discussion of the potential of the individual as a rehabilitation risk.

Mr. DRINAN. Mr. Chairman, may I ask at this point that—you are the third witness who speaks more or less for the administration, and is there agreement among the Attorney General and the Director of the FBI in talking about any of the essentials of the bill?

I cannot recall what the other two gentlemen said precisely about this right of review, but are there substantial differences in the administration as to what we are trying to do here?

Mr. VELDE. There are some differences, I think, on this point. However, there is a commonality of interest among the three witnesses that have testified that may depart in some respects from the provision of the bill itself.

Mr. DRINAN. Do you mean you do not even buy the administration bill?

Mr. VELDE. The Justice bill. I think it is not technically accurate to call it the administration bill.

Mr. DRINAN. I mean, you depart from that?

Mr. VELDE. In this respect, yes, sir.

Mr. DRINAN. Well, how is there agreement?

Mr. VELDE. Well, we all depart in the same fashion. In other words, I think there is agreement, and I have not read the transcript of the testimony. But from what I understand, we are essentially in the same view on this point, that there should not be an unrestricted right of judicial access by an individual of criminal offender proc-

essing information, not criminal history information but processing information. I believe the Bureau and the Attorney General and now LEAA are essentially of the same view on this matter.

Mr. DRINAN. But is that in the Justice bill?

Mr. VELDE. Section 14 of the Justice bill grants a broader right of access to the individual than our testimony requests. Therefore in effect, we are suggesting that the provision of the Justice bill is too broad.

Mr. EDWARDS. You do not even want a judge to be able to make that decision?

Mr. VELDE. No. We want the individual to have the right of access for criminal history records, virtually an unrestricted right. For criminal processing information, which oftentime contains sensitive information, the judge should be able to provide all or portions of that information for criminal proceedings, but not necessarily in civil proceedings. That is our point of view.

Mr. DRINAN. But Mr. Velde, do you not think it is a little unusual that the administration and Justice puts out this bill and it is filed in the name of the administration or as a favor to the administration, and then the three spokesmen for the administration come in and just tear the guts out of section 14?

I mean, what has happened?

Do you people get together ahead of time and say, what is our position?

Is the Civil Rights Division asked about this thing?

Mr. VELDE. Congressman, first, I believe the Civil Rights Division was asked to comment on this draft bill.

Mr. DRINAN. Do you have their statements?

Can we have for our knowledge and for the record, at least for our knowledge, their memos?

Mr. VELDE. I do not have them in my possession. I am sure the Justice Department could provide it.

Mr. DRINAN. Well, can you take care and see that I get it personally? I want it.

Mr. VELDE. I would be pleased to.

Mr. DRINAN. I will be waiting for it in a day or two.

Mr. VELDE. If my recollection is correct, I believe the Civil Rights Division actually had no comment on the bill in its response to the Department.

With respect to your other question, Congressman, it is unusual in this instance, but understand that the Justice bill was prepared in a period of transition and some turmoil within the Department. I think that is somewhat of an understatement. It was just not possible to focus in all cases on every provision of the bill. In the overriding interest of seeing this legislation progress, it was decided that even though there were unsettled matters with respect to the provisions of this bill, not only within Justice but within the executive branch as a whole, it was better to submit it in its present form, rather than to delay the submission any longer. That is why you will find in some cases a differing view concerning some of the provisions.

Mr. DRINAN. Well, if we keep developing the bill here and get to markup at all, can we anticipate solid, firm support from the admin-

istration for whatever version comes out, assuming that it is not radically different from this?

Mr. VELDE. From the administration?

I would not be so brash as to speak with respect to that point, because I know that the Department of Defense, for example, the Department of Health, Education, and Welfare, and the Civil Service Commission all have strong views on this bill, and they differ in some respects from each other. There are some conservative views, there are liberal views, there are nonlaw enforcement views, there are enforcement views, and so on. I do not think there is any likelihood of any unanimity of agreement in other agencies of the executive branch. I think you can count on support from the Law Enforcement Assistance Administration for the major objectives of this bill.

Mr. DRINAN. Well, you have just destroyed one of them.

Mr. VELDE. Well, I would hope that my comments have attempted to improve that provision, rather than destroy it.

Mr. DRINAN. Well, there is nothing left.

Mr. VELDE. No, no.

Mr. DRINAN. You can get a court decree or a statute. Maybe we should put a statute right into this thing.

What do you mean?

There is nothing left of 14.

Mr. VELDE. No; there are two circumstances in which you would have right of discovery in section 14, in civil and in criminal proceedings. My comments address themselves only to the civil proceedings, not to criminal. There would still be the unrestricted right of review, of access, challenge, discovery, if you will, in criminal proceedings and in certain cases in civil proceedings.

Mr. DRINAN. Well, going back to your own testimony, you changed the words. I wonder if you are even certain of what you are saying here. Your script here says, "The knowledge that it can be easily reviewed would hamper the free flow of information." But then when you spoke you said it "might," instead of "would."

And further down the script says, "If such information is being used during a revocation proceeding, it would in my view be proper," and then you said, "it may."

I mean, are you certain?

Or is that just incidental?

Mr. VELDE. I think you can rely on the text as submitted, Mr. Congressman. That was just my own paraphrasing of the words as I went along. I do not mean to influence the substance of the statement at all.

Mr. DRINAN. Can you really prove that statement, "The knowledge that it can be easily reviewed would hamper the free flow of information"?

Mr. VELDE. Yes, there are instances, particularly in the organized crime area where defendants in criminal proceedings have used discovery rights to attack the existence of intelligence systems and other criminal justice information systems. There are numerous instances at the Federal as well as at the State level which could be supplied for the record.

Mr. DRINAN. Could they not still do that if they could get a court order on discovery?

Mr. VELDE. Yes. And we are not objecting.

Mr. DRINAN. So that just proves your point. They still can do that.

Mr. VELDE. In criminal proceedings, yes. But with respect to civil proceedings, we think this is opening the door perhaps too much.

Mr. DRINAN. Thank you.

Mr. EDWARDS. Mr. Velde, if this bill is enacted somewhat as it is, the administration bill, it certainly is going to change the life of a lot of these agencies that you mention, like the Civil Service Commission and the Department of Defense. They are going to have to come up with specific statutory authority to get their hands on some of this information and it is not going to be the same kind of information they are used to getting now. They are getting the same information now that the police departments get, rap sheets.

Mr. VELDE. I think in many instances, yes, sir. In that regard the Justice bill is a very strict bill as far as nonlaw enforcement dissemination of not only record information, but intelligence and processing information. It is very strict.

Mr. DRINAN. Another point, Mr. Chairman, if I may,

When you say it is a very strict bill, as if the administration is doing something that is very commendable, are they going beyond what Menard has required?

Mr. VELDE. Yes, in many respects. Menard addressed itself only to criminal history records held by the FBI. This bill covers intelligence systems, it covers processing information at the Federal, State, and local level. It is a much more comprehensive bill.

Mr. DRINAN. But Menard too, in another case would say the same thing. The natural implication of Menard is that they cannot do it in the civil if they cannot do it in the criminal.

Mr. VELDE. Menard does not address intelligence systems at all.

Mr. DRINAN. Yes, I know. But you are just doing what Menard in its spirit said must be done.

Mr. VELDE. Well, Menard is still on appeal and the court of appeals here in the District has not rendered a decision. So what Menard will eventually stand for I do not know. But with respect to the district court decision on it, I think your assessment is correct.

Mr. DRINAN. Thank you.

Mr. VELDE. The pending bills contain similar administrative remedies and sanctions with respect to judicial review. We concur in the intent of these provisions. However, where court action is concerned, it is our strong recommendation that in the case of a State operation, remedies for violations should be pursued through the State courts rather than the Federal courts and only after administrative remedies have been exhausted. It is also important that a defense of good faith reliance upon the provisions of the statute or of applicable regulations be available in a criminal action or civil action for damages.

This is a provision in the Justice bill that is not found in the Ervin bill.

We support the provision of the Justice bill that would require management control of a criminal information system in a criminal justice agency. This is necessary to guard against unauthorized access to data and also necessary to protect system security.

With respect to regulation and control, we support the provisions of the Justice bill, which vests regulatory authority in the Attorney

General. It is necessary to have uniform regulation of information and intelligence systems.

However, we recognize that there are opposing views on this issue, both with respect to Federal and State systems. If this subcommittee gives consideration to other approaches, we offer the following observations. The Ervin bill proposes a three-tiered board and advisory committee structured to regulate and even operate these systems.

Mr. EDWARDS. Why do you have to have a board at all?

What is wrong with subcommittees of Congress?

Mr. VELDE. Under the Ervin bill, for example, Mr. Chairman, the Federal board operates the systems. I do not know that the committees of Congress would want to place themselves in that business. Legislative oversight is one thing, but actual day-to-day operation is quite another. I do not think this would really be something that the committees would themselves welcome.

There might also be some constitutional difficulties.

Mr. EDWARDS. Oh, I am not thinking of anything larger than oversight. It seems to me that the administration bill would generally change the national law and regulate the various State systems and the Federal system.

Mr. VELDE. That is correct.

Mr. EDWARDS. And I do not quite understand why there would have to be a separate board that would involve itself in it.

Mr. VELDE. Under the Justice bill that is correct. I was really referring now to the provisions of the Ervin bill, in which there is a Federal board established to regulate all Federal and all interstate systems with a State advisory committee, and then a State board established in each State. I was referring now to this three-tiered structure that is provided in the Ervin bill.

A Federal board could be a workable alternative for Federal systems. But we would recommend, based on 5 years of experience with Project SEARCH, that a group of State representatives designated by the Governors of the several States would be an appropriate and effective vehicle to regulate interstate systems. The group should be created by Federal law and given a Federal charter so as to be able to promulgate and enforce meaningful regulations and controls over systems within their jurisdiction. Project SEARCH has fully demonstrated that State representatives can manage complex technical and policy issues and systems of this kind.

With respect to intrastate systems—that is, wholly within a State—this should be a matter of State legislative policy, consistent with minimum standards set forth in the Federal legislation, as is the case in the regulation and control of electronic surveillance.

The SEARCH model bill provision for a State control board, which is contained in the Ervin bill and has been adopted in Massachusetts might be an appropriate solution. However, we would not object to the recently passed California law which places regulatory powers in the State attorney general. But this is a matter best left to the States.

The Justice bill sets an effective date of 1 year after enactment. Consideration should be given to making some provisions of the act effective 2 years or perhaps even longer after enactment. This time frame is suggested because of the difficulty we perceive in a State's ability to

conform in a shorter period of time. Primary considerations cannot be tacked on to an automated system, but must be integrated into the software design.

Special attention must be given to designing facilities which house criminal justice information files to reduce the possibility of physical damage to the information. Steps which should be taken include having facilities with heavy-duty, nonexposed walls, perimeter barriers, detection and warning devices, and watertight facilities. This takes time and money. To assure system security and accuracy and completeness of records, audits must be conducted regularly. Audit trails will require added recordkeeping responsibility. Mandatory reporting—and now I am referring to the State level—will require that all criminal justice agencies, including courts and correctional authorities, contribute accurate data on court dispositions and other steps in the criminal justice process. Those criminal justice agencies with inadequate or obsolete reporting systems must be given time to bring their data processing up to date. Programers, computer operators, and others working in the area must be trained. In fact, 2 years may not be enough to respond to these new requirements.

Mr. Chairman, thank you for allowing me the opportunity to express the LEAA's views on these comprehensive legislative proposals. I would be pleased to answer any question you or your committee would wish to direct to me.

Mr. EDWARDS. Thank you very much, Mr. Velde, for a most helpful statement.

Mr. Butler?

Mr. BUTLER. I have no questions. Thank you very much for your testimony. It is most helpful.

Mr. EDWARDS. Mr. Drinan?

Mr. DRINAN. I wonder, Mr. Velde, if you have any reaction to what is proposed in Senator Ervin's bill as to the creation of a Federal information system?

In the Justice bill there is only some type of an advisory function; is there not?

Mr. VELDE. No; there is no advisory committee.

Mr. DRINAN. Well, do you have any reaction to what Senator Ervin has proposed?

Mr. VELDE. As I indicated in my statement, Mr. Congressman, we prefer the provision of the Justice bill. We do recognize the opposing views. This is a controversial area, one in which we recognize there are many strongly held State views which would object to any Federal regulation, whether it be by an attorney general or a Federal board. And, therefore, I make the other recommendations in the alternative.

Mr. DRINAN. Thank you.

Mr. VELDE. Based on our experience in working with the States over the past 5 years, we feel that the States are fully capable of discharging these responsibilities.

Mr. DRINAN. Well, would you say that the States are complying more with the desirable objective of furnishing dispositions on the arrest?

Do you have any large statistics as to how many actually are furnishing as quickly as possible the disposition of the arrest?

Mr. VELDE. Congressman, I believe the FBI testified before this subcommittee that it is receiving about 11,000 criminal records a day. Of these 11,000 about 8,000 contain disposition information.

Mr. DRINAN. No; I mean 8,000 different arrest records.

Mr. VELDE. 8,000 of the 11,000 received a day. In other words, there are 3,000 received a day that are arrest records; 8,000 do have dispositions.

Mr. DRINAN. Even now they receive at least 11,000 arrest records every day, and in a different department they get 8,000 dispositions of previous arrests. So they have these many thousands of arrest records that they send out to everybody, and the FBI gentleman could not give me any hard information. And I talked to him afterward, on how many hundreds of thousands of arrest records without any dispositions do they still have, and do they have any plan to retrieve them. For example, from Philadelphia, for years, never, never did they get a disposition. Yet, they continue to send out the arrest record. So he did not seem to have any information. He did not have any information, he told me.

So how many millions of arrest records, even if we pass this bill, will be there forever and will be disseminated, with no disposition and no attempt to get a disposition?

Mr. VELDE. We estimate that nationally the States possess about 20 million criminal history records.

Mr. DRINAN. The FBI?

Mr. VELDE. No; the States. At the State or local level, 20 million. This was based on a survey of State systems conducted by LEAA in 1971.

Mr. DRINAN. Arrest records?

Mr. VELDE. Criminal history records. We physically measured the files with a yardstick and did not search any individual files to see whether they were complete or just bare arrest records or what.

Mr. DRINAN. You do not have an answer to my question either?

Mr. VELDE. I am attempting to outline as much of an answer as I can. There is a universe of roughly 20 million records held at the State level. There may be again that many records held by the FBI of either Federal offender records or State and local records, as well. There is probably, added to that universe, 1 to 2 million records a year.

In 15 States now there is a provision for mandatory State reporting legislation on the books which requires court and correction agencies to report dispositional data. Therefore, in those 20 States, there are systems in existence which reasonably could be expected to get timely and complete disposition data, from court and correction agencies, along with the arrest record. These 20 States represent, from a population point of view, about 45 percent of the Nation's criminal business. In other words, they have roughly that amount of population, so you may say that in half of the criminal transactions disposition data is now available because of mandatory State reporting legislation.

The Justice and Ervin bills also would strongly encourage the other States to pass mandatory reporting legislation. Otherwise, they could not comply with this. I think prospectively if either one of these bills were enacted after a period of time the overall issue of matching up dispositions with arrests would be solved.

Now, with respect to the universe of, let us say 40 million arrest records, an early estimate made by Project SEARCH and its original demonstration of the automation and exchange of criminal histories indicated that perhaps 25 percent of the records currently held by State and local agencies, let us say 5 million would need to be converted to the automated format. In other words, actually put into a computer system.

Experience was that it might cost as much as $5 a record to convert a manual file and to attempt to get disposition data into the manual record.

Mr. EDWARDS. I am sorry, Mr. Velde, but we are going to have to go. If you could stay for a few minutes and finish—we do have to go. These hearings will continue on March 28 at 10 a.m. in room 2226. The witnesses will be representatives of the Department of Defense and the Civil Service Commission, and I am sure we will have their wholehearted, enthusiastic endorsement of the bill.

[Laughter.]

Mr. EDWARDS. But thank you very much, Mr. Velde. It has been very helpful.

[Whereupon, at 4:15 p.m., the hearing was adjourned, to reconvene at 10 a.m. on March 28, 1974.]

DISSEMINATION OF CRIMINAL JUSTICE INFORMATION

THURSDAY, MARCH 28, 1974

HOUSE OF REPRESENTATIVES,
CIVIL RIGHTS AND CONSTITUTIONAL RIGHTS
SUBCOMMITTEE OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10 a.m., in room 2226, Rayburn House Office Building, Hon. Don Edwards [chairman of the subcommittee] presiding.

Present: Representatives Edwards, Waldie, Sarbanes, Drinan, Rangel, Wiggins, McClory, and Butler.

Also present: Alan A. Parker, counsel; Arden B. Schell, assistant counsel; and Michael W. Blommer, associate counsel.

Mr. EDWARDS. Good morning. The hearing will come to order.

We have a number of other members of the subcommittee who will be here in due time but we have a full program this morning and we want to move right along.

Today, the Subcommittee on Civil Rights and Constitutional Rights of the Committee on the Judiciary continues our hearings on the regulation and control of criminal justice information systems.

We have been studying this area, especially the dissemination and use of criminal arrest records, since the 92d Congress. Our efforts through our hearings and staff work have been, in my view, fruitful and productive and the accumulated information will provide us a solid base from which to draft strong and effective legislation. And it is my personal view, and the view of staff, that this, indeed, might be our last hearing today and that we will proceed with the writing of the bill.

Our witnesses today are Mr. David O. Cooke, Deputy Assistant Secretary of Defense for Administration, and with Mr. Cooke we will have Mr. Anthony L. Mondello, General Counsel for the Civil Service Commission.

Mr. Cooke is a retired captain of the U.S. Navy. He began his extensive and distinguished service with the Department of Defense in 1958 when he was a member of the task force that led to the Department of Defense Reorganization Act of 1958. He has since participated in the administrative affairs of the Department of Defense. By virtue of the vast experience he has obtained with defense problems across the board, he will certainly be a most informative witness. I have read your statement, Mr. Cooke, and it certainly is very thorough and comprehensive. We welcome you, and would you please introduce Mr. Andrews and Mr. Liebling for the record.

TESTIMONY OF DAVID O. COOKE, DEPUTY ASSISTANT SECRETARY OF DEFENSE, ACCOMPANIED BY JOSEPH J. LIEBLING, DEPUTY ASSISTANT SECRETARY OF DEFENSE FOR SECURITY POLICY; ROBERT T. ANDREWS, ASSISTANT GENERAL COUNSEL, DEPARTMENT OF DEFENSE; AND BERNARD J. O'DONNELL, ASSISTANT DIRECTOR, DEFENSE INVESTIGATIVE SERVICE

Mr. COOKE. Thank you, Mr. Chairman. And thank you for that kind introduction. And I would like to introduce my colleagues here at the table. On my right, Mr. Joseph J. Liebling, Deputy Assistant Secretary of Defense for Security Policy; and on my left, Mr. Robert T. Andrews, Assistant General Counsel of the Department of Defense.

Mr. EDWARDS. Well, we welcome both of you gentlemen, too.

Now, it is my understanding that you desire to include in the record your total statement of more than 20 pages, but will proceed with a shorter statement?

Mr. COOKE. I thought in the interest of expediting your hearing, Mr. Chairman, and allowing ample time for questions, if you would allow me the privilege of summarizing my total statement briefly and also adding, at this time, a few other considerations which we have developed as a result of further study of the bill and its effect upon the Department of Defense.

Mr. EDWARDS. Without objection, that will be the procedure and you may proceed.

[The prepared statement of Mr. Cooke follows:]

[Testimony resumes on p. 389.]

STATEMENT OF DAVID O. COOKE, DEPUTY ASSISTANT SECRETARY OF DEFENSE (ADMINISTRATION)

Mr. Chairman, I appreciate the opportunity to appear before your Subcommittee today to testify on H.R. 12574, a Bill to facilitate and regulate the exchange of criminal justice information. It is my understanding that you are considering in addition a number of other bills relating to the same subject, which would impose varying degrees of restrictiveness on such information. Although my testimony will be generally confined to H.R. 12574, I believe that in explaining the need for criminal justice information, I shall make clear the basis for the Department of Defense position on any other Bills on this sensitive subject.

H.R. 12574 would regulate access to and use of criminal justice information contained in information systems as defined in the Bill. It would also provide for procedures to assure the security of the information, to provide for updating of the information and for purging outdated criminal justice information. The Bill would further provide for certain civil and criminal remedies for violations of the provisions of the Bill, and would authorize the Attorney General to exercise certain controls and issue implementing regulations.

At the outset I would like to state that the Department of Defense is completely in accord with the spirit of the Bill. We agree that unrestricted access to and use of criminal justice information could have serious adverse consequences for the persons whom such information identifies. We agree that access and use to such information should be controlled, and that the controls must be adjusted to reflect the rights both of the individual and the Government. It is our view that in attempting to strike this difficult balance in H.R. 12574 certain important requirements of the Department of Defense have not been given consideration they merit.

I believe it would be helpful in understanding our position on the bill to outline the responsibilities of the Department of Defense in making two major types of determinations concerning personnel and to describe the investigative actions which those determinations entail.

The first type is concerned with acceptability and retention. Under the provisions of Executive Order 10450 the Department of Defense as an employer of federal personnel must insure that the hiring and retention of each employee is clearly consistent with the interests of national security. The Secretary of Defense has imposed a parallel requirement for military personnel to insure that their service is also clearly consistent with the interests of national security. This regulation, though not specifically provided for by Executive Order, is a reflection of the national policy expressed in Executive Order 10450.

The second category of determinations involves access to classified information. Executive Order 11652 provides that only those persons shall be given access to classified information, who are found to be trustworthy. Executive Order 10865 provides that access to classified information may be given to personnel in industry only when such access is clearly consistent with the interests of national defense.

An enlightened determination of acceptability, retention, or clearance as described above can only be made after consideration of all available relevant information including criminal justice information. The officials in the Department of Defense who are charged with making this determination cannot perform their duties, if they are denied access to relevant criminal justice information. Therefore, denial of such information, wholly or partially, as contemplated in the Bill may make it impossible for the Department to discharge its responsibilities under Executive Orders and national policy. Even when this information could be obtained from other sources, such denial of information would substantially increase investigative costs.

The Department of Defense firmly believes that access to criminal justice information, and particularly to "criminal offender record information," is an essential ingredient in adequate security investigation procedures. This need should be recognized by clear and unambiguous provisions in the Bill. Inasmuch as major programs under Executive Orders are administered by the Department of Defense, it would be inappropriate to subject the acquisition of information needed to administer them to the approval of another Cabinet officer, in this case, the Attorney General.

I should like to describe briefly, the extent of the Department of Defense measures which provide a framework for the determinations involving acceptability, retention, and clearance. All of these measures have been formulated into a personnel security program, the purpose of which is to assure the trustworthiness and reliability of persons who are members of the Department as well as those given access to classified information. This program involves three categories of persons—civilian employees of the Department, military personnel, and contractors and contractor employees in Defense industry whose duties require access to classified information.

With few exceptions, all civilian positions of the Department of Defense fall into three categories within the meaning of E.O. 10450; they are critical-sensitive, non-critical-sensitive, and non-sensitive positions. Critical-sensitive positions are those involving either access to Top Secret information or certain special fiduciary official relationships; non-critical-sensitive positions involve either access to Secret or Confidential information or fiduciary relationships of a lesser degree than for critical-sensitive positions. All other positions are in the non-sensitive category.

Before a civilian is placed in a critical-sensitive position he normally receives a Background Investigation. An integral part of this investigation is a check of the FBI criminal files and a check of local police records in the area where the individual has resided for a substantial period of time. During the Fiscal Year 1974, approximately 3300 Background Investigations of civilians alone will be conducted, each of which will include check with the FBI and one or more state or local police agencies. I should like to point out that the Department of Defense has a larger number of critical-sensitive positions than any other Department or Agency.

A less extensive inquiry, called a National Agency Check with written inquiries is conducted for applicants and appointees to non-critical-sensitive and non-sensitive positions. These are generally conducted by the Civil Service Commission and the results furnished to the Department of Defense. Each such inquiry requires a record check with the FBI. Current estimates indicate that the Commission will conduct approximately 119,000 checks on behalf of the Department of Defense during Fiscal Year 1974. It is readily apparent that although these inquiries are made by the Civil Service Commission, any with-

holding of FBI records from the Commission would amount to a denial of the information to the Department of Defense.

Unlike civilian employees, the positions of military personnel are not grouped into categories of sensitivity. Investigations are, however, conducted by the Department of Defense to furnish information relating to acceptability, retention and clearance. A record check is made with the FBI on each person entering the military. We estimate that approximately 668,000 checks on military personnel will be made in FY 1974. In addition, military personnel who require access to Top Secret information or who occupy certain fiduciary positions require a Background Investigation. It is estimated that in Fiscal Year 1974 we will have conducted approximately 39,480 such investigations. In each of these Background Investigations, as explained above, at least one check with local police agencies is required.

The third category of personnel in our security program consists of persons in industry who require access to classified information in the performance of government contracts.

Briefly stated, our industrial security clearance program, which is conducted under E.O. 10865, that before a company can be designated as a cleared facility, it must meet prescribed standards assuring that it has the capability of affording adequate protection to classified information which may be released to it. In addition, key personnel of the firm, and all employees who require access to this information, must be found to be reliable and trustworthy. Once a company has been accredited as a cleared facility, employees who require access to Confidential information may be cleared by the facility after an appropriate check of locally available records. Employees who require access to Secret information require a National Agency Check conducted by the Department of Defense. In Fiscal Year 1974 it is anticipated that approximately 81,500 such checks will be conducted; each of them will require an inquiry of the criminal files of the FBI. Industrial employees who require access to Top Secret information must receive a Background Investigation, including one or more checks with state and local police agencies. It is expected that in Fiscal Year 1974 approximately 4,230 Background Investigations will be conducted on industrial employees.

I might add that we regard our industrial security clearance program as especially significant because of its relationship with a large segment of the population which is not employed by the government. There are about 12,000 cleared facilities, and approximately 903,000 employees of these facilities are eligible for access to classified information required in the performance of their work. Our industrial security program is operated not only for our own security requirements but for 13 other Departments and Agencies of the Federal Government.

The inquiries or investigations of the three categories of individuals I have described and which serve as the basis for making determinations of acceptance eligibility or clearance all involve access to and use of criminal justice information. Our present estimate is that as a minimum, approximately one million checks annually are made with a Federal, state or local element of a record system which would be subject to the provisions of the Bill.

Information used in the personnel security program is obtained by the Defense Investigative Service. As you may know, in October 1972, the Defense Investigative Service was created and assumed responsibility for all personnel security investigations in the Department of Defense. It performs no criminal justice functions but requires access to and utilization of any existing or future criminal justice information system. The Department of Defense—through the Defense Investigative Service—may not be the largest user of the system, but it is probably the largest user which is not a criminal justice agency. I am certain the Attorney General had these requirements in mind when, in his testimony before this Subcommittee, he recommended that we have an opportunity to express our views.

To meet the needs of the Department of Defense we recommend the following changes:

Section 5(b) should be changed to read:

Direct access to information contained in a criminal justice system subject to this Act shall be available only to authorized officers or employees of a criminal justice agency, *or an agency concerned with national defense, foreign policy, federal employment, access to classified information, or military service.*

The present wording of this provision could be construed to bar Department of Defense investigative personnel from conducting inquiries to state and local police agencies concerning military personnel, departmental employees or indus-

trial personnel holding or requiring security clearances. The police agencies might well reason that if access to the information system is prohibited access to the information itself also is prohibited. The proposed language is recommended in order to prevent such an interpretation. I have already explained the large number of inquiries which the Department of Defense makes to state and local police agencies each year and has found that these inquiries provide valuable leads to information relating to reliability and trustworthiness. If the Department of Defense is barred from making these checks, this vital information will not be available through the Federal Bureau of Investigation, the principal criminal justice agency of the Federal Government Representatives of the Federal Bureau of Investigation have informed us that that agency does not have the resources to conduct such inquiries for the Department of Defense.

Section 5(c)(2) should be changed to read:

Criminal intelligence information may be used for a purpose not related to criminal justice if the *head of an executive department or agency* determines, with regard to the particular case or class of cases, that such use is necessary because of reasons of national defense, foreign policy, *access to classified information, federal employment, or military service.*

The authorization in the Bill is too narrow; it could be construed as relating to only national security cases or those involving access to classified information. It could also be construed to deny to the Department of Defense Federal Bureau of Investigation reports on personnel, in whom the Department has a security interest. The proposed additional wording broadens the scope for use in cases involving employment and membership in the Armed Forces. It also relieves the Secretary of Defense of the necessity to obtain the approval of another cabinet officer before requiring information needed to discharge his security responsibilities.

Section 5(d)(4) should be changed to read:

Criminal offender processing information may be used for the purpose not related to criminal justice if such use is expressly authorized by a court, federal or state statute, *or related to federal employment, access to classified information or military service.*

The italicized language would authorize the Department of Defense access to criminal offender processing information. In considering persons for civilian employment, security clearance, or military service as part of any rehabilitation program, the Department of Defense must be aware of all steps in the criminal justice process which have been taken. Without such information, it will be difficult to find possible ways to make an informed decision concerning employment or placement. The proposed language would, in addition, eliminate the necessity for a decision by the Attorney General on questions of use of such information by the Department of Defense.

Section 5(e)(1) should be changed to read:

Criminal offender record information may be used for criminal justice purposes or for other purposes which are expressly provided for by federal statute or Executive Order or state statute *or related to acceptability or retention in the military service.*

Without the proposed language the Department of Defense would not be authorized to use criminal offender record information in making determinations for acceptability or retention for military personnel because such determinations are not governed under the provisions of an existing Executive Order and are authorized by implied rather than by direct statutory authority. The revised language also eliminates the necessity for referring cases or classes of cases to the Attorney General for decision. Such referral is made as a matter of normal procedure when a serious question arises on the interpretation of any statute or Executive Order.

Section 8(d)(1) should be changed to read as follows:

The prohibition set forth in subsection (c) shall not apply—

(1) *when the head of an executive department so* determines, with regard to the particular case or class of cases, for reasons relating to national defense, foreign policy, *federal employment, access to classified information or military service.*

Without the exemption in the proposed revision to Section 8(d)(1), the Department of Defense would be prohibited from obtaining arrest records in the event of an acquittal, dismissal of charges, or abandonment of prosecution.

This Department has the requirement to provide for national defense. In so doing it cannot disregard or ignore informatiaon relevant to a determination of

the trust worthiness of its personnel or of those who may have access to its classified information.

Secretary of Defense's responsibility to make the judgment required in these cases and then assure, through his regulations, that the arrest records are properly handled within this agency. Though these are arrest records, and as such, subjective reports, it is necessary for those who make security clearance and employment determinations to have the information.

Section 9(c)(2) should be changed to read:

Regulations of the Federal agencies concerned shall set forth procedures regarding access to a sealed record, when the needs of that Federal agency engaged in criminal, counterintelligence or security investigations, investigations regarding suitability for civilian employment, access to classified information or military service, or related investigations and functions, dictate.

Adequate investigations require thorough examinations into the background of individuals. Many important aspects of their background are found in or developed from criminal offender record information. It is necessary for the Department of Defense, in considering applicants for security clearances, civilian employment or military service, to review a person's past in order to judge his trustworthiness. Responsible and trustworthy individuals are needed in government service, especially for positions of great sensitivity in the Department of Defense. Access to criminal offender record information is necessary to assure that only suitable individuals continue to be recruited. Regulations presently exist within the Department of Defense to assure proper use of this information.

Section 10 should be changed to read:

Except when the needs of Federal agencies engaged in criminal, counterintelligence or security investigations, investigations regarding suitability for civilian employment, access to classified information, or military service, or related investigations and functions dictate, the greater rights of privacy or protection provided by a State law or regulation governing use, updating, or sealing of records in that state's criminal justice information system shall prevail. Use of information in interstate systems or the use of information obtained through interstate transfer shall be governed solely by this Act and implementing regulations.

The present language for Section 10 is unacceptable. The Department of Defense has a valid and proven need for information contained in state criminal justice information systems. This need has been explained above in answers to other proposed restrictions. Just as under the Federal restrictions an individual will possibly be placed at a disadvantage if a proper and thorough check of his records is not possible, so a whole state population would possibly be penalized by too strict a state records control law. A thorough investigation requires verification of all information received. If a question arises concerning a man's record in a state which has a law prohibiting the Department of Defense from acquiring required criminal justice information and no other information is available, his request for a job or security clearance could be adversely affected.

Problems exist at present with state statutes that restrict such information, our argument against these restrictions has been based on the supremacy clause of the Constitution, i.e., the needs of agencies of the Federal Government in this area override the power of the individual states to deny access to needed information. To retain the present language of the Bill would effectively destroy this contention.

We recognize that drafting legislation in this area is a difficult task. As the Attorney General has testified:

> The area of non-criminal justice use of criminal justice information presented the greatest difficulty and disagreement.

The language we have used in our suggested modifications to the Bill is, of course, not the only wording which could be used to cure defects which would impair the personnel security system of the Department of Defense. We would be glad to work with you on alternative language which would meet our requirements.

Despite the objections to specific provisions of the Bill which I have just outlined, we are completely in accord with the objective of the Bill—to protect the right of individual to privacy and to protect him from an arbitrary or capricious action as the result of a police record. Section 2 of the Bill states that particular risks to the individual may be presented when criminal justice information is used for non-criminal justice purposes. We agree with that statement, but I believe that the risks attendant on giving the Department of Defense access and use of such information are negligible.

One of the reasons for restricting access to non-criminal justice agencies is that it may be misused to the disadvantage of the individual. There is a concern that the mere existence of a conviction or arrest record will automatically foreclose a favorable action. This is not the case. A conviction or arrest above is seldom if ever the determining factor. All the circumstances of the arrest are examined. We consider such factors as extent of involvement, seriousness of the wrongful act, recency and frequency of the act, and the relationship of the act to reliability and trustworthiness.

I can best illustrate this point through a recent survey of security clearance cases involving industrial personnel.

Since January 1, 1971, we have completed action upon 477 cases involving arrest records. The offenses involved include intoxication, disorderly conduct, lewd and lascivious conduct, burglary and grand larceny, rape, and murder. Many of the arrests resulted in convictions; others did not. Our Screening Board has been careful to distinguish between the two categories and draws no adverse inference from the mere fact of arrest.

In 288 of the 477 cases, we determined it to be clearly consistent with the national interest to grant or continue security clearance at the level of TOP SECRET, SECRET and CONFIDENTIAL.

In five other cases we discontinued processing due to the willful failure or refusal of the applicants concerned to provide information deemed by the Board to be essential to a well-informed determination.

In the remaining 184 or about 40% of the cases involving arrests, we concluded, upon the basis of the available information, that determinations in favor of the applicants were not warranted. In each of those cases the applicant was provided a statement of reasons setting out the basis for our action. It is significant that in not one of those cases was the action predicated solely upon the existence of an arrest or conviction record. On the contrary, other considerations such as habitual excessive use of intoxicants; on-going abuse and dishonesty weighed heavily in the balance.

Each applicant to whom a statement of reasons was issued was informed fully of the further procedures available to him. Those procedures include the right to submit a written answer to the statement of reasons, an opportunity for a hearing in the matter, and, ultimately, a right of appeal to an Appeal Board.

Ninety-four (94) of the applicants to whom statements of reason were issued availed themselves of those further procedures by submitting timely answers to the statement of reasons; 82 defaulted by failing to submit answers within the time allotted; 6 withdrew their applications for clearance; and the remaining 2 still have time within which to answer.

The great majority of the 94 applicants who answered the statements of reasons also requested hearings before an examiner; the others elected to have their cases assigned to an examiner for determination without a hearing. 37 of those 94 cases resulted in examiner determinations in favor of the applicants, 50 examiner determinations adverse to the applicants (i.e., denials); and 7 still are pending.

Twenty-four (24) of the 50 adverse examiner determinations were appealed to our Appeal Board. In 2 of those cases the Appeal Board reversed the examiner and in 17 it affirmed the examiner's determinations by denying clearance. The remaining 5 cases still are pending with the Appeal Board.

To summarize, out of 463 completed cases involving arrest records, favorable action was taken in 327, or 71%. I submit that these facts show that while we need and require criminal offense records, they are only considered in the light of all attendant circumstances and are merely one factor in an overall commonsense determination.

In order to make certain that the 12,000 firms engaged in classified contracts with the Department of Defense and other participating Departments and Agencies clearly understood the Departmental interest in this matter, we issued a policy statement in the May 31, 1968 issue of the DoD Industrial Security Letter. The principal purpose of this letter was to clarify an erroneous opinion by some contractors that an applicant's or an employee's criminal record would be an automatic and absolute bar to the issuance of a security clearance. We stated flatly then and have reiterated it often that such an opinion was not true. We further stated that the company is clearly entitled to employ persons with a past criminal record and that such employees whose duties necessitate their having access to classified information could be processed for a personnel security clearance in the same manner as employees without criminal records. I should like to make it clear that in trying to prevent any misunderstanding con-

cerning Department of Defense policy concerning clearance we were careful, as always, to leave the issue of hiring and continuation of employment as a matter for the contractor and employee to determine.

The question may be raised: If arrest records per se do not play a major role in personnel security determinations, why, then, is the Department of Defense concerned with such records with such information? In his testimony before this Subcommittee, the Attorney General stated:

> Arrest data, even without a conviction, will give leads to law enforcement officials. Such data can identify a pattern of possible criminal activity which ultimately can lead to a conviction.

We can paraphrase that statement and retain its logic. Arrest data even without a conviction will give leads to other relevant information. Such data can identify a pattern of activity which may be of value in making a determination of acceptability, retention or clearance.

Another reason for restricting access to criminal justice information is the concern for individual privacy. The Department of Defense shares that concern with the Congress. The investigative records in personnel security cases are retained in repositories where access is strictly controlled. A file is released only to persons who must review it for a determination involving the issue of acceptability, retention, suitability or clearance.

Most of the personal data used in our personnel security program is stored in manual files rather than computers. We anticipate, however, that in the future we may require more storage in automatic data processing systems. We began our research into the field with the establishment in 1967 of the Defense Service Task Force on Computer Security. A comprehensive Department policy was formulated in 1972 and shortly thereafter we published an ADP Security Manual dealing with techniques and procedures for implementing, deactivating and testing evaluating secure resource sharing ADP systems. We regard ourselves, if not initiators, at least as pioneers in this field. We admit that there are still problems created by computers which contain both personnel security data and other information not requiring restricted access. We are also aware that a dedicated system is much more costly than one shared with other programs. While we do not claim to have overcome these difficulties, we have a degree of expertise in this field equal to that of any other public agency, and we are thoroughly apprised of the current state of the art. Whatever ADP techniques we acquire for protecting classified information we can readily apply to protecting the privacy of personal data.

We are concerned, as are you, that individual privacy in personal matters remain inviolate. As a reflection of this concern, we developed in 1968 a privacy section of the Personnel Security Questionnaire which is used as a basis to clear people in industry. This form provides a means to protect individual privacy of contractor employees in cases where the government requires certain personal information such as criminal, medical, and financial records. This information is not provided to the employing contractor unless the individual himself chooses to make it available.

Under the prior procedure some employees, fearing the loss of their jobs when an employer became aware of derogatory information, often resorted to omissions or misstatement on questionnaires which were forwarded in their entirety through the employer. When such falsifications were discovered, extensive investigations were required to obtain the true facts. The old procedures were costly, time consuming and frequently lead to an unwarranted and undesirable invasion of privacy.

I have cited the Privacy Questionnaire as an example of how a procedure can be developed which will achieve a practical and effective balance between a legitimate need for information by a Government Department and the personal right to privacy. We are continually searching for additional methods by which we can insure that personal data, including criminal justice information, is, like classified information, given only to those who have a bona fide need-to-know.

We have stressed the importance of criminal justice information to the Department of Defense for purposes of personnel security, and we have pointed out our ability to protect it. In our opinion, these are two points which have not been given appropriate consideration in the drafting of the Bill.

In its present form the Bill approaches the issue of access to and use of criminal justice information by dividing recipients into two mutually exclusive categories: Criminal justice agencies and all other agencies. The restrictions imposed by the Bill on criminal justice agencies, though far reaching, do not appear to seriously impede the internal operations of such agencies. In contrast, the re-

strictions imposed on all other agencies are apparently based on the assumption that they have relatively little need for access and use. The treatment of non-criminal justice agencies seems to be derived from another assumption, that these agencies cannot or should not be trusted with criminal justice information except within extremely narrow limits. We believe that both of these assumptions are incorrect in their application to the Department of Defense.

In dividing all recipients into two categories—criminal justice agencies and all others—the Bill fails to reflect the wide variance in the need for criminal justice information which may exist between various Federal agencies and possibly between various state and local agencies. Admittedly, there are some non-criminal justice agencies which have only a peripheral need for criminal justice information and could well operate within the limitations of the Bill; others, such as the Department of Defense would be severly handicapped by its restrictions. The Bill regards all non-criminal justice agencies as having only minimal requirements for criminal justice information. This is not the case. I would respectfully suggest to this Subcommittee that in its deliberations on this difficult subject, it make appropriate provision for the needs not only of the Department of Defense but for other agencies with extensive personnel security responsibilities.

As I have stated earlier, we fully support the purpose of the Bill. Our objections are concerned with approach, rather than principle. We believe that privacy legislation following the approach we have suggested would enable the Department of Defense to obtain the data necessary to make determinations concerning acceptance, retention and clearance, and would protect the individual against disclosure of personal information which could be prejudicial.

In conclusion, let me assure you that any criminal justice information we receive will be used judiciously and will be given the proper degree of protection.

Thank you, again, Mr. Chairman, for the opportunity to present this testimony.

Mr. COOKE. Thank you. And I want to say at the outset that the Department of Defense appreciates the opportunity to appear before your subcommittee to testify on this important piece of legislation.

In general the difficulties presented by the bill appear to stem from the fact that it regards all noncriminal justice agencies as having minimal requirements for criminal justice information. I can assure you this assumption is not applicable to the Department of Defense. We have an extensive need for criminal justice information in making two major types of determinations.

The first type is concerned with acceptability and retention. Under the provisions of Executive Order 10450 the Department of Defense as an employer of Federal personnel must insure that the hiring and retention of each employee is clearly consistent with the interests of national security. The security of defense has imposed a parallel requirement for military personnel to insure that their service is also clearly consistent with the interests of national security. This regulation, though not specifically provided for by Executive order, is a reflection of the national policy, expressed in Executive Order 10450.

The second category of determinations involves access to classified information. Executive Order 11652 provides that only those persons shall be given access to classified information. Executive Order 11652 provides that only those persons shall be given access to classified information, who are found to be trustworthy. Executive Order 10865 provides that access to classified information may be given to personnel in industry only when such access is clearly consistent with the national interest.

An enlightened determination of acceptability, retention, or clearance as described above can only be made after consideration of all available relevant information including criminal justice information. The officials in the Department of Defense who are charged with making this determination cannot properly carry out their responsibilities

if they are denied access to relevant criminal justice information. Therefore, denial of such information, wholly or partially, as contemplated in the bill may make it impossible for the Department to discharge its responsibilities under Executive orders and national policy.

The Department of Defense conducts a number of investigative and adjudicative activities which provide a framework for the determination involving acceptability, retention, and clearance. All of these measures have been formulated into a personnel security program, the purpose of which is to assure the trustworthiness and reliability of persons who are members of the Department as well as those given access to classified information.

The inquiries or investigations which serve as the basis for making determinations of acceptance, eligibility, or clearance all involve access to and use of criminal justice information. Our present estimate is that as a minimum, approximately 1 million checks annually are made with a Federal, State, or local element of a record system which would be subject to the restrictive provisions of the bill.

Information used in the personnel security program is obtained by the Defense Investigative Service. In October 1972, the Defense Investigative Service was created and assumed responsibility for all personnel security investigations in the Department of Defense. It performs no criminal justice functions, but requires access to and utilization of any existing or future criminal information system.

Mr. EDWARDS. How big is the Defense Investigative Service?

Mr. COOKE. Mr. Chairman, the Defense Investigative Service—I would like to supply the exact figures for the record—but it is around 5,000, sir.

What we did in the interest of economy, instead of having the investigative agencies of the three military departments as separate entities conducting personal security investigations, we combined them and achieved some economy in scale in doing so. This was at the direction of the President in a decision in November 1970.

Mr. EDWARDS. Does it have its own, does it have——

Mr. COOKE. I have the exact figures. There are approximately 2,850, sir.

Mr. EDWARDS. Does it have its own file system and criminal record system?

Mr. COOKE. It has since its inception. There were many, many files of previous investigations that had been conducted by the three service investigative agencies which still remain within the investigative agency files, but since it started it is building up its own files, sir.

Mr. EDWARDS. Is it similar to the FBA files? Is access by fingerprint code or by name, or by serial number? How do you get into your files?

Mr. O'DONNELL. By a name and one other indicator such as a social security number, the former service number, or a date of birth in order to identify the file as pertaining to that individual.

Mr. BUTLER. Mr. Chairman?

Mr. EDWARDS. Yes, of course, Mr. Butler.

Mr. BUTLER. If all the information you have is a fingerprint, can that get you into your files?

Mr. O'DONNELL. Negative.

Mr. BUTLER. Thank you.

Mr. EDWARDS. Does anybody else use your file except the Department of Defense? Any other Federal agency?

Mr. COOKE. Mr. Chairman, in our industrial security program that is the clearing of contractor personnel who handled classified contracts, we handle this program not only for the Department of Defense but for the 13 other Government departments and agencies, again in the interest of economy.

Mr. EDWARDS. Well, you have a sort of mini-FBI file, then? In other words, is there not some kind of a duplication involved there?

Mr. COOKE. I would think, sir, that our load in personnel security investigations is such that I suspect it would be well beyond the capability of the Bureau to undertake.

Then, going back to the FBI, I think it is fair to say we investigate for a different purpose, I believe, for the security clearances or the acceptability, retention, of our own people.

Mr. EDWARDS. Fine. You can proceed.

Mr. COOKE. If I may proceed.

Mr. EDWARDS. Yes, please.

Mr. COOKE. The Department of Defense—through the Defense Investigative Service—may not be the largest user of a criminal justice system, but it is probably the largest user which is not a criminal justice agency.

In our prepared statement we have discussed in some detail the suggested changes to the bill which would satisfy our requirements. At this point, I would like to present some additional comments which were not included in the prepared testimony.

In seeking to correct abuses and to impose the proper safeguards H.R. 12574 has failed to take into account three important considerations in the application of its provisions to Department of Defense operations. First, the Department of Defense, unlike Federal and State law enforcement agencies, is directly concerned with law enforcement responsibilities only as it relates to military personnel. Second, because of the national defense mission, the military departments have a justifiable need for criminal justice information in their worldwide operations. Third, by law, the military departments have exclusive criminal jurisdiction, at least for military-type offenses, under the Uniform Code of Military Justice, over members of the Armed Forces, separate and apart from the responsibilities of the Attorney General.

By making its provisions applicable to the Department of Defense without regard to the foregoing distinctions, the bill would cause adverse, and perhaps unintended, effects upon Defense operations. Of particular concern are the restrictions placed on the use of criminal justice information within the Department of Defense as exemplified by the following:

The sealing of conviction information will deny to commanders valuable and pertinent information which is presently available to them in making determinations as to appropriate disposition of criminal charges. The necessity of obtaining court orders for such data, and the elaborate challenge provisions of the act could greatly impede the progress of courts-martial and result in frequent delays.

Mr. BUTLER. Mr. Chairman?

Mr. EDWARDS. Yes, Mr. Butler?

Mr. COOKE. No, I am not saying that. But, I am saying if we have a course of conduct of a man, a series of unauthorized absences over

a period of time during his current enlistment in the service, sir, in making the initial determination, should we try this man by general court-martial or should it be a summary court, which is not authorized to award a punitive discharge, the officer in charge of making that very important decision would want to look at, as I said, the whole man and his service record.

Also, let us take the situation where a man has been tried by court-martial.

Mr. EDWARDS. Well, I do not want to make a big thing of it.

Mr. DRINAN. Well, I wish you would, Mr. Chairman.

Mr. EDWARDS. It bothers me, yes.

Mr. DRINAN. May I speak, sir?

Mr. EDWARDS. Yes.

Mr. DRINAN. I find this a little unbelievable that you did not answer the chairman's question. On page 5, are you telling us that you think that any conviction or any violation of law 7 years before, that under the bill would be withheld, are you saying that your people routinely go back and get everything like this? You say it is valuable and pertinent in your work, and all the bill would say is that you have to get a court order for that. Now, are you telling us that the efficiency of your operation is so important that 7 years before you disapprove of that——

Mr. COOKE. I think the bill, proposed section 9A, says at a minimum. Presumably, the requirements could be less than 7 years. And, Mr. Congressman, we are talking about military or rather criminal justice information within in the bill which has been generated within our own system, internally, the man's service record in a court-martial and a court-martial is a Federal court.

Mr. DRINAN. Would you answer the chairman's question? Do you think that is fair?

Mr. COOKE. Yes, I do, considering the unusual responsibilities of the Department of Defense in the area of military personnel.

Mr. EDWARDS. Would the gentleman yield?

Mr. DRINAN. Yes.

Mr. EDWARDS. Then do you take the present view of the FBI that the appropriate time to seal a record would be at age 80?

Mr. COOKE. I would categorically say, no, Mr. Chairman.

Mr. DRINAN. What age would you?

Mr. EDWARDS. At what time would you consider that a person has been rehabilitated and is entitled to a fresh start and have the record expunged or sealed? The FBI right now says age 80. They feel a man or a woman is not too much of a menace at age 80, apparently.

Mr. COOKE. I would say certainly from the viewpoint of military justice, when the man leaves the service and in the case of the enlistments, the enlisted personnel, many things are not—I would have to check this because I am not the personnel expert—carried over from the prior enlistment to the new enlistment. The record is swept clean.

Mr. EDWARDS. I did not want to get hung up on this particular point at this time. Do you want to proceed?

Mr. MCCLORY. May I just ask, so I understand the rest of the testimony, I would like to ask a question or two if I might?

Mr. BUTLER. May I ask a question at this moment?

Mr. EDWARDS. Yes.

Mr. BUTLER. Going back to the first sentence in that paragraph, "the sealing of conviction information will deny to commanders valuable and pertinent information which is presently available to them in making determinations as to appropriate disposition of criminal charges." What are we referring to there? What determinations of appropriate criminal charges would be guided by the information that would be denied you?

Mr. COOKE. Well, under the Uniform Code of Military Justice, Mr. Butler, the commanding officers who are convening authorities for the various levels of court-martial, face a decision as to the disposition of a particular incident involving an individual in their command. They may resort to nonjudicial punishment, which is essentially of a disciplinary nature, but not of a judicial nature. They may recommend or convene a court-martial of ascending order of severity, summary court, special court, general court-martial. And in looking and making that decision, a convening authority, a commanding officer with convening authority responsibility, takes a look at the whole man and his record. And it is an important aspect.

Mr. BUTLER. Is that the whole man, as to his record in the military, or do you have access to his criminal record that might be available, say, in the FBI records?

Mr. COOKE. Well, usually, we are talking now of military personnel, not our civilian employees.

Mr. BUTLER. Right.

Mr. COOKE. The previous criminal record, if any, would be adjudicated and looked at in determining.

Mr. BUTLER. That is considered relevant in your determination?

Mr. COOKE. In determining whether to enlist the man, the individual in the first place, because as you know in title C there are prohibitions against enlisting a man with a conviction of a felony, except in very restricted circumstances. We are essentially talking about service record, how he has performed, since we have had him in the service.

Mr. BUTLER. Thank you.

Mr. EDWARDS. Mr. Cooke, do you mean that some lieutenant or some officer in charge of a court-martial—it could be a lieutenant, is that correct?

Mr. COOKE. Now, our convening authority, sir, for a general court-martial would be a flag or a general officer. A special court-martial could be the commanding officer, commander of a destroyer.

Mr. EDWARDS. Are you serious in saying that the enlisted man, or whoever he might be, before the particular court-martial, that his conduct that took place 7 years before is going to be relevant to that case? Is that going to be taken into consideration? Do you think that is fair?

Mr. COOKE. What I am saying, Mr. Chairman, is that in judging——

Mr. EDWARDS. And nothing intervening, you know, 7 years but nothing intervening?

Mr. COOKE. Yes.

Mr. MCCLORY. Do you regard yourself and your agency as falling within the definition of the bill, insofar as the criminal justice agencies are concerned? You do not regard the military as somehow

being apart, do you? Are you a part of the criminal justice system?

Mr. COOKE. We read the language of the present draft——

Mr. MCCLORY. As applicable to you?

Mr. COOKE. Yes, particularly the restrictions and this cuts two ways, Mr. McClory. It cuts from our problems of our internal system of military justice, but it also cuts in this fashion that if we were to say the Department is not a law enforcement agency generally, in our program of acceptability clearances for taking new people in, in our program for granting security clearances for access to sensitive defense information, we feel we do need the criminal offender records and criminal justice information from other law enforcement agencies, such as the FBI.

Mr. MCCLORY. You currently engage in an exchange of information, do you? You secure information from the FBI and you furnish them information if they request it?

Mr. COOKE. Yes; we do.

Mr. MCCLORY. On the other hand in retention of your own data, with regard to criminal activities in the military, you are not constrained by FBI rules or any other insofar as limitations on access to materials or destruction of records?

Mr. COOKE. Well, let me say, Mr. McClory, that we have rather firm rules both in the Defense Investigative Service and those files still remaining in the military.

Mr. MCCLORY. You have your own system?

Mr. COOKE. Yes.

Mr. MCCLORY. And you operate under your own rules?

Mr. COOKE. Yes.

Mr. MCCLORY. And these are independent of the FBI?

Mr. COOKE. Yes.

Mr. MCCLORY. Thank you.

Mr. COOKE. Criminal intelligence information, such as traffic accident investigations and Naval Investigative Service investigation reports, are presently used by commanding officers in making such administrative determinations as line or duty-misconduct and pecuniary liability of individuals for loss, damage or destruction of Government property. Investigative reports are also extremely valuable to the commander in reassessing and changing standing operating procedures in order to promote efficiency and mission effectiveness. To restrict access to such information or to require it to be obtained from other independent investigations promotes inefficiency and increases costs and manpower requirements.

Incidentally, portions of an ordinary military service jacket could be considered a criminal justice information system as defined by section 3(a) of the proposed bill. For example, Bureau of Naval Personnel Manual 3840180, "Time lost from active duty which must be made up," requires that entries be made in a service jacket whenever time is lost from a member's current enlistment or current period of obligated absence, confinement, civil arrest, or sickness/misconduct. Routine record entries for such things as unauthorized absence and arrest and/or confinement by civil authorities could constitute criminal offender processing information and thus become criminal justice information. Should such an interpretation be placed upon ordinary service jacket entries, and they are substanitally the same for all

services, internal use of the service jacket would be greatly restricted and could subject official users of such information to the sanctions authorized by the proposed bill.

There are serious questions raised by section 5 of the act regarding the Attorney General's role in determining what information would be available for use in the military criminal justice system. Although it would appear that our proposed amendatory language would provide the military services with access to the requisite information, it is unclear as to whether the enactment of this bill would not result in the Attorney General exercising some unwarranted type of supervising authority over the military criminal justice system.

An unusually severe administrative burden would be placed upon the military services by way of recordkeeping requirements and responsibility for notification of an individual concerned. Oftentimes information might be introduced into the military criminal justice system for use in court-martial proceedings but then might later be used for nonmilitary justice uses such as the line of duty misconduct hearings that I referred to. Restrictions on the use of the information for the latter purpose would seriously hamper our present administrative processes.

By severely restricting access to and use of criminal justice information, the military commander is denied information needed in making determinations concerning recruitment, assignment, retention, promotion, and separation.

Mr. WALDIE. Mr. Chairman, may I interrupt?

Mr. EDWARDS. Yes, Mr. Waldie.

Mr. WALDIE. Mr. Cooke, I am sorry, you may have covered this, and I came late to the meeting, and I apologize if that is the case. But I am puzzling over the last paragraph you have just read:

> Oftentimes information might be introduced into the military criminal justice system for use in court-martial proceedings but then might later be used for nonmilitary justice uses.

What is a nonmilitary justice use?

Mr. COOKE. Well, I referred to one on the previous page, Mr. Waldie, which is that a serviceman is required to make up time lost from active duty as a result of an unauthorized absence, as a result of a confinement or a civil arrest, as a result of misconduct on its own part. These are not military justice uses. But, for example, the period of an arrest and confinement for 10 days in well, in the Arlington County jail, and then he returns to duty, that man has to make up the 10 days of obligated service, or a portion of his enlistment, and the service records from which such are used to reflect matters of that nature.

Mr. WALDIE. I do not see how that fits in the example you have given here, information introduced into the military criminal justice system. That is not the information you just described, a man arrested in the county for a nonmilitary civil or criminal act.

Mr. COOKE. All right, let me try another one, sir.

In a court-martial involving, let us say, the unauthorized use of a Government motor vehicle on a military installation, in all probability he would be tried by court-martial and not out in the concurrent jurisdiction by the civil authorities. Say the man is injured, maybe permanent damage to the leg as a result of this. We have to conduct an inquiry as to whether his injury occurred in the line of duty, and

whether his injury was or was not a result of his own misconduct, because it makes a difference in whether he might get any disability benefits.

Mr. WALDIE. Is it your understanding that this bill would prevent you from utilizing the information that was adduced at the court-martial for the unauthorized use?

Mr. COOKE. Internally, it is our understanding, sir, that a too literal or a literal reading of these sections would or could be construed to achieve that very effect.

Mr. WALDIE. Well, what I really am asking, I guess, are you realistic in that suggestion? Let me make it very clear what I understood you to say. The military personnel made unauthorized use of a vehicle on post and was in an accident and received an injury. He is court-martialed from the unauthorized use of the vehicle. The evidence adduced at the court-martial, in your view, could not be utilized to determine the extent of liability for any damage that he had done unto himself? The injury evidence received?

Mr. COOKE. I think referring to—would you like to answer that, Mr. Andrews?

Mr. ANDREWS. We see some problems in your provision which restricts the use of criminal intelligence information in that it ties it to the performance of a statutory function of the noncriminal justice component. It then makes some other exceptions under regulations issued by the Attorney General and we believe that, depending on what those regulations provide, we might have difficulty in using this criminal justice information for a noncriminal justice purpose, such as just indicated.

Mr. WALDIE. You mean you might have, it is your understanding you might have difficulty in using the traffic report or the investigation of the accident to determine a later compensation case where the issue is, was he responsible for his own injury or was it incurred in the line of duty?

Mr. ANDREWS. That is the way we read the provisions of section 5. And if we are incorrect, we would be glad to be notified.

Mr. COOKE. Do not misunderstand. We do not believe anyone intended this but we did want to call it to the attention, particularly of you engaged in drafting this, as to some of the problems we see with a perhaps over-literal reading of the provisions.

Mr. WALDIE. Well, I must say that clearly I would assume that is not the intention. Can counsel answer that, Mr. Chairman? Is there any realistic reason to interpret the statute as this paragraph seems?

Ms. SCHELL. Certainly no intent, Mr. Waldie.

Mr. WALDIE. Well, all right.

Mr. Chairman, I have no further questions.

Mr. COOKE. And I think the last major point, additional point I would like to make is that a military commander must have available to him any and all information bearing on the reliability and trustworthiness of those under his command. Any restrictions, such as is contemplated by the bill, results in incomplete and inaccurate personnel data which will perforce have a deleterious effect upon the commander's ability to carry out his mission. This is especially important when assigning personnel to such sensitive billets as atomic submarines, weapons silos, and intelligence mission.

Let me digress a moment. I talked to an officer who formerly had responsibility in the Air Force in our missile program, and he said, gee, in the reliability of these people down below in the silos, he just has to know are they mentally stable, do they have a record of intoxication perhaps, or was there some emotional problems which resulted in drugs. We have a special program for suitability and reliability of some of our key personnel, officers and enlisted, who occupy these highly sensitive positions. But, it goes farther than that. The commanding officer of a destroyer in making a decision as to who to put in steering aft, to have to again—these are problems associated with military readiness, which I think is a unique type problem.

But, let me conclude.

Returning to my summary, I would like to discuss briefly the concerns which underlie this proposed legislation.

One of the reasons for restricting access to noncriminal justice agencies is that it may be misused to the disadvantage of the individual. There is a concern that the mere existence of a conviction or arrest record will automatically foreclose a favorable action. Let me assure you this is not the case within the Department of Defense. A conviction of arrest is seldom, if ever, the determining factor. All the circumstances of the arrest are examined. We consider such factors as extent of involvement, seriousness of the wrongful act, recency and frequency of the act, and the relationship of the act to reliability and trustworthiness.

Another reason for restricting access to criminal justice information is the concern for individual privacy. The Department of Defense shares that concern with the Congress. The investigation records in personnel security cases are retained in repositories where access is strictly controlled. A file is released only to officials who must review it for a determination involving the issue of acceptability, retention, suitability or clearance.

In our prepared testimony we have cited our development and use of the privacy section of the personnel security questionnaire, used in the industrial security program, as reflection of our concern for individual privacy. We are continually searching for additional methods by which we can insure that personal data, including criminal justice information, is, like classified information, given only to those who have a bona fide need to know.

Finally, let me assure you that we fully support the spirit and purpose of the bill. Our objections are concerned with approach rather than principle. We believe the privacy legislation, following the approach we have suggested in our prepared testimony, would both enable the Department of Defense to obtain necessary data and at the same time protect against unwarranted disclosures.

Thank you, Mr. Chairman, for the opportunity to present this testimony and I and my colleagues will be glad to respond to any of your specific questions.

Mr. EDWARDS. Well, thank you, Mr. Cooke. We are going to be operating under, as best we can, the 5-minute rule today. And I have only a couple of questions generally to lay some groundwork and information for the benefit of all of us.

First of all, I want you to know that this committee understands the special problems of the Department of Defense and is keenly sensi-

tive to your problems with regard to the reliability and trustworthiness of your employees and so forth.

First of all, let me ask you this: Is every employee of the Department of Defense, or every applicant for employment, investigated by the Department of Defense, and is a rap sheet from the police, State and local, and the FBI acquired?

Mr. COOKE. Mr. Chairman, under, as I noted, there were several Executive orders applying to not only the Department of Defense personnel, but contractor personnel in the area of security, and also by secretarial direction to military personnel. Let me talk, first-off on our civilian employee program which is based upon Executive Order No. 10450, talking about our own civilian employees and implemented by Department of Defense directive 5210.9. Here, by the way, we will be pleased to furnish copies of these.

Mr. EDWARDS. Yes. Without objection, we will include them in the record at this point.

[Copies of Executive Order No. 10450 and Defense directive 5210.7 follow:]

[Testimony resumes on p. 462.]

EXECUTIVE ORDER 10450

[*Ed. Note:* This Order established the Eisenhower security program. The print following incorporates amendments made by Executive Orders 10491, 10531, 10548, 10550, and 11605.]

WHEREAS the interest of the national security require that all persons privileged to be employed in the departments and agencies of the Government, shall be reliable, trustworthy, of good conduct and character, and of complete and unswerving loyalty to the United States; and

WHEREAS the American tradition that all persons should receive fair, impartial, and equitable treatment at the hands of the Government requires that all persons seeking the privilege of employment or privileged to be employed in the departments and agencies of the Government be adjudged by mutually consistent and no less than minimum standards and procedures among the departments and agencies governing the employment and retention in employment of persons in the Federal service:

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes of the United States, including section 1753 of the Revised Statutes of the United States (5 USC 631; the Civil Service Act of 1883 (22 Stat. 403; 5 USC 632, et seq.); section 9A of the act of August 2, 1939, 53 Stat. 1148 (5 USC 118j); and the act of August 26, 1950, 64 Stat. 476 (5 USC 22–1, et seq.), and as President of the United States, and deeming such action necessary in the best interests of the national security, it is hereby ordered as follows:

Sec. 1. In addition to the departments and agencies specified in the said act of August 26, 1950, and Executive Order No. 10237 of April 26, 1951, the provisions of that act shall apply to all other departments and agencies of the Government.

Sec. 2. The head of each department and agency of the Government shall be responsible for establishing and maintain within his department or agency an effective program to insure that the employment and retention in employment of any civilian officer or employee within the department or agency is clearly consistent with the interests of the national security.

Sec. 3. (a) The appointment of each civilian officer or employee in any department or agency of the Government shall be made subject to investigation. The scope of the investigation shall be determined in the first instance according to the degree of adverse effect the occupant of the position sought to be filled could bring about, by virtue of the nature of the position, on the national security, but in no event shall the investigation include less than a national agency check (including a check of the fingerprint files of the Federal Bureau of Investigation), and written inquiries to appropriate local law-enforcement agencies, former employers and supervisors, references, and schools attended by the person

under investigation: *Provided*, that upon request of the head of the department or agency concerned, the Civil Service Commission may, in its discretion, authorize such less investigation as may meet the requirements of the national security with respect to per-diem, intermittent, temporary, or seasonal employees, or aliens employed outside the United States. Should there develop at any stage of investigation information indicating that the employment of any such person not be clearly consistent with the interests of the national security, there shall be conducted with respect to such person a full field investigation, or such less investigation as shall be sufficient to enable the head of the department or agency concerned to determine whether retention of such person is clearly consistent with the interests of the national security.

(b) The head of any department or agency shall designate, or cause to be designated, any position within his department or agency the occupant of which could bring about, by virtue of the nature of the position, a material adverse effect on the national security as a sensitive position. Any position so designated shall be filled or occupied only by a person with respect to whom a full field investigation has been conducted: *Provided*, that a person occupying a sensitive position at the time it is designated as such may continue to occupy such position pending the completion of a full field investigation, subject to the other provisions of this order: *And provided further*, that in case of emergency a sensitive position may be filled for a limited period by a person with respect to whom a full field preappointment investigation has not been completed if the head of the department or agency concerned finds that such action is necessary in the national interest, which finding shall be made a part of the records of such department or agency.

Sec. 4. The head of each department and agency shall review, or cause to be reviewed, the cases of all civilian officers and employees with respect to whom there has been conducted a full field investigation under Executive Order No. 9835 of March 21, 1947, and, after such further investigation as may be appropriate, shall re-adjudicate, or cause to be re-adjudicated, in accordance with the said act of August 26, 1950, such of those cases as have not been adjudicated under a security standard commensurate with that established under this order.

Sec. 5. Whenever there is developed or received by any department or agency information indicating that the retention in employment of any officer or employee of the Government may not be clearly consistent with the interests of the national security, such information shall be forwarded to the head of the employing department or agency or his representative who, after such investigation as may be appropriate, shall review, or cause to be reviewed, and, where necessary, re-adjudicate, or cause to be re-adjudicated, in accordance with the said act of August 26, 1950, the case of such officer or employee.

Sec. 6. Should there develop at any stage of investigation information indicating that the employment of any officer or employee of the Government may not be clearly consistent with the interests of the national security, the head of the department or agency concerned or his representative shall immediately suspend the employment of the person involved if he deems such suspension necessary in the interests of the national security and, following such investigation and review as he deems necessary the head of the department or agency concerned shall terminate the employment of such suspended officer or employee whenever he shall determine such termination necessary or advisable in the interests of the national security, in accordance with the said act of August 26, 1950.

Sec. 7. Any person whose employment is suspended or terminated under the authority granted to heads of departments and agencies by or in accordance with the said act of August 26, 1950, or pursuant to the said Executive Order No. 9835 or any other security or loyalty program relating to officers or employees of the Government, shall not be reinstated or restored to duty or reemployed in the same department or agency and shall not be reemployed in any other department or agency, unless the head of the department or agency concerned finds that such reinstatement, restoration, or reemployment is clearly consistent with the interests of the national security, which finding shall be made a part of the records of such department or agency: *Provided*, that no person whose employment has been terminated under such authority thereafter may be employed by any other department or agency except after a determination by the Civil Service Commission that such person is eligible for such employment.

Sec. 8. (a) The investigations conducted pursuant to this order shall be designed to develop information as to whether the employment or retention in employment in the Federal service of the person being investigated is clearly

consistent with the interests of the national security. Such information shall relate, but shall not be limited, to the following:

(1) Depending on the relation of the Government employment to the national security:

(i) Any behavior, activities, or associations which tend to show that the individual is not reliable or trustworthy.

(ii) Any deliberate misrepresentations, falsifications, or omissions of material facts.

(iii) Any criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, habitual use of intoxicants to excess, drug addiction, or sexual perversion.

(iv) Any illness, including any mental condition, of a nature which in the opinion of competent medical authority may cause significant defect in the judgment or reliability of the employee, with due regard to the transient or continuing effect of the illness and the medical findings in such case.

(v) Any facts which furnish reason to believe that the individual may be subjected to coercion, influence, or pressure which may cause him to act contrary to the best interests of the national security.

(2) Commission of any act of sabotage, espionage, treason, or sedition, or attempts thereat or preparation therefor, or conspiring with, or aiding or abetting, another to commit or attempt to commit any act of sabotage, espionage, treason or sedition.

(3) Establishing or continuing a sympathetic association with a saboteur, spy, traitor, seditionist, anarchist, or revolutionist, or with an espionage or other secret agent or representative of a foreign nation, or any representative of a foreign nation whose interests may be inimical to the interests of the United States, or with any person who advocates the use of force or violence to overthrow the government of the United States or the alteration of the form of government of the United States by unconstitutional means.

(4) Advocacy of use of force or violence to overthrow the government of the United States, or of the alteration of the form of government of the United States by unconstitutional means.

(5) Knowing membership in, or affiliation or sympathetic association with, any foreign or domestic organization, association, movement, group, or combination of persons (hereinafter referred to as organization) which is totalitarian, fascist, communist, subversive, or which has adopted a policy of unlawfully advocating the commission of acts of force or violence to deny others their rights under the Constitution or laws of the United States or of any State, or which seeks to overthrow the government of the United States or any State or subdivision thereof by unlawful means. (As amended by E.O. 11605, dated July 2, 1971, 36 Fed. Reg. 131.)

(6) Intentional, unauthorized disclosure to any person of security information, or of other information disclosure of which is prohibited by law, or willful violation or disregard of security regulations.

(7) Performing or attempting to perform his duties, or otherwise acting, so as to serve the interests of another government in preference to the interests of the United States.

(8) Refusal by the individual, upon the ground of constitutional privilege against self-incrimination, to testify before a congressional committee regarding charges of his alleged disloyalty or other misconduct.

(b) The investigation of persons entering or employed in the competitive service shall primarily be the responsibility of the Civil Service Commission, except in cases in which the head of a department or agency assumes that responsibility pursuant to law or by agreement with the Commission. The Commission shall furnish a full investigative report to the department or agency concerned.

(c) The investigation of persons (including consultants, however employed), entering employment of, or employed by, the Government other than in the competitive service shall primarily be the responsibility of the employing department or agency. Departments and agencies without investigative facilities may use the investigative facilities of the Civil Service Commission, and other departments and agencies may use such facilities under agreement with the Commission.

(d) There shall be referred promptly to the Federal Bureau of Investigation all investigations being conducted by any other agencies which develop information indicating that an individual may have been subjected to coercion, influence, or pressure to act contrary to the interests of the national security, or

information relating to any of the matters described in subdivisions (2) through (8) of subsection (a) of this section. In cases so referred to it, the Federal Bureau of Investigation shall make a full field investigation.

Sec. 9. (a) There shall be established and maintained in the Civil Service Commission a security-investigations index covering all persons as to whom security investigations have been conducted by any department or agency of the Government under this order. The central index established and maintained by the Commission under Executive Order No. 9835 of March 21, 1947, shall be made a part of the security-investigations index. The security-investigations index shall contain the names of each person investigated, adequate identifying information concerning each such person, and a reference to each department and agency which has conducted an investigation concerning the person involved or has suspended or terminated the employment of such person under the authority granted to heads of departments and agencies by or in accordance with the said act of August 26, 1950.

(b) The heads of all departments and agencies shall furnish promptly to the Civil Service Commission information appropriate for the establishment and maintenance of the security-investigations index.

(c) The reports and other investigative material and information developed by investigations conducted pursuant to any statute, order, or program described in section 7 of this order shall remain the property of the investigative agencies conducting the investigations, but may, subject to considerations of the national security, be retained by the department or agency concerned. Such reports and other investigative material and information shall be maintained in confidence, and no access shall be given thereto except, with the consent of the investigative agency concerned, to other departments and agencies conducting security programs under the authority granted by or in accordance with the said act of August 26, 1950, as may be required for the efficient conduct of Government business.

Sec. 10. Nothing in this order shall be construed as eliminating or modifying in any way the requirement for any investigation or any determination as to security which may be required by law.

Sec. 11. On and after the effective date of this order the Loyalty Review Board established by Executive Order No. 9835 of March 21, 1947, shall not accept agency findings for review, upon appeal or otherwise. Appeals pending before the Loyalty Review Board on such date shall be heard to final determination in accordance with the provisions of the said Executive Order No. 9835, as amended. Agency determinations favorable to the officer or employee concerned pending before the Loyalty Review Board on such date shall be acted upon by such Board, and whenever the Board is not in agreement with such favorable determination the case shall be remanded to the department or agency concerned for determination in accordance with the standards and procedures established pursuant to this order. Cases pending before the regional loyalty boards of the Civil Service Commission on which hearings have not been initiated on such date shall be referred to the department or agency concerned. Cases being heard by regional loyalty boards on such date shall be heard to conclusion, and the determination of the board shall be forwarded to the head of the department or agency concerned: *Provided*, that if no specific department or agency is involved, the case shall be dismissed without prejudice to the applicant. Investigations pending in the Federal Bureau of Investigation or the Civil Service Commission on such date shall be completed, and the reports thereon shall be made to the appropriate department or agency.

(a) Executive Order No. 9835 of March 21, 1947, as amended is hereby revoked.

(b) The head of each department and agency shall be furnished by the Attorney General with the name of each organization which shall be or has been heretofore designated under this order. Except as specifically provided hereafter, nothing contained herein shall be construed in any way to affect previous designations made pursuant to Executive Order No. 10450, as amended.

(c) The Subversive Activities Control Board shall, upon petition of the Attorney General, conduct appropriate hearings to determine whether any organization is totalitarian, fascist, communist, subversive, or whether it has adopted a policy of unlawfully advocating the commission of acts of force or violence to deny others their rights under the Constitution or laws of the United States or of any State, or which seeks to overthrow the government of the United States or any State or subdivision thereof by unlawful means.

(d) The Board may determine that an organization has adopted a policy of unlawfully advocating the commission of acts of force or violence to deny others their constitutional or statutory rights or that an organization seeks to overthrow the government of the United States or any State or subdivision thereof by unlawful means if it is found that such group engages in, unlawfully advocates, or has among its purposes or objectives, or adopts as a means of obtaining any of its purposes or objectives—

(1) The commission of acts of force or violence or other unlawful acts to deny others their rights or benefits guaranteed by the Constitution or laws of the United States or of the several States or political subdivisions thereof; or

(2) The unlawful damage or destruction of property; or injury to persons; or

(3) The overthrow or destruction of the government of the United States or the government of any State, Territory, district, or possession thereof, or the government of any political subdivision therein, by unlawful means; or

(4) The commission of acts which violate laws pertaining to treason, rebellion or insurrection, riots or civil disorders, seditious conspiracy, sabotage, trading with the enemy, obstruction of the recruiting and enlistment service of the United States, impeding officers of the United States, or related crimes or offenses.

(e) The Board may determine an organization to be "totalitarian" if it is found that such organization engages in activities which seek by unlawful means the establishment of a system of government in the United States which is autocratic and in which control is centered in a single individual, group, or political party, allowing no effective representation to opposing individuals, groups, or parties and providing no practical opportunity for dissent.

(f) The Board may determine an organization to be "fascist" if it is found that such organization engages in activities which seek by unlawful means the establishment of a system of government in the United States which characterized by rigid one-party dictatorship, forcible suppression of the opposition, ownership of the means of production under centralized governmental control and which fosters racism.

(g) The Board may determine an organization to be "communist" if it is found that such organization engages in activities which seek by unlawful means the establishment of a government in the United States which is based upon the revolutionary principles of Marxism-Leninism, which interprets history as a relentless class war aimed at the destruction of the existing society and the establishment of the dictatorship of the proletariat, the government ownership of the means of production and distribution of property, and the establishment of a single authoritarian party.

(h) The Board may determine an organization to be "subversive" if it is found that such organization engages in activities which seek the abolition or destruction by unlawful means of the government of the United States or any State, or subdivision thereof.

(i) The Board may further determine, after consideration of the evidence, that an organization has ceased to exist. Upon petition of the Attorney General or upon petition of any organization which has been designated pursuant to this section the Board after appropriate hearings may determine that such organization does not currently meet the standards for designation. The Attorney General shall appropriately revise or modify the information furnished to departments and agencies consistent with the determinations of the Board.

(j) The Board shall issue appropriate regulations for the implementation of this section. (As amended by E.O. 11605, dated July 2, 1971, 36 Fed. Reg. 131.)

* * * * * * *

Sec. 13. The Attorney General is requested to render to the heads of departments and agencies such advice as may be requisite to enable them to establish and maintain an appropriate * * *

Sec. 14. (a) The Civil Service Commission, with the continuing advice and collaboration of representatives of such departments and agencies as the National Security Council may designate, shall make a continuing study of the manner in which this order is being implemented by the departments and agencies of the Government for the purpose of determining:

(1) Deficiencies in the department and agency security programs established under this order which are inconsistent with the interests of, or directly or indirectly weaken, the national security.

(2) Tendencies in such programs to deny to individual employees fair, impartial, and equitable treatment at the hands of the Government, or rights under the Constitution and laws of the United States or this order.

Information affecting any department or agency developed or received during the course of such continuing study shall be furnished immediately to the head of the department or agency concerned. The Civil Service Commission shall report to the National Security Council, at least semiannually, on the results of such study, shall recommend means to correct any such deficiencies or tendencies, and shall inform the National Security Council immediately of any such deficiency which is deemed to be of major importance.

(b) All departments and agencies of the Government are directed to cooperate with the Civil Service Commission to facilitate the accomplishment of the responsibilities assigned to it by subsection (a) of this section.

(c) To assist the Civil Service Commission in discharging its responsibilities under this order, the head of each department and agency shall, as soon as possible and in no event later than ninety days after receipt of the final investigative report on a civilian officer or employee subject to a full field investigation under the provisions of this order, advise the Commission as to the action taken with respect to such officer or employee. The information furnished by the heads of departments and agencies pursuant to this section shall be included in the reports which the Civil Service Commission is required to submit to the National Security Council in accordance with subsection (a) of this section. Such reports shall set forth any deficiencies on the part of the heads of departments and agencies in taking timely action under this order, and shall mention specifically any instances of noncompliance with this subsection.

Sec. 15. This order shall become effective thirty days after the date hereof.

DWIGHT D. EISENHOWER.

THE WHITE HOUSE
April 27, 1953

REPRINT
(with changes through January 31, 1967)

September 2, 1966#
NUMBER 5210.7

ASD(A)

Department of Defense Directive

SUBJECT Department of Defense Civilian Applicant and Employee Security Program

References:
(a) DoD Directive 5210.7, "Department of Defense Civilian Applicant and Employee Security Program", August 12, 1953 (hereby cancelled)
(b) DoD Directive 5210.11, "Obligation to Counsel of Record at Security Hearing Boards", June 5, 1954 (hereby cancelled)
(c) 10 U. S. Code 133
(d) 5 U. S. Code 3571, 7312 and 7532
(e) Executive Order 10450, "Security Requirements for Government Employment", April 27, 1953, as amended by Executive Orders 10491, 10531, 10548, 10550, hereafter referred to as Executive Order 10450
(f) Internal Security Act of 1950, as amended (50 U. S. Code 781 et seq.)
(g) DoD Directive 5210.8, "Policy on Investigation and Clearance of DoD Personnel for Access to Classified Defense Information", February 15, 1962
(h) Federal Personnel Manual, 1963
(i) Public Law 89-380; 80 Stat. 94
(j) Federal Personnel Manual System Letter No. 550-17, and Erratum, dated August 26, 1966

I. PURPOSE

This Directive prescribes policies and procedures to insure that the employment or retention in employment of any civilian officer or employee in a sensitive position in the Department of Defense is clearly consistent with the interests of national security.

#First amendment (Ch 1, 1/31/67)

Sept 2, 66#
5210.7

II. CANCELLATION

References (a) and (b) are hereby superseded and cancelled.

III. AUTHORITY

This Directive is issued pursuant to the authority vested in the Secretary of Defense by references (c), (d), (e) and (i).

IV. APPLICABILITY

This Directive is applicable to employees and applicants for employment in sensitive positions with the Department of Defense. This directive is not applicable to the National Security Agency. Policies and procedures which govern the civilian applicant and employee security program of that Agency are prescribed by Public Law 88-290, directives of the Executive Branch, directives of the Department of Defense, and regulations of the National Security Agency. The provisions of section 7532 of title 5, United States Code, reference (d), apply to the Agency if the Director, NSA, proposes a suspension or termination of an employee in accordance with the said section. When the Director, NSA, elects to utilize the provisions of section 7532 of title 5, United States Code, reference (d), he shall consult with the DoD General Counsel prior to preparation of a letter of charges.

V. RESPONSIBILITY

The Secretaries of the Military Departments, the Assistant Secretary of Defense (Administration) for the Office of the Secretary of Defense and other assigned activities, and the Directors of Defense Agencies, except the National Security Agency, shall implement this Directive and apply the policies and procedures set forth herein.

VI. DEFINITIONS

A. National Security

As used herein, the term "national security" refers to those activities which are directly related to the protection of the military, economic, and productive

#First amendment (Ch 1, 1/31/67)

strength of the United States, including the protection of the Government in domestic and foreign affairs, against espionage, sabotage, subversion, and any other illegal acts which adversely affect the national defense.

B. Head of DoD Component

As used herein, the term, "Head of DoD Component" means the Secretaries of the Military Departments, the Assistant Secretary of Defense (Administration) for the Office of the Secretary of Defense and assigned activities, and the Directors of Defense Agencies.

C. Sensitive Position

A "sensitive position" is any position within the Department of Defense the occupant of which could bring about, by virtue of the nature of the position, a material adverse effect on the national security. Sensitive positions are of the following two categories:

1. Noncritical Sensitive Position. Positions so designated by authority of the Head of a DoD Component, involving the following:

   a. Any position, the duties or responsibilities of which require access to SECRET or CONFIDENTIAL defense information or material.

   b. Any position involving education and orientation of DoD personnel.

   c. Any other position so designated by authority of the Head of a DoD Component.

2. Critical Sensitive Position. Positions so designated by authority of the Head of a DoD Component, involving the following:

   a. Access to TOP SECRET defense information or material.

b. Development or approval of war plans, plans or particulars of future major or special operations of war, or critical and extremely important items of war.

c. Development or approval of plans, policies, or programs which affect the over-all operations of the Department of Defense or of a DoD Component, i.e., policy-making or policy determining positions.

d. Investigative duties, the issuance of personnel security clearances, or duty on personnel security boards.

e. Fiduciary, public contact, or other duties demanding the highest degree of public trust.

f. Any other position so designated by authority of the Head of a DoD Component.

VII. POLICY

A. No civilian will be employed or retained in employment in a sensitive position of the Department of Defense unless his employment or retention in employment is clearly consistent with the interests of the national security.

B. The use of the suspension and removal procedures authorized by the provisions of section 7532 of title 5, United States Code, reference (d), shall be limited to cases in which the interests of the national security are involved. Maximum use shall be made of normal Civil Service removal procedures where such procedures are adequate and appropriate.

* C. No United States citizen permanent or indefinite employee of the Department of Defense who has been appointed to a sensitive position shall be suspended, reassigned or detailed to a non-sensitive position in the interests of national security without being granted the procedural benefits set forth in Section X. *

#Second amendment (Ch 4, 5/6/69)

D. No classified defense information, nor any information which might compromise investigative sources or methods or the identity of confidential informants, shall be disclosed to any employee, his counsel, or representatives, or to any other person not clearly authorized to have access to such information.

VIII. STANDARD AND CRITERIA

A. Standard

The standard for employment and retention in employment is that, based on all the available information, the employment or retention in employment of an individual is clearly consistent with the interests of national security

B. Criteria for the Application of Standard

In the application of the above standard, consideration will be given to, but not limited to, the following activities and associations, whether current or past. As the following activities and associations are of varying degrees of seriousness, the ultimate determination must be made on the basis of an over-all common-sense evaluation of all the information in a particular case.

1. Depending on the relation of the employment to the national security:

   a. Any behavior, activities, or associations which tend to show that the individual is not reliable or trustworthy.

   b. Any deliberate misrepresentations, falsifications, or omissions of material facts.

   c. Any criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, habitual use of intoxicants to excess, drug addiction, or sexual perversion.

d. Any illness, including any mental condition, of a nature which in the opinion of competent medical authority may cause significant defect in the judgment or reliability of the employee, with due regard to the transient or continuing effect of the illness and the medical findings in such case.

e. Any facts which furnish reason to believe that the individual may be subjected to coercion, influence, or pressure which may cause him to act contrary to the best interests of the national security.

2. Commission of any act of sabotage, espionage, treason, or sedition, or conspiring, aiding, or abetting another to commit or attempt to commit any act of sabotage, espionage, treason, or sedition.

3. Establishing or continuing a sympathetic association with a saboteur, spy, traitor, seditionist, anarchist, or with an espionage or other secret agent or representative of a foreign nation, or any representative of a foreign nation whose interests may be inimical to the interests of the United States, or with any person who advocates the use of force or violence to overthrow the Government of the United States or the alteration of the form of Government of the United States by unconstitutional means.

4. Advocacy of use of force or violence to overthrow the Government of the United States, or of the alteration of the form of Government of the United States by unconstitutional means.

5. Membership in, affiliation or sympathetic association with, any foreign or domestic organization, association, movement, group or combination of persons which is totalitarian, Fascist, Communist, or subversive, or which has adopted, or shows a policy of advocating or approving the commission of

acts of force or violence to deny other persons their rights under the Constitution of the United States, or which seeks to alter the form of Government of the United States by unconstitutional means. (These include, but are not limited to, those organizations, movements, or groups officially designated by the Attorney General of the United States pursuant to Executive Order 10450.)

6. Intentional, unauthorized disclosure to any person of classified information, or of other information, disclosure of which is prohibited by law.

7. Performing or attempting to perform his duties, or otherwise acting, so as to serve the interests of another government in preference to the interests of the United States.

8. Participation in the activities of an organization established as a front for an organization referred to in paragraph VIII. B. 5 above, when his personal views were sympathetic to the subversive purposes of such orgarization. (See Internal Security Act of 1950, as amended (50 U. S. Code 781 et seq.), reference (f), for a definition of Communist-front organizations).

9. Participation in the activities of an organization with knowledge that it had been infiltrated by members of subversive groups under circumstances indicating that the individual was part of, or sympathetic to, the infiltrating element or sympathetic to its purposes.

10. Participation in the activities of an organization, referred to in paragraph VIII. B. 5. above, in a capacity where he would reasonably have had knowledge of the subversive aims or purposes of the organization.

11. Sympathetic interest in totalitarian, Fascist, Communist, or similar subversive movements.

#First amendment (Ch 1, 1/31/67)

12. Sympathetic association with a member or members of an organization referred to in paragraph VIII. B. 5 above. (Ordinarily, this will not include chance or occasional meetings, nor contacts limited to normal business or official relations.)

13. Currently maintaining a close, continuing association with a person who has engaged in activities or associations of the type referred to in paragraph VIII. B. 2 through paragraph VIII. B. 11 above. A close continuing association may be deemed to exist if the individual lives with, frequently visits, or frequently communicates with, such person.

14. Close continuing association of the type described in paragraph VIII. B. 13 above, even though later separated by distance, if the circumstances indicate that renewal of the association is probable.

15. The presence of a spouse, parent, brother, sister, offspring, or any person with whom a close bond of affection exists in a nation whose interests may be inimical to the interest of the United States or in satellites or occupied areas of such a nation, under circumstances permitting coercion or pressure to be brought on the individual through such persons.

16. Willful violation or disregard of security regulations.

17. Acts of a reckless, irresponsible, or wanton nature which indicate such poor judgment and instability as to suggest that the individual might disclose classified defense information to unauthorized persons, or otherwise assist such persons, whether deliberately or inadvertently, in activities inimical to the security of the United States.

18. Refusal by the individual, upon the ground of constitutional privilege against self-incrimination, to testify before a congressional committee or Federal or State Court, regarding charges of his alleged disloyalty or other misconduct relevant to his security eligibility.

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19. Any excessive indebtedness, recurring financial difficulties, unexplained affluence, or repetitive absences without leave, which furnish reason to believe that the individual may act contrary to the best interests of national security.

20. Refusal by the individual on constitutional or other grounds, or intentional failure to complete required security forms or personal history statements, or otherwise failing or refusing, in the course of investigation, interrogation, or hearing, to answer any pertinent question regarding the matters described in paragraph VIII. B. 1 through paragraph VIII. B.19 above.

~~G. Certification~~

~~Prior to employment, the applicant shall be required to certify in writing that he has seen, read, understood, and correctly answered the questions relating to the list of organizations designated by the Attorney General under Executive Order 10450, "Security Requirements for Government Employment."~~

IX. PERSONNEL SECURITY INVESTIGATIONS

A. Investigative Requirements

1. General

a. The appointment of each civilian officer or employee in a sensitive position in the Department of Defense shall be made subject to investigation. The scope of the investigation shall be determined, in the first instance, according to the degree of adverse effect the occupant of the position sought to be filled could bring about, by virtue of the nature of the position, on the national security, but in no event shall the investigation include less than a National Agency Check (including a check of the fingerprint and subversive files of the Federal Bureau

#First amendment (Ch 5, 10/17/73)

of Investigation), and written inquiries to appropriate local law enforcement agencies, former employers and supervisors, references, and schools attended by the person under investigation; Provided, that to the extent authorized by the Civil Service Commission, a lesser investigation may suffice with respect to per diem, intermittent, temporary, or seasonal employees, or aliens employed outside the United States.

b. Should there develop at any stage of investigation information indicating that the employment of any such person may not be clearly consistent with the interests of the national security, the investigation will be extended as necessary to enable the Head of the DoD Component concerned, or his designee, to determine whether the employment or retention of such person is clearly consistent with the interests of the national security, or whether further actions are necessary under the provisions of section 7532 of title 5, United States Code, reference (d), as implemented herein.

c. Investigative reports shall be forwarded by the investigative agency to employing activities, under procedures established by the Head of the DoD Component concerned.

d. The employing activity will review the investigative reports to determine whether they contain derogatory information, and, if so, if the information is of a suitability nature as defined in Chapter 731, Federal Personnel Manual, reference (h), or a security nature as defined in Chapter 732 of the same reference, or both. The employing activity will, if possible, make a decision as to employing or retaining in employment on the basis of the suitability information. If it cannot make a decision on

#First amendment (Ch 1, 1/31/67)

the basis of suitability information alone and the decision requires resolution of the security information, the employing activity will refer the case to the Central Clearance Group for appropriate action, as provided below.

2. Noncritical Sensitive Positions

Civilian applicants or appointees to noncritical sensitive positions shall be subject to the investigative requirements as prescribed in reference (g), but in no event shall these requirements include less than the investigation prescribed in paragraph IX. A. 1. above; Provided, that as a minimum, a National Agency Check with satisfactory results shall be completed prior to appointment, although in case of an emergency, such position may be filled for a limited period by an individual with respect to whom such investigation, including the National Agency Check, has not been completed, provided the request for a National Agency Check has been made and the Head of the DoD Component concerned, or his designee, finds that the delay in appointment pending completion of the investigation would be harmful to the national interest, which finding shall be reduced to writing and be made a part of the records of the DoD Component concerned.

3. Critical Sensitive Positions

No civilian shall be appointed to a critical sensitive position prior to the completion with satisfactory results of a background (full field) investigation as defined in reference (g); Provided, that in case of emergency, such positions may be filled for a limited period by an individual with respect to whom a background (full field) investigation has not been completed if a National Agency Check with satisfactory results has first been completed, and the request for a background investigation has been made and the Head of the DoD Component concerned, or his

designee, finds that the delay which may be caused by completion of the investigation would be harmful to the national interest, which finding shall be reduced to writing and be made a part of the records of the DoD Component concerned.

4. Reinvestigation of Incumbents of Critical Sensitive Positions

The incumbent of each critical sensitive position shall, five years after his appointment, and at least once each succeeding five years, be required to submit an updated personnel security questionnaire to the appropriate security officer of his Component, and the Head of the DoD Component concerned shall provide for a review of the personnel security questionnaire, together with the personnel file of the incumbent, previous reports of investigation concerning him, and other appropriate information. A determination then shall be made regarding what further action, if any, is appropriate; for example, whether a check of local police and credit records, a National Agency Check or an updated background investigation may be required.

B. Referral to Federal Bureau of Investigation

Investigations which develop information indicating that an individual may be subjected to coercion, influence, or pressure to act contrary to the interests of the national security, or information relating to any of the matters described in paragraphs VIII. B. 2 through 14, 16, and 18 shall be referred promptly to the Federal Bureau of Investigation for a full field investigation.

C. Security Investigation Index

This index is maintained by the Civil Service Commission under section 9(a) of Executive Order 10450. In order to comply with section 9(b) of the said Executive Order, the

investigative agencies which conduct personnel security investigations under this Directive, shall prepare and submit in triplicate, Standard Form 79 (Notice of Security Investigation) to the Bureau of Personnel Investigations, United States Civil Service Commission, Washington, D. C. 20415, on the same day the investigation is initiated. Additionally, appropriate information concerning each person who has been suspended or terminated under the provisions of section 7532 of title 5, United States Code, reference (d), will be furnished to the Civil Service Commission.

D. Custody of Investigative Information

The reports and other investigative material and information developed by investigations conducted pursuant to the provisions of section 7532 of title 5, United States Code, reference (d), Executive Order 10450, or any other security or loyalty program relating to officers or employees of the Government, shall remain the property of the investigative agency conducting the investigations. Such reports and other investigative material and information shall be maintained in confidence, and access to them may be given to other departments, agencies, and components conducting security programs in accordance with the provisions of section 7532 of title 5, United States Code, reference (d), under appropriate safeguards established by the Head of the DoD component concerned.

E. Central Clearance Group

A Central Clearance Group shall be established by the Head of each DoD Component. The Group shall be composed of personnel who have been selected on the basis of maturity and demonstrated good judgment. The Central Clearance Group shall review all investigative files referred to it under this Directive and shall make determinations in such cases whether employment or retention in employment in a sensitive position is clearly consistent with the interests of national security. The Group may, in accordance with the policy of sub-section VII. B., recommend to employing activities the use of normal

#First amendment (Ch 1, 1/31/67)

Civil Service removal procedures. In the event such removal procedures are not feasible and the Central Clearance Group determines that continued employment in a sensitive position is not clearly consistent with the interests of national security, the Group shall recommend to the Head of DoD Component concerned that the case be processed under section X. In the case of applicants, the Group shall process cases under section XIII.

X. APPLICATION OF SUSPENSION AND REMOVAL AUTHORITY TO DEPARTMENT OF DEFENSE EMPLOYEES

A. Suspension from Employment

1. The authority to suspend an employee under the provisions of section 7532 of title 5, United States Code, reference (d), is based upon a determination that such action is deemed necessary in the interests of national security. This determination is to be made solely by the Head of the DoD Component concerned, or, in the case of the Military Departments, by a statutory official designated by the Secretary concerned.

2. Normally, suspension action will be accompanied by a letter of charges. However, in exceptional cases in which there is significant evidence of espionage, sabotage, sedition, treason, or subversion, and where the individual's continued employment would pose an immediate threat to the national security, emergency suspension action may be effected without issuing concurrently a letter of charges, Provided, that a letter of charges is issued to the employee within 30 days of the effective date of suspension, which shall be subject to amendment within 30 days thereafter. In such cases, emergency suspension action may also be exercised by subordinate commands. A copy of the suspension action by subordinate commands shall be forwarded directly and promptly to the Head of DoD Component concerned and a copy sent to the Assistant Secretary of Defense (Administration).

#First amendment (Ch 1, 1/31/67)

3. Before issuing a letter of charges, the Head of the DoD Component concerned will forward the proposed action, together with all supporting information, to the General Counsel of the Department of Defense. The General Counsel will consult with representatives of the Department of Justice to assure that the rights of employees are fully considered, and to determine whether the proposed charges are fully supported, and the extent to which confrontation and cross-examination of witnesses will be required. Following such consultation, the General Counsel will advise the Head of the DoD Component regarding the procedure to be followed in the particular case.

4. Employees will not be suspended under this authority while an investigation is pending when the available information indicates that retention in a duty status during such investigation would not pose an immediate threat to the national security. When considered necessary in order to provide the maximum protection to the security of the activity or of classified defense information or material pending determination under the provisions of section 7532 of title 5, United States Code, reference (d), interim action other than suspension, such as withholding of access to classified defense information or material, temporary detail or reassignment will be used to the fullest practicable extent.

5. Suspension from a sensitive position, together with temporary detail to a nonsensitive position without loss of pay, may be utilized in order to initiate action as prescribed in subsection X.B. below, Provided, the suspending authority notifies the employee that he may be suspended without pay at any time prior to the final decision of his case.

B. Right of Employee to Hearing

A United States citizen employee of the Department of Defense having a permanent or indefinite appointment, irrespective of whether the employee has completed the

#First amendment (Ch 1, 1/31/67)

* probationary or trial period, whose termination under the provisions of section 7532 of title 5, United States Code, reference (d), is proposed shall be granted the following procedural benefits:

1. The employee will be given a letter of charges in accordance with the provisions of section 7532 of title 5, United States Code, reference (d), which will be as specific as security considerations permit. Each charge will be directly related to one or more of the specific criteria set forth in subsection VIII. B.

2. The employee shall be informed in the letter of charges of his right (a) to a hearing, (b) to be represented by counsel of his choice, (c) to testify in his own behalf, (d) to present witnesses and offer other evidence under oath or affirmation, and (e) to cross-examine any witnesses offered in support of the charges.

3. The employee will be given thirty calendar days in which to answer the letter of charges and to request a hearing.

4. The hearing by an authority duly constituted for this purpose provided for in section 7532 of title 5, United States Code, reference (d), is construed to mean a hearing before a board established solely by the Head of the DoD Component concerned, and, in the case of the Military Departments, by a statutory official designated by the Secretary concerned. The board shall be composed of not less than three impartial and disinterested members, all or a majority of whom shall be civilians. One member shall be designated as Chairman, and, as such, is authorized to administer oaths. The members will be selected from DoD Components other than the one by which the individual is employed.

C. Hearing Board Counsel

1. A qualified attorney will be assigned to act as counsel for the hearing board. He will be responsible for assisting the hearing board in making certain that the

#First amendment (Ch 1, 1/31/67)

record is as complete as practicable. He will question Department of Defense witnesses and cross-examine witnesses produced by the employee, although the hearing board may also question any witness.

2. In order to reduce the issues in controversy and to simplify the hearing, the hearing board counsel is authorized to consult directly with the employee or his counsel, as appropriate, for the purpose of reaching mutual agreement on such matters as the clarification of the issues, the taking of depositions and stipulations with respect to testimony, and the contents of documents and other physical evidence. Such stipulations shall be binding upon the employee and the Department of Defense for the purpose of these proceedings.

D. Reply to Letter of Charges

1. The letter of charges shall notify the employee to reply to each of the charges under oath or affirmation and specifically to admit, or deny, or expressly disclaim knowledge, as appropriate, of each of the charges. The employee shall be advised to make arrangements to produce witnesses and such information in support of his reply as may be required.

2. The letter of charges shall advise that the employee is required to give complete information and testimony regarding the allegations, and that failure to do so will necessitate a determination being made in the light of the record as it stands.

3. Should an employee not file a written request for a hearing within 30 calendar days, the employee shall be deemed to have relinquished the right to such a hearing. In the event the employee does not avail himself of a hearing, a final determination shall be made by the official designated in subsection X. F., based upon all available information, including the employee's reply to the letter of charges and all documents in support thereof.

4. Where, after due notice of the time and place set for the hearing, the employee, without explanation, fails to appear for such hearing, the hearing board shall consider the case and make its recommendation on the basis of the information available to it.

E. Hearing Procedure

1. Hearings before security hearing boards shall be conducted expeditiously in an orderly manner with dignity and decorum. Should the conduct of the employee or his counsel be such that the orderly and prompt disposition of the matters before the Board are impaired, or rulings ignored or flouted deliberately, the Chairman is authorized in his discretion to recess the hearing forthwith. Further proceedings may be held only after assurances satisfactory to the Chairman are made by the offending party that he is prepared to abide by the rulings of the Chairman.

2. Testimony before hearing boards shall be given under oath or affirmation.

3. The hearing board shall take whatever action is necessary to insure the employee of full and fair consideration of his case. The employee will be informed by the Chairman of his rights under this Directive.

4. After the hearing has been convened the letter setting forth the charges against the employee shall be read, and the statements and affidavits by the employee in answer to such charges, unless such reading is waived by mutual consent of the Chairman and the employee. In any event, such material shall be incorporated as a part of the record of the hearing.

5. The Department and the employee may introduce evidence responsive to the issues. Rules of evidence shall not be binding on the board, but the Chairman

may impose reasonable restrictions as to the relevance, competency, and materiality of matters considered, so that the hearings shall not be unduly prolonged. Unclassified investigative information not made available to the employee whose removal is sought under the provisions of section 7532 of title 5, United States Code, reference (d), shall not be furnished to the Board. Investigative information not made available to the employee whose removal is sought under the provisions of section 7532 of title 5, United States Code, reference (d), shall not be furnished the Board subject to the following exception: If the investigative information constitutes classified information the Board may receive and consider such information, provided the employee is furnished as comprehensive and detailed an unclassified summary of the information as the national security permits.

6. The employee shall have the right to control the sequence of witnesses called by him. Reasonable cross-examination of witnesses by the employee shall be permitted.

7. The hearing board shall give due consideration to documentary evidence developed by investigation, including but not limited to, such matters as membership cards, petitions bearing the employee's signature, personnel and security forms executed by the employee, and transcripts of relevant testimony before other duly constituted authorities. The fact that such evidence has been considered shall be made a part of the transcript of the hearing, together with a complete identification of the document in question, including date, place, and other designative information.

8. The Chairman, in his discretion, may invite any person to appear at the hearing and testify, and may cross-examine him. The employee may be called to testify. Where an employee's refusal to testify or to answer questions regarding the issues in his case prevents the board from reaching a

#First amendment (Ch 1, 1/31/67)

determination that his employment is clearly consistent with the interests of national security, the board may adjourn the hearing and take action as provided in paragraph X.E. 14 below.

9. The hearing board shall conduct the hearing proceedings in such manner as to protect information, the disclosure of which would adversely affect the national security or tend to disclose or compromise investigative sources or methods.

10. Hearings shall be private. There shall be present at the hearing only the members of the hearing board, the hearing board counsel, the stenographer or stenographers, the employee, his counsel, Department of Defense officials concerned, and witnesses when actually testifying.

11. Where the hearing board determines that further investigation is essential in order to arrive at a proper decision in the case, the board will specify the particular areas to be investigated on an expeditious basis through the DoD Component concerned.

12. The hearing board, in making its recommendation, shall take into consideration the fact that the employee may have been handicapped by the nondisclosure to him of classified defense information, or the inability of the employee to attack the credibility and accuracy of any person furnishing information about the employee who fails to appear as a witness. Where such persons are not confidential informants, their failure to appear, together with the reason for their absence, shall be considered by the board, as well as the fact that the board cannot pay witness fees or reimburse them for their travel or other expenses. The board shall reach its conclusions and base its determination on the transcript of the hearing, together with such classified defense information as may be submitted to it. This classified information will be identified and included in the classified portion of the record for review by the official

designated in subsection X.F., together with the information disclosed to the employee pursuant to paragraph X.E.5. above. Where such information has not been shown to the employee, the reasons for this action will be set forth.

13. A complete verbatim stenographic transcript will be made of the hearing by qualified reporters, which will be made a permanent part of the record. The employee will be furnished a copy of the transcript without cost. The transcript shall not include classified information submitted to the board, but shall include an unclassified summary thereof.

14. The hearing board will make findings of fact with respect to each allegation in the letter of charges, and a recommendation whether retention of the employee is clearly consistent with the interests of the national security. The report of the board will be in writing, and will be signed by all members of the board. If a determination is not unanimous, a signed minority report shall be submitted.

15. The record of the case, including the findings and the recommendation of the hearing board, shall be reviewed by the official designated in subsection X.F. Following such review, the employee shall be notified in writing of the final determination, and if adverse, the hearing board's report and recommendations, except for any classified portions, shall be made available to the employee.

F. Termination of Employment

The authority to terminate the employment of an employee of a Military Department is vested solely in the Secretary of the Military Department concerned and in such other statutory official as he may designate. Action to terminate employees of the Office of the Secretary of Defense, and DoD Components other than those of the Military Departments, shall be submitted to the Assistant Secretary of Defense (Administration) for decision.

G. Resignations

A resignation submitted by an employee after notice of suspension or other proposed adverse action under the provisions of section 7532 of title 5, United States Code, reference (d), has been communicated to him and before final action has been taken, will be accepted. However, the Standard Form 50 effecting the resignation will bear the following Notation, "Resigned while action pending to separate for security reasons under the provisions of section 7532 of title 5, United States Code."

H. Benefits

An employee whose employment has been suspended or terminated under the provisions of section 7532 of title 5, United States Code, reference (d), and who is reinstated or restored to duty under the provisions of section 3571 of title 5, United States Code, reference (d), is entitled to benefits as provided for by section 3 of Public Law 89-380, reference (i), and as prescribed by Federal Personnel Manual System Letter No. 550-17, and Erratum, reference (j).

XI. REINSTATEMENT, RESTORATION TO DUTY OR REEMPLOYMENT OF TERMINATED EMPLOYEES

A. Any person whose employment in the Department of Defense is terminated under the provisions of section 7532 of title 5, United States Code, reference (d), or any other security or loyalty program relating to officers or employees of the Government, shall not be reinstated or restored to duty or reemployed in the Department of Defense unless the Secretary of Defense, or his designee for that purpose, finds that such reinstatement, restoration, or reemployment is clearly consistent with the interests of the national security, which finding shall be made a part of the record.

#First amendment (Ch 1, 1/31/67)

B. Any person whose employment in any other agency or department of the Government is terminated under the provisions of section 7532 of title 5, United States Code, reference (d), or any other security or loyalty program of the Government, shall not be employed in the Department of Defense unless the Civil Service Commission determines that such person is eligible for employment and the person's employment is approved by the Secretary of Defense, or his designee for that purpose, which determination and approval shall be made a part of the record. See section 7312 of title 5, United States Code, reference (d).

XII. REFERRAL OF POSSIBLE DEROGATORY INFORMATION

Whenever there is developed or received any information indicating that the retention in employment of any officer or employee of the Department of Defense may not be clearly consistent with the interests of the national security, such information shall be forwarded to the Head of the DoD Component concerned or his designee. In such cases the Head of the DoD Component concerned or his designee, after such investigation as shall be appropriate, shall review, and, where necessary, adjudicate or readjudicate, in accordance with the provisions of section 7532 of title 5, United States Code, reference (d), the case of such officer or employee.

XIII. SECURITY DETERMINATIONS CONCERNING APPLICANTS FOR SENSITIVE POSITIONS

Applicants being considered for a sensitive position should, whenever appropriate, have an opportunity to explain or refute derogatory security information (as distinct from derogatory suitability information) developed in an investigation before being rejected or nonselected on security grounds. The Central Clearance Group shall perform this function, by permitting the individual concerned to have an option either to appear personally and informally before a member or designee of the Group or to respond to written interrogatories to be furnished to the individual by the Group. The purpose of this provision is to prevent errors which might otherwise result from mistakes in identity or mitigating circumstances which are unknown to the prospective employing DoD Component. In the event the Central Clearance Group determines that employment of the applicant is not clearly consistent with the interests of national security, the Group shall recommend to the Head of the DoD Component concerned that the applicant be denied employment.

#First amendment (Ch 1, 1/31/67)

XIV. NOTICE REQUIREMENTS

Pursuant to Executive Order 10450, as amended, and in order to assist the Civil Service Commission in discharging its responsibilities under that Order, the Department of Defense Components will notify the Civil Service Commission of the action taken as soon as possible after the receipt of the final investigative report on a civilian officer or employee subject to full field investigation under the provisions of the Order. In the case of a completely favorable investigation, notification shall be made within thirty (30) days. In the case of an unfavorable investigation, notification shall be made within ninety (90) days. In both situations, if special circumstances have precluded accomplishing the reports to the Civil Service Commission within the time limits, continuing reports will be made to the Civil Service Commission every thirty (30) days until accomplished. Such notice shall be in accordance with and conform to the requirements of the Civil Service Commission as stipulated in Chapter 736, Appendix B-1, Federal Personnel Manual, reference (h). The Assistant Secretary of Defense (Administration) shall be notified with regard to each suspension or termination under provision of section 7532 of title 5, United States Code, reference (d), and of reinstatement, restoration to duty or reemployment following any suspension or termination. Such notice shall be made no later than 10 days after each such action has occurred and will include the full name, date and place of birth, grade, type of action, and the date the action was taken with respect to such employee.

XV. IMPLEMENTATION

Two copies of implementing regulations shall be forwarded to the Assistant Secretary of Defense (Administration) for review within sixty (60) days. One copy shall be marked to indicate the implemented sections, subsections, paragraphs and subparagraphs of this Directive.

XVI. EFFECTIVE DATE

This Directive is effective immediately.

Robert S. McNamara
Secretary of Defense

#Second amendment (Ch 2, 6/30/67)

DEPARTMENT OF DEFENSE
DIRECTIVES SYSTEM TRANSMITTAL

NUMBER	DATE	DISTRIBUTION
5210.7 - Ch 1	January 31, 1967	5200 series

ATTACHMENTS

Reprinted DoD Directive 5210.7, "Department of Defense Civilian Applicant and Employee Security Program," September 2, 1966.

INSTRUCTIONS FOR RECIPIENTS

REPRINT

Attached is a reprint of DoD Directive 5210.7 incorporating authorized administrative changes indicated by marginal asterisks.

The reprinted Directive is to be substituted for copies of 5210.7 originally distributed.

EFFECTIVE DATE AND IMPLEMENTATION

This change is effective immediately. Two (2) copies of revised implementing documents shall be forwarded to the Assistant Secretary of Defense (Administration) within thirty (30) days.

Maurice W. Roche

MAURICE W. ROCHE
Director, Correspondence and Directives Division
OASD(Administration)

WHEN PRESCRIBED ACTION HAS BEEN TAKEN, THIS TRANSMITTAL SHOULD BE FILED WITH THE BASIC DOCUMENT

SD FORM 106-1 PREVIOUS EDITIONS ARE OBSOLETE

DEPARTMENT OF DEFENSE
DIRECTIVES SYSTEM TRANSMITTAL

NUMBER	DATE	DISTRIBUTION
5210.7 - Ch 2	June 30, 1967	5200 series

ATTACHMENTS

Pages 23 and 24 of DoD Directive 5210.7, Sept 2, 66.

Implemented 3/15/74 EE

INSTRUCTIONS FOR RECIPIENTS

The following page changes to DoD Directive 5210.7, "Department of Defense Civilian Applicant and Employee Security Program," dated September 2, 1966, have been authorized:

PAGE CHANGES

Remove: Pages 23 and 24
Insert: Attached replacement pages.

Implemented 3/15/74 EE

Current change appears on page 24 and is indicated by marginal asterisks. Previous changes to both pages have been incorporated.

EFFECTIVE DATE AND IMPLEMENTATION

This change is effective immediately. Two (2) copies of revised implementing documents shall be forwarded to the Assistant Secretary of Defense (Administration) within sixty (60) days.

Maurice W. Roche

MAURICE W. ROCHE
Director, Correspondence and Directives Division
OASD(Administration)

WHEN PRESCRIBED ACTION HAS BEEN TAKEN, THIS TRANSMITTAL SHOULD BE FILED WITH THE BASIC DOCUMENT

SD FORM 1 MAR 62 106-1 PREVIOUS EDITIONS ARE OBSOLETE

DEPARTMENT OF DEFENSE
DIRECTIVES SYSTEM TRANSMITTAL

NUMBER	DATE	DISTRIBUTION
5210.7 - Ch 3	March 6, 1968	5200 series

ATTACHMENTS

None

INSTRUCTIONS FOR RECIPIENTS

The following pen change to DoD Directive 5210.7, "DoD Civilian Applicant and Employee Security Program," dated September 2, 1966, has been authorized:

PEN CHANGE

Page 1, correct reference (e) to read as follows: Implemented 3/15/74 Ed

"(e) Executive Order 10450, Security Requirements for Government Employment, April 27, 1953, as amended by Executive Orders 10491, 10531, 10548, 10550, hereafter referred to as Executive Order 10450."

Changed portion is underscored.

Maurice W. Roche
MAURICE W. ROCHE
Director, Correspondence and Directives Division
OASD (Administration)

WHEN PRESCRIBED ACTION HAS BEEN TAKEN, THIS TRANSMITTAL SHOULD BE FILED WITH THE BASIC DOCUMENT

SD FORM 1 MAR 68 106-1 PREVIOUS EDITIONS ARE OBSOLETE

DEPARTMENT OF DEFENSE
DIRECTIVES SYSTEM TRANSMITTAL

NUMBER	DATE	DISTRIBUTION
5210.7 - Ch 4	May 6, 1969	5200 series

ATTACHMENTS
Pages 3 and 4 of DoD Directive 5210.7, Sept 2, 66.

INSTRUCTIONS FOR RECIPIENTS

The following page changes to DoD Directive 5210.7, "Department of Defense Civilian Applicant and Employee Security Program," dated September 2, 1966, have been authorized:

PAGE CHANGES

Remove: Pages 3 and 4
Insert: Attached replacement pages.

- Implemented 3/13/74 EB

Current change appears on page 4 and is indicated by marginal asterisks. Previous change to page 4 has been incorporated.

EFFECTIVE DATE AND IMPLEMENTATION

This change is effective immediately. Two (2) copies of revised implementing documents shall be forwarded to the Assistant Secretary of Defense (Administration) within sixty (60) days.

Maurice W. Roche
MAURICE W. ROCHE
Director, Correspondence and Directives Division
OASD(Administration)

WHEN PRESCRIBED ACTION HAS BEEN TAKEN, THIS TRANSMITTAL SHOULD BE FILED WITH THE BASIC DOCUMENT

SD FORM 1 MAR 68 106-1 PREVIOUS EDITIONS ARE OBSOLETE

DEPARTMENT OF DEFENSE
DIRECTIVES SYSTEM TRANSMITTAL

NUMBER	DATE	DISTRIBUTION
5210.7 - Ch 5	October 17, 1973	5200 series

ATTACHMENTS
Pages 9&10 to DoD Directive 5210.7, 9/2/66

INSTRUCTIONS FOR RECIPIENTS

The Deputy Secretary of Defense approved the following page changes to DoD Directive 5210.7, "DoD Civilian Applicant and Employee Security Program" dated September 2, 1966:

PAGE CHANGES

Remove: Pages 9&10

Insert: Attached replacement pages

Implemented 3/1/74 ES

Change appears on page 9 and is indicated by marginal asterisks.

EFFECTIVE DATE AND IMPLEMENTATION

This change is effective immediately. Two copies of revised implementing instructions shall be forwarded to the Assistant Secretary of Defense (Comptroller) within 60 days.

Maurice W. Roche
MAURICE W. ROCHE, Director
Correspondence and Directives
OASD(Comptroller)

WHEN PRESCRIBED ACTION HAS BEEN TAKEN, THIS TRANSMITTAL SHOULD BE FILED WITH THE BASIC DOCUMENT

SD FORM 1 MAR 68 106-1 PREVIOUS EDITIONS ARE OBSOLETE

June 19, 1956
NUMBER 5210.9

Department of Defense Directive

SUBJECT Military Personnel Security Program

References: (a) Department of Defense Directive 5210.9, "Military Personnel Security Program", dated April 7, 1954, as amended (cancelled herein)

I. PURPOSE

The purpose of this Directive is to establish uniform procedures and provide policy guidance pertaining to the acceptance, rejection or separation of persons whose membership in the Armed Forces would not be clearly consistent with the interests of national security in order to assure that the effectiveness of the Armed Forces of the United States will not be jeopardized by subversive elements within their ranks.

II. SCOPE AND APPLICABILITY

A. This Directive prescribes the standard and criteria for:

1. the separation of military members from the Armed Forces or its reserve components in the interests of national security, and

2. the rejection of applicants for appointment or enlistment, or of persons who would otherwise be inducted or ordered into active military service, when the acceptance of such persons into the Armed Forces would not be clearly consistent with national security.

B. This Directive applies to all members and prospective members of the Armed Forces and their reserve components, including the Coast Guard when the Coast Guard is operating as a part of the Department of the Navy.

C. The provisions of this Directive will not be used to reject or separate a person from service with the Armed Forces where national security is not the primary consideration. Rejection or separation on grounds other than for security reasons will be made under other applicable directives. This Directive does not preclude trial by court-martial when such action is considered appropriate by competent authority.

III. GENERAL POLICY

A. The underlying principle of this policy is to prevent damage to the Armed Forces by espionage, sabotage and subversion, and at the same time to protect the rights of the individual members of the Armed Forces.

B. The Department of Defense will assume that the acceptance or retention of any member of the Armed Forces is clearly consistent with the interest of national security unless and until a determination to the contrary is made by competent authority of the Military Department concerned. However, when credible information which raises the question of security is received, action will be taken to determine whether acceptance or retantion is consistent with the interests of national security. In no case will any person, reasonably believed to have at any time engaged in any of the activities listed in Section VIII C 2 below, be appointed, enlisted, or inducted into any of the Armed Forces without the approval of the Secretary of the Military Department concerned. Any member who is separated under the provisions of the appropriate Military Department regulation issued in implementation of this Directive, or whose records reflect that he was separated under other authority while undergoing investigation under the provisions of such regulation, will not be appointed or enlisted in any of the Armed Forces at a later date without the approval of the Secretary of the Military Department concerned.

IV. DEFINITION

National Security. As used herein, the term "national security" relates to the protection and preservation of the military, economic, and productive strength of the United States, including the security of the government in domestic and foreign affairs, against or from espionage, sabotage, and subversion, and any and all acts designed to weaken or destroy the United States.

V. CANCELLATION

This Directive reissues with certain modifications the former Department of Defense Military Personnel Security Policy as set forth in reference (a). Reference (a) is therefore cancelled.

VI. REPORTING OF INFORMATION

It shall be the duty of every member of the Armed Forces to report to his commanding officer any information coming to his attention which indicates that retention of any member of the Armed Services may not be clearly consistent with the interests of national security.

VII. INVESTIGATIVE REQUIREMENTS

A. The investigative agencies of the Armed Forces, when conducting investigations pursuant to this program, will develop all relevant facts with special emphasis being given to that information which supports or refutes an allegation stemming from the criteria hereinafter described.

B. A National Agency Check shall be conducted prior to the appointing or commissioning of any individual as an officer or Warrant Officer.

C. Upon being ordered to extended active duty, a National Agency Check will be initiated at the officer's first duty station, if not already accomplished.

VIII. STANDARD AND CRITERIA

A. Standard

The standard for appointment, enlistment, induction, or retention into or within the Armed Forces shall be that on all the available information it is determined that the appointment, enlistment, induction or retention is clearly consistent with the interests of national security.

B. Criteria for Application of Standard

An officer or Warrant Officer of the Armed Forces holds a sensitive position by virtue of his commission or warrant regardless of the duties and responsibilities

of his assignment. Likewise, an enlisted member whose qualifications would normally require that he have access to classified information or material will be considered to hold a sensitive position regardless of the duties and responsibilities of his assignment. Nothing herein will serve to preclude temporary assignment to specially controlled duty as a security measure. However, indefinite assignment to such duty will be made only as prescribed by the Secretary of the Military Department concerned.

C. Application of Criteria

1. The ultimate determination of whether acceptance or retention in the Armed Forces is clearly consistent with the interests of national security must be an over-all common sense determination based on all available information. The Secretaries of the Military Departments shall issue uniform instructions for guidance in arriving at this common sense determination.

2. The activities and associations listed below, whether current or past and while not all inclusive, are of varying degrees of seriousness and warrant initiation of action to effect such determination:

   a. Commission of any act of sabotage, espionage, treason or sedition, or attempts thereat or preparation therefor, or conspiring with or aiding or abetting another to commit or attempt to commit any act of sabotage, espionage, treason, or sedition.

   b. Establishing or continuing a sympathetic association with a saboteur, spy, traitor, seditionist, anarchist, or revolutionist, or with an espionage or other secret agent or representative of a foreign nation, or any representative of a foreign nation whose interests are inimical to the interests of the United States, or with any person who advocates the use of force or violence to overthrow the Government of the United States or the alteration of the form of government of the United States by unconstitutional means.

   c. Advocacy of use of force or violence to overthrow the Government of the United States, or

of the alteration of the form of government of the United States by unconstitutional means.

d. Membership in, or affiliation or sympathetic association with, any foreign or domestic organization, association, movement, group, or combination of persons which is totalitarian, Fascist, Communist, or subversive, or which has adopted, or shows, a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights, under the Constitution of the United States, or which seeks to alter the form of government of the United States by unconstitutional means. (An organization, movement, or group, officially designated by The Attorney General of the United States to be totalitarian, Fascist, Communist, or subversive, to advocate or approve forcible or violent denial of Constitutional rights, or to seek alteration of the form of government of the United States by unconstitutional means, shall be presumed to be of a character thus designated until the contrary be established).

e. Performing or attempting to perform his duties, or otherwise acting, so as to serve the interests of another government in preference to the interests of the United States.

f. Intentionalfailure or refusal to sign the DD Form 98; refusal to completely answer questions contained in DD Forms 98, 390, or 398; or otherwise failing or refusing to answer any pertinent question propounded in the course of an official investigation, interrogation, or examination, conducted for the purpose of ascertaining the existence or extent, or both, of conduct of the nature described in a through e above, and g through m below.

g. Participation in the activities of an organization as a front for an organization referred to in d above, when his personal views were sympathetic to the subversive purposes of such organization.

h. Participating in the activities of an organization with knowledge that it had been infiltrated

by members of subversive groups under circumstances indicating that the individual was a part of, or sympathetic to, the infiltrating element or sympathetic to its purpose.

i. Participation in the activities of an organization referred to in d above, in a capacity where he should reasonably have had knowledge of the subversive aims or purposes of the organization.

j. Sympathetic association with a member or members of an organization referred to in d above.

k. Currently maintaining a close continuing association with a person who has engaged in activities or associations of the type referred to in a through i above. A close continuing association may be considered to exist if the individual lives at the same address as, frequently visits, or frequently communicates with such person.

l. Close continuing association of the type described in k above, even though later separated by distance, if the circumstances indicate that renewal of the association is probable.

m. Any facts, other than as set forth in 3, below, which furnish reason to believe that the individual may be subjected to coercion, influence, or pressure which may cause him to act contrary to the best interests of national security. Among matters which should be considered in this category would be the presence of a spouse, parent, brother, sister, or offspring in a nation, a satellite thereof, or an occupied area thereof, whose interests are inimical to the security of the United States.

3. Separation Under Other Appropriate Directives or Regulations

IMP.?

Persons who fall within the criteria prescribed below are examples of members of the Armed Forces whose retention may not be clearly consistent with the interests of national security. However, action will not be initiated to separate a person from service with the Armed Forces under this security

program unless the criteria set forth in Section VIII C 2 above are involved to the degree that national security is the primary consideration and action under other directives or regulations of the Military Departments or the Uniform Code of Military Justice has been determined to be inappropriate.

a. Willful violation or disregard of security regulations.

b. Intentional unauthorized disclosure to any person of classified information, or of other information, disclosure of which is prohibited by law.

c. Any deliberate misrepresentation, falsification, or omission of material fact.

d. Any criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, habitual use of intoxicants to excess, drug addiction, or sexual perversion.

e. All other behavior, activities, or associations which tend to show that the member is not reliable or trustworthy.

IX. ADMINISTRATIVE POLICIES

The Secretary of each of the Military Departments will prescribe procedures to be taken within his department to implement this Directive. Procedures so established shall be governed by the following:

A. Certification as to Non-Affiliation with Certain Organizations

What is this?

The following persons will be required to accomplish a DD Form 98:

1. Each applicant for initial appointment or initial enlistment prior to his appointment or enlistment. Normally DD Form 98 will not be required for a subsequent appointment or enlistment provided the individual has had continuous service in one of the Armed Forces and has previously satisfactorily completed DD Form 98.

2. Each registrant prior to induction.

3. Each member of a Reserve component of the Armed Forces voluntarily or involuntarily entering upon a tour of extended active military duty immediately upon reporting to the initial activity to which his orders require him to report for such duty.

4. Reserve personnel not on extended active duty, as determined by the Secretary of the Military Department concerned.

5. Retired members of the Armed Forces when recalled to active military service.

B. Application for Appointment

The completed DD Form 98 and DD Form 398, and where applicable DD Form 390, will be attached as an inclosure to the application for appointment. If an applicant fails or refuses to accomplish the DD Form 98 in its entirety, his appointment will be denied. If the DD Form 98 is completed and entries are made thereon which provide reason for belief that his appointment may not be clearly consistent with the interests of national security, such appointment shall be withheld pending a decision by the Military Department concerned.

C. Application for Enlistment

If an applicant for enlistment fails or refuses to accomplish the DD Form 98 in its entirety, his enlistment will be denied. If the DD Form 98 is completed and entries are made thereon which provide reason for belief that his enlistment may not be clearly consistent with the interests of national security, such enlistment will be held in abeyance pending a decision by the Military Department concerned.

D. Member of Reserve Components of the Armed Forces

If a member of a Reserve component of any Armed Service intentionally fails or refuses to accomplish the DD Form 98 in its entirety or makes entries thereon which provide reason for belief that his entry may not be clearly consistent with the interests of national security, action will be instituted with a view toward separation

from the Service in accordance with procedures prescribed by the Secretary of the appropriate Military Department pursuant to this Directive.

E. Retired Members of the Armed Forces

If any retired member of any Armed Service, voluntarily entering or being involuntarily called or ordered to active military service, fails or refuses to accomplish the DD Form 98 in its entirety or makes entries thereon which provide reason for belief that his entry may not be clearly consistent with the interests of national security, action will be instituted with a view toward separation from the Service, if authorized by law, in accordance with procedures prescribed by the Secretary of the appropriate Military Department.

F. Inductees

1. Known Communists will not be inducted into the Armed Forces. The Federal Bureau of Investigation and the Selective Service System shall be notified promptly of their rejection.

2. Whenever a person who is being processed for induction fails or refuses to accomplish satisfactorily the DD Form 98 in its entirety, or furnishes thereon significant derogatory information with respect to his background, further process of induction may be postponed pending completion of a thorough investigation. In the event this investigation reveals that his induction would not be clearly consistent with the interests of national security, he will not be accepted into the service. The initial determination concerning acceptance or rejection for induction shall be made by an Inter-Service Committee which will be established and supervised by the Secretary of the Army as the Executive Agent for Selective Service. The Inter-Service Committee shall be comprised of representatives of the Services participating in Selective Service procurement and shall be authorized to act for the Secretaries of their respective Departments. In the event the registrant is rejected, an opportunity to be heard will be granted, if the registrant so requests. The hearing will be before an appropriate board of officers (Hearing Board) convened under the instructions of the Secretary of the Army as Executive Agent.

The Secretary of the Army as Executive Agent will, after the hearing cause an appropriate review of the case and his decision will be binding on the Military Departments. If the rejected registrant fails to request a hearing within a reasonable period, the initial determination of the Inter-Service Committee shall be final.

3. Doctor and dentist applicants for commissions who are subject to induction and:

   a. Who fail or refuse to accomplish the DD Form 98 in its entirety will not be appointed and the determination as to their induction will be handled in accordance with the provisions of subparagraph 2, above.

   b. Who complete the DD Form 98 with entries made thereon which provide reason for belief that the appointment would not be clearly consistent with the interests of national security, will not be appointed or inducted pending a decision by the Military Department concerned. The applicant will then be given the opportunity to be heard before an appropriate board of officers (Hearing Board). Before any such case is referred to a Hearing Board, however, it will be reviewed by an appropriate Screening Board appointed by the Secretary of the Service concerned. The Screening Board will operate in accordance with the procedures established by the Service Secretary concerned and will recommend to him, among other things, (a) whether the applicant should be tendered a commission, (b) whether the case should be referred to a Hearing Board, and (c) if a hearing is recommended, the information to be included in the statement of reasons. Hearing Boards will recommend that the applicant be (a) tendered a commission, (b) denied a commission but inducted in an enlisted capacity and used on non-sensitive assignments, or (c) rejected for service in any capacity on the basis that such service would not be clearly consistent with the interests of national security. These instructions are applicable to registrants having an obligation for service under subsection 4(i) only of the Universal Military Training and Service Act, as amended, as well as those having an obli-

gation for service under subsections 4(a) (b) and (i) of the aforementioned Act.

C. Separation of Members

1. Cases susceptible to resolution under court-martial procedure shall normally be so processed.

2. Where, for any reason, court-martial proceedings are inappropriate, impracticable, or inadvisable, administrative proceedings with a view toward separation of members whose continued service may not be clearly consistent with the interests of national security shall be initiated in accordance with applicable statutory authority.

3. In any administrative proceeding to separate a member of the Armed Forces in the interest of national security, such member will be afforded an opportunity upon request to present evidence in his behalf as to why he should not be separated. Reasonable time will be afforded the member to present his case; however, a period in excess of 15 days may be granted only when the member can produce ample and sufficient justification for additional time.

4. Administrative procedures, as directed herein, shall not be trials or adjudications, but shall be directed to the end of obtaining factual findings and unbiased opinions by boards of officers that the members under investigation are, or are not, persons whose continued services are clearly consistent with the interests of national security. Whenever practicable the Headquarters of the Service concerned will make available to the Hearing Board an examiner without vote to assist the Board in assuring that the record of the proceedings is as complete as possible and that all pertinent information favorable as well as unfavorable to the individual is developed. The Hearing Board proceedings are subject to review as may be prescribed by the Secretary of the Military Department concerned.

5. When after review of the findings and opinions of boards of officers, the decision is that the continued service of a member of the Armed Forces is not clearly consistent with the interests of national security, he shall be separated and the character of

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the separation shall be predicated upon a careful consideration of all pertinent factors, including the gravity of substantiated derogatory information and the character of the service performed.

6. In the case of separation of any member of the Armed Services, under conditions outlined in the preceding subparagraph, the DD Form 214 (Armed Forces of the U.S. Report of Transfer or Discharge) will cite as authority the appropriate directive of the Military Department under which separation is affected.

7. If administrative proceedings, as defined in paragraph 4 above, result in a final determination by competent authority that an individual's retention is clearly consistent with the interests of national security, such determination shall be conclusive and binding, and may, in the absence of subsequently developed information substantially controverting that determination, support assignment of the member to normal duties.

8. The actions and procedures adopted by each of the Military Departments in implementation of this Directive shall emphasize and make specific provision for prompt and expeditious resolution of each case which may arise.

H. Assignment Restrictions

During the period when a member of an Armed Service is under investigation for security reasons, and during the administrative processing of any case arising therefrom, the member will be placed under such restriction with respect to assignments and access to classified information as are required to protect the interests of national security.

I. Control of Investigative Information

The reports and other investigative material and information developed by investigations conducted pursuant to directives in implementation of this program shall remain the property of the investigative agencies conducting the investigations, except that copies of reports of preinduction investigations shall be furnished to the Military Department to which the individual is allocated under the Selective Service Program. Such reports and other investigative material and information shall be

maintained in confidence, and no access shall be given thereto to other departments and agencies conducting security programs except in accordance with procedures prescribed by the Secretary of the Military Department concerned.

J. Cooperation with Investigative Agencies

All Services will cooperate fully with Federal investigative agencies, and will avoid action tending prematurely to warn suspects that they are under suspicion or to compromise confidential sources of information. In cases presenting any substantial reason for belief that retention in the Armed Services may facilitate investigation and/or prosecution by Federal agencies, such retention may be effected notwithstanding any other provision of this Directive. Similarly administrative procedures with a view toward separation as directed herein may be withheld for a reasonable period pending completion of necessary investigation and advice by the investigative agency concerned that its missions will not be hampered by institution of such procedures.

X. PROCESSING OF CASES

It is imperative that investigations and hearings under this program be completed on a priority basis so that determinations can be made with maximum expedition. Military Departments will render monthly reports to the Office of the Secretary of Defense covering status of all cases that are processed under this Directive, in accordance with a DoD Instruction to be issued.

XI. ACTION REQUIRED

Regulations of the Military Departments implementing this Directive will be coordinated with the Office of the Secretary of Defense to insure uniformity with respect to methods, procedures, and safeguards and forwarded so as to reach this office not later than 60 days from the effective date of this Directive.

XII. EFFECTIVE DATE

This Directive is effective immediately.

C. E. Wilson

Secretary of Defense

DEPARTMENT OF DEFENSE
DIRECTIVES SYSTEM TRANSMITTAL

NUMBER	DATE	DISTRIBUTION
5210.9 - Ch 1	August 3, 1964	5200

ATTACHMENTS

None

INSTRUCTIONS FOR RECIPIENTS

The following pen changes to DoD Directive 5210.9, "Military Personnel Security Program," dated June 19, 1956, have been authorized:

PEN CHANGES

1. Page 5, subparagraph VIII. C. 2. f. - Delete: ", 390,"

2. Page 8, subsection IX. B. - Delete: ", and where applicable DD Form 390,"

3. Pages 10 and 11, subparagraph IX. F. 3. b. - Delete ALL of the last sentence, beginning at the bottom of Page 10 and ending at the top of Page 11.

4. Page 13, section X. - Delete ALL of the second sentence.

IMPLEMENTATION

Two (2) copies of revised implementing regulations shall be forwarded to the Assistant Secretary of Defense (Manpower) within thirty (30) days.

Maurice W. Roche

MAURICE W. ROCHE
Administrative Secretary

WHEN PRESCRIBED ACTION HAS BEEN TAKEN, THIS TRANSMITTAL SHOULD BE FILED WITH THE BASIC DOCUMENT

SD FORM 1 MAR 62 106-1 PREVIOUS EDITIONS ARE OBSOLETE

DEPARTMENT OF DEFENSE
DIRECTIVES SYSTEM TRANSMITTAL

NUMBER	DATE	DISTRIBUTION
5210.9 - Ch 3 (Supersedes Ch 2, 8/26/64)	July 12, 1965	5200 series

ATTACHMENTS

Pages 3, 4, 5, and 6 of DoD Directive 5210.9, Jun 19, 56.

INSTRUCTIONS FOR RECIPIENTS

The following page changes to DoD Directive 5210.9, "Military Personnel Security Program," dated June 19, 1956, have been authorized:

PAGE CHANGES

Remove: Pages 3, 4, 5, and 6
Insert: Attached replacement pages.

Current changes appear on Pages 3 and 6 and are indicated by marginal asterisks. Previous changes to Pages 3 and 5 have been incorporated.

IMPLEMENTATION

Two (2) copies of revised implementing regulations shall be forwarded to the Assistant Secretary of Defense (Manpower) within sixty (60) days.

Maurice W. Roche

MAURICE W. ROCHE
Director, Correspondence and Directives Division
OASD(Administration)

WHEN PRESCRIBED ACTION HAS BEEN TAKEN, THIS TRANSMITTAL SHOULD BE FILED WITH THE BASIC DOCUMENT

SD FORM 1 MAR 62 106-1 PREVIOUS EDITIONS ARE OBSOLETE

V. CANCELLATION

This Directive reissues with certain modifications the former Department of Defense Military Personnel Security Policy as set forth in reference (a). Reference (a) is therefore cancelled.

VI. REPORTING OF INFORMATION

It shall be the duty of every member of the Armed Forces to report to his commanding officer any information coming to his attention which indicates that retention of any member of the Armed Services may not be clearly consistent with the interests of national security.

VII. INVESTIGATIVE REQUIREMENTS

A. The investigative agencies of the Armed Forces, when conducting investigations pursuant to this program, will develop all relevant facts with special emphasis being given to that information which supports or refutes an allegation stemming from the criteria hereinafter described.

B. A National Agency Check shall be conducted prior to the appointing or commissioning of any individual as an officer or Warrant Officer.

C. The National Agency Checks for members of the Reserve Officer Training Corps shall be initiated upon appointment or enrollment in the Naval Reserve Officers Training Corps or upon enrollment in the advance courses of the senior division, Army and Air Force Reserve Officer Training Corps. The results of this National Agency Check should be available during the first term, quarter or semester following enrollment.

D. Upon being ordered to extended active duty, a National Agency Check will be initiated at the officer's first duty station, if not already accomplished.

* E. Effective October 1, 1965, enlistees and inductees will complete DD Form 398, "Statement of Personal History", at the time of enlistment or induction and prior to entry on active duty. Effective November 1, 1965, a National Agency Check will be initiated immediately for such individuals upon reporting for duty at basic training. *

VIII. STANDARD AND CRITERIA

A. Standard

The standard for appointment, enlistment, induction, or retention into or within the Armed Forces shall be that on all the available information it is determined that the appointment, enlistment, induction or retention is clearly consistent with the interests of national security.

*Second amendment (Ch 3, 7/12/65)

B. Criteria for Application of Standard

An officer or Warrant Officer of the Armed Forces holds a sensitive position by virtue of his commission or warrant regardless of the duties and responsibilities of his assignment. Likewise, an enlisted member whose qualifications would normally require that he have access to classified information or material will be considered to hold a sensitive position regardless of the duties and responsibilities of his assignment. Nothing herein will serve to preclude temporary assignment to specially controlled duty as a security measure. However, indefinite assignment to such duty will be made only as prescribed by the Secretary of the Military Department concerned.

C. Application of Criteria

1. The ultimate determination of whether acceptance or retention in the Armed Forces is clearly consistent with the interests of national security must be an over-all common sense determination based on all available information. The Secretaries of the Military Departments shall issue uniform instructions for guidance in arriving at this common sense determination.

2. The activities and associations listed below, whether current or past and while not all inclusive, are of varying degrees of seriousness and warrant initiation of action to effect such determination:

   a. Commission of any act of sabotage, espionage, treason or sedition, or attempts thereat or preparation therefor, or conspiring with or aiding or abetting another to commit or attempt to commit any act of sabotage, espionage, treason, or sedition.

   b. Establishing or continuing a sympathetic association with a saboteur, spy, traitor, seditionist, anarchist, or revolutionist, or with an espionage or other secret agent or representative of a foreign nation, or any representative of a foreign nation whose interests are inimical to the interests of the United States, or with any person who advocates the use of force or violence to overthrow the Government of the United States or the alteration of the form of government of the United States by unconstitutional means.

   c. Advocacy of use of force or violence to overthrow the Government of the United States, or

of the alteration of the form of government of the United States by unconstitutional means.

d. Membership in, or affiliation or sympathetic association with, any foreign or domestic organization, association, movement, group, or combination of persons which is totalitarian, Fascist, Communist, or subversive, or which has adopted, or shows, a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights, under the Constitution of the United States, or which seeks to alter the form of government of the United States by unconstitutional means. (An organization, movement, or group, officially designated by The Attorney General of the United States to be totalitarian, Fascist, Communist, or subversive, to advocate or approve forcible or violent denial of Constitutional rights, or to seek alteration of the form of government of the United States by unconstitutional means, shall be presumed to be of a character thus designated until the contrary be established).

e. Performing or attempting to perform his duties, or otherwise acting, so as to serve the interests of another government in preference to the interests of the United States.

f. Intentionalfailure or refusal to sign the DD Form 98; refusal to completely answer questions contained in DD Forms 98 or 398; or otherwise failing or refusing to answer any pertinent question propounded in the course of an official investigation, interrogation, or examination, conducted for the purpose of ascertaining the existence or extent, or both, of conduct of the nature described in a through e above, and g through m below.

g. Participation in the activities of an organization as a front for an organization referred to in d above, when his personal views were sympathetic to the subversive purposes of such organization.

h. Participating in the activities of an organization with knowledge that it had been infiltrated

#First amendment (Ch 1,8/3/64)

by members of subversive groups under circumstances indicating that the individual was a part of, or sympathetic to, the infiltrating element or sympathetic to its purpose.

i. Participation in the activities of an organization referred to in d above, in a capacity where he should reasonably have had knowledge of the subversive aims or purposes of the organization.

j. Sympathetic association with a member or members of an organization referred to in d above.

k. Currently maintaining a close continuing association with a person who has engaged in activities or associations of the type referred to in a through i above. A close continuing association may be considered to exist if the individual lives at the same address as, frequently visits, or frequently communicates with such person.

l. Close continuing association of the type described in k above, even though later separated by distance, if the circumstances indicate that renewal of the association is probable.

m. Any facts, other than as set forth in 3, below, which furnish reason to believe that the individual may be subjected to coercion, influence, or pressure which may cause him to act contrary to the best interests of national security. Among matters which should be considered in this category would be the presence of a spouse, parent, brother, sister, or offspring in a nation, a satellite thereof, or an occupied area thereof, whose interests are inimical to the security of the United States.

* n. Any excessive indebtedness, recurring financial difficulties, unexplained affluence or repetitive absences without leave which furnish reason to believe that the individual may act contrary to the best interests of national security. *

3. Separation Under Other Appropriate Directives or Regulations

Persons who fall within the criteria prescribed below are examples of members of the Armed Forces whose retention may not be clearly consistent with the interests of national security. However, action will not be initiated to separate a person from service with the Armed Forces under this security

#First amendment (Ch 3, 7/12/65)

DEPARTMENT OF DEFENSE
DIRECTIVES SYSTEM TRANSMITTAL

NUMBER	DATE	DISTRIBUTION
5210.9 - Ch 4	September 7, 1965	5200 series

ATTACHMENTS

Pages 3 and 4 of DoD Directive 5210.9, Jun 19, 56.

INSTRUCTIONS FOR RECIPIENTS

The following page changes to DoD Directivd 5210.9, "Military Personnel Security Program," dated June 19, 1956, have been authorized:

PAGE CHANGES

Remove: Pages 3 and 4
Insert: Attached replacement pages.

Current change appears on page 3 and is indicated by marginal asterisks. Previous change to page 3 has been incorporated.

EFFECTIVE DATE AND IMPLEMENTATION

This change is effective immediately. Two (2) copies of revised implementing documents shall be forwarded to the Assistant Secretary of Defense (Manpower) within ninety (90) days.

Maurice W. Roche

MAURICE W. ROCHE
Director, Correspondence and Directives Division
OASD(Administration)

WHEN PRESCRIBED ACTION HAS BEEN TAKEN, THIS TRANSMITTAL SHOULD BE FILED WITH THE BASIC DOCUMENT

SD FORM 1 MAR 62 106-1 PREVIOUS EDITIONS ARE OBSOLETE AD 9033

V. CANCELLATION

This Directive reissues with certain modifications the former Department of Defense Military Personnel Security Policy as set forth in reference (a). Reference (a) is therefore cancelled.

VI. REPORTING OF INFORMATION

It shall be the duty of every member of the Armed Forces to report to his commanding officer any information coming to his attention which indicates that retention of any member of the Armed Services may not be clearly consistent with the interests of national security.

VII. INVESTIGATIVE REQUIREMENTS

A. The investigative agencies of the Armed Forces, when conducting investigations pursuant to this program, will develop all relevant facts with special emphasis being given to that information which supports or refutes an allegation stemming from the criteria hereinafter described.

B. A National Agency Check shall be conducted prior to the appointing or commissioning of any individual as an officer or Warrant Officer.

C. The National Agency Checks for members of the Reserve Officer Training Corps shall be initiated upon appointment or enrollment in the Naval Reserve Officers Training Corps or upon enrollment in the advance courses of the senior division, Army and Air Force Reserve Officer Training Corps. The results of this National Agency Check should be available during the first term, quarter or semester following enrollment.

D. Upon being ordered to extended active duty, a National Agency Check will be initiated at the officer's first duty station, if not already accomplished.

E. Effective October 1, 1965, enlistees and inductees will complete DD Form 398, "Statement of Personal History," at the time of enlistment or induction and prior to entry on active duty. Effective November 1, * 1965, a National Agency Check will be initiated immediately for all * * enlistees upon reporting for duty at basic training. Effective July 1, * * 1966, a National Agency Check will be initiated immediately for all * * inductees upon reporting for duty at basic training. *

VIII. STANDARD AND CRITERIA

A. Standard. The standard for appointment, enlistment, induction, or retention into or within the Armed Forces shall be that on all the available information it is determined that the appointment, enlistment, induction or retention is clearly consistent with the interests of national security.

#Third amendment (Ch 4, 9/7/65)

B. Criteria for Application of Standard

An officer or Warrant Officer of the Armed Forces holds a sensitive position by virtue of his commission or warrant regardless of the duties and responsibilities of his assignment. Likewise, an enlisted member whose qualifications would normally require that he have access to classified information or material will be considered to hold a sensitive position regardless of the duties and responsibilities of his assignment. Nothing herein will serve to preclude temporary assignment to specially controlled duty as a security measure. However, indefinite assignment to such duty will be made only as prescribed by the Secretary of the Military Department concerned.

C. Application of Criteria

1. The ultimate determination of whether acceptance or retention in the Armed Forces is clearly consistent with the interests of national security must be an over-all common sense determination based on all available information. The Secretaries of the Military Departments shall issue uniform instructions for guidance in arriving at this common sense determination.

2. The activities and associations listed below, whether current or past and while not all inclusive, are of varying degrees of seriousness and warrant initiation of action to effect such determination:

   a. Commission of any act of sabotage, espionage, treason or sedition, or attempts thereat or preparation therefor, or conspiring with or aiding or abetting another to commit or attempt to commit any act of sabotage, espionage, treason, or sedition.

   b. Establishing or continuing a sympathetic association with a saboteur, spy, traitor, seditionist, anarchist, or revolutionist, or with an espionage or other secret agent or representative of a foreign nation, or any representative of a foreign nation whose interests are inimical to the interests of the United States, or with any person who advocates the use of force or violence to overthrow the Government of the United States or the alteration of the form of government of the United States by unconstitutional means.

   c. Advocacy of use of force or violence to overthrow the Government of the United States, or

DEPARTMENT OF DEFENSE
DIRECTIVES SYSTEM TRANSMITTAL

NUMBER	DATE	DISTRIBUTION
5210.9 - Ch 5	October 17, 1973	5200 series

ATTACHMENTS

Pages 5&6, 7&8, 9&10 to DoD Directive 5210.9, 6/19/56

INSTRUCTIONS FOR RECIPIENTS

The Deputy Secretary of Defense approved the following page changes to DoD Directive 5210.9, "Military Personnel Security Program," dated June 19, 1956:

PAGE CHANGES

Remove: Pages 5&6, 7&8 and 9&10

Insert: Attached replacement pages

Changes appear on pages 5, 7&8, 9&10 and are indicated by marginal asterisks.

EFFECTIVE DATE AND IMPLEMENTATION

These changes are effective immediately. Two copies of revised implementing instructions shall be forwarded to the Assistant Secretary of Defense (Comptroller) within 60 days.

Maurice W. Roche

MAURICE W. ROCHE, Director
Correspondence and Directives
OASD(Comptroller)

WHEN PRESCRIBED ACTION HAS BEEN TAKEN, THIS TRANSMITTAL SHOULD BE FILED WITH THE BASIC DOCUMENT

SD FORM 1 MAR 62 106-1 PREVIOUS EDITIONS ARE OBSOLETE

of the alteration of the form of government of the United States by unconstitutional means.

d. Membership in, or affiliation or sympathetic association with, any foreign or domestic organization, association, movement, group, or combination of persons which is totalitarian, Fascist, Communist, or subversive, or which has adopted, or shows, a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights, under the Constitution of the United States, or which seeks to alter the form of government of the United States by unconstitutional means. (An organization, movement, or group, officially designated by The Attorney General of the United States to be totalitarian, Fascist, Communist, or subversive, to advocate or approve forcible or violent denial of Constitutional rights, or to seek alteration of the form of government of the United States by unconstitutional means, shall be presumed to be of a character thus designated until the contrary be established).

e. Performing or attempting to perform his duties, or otherwise acting, so as to serve the interests of another government in preference to the interests of the United States.

f. Intentional failure or refusal to sign the DD Form 398; refusal to completely answer questions contained therein; or otherwise failing or refusing to answer any pertinent question propounded in the course of an official investigation, interrogation, or examination, conducted for the purpose of ascertaining the existence or extent, or both, of conduct of the nature described in a through e above, and g through m below. *

g. Participation in the activities of an organization as a front for an organization referred to in d above, when his personal views were sympathetic to the subversive purposes of such organization.

h. Participating in the activities of an organization with knowledge that it had been infiltrated

#Second amendment (Ch 5, 10/17/73)

by members of subversive groups under circumstances indicating that the individual was a part of, or sympathetic to, the infiltrating element or sympathetic to its purpose.

i. Participation in the activities of an organization referred to in d above, in a capacity where he should reasonably have had knowledge of the subversive aims or purposes of the organization.

j. Sympathetic association with a member or members of an organization referred to in d above.

k. Currently maintaining a close continuing association with a person who has engaged in activities or associations of the type referred to in a through i above. A close continuing association may be considered to exist if the individual lives at the same address as, frequently visits, or frequently communicates with such person.

l. Close continuing association of the type described in k above, even though later separated by distance, if the circumstances indicate that renewal of the association is probable.

m. Any facts, other than as set forth in 3, below, which furnish reason to believe that the individual may be subjected to coercion, influence, or pressure which may cause him to act contrary to the best interests of national security. Among matters which should be considered in this category would be the presence of a spouse, parent, brother, sister, or offspring in a nation, a satellite thereof, or an occupied area thereof, whose interests are inimical to the security of the United States.

* n. Any excessive indebtedness, recurring financial difficulties, unexplained affluence or repetitive absences without leave which furnish reason to believe that the individual may act contrary to the best interests of national security. *

3. Separation Under Other Appropriate Directives or Regulations

Persons who fall within the criteria prescribed below are examples of members of the Armed Forces whose retention may not be clearly consistent with the interests of national security. However, action will not be initiated to separate a person from service with the Armed Forces under this security

#First amendment (Ch 3, 7/12/65)

program unless the criteria set forth in Section VIII C 2 above are involved to the degree that national security is the primary consideration and action under other directives or regulations of the Military Departments or the Uniform Code of Military Justice has been determined to be inappropriate.

a. Willful violation or disregard of security regulations.

b. Intentional unauthorized disclosure to any person of classified information, or of other information, disclosure of which is prohibited by law.

c. Any deliberate misrepresentation, falsification, or omission of material fact.

d. Any criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, habitual use of intoxicants to excess, drug addiction, or sexual perversion.

e. All other behavior, activities, or associations which tend to show that the member is not reliable or trustworthy.

IX. ADMINISTRATIVE POLICIES

The Secretary of each of the Military Departments will prescribe procedures to be taken within his department to implement this Directive. Procedures so established shall be governed by the following:

* A. Completion of DD Form 398, "Statement of Personal History" *
*

The following persons will be required to accomplish * a DD Form 398: *

1. Each applicant for initial appointment or initial enlistment prior to his appointment or enlistment. * Normally DD Form 398 will not be required for a * subsequent appointment or enlistment provided the individual has had continuous service in one of the Armed Forces and has previously satisfactorily * completed DD Form 398. *

#First amendment (Ch 5, 10/17/73)

2. Each registrant prior to induction.

3. Each member of a Reserve component of the Armed Forces voluntarily or involuntarily entering upon a tour of extended active military duty immediately upon reporting to the initial activity to which his orders require him to report for such duty.

4. Reserve personnel not on extended active duty, as determined by the Secretary of the Military Department concerned.

5. Retired members of the Armed Forces when recalled to active military service.

B. Application for Appointment

* The completed DD Form 398 will be attached as an inclosure to the application for appointment. If an applicant fails or refuses to accomplish the DD Form 398 in its entirety, his appointment will be denied. If the DD Form 398 is completed and entries are made thereon which provide reason for belief that his appointment may not be clearly consistent with the interests of national security, such appointment shall be withheld pending a decision by the Military Department concerned.

C. Application for Enlistment

If an applicant for enlistment fails or refuses to accomplish the DD Form 398 in its entirety, his enlistment will be denied. If the DD Form 398 is completed and entries are made thereon which provide reason for belief that his enlistment may not be clearly consistent with the interests of national security, such enlistment will be held in abeyance pending a decision by the Military Department concerned.

D. Member of Reserve Components of the Armed Forces

If a member of a Reserve component of any Armed Service intentionally fails or refuses to accomplish the DD Form 398 in its entirety or makes entries thereon which provide reason for belief that his entry may not be clearly consistent with the interests of national security, action will be instituted with a view toward separation

#First amendment (Ch 5, 10/17/73)

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from the Service in accordance with procedures prescribed by the Secretary of the appropriate Military Department pursuant to this Directive.

E. Retired Members of the Armed Forces

If any retired member of any Armed Service, voluntarily entering or being involuntarily called or ordered to active military service; fails or refuses to accomplish * the DD Form 398 in its entirety or makes entries thereon * which provide reason for belief that his entry may not be clearly consistent with the interests of national security, action will be instituted with a view toward separation from the Service, if authorized by law, in accordance with procedures prescribed by the Secretary of the appropriate Military Department.

F. Inductees

1. Known Communists will not be inducted into the Armed Forces. The Federal Bureau of Investigation and the Selective Service System shall be notified promptly of their rejection.

2. Whenever a person who is being processed for induction fails or refuses to accomplish satisfactorily * the DD Form 398 in its entirety, or furnishes thereon * significant derogatory information with respect to his background, further process of induction may be postponed pending completion of a thorough investigation. In the event this investigation reveals that his induction would not be clearly consistent with the interests of national security, he will not be accepted into the service. The initial determination concerning acceptance or rejection for induction shall be made by an Inter-Service Committee which will be established and supervised by the Secretary of the Army as the Executive Agent for Selective Service. The Inter-Service Committee shall be comprised of representatives of the Services participating in Selective Service procurement and shall be authorized to act for the Secretaries of their respective Departments. In the event the registrant is rejected, an opportunity to be heard will be granted, if the registrant so requests. The hearing will be before an appropriate board of officers (Hearing Board) convened under the instructions of the Secretary of the Army as Executive Agent.

#First amendment (Ch 5, 10/17/73)

The Secretary of the Army as Executive Agent will, after the hearing cause an appropriate review of the case and his decision will be binding on the Military Departments. If the rejected registrant fails to request a hearing within a reasonable period, the initial determination of the Inter-Service Committee shall be final.

3. Doctor and dentist applicants for commissions who are subject to induction and:

* a. Who fail or refuse to accomplish the DD Form 398 in its entirety will not be appointed and the determination as to their induction will be handled in accordance with the provisions of subparagraph 2, above. *

* b. Who complete the DD Form 398 with entries made thereon which provide reason for belief that the appointment would not be clearly consistent with the interests of national security, will not be appointed or inducted pending a decision by the Military Department concerned. The applicant will then be given the opportunity to be heard before an appropriate board of officers (Hearing Board). Before any such case is referred to a Hearing Board, however, it will be reviewed by an appropriate Screening Board appointed by the Secretary of the Service concerned. The Screening Board will operate in accordance with the procedures established by the Service Secretary concerned and will recommend by him, among other things, (a) whether the applicant should be tendered a commission, (b) whether the case should be referred to a Hearing Board, and (c) if a hearing is recommended, the information to be included in the statement of reasons. Hearing Boards will recommend that the applicant be (a) tendered a commission, (b) denied a commission but inducted in an enlisted capacity and used on non-sensitive assignments, or (c) rejected for service in any capacity on the basis that such service would not be clearly consistent with the interests of national security. *

*First amendment (Ch 5, 10/17/73)

Mr. COOKE. Under that program, under the provisions of Executive Order No. 10450 it provides the investigations conducted pursuant to this order shall be designed to develop information as to whether the employment or retention in employment in the Federal service of persons being investigated is clearly consistent with the interests of national security.

Now, on incoming personnel, coming into the program, to determine whether they are in a position to be hired by the Department of Defense or, for that matter, any executive department or agency, we realize Mr. Mondello will talk about essentially the incoming people for the Civil Service Commission. And now, the Commission, or in some cases ourselves conduct a national agency check. What does a national agency check consist of? And if I can find this in the voluminous mess here, if you will bear with me a moment, so I will be sure to have it all.

The national agency check consists of a check of the FBI records, the records of the military department——

Mr. EDWARDS. Are you talking about all civilian employees of the Department of Defense now?

Mr. COOKE. Yes. Yes; I am. I am not saying that we do them necessarily. As I said, in your incoming we rely on the Civil Service Commission to conduct most of ours.

Mr. EDWARDS. You say you do them but you also rely on the Civil Service Commission. Who makes the investigation, who gets the rap sheets, who fingerprints the people?

Mr. COOKE. What I am saying is normally for incoming civilians we are talking about at the entry level, we rely on the Civil Service Commission to conduct the national agency check. Now, under the——

Mr. EDWARDS. So your 2,500-person bureau does not have anything to do with checking the background and investigating the background of applicants for civilian employment? That is the responsibility of the Civil Service Commission?

Mr. LIEBLING. That is on incoming personnel.

Mr. COOKE. And civilian, not military.

Mr. LIEBLING. In 1965, we entered into an arrangement with the Civil Service Commission because the Defense Department in relation to other Government agencies, had at that particular time, roughly in the late 1960's, approximately 80 percent of all of the sensitive positions in the Federal Government. And by agreement with the Commission, as approved by Mr. Macy at that particular time, we conduct the investigations on these people who will go into that type of position. That is a critical sensitive, and noncritical sensitive or for access to classified information, as we interpret it as related to national security under the Executive order.

Mr. EDWARDS. So for sensitive jobs, you conduct your own investigations?

You do not use the Civil Service Commission at all?

Mr. LIEBLING. The Civil Service conducts the national agency check and the Department of Defense conducts the remainder of the background investigation.

Mr. COOKE. Essentially, Mr. Chairman, we are talking about two separate but related programs. One is the acceptability or the suitability of the individual for employment, and as Mr. Liebling suggested,

we have the designated and, as a matter of fact, the executive branch has designated certain positions as critical sensitive and other positions as——

Mr. LIEBLING. All civilian positions are designated as critical sensitive, noncritical sensitive, and nonsensitive. We are also concerned with access to classified information under Executive Order 11652 and those personnel that might be involved in fiduciary type of positions, those of sensitive responsibility and so on, and we conduct the investigations on those people.

Mr. COOKE. Now, in addition we were talking about a critical-sensitive position which involves the other half of our program, not only suitable for employment but access to classified information, and the investigation of the individual is considerably expanded to a background investigation. The national agency check, as I am sure you have heard before, is a check of the available records.

Mr. EDWARDS. Now, you make that yourself?

Mr. COOKE. Yes; for military and industrial personnel.

Mr. EDWARDS. Would you read it quickly, the agencies you check? They are the FBI——

Mr. COOKE. Well, the national agency check standard is FBI, the Service Investigative Agencies, the Civil Service Commission, the Immigration and Naturalization Service, and our Defense Industrial Security Office, which handles the industrial clearances out in Ohio. The House Industrial Security Committee will be checked when pertinent to the inquiry. Also, other agencies but essentially it is a record check unless something develops out of it.

Mr. EDWARDS. Now, how about people who are going to enlist or be drafted, in the event the draft exists, into the Armed Services? Do you get a criminal record on each one of them?

Mr. COOKE. Essentially we run, and Mr. O'Donnell—you check me on this if I am wrong, what amounts to a national agency check on enlistees.

Mr. O'DONNELL. That is correct.

Mr. COOKE. And that, of course, is done by our Defense Investigative Service. It may amplify just a bit more that if we get into the more sensitive positions, it is not only a national agency check, but it is a background investigation, which starts out with a national agency check. But we actually send agents out to talk to references, to check school records, to go into much more detail into the suitability and eligibility for security clearance of those individuals.

Mr. EDWARDS. Let me ask one last question: When there is a court-martial or a military commander is concerned about a particular problem he might have with one of his personnel, does he have the authority to request of the State police or the FBI the criminal record of an individual?

Mr. COOKE. No, sir, not the military commander at all. It has to be done with one of our investigative agencies who are charged with that responsibility.

Mr. EDWARDS. And they will do it upon the request of any military commander?

Mr. O'DONNELL. Not in quite those terms. As a part of an investigation leading to a court-martial, there would have been a check of available records and local records made by the investigative agency

concerned. For a specific request such as you indicated would not be necessary.

Mr. LIEBLING. It would have to be supported by some pretty good reason.

Mr. EDWARDS. Mr. Wiggins?

Mr. WIGGINS. Thank you, Mr. Chairman. The witness used an illustration which raised an unrelated question, and I am going to direct that question to counsel, if I can. And then I will get back to our witness for some further questions.

Mr. COOKE. Your counsel, not mine?

Mr. WIGGINS. Yes, our own counsel.

Section 3 is the definition section of the bill. Section 3(d) defines criminal intelligence information, and criminal intelligence information in general is that information compiled by a criminal justice agency for the purpose of criminal investigations, including reports of informants and investigators and so forth. Let us assume the following case:

Let us assume that there is a truckdriver involved in an automobile accident which produces a death, and at least there is a suspicion that that might result in a manslaughter prosecution by reason of his acts. I would assume, under normal circumstances, the police would make sketches of the scene of the accident, would take statements from witnesses and would generally develop a body of information relating the the circumstances surrounding that accident and death. Would that be criminal justice information, criminal intelligence information, Counsel, in your view.

Ms. SCHELL. There would be some distinction. I believe, between that. That would not be criminal intelligence information. That would be criminal offender processing information, which would be a report, that is a part of an investigation of that accident that would be identifiable to that individual.

Mr. WIGGINS. Well, all right. Let us proceed with at least some question as to the proper categorization of that information. Following the trial, and let us assume a conviction of the defendant for manslaughter, subsequent civil litigation ensues or let us say for wrongful death. Can the parties to that civil litigation gain access to the information compiled by the officers at the scene? Now, I think you know that it is quite common that subpenas be issued in order to obtain that information at the trial of the subsequent civil litigation in a typical accident case. My question to you is whether anything in this act would preclude the use of such information in subsequent civil litigation?

Ms. SCHELL. I do not believe it would.

Mr. WIGGINS. Well, if it is criminal justice intelligence I think it might.

Ms. SCHELL. If it is classified as criminal intelligence information.

Mr. WIGGINS. On the other side, you say if it is classified as processing information, it is your belief that it would be available outside of the criminal justice system?

Ms. SCHELL. Well, that would be available to the courts and the defendants in a civil suit.

Mr. WIGGINS. In a subsequent civil case?

Ms. SCHELL. Yes.

Mr. WIGGINS Well, I think it is worthy of looking into it. I do not believe we would want to preclude the normal function of counsel in many criminal cases involving serious injury do involve subsequent civil litigation, and I do not think it is our intention to so insulate the information developed during the criminal investigation within the criminal justice system, that it cannot be used thereafter to vindicate a civil right of the private individual.

Mr. EDWARDS. Would not that information have been developed in the court proceeding and be a matter of record that you referred to?

Mr. WIGGINS. Well, it might and it might not. I know that, calling upon my own experience, and being interested in seeing all of the data obtained by the officers at the scene of the arrest, it is possible that that never would have been developed in the court. It might have resulted in a guilty plea, for example, where there was no record developed in court, but still the need in subsequent civil litigation is present.

I would ask our chairman if we could instruct counsel just to look into the question. I think it is of sufficient importance that we ought not to, by inadvertence, do something that we would not otherwise intend to do and to report to the subcommittee on that.

Mr. EDWARDS. Very good.

Mr. WIGGINS. Have I framed the problem adequately, counsel?

Ms. SCHELL. I think the biggest problem, perhaps, is just in the Criminal Intelligence Information section. The definition needs to be more narrowly defined so that we have an understanding that it is outside of the normal investigative function. It is more of the informant, unsubstantiated kind of reports, rather than in the process of collecting information in the normal course of investigating, as you used in the example of the accident.

Mr. WIGGINS. All right.

Now, back to our witness before us this morning.

Do you receive, and by that I mean does the Department of Defense receive, intelligence information normally from any other Federal agency?

Mr. COOKE. If we are conducting a criminal intelligence investigation, as we perceive it to be defined under the proposed section 3(d), depending upon the nature of the facts, what the situation is, why our investigative agencies would, indeed, go to the Federal Bureau of Investigation perhaps in the matter or to other Federal agencies for facts.

Mr. WIGGINS. Do you receive intelligence information not with respect to a particular crime, but in terms of a normal flow of information generated by intelligence collection sources, such as the FBI, for example? Does that come into the possession of the Department of Defense in a routine sort of way?

Mr. COOKE. Let me answer in this way: That we would routinely get such information if it involves intelligence information impacting upon the Department of Defense. That is to say, a threat involving the security of a base, a threat possibly involving use of narcotics. I would also say parenthetically, that within the last several years we have issued Department of Defense directives under Secretary Laird, which severely restricted the retention and use of that information,

and it has a very short half-life. But the Bureau, particularly in areas involving security of installations, or involving threats to defense property, to defense personnel, we would, and we would hope to get such information because it directly and vitally concerns us.

Mr. WIGGINS. My reason for asking the question is because of the fairly restrictive language in section 5, subparagraph 2 and 3, which involves the use of criminal justice or, excuse me, criminal intelligence information by components of the same agency. I take it to be the same agency that generates the information?

Mr. COOKE. That is the way we see it.

Mr. WIGGINS. And if it is your normal practice to receive intelligence information from other agencies, I would be interested in your comment upon whether this language might interfere with that.

Mr. COOKE. Yes, indeed. We find that a problem.

Mr. WIGGINS. Also it indicates that if the criminal intelligence information is to be used by a noncriminal justice component of the same agency, then it can only be used by that component which it seems to me would preclude the intentional, perhaps, preclude the interchange of information within an agency; that is, once it is received by a component, it is isolated in that component and it may be very difficult for you to circulate intelligence information to other agencies out of that component, but which would have a legitimate interest in it.

Mr. COOKE. We agree, sir, and we like to feel that this was, we hope, unintended because I am not so sure that the degree to which some of the unique problems of the Department were fully explored, and that is why we appreciate the opportunity to talk to you this morning.

Mr. WIGGINS. I take it you have thought about the problem which I am just raising in my questions?

Mr. COOKE. Yes.

Mr. WIGGINS. Have you thought about a specific illustration of how it might preclude your normal functions? I think it would be better, easier for me to understand the impact of this language, if you could give me some illustration.

Mr. COOKE. Bob, can you suggest a specific?

Mr. ANDREWS. I think we have already referred to the fact that the availability of criminal intelligence information under No. 5(c)(3) appears to be tied to the performance of a statutory function. Now, we have some question as to what a statutory function means. Does it mean that that component must have an express statutory duty? Does it mean that that component must have express statutory authority to obtain this type of information in carrying out that statutory duty? It seems to be very limited and there may be components in the Department of Defense that are not even mentioned in the statute. And thus they would be as we read it, foreclosed from gaining availability to this kind of information.

The commanding officer who made the inquiry as to why a fire broke out on his ship, may have decided that it is not, it was not due to crime, but it may have been done by simple negligence. He still has to have that information, and his officers, who would be assigned to the safety investigation which would not be going after the determination of a crime, but an examination of negligence, may be foreclosed under that provision. Now, he could get it if the Attorney General's regulations provided for this kind of thing, but we feel that the kinds of situations

that the military commander faces in a worldwide basis are so varied that it would be very difficult for the Attorney General to accurately predict all of the occasions when criminal intelligence information would be needed by a noncriminal justice component of the Department.

Mr. WIGGINS. Do you think the use of the vague words "national defense" in 5(c)(2) would be adequate to create a general exception for the Department of Defense?

Mr. ANDREWS. The term "national defense" has been a term that each congressional committee has wrestled with. I think if your legislative history were clear and precise that we could perhaps live with it. But we believe that it probably ought to be expanded.

Mr. COOKE. Mr. Wiggins, we had suggested possibly adding the words after "national defense" or foreign policy in line 4, page 7, of the proposed bill: "Access to classified information, Federal employment or military service," and in amplification Mr. Andrews answered to you, your immediately preceding question where lines 10 through 12 say such information may be used by a non-criminal-justice component only in connection with performance of a statutory function, our Defense Investigative Service which conducts all those personal security investigations, conducted by the Department, is not only, it is not a statutory agency, it was created under the authority of the National Security Act in 1947, as amended, by the Secretary of Defense. And it is by the terms of the bill not a criminal justice component, and it does not have statutory functions. As a matter of fact, the civilian personnel program rests upon Executive Order 10450. The industrial security program rests upon Executive Order 10865. Our military personnel program rests upon Department of Defense directives. And our security program generally rests upon Executive Order 11652.

Mr. WIGGINS. One final observation on the question. For the purpose of my question, let us suppose that the police agencies of the city of San Diego are funded in part by Federal funds and would be within the coverage of this act. If that police agency should develop in the course of its normal activities, some intelligence information that an act of sabotage might be committed with respect to a ship, a Navy ship in the harbor at San Diego, does it have the free right to transfer that information to you for appropriate action?

Mr. COOKE. Under the terms of your proposed bill, sir, it is that we would hope now, because of the close liaison between our people and local and Federal law authorities, that we would obtain such information.

Mr. WIGGINS. I am sure you do now. But under the act?

Mr. COOKE. But under the act, proposed section 5(b) states direct access to information contained in a criminal justice system, information system, and criminal justice information system would include, as I read the bill, not only, would include among other things criminal intelligence information shall be available only to authorized officers or employees of a criminal justice agency. And I would think it would severely, it would impede, if not absolutely prohibit, the transmission of such information.

Mr. WIGGINS. Thank you, sir.

Mr. EDWARDS. Mr. Waldie?

Mr. WALDIE. Mr. Cooke, do I understand the breakdown of your authority correctly, that in conducting investigations of civil employees of the Defense Department, you act under the authority of three Executive Orders, 10450, 11652, and 10865?

Mr. COOKE. For security purposes; yes, sir. Now, 10865 does not relate to——

Mr. WALDIE. I know.

Mr. COOKE. It relates to defense contract employees.

Mr. WALDIE. And then your authority for examining security of military personnel comes under DOD directives?

Mr. COOKE. DOD directive 5210.9, sir.

Mr. WALDIE. And you use the Civil Service Commission, I gathered, somewhere along here to do some of these checks. Where is that?

Mr. COOKE. This is to determine for us like other departments and agencies where initial entry into Federal employment is sought, to determine the suitability.

Mr. WALDIE. Is that Executive Order 10450?

Mr. COOKE. That would be under the provisions of——

Mr. LIEBLING. Public Law 733 requires that, I believe, and 10450.

Mr. COOKE. Mr. Liebling says Public Law 733. But it is 10450.

Mr. WALDIE. So you do not do anything under Executive Order 10450? The Civil Service does that?

Mr. LIEBLING. We do for the positions, as we explained earlier, concerning those employees in critical-sensitive positions in the Department of Defense.

Mr. WALDIE. They would come under 11652, would they not?

Mr. LIEBLING. They would come under both.

Mr. WALDIE. If they do not come under 10450, you do not touch them, do you?

Mr. LIEBLING. 10450 set up the initial requirements for——

Mr. WALDIE. I know. They also come under 11652, and the Civil Service does it exclusively, do they not?

Mr. LIEBLING. No.

Mr. WALDIE. Which ones do the Civil Service Commission do exclusively?

Mr. O'CONNELL. The exclusives that they are concerned with are those civilian employee positions which are not concerned with access to classified information, critical-sensitive and so forth.

Mr. WALDIE. If they have access to classified information, they come under Executive Order 11652, do they not?

Mr. COOKE. They follow both.

Mr. O'DONNELL. The wording of both would cover them.

Mr. COOKE. It was under Executive Order 10450 that the then Chairman Macy of the Civil Service Commission set up for the executive branch the critical-sensitive, noncritical-sensitive positions.

Mr. WALDIE. Well, where is the highest category of reliability that you investigate? Under Executive Order 11652?

Mr. LIEBLING. I would say yes. Executive Order 11652, established in 1972, is more current; and although it started out as a classification program directive, we tried to get some interface with the earlier Executive orders because of strictly currency and so on, and terminology, and Executive orders now being looked at with 10450.

Mr. WALDIE. And is that a higher classification usually than your DOD directive 5210.9?

Mr. LIEBLING. Well, it is an interesting point. You are talking about the different powers——

Mr. COOKE. No, I do not think so. It is a parallel one, Mr. Waldie.

Mr. WALDIE. I guess what I am trying to find out, and I do not understand it yet listening to you, you have 2,200 employees, and you at one point said you did a million checks of local law enforcement agencies last year, I guess, or——

Mr. COOKE. Well, of all sources, not local law, but let me see if I can——

Mr. WALDIE. Well, I am trying to find out where you are doing most of your work. Are you doing it under 11652 or 5210.9, or 10450 or 10865? Where do you concentrate your people?

Mr. LIEBLING. The greatest amount of work by effort, actually, if you broke it down, mathematically, we would have about 1,226,000 cleared people, over 1,226,000 in the industrial community and, roughly, under 3 million total for civilian-military and industrial. So, if you subtract 1,226,000 from approximately 3 million, I think you get the figure.

Mr. COOKE. Let me respond.

Mr. WALDIE. But the Civil Service Commission does an awful lot of those?

Mr. COOKE. Let me respond very briefly.

Mr. WALDIE. Wait a minute. But the Civil Service Commission does an awful lot of those, do they not, that you never touch of your 3 million, Mr. Liebling?

Mr. LIEBLING. No; they do a very, very small amount because, as I indicated, most of our positions would be categorized as being in the critical-sensitive area, or in some sort of national defense effort.

Mr. WALDIE. So in the Department of Defense, really the Civil Service Commission does not have much to do with these security checks?

Mr. LIEBLING. No; not in the very limited degree. We have some figures.

Mr. COOKE. Perhaps I can shed some light with some figures, Mr. Waldie.

During fiscal year 1974, we estimate that we are going to have about 3,300 background investigations of civilians alone, and those background investigations are required both under 11652 for access to classified information and under Executive Order 10450, because they are critical-sensitive. So I do not know whether you work——

Mr. WALDIE. How many do you estimate of those 3,300 you will reject for being inadequate?

Mr. COOKE. I do not have the figures.

Mr. WALDIE. Well, how many did you do last year, and how many did you reject for being inadequate?

Mr. COOKE. May I see if those are immediately available and supply that for the record?

Mr. WALDIE. I would appreciate that. I will tell you why I am so curious. You do a lot of investigations and you have a lot of worries about the information that might be denied you. And I am curious as to how many people really are impacted adversely by your investi-

gations. And I guess there would be a mathematical way of at least trying to give us some feeling of that. If you anticipate 3,300 of those checks next year, background checks, you must have had a figure for last year and you are anticipating compared to what you did and, of course, for the background checks you did, there must be a figure as to what you rejected.

Mr. COOKE. May I respond briefly now and amplify for the record?

Mr. WALDIE. Sure.

Mr. COOKE. But on our case workload we would estimate that on national agency checks for incoming employees, we would get about 119,000 in fiscal year 1974, and these will be conducted by our friends in the Civil Service Commission.

Now, in coming to military personnel we would estimate that about 668,000 checks in fiscal year 1974 of military personnel, and we handle, of course, our own military personnel. And that is national agency checks, when we are talking about background investigations, either in initial background investigations or that we have to bring up to date every 5 years, and we would estimate almost 40,000 of those in fiscal year 1974; 39,480 is the estimate so this does represent a rather substantial workload in those areas for our Defense Investigative Service.

Now, in addition, we have our industrial security program, the defense contractors who are working on classified contracts. We would estimate that in fiscal year 1974 there would be approximately 81,500 national agency checks under the industrial security program. These are done by the Defense Investigative Service and we would estimate, as far as background investigations, on industrial employees about 4,230.

Mr. WALDIE. Do you have a file and a record of all of those multiple tens of thousands of checks that you have done?

Mr. COOKE. Yes, we do. I would like——

Mr. WALDIE. OK. Will you provide the committee, unless the Chair objects, with your estimate of how many checks you are going to do this year? Also, what you, in fact, did last year and how many, as a result of the checks, were denied employment?

Mr. COOKE. Now, also, it is in the record, in the longer prepared statement, which I did not read, sir——

Mr. WALDIE. No, no. Can you provide the information I have asked for?

Mr. COOKE. Yes.

Mr. LIEBLING. Mr. Waldie, may I make a suggestion? You referred to the phrase "denied employment." Our program is for suitability, retention and so forth, plus access to classified information. I presume you mean any adverse action including eligibility for classified information?

Mr. WALDIE. Exactly. Right.

Mr. COOKE. I will be pleased to provide a search of what we have available and provide it, sir.

[The information referred to follows:]

It is estimated that the Department of Defense will conduct approximately 3,300 Background Investigations on civilian employees during FY 1974. During FY 1973, we conducted 4,382 such investigations, None of these investigations resulted in separations for security reasons. We have no information on the number of adverse employment actions that may have been taken on the subjects of these investigations.

Mr. WALDIE. I presume that when you provide that, that you will break it down as to what the adverse action was, denial of employment, denial of access to classified information, denial of requests for retention?

Mr. LIEBLING. Denial of employment in the industrial community, we probably will not have those figures because the Department of Defense does not enter into the employee-employer relationship. Our judgment is only concerned with the man's eligibility for access to classified information.

Mr. WALDIE. At least you can provide me a record of those refused access to classified information in the private, industrial sector?

Mr. LIEBLING. Yes, in that area we can, yes.

Mr. EDWARDS. Mr. McClory.

Mr. MCCLORY. Thank you, Mr. Chairman.

I would gather, Mr. Cooke, from this cursory examination of your elaborated statement that really this legislation, in your opinion, you would rather just do without it entirely because it is going to impede your operation? For instance, you really want ready and free access to arrest records and you feel that you used that information prudently and fairly, and that it does not jeopardize any individuals. As a matter of fact, you have a policy of reviewing arrests and even conviction records so that you feel that the dissemination, the free dissemination of this information to you ought to be continued without restriction as contained in the proposed legislation, is that about right?

Mr. COOKE. Mr. McClory, we have the impression that the proposed legislation was developed to facilitate the exchange of criminal justice information as defined in the bill between law enforcement agencies, and really some of the problems we have been elaborating about are the internal use within the Department which have not been fully explored before this date. Would you like to add anything to that, Bob?

Mr. MCCLORY. In other words, you are really not commenting on my statement. You are reserving an opinion on that?

Mr. COOKE. Well——

Mr. ANDREWS. I think we share the concern of this committee over the proliferation of arrest data to persons who do not have a real need to know, particularly persons outside of Government. And we do know that adverse effects can result.

Second——

Mr. MCCLORY. Would you like to be exempted, though?

Mr. ANDREWS. Well, I think we are, I think we are willing—I am going to my second point. I think that to the extent that we have criminal justice responsibility in the areas we have defined, we would like to continue to have access to FBI and State and local police department records in making what we consider necessary determinations. And to the extent that we are permitted that authority, I think we could support the bill.

However, particularly in the area of our internal use, we have very real problems, and we have particular problems with the insertion of the Attorney General in certain of these areas, so we feel that it was not really intended by the terms of the bill. I think that the system that the bill is devised to serve, as Mr. Cooke indicated, it is law enforcement agencies, and it is a system designed for the exchange between law enforcement agencies that have been superimposed over the Defense operation, which just do not fit that way. And I think we have

indicated today we have an awful lot of problems. Now, if our problems are severe enough then I guess we say we are opposed to the bill.

Mr. McCLORY. Well, you have given us the statistics of 477 cases involving arrests and convictions and you have reviewed all of those, and 71 percent of the people you have vindicated and you have given them jobs or something.

Mr. COOKE. Those were ——

Mr. McCLORY. Wait a minute. So that really while 29 percent of them did not get favorable treatment, so what?

Mr. LIEBLING. Not necessarily out of the 29 percent. Some may have withdrawn. They may have changed jobs and so forth. It does not necessarily mean denials.

I wholeheartedly support your earlier comment ——

Mr. McCLORY. You see, the thing I think that some of the members of this committee at least feel, you know, if there is one person who is deprived of a job or an advancement because of an old arrest record, or even some old conviction record we have really deprived that person of the civil rights that we want to grant to him.

Mr. LIEBLING. Well, we are very much concerned with civil rights, but there may be an impression that the use of the information is unjudiciously applied in the Department of Defense. I would like to allay that concern immediately. If I may just use an example:

In 1968, where certain corporations were using criminal records, and arrest records to bar employment, we issued a specific instruction in the Department of Defense which specifically suggests that the Department of Defense security regulations do not preclude employment on the basis of criminal records. And, in fact, and I am paraphrasing, they are also eligible for security clearance. It depends on adjudicatory factors, the recency, the occurrence and the severity of it, and so on, and we do not, on the basis of an arrest record alone, take adverse action.

Mr. McCLORY. I think we understand each other. In other words, if everybody was as judicious and as fair as the Department of Defense is we would not need this legislation?

Mr. LIEBLING. Well, in the amount of numbers we deal with I would have to go along with that.

Mr. COOKE. Could I add one thing?

Mr. McCLORY. Do you think it is good for others—well, for the private sector, you think it is good?

Mr. LIEBLING. As a matter of objective; yes. Undoubtedly.

Mr. McCLORY. How about other agencies of Government? Would you think that that would be good or bad?

Mr. LIEBLING. Yes. I might allude to the fact that the executive branch, the President himself, has just introduced a Council on Privacy which will go into many of these subjects and also include the reference to the discussions of this committee.

Mr. McCLORY. How about this? In your statements, your long and your short statement both, raise objections to the authority of the Attorney General to determine information that would be available to the military criminal justice system? Do you think that you object to having the Attorney General sort of superimposed on the military

to determine what criminal justice information system should be available to you?

Mr. COOKE. Yes; we do, sir.

Mr. MCCLORY. OK. That is all, Mr. Chairman. Thank you.

Mr. EDWARDS. Mr. Sarbanes?

Mr. SARBANES. I was delayed in arriving and this question may have been asked. But, I am interested to know to whom you supply this information upon request that you obtain from the FBI, and the numerous other agencies? To whom do you supply the information which you assemble and collect and put together from your own investigation, or develop through various proceedings within the Department of Defense?

Mr. COOKE. I take it that you are referring to whom we supply outside?

Mr. SARBANES. The Department of Defense.

Mr. COOKE. Outside of the Department? I will be glad to submit that for the record, sir, but let me suggest some so that you can get a feel for it. The Department of State, Office of Security, Treasury, Secret Service, Customs, IRS, the Department of Justice——

Mr. RANGEL. Excuse me. Could you start over? I am terribly sorry.

Mr. COOKE. Yes, of course, Mr. Rangel.

The Department of State, primarily the Office of Security in the Department of State; also AID. The Department——

Mr. EDWARDS. You are telling us that this information you get from police departments and from the FBI you, in turn, redisseminate?

Mr. COOKE. No; we do not redisseminate, but if we are specifically requested in a case by an individual, say, as to what is in our investigative file to another Federal department or agency who has an analogous responsibility.

Mr. EDWARDS. Under what rule or regulation do you do this?

Mr. O'DONNELL. Each one of the 20 Federal agencies must advise us of the law, the statute, the directive, the Executive order, under which they must have access to this type of information. And then it is controlled more strictly after that as to who gets it and to what form it is in. But, usually, they just get a summary of what has been prepared.

Mr. RANGEL. Excuse me, Mr. Chairman, maybe I did not understand that. Sir, are you saying there are 20 Federal investigative agencies?

Mr. O'DONNELL. No; 20 Federal agencies which have, under various directives, executive orders, et cetera, occasion to indicate that they have a need for conducting an investigation. In the accomplishment of the national agency check by the Civil Service Commission, they will contact the Defense Investigative Service to determine what we have in our files concerning a particular individual, as we do with them when we conduct a check of their records.

Mr. RANGEL. I understand that. But the 20 agencies that you refer to, each has its own investigative staff and they share the information?

Mr. O'DONNELL. They have a staff that is charged with security responsibilities, and it is through that unit that they obtain the information; yes.

Mr. RANGEL. And when you say security, you mean investigators, investigative staff?

Mr. O'DONNELL. Not necessarily. Sometimes they are inspectors general of an agency, they are security officers of an agency. They are not necessarily investigators in the sense that they are, if you will, street investigators, who go out and conduct investigations. But they do have this unit within these agencies.

Mr. RANGEL. They keep files?

Mr. O'DONNELL. Yes. That is correct.

Mr. RANGEL. Thank you, Mr. Chairman.

Mr. EDWARDS. Mr. Sarbanes?

Mr. SARBANES. Mr. Cooke, could you go on with that list, please? I do not think you had finished.

Mr. COOKE. The Department of Justice, Department of Interior, Commerce, HEW, HUD, and Transportation—parenthetically, that has the Coast Guard in it, of course—Agriculture, the AEC, General Services Administration, and the Postal Service.

Mr. DRINAN. Would you name the agencies to whom you do not disseminate the information? It would be easier.

Mr. COOKE. I will supply the list for the record.

Mr. RANGEL. Have you finished that list?

[The following is a complete list of Federal departments and agencies accredited to receive investigative data from the Defense Investigative Service:]

1. Department of State
   A. Office of Security
   B. Agency for International Development
2. Department of Treasury
   A. U.S. Secret Service
   B. U.S. Customs Service
   C. Bureau of Engraving and Printing
   D. Internal Revenue Service
3. Department of Justice
   A. Federal Bureau of Investigation
   B. Drug Enforcement Administration
   C. Immigration & Naturalization Service
4. Department of Interior
   A. Director of Geological Survey
5. Department of Commerce
   A. Director of I&S
6. Department of Health, Education and Welfare
7. Department of Housing and Urban Development Assistant Inspector General for Security
8. Department of Transportation
   A. Director of I&S, Office of the Secretary
   B. United States Coast Guard
9. Department of Agriculture
10. Executive Office of the President
    A. Office of Management and Budget
11. U.S. Atomic Energy Commission, Division of Security
12. Export-Import Bank of U.S.
13. Federal Communications Commission
14. U.S. General Services Administration
15. National Aeronautics and Space Administration
    A. Director of Security
    B. Goddard Center
16. U.S. Postal Service

17. U.S. Environmental Protection Agency
18. U.S. Veterans' Administration
19. Action
20. U.S. Civil Service Commission
21. U.S. CIA
22. Library of Congress (Personnel Office)

Mr. SARBANES. Do I understand the Defense Investigative Agency within the Department collects information from local and State law enforcement agencies, conducts its own investigations, and out of all of them, assembles the file with respect to an individual? Is that correct?

Mr. COOKE. The Defense Investigative Service, the great majority of its investigations, which are national agency checks merely go to the national agency to see if there is a record. But, in the event of a background investigation, where higher standards and more detailed knowledge is necessary about the individual being investigated, primarily because of access to highly classified information, there will be local record checks requested; yes, sir.

Mr. SARBANES. And then those various Federal agencies that you list could contact you and ask for information on a certain individual and you would supply to them, I take it, a summary or perhaps the entire file?

Mr. COOKE. A summary in most cases. Bear in mind, though, as Mr. O'Donnell said, this would be more a specific information and under specific authority of the requesting agency, either by statute, Executive order, of such information, in other words, the need and right to know. We do not routinely do it. There is this notion, and let me just advise you. We do not routinely take everything and pass it out to these people.

Mr. SARBANES. I understand that. Now, when you listed the Department of Justice, I would assume that that encompasses the Federal Bureau of Investigation; is that right?

Mr. COOKE. It encompasses the Bureau and the Drug Enforcement Administration, Immigration and Naturalization Service.

Mr. SARBANES. Now, do you supply, if the State police of a particular State request from you information with respect to a certain individual, do you supply them information?

Mr. COOKE. Mr. O'Donnell tells me no.

Mr. SARBANES. If the FBI requested it from you, I take it you supply it to them without question?

Mr. COOKE. Yes, sir.

Mr. SARBANES. Leaving open, of course, the possibility that it is subsequently transmitted by them to the State policy agency; would that be correct?

Mr. COOKE. I think that is a possibility. I am not familiar with what the Bureau does with their files.

Mr. SARBANES. Then the other question I wanted to ask is what the Department does to provide an individual with the opportunity to check the record on him and to ascertain its accuracy, and to challenge information that is contained therein with respect to its accuracy?

Mr. COOKE. I think I could answer it this way. If there is to be an affirmative action, a revocation of a security clearance, be it civilian,

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military, industrial contract employees, although the procedures differ slightly, in each of those cases why the individual concerned has rights to administrative due process, which extends to right to counsel, right to be informed of obviously the allegations against them. It is rather elaborate, at least as in the case of the industrial security appellate proceedings, with a screening board, hearing examiners and the final review board. So, what I am saying is, if there are—and, of course, if we are talking now not of clearances but an actual court martial, why the full pendulum of rights under the Uniform Code of Military Justice are provided the individual. And Mr. O'Donnell tells me or reminds me that as a part of the investigation, if there is some indication in the investigation that the man has a criminal record, he is asked and interviewed about it, I think in large regard in fairness to him, because as our records indicate in industrial security, an arrest record, a criminal offender record standing alone does not necessarily preclude access.

Mr. SARBANES. Well, now, is that inquiry a standard procedure or——

Mr. O'DONNELL. Upon the development of adverse information as part of the investigative procedure, one of the final steps is an interview of the person who has been under investigation to get his version. He is offered an opportunity to provide a signed, sworn statement, as to the facts and circumstances as he knows them to be, so that the adjudicator can consider all aspects of this in making the determination.

Mr. SARBANES. Well, I want to be very clear now. Is he given an opportunity only if an action adverse to him is to be taken or is he given an opportunity if adverse information is developed short of whether an adverse decision is made?

Mr. COOKE. The latter.

Mr. O'DONNELL. The Defense Investigative Service is not a part of the adjudicative action. Therefore, our investigation, which is based on the fact that a question has arisen concerning the individual, is completed before it is turned over to the adjudicator. The subject is interviewed and his statement is taken. He states his version of the facts and is given a full opportunity to provide whatever information orally or recordwide that he wants to.

Mr. SARBANES. Are those procedures spelled out somewhere in a manual or something that is made available to employees, and if they are, could you furnish a copy of it?

Mr. COOKE. Yes, sir.

Mr. SARBANES. They are spelled out?

Mr. O'DONNELL. Well, we have them as part of an investigative manual. I do not know that they are—I do not know the answer as to whether or not a manual is available to employees which would spell them out.

Mr. COOKE. We will provide you what we have.

[The following statement of policy governing interviews with military, civilian, and industrial subjects of investigations, together with the forms used, is submitted for insertion in the record:]

It is DIS policy that whenever a Subject is interviewed at the conclusion of an investigation to clarify or resolve unfavorable information disclosed during an investigation, he will be fully advised of his rights under Article 31, UCMJ, or the Fifth Amendment to the Constitution of the United States, as appropriate. DIS Forms 18a through 22a are used for this purpose (copies attached). DIS Forms 18a, 19a, and 20a are used for military, civilian, and industrial subjects, as appropriate, when the purpose of the interview is solely to afford the Subject an opportunity to explain or clarify unfavorable information. DIS Forms 21a and 22a are used for civilian/industrial and military subjects, as appropriate, when the Subject is suspected of an offense. The data on the appropriate form will be read to the Subject and then he will be asked the following questions:

1. Do you understand your rights?
2. Do you wish to consult a lawyer?
3. Do you desire that a lawyer be present during this interview?

If the Subject answers "yes" to the first question and "no" to the second and third question, then Part I of the appropriate DIS Forms 18 through 22 will be completed and he/she will be asked to sign and date this part of the form. If the Subject agrees to provide a written statement at the conclusion of the oral interview, the statement will be typed or written in Part II of the same form, with blank sheets of paper used for subsequent pages if necessary, with the last portion of the statement being typed or written on DIS Form 24. (Copies of DIS Forms 18 through 22 and 24 are attached). The Subject is given a copy of the statement if he/she wants it.

STATEMENT OF MILITARY CONDUCT

PART I ACKNOWLEDGMENT OF RIGHTS

PLACE: _____

I, _____, have been advised by Special Agent _____ that as a necessary part of an investigation in connection with (my acceptance or retention in the military service) (my access to classified Department of Defense information), I am being interviewed to afford me an opportunity to furnish details concerning specific allegations regarding my _____

I have also been advised:

(1) That I have the right to remain silent and make no statement at all;
(2) That any statement I do make, oral or written, may be used as evidence against me in a trial by court-martial or in other judicial or administrative proceeding;
(3) That I have the right to consult with a lawyer prior to any questioning. This lawyer may be a civilian lawyer retained by me at my own expense; or, if I wish, Army/Navy/Air Force/Marine Corps authorities will appoint a military lawyer to act as my counsel without cost to me;
(4) That I have the right to have such retained civilian lawyer or appointed military lawyer present during this interview;
(5) That I have the right to request a lawyer at any time during this interview;
(6) That if I decide to answer questions without a lawyer present, I may [illegible] the interview at any time.

I understand my rights as related to me and as set forth above. With that understanding, I have decided that I do not wish to exercise my right to remain silent, I do not desire to consult with either a civilian or military lawyer at this time, and I do not desire to have such a lawyer present with me during this interview. I make this decision freely and voluntarily and it is made with no threats [illegible] promises extended to me.

Signature: _____

Witnessed: _____ Date & Time: _____

_____

PART II STATEMENT

At this time, I, _____, [illegible] statement. This statement is made with an understanding of my [illegible] as set forth above, and it is made with no threats having been made or [illegible]

PART I ACKNOWLEDGMENT OF RIGHTS

PLACE: _____

_____

I, _____, have been advised by Special Agent _____ that as a preliminary part of an investigation pertaining to my suitability for a position of trust which could affect my employment or retention in a sensitive position and/or my access to classified Department of Defense information, I am being interviewed to afford me an opportunity to furnish details concerning specific allegations regarding my _____.

I have also been advised:

(1) That I have the right to remain silent and make no statement at all;
(2) That any statement I do make, oral or written, may be used as evidence against me in a trial or in judicial or administrative proceedings;
(3) That I have the right to consult with a lawyer prior to any questioning;
(4) That I have the right to have a lawyer present during this interview;
(5) That I may obtain a civilian lawyer of my own choosing and at my own expense or, if I cannot afford a lawyer, the Department of Defense will give me reasonable assistance in finding one;
(6) That I have the right to request a lawyer at any time during this interview;
(7) That if I decide to answer questions without a lawyer present, I may terminate the interview at any time.

I understand my rights as related to me and as set forth above. With that understanding, I have decided that I do not wish to exercise my right to remain silent, I do not desire to consult with a lawyer at this time, and I do not desire to have a lawyer present during this interview. I make this decision freely and voluntarily and it is made with no threats having been made or promises extended to me.

Signature: _____

Witnessed: _____

_____

Date & Time: _____

PART II STATEMENT

At this time, I, _____, desire to make the following voluntary statement. This statement is made with an understanding of my rights as previously related to me and as set forth above, and it is made with no threats having been made or promises extended to me.

STATEMENT OF MILITARY ACCUSED

PART I ACKNOWLEDGMENT OF RIGHTS

PLACE: _____

I, _____, have been advised by Special Agent _____ that as a necessary part of an investigation in connection with (my acceptance or retention in the military service) (my access to classified Department of Defense information), I am being interviewed to afford me an opportunity to furnish details concerning specific allegations regarding my _____

_____

I have also been advised:

(1) That I have the right to remain silent and make no statement at all;
(2) That any statement I do make, oral or written, may be used as evidence against me in a trial by court-martial or in other judicial or administrative proceeding;
(3) That I have the right to consult with a lawyer prior to any questioning. This lawyer may be a civilian lawyer retained by me at my own expense; or, if I wish, Army/Navy/Air Force/Marine Corps authorities will appoint a military lawyer to act as my counsel without cost to me;
(4) That I have the right to have such retained civilian lawyer or appointed military lawyer present during this interview;
(5) That I have the right to request a lawyer at any time during this interview;
(6) That if I decide to answer questions without a lawyer present, I may terminate the interview at any time.

I understand my rights as related to me and as set forth above. With that understanding, I have decided that I do not wish to exercise my right to remain silent, I do not desire to consult with either a civilian or military lawyer at this time, and I do not desire to have such a lawyer present during this interview. I make this decision freely and voluntarily and it is made with no threats having been made or promises extended to me.

Signature: _____

Witnessed: _____ Date & Time: _____

_____

PART II STATEMENT

At this time, I, _____, desire to make the following voluntary statement. This statement is made with an understanding of my rights as previously related to me and as set forth above, and it is made with no threats having been made or promises extended to me.

STATEMENT OF INDIVIDUAL CONCERNED

PART I — ACKNOWLEDGEMENT OF RIGHTS

PLACE: _____

_____

I, _____, have been advised by Special Agent _____ that as a necessary part of an investigation in connection with my eligibility for access to classified Department of Defense information, I am being interviewed to afford me an opportunity to furnish details concerning specific allegations regarding my _____

_____.

I have also been advised:

(1) That I have the right to remain silent and make no statement at all;
(2) That any statement I do make, oral or written, may be used as evidence against me in a trail or in judicial or administrative proceedings;
(3) That I have the right to consult with a lawyer prior to any questioning;
(4) That I have the right to have a lawyer present during this interview;
(5) That I may obtain a civilian lawyer of my own choosing and at my own expense or, if I cannot afford a lawyer, the Department of Defense will give me reasonable assistance in finding one;
(6) That I have the right to request a lawyer at any time during this interview;
(7) That if I decide to answer questions without a lawyer present, I may terminate the interview at any time.

I understand my rights as related to me and as set forth above. With that understanding, I have decided that I do not wish to exercise my right to remain silent, I do not desire to consult with a lawyer at this time, and I do not desire to have a lawyer present during this interview. I make this decision freely and voluntarily and it is made with no threats having been made or promises extended to me.

Signature: _____

Witnessed: _____

_____

Date & Time: _____

PART II — STATEMENT

At this time, I, _____, desire to make the following voluntary statement. This statement is made with an understanding of my rights as previously related to me and as set forth above, and it is made with no threats having been made or promises extended to me.

STATEMENT OF CIVILIAN CRIMINAL SUSPECT

PART I — ACKNOWLEDGMENT OF RIGHTS

PLACE: _____

I, _____, have been advised by Special Agent _____ that he is investigating the alleged offense(s) of _____

_____

of which I am suspected.

I have also been advised:

(1) That I have the right to remain silent and make no statement at all;
(2) That any statement I do make, oral or written, may be used as evidence against me in a trial or in judicial or administrative proceedings;
(3) That I have the right to consult with a lawyer prior to any questioning;
(4) That I have the right to have a lawyer present during this interview;
(5) That I may obtain a civilian lawyer of my own choosing and at my own expense or, if I cannot afford a lawyer, the Department of Defense will give me reasonable assistance in finding one;
(6) That I have the right to request a lawyer at any time during this interview;
(7) That if I decide to answer questions without a lawyer present, I may terminate the interview at any time.

I understand my rights as related to me and as set forth above. With that understanding, I have decided that I do not wish to exercise my right to remain silent, I do not desire to consult with a lawyer at this time, and I do not desire to have a lawyer present during this interview. I make this decision freely and voluntarily and it is made with no threats having been made or promises extended to me.

Signature: _____

Witnessed: _____

_____

Date & Time: _____

PART II — STATEMENT

At this time, I, _____, desire to make the following voluntary statement. This statement is made with an understanding of my rights as previously related to me and as set forth above, and it is made with no threats having been made or promises extended to me.

PART I

PLACE: _____

I, _____, have been advised by Special Agent _____ that he is investigating the alleged offense(s) of _____

_____

of which I am suspected.

I have also been advised:

(1) That I have the right to remain silent and make no statement at all;
(2) That any statement I do make, oral or written, may be used as evidence against me in a trial by court-martial or in other judicial or administrative proceeding;
(3) That I have the right to consult with a lawyer prior to any questioning. This lawyer may be a civilian lawyer retained by me at my own expense; or, if I wish, Army/Navy/Air Force/Marine Corps authorities will appoint a military lawyer to act as my counsel without cost to me;
(4) That I have the right to have such retained civilian lawyer or appointed military lawyer present during this interview;
(5) That I have the right to request a lawyer at any time during this interview;
(6) That if I decide to answer questions without a lawyer present, I may terminate the interview at any time.

I understand my rights as related to me and as set forth above. With that understanding, I have decided that I do not wish to exercise my right to remain silent, I do not desire to consult with either a civilian or a military lawyer at this time, and I do not desire to have such a lawyer present during this interview. I make this decision freely and voluntarily and it is made with no threats having been made or promises extended to me.

Signature: _____

Witnessed: _____

Date & Time: _____

_____

PART II STATEMENT

At this time, I, _____, desire to make the following voluntary statement. This statement is made with an understanding of my rights as previously related to me and as set forth above, and it is made with no threats having been made or promises extended to me.

STATEMENT

Place: _____

_____
(Date and Time)

I, _____, do hereby make the following voluntary statement to _____, who has identified himself to me as a Special Agent of the Defense Investigative Service. I make this statement without any threats having been made against me or any promises extended to me.

STATEMENT CONTINUATION SHEET

I further state that I have read this entire statement, consisting of _____ pages, initialed all pages and corrections, and signed this statement, and that it is correct and true as written.

_____
(Signature)

_____
(Date) (Time)

WITNESSES

_____
(Signature)

_____
(Signature)

Subscribed and sworn to before me at _____
this _____ day of _____

_____
Special Agent (DIS)

DIS Form 24

Mr. EDWARDS. Mr. Sarbanes, in connection with one of your questions, may I ask a question?

Mr. SARBANES. Sure. I am finished.

Mr. EDWARDS. The criminal record that you get from the FBI, under FBI rules and regulations, you are not allowed to send that out to anybody else?

Mr. COOKE. That is correct, sir.

Mr. EDWARDS. But you just said you disseminate this information?

Mr. COOKE. We disseminate excerpts. Most of the other agencies, by the way, are coming to us largely because most people have had military service, so the typical request is for the record of military service. No; we do not send the FBI records out.

Mr. EDWARDS. Just excerpts?

Mr. COOKE. No.

Mr. EDWARDS. Mr. Butler.

Mr. BUTLER. Mr. Sarbanes, have you finished?

Mr. SARBANES. Yes.

Mr. BUTLER. Well, I have no questions.

Mr. EDWARDS. Mr. Drinan.

Mr. WALDIE. Mr. Chairman, could that last response be clarified? Do you say that you send excerpts of the FBI records?

Mr. COOKE. No; what I am saying is we do not furnish excerpts of FBI records to one of these requesting agencies.

Mr. SARBANES. Well, I would like to pursue that now, because as I understand it, you would. If the appropriate officials in the State Department or one of the other Federal agencies which were listed, requested information on an individual, you would furnish a summary with respect to that individual from your file, and that summary might well include within it material that was furnished to you by the FBI, might it not?

Mr. O'DONNELL. No; it would not because the summary is written to exclude under what is known as the third agency rule, information coming from outside of the agencies involved. I might add that if an agency is coming to us to check our records, rest assured they are also going to the FBI to check their records. Therefore, they are getting the information.

Mr. SARBANES. That may well be, but what I want to know——

Mr. BUTLER. Mr. Chairman, I am reclaiming my time.

Mr. Chairman?

Mr. EDWARDS. Yes, Mr. Butler?

Mr. BUTLER. What is the third agency rule? Have you made a reference to that earlier today?

Mr. O'DONNELL. No; I have not. It is simply that information gathered from one investigative agency is not routinely supplied to outside of the two agencies who are involved.

Mr. BUTLER. I understand that.

Referring now to the third agency rule, I understand the effect of it. Is this a rule included in an Executive order or is it just policy that agencies have developed, or where did it come from?

Mr. O'DONNELL. It goes back to the 1950's, I believe. It may be earlier with the original delimitation agreement between the FBI and the investigative services of the armed services.

Mr. BUTLER. So, it is a policy decision which has been made between the FBI and——

Mr. O'DONNELL. Yes; of many years standing, yes, sir.
Mr. BUTLER. But it is still considered extant?
Mr. O'DONNELL. Yes, sir.
Mr. EDWARDS. Mr. Drinan.
Mr. DRINAN. Thank you, Mr. Chairman.

Gentlemen, I read your testimony last night and I was prepared to think that perhaps the Department of Defense had a case. But, I am afraid, in all candor, the case has not been made this morning; 668,000 checks are made each year through the FBI for every kid entering the military. You are telling us now that this is able to be transmitted to 25 agencies and that even though an FBI report may not be disseminated we hear now, first, that excerpts are disseminated, and then that was contradicted and now the third agency rule, which I frankly do not understand. And I do not want to go into it here and now. But, the fundamental premise on which you operate, I think, has not been demonstrated.

You say the DOD requires and needs this information, even if there is some little arrest record and 75 percent of all arrests never eventuate in a conviction. It is not self-evident that you need this information and, frankly, I do not think you have made out a case. Two or three million people are in the military, as military or civilians and you are saying, in effect, to us we praise the objective of your bill, but please go away from DOD. These people are not entitled to the ordinary rights of Federal law.

There is really no case that you made for the necessity of arrest records. And no information that you have given proves to me that you absolutely must have arrest records for all of the purposes of the military. Now, you cannot have it both ways. You are saying that really you never do anything on the basis of arrest records, even arrest and conviction, and yet you turn around and say, this is essential, we cannot be excluded.

Frankly, I think that some of your statements are misleading. You have said, on page 9, that you are continually searching for additional methods by which you can insure that personnel data is given only to those who have a bona fide need to know, but you do not blink an eyelash when 20 agencies or more get a summary from DOD of everything you collect on some little kid that volunteers for the Army or the Post Office and all of these agencies. And that is there forever in an agency and there is no retracting it.

And so I am sorry to be so critical, but I want to bring up a point that has not been brought up. Not merely are you saying we should not apply this to DOD, you are saying, on page 17 of your full statement, that we should tell all of the States that they have no right to deny any information to DOD. And Massachusetts and other States have been saying precisely that they have, and I wonder if you would want to explain the concealed threat here, really, on page 17, where you say that if the States do not face up and give us all of the information that we want, that the requests for a job or security clearance could be adversely affected?

Mr. COOKE. Well, let me talk specifically on Massachusetts, and the effect of that statute, that State statute up there. The Office of Industrial Security, Defense Supply Agency, which heads our industrial security program, states that there have been since January 1973, 545 personnel security cases without complete arrest record data. This re-

sulted from the refusal of State and local authorities in Massachusetts, under the Massachusetts statute, to release criminal justice information to the Defense Investigative Service.

Also, the Defense Investigative Service says that in Massachusetts there have been outside the industrial security program, some almost 7,000 investigations which they have been unable to complete in total because of the lack of availability of information.

Mr. DRINAN. I know all about it; I am from Massachusetts.

Mr. COOKE. I know you are. That is why I am using Massachusetts.

Mr. DRINAN. I know all about it. I have been involved in the whole thing all the way along. What do you think in justice or fairness? You are asking this committee, on page 17, to say to the States that they have no right to enact a law of privacy and that we are going to boycott you and threaten you and you will get no jobs and no security clearances. Is that what you are telling us?

Mr. COOKE. What I am saying is for certain jobs in the Department of Defense where we have to be assured of the suitability of the employee to be put in those jobs, if we cannot complete a security investigation, it may be that the individual would not get a security clearance. A security clearance is not, in our judgment, a matter of right. It is a matter which involves the Department of Defense very directly, very intimately, and their legitimate needs.

Mr. DRINAN. If the State says that we are going to withhold an arrest record, this arrest record is 7 years old, or where there is an arrest record which did not eventuate in a conviction, you are going to deny a security clearance.

Mr. COOKE. I did not say that. I said it is going to prevent us from adequately adjudicating a case and deciding whether a security clearance is warranted under the circumstances.

Mr. DRINAN. The presence or the absence of a simple arrest record is going to determine your conclusion as to the suitability of this person?

Mr. COOKE. I do not know what you call a simple arrest record, Mr. Drinan. And I have actual cases where we can develop a pattern, a pattern of behavior which suggests unreliability, emotional instability where we would not want to give a man access.

Mr. DRINAN. Mr. Cooke, maybe that is the information you should give us. You have not given us a single thing where you have demonstrated the absolute need for this broad data of arrest records.

Mr. COOKE. Well, let me take a rundown, an actual case.

Mr. DRINAN. Well, from one case you cannot make a policy. I say, if you want to have credible testimony, that we ought to totally exempt the Department of Defense from this bill that we want to get through, then you have to turn up with something more than you have turned up with this morning.

Mr. COOKE. What I am saying is that in the industrial security, and as you read last night when you read the statement, that we took a look at since 1971, at 477 cases. They are the figures that are most immediately available in the industrial security program, because the clearances are centralized.

Mr. DRINAN. I know. I read that. Yes.

Mr. COOKE. In 79 percent of the cases, we did grant——

Mr. DRINAN. As Mr. McClory, I am worried about the 21 percent.

Mr. COOKE. Well, we are worried about the possibility of individuals, too, on the basis of the whole man again, I am saying, do not qualify and should not be granted a security clearance.

Mr. DRINAN. Mr. Cooke, on another point you mentioned not in your testimony, but you just happened to mention that your agency or your employees go into the House Internal Security Committee, of which I am a member. As I read the law, and I think people would agree, there is no Executive order that justifies this coming into the files of a committee of the House Internal Security Committee. Do you want to comment on the information you get and what, if any, value it has?

Mr. COOKE. I am not in the business of investigating as such, sir. Could you, Mr. O'Donnell?

Mr. O'DONNELL. At this point in time usually, if at all, it could arise, it is with identification of membership in an organzation. It, by itself, would lead to other questions as to the recency, the extent of participation, offices held, if any, that type of thing. And then the adjudicator views it, of course, in the totality of the investigation.

Mr. DRINAN. Well, you are not answering the question. I mean, what happens if you get the fact that this man was a member of the Socialist Party 12 years ago? What do you do with it?

Mr. O'DONNELL. As far as the Defense Investigative Services, it is recorded and considered as part of the package by the adjudicator.

Mr. DRINAN. In the Internal Security Committee, if the Congress of the United States closed its files, as it is legally required to do, and as many have been pushing for many years, would you have any loss?

Mr. COOKE. I would not characterize our loss as very great.

Mr. DRINAN. Would you say that it is any loss? May I suggest that that is so, and perhaps the DOD could follow the law and admit that it has absolutely no legal authorization or right to come into a House committee and look at its files. There is no justification in any law, and you are doing something illegal. Am I correct?

Mr. COOKE. No; I think it is entirely up to the House committee as to whether they want to furnish the files.

Mr. DRINAN. If the committee wants to violate the law, that does not justify another agency of Government violating. Mr. Andrews, would you want to comment on that?

Mr. ANDREWS. I would like to submit something for the record. Would you refer to the law, please?

Mr. DRINAN. It is the absence of law that makes these files inviolate, unless there is a specific Executive order and that Executive order was repealed years ago.

Mr. ANDREWS. What is the basis for it being inviolate?

Mr. DRINAN. Because the rules of the House say that no executive agency may come here unless specifically authorized by an Executive decree of the President. There was an Executive decree for a number of years, and the agencies legitimately came to the files of the House Internal Security Committee for the whole House Un-American Activities Committee, and that old Executive order was repealed many years ago, and therefore, there is no justification.

Mr. ANDREWS. I would like to submit something for the record, and we would be very happy to examine this point.

Mr. DRINAN. Thank you. I yield back.

Mr. EDWARDS. Mr. Rangel.

Mr. RANGEL. Thank you. Be patient with me because I did not study your testimony. But to follow through on the Massachusetts situation, in investigating a person for a civilian job in connection with national security, why could not the Federal Bureau of Investigation perform that function?

Mr. COOKE. There are several problems, Mr. Rangel. Under the provisions of the bill, as we read it, we have some problem about whether the Bureau could, affirmatively give this information to us, so we can consider those facts along with the others.

Mr. RANGEL. I am not talking about the proposed bill. I am talking about the fact that you are not getting cooperation from the Massachusetts authorities based on their State law. It could be that because you are not satisfied, because your investigators could not get all of the information, that someone would be denied clearance. I am asking if it were not a civilian defense plant, what tools would be available, say, for an applicant to the U.S. attorney's office that would be dealing with sensitive information that would not be available to you under existing laws?

Mr. COOKE. I have not read the exact language of the Massachusetts statute. Perhaps you could help me.

Mr. RANGEL. No, please.

Mr. COOKE. It seems to me that the Massachusetts statute says that the FBI, for example, cannot turn that information over to a non-law-enforcement agency. So, assuming——

Mr. RANGEL. Are you saying that local law precludes a Federal agency from sharing information with another Federal agency?

Mr. COOKE. I think that is the effect of the Massachusetts law, sir, yes.

Mr. RANGEL. Could that be clarified by counsel?

Mr. EDWARDS. I believe that we can clarify that here if you would yield?

Mr. RANGEL. I yield.

Mr. EDWARDS. Massachusetts law provides that a certain definition of organizations or agencies outside of the criminal justice system may receive criminal justice record information and they have a long list of them, and apparently your Deparement does not qualify.

Mr. COOKE. The Defense Investigative Service is not law enforcement.

Mr. EDWARDS. No. That is not correct. You do not necessarily have to have a law enforcement aspect to it. Is that correct?

Ms. SCHELL. There has to be a State or Federal statute that provides for it.

Mr. EDWARDS. A State or Federal statute.

Mr. COOKE. We had Mr. O'Donnell who went up to Massachusetts some time ago, and you are right, it has to be a State or Federal statute, and the personal security programs are based either on Executive orders or in the case of military personnel, the Department of Defense directives.

Mr. EDWARDS. So, logically, you should welcome a Federal statute that would set the perimeters of your right to certain information.

Mr. COOKE. Indeed, as to that point we would, Mr. Chairman.

Mr. RANGEL. What relationship, if any, has the CIA got with the Defense Investigative Service?

Mr. COOKE. None that I am aware of.

Mr. RANGEL. Do you share information with that agency?

Mr. O'DONNELL. They are accredited to check our files, and as a part of the National Agency check where an individual has resided for a substantial time overseas, there is usualy a check made of the Central Intelligence Agency.

Mr. RANGEL. Am I correct in understanding that there are 25 Federal agencies, at least 25 Federal agencies, and you will provide us with a full list, that you share investigative information with, and they share similar type data with you?

Mr. COOKE. I would say not share. There are 22 which I believe is the exact number, Mr. Rangel, but we will supply it for the record. But, where we will respond to a request from one of these agencies, providing the request is for a specific individual, and providing there is a showing that they have authority by statute or Executive order, and also, as was previously explained by Mr. O'Donnell, making clear that the third agency rule applies, and we do not pass on information we have gathered from a third agency in the course of our investigation to the requesters. So, with those caveats, I think the answer is yes.

Mr. RANGEL. But theoretically, it is possible for a citizen to have a file in 23 investigative Federal agencies, including local agencies?

Mr. O'DONNELL. It does not quite work out that way. The investigation conducted and perhaps the gentleman from Civil Service Commission can assist here, the investigation conducted by HUD, HEW, and so forth, do they not essentially go to the Commission as the respository?

Mr. DRUMMOND. No; they are allowed to keep up their investigation but they do a full field investigation and they let us know they are conducting it, only so we will know where the report of the investigation is.

Mr. O'DONNELL. We routinely check with the Civil Service Commission as to the existence of an investigation on someone who has indicated past or present Civil Service employment. There is not an exchange of information or a sharing of it unless there is a reason to believe the person was once employed by the Federal Government.

Mr. RANGEL. That works the other way around. If somebody wanted to come to Defense, and you knew——

Mr. O'DONNELL. If we knew he worked with one of the other agencies, we would check with them.

Mr. RANGEL. Or if he was a part of the Justice Department, or a part of Agriculture, or a part of anything. Every agency has its own investigative agency as well as yours, and then, depending on the background of the individual, you reach out to the other investigative agencies to get material.

Mr. O'DONNELL. Right.

Mr. RANGEL. So that there are times that the FBI would reach out to you because of your own private files?

Mr. O'DONNELL. Yes, that is correct.

Mr. RANGEL. Now, outside of the military, with civilian defense plants, do you have occasion to investigate civilians?

Mr. COOKE. I refer to the Department of Defense Directive 5200.27 which we are talking about civilians not affiliated with the Depart-

ment of Defense by being an employee of military defense contractors, and only under very limited circumstances in that where there is an actual threat, to personnel, to the security of the installation, and there we turn—we do not investigate, we turn to resources of the Federal Bureau of Investigation.

Mr. RANGEL. Could you amplify on that?

Mr. COOKE. Yes, I would be glad to for the record.

Mr. RANGEL. No. I just would like to know whether you might initiate an investigation for national security?

Mr. COOKE. On somebody not affiliated with the Department?

Mr. RANGEL. Yes.

Mr. COOKE. We would not, sir. We do not.

Mr. RANGEL. Do you have the overall responsibility for the military investigations?

Mr. COOKE. I in my office?

Mr. RANGEL. Whoever is in charge of the Department of Defense investigative services?

Mr. COOKE. Yes.

Mr. RANGEL. He would have it?

Mr. COOKE. Yes.

Mr. RANGEL. Well, I think that it is an accepted fact that the military has received assignments to investigate civilians. So, therefore, if they come under DOD, then you have authorized the investigation of civilians.

Mr. COOKE. Mr. Rangel, a committee of the other body, if I may use that term, conducted, Senator Ervin conducted rather extensive hearings several years ago, and indeed back in the late 1960's—1967, 1968—there were assignments made to military investigative agencies which at least were interpreted as building up rather substantial files on individuals not affiliated with the Department.

Then Secretary Laird issued two directives, 5200.26 and 27, which cut back on that. He established a Defense Investigative Review Council that I am currently chairing to insure that these files were destroyed to preclude the——

Mr. RANGEL. Sir?

Mr. COOKE. So what I am saying——

Mr. RANGEL. It is informative what you are telling me. I am just really trying to find out, since you deal in exchange of information with 22 agencies, how many investigative agencies besides the Defense Investigative Service come under the Department of Defense?

Mr. COOKE. We have the Defense Investigative Service which is now the exclusive personnel security investigator, but there are also criminal investigations conducted by the Directorate of Special Investigation of the Air Force, there are criminal investigations conducted by CID, the Criminal Investigations Division of the Army, and the Naval Investigative Service.

Mr. RANGEL. OK. So, in addition to the cooperative investigative agencies, if the chairman permits, could you give us the list of the agencies that come under your umbrella that have——

Mr. COOKE. Within the Department of Defense?

Mr. RANGEL. Within the Department of Defense.

Mr. COOKE. Both within Personnel Security and Criminal Investigations?

[The following information was received for the record:]

Investigative organizations within the Department of Defense are the:
1. Army Intelligence Command,
2. Army Criminal Investigation Command,
3. Naval Investigative Service,
4. Directorate of Special Investigation, Air Force and
5. Defense Investigative Service

Mr. RANGEL. Now, what control, if any, do you have over the other investigative agencies? I mean, are they independent agencies but merely under the umbrella of——

Mr. COOKE. You mean the Military Department Agencies, sir, or the ones outside of the Department of Defense?

Mr. RANGEL. All within the Department of Defense.

Mr. COOKE. All of the investigative agencies march to the same drummer because they are all under the direction, authority and control of the Secretary of Defense. And our standard directive, for example, the directive on what should be done for policies and investigation clearance of DOD personnel for access to classified defense information.

Mr. RANGEL. Now, that clears it up. I do not want to lose my next point. You have answered that.

Mr. COOKE. They follow the same directive.

Mr. RANGEL. Now, does that mean that an investigative agency under the Department of Defense cannot initiate an investigation without first checking with the DOD?

Mr. COOKE. Formal check, no, sir, it does not, for example in a criminal investigation which would be initiated. It could be initiated by the field office of the Army Criminal Investigation Command.

Mr. RANGEL. Do you get a copy of the conclusion of that investigation?

Mr. COOKE. No.

Mr. RANGEL. So while they all march to the same drummer, you really do not know what investigations are being conducted by the investigative agencies that come under DOD?

Mr. COOKE. I think there are several ways I would like to respond. Each military department has an Inspector General who looks at these, as well as other DOD directives. And now when we are talking about what these agencies have been doing within the last 2 years, the Defense Investigative Review Council has conducted a series of unannounced inspections to insure the compliance with the new requirements laid down by Secretary Laird, and we conducted——

Mr. RANGEL. Perhaps if I tell you the thinking behind the question, then the answer could deal with it. In addition to, theoretically, an individual having files with 22 Federal agencies, I am now led to believe that investigative agencies that come under the umbrella of DOD, do not have to keep files with your office. So, therefore, if under the Freedom of Information Act, a citizen really wanted to find out what Federal agency had information on him that he could review to assist them, to give direction, he could not only not get that information from you, but he could not get it from the FBI or the Department of Justice or any other. I mean, we really do not know how many files that we have within DOD on an individual.

Mr. ANDREWS. I would assume the answer is that the agencies maintain files only because the man has been employed in that agency or has been a member of the military service. And so that any one who has had this past affiliation would know which agencies to go to see if they

have a file on him. I am sure that the Department of Defense does not keep a file on agricultural employees who have never been affiliated at all with the Defense Department.

Mr. RANGEL. Why would you be sure of that? I mean with the information-sharing ability of these agencies, I can see where a discharged military person, going into a civilian plant, and applying for a job, in his sensitive position with Agriculture could have files all over.

Mr. COOKE. He would not there, sir, because as far as—I am not so sure Agriculture has any classified contracts, but——

Mr. RANGEL. Well, then, why would they have an investigative office that would share information with you of an investigative nature?

Mr. COOKE. Because, as I pointed out, we are talking about two different types of programs here. We are talking about not only eligibility for security clearances, we are talking about suitability for Federal employment.

Mr. RANGEL. Do you believe, and this is my last question, that even if we did not have this proposed legislation, and excluding the military, that the Federal Bureau of Investigation has the potential, standing alone, to provide you with all information that you might need, in terms of national security?

Mr. COOKE. No.

Mr. RANGEL. And why not?

Mr. COOKE. Because it is simply a factor of workload.

Mr. RANGEL. I mean assuming that—I am talking about the potential. If they took all of your investigators and transferred them to Justice, certainly they would have the people. What is so unique about what you are doing that requires you to have your own investigative force outside of the military?

Mr. COOKE. I think our responsibility under Executive order for the clearance of people for access to sensitive defense information.

Mr. RANGEL. Here, again, and I am really trying to find out, I have been through all of these clearances, and it seems to me that whether or not I applied for a job as an assistant U.S. attorney dealing with sensitive information in prosecuting enemies of the United States, or applying for a job to look over plans for an atomic submarine, if I am a bad guy, a bad risk, I am a bad risk. And I just do not see why in this country, if we really are talking about national security, we have to have two agencies basically doing the same type of work for national security. Now, why do you have your own investigative agency for national security? And I am not talking about how many men the FBI has. Do they not have the potential? And I am not talking about the military. Do they not have the potential to safeguard this country against people for security reasons?

Mr. COOKE. Well, the FBI does not have the responsibility for clearing people. You are asking really, do they have the potential to conduct all of our investigations, assuming unlimited resources and could we rely——

Mr. RANGEL. I do not understand the unlimited resources. Do you mean if they had——

Mr. COOKE. Yes.

Mr. RANGEL. Well, you have limited resources. If they had your resources, you do not mean unlimited resources. I just mean, and I

am looking at this without being aware of your unique problems, I am just looking at this as a citizen, and I just cannot see why the Department of Defense, with the exception of those things related to the military, would have to have an investigative agency to deal with national security outside of the Justice Department.

Mr. COOKE. I would like to amplify my remarks on that for the record, if I may, please, Mr. Rangel.

Current arrangements for investigating personnel affiliated with the Department of Defense stem from several sources. The investigation of civilian personnel rests on an agreement incorporated in an exchange of correspondence in 1954 between Philip Young of the Civil Service Commission and Charles E. Wilson, Secretary of Defense. Under the agreement the Civil Service Commission agreed to conduct National Agency Checks on civilians applying for employment with the Department of Defense. If the civilian applicant required a Background Investigation, the Department was authorized to conduct such investigation. When the civilian was already an employee, the Department of Defense was authorized to conduct whatever investigation might be required, i.e., a National Agency Check or a Background Investigation. This is consistent with provisions of Executive Order 10450.

The Department of Defense under Executive Order 10865 and 11652 is required to make a finding that persons afforded access to classified information are trustworthy and reliable and that such access is clearly consistent with the national security. Such a finding must be based on an investigation of industrial personnel, departmental employees, and military personnel come within this requirement. The Department of Defense conducts these investigations except as noted herein.

The definition of investigative jurisdiction of the Department of Defense and the Federal Bureau of Investigation is set forth in a Delimitations Agreement of 1949, as amended, and with which this Committee is familiar. The Department of Defense exercise investigative jurisdiction in cases falling within the purview of the Uniform Code of Military Justice. In other cases civil law enforcement authorities usually assume such jurisdiction.

Mr. RANGEL. OK. I have no further questions.

Mr. EDWARDS. Counsel?

Ms. SCHELL. I just have a couple of questions. I would like to go back to your view of arrest records and how they are used in employment determinations. Specifically, I want to go to a couple of comments that you made just a little while ago, and a couple of comments that you made in your statement.

The first thing is that on page 19 of your statement you said that a conviction or an arrest alone is seldom, if ever, a detemining factor and that all of the circumstances of the arrest are examined. I was wondering if you could clarify what you mean by "all of the circumstances of an arrest" and how you obtain that kind of information?

Mr. COOKE. Well, let me give you perhaps an example of a couple of cases that we picked at random from our industrial security program. As case No. 1, it was a 27-year-old high school graduate, employed by a nationally known corporation, who was eventually granted a security clearance. On the basis of the record and our investigation,

we found that in September of 1965, when he was 20 years old, he was arrested and convicted for robbery and, at that time, he admitted to 18 or 19 other holdups of taxicabs.

In 1967, he was released as rehabilitated and in May 1967, 5 days later, he again attempted to hold up a driver of a taxicab. And in 1968 he was sentenced to a period of 2 to 8 years.

Ms. SCHELL. May I interrupt just a moment?

Mr. COOKE. Yes.

Ms. SCHELL. Do you have any examples of a person who applied for employment that just has records of arrests, no convictions?

Mr. COOKE. I do not have in the four cases we have pulled, Counsel.

Ms. SCHELL. Well, just previously, in your testimony you stated that a number of arrests could show or could demonstrate to you some pattern of activity, or some pattern of personality that would somehow give you a clue to this person's character for employment determinations. Could you clarify that?

Mr. COOKE. I think it might have been the Attorney General perhaps, or it was Mr. Kelly——

Ms. SCHELL. It is on page 23, I believe.

Mr. COOKE [continuing]. Who stated before this committee "arrest data even without a conviction, will give leads to law enforcement officials. Such data can identify a pattern of possible criminal activities which ultimately can lead to a conviction."

What we are saying is, arrest data, even without a conviction, will give leads to relevant information in making these very difficult investigations.

Ms. SCHELL. What reason—I mean, I can understand the Attorney General saying something to the effect that in investigations that the knowledge of these previous arrests could lead possibly to a future conviction. But what kinds of information does it give your investigators as far as an employment decision? How do you interpret it? What I am trying to really establish is, what is your feeling about an arrest record?

Mr. COOKE. Our feeling is that we do need, and we used criminal offender information, which includes arrests and possibly conviction records in making these judgments.

Mr. DRINAN. Would counsel yield?

Ms. SCHELL. Yes.

Mr. DRINAN. Sir, you say you have no cases with you, and then you go on to say that you are all for privacy and that you share our concern for it. Well, how many examples can you produce that will rebut the importance of privacy? In other words, you have got to give us some data that arrest records, independent of convictions, are helpful to you. You cannot just expect us to believe a bland statement of the Attorney General because he said it and your bland statement. So, you have not really given counsel here any information.

Mr. ANDREWS. May I speak to that?

I think the intent here was to indicate that there was some value as an investigative lead. It would not necessarily be of any value in making an adjudicative determination.

Now, in a particular case there might be an arrest and the prosecuting witness died. There might be all sorts of circumstances which would suggest that the man probably committed the act.

Ms. SCHELL. How do you find out that information? If you get a rap sheet from a local law-enforcement agency and it says he was arrested on such and such a day, and he was released on such and such a day, if you get the disposition now, where do you get the information that the prosecution witness died?

Mr. ANDREWS. This would be the Defense Investigative Services' witness question.

Mr. O'DONNELL. It would be done through an inquiry which would lead to the arresting officers and would include other people who were present. The subject is often asked to give his version of what took place—and in order to try to get a frame of reference from which the adjudicator can make a knowledgeable decision as to how this happened. Absent the ability to review the record, and identify the arresting officials, inquire of them to determine what disposition was made, to determine what probation action was taken, all of these things we get into, not necessarily because we know the person has a record, but because in the course of the other investigations somebody says so-and-so says he was picked up for this, this type of thing, and then in fairness to the individual, once that somebody has said that, I believe it is imperative that we have access to all of the facts and circumstances so that a knowledgeable decision can be made, instead of being left up in the air that someone says something happened.

Ms. SCHELL. You mean to tell me, then, that what in essence you are saying is that if a man is arrested for some serious crime that you actually are carrying on a trial, off the record?

Mr. O'DONNELL. No; it is not a trial. It is a gathering of information for us by the adjudicator, or the decisionmaking person with respect to clearance, or maybe permission to attend a school, where absent the information, the adjudicator simply makes the decision that, "Well, I have 'upteen' applicants for this position"——

Ms. SCHELL. Isn't that the kind of decision, though? You are really establishing whether you believe the person was guilty on that arrest, and isn't that a decision for a court to make, and if he doesn't——

Mr. WIGGINS. Would somebody yield?

Mr. O'DONNELL. No; I think that is carrying it a bit far.

Mr. WIGGINS. Would you yield?

Ms. SCHELL. Yes.

Mr. WIGGINS. I do not understand that a person has a right to a security clearance unless the Department of Defense can prove beyond a reasonable doubt that he is disqualified. Quite the contrary. I think that the Department of Defense can approach that question with no presumption and no assumption either for or against the man, and can bring any evidence to bear on the solution.

Mr. DRINAN. Would the gentleman yield?

They are not making merely a security clearance check. They are talking about a probation or application to go to MIT to study chemistry or physics or something, and they are talking about all of the civilian things to which a person is entitled.

Mr. WIGGINS. I do not think that we can really argue accurately that the fact of an arrest is not the end answer, and concerning the eligibility of a man for clearance, it is a fact which is worthy of further investigation, and that is what I understand you do.

Mr. LIEBLING. It is merely a lead toward further inquiry to substantiate the facts.

Mr. WIGGINS. And you are not concerned really with his guilt or innocence?

Mr. LIEBLING. No, sir; not at that point.

Mr. COOKE. Let me pick up on MIT. We might have three possible places and we do not know where we are going to send some of our people to, and we might have 100 applicants, probably do, and more, and what Mr. O'Donnell was suggesting that in the absence—we in the course of the investigation on John Doe, find that someone says, "Oh, yes, he was picked up by the police," and such and such. In the absence of further investigation, in considering the case of going to school, he does not have an inalienable right to go to our school at our expense.

Mr. DRINAN. Mr. Cooke, that is not the question that counsel proposed. She proposed, and you came back, she proposed a case where a conviction was not had, where there is an arrest which does not result in a conviction. Then one of you people said, "Well, maybe the key witness died." And she makes the point, and then insists upon the point, that if he has received a total acquittal, the reasons for that acquittal are not up to you people, and if you use them, then I think that is a hideous setting aside of a judicial decree.

Mr. WIGGINS. I could not disagree more. There is no point in arguing the point but I just think there are different standards that are involved.

Mr. SARBANES. Could I—I want to make sure that I understand the Department's attitude on this question because, obviously, we are trying to deal, we may have to deal, with some general rules, if we are going to develop legislation. And Mr. Cooke, I want to separate, without talking about arrests, and then you kind of merged into criminal information, and then merged it in with convictions and so forth—I just want to know how much your work would be inhibited if a record of an arrest alone were not available to you, not an arrest and a conviction but an arrest only?

Mr. COOKE. Well, in cases it would leave loose ends because we would have the defense investigative service with three people that they interview saying he was arrested for whatever. In other words, to get the whole story——

Mr. SARBANES. This would suppose, I would assume, that you would not be able then to use that information on the person?

Mr. EDWARDS. No; he can go on down to the court, and if three people have said he was arrested, all they would have to do is go down to the court and look up the record. We are talking about systems dissemination of arrest records throughout the United States and violations of privacy generally that take place when you have these systems. We are at a higher level than we are talking about right now. We have been on this subject for 2½ years, and you are missing the point very badly of the whole idea, when you say it is terribly important that an arrest record, a negative arrest record, 3 or 4 or 5 years ago that nobody even had the interest to take to court, or where there was not an acquittal and it was not prosecuted, it is going to be, well, let me put it this way.

The rap sheets of the FBI with 15 or 20 naked arrests on them, are going to be a thing of the past. Either they are going to do it on

their own, or the bill that the Department of Justice sent over to us is going to be enacted, and do you not really think that this is something that you ought to be sensitive to, too? Are you going to go down fighting for a 10-year-old arrest record?

Mr. COOKE. No, I do not think we are going to go down fighting for a 10-year-old arrest record.

Mr. EDWARDS. Well, that is what we are talking about.

Mr. WIGGINS. Unless it were for espionage.

Mr. COOKE. Well, of course, there are arrest records and arrest records.

Mr. EDWARDS. Counsel? I think everybody interrupted everybody.

Ms. SCHELL. I have no more questions.

Mr. EDWARDS. Mike?

Mr. Blommer?

Mr. BLOMMER. No questions.

Mr. WIGGINS. I have a request, Mr. Chairman.

Mr. EDWARDS. Yes.

Mr. WIGGINS. Mr. Chairman, since we are contemplating holding perhaps one more hearing only, and then we will undertake the markup of the bill, if we have not requested of the following agencies, I do now request that we direct a written communication to the agencies which I list and inviting their comments on the legislation, not necessarily their appearance. I would request that we receive some comment from the State and local enforcement agencies, and I would think perhaps the Association of Chiefs of Police might be an appropriate agency to direct the request to. Also, the Association of Attorneys General and the Department of the Treasury, particularly with respect to the Secret Service functions and any other criminal investigative functions which are assigned to that. Also, the State Department, particularly with respect to its visa responsibility, and the CIA, and the Atomic Energy Commission.

Mr. WALDIE. Mr. Chairman?

Mr. EDWARDS. Yes?

Mr. WALDIE. This is somewhat beyond the scope of the bill, but your experience may be able to give me some information I am seeking. In the process of acquiring or inquiring as to security clearance, or whatever, you are making a determination about the employee of a private employer who is working on Government contracts. Are there any other private employers in the country, large employers, that have the requirements that the Federal Government has, that a security clearance must be obtained, although it is minimal, I presume, before employment is permitted? Trustworthiness, apparently, is a category? Does any other employer have a similar such program?

Mr. COOKE. Not that I am aware of. Well, the Atomic Energy Commission, but we are talking Federal——

Mr. WALDIE. Yes.

Mr. COOKE. I would like to comment on that because I think——

Mr. WALDIE. Really the question, the basic question is in your implementation or execution of that program you must devote enormous parts of limited manpower to that effort, and I would suspect at very little return. Is there really a need for us to determine trustworthiness on the basis of hiring someone?

Mr. COOKE. Well, if we are talking about our industrial security program, that is classification——

Mr. WALDIE. No. I am not talking about that. I am talking about that lowest categories of all Federal employees, which must have an inquiry made of their background.

Mr. COOKE. In our judgment, there is, and I would hope the witnesses who you will hear from the Civil Service Commission can elaborate.

Mr. WALDIE. But it has not apparently been so determined by any private employer in the land. A Department of Agriculture employee, for example, that you suggest would hardly have any reason to have a security clearance within the Department of Agriculture, do we really need to have someone investigate applicants for employment in the Department of Agriculture to determine their trustworthiness to the Federal Government?

Mr. COOKE. I yield to the Civil Service Commission who can speak for the executive branch, generally.

Mr. WALDIE. Is that what we are determining, by the way, their trustworthiness for the Federal Government?

Mr. COOKE. Their suitability for Federal employment.

Mr. WALDIE. Well, what is that, trustworthiness? Is there a different criteria for suitability for Federal employment than General Motors, for example? Do you have to have a higher qualification of suitability to work for the Federal Government than General Motors?

Mr. COOKE. I can conceive of many jobs in Agriculture, indeed.

Mr. WALDIE. I know, and I can, too. I am talking about a production line job in General Motors or talking about sorting the mail in the post office. Do you have to have a higher confidentiality for sweeping the floors in the post office? You do not make any designation by way of what their category of work is, you just say if you apply for a job, no matter what it is, we have to determine your trustworthiness by assigning some investigator to look into some part part of your background and make a determination on whether you are are not trustworthy. And I guess a file is set up, and you have assigned someone from your agency to make those determinations, and that is manpower, and you make a list that, yes, we find this individual trustworthy for Federal employment. What I am really trying to find out is what is so unique about Federal employment that we require a higher standard of trustworthiness to the employer, which is the Federal Government, than a private employer insists upon in performing his responsibilities?

Mr. COOKE. I am not at all competent to determine what a private employer insists upon his employment application blanks, or how he processes those. So, I just do not know the standard.

Mr. WALDIE. OK. Is it not a fair question to ask? Just answer this question, if you will then. I apply for a job, or my son does. He is 18 years old and he wants to have a job sweeping out grain bins when they have sent the wheat to Russia, the Department of Agriculture, and then you must then go through some sort of routine as to whether he is entitled to sweep out those grain bins. What investigation do you do in that case?

Mr. COOKE. Well, we do not, and I would like—I, frankly, do not know what we do with the grain bins sweeper in the Department of Agriculture if, indeed, there is one.

Mr. WALDIE. Do you not do a 10450 investigation?

Mr. COOKE. Well, for initial input we are talking about civilian employees and the Civil Service Commission does this.

Mr. WALDIE. You have the Civil Service Commission representatives here. Can you tell me what you do in the case of the grain sweeper?

Mr. DRUMMOND. In a case like that, sir, no investigation would be conducted prior to appointment. He could be employed. His employment is subject to investigation and there would be a minimal national agency check and inquiry.

Mr. WALDIE. What does that mean?

Mr. DRUMMOND. It would mean a check of the Federal Bureau of Investigation fingerprint files, and the main files, and the Central Intelligence index, which they speak about, if he was in the military service.

Mr. EDWARDS. Would you identify yourself for the record, please?

Mr. DRUMMOND. Yes, sir. I am Robert J. Drummond, Director, Bureau of Personnel for the U.S. Civil Service Commission. Personnel Investigations, I am sorry. And there would be a check of our security index, which is an index which merely would tell you whether or not any prior investigation was conducted on the individual, and apparently the same example you give, age 18, there probably would not be.

Mr. WALDIE. But anyone that comes in is subject to at least that sort of background examination?

Mr. DRUMMOND. That is true, sir.

Mr. WALDIE. And then you write to them and they will send you his military record?

Mr. DRUMMOND. No; they would not send us the military record. Usually we just get the rates of service and the type of discharge.

Mr. WALDIE. All right.

Now, under the types of discharge, can you tell—is there just the one category, honorable or dishonorable, or are there a lot of categories?

Mr. DRUMMOND. Honorable and dishonorable——

Mr. WALDIE. Are the discharges different? There was a story in the newspaper recently that they are coded.

Mr. COOKE. I think the story is the coding was eliminated by direction of Secretary Schlesinger.

Mr. WALDIE. Was there coding?

Mr. COOKE. It is not in my area, but apparently there was.

Mr. WALDIE. Why is that not in your area?

Mr. COOKE. That is the area of manpower.

Mr. WALDIE. Well, isn't that the information that you would send for, too?

Mr. COOKE. That would be the Assistant Secretary for Manpower.

Mr. WALDIE. Don't you send the information concerning the discharge to prospective employers?

Mr. COOKE. No.

Mr. WALDIE. Well, that is what the gentleman just told me, that he got from you folks the type of discharge.

Mr. COOKE. We are talking about employment in the Federal sector.

Mr. WALDIE. That is what I am talking about, too. So, then why is not the discharge coding a matter under your jurisdiction?

Mr. COOKE. Well, it is a large and diverse department, and it is not—the discharge coding is at the Office of the Secretary of Defense level, the responsibility of the Assistant Secretary for Manpower and

Reserve Affairs, and implemented to the military personnel divisions in the military departments.

Mr. WALDIE. So in the future, they do not code the discharges?

Mr. COOKE. I have read the same newspaper story you did, sir.

Mr. WALDIE. You do not know any more about it than what you read in the newspapers?

Mr. COOKE. No, sir.

Mr. WALDIE. You do not know if the discharges that are already in your files on all of the people discharged from the service over the years, you do not know whether that is coded and, therefore, subject to interpretation by those who understand the code?

Mr. COOKE. I understand it had been coded, yes, sir.

Mr. WALDIE. So all of that information is still coded, all of the past files?

Mr. COOKE. I would think so, but I am speaking with no knowledge. But I would think that the Secretary's decision was prospective and not retrospective.

Mr. WALDIE. Well, what do we do about those that are abused by that coding? Is the coding wrong in your view?

Mr. COOKE. I just do not know; I would assume that there were abuses of it and, in view of Mr. Schlesinger's decision, but——

Mr. WALDIE. You had your hand up?

Mr. DRUMMOND. Sir, I might say that we do not get any code or anything. We get the type of discharge, not by code, honorable or dishonorable, whatever the circumstances in English, not by code.

Mr. EDWARDS. Will the gentleman yield?

Mr. WALDIE. You do not even know what the code was, so you do not know whether you get it or not, and I gather that Mr. Cooke does not know what the code was, so maybe you are getting it coded.

Mr. EDWARDS. You mean to tell me that you would ignore a lead like that when it falls into your lap, as to whether he is a gambler, or a drinker, or a homosexual, or inclined toward dishonesty? I think the coding is outrageous myself, but you are telling us that the Civil Service Commission Investigative Department does not look for that lead?

Mr. DRUMMOND. We get it right from the military records as to the type of discharge without any coding, and the reason for it.

Mr. EDWARDS. I think you are to be complimented that you do get it, but I cannot imagine that an investigator would not go to that lead.

Mr. DRUMMOND. Perhaps I am not making myself clear. We do not need the code. We get the exact reason for the discharge.

Mr. EDWARDS. Oh, I see, you got me.

Mr ANDREWS. Mr. Waldie, I just might add at this late hour——

Mr. WALDIE. Wait a minute. Is he telling us the truth? In other words, you fellows do not fool around with the code, you send them the real stuff? The code is just for the civilian employee? I gather from what you said here, I was kind of wondering if you cracked the code—well, he said he does not need to, that they give it to him uncoded, they give him the raw stuff regarding discharge.

Mr. ANDREWS. Let me present this for the record in a separate statement. But, I would say that there is a code, and that discharge code is then given to the man, and the man then would go to an employer. The employer would say, do you have an honorable discharge or what do

you have, and there was a code on that paper. And while the contractors were not supposed to get a hold of the code, they learned what the code words were, and they acted adversely on the man. It is my understanding that that kind of action will be eliminated.

Now, we put this code——

Mr. DRINAN. Just for the record. Only dishonorable or is it honorable and dishonorable discharges? All of the dishonorable discharges still have the spin number on it, and that has not been changed, really.

Mr. ANDREWS. Well, the dishonorable——

Mr. DRINAN. Less than honorable.

Mr. WALDIE. So the private employer now has no way to understand what the code is? It is broken.

Mr. ANDREWS. That is my understanding.

Mr. WALDIE. But what about you fellows? Do you have the information, that in the past was coded information, when it arrived with the employer? Do you have it without the code?

Mr. COOKE. Yes.

Mr. WALDIE. So, when he suggests that the code does not bother him because you folks gave him the information you had without the necessity of code, he is correct?

Mr. COOKE. I do not know. I would have to say that this is outside of my area of responsibility, and I think in general cases——

Mr. WALDIE. Now, the next question, the next——

Mr. MONDELLO. We received information that an individual was discharged dishonorably virtue of a court-martial, or gambling.

Mr. WALDIE. I am talking about an honorable discharge. The next question I want to ask——

Mr. BUTLER. Would the gentleman yield?

Mr. WALDIE. Let me ask the last question.

If the Secretary of the Army thinks it is important that this sort of information that was coded not be conveyed to private employers because it would jeopardize the employee, and I presume that is the only reason for the veteran who is seeking employment, why is it essential for the Federal Government that the veteran be jeopardized when he seeks employment with the Federal Government? They do get the information, do they not? That is what he said. They do not code the information.

Mr. COOKE. I think what the Commission is saying that they get the character of the discharge, and if it is honorable that is all they get.

Mr. DRUMMOND. That is right.

Mr. COOKE. I do not want to put words in their mouth.

Mr. WALDIE. If the code on the fellow's discharge was that he was a homosexual, do you give that information to the Commission out of your records? You would, would you not? Well, come on, you would, right?

Mr. COOKE. I would like to supply that because I am just out of my area considerably now, Mr. Waldie.

Mr. WALDIE. You mean you would not?

Mr. COOKE. I do not know. I will supply it for the record.

Mr. WALDIE. Well, suppose you had information that this veteran was a homosexual. It was coded on his discharge, which we do not do any longer because that is unfair to him, as was indicated by the Sec-

retary's decision that private employers not learn that fact, but you fellows in intelligence know it, or whatever your agency is called. Do you mean to tell me you would respect the sensitivity that the Secretary is apparently exhibiting to private employers, and not convey that information to people in the Federal Government, seeking to employ that fellow? Is that what you are essentially telling me?

Mr. COOKE. No. I think what I am telling you is that I will try to find out the facts and supply them for the record, because I simply do not know at this time.

Mr. WALDIE. Well, please do. I would like to know all of the categories for which discharges are coded, and what do you do with the information as to individual's deficiencies that required coding, alleged deficiencies that required a coding discharge.

Thank you, Mr. Chairman.

Mr. EDWARDS. Mr. Butler?

Mr. BUTLER. Essentially that was my request. I felt that we were going along a line of questioning that the witness was not an expert in. But, I would like some statement basically.

Mr. COOKE. We will be pleased to furnish it.

Mr. BUTLER. Of existing policy in this area and who has access to it, and how it is disseminated. Thank you.

[The information requested follows:]

The Department of Defense policy with respect to Separation Program Number (SPNs) is being made retroactive as of May 1, 1974, and upon request such code numbers will be deleted from copies of DD Form 214 "Report of Separation from Active Duty." The following documents are pertinent:

DISCONTINUATION OF SEPARATION CODES ON DISCHARGE DOCUMENTS

The Department of Defense has recently announced the discontinuance of the practice of placing codes on discharge documents provided to service members. These codes were used to describe the reason and authority for a member's discharge and his reenlistment eligibility.

The Department has determined that the use of these codes is a potentially contributing factor in undesirable discrimination against an individual by prospective employers or other persons in civilian life. Undesirable discrimination was not intended nor desired, whatever the circumstances of an individual's separation from active duty. Each individual will continue to have access to his reason for discharge and reenlistment eligibility, if he wishes to obtain this information.

For the deserving individual, discharge documents contain valuable information when he seeks veterans' benefits, civilian employment, or reenlistment. The purpose of this change is to insure that information on the document is readily explainable with a minimum of difficulty. The Military Services will continue the longstanding practice of separation counseling. The specific reason for discharge is thoroughly explained to each service member prior to his separation from active duty.

In addition to the discontinuance of these codes from the individual's copy of discharge documents, provisions are being made for the deletion of this information in the cases of former service members who wish this information to be deleted. In these instances, a new copy of the original form will be provided with these codes deleted. Also, as was previously available on the request of a former service member, a narrative description of the reason for discharge will be provided. These procedures are being finalized and the respective Military Services should be ready to process requests by May 1, 1974. Personnel offices at military posts, bases, and stations will have the appropriate instructions at that time.

PROCEDURES FOR REQUESTING DELETION OF ABBREVIATED SEPARATION REASONS FROM DISCHARGE DOCUMENTS

On May 1, 1974, veterans who wish to have their Separation Program Number (SPN), Reason and Authority for discharge, and Reenlistment Code deleted from their copy of the DD Form 214, "Report of Separation From Active Duty" (or from previous editions of the form) may apply to their former service to have the abbreviated codes deleted from their copy of the form. Requests should be mailed to the following addresses:

Army.—Commander, Reserve Components Personnel and Administration Center, Box 12479, Olivette Branch, St. Louis, Missouri 63132.

Navy.—Chief, Bureau of Naval Personnel (Pers 38), Department of the Navy, Washington, D.C. 20370.

Air Force.—Air Force Military Personnel Center (DPMDR), Randolph AFB, Texas 78148.[1]

Marine Corps.—Commandant, U.S. Marine Corps (MSRB–10), Headquarters, U.S. Marine Corps, Washington, D.C. 20380.

The request should include name, social security number, any military service identification number, dates of service, and a copy of the DD Form 214.

Further information is available at local military personnel offices.

Also, as was previously available on the request of a former service member, a narrative description of the reason for discharge will be provided in response to the veteran's request. The Department of Defense plans to initiate wide ranging information releases to make this change in policy known to veterans. The Department is also requesting the assistance of the Veterans Administration, General Services Administration, Selective Service System, Department of Labor, and over 50 veterans organizations in publicizing this information.

Mr. EDWARDS. Are there other questions?

If the members stay for just a moment after we are through, Mr. Butler wants to speak with us for a moment.

On Wednesday, April 3, in room 2141, Mr. Mondello of the Civil Service Commission, will testify. And we thank you very much, Mr. Mondello, and the gentlemen with you for sitting it out today. And we are sorry that we did not get a chance to hear you today, but we want to give an entire morning to you.

Mr. Cooke, Mr. Andrews, and Mr. Liebling, we thank you very much. We will be in touch with you with some questions, which you can file with us.

Mr. COOKE. We will be pleased to answer them.

Mr. EDWARDS. And we also are very anxious to work with you on this matter. We know you have some special problems.

Mr. COOKE. We will be delighted with the opportunity to do so, Mr. Chairman.

Mr. EDWARDS. Very good.

Then we are adjourned.

[Whereupon, at 12:32 p.m., the hearing was adjourned to reconvene on Wednesday, April 3, 1974, in room 2141.]

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[1] It is preferable that former USAF members make their request through a local base personnel office.

DISSEMINATION OF CRIMINAL JUSTICE INFORMATION

WEDNESDAY, APRIL 3, 1974

HOUSE OF REPRESENTATIVES,
CIVIL RIGHTS AND CONSTITUTIONAL RIGHTS
SUBCOMMITTEE OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10 a.m. in room 2141, Rayburn House Office Building, Hon. Don Edwards [chairman of the subcommittee] presiding.

Present: Representatives Edwards, Waldie, Sarbanes, Drinan, Wiggins, and McClory.

Also present: Alan A. Parker, counsel; Arden B. Schell, assistant counsel and Michael W. Blommer, associate counsel.

Mr. EDWARDS. The hearing will come to order.

Today we continue the hearing which we began on Thursday, March 28. And Mr. Mondello, you are most kind in agreeing to return and provide the testimony which was originally scheduled for last week. And we appreciate your indulgence.

This morning's hearing is a continuation of our efforts in the area of the regulation and control of criminal justice information systems. Our witness is Mr. Anthony L. Mondello, General Counsel to the Civil Service Commission.

Mr. Mondello has served as General Counsel to the Civil Service Commission since 1968. Before beginning this appointment, he served with the Department of Justice for 20 years, where he was honored for the excellence of his legal work on a number of substantial projects. It is indeed a pleasure to receive your testimony today, and I'm sure it will be most helpful to the subcommittee in its work.

And the subcommittee apologizes for any inconvenience that the delay of your appearance from last week caused you. Will you please introduce the gentleman with you, and then proceed? And I understand, Mr. Mondello, that you have some notes and a handwritten statement that you would like to give, and you may proceed with that after identifying the two gentlemen with you.

TESTIMONY OF ANTHONY L. MONDELLO, GENERAL COUNSEL, U.S. CIVIL SERVICE COMMISSION, ACCOMPANIED BY ROBERT DRUMMOND, CHIEF OF THE BUREAU OF PERSONNEL INVESTIGATIONS, AND PIERCE MYERS, ATTORNEY

Mr. MONDELLO. Thank you, Mr. Chairman. The individual sitting to my right is Mr. Drummond who is the Chief of the Bureau of Personnel Investigations of the Civil Service Commission. The individual

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sitting at my left is Pierce Myers, an attorney in my own office. And my name is Anthony Mondello, and I am the General Counsel of the Civil Service Commission.

Mr. Chairman, I thought it would be useful if I would make some introductory remarks of a general sort this morning, but which would respond to some of the interesting questions that were raised last week with the representatives from the Department of Defense. I would like to do that and——

Mr. EDWARDS. Would you bring the microphone a little closer, Mr. Mondello, please? Very good.

Mr. MONDELLO. I would like to make those introductory remarks, and then make just a few remarks in reference to some specific materials that are in the prepared statement which I do not intend to read. I would appreciate it, however, if that entire prepared statement could be placed in the record of these proceedings.

Mr. EDWARDS. Yes, without objection, it will be inserted in the record in full.

[The prepared statement of Mr. Mondello follows:]

STATEMENT OF ANTHONY L. MONDELLO, GENERAL COUNSEL OF THE U.S. CIVIL SERVICE COMMISSION

Mr. Chairman, I appreciate this opportunity to present the views of the Civil Service Commission on H.R. 12575, the "Criminal Justice Information Control and Protection of Privacy Act of 1974," H.R. 12574, the "Criminal Justice Information Systems Act of 1974," H.R. 9783, a bill "To regulate the collection, storage, and dissemination of information by criminal data banks established or supported by the United States," and H.R. 188, a bill "To amend title 28 of the United States Code to provide for the dissemination and use of criminal arrest records in a manner that insures their security and privacy." The Commission strongly supports the spirit of the bills as expressed in section 101 of H.R. 12575 and section 2 of H.R. 12574, particularly, with respect to the operations of the Commission, section 2(b) of H.R. 12574, which states:

"(b) Particular risks, from the standpoint of the individual, may be presented when criminal justice information is used for a purpose not related to criminal justice. No such use should be permitted unless it is clearly necessary and is justified on the basis of weighing the interests of the individual (including the right of privacy procedural rights, and access to employment) against the needs of government or of society."

We believe that the use by the Commission of criminal justice information is clearly necessary and justified and that we have struck a proper balance between the interests of the individual seeking government employment and the needs of the government. Accordingly, while supporting the spirit of the bills, we wish to express specific concerns as to their effect on our operations and make appropriate suggestions for amendment to the bills to insure that their implementation would not adversely affect our mission.

The Commission needs to have access to criminal justice records so that good personnel decisions can be made respecting the approximately 450,000 positions which are filled each year. Over 1.7 million people make application for Federal employment yearly. Of these the Commission conducts over 350,000 investigations. About 25,000 investigations are conducted by the agencies. About 20,000 of the Commission's investigations are full field investigations while the remainder, national agency checks, are inquiries by correspondence. The restrictions in these bills we think, would have the effect of preventing the Commission, and the agencies involved, from placing the best people needed to implement governmental programs because we could not ascertain critical facts concerning their suitability for employment.

Initially, we note that section 201(b) of H.R. 12575 provides that all criminal justice information (including arrest records, correctional and release information, conviction records, identification records and wanted persons records) may be collected only by, or disseminated only to officers and employees of criminal

justice agencies, with limited exceptions for conviction record information, and shall be used for the purpose of administration of criminal justice.

H.R. 9783, section 3(a), provides that no criminal data bank shall release any data to any person who is not an official of a criminal justice agency who seeks such data in the course of official duty, nor shall any person not in the course of official duty as such an official seek any data from a criminal data bank.

H.R. 188 adds a new chapter 177 to title 28, section 3101(a) of such chapter providing that no officer or employee of the United States or of any Federally assisted law enforcement agency may disseminate in any manner any criminal arrest record to any person other than another officer or employee of a law enforcement agency.

These last two bills, therefore, would appear to preclude the Civil Service Commission from obtaining criminal justice information or making such information in its files available to Federal agencies in connection with suitablity investigations. However, H.R. 12575 and H.R. 12574 would appear to permit *limited* Commission use of criminal justice information under certain circumstances.

Section 5 of H.R. 12574 relates to access to criminal justice information, including criminal intelligence information, criminal offender processing information and criminal offender record information. Subsection (b) provides that *direct* access to information contained in a criminal justice information system shall be available only to authorized officers or employees of a criminal justice agency. Subsection (c) provides that criminal intelligence information may be used for reasons of national defense or foreign policy, as determined by the Attorney General.

Subsection (d) allows criminal offender processing information to be made available to the individual to whom the information refers, to qualified persons for criminal research, and where the use is expressly authorized by a court order or Federal or State statute, as determined by the Attorney General. This restriction will severely handicap the Commission's Rehabilitated Offender Program. That program is based on a Presidential directive and not a statute. Extent of rehabilitation is a crucial consideration in determining employability of ex-felons. Denial of access to the records essential to determining rehabilitation will seriously impair the Commission's ability to make these determinations and may well result in denial of employment opportunity to those whom the rehabilitated offender program was designed to benefit. The impairment will be government-wide since the program applies to the Commission and all other Government agencies alike. We note that section 204 of H.R. 12575 permits rehabilitation officials of criminal justice agencies to orally represent the substance of individuals' criminal history record information to prospective employers with the consent of the individuals, if it would be helpful to their obtaining employment. We wonder about the adequacy of such representations, and observe that the Commission, which makes most of the investigations for persons employed by other agencies, is apparently excluded from hearing these oral reports.

Subsection (e) authorizes use of criminal offender record information for purposes which are expressly provided for by Federal statute or Executive order or State statute, as determined by the Attorney General. It is not clear whether the Commission would have the benefit of this authorization, nor do we know whether this authority is subject to any of the specific restrictions stated in (a) through (d) above.

The Civil Service Commission does not appear to meet the definition of a criminal justice agency in section 102(16) of H.R. 12575, section 3(h) of H.R. 12574 or section 1(3) of H.R. 9783 (or the definition of "law enforcement" agency on page 8 of H.R. 188) since it does not perform a criminal justice activity as its principal function. Thus, the bills would have the effect of denying the Commission access to information from law enforcement agencies—local, state or national—unless in the case of H.R. 12574, the Commission could be interpreted as coming within one of the exceptions specified in its section 5. Under H.R. 12575, section 201(c), conviction record information may be made available for purposes other than the administration of criminal justice only if expressly authorized by applicable State or Federal statute. Since the Commission's statutory authority to investigate is "general" in its statement and scope, and was granted in 1871 in language unconcerned with criminal justice information, the intended application of the "expressly authorized" language is difficult to perceive.

Executive Order 10450, the Commission's most specific basic authority for conducting investigations, appears to meet the requirement of section 5(e) of

H.R. 12574. Section 3(a) of Executive Order 10450 covers scope of investigation and requires a check of the fingerprint files of the Federal Bureau of Investigation and written inquiries to appropriate local law enforcement agencies. The security criteria in section 8(a) refers to criminal conduct. Section 8(b) requires the Commission to furnish a full investigative report to the department or agency concerned.

Thus, Executive Order 10450 appears to give the Commission ample authority to continue to obtain criminal offender record information as part of the investigations conducted under that authority and to furnish the information to employing agencies if H.R. 12574 is enacted. However, the Attorney General might interpret these authorities otherwise. To do so, however, would seriously impair the Commission's functions under Executive Order 10450.

Similarly, Civil Service Regulation 721.301 makes appointments in the competitive service subject to investigation by the Commission, and section 731.201 includes criminal conduct under the reasons for disqualification. While it does not spell out specific criminal investigative requirements, its terms cannot be satisfied in the absence of criminal record information.

There are additional authorities under which the Commission conducts investigations, and they do not refer specifically to obtaining criminal offender record information as part of any required investigative coverage. We refer to the following in particular:

Section 5.2 of the Civil Service Rules (5 CFR 5.2)

Public Law 82-298 (66 Stat. 43), which substitutes the Commission for the Federal Bureau of Investigation as the agency to conduct investigations under a number of statutes.

The Atomic Energy Act of 1954 (58 Stat. 919)

The United States Information and Educational Exchange Act of 1948 (62 Stat. 6), and

Executive Order 10422, Investigations for International Organizations.

The Atomic Energy Act requires investigations and authorizes the Atomic Energy Commission to establish standards and specifications as to the scope and extent of investigations to be made by the Civil Service Commission. Atomic Energy Commission has in fact included law enforcement checks in its requirements. This should satisfy the legal requirement of H.R. 12574 and H.R. 12575, but the interpretation which would be reached by the Attorney General if this bill is enacted is not known.

If H.R. 12574 envisions that there must be a specific authorization to obtain and use information from law enforcement agencies on arrests, convictions, and related matters, only Executive Order 10450—and presumably the Atomic Energy Act—would clearly meet this test. We believe that this information should be available in all our investigations. If the effect of the "expressly authorized" language would deny us the information we need to accomplish our functions, we are opposed to its use.

We feel that it is vitally necessary to the accomplishment of an important Commission mission (i.e., to aid governmental agencies in determining the suitability of applicants for Federal employment) that arrest and conviction records continue to be available for our evaluation and that of the agencies. This information is necessary not only for determining whether, in consideration of all available material, an applicant should be employed but also for what positions he would be suitable.

It takes little imagination to envision the relevancy of a recent embezzlement conviction to the suitability of an applicant for a payroll clerk position, of a person with a history of child molesting for any position in close and unattended contact with children, or of a person with drug-related problems for a position in a hospital or clinic. This is not to say that Government employment is closed to such people. We do, after all, have a positive rehabilitated offender program. But employment in that program is based on proof of rehabilitation and offenders are not placed in positions which are not conducive to their rehabilitation or where their employment in a particular position might constitute an unacceptable risk to the agency, its personnel, or to the public. These considerations apply particularly in a national security standpoint.

Section 5(f) of H.R. 12574 imposes on any agencies operating a criminal justice information system subject to this legislation a very heavy burden of record keeping. If the Commission is operating a criminal justice information system subject to this legislation [and it is not at all clear that we are], this section will create an administrative monstrosity in terms of the accumulation of paper and paperwork and the vast and needless expenditure of personnel time and

money. The Commission receives hundreds of thousands of requests from agencies each year for investigation which involve a search of criminal records, and the burden section 5(f) would impose on us to keep detailed records of each request is self evident. The burdens created appear to far exceed any tangible benefits that would be derived from this subsection.

The notice requirement of section 6(c) of H.R. 12574 would also entail a tremendous amount of paperwork for the Commission. We conduct over 300,000 investigations a year. Our experience indicates that the completion of a fingerprint chart by the individual applicant or appointee for investigative purposes is ordinarily a sufficient notice to him or her that those prints will be checked with the FBI. However, this commonly accepted assumption is neither stated nor implied in the bill. The current Form 171, Application for Federal Employment, presently contains the following in boldface type immediately before the place for the applicant's signature:

"All statements are subject to investigation, including a check of your fingerprints, police records, and former employees." It would be possible, of course, to modify all forms and charts to contain a more precise notification to the applicant that criminal offender record information is being requested and that he has a right to review his file for the purpose of challenge or correction. But the bill seems to place the function of requiring the requester to give notice in the criminal justice agency, and there is no way to predict whether such agencies (national, state, or local) would regard section 6(c) of H.R. 12574 as mandating a new notice subsequent to or contemporaneous with each separate request for information. In addition, the requirements of section 6(c) would undoubtedly result in considerable delays in processing applications and placing any applicant in the position.

Section 7 of H.R. 12574, Accuracy and Completeness of Criminal Offender Record Information, and section 206, Security, Accuracy, Updating and Purging, of H.R. 12575 would be most helpful to the Commission in its investigations. Having information on disposition would save investigating time and permit us to make employment decisions based upon the full record, assuming that these records continue to be available to the Commission.

The restrictions on furnishing arrest record information under the circumstances described by section 8(c) of H.R. 12574 and the prohibition in section 201 of H.R. 12575 would nullify the Commission procedure, expressed on FPM page 731.8, outlined for use in consideration of criminal records. This commonsense approach to the handling of information concerning arrests was a key part of the rehabilitated offender policy enunciated in 1966 by FPM Letter 736-2. These key works from that issuance, referring to the change in emphasis on the application form from arrests to convictions are important:

"The deletion of inquiry about arrests which have not resulted in convictions is designed to prevent the summary rejection of applicants on the basis of unevaluated arrest records. The decision of this inquiry does not, however, preclude the Commission and the agency concerned, as part of the full consideration of an individual's case, from developing the circumstances relative to arrests and taking them into consideration in determining suitability for Federal employment. This is a reasonable and necessary part of a suitability determination as the circumstances surrounding some arrests have a genuine bearing on the individual's fitness regardless of the absence of a criminal conviction. For example, some arrested persons are not brought to trial because of the disappearance of witnesses or an unwillingness on the part of those concerned to prosecute. What has been done by the deletion of the arrest inquiry is to allow the unconvicted individual the very real and worthwhile opportunity to have his application considered on an equal basis with all others, while preserving for the Government the right to reject any truly unsuitable persons when an evaluation of the facts surrounding an arrest justify that action. This is a fair balancing of the equities of all concerned."

The value of arrest records which do not result in convictions was discussed by FBI Director Clarence M. Kelly in his testimony on these and similar bills. Presently, the FBI has a policy of notifying Federal agencies of arrests of their employees. This policy, which aids administrators in making informed judgments about the continuation of these employees in the Government, would appear to be prohibited by these bills.

Section 8(d)(1)-(6) of H.R. 12574 provides that the prohibition in subsection (c) shall not apply in certain situations, e.g. when the Attorney General determines, with regard to the particular case or class of cases for reasons of na-

tional defense or foreign policy that it should not apply. The exceptions created by subsection (d) encompass relatively few of the types of cases that the Commission investigates. The manner of expression of paragraph 6 of subsection (d) makes it rather clear that only a new statute would allow the Commission to use arrest information as it now does. Recognizing that it is no easy task to secure legislation, the effect of section 8(c) would have a most deleterious effect on the Commission's investigative function.

Section 9 of H.R. 12574, Sealing of Criminal Offender Record Information, and section 206, Security, Accuracy, Updating and Purging, of H.R. 12575, would create a very difficult task for the Civil Service Commission if these sections are read to apply to the information maintained in Official Personnel Folders and investigative files. The Commission controls literally millions of Official Personnel Folders and hundreds of thousands of investigative files under its jurisdiction, and the task of checking each and every folder of past and present employees to see if they contain criminal offender record information which must be sealed would require a vast workforce and a substantial amount of time to complete. Section 9(c)(1) of H.R. 12574 provides that regulations may exempt from full compliance with the requirement of this section systems which are manual in nature. Since the vast preponderance of our records are contained in a manual-type system, we would hope that the Attorney General would exempt us from compliance if H.R. 12574 is enacted—but that result is not mandated by the bill, and we think it should be.

In addition we oppose the concept of sealing records from access to the Commission in its investigations. Even the older criminal records may be relevant, along with recent conduct, in determining suitability, particularly for sensitive positions related to national security.

Section 10 of H.R. 12574 and section 310 of H.R. 12575, Precedence of State Laws, would provide no protection for Federal agencies from unduly restrictive state laws. The need for information, including that from state systems, is vital; and if an agency should qualify to receive such information under Federal law we question whether state law should be interposed to defeat the purposes of the Federal statutory authorization.

Section 11 of H.R. 12574, Security of Criminal Justice Information Systems, would present huge problems for the Commission should this bill be read in such a way as to find that the Commission is operating a criminal justice information system. If the Commission is operating a system subject to this legislation, this section would, presumably, require us to segregate criminal justice information from other personal data. Segregation of such information in millions of Official Personnel Folders and hundreds of thousands of investigative files would involve vast expenditures of resources which are presently not available.

We strongly urge that H.R. 12575, H.R. 12574, H.R. 9783, and H.R. 188 be revised to specifically provide for continued access to criminal justice information by the Civil Service Commission and by other Federal agencies in their investigations required for employment purposes, if, indeed, you determine to report any of these bills. The legislation should also make special provisions for access to criminal justice information by agencies concerned with national defense and foreign policy and with access to classified information in their selection of personnel for sensitive positions related to national security.

Our testimony is based on the assumption that we will continue to carry out our responsibilities as we have been doing. If the proposed legislation now before you is enacted without amendment to accommodate to our operations, you will be setting in motion a course requiring changes in legislation, regulations and practices which we believe should be considered now.

We would be pleased to furnish whatever technical assistance may be required in modifying the language to which we have objection.

Mr. MONDELLO. We have been investigating for relative capacity and fitness under the Civil Service Act for a period extending over 90 years. Our aims are very similar to yours when you hire people. You want people of competence, industry, and integrity, and so do we. So, we ask a lot of questions of a lot of people to get the answers on those matters.

Basically, we want reliable information, and we do not care if it does not come to us in the form of arrest records or conviction records. We use information which has no taint of criminality at all. It is no

crime to be lazy or incompetent or dishonest, or a pathological liar. But we do not want, any more than you do, to load up our staffs with lazy, incompetent, and dishonest people. We also have security and suitability interests that you were discussing last Thursday with the Department of Defense.

We are normally interested in recent evidence of conduct and behavior because immediate past performance is usually the best guide to conduct on the job. But we do not understand the bill's penchant for arbitrarily fixed periods of time beyond which one cannot look. We, too, follow guidelines which keep us from dredging up from the dimmer past. On full field investigations, we record information basically on the last 15 years or a shorter period of time over the age of 18, and we really focus on the last 5 years of an individual's life. But the real test on the age of data is the simple test of relevance.

Bear in mind that we hire people who have been criminally convicted as recently as within a year or two of their appointment. Sometimes this is because the episode that the conviction represents is plainly a sport, a single explainable aberration in an otherwise unmarred lifespan. But, we are troubled about the 7-year rule on criminal records beyond which the proposed bill would suggest that you not go because, in our judgment, the past is, indeed, prolog and where the facts pro and con with respect to a given individual are relatively in even balance, we think it is unwise to cut oneself off arbitrarily from any knowledge which may prove to be critical. I suggest that even if you think information of that sort is being abused, your response should not be to make us ignorant of it, but rather to establish procedures which would guard against the effects of abuse if you think we have been abusive.

We offer similar judgment concerning arrest records. Arrests are not important to us. What is important is knowledge of the circumstances which gave rise to the arrest. We used to require applicants to report arrests on the application form for employment until we learned that that information was, indeed, being abused. In the competition for jobs, personnel officials chose to deal only with those whose forms were clean, who had not reported arrests, and to make their selections accordingly. So, we took the question off that form and it now appears only on the security forms which are used principally after qualifications have been considered and tentative or even firm selections have been made and we use it at times, sometimes, when individuals are already on the job. But, we still need to know.

Mr. EDWARDS. What do you use then after they are on the job? What are you referring to?

Mr. MONDELLO. I am suggesting that most of the investigations we make, whether the NACI type or the full field investigations are made subsequent to employment and the effect of our taking the arrest record information off the form 171, the standard form for application for employment, is that the personnel people who are supposed to be concerned principally, if not exclusively, with qualifications, now do not have that information at all. So, they make their judgment about competence and they make their decision as to whether there is an employable individual in terms of whether he can do the job. We subsequently find out whether there is an arrest record.

The advantage of that to the individual is that if we then have to dislodge him from employment, as the Commission is allowed to do

during the first year of employment, he gets to know the reasons for his dismissal, and he can contest them in an administrative appeal and in court.

Mr. EDWARDS. On the application form do you require that an applicant advise you of any arrests that have taken place?

Mr. MONDELLO. No, sir. That is the question that I am stating we took off the form. We now ask only about convictions on the form. But, we still need to know about behavior and arrest records constitute a ready source of lead information concerning potentially significant episodes in an individual's life which we might not otherwise discover. Arrest records can never, by themselves, be determinative of anything with record to employability, but they are certainly useful as leads to hard information which our experience proves is frequently significant.

Again, we question why the arbitrary limitation of 1 year on arrest records would be imposed. Think of an arrest for embezzlement, 13 months prior to an employment as disbursing officer, which does not lead to prosecution or conviction because the individual within the year decided to return the money on the promise that no prosecution would follow. Do you really want to keep us from that kind of information?

Mr. EDWARDS. Mr. Mondello, are you telling us that your investigation background and the application forms, and the work that you do in a situation such as you describe would make it impossible for you to have the information, or that any kind of a mediocre investigation would not have reflected that a man that you are going to hire as a disbursing officer was arrested for embezzlement 13 months ago? It is very hard to believe, Mr. Mondello.

Mr. MONDELLO. Well, all I can suggest about that is that when the investigation routines of the Government are regarded as having failed, then is when we hear about it, and then is when we find out that there was something in someone's life that perhaps should have been discovered and was not discovered. Whether it is because we did not push far enough, or push far enough back, this happens. We are not perfect in the investigations any more than we are perfect in anything else. But, I remind you, sir, that some 2 years ago there was an episode of an individual who, with his son, hijacked an airplane, and it turned out that he was a grade 15 employee at one of the departments or agencies and there was an immediate hue and cry as to why we had not discovered something about him that would have told us that he was the kind of individual who would commit this kind of criminal activity and, therefore, should not have been hired. I am told that we did not, fortunately, conduct that particular investigation. I think it was handled by the agency. But, I am also told that there was abundant evidence in his background, had it been sought and recorded, which would have put them on notice that he would not have been a good employee, so that they need not have suffered the embarrassment they did suffer.

But, the fact of the matter is this happens, and there is no way to predict when it is going to happen. All you can do is do the best you can, follow the normal leads that commonsense tells you you ought to follow. But, one thing certainly is sure, a man's neighbors may know nothing about any criminality that occurs with respect to his employ-

ment, so that when we are checking on his background through neighbors, and statements they make about it, they may not know. If we go to his employer, what if the employer is the very man that promised him that not only would no prosecution follow if he gave back the $50,000 he took, but promised also that he would not say anything about it to anybody. We can go to the employer himself, and still not find out. And if it was a closely held secret in the corporation, and on the day when our investigator showed up nobody who really had evidence of this was around, and everybody else was saying what a great employee he was, it is perfectly obvious we might miss it. There is no way to insure yourself that you will not.

Mr. EDWARDS. Perhaps you could, Mr. Mondello. It is very hard to imagine. I have been an investigator myself and it is very, very hard to imagine that the case that you describe could possibly take place where a man was arrested in his community 13 months ago for embezzlement and just because your investigator cannot get the rap sheet on that, that he is not going to discover it. I think you should fire that investigator.

Mr. MONDELLO. Well, all right. Excuse me just a moment, sir. I am sorry but I have got my papers in some disorder and I would like to backtrack.

Mr. EDWARDS. Please proceed.

Mr. MONDELLO. The question came up last Thursday as to who had the burden of proving what at hearings of this kind on this bill. I would like to suggest that Congress does not ordinarily enact legislation for which it sees no need, and that this proposed legislation is designed to serve some needs which do not involve functions of the Civil Service Commission at all, and on which we have no comment. Our only real purpose in being here is to caution you with regard to effects that this legislation would have on functions of the Commission which we think would damage those functions.

I think the proponents of new legislation which would interfere with congressionally authorized practices, persistently engaged in for 90 years, ought to at least bear the burden of showing those practices are abusive of the aims of Congress or the privacy or private rights of individuals. You will remember that because our concerns were inadequately considered earlier, the Attorney General suggested that you hear us out up here. I want to say affirmatively that I think the Commission handling of information obtained by investigation in order to accomplish the functions given it by Congress and the President has not been abusive of any congressional objectives and has been conducted with due regard for the private and constitutional rights of the individuals affected.

By the way, we asked your counsel to place before you a blue covered booklet. I apologize for its age. It was written in February 1969, and I must confess to you that in relatively significant portions concerned with what we are talking about today it is out of date. We have made some attempts at bringing it statistically up to date by writing in hand the figures that are more recent than the 1970 year recorded there. If you turn the pages to page O, and these are alphabetically designated, you will notice at the foot of the page we have filled out the three columns for the years 1971, 1972, and 1973 and we have done that elsewhere in this booklet. The booklet is a handy example of the kind of

instructions and public statements we make about what we are doing when we investigate, and I commend it to you.

I would like to refer to one page of it now because you may not be aware of the rules which govern our investigators. They happen to be stated in an operations letter. It is letter No. 730–60 dated February 27, 1967, and that letter is found in the "Federal Personnel Manual" which is available to the public at large from the Superintendent of Documents; and here is a copy of 730–60 I would like to offer for the record so you can have it in its own terms. A summary of the contents of that letter is found at pages F1 and 2 in that blue booklet.

The point of that is that we investigate quite openly. We tell people what we are about. We do not work under cover, or use tricks, or wiretaps, or trash searches, or lie detectors. For the most part when we declare an applicant ineligible to compete for a job, or when we order anyone removed for suitability reasons, they are told why, and they have the opportunity through both informal and some very formal procedures to contest the issue right through administrative appeal to the Board of Appeals and Review of the Commission and then on to the courts. Some of our cases have been decided, running through this channel, by the Court of Appeals of the District of Columbia.

Now, while there are some situations where this formality is not available, chiefly when preappointment full field investigations are used to nonselect somebody on the basis either of his qualifications, or his suitability, we still postaudit the agency's use of our investigative reports to insure that they are not being abused to the detriment of the private rights of these individuals. We not only do not accord special significance to the fact of arrest. We actually take into account the full context of the circumstances surrounding a conviction to insure that we concern ourselves only with those of its aspects which are validly job related.

I am not claiming that we are perfect at this business, but I assure you that we constantly try to improve, and we do improve. And I think you will find us trustworthy in our handling of information without abuse to the private interests the proposed bill is designed to protect.

Last week I thought I detected a consensus on Congressman Wiggins' suggestion that you did not want to keep criminal justice information from a litigating lawyer in a civil lawsuit so that the normal purposes of such litigation would continue to be served. I suggest that those litigating purposes you were willing to take into account are not more important than our purpose of trying to hire for the Government persons of competence, industry, and integrity.

Father Drinan asked the Department of Defense representatives about obtaining data from Massachusetts criminal justice agencies. I am told that we are currently receiving such data as a result of Massachusetts' acceptance of us as qualified by them under their statute. But, only we can use it. We cannot, and we do not, put it in our investigative reports since those will be seen by other agencies. And since we lack permission under the Massachusetts statute to disseminate it, we keep it in a separate envelope in each file, and we can only make it available either to the FBI or a similar law enforcement agency which is authorized by the Massachusetts statute to receive it. I think that is a terribly awkward situation for us to be in. It compli-

cates our administrative routines, and I think if you begin to multiply that by 50 different State statutes having different provisions, it may not be worth having.

Mr. DRINAN. Well, I'm sorry if it complicates your administration but it does protect privacy. Maybe all 50 States should be authorized to do that or even required to do that.

Mr. MONDELLO. Yes, sir.

Mr. DRINAN. Then it would not be awkward for you at all.

Mr. MONDELLO. It would still remain awkward.

Mr. DRINAN. What would your Commission lose? Nothing.

Mr. MONDELLO. Well, dollars, the handling of the information.

Mr. DRINAN. For all 50 States, if you say anything that comes from the States goes only to law enforcement agencies, it does not go to all of these other civilian branches——

Mr. MONDELLO. That is one way certainly of protecting privacy.

Mr. DRINAN. What is so wrong about it? Are you opposed to that?

Mr. MONDELLO. I am opposed to it because it is awkward to us. What I am suggesting——

Mr. DRINAN. How would you protect privacy? Wait a minute. How would you protect privacy, sir? You say Massachusetts protects privacy; they have gone through and they are really fighting for this, and there is a courageous Republican Governor who is fighting for privacy and you say it is awkward. How are you going to protect privacy? You have conceded the point that this does, in fact, protect privacy. How are you going to protect privacy?

Mr. MONDELLO. What I am suggesting in this entire statement is the way we do protect privacy. What I am suggesting to this committee is that you should not turn loose 50 States that will have different provisions for us to follow or not follow. If you think we are not doing the right job of protecting privacy, we are subject to your control, and you ought to see to it that whatever procedures you set up will cause us to do that.

Now, what I am urging on you, sir, is that we are, indeed, protecting privacy. I just described a situation where you go all the way through administrative proceedings and you get to the courts about whether your private rights have been molested or not. That is the kind of protection that we can achieve and do achieve in the Federal service. If that falls short of what you would like us to do, you will have to tell us what more you want us to do. But, I am suggesting that we too are concerned with privacy and I think we are protecting it and I do not see why if you have a choice between a single uniform way of handling the Federal business, or permitting it to be carved up by 50 States, why you should choose the carved up method. I think the uniformity would be a boom and would keep it under your tight control. That is all I am trying to say.

Mr. DRINAN. Do you, therefore, agree with the DOD that this law should forbid Massachusetts from having higher standards than the Federal law?

Mr. MONDELLO. No, sir. I regard the States, as the Supreme Court has regarded them, as areas where experimentation can proceed. There is not only one way to do any one thing in this country. I do not see any need for a Federal straitjacket on everything, but I think where the Federal business is at stake—and mind you the 2.6 million or however

many employees we have now in the Federal Government are working for all of the people of the United States—the interrelationship between the State governments and the Federal Government on any number of programs is perfectly obvious to all. By having unusual competence in the Federal Establishment, I think you do help the States. Now, if Congress in its wisdom decides that there are certain standards to be followed with respect to the protection that everybody should follow then yes, sir, I think that the Federal Government should impose its will on the States. But I do not think that means the States cannot experiment with something further. So, I can tolerate State statutes and I think this Congress can tolerate State statutes.

Mr. DRINAN. But you are choosing a lower standard of privacy.

Mr. MONDELLO. No, sir. I do not think we are.

Mr. DRINAN. You just said if we enact a higher standard, you want the present one which is lower than the one we want. I yield back, Mr. Chairman.

Mr. MONDELLO. On the question of our going to the files of the House Internal Security Committee, when President Truman issued Executive Order 9835 in 1947, and included a search of those files as one of the minimal things that he was encouraging people in the executive branch to do, he was only telling executive branch personnel what to do. I do not think that anybody has ever suggested that President Truman had any directory power over any of the affairs of the Internal Security Committee.

When that expression about going to those files was left out of Executive Order 10450, it did not render any investigative agency powerless to attempt to use those files as a source. In fact, 10450 makes reference to the NACI, the national agency check and inquiry, which by that time was quite well known as a device which could go to almost any source and as a matter of course did, indeed, include the Internal Security Committee file searches. And so agencies have gone there and we have gone there.

Now, control over those records is not an executive branch problem. It is a problem for the House, or for that House committee under House rules, matters with which we have nothing to do.

Mr. Drummond is going to have to decide, and he is the Chief of the Investigative Bureau of the Civil Service Commission, whether the productivity of those searches is really worth the effort. But, until that question is answered in the negative, we may continue our requests and the House Internal Security will have to determine for itself whether it will comply with our requests.

Mr. DRINAN. Mr. Mondello?

Mr. MONDELLO. Yes, sir.

Mr. DRINAN. Do you feel the House of Representatives is in violation of its own rules by allowing the executive agencies to come in?

Mr. MONDELLO. Sir, I do not know what the House rules are that govern the records of the committee.

Mr. DRINAN. But you concede that if the House changed its rule this afternoon Mr. Drummond could never send investigators again?

Mr. MONDELLO. Well, it is simpler than that. If the House committee or even its staff decides to turn down any request he makes, that is the end of the matter. There is nothing we can do about that and I am quite sure nothing we would do.

Mr. DRINAN. Of all of the requests that Mr. Drummond and his associates make, only 11 percent are fruitful in any way, or they have files for only 11 percent. There is no indication what information is obtained or what you do with it. Would you want to explain why this is fruitful or what is done with that information?

Mr. MONDELLO. I would like to defer to Mr. Drummond.

Mr. DRINAN. Yes.

Mr. DRUMMOND. Yes, sir. The information received, and I believe the 11-percent figure may have come from a letter that we sent to Congressman Waldie last year, and I have a copy or Mr. Mondello has a copy of that. Any information first of all of those where we call a matchup, where a name that we submit your people indicate there is a possibility of an association with names in your file, then we have to go back and further search for some identifying information. Whatever comes out of there is considered along with all of the other information that we have from other sources to determine whether or not it is actionable at all. I might say——

Mr. DRINAN. What do you mean by "actionable"?

Mr. DRUMMOND. First of all, the information, whether we say "actionable," whether we might convert it to the Federal Bureau of Investigation or whether it has any information with respect to a suitability determination in determining character and overall fitness of the individual for employment. Very frankly, sir, of 17,000 searches, which represent only 7 percent of the total investigations that we have initiated this year and looking at our referrals to the Federal Bureau of Investigation so far this fiscal year, none were passed on information from the House Committee on Internal Security.

Mr. DRINAN. Well, I would hope not. I mean, are you suggesting that the files here have information that the FBI should have and that, in effect, if the staff knows it that they are withholding, not sending information to the FBI?

Mr. DRUMMOND. Absolutely not, sir. I would suggest that rather that information, if you do have it in your files that would be information that the FBI should have, they have it already.

Mr. DRINAN. What therefore, if anything, do you ever get from the House Internal Security Committee that you could not get in a more verified and valid form from the FBI?

Mr. DRUMMOND. Following the appearance before Mr. Waldie last spring I have attempted to maintain some records to make some decisions in terms of the productivity of all of our searches, not only the House Committee on Internal Security, and we are about to complete the compilation of these figures to determine the worthwhileness of continuing such a search, sir.

Mr. DRINAN. Would you have any information for us about the cost analysis of it? Has it been worthwhile in general?

Mr. DRUMMOND. I could not tell you precisely the cost of that particular search, sir. But, in terms of the overall cost of what we call our national agency check and inquiry program, of which those checks of the Internal Security and the FBI are a part of, the overall operating costs averages out to about currently in this fiscal year $7.50 a case, $7.50 for that paper process.

Mr. DRINAN. Could you name any bad thing that could happen to your agency——

Mr. DRUMMOND. Pardon, sir?

Mr. DRINAN. Could you name any bad thing that would happen to your investigations if you knew today that Mr. Ichord said that you may not use the files of the House Internal Security Committee ever again?

Mr. DRUMMOND. Only to the extent that no matter what the source, wherever the repository of information is where we might go only to the extent that if something was there that was valuable in a case we would look at.

Mr. DRINAN. You are assuming that you do find——

Mr. DRUMMOND. For example, we make a lot of searches of police departments throughout the country and in terms of the productivity of that search, you might say, "Well we should eliminate these." Well, we could eliminate them if we knew the places where the information was. It is just like we have a lot of statistics in the medical field on how many of us might suffer a heart attack, but we do not know which ones, and that is the problem. So, we have to go and we have to go to all of the possible sources, sir.

Mr. DRINAN. Well, that is not an answer. But when is this study coming up?

Mr. DRUMMOND. I would expect it will be completed by the end of this fiscal year, in June, sir. I can say right now we have cut down considerably of the searches of the House committee.

Mr. DRINAN. You have since Mr. Waldie's investigation? That is very interesting. Why? Why, sir?

Mr. DRUMMOND. Because of the absence of productivity, and I think that I have given you some statistics already.

Mr. DRINAN. Only 11 percent have anything. But, to what extent have you cut down? Now this is very interesting.

Mr. DRUMMOND. I could not say for last year, sir. I have the total for this fiscal year to date, which I have given you, about 18,000 out of some 242,000-some investigations initiated which would have a possibility of a check there, and that represents 7 percent of that total.

Mr. DRINAN. And that is substantially less than last year?

Mr. DRUMMOND. That is for this fiscal year, from July 1 to date, as of yesterday.

Mr. DRINAN. Well, that is very interesting. Maybe if we keep raising the question that will fade away to zero the year after and you will never miss the files. I mean, you are not giving me any reason why you keep going to the files except that it is a possible source. Well, the telephone book is a possible source, but you have to justify it in a cost-analysis situation that you are getting raw data, and I have seen hundreds of those files, and frankly they are worthless. They are old and they are not kept up. And they are just clippings of newspapers and I do not see how you could learn anything there worthwhile that is not in the FBI or some other agency. Furthermore, you are learning things that are not really criminal at all, and it is guilt by association. I recently acquired a dossier, a long dossier on a Massachusetts rabbi, and if he were applying for Federal employment, if you used anything that was said there, I think that would be a gross violation of due process. I frankly fear the presence, in the hands of a Federal official under you, of any information that they give up.

Mr. DRUMMOND. I might say this with respect to that information being in hand, sir. That information, once we have determined that it has no bearing on the case, is not made a part of the case and sent out to another agency.

Mr. DRINAN. What is the other agency?

Mr. DRUMMOND. Well, we do investigations for other agencies, sir.

Mr. DRINAN. What other agency do you send this to when it is not relevant to you? Why do you send it?

Mr. DRUMMOND. I say we do not send it.

Mr. MONDELLO. Mr. Drinan, he is saying we do not send it.

Mr. DRINAN. You just put it somewhere else. Why don't you just return it to the House Internal Security Committee?

Mr. DRUMMOND. If you would like that, sir, we would.

Mr. DRINAN. Why don't you? Less harm would be done. But now, in how many cases—I think we have a right to this—in how many cases do you find this information is useless, and you set it aside in some repository not to be distributed anyplace? In how many cases? I think we have a right to that. They are House files.

Mr. DRUMMOND. Sir, out of these 17,000 or 18,000 that we checked so far, I would be happy to supply that information once I ascertain it myself.

Mr. DRINAN. All right. Thank you.

Mr. EDWARDS. Mr. Waldie.

Mr. WALDIE. Would you refer briefly to page C for Charlie of your investigation program?

Mr. DRUMMOND. Page C, sir?

Mr. WALDIE. C three, and on paragraph six the types of derogatory data developed. My first question is, what is the loyalty security information types that are listed in Executive Order 10450? Well, maybe a way of answering that—do we have a copy of that, Mr. Chairman?

Mr. DRUMMOND. Yes, we have.

Mr. WALDIE. OK. I will just keep that, and let me go down then to the third category, criminal infamous, dishonest, immoral, or notoriously disgraceful conduct. Included are murder, assault, rape, homosexuality, indecent exposure, theft, habitual use of alcohol to excess. Is homosexuality, admitted homosexuality, a reason for disqualification for Federal employment?

Mr. DRUMMOND. Let me say, sir, that up until last November, evidence of homosexuality that is current, ongoing homosexual conduct, was disqualifying under our suitability standards. There was a court decision in a district court of California which, in a sense, and I think Mr. Mondello in terms of the legality of it could explain it better, but in a sense, it prohibited the Civil Service Commission from applying this disqualifying factor to homosexual conduct solely on the basis of the homosexual conduct and solely on the basis that it might at some future time bring the Federal service into disrepute. As a result of that decision, we have put out and we published in the Federal Register, I believe it was November or December, new proposed suitability regulations which, in effect, would make the disqualification relate to the individual's ability to perform the job, or the agency's ability to carry out its mission, taking into account such factors as the nature of whatever offense it is, the recency of it, the nature of the position; and if it were criminal conduct, the extent of rehabilitation et cetera. I

have a copy of the bulletin which we published and sent out to agencies for comment. We also sent out letters and asked for individual comments, and I would be happy to make the bulletin which contains the proposed changes available to this committee.

Mr. WALDIE. If we do not have that, Mr. Chairman, I would request that we receive it.

Mr. MONDELLO. Congressman Waldie, I would like to offer an amendment to Mr. Drummond's remarks.

Mr. WALDIE. Yes, Mr. Mondello.

Mr. MONDELLO. I have been busy with regard to dealing with homosexuality and the posture of the Commission on the homosexual regulations and what they ought to be for several years now. It was not, as Mr. Drummond suggests, as a result or the result of the issuance by a court in California of that case that we proceeded with these proposed regulations. I suggest to you that we did issue the regulations or proposed regulations for public notice and comment on December 3, 1973, sir, and the case came out very shortly before that. However, the changes in the regulations have been discussed with the Commission, and various proposals by different bureaus of the Commission have been advanced and retreated from over the past couple of years. The matter has come to the Commission's attention; that is, to the attention of the three Commissioners in a meeting on this very subject, and on the subject of loyalty and a variety of other things, at least twice within the past year, and it will come up before them again when we have received all of the public comments and decided what to do about the regulations, because only they can issue them.

My point is the matter has been a matter of concern for some time in the Commission, and the point that Mr. Drummond makes about the nature of the change that we would make, which would cause individuals who have anything to do with the judgment of suitability on account of sexual aberration, if you will, to limit themselves by not making moral judgments, but making judgments about employability. There have been any number of homosexuality cases in the courts within the past couple of years, and the courts have made it quite plain, including the Court of Appeals of the District of Columbia in the *Norton* case, and several district court cases under the ruling in the *Norton* case, that homosexuality can get in the way of employability, particularly if the individual who performs the homosexual activity regards it as a skeleton in the closet or is not a member of the Matachine society where he is proud to announce it, then it would be that those people could be blackmailed, and one could not——

Mr. WALDIE. I understand that one of the primary reasons for barring the individuals was a susceptibility to blackmail and a breach of security that might, therefore, occur, particularly in positions of security. But the homosexual who makes no pretense about his preferences would not seem to me to——

Mr. MONDELLO. I agree with you.

Mr. WALDIE. So am I correct then that the law at the present time is that the fact of homosexuality in and of itself does not preclude the Federal employment? It is the impact of homosexuality on the ability to perform?

Mr. MONDELLO. That is the judgment that I think the Commission is making in considering these new regulations.

When you ask me what the law is—after the S.I.R. case came out of California in a district court decision—there was a decision that came out about 2 weeks ago from a district judge in Chicago which takes absolutely the contrary point of view, and I do not know what the law is. But I do know that the Commission has a function in this area that it is going to fulfill it in its own way.

Mr. WALDIE. And if the regulations as you have proposed them are adopted, what then will be status of the law with regard to homosexuality?

Mr. MONDELLO. Well, the entire range of suitability disqualifications, and there are very few, there are about six of them, and basically they are adequately summarized, I think—well, no, they are not. No, they are not.

Mr. WALDIE. No, the——

Mr. MONDELLO. In this same booklet, Congressman Waldie, there is a statement that is a summary of section 731.201 of the Commission's regulations, and it is in here someplace, and it just recites that the full range of—here they are. It is on page G for George five, that list, without the paraphernalia that encumbers it in the regulations, is precisely the list you find in our regulations today and you notice what they all are. Some of them are responsive to congressional statute. For example, the one on the habitual use of intoxicating beverages has been in the code since 1883, and the reasonable doubt of loyalty of the individual or the applicant to the Federal Government has a history which culminates with our living with the *Wadmond* case of the Supreme Court. There is no difficulty in these areas. What we have done with that set of disqualification provisions is this: We would add to them, at least this is the proposal as it went public, we would add to that entire set of regulations an additional set of conditions which would have to be satisfied in connection with each and every one of those so-called disqualifiers. I can read it quickly if you like. It is this long. This would be section 731.202, and it is called "Factors To Be Considered":

> In making determinations under Section 731.201 the Commission shall consider, among other factors: (*a*) Whether the individual's conduct would interfere with or prevent effective performance in the position applied for or employed in;
>
> (*b*) Whether the individual's conduct would interfere with or prevent effective performance by the employing agency of its duties and responsibilities;
>
> (*c*) The kind of position for which the person is applying or in which the person is employed. In some cases some of the disqualifiers just make no sense and would not be relative.
>
> (*d*) The nature and seriousness of the conduct;
>
> (*e*) The circumstances surrounding the conduct;
>
> (*f*) A recency of the conduct;
>
> (*g*) The age of the applicant or appointee at the time;
>
> (*h*) Causative, social or environmental conditions; and
>
> (*i*) The absence or presence of rehabilitation or efforts toward rehabilitation.

As our prepared statement explained, we do have a rehabilitated offender program, and it seems to work well. We take risks, but risks will be taken. We think that if something similar to this, and it need not be the precise language here, comes through the public bath, it is going to have, I think, a very dramatic effect on the kinds of aberrational cases that have come up in the past, and I think this is a good step in the right direction.

Mr. WALDIE. I have no more questions, Mr. Chairman, except to commend the Commission and its staff. I think this is an excellent detailed report, and we would be well served if we had similar breakdowns in terms of percentages, in terms of effectiveness from the Department of Defense.

Mr. EDWARDS. I believe we should. We are going to direct some questions to the Department of Defense, and that will be among them. We are also going to direct some more questions to the Civil Service Commission on items that we will not be able to cover today.

Mr. EDWARDS. Mr. Wiggins.

Mr. WIGGINS. Thank you, Mr. Chairman.

Mr. Mondello, your prepared statement indicates that you support the spirit of the legislation, and apparently concede that something appropriate might well be done in this area. And my questions are going to be directed toward what might be done appropriately in this field.

First of all, sir, do you support a procedure for the correction of records and giving to an individual the right to challenge the accuracy of that record?

Mr. MONDELLO. My response would depend on what burdens you wanted to put on us with respect to that. For example, very often we have in our files information which is only tangentially relevant to whether an individual X should sit in post Y. That information may be incorrect and we are fully aware that when you go out and talk to a person's neighbors, friends, associates, schoolmates, and what have you, you get a good deal of information that is just the sheerest garbage. People volunteer all kinds of things to us. The poor investigator who is listening has no idea whether an allegation made to him Tuesday is going to be relevant to some additional information he picks up on Friday and so as a normal matter he tends to record it. A winnowing process goes on so that by the time he writes his investigation report, he is hopeful that he has extracted only what is useful and relevant to the position.

But, I do not think that we would like, or that you should put on us the burden when somebody comes forward and says, my neighbor, I think, said to you when your investigator came around that I borrowed his tools and returned them broken, you know, an episode that probably we did not choose to take into account even though we heard the words. I do not want the Commission to be charged with the responsibility of making a determination as to whether he did or did not return the tools in broken fashion. You know, it is senseless, it is irrelevant to what we are doing. We are criticized sometimes by people who say we should not be using these files when they contain invalid information.

Well, I put my faith someplace else. I want to train every personnel man in town, and every security official in town, who reads reports to read them with some sense.

Mr. WIGGINS. Well, do you retain the relevant as well as the irrelevant data in perpetuity once it is included?

Mr. MONDELLO. I think we do.

Mr. WIGGINS. Including the irrelevant data?

Mr. MONDELLO. Yes. Whatever the investigational report contains, that investigation report sits in a file in Mr. Drummond's office. The

old ones are sent to some secure Federal records center someplace, and I have heard it estimated that there are literally millions of these files which are merely a reflection of the residue of having hired 300,000 people a year for so many years.

Mr. WIGGINS. Is there any public purpose to be served by retaining information upon which you did not rely in making your employment decisions?

Mr. MONDELLO. Well, maybe this is not an answer. Yes, if you are dealing with millions of files. I figured out the other night because I thought it might come up, and I had used it in another connection, you have 2.6 million files and that is the current Federal work force and you devote only 9½ seconds to doing something with each file, and it takes you 1,000 man-days, 4 man-years to do that something. That means picking it up from one end of the table and walking down and putting it at the other end of the table, no typing, no nothing. If you tell us that we have the burden of going through every one of our investigative files, and particularly if you run this back into the past, the problem of segregation of one kind of information from another is not a simple clerical problem. It is going to take some decent manpower and sometimes brainy work.

Mr. WIGGINS. Well, all right. I can understand that, the problem of purging millions of existing files. But, when we talk only prospectively, could you comment on whether it would interfere with the function of your agency, if you did not retain in the future raw data upon which you did not rely in making your judgments?

Mr. MONDELLO. Well, I do not think—you know, we have in Mr. Drummond's office, we have a review committee. We take people of sense and judgment that we trust, and who have seen this kind of business before and they actually vote on cases, whether X should be declared unsuitable on the basis of what is in the file. I think that they do write memoranda to each other about particular cases, and they sometimes do, indeed, reflect on what it was that caused them to make a determination of a certain sort, but they do not do that in every case, and they do not, when they do it, act like our board of appeals and review which knows its opinions will be public, must be rational, must hang together right, and must, indeed, disclose what they considered, what the issues were and so on. It is completely different kind of administrative routine. So, it is not easy.

First of all, if we do decide what we did not use and what we did, it is not easy to segregate the two, even if that is possible and feasible to do. And if you give us the money to do it, if you want it done, sure, I suppose it can be done at great cost. I do not know what you would propose to do then. Destroy the irrelevant data? I suppose that could be done.

Mr. WIGGINS. Mr. Chairman, did you want me to yield?

Mr. EDWARDS. I am curious as to what part of any bill would make the law apply to the internal records of the Civil Service Commission. It seems to me that the total thrust of our effort is with criminal record disseminating organizations.

Mr. WIGGINS. I agree with that, Mr. Chairman. And my followup question about retaining or destroying irrelevant data was a product of your first answer.

Let me go on and ask a few more questions about what you think is right. What about the conceptual proposition of requiring criminal justice agencies to update their dispositions of cases which they have handled?

Mr. MONDELLO. It is a great idea. I do not know whether it is feasible, practicable.

Mr. WIGGINS. Conceptually you would support the idea if we can work it mechanically in a reasonable way?

Mr. MONDELLO. Yes, sir.

Mr. WIGGINS. I take it that you also support conceptually the idea of limited access of criminal justice information?

Mr. MONDELLO. By noncriminal justice agencies?

Mr. WIGGINS. Well, just conceptually the idea of some limitation? Now, the tough question, of course is what shall be those limitations and where should it go, in the public interest, and can you give me some thoughts about what is the proper access in your mind for criminal justice information?

Mr. MONDELLO. Well, I think I spoke about that before you came in this morning. My feeling about that is that you should not, if you want to give someone a function to perform, such as has been given to the Civil Service Commission, you should try very hard not to close them off from information. If you do not like the way they do the business, make them change their way of doing it. But ultimately you have got to get people who are trustworthy in the handling of information who will not sack the system, who will not deny people's private rights. My suggestion is that if the purpose to be served by access to particular information is a worthy purpose, then do not place arbitrary limits on it, but be sure that the people who perform that purpose are functioning well, and that is a question of oversight.

Mr. WIGGINS. Do you believe it would be a reasonable limitation to confine it to public access by public agencies; I mean, to prohibit absolutely private access to criminal justice information?

Mr. MONDELLO. Well, I believe it was you, sir, who brought up the issue of whether private lawyers in litigation should have access. I can understand for those purposes of the ordinary civilian workaday world in which we live, that Congress is aware that litigants ought to have a crack at decent information and if there is only one repository for it, maybe they ought to have it. If you detect that there, even there there ought to be limits, for example, you could have sealed records in courts for the reception of such information. We could have lockboxes all over the place. It just depends on how important the limitation on access is, and how much money you have to afford to do it. But I think these are the competing concerns.

Mr. WIGGINS. Well, I am driven to the conclusion that if we provide this sort of maximum responsible flexibility on a need to know basis that we end up with a statute that says that access to criminal justice information will be confined to criminal justice agencies, or to others, where authorized by law period. And then the legislative bodies make judgments as to whether or not there is a public purposes to be served in a need to know context to all manner of other agencies which conceivably would want access to it. But would that be any true limitation to the access to do that?

Mr. MONDELLO. The way you just described it, sir, it does not sound like much of a limitation. The authorized by law, I would suppose, would include executive orders as well as statutes, and Federal as well as State statutes and so on. I notice that the bill or one of these bills makes a distinction depending on whether your source of authority is statute or Executive order.

The one thing I did not like about the bills, which I hope you did not treat as hypertechnical, was the provision framed in such a way as to place within State and local criminal justice agencies the decision whether to demand of a requester that he come in with the consent of the individual about whom he is making the request. There is a statement related to that provision that unless the requester has a bill, a statute which authorizes such requests, he cannot make it. It does not have to be honored. Well, that sems to say that unless you have got a statute, probably passed after your proposed bill is passed, you do not have anything. And the simple direction by the Congress in 1883 to us to go and investigate as to relative capacity and fitness goes down the drain as an inadequate basis for making such a request.

Mr. WIGGINS. I understand that that is a possible and perhaps a very realistic construction of the proposed statute.

Tell me, what is your attitude about the concept of sealing records for all purposes?

Mr. MONDELLO. Well, again, if the sealing takes place on account of age of records, I have difficulty as I have stated with the 1-year limitation of arrest records and with the 7-year limitation on other criminal record information. Because it seems simply again to provide blinders—do not look here—and you never know what you are missing. There is no way to predict what that will be.

Mr. WIGGINS. That value overweighs the age argument? We should have no limitation on it at all? But do you support some limitation, some currency in the records in order to make them available to you and other agencies which may have access to them?

Mr. MONDELLO. Well, sir, we go back 15 years and I think that would violate all of the standards that you put in this statute.

Mr. WIGGINS. Well, is that 15-year period a reasonable time?

Mr. MONDELLO. Well, after your hearing last Thursday Mr. Drummond went back to his office and he wanted to find out just what was going on there because of the number of questions of the kind that had been raised and so he asked his people to simply take the current block of adjudications of suitability that were going on in the office, no preselection of any sort, just take them all and look at them and see what they are. We found out that out of I think there were 280—well, approximately, an approximate figure will do for the example. Out of about 280 cases that they looked at, it was noted that most arrests and convictions discovered had occurred during the most recent 5 years. Most. I do not know the precise figures on that one. Violations ranged from everything from public drunkenness to assault with a deadly weapon, and there was one case of premeditated murder, but that was older than 5 years. It could have been within the 7-year period; I do not know. But we use guidelines which are somewhat flexible.

Mr. WIGGINS. Tell me about the 15-year guideline. Does that make sense to you or is that too restrictive, too liberal?

Mr. DRUMMOND. The 15 years that Mr. Mondello is referring to is for our full field investigations, and these we will do about 20,000 of this year. We do not personally investigate back 15 years, but we would make record searches at police jurisdictions during that period of time.

Mr. WIGGINS. What about something older than 15 years?

Mr. DRUMMOND. We probably would miss it unless through the current investigation, with emphasis on the 5 years, you would possibly pick it up.

Mr. WIGGINS. If a conviction were revealed to you on the basis of a normal record search, for example, at the FBI, 20 years old, would you do anything further in investigating that, the facts and the circumstances surrounding that conviction?

Mr. DRUMMOND. That would depend in a personnel investigation on what we found to date. Normally it would not even be considered in any adjudication.

Mr. MONDELLO. But it might be. I think that is the point Mr. Drummond is making. If you had a recent episode similar in character to the episode for which there was a very old criminal conviction, you reach that point in the suitability determination where you are weighing what the risk is and if you are at the delicate hanging point, you might have that tip the scale. I do not think there is any way to predict.

Mr. WIGGINS. In order to make the balancing you have to have access to the facts?

Mr. MONDELLO. Yes, sir.

Mr. WIGGINS. And you would attach perhaps less weight to a very ancient record, but you would reserve in a perfect world the right to give some weight to it?

Mr. MONDELLO. I think even beyond that. If that is all you had, if this was the only peccadillo in an otherwise decent record, you just would not regard it. It is too old. Everybody would understand that.

Mr. WIGGINS. I take it then that the answer of whether there should be a sealing of records, in your view the answer is no?

Mr. MONDELLO. That is a very complicated judgment. You are weighing the danger of exposure of people's private lives to people like us, and to a lot of other people as well, because once the system is compromised, God only knows where that information goes and into whose hands it goes and there is merit in setting, I hope, guidelines rather than arbitrary fixed time periods. But, you know, I suppose even——

Mr. WIGGINS. Do I understand that to be your preferred model, the guidelines for the use of information?

Mr. MONDELLO. Some flexibility.

Mr. WIGGINS. As distinguished from barring any access to it at all?

Mr. MONDELLO. Yes, sir.

Mr. WIGGINS. That is the only question I have, Mr. Chairman.

Mr. EDWARDS. Mr. Sarbanes.

Mr. SARBANES. Mr. Mondello, I want to make sure I understand a couple of things here. Does the Commission run a check on every applicant for Federal employment regardless of the nature of the job. whatever the job may be?

Mr. MONDELLO. I think that is true, yes, sir.

Mr. SARBANES. Obviously you apply a different standard, I would assume, in evaluating the suitability depending upon the nature of

the job as distinguished from a jaintor in a building to someone who is going to handle important secrets. But, to start out you run a check with respect to both that is similar, is that correct?

Mr. MONDELLO. The NACI. Is that done in a full field investigation?

Mr. DRUMMOND. The NAC part. The inquiry is by personal investigation. The National Agency Check and Inquiry consists of a check of the FBI name files and fingerprint files, our security index which contains a record or all investigations conducted by us or conducted by other agencies to avoid duplication, and in some cases a check of the House Internal Security Committee files. And if the individual was in the military service, a check of the Defense Intelligence Index, then inquiries, forms are mailed to former employers for those cases that are nonsensitive for the past 5 years, educational institutions where they attended and references. That is what the NACI is. It is a complete paper process. Should any of these develop information which should warrant our resolution of information or investigating further, this would be converted to personal investigation. The vast majority of them, once they are completed, the application is sent to the agency that we are working it for, simply marked processed under section 3A of Executive Order No. 10450, and there really is no file of that except an index card. That would be all that would be left. If we did do any investigation, personal investigation, then we would keep a file on that. The other investigations, your full field investigations which are personally conducted by an investigator, they number about 20,000 and always end up with a report.

Mr. SARBANES. And those are related to the nature of the job?

Mr. DRUMMOND. Which are related to what we would call critical sensitive positions, in those cases.

Mr. SARBANES. On the written accumulation of the data you make no distinction between jobs, and you run the same kind of check with respect to past potentially criminal involvement no matter what the nature of the job is?

Mr. DRUMMOND. For all intents and purposes.

Mr. SARBANES. And on the nature of how far back you go, or the nature of the offense, it is the same in each instance, is that correct?

Mr. DRUMMOND. Yes, sir.

Mr. SARBANES. I am interested in the testimony on page 8 of your prepared statement, and I guess it follows a little bit along the line of thought for the kind of point that Mr. Wiggins was trying to get at. You say "we feel it is vitally necessary to the accomplishment of an important Commission mission—that is, to aid governmental agencies in determining the suitabiilty of applicants for Federal employment—that arrest and conviction records continue to be available for our evaluation and that of the agencies." I want to ask this question: With the phrase "arrest and conviction records," are you talking about two separate things or are you linking that together? You do not mean an arrest and conviction with respect to that arrest, or are you separating——

Mr. MONDELLO. I am separating.

Mr. SARBANES. You are separating, so you are talking about an arrest record without a conviction?

Mr. MONDELLO. Yes, sir.

Mr. SARBANES. All right. My next question is if I were to take that same statement and put in front of "important State Commission

mission to aid governmental agencies in determining the suitability of applicants for State employment," would you feel that that was an appropriate power, that no limitations ought to be placed? Would you assert for that agency the same scope that you are asserting in the statement for your agency?

Mr. MONDELLO. Certainly if I worked for one of those agencies, because I believe they should be as much interested as we in hiring good people since they are dealing with the people of the United States too.

Mr. SARBANES. And if I were to include a county, I take it the answer would be the same?

Mr. MONDELLO. Yes, sir.

Mr. SARBANES. Now, if I were to put in the State Banking Commission to aid banking institutions in determining the suitability of applicants for bank employment, what would be your answer?

Mr. MONDELLO. You would be dealing there with a more private rather than public function. The situation might be distinguishable. I do not think a legislature like our own, the Congress, or State legislatures, as they are busy working on this for State purposes, need to do the same thing with respect to public entities as they do with others. I think there are significant differences, and they might be telling in dealing with the delicate balance you are running through to see how far you can go to protect privacy, which is essentially what you are about, without defeating other valid constitutional purposes at the same time.

Mr. SARBANES. Well, what are the distinctions, or what are the factors that you would advance as enabling you to make this distinction?

Mr. MONDELLO. I think you are asking me what my definition of public interest would be, and it is not easy. Now whether a commercial establishment goes broke ultimately can have an effect on the public if it happens too frequently. Whether a particular bank goes broke because it hired somebody who was an embezzler and it did not discover it, is one of those questions. Since you are starting in this area, maybe you ought to start slowly and worry initially about the Federal concerns. You have already charged our Commission under the Intergovernmental Personnel Act to see that States do, indeed, run merit systems and select their personnel with care, and treat them decently, this kind of thing. Now, these are all public purposes and I think it is more important that you deal first and best with those entities which are, indeed, public and which affect everybody in the country, than it is that you worry about particular private commercial establishments. But, you know, there are other choices and I am not a seer. This is the way I would cut the pie.

Mr. SARBANES. When you say worry about them, do you mean worry about them in the sense that they should have access to this information, or worry about them in the sense that we could go ahead and make the judgment that they should not, and only protect access for the public agencies?

Mr. MONDELLO. I thought the question you asked me, the first implication was the question of whether you should allow banks to have access because of their own private interests.

Mr. SARBANES. I take it your response in the sense of not worrying about it is that we should not, is that correct?

Mr. MONDELLO. I really do not know enough about the situation to make a determination now. But I am suggesting that there might be differences in what you do with respect to banks and what you do with respect to governments.

Mr. SARBANES. Now, to the extent that we allow anyone to come under this kind of a justification that you put forth here on page 8, then all of the points you made about having trained personnel who would use these records in a commonsense and sensible way, of course, applies to the personnel of all those agencies as well. That argument, coupled with this extension here, does mean that we have to worry about the sensibility of the Civil Service Commission, but it means we also have to worry about the sensibility of every agency that is brought under these same rubrics?

Mr. MONDELLO. Absolutely. Absolutely. I think that you can establish rules for people in the security community and for people in the personnel fraternity about how they treat investigative reports, and you can insist that those rules be followed. We do some of that ourselves. I suggested earlier that on a postaudit basis we go out and examine the agencies to see if they are really locking these files up, and checking to see if they carry logs of who sees them and for what purpose.

Now, I do not know how infallible this system is, and I do not know how much money we spend on it, but we do it. And you probably have noticed the Commission is moving in a lot of different areas at once to see that agencies are doing what they are supposed to do about personnel matters, but you know, eternal vigilance is the price you pay. And I think you have to put your faith in those people to do the job right, and to get rid of those who do not. It is as simple as that.

And yes, you pay a high premium on getting good people and making them do the job right, because the protection you are trying to achieve is so brutally important in this country that it has got to be done that way.

Mr. SARBANES. Of course, the alternative approach is to determine that certain information would be relevant so infrequently, and that the potential for abusing it may be so great in terms of the sensitivity of the personnel handling it that you would make the judgment not to permit access to it, even though in a few instances that might handicap an extremely perceptive and sensitive evaluator. That judgment could certainly be made with respect to a lot of this information that we are talking about, could it now?

Mr. MONDELLO. Absolutely. And my purpose in being here this morning is to let you know what we do at the Commission so that you can capably make that judgment as to where you want to draw this line.

You could block out all information from us and render us powerless to do a decent job. I trust that you would not, and I do not know where you are going to draw the line ultimately.

But, yes, that is what the game is all about.

Mr. SARBANES. Does your rehabilitated offender program apply—I take it it applies to those with conviction records, not arrest records?

Mr. MONDELLO. Yes, sir. We do not make much of the fact that somebody has been arrested. We are not interested in that. We are interested in what he was arrested for, what the episode was, and whether that means something to us.

Let me put it this way. A person need not have been arrested for us to be interested in what behavior he conducted at a particular time and a particular place so that crystallizing this piece of information in the arrest record does not really make an awful lot of difference. Arrest records are simply a very convenient source of lead information for us that tells us about what people have done, and then we have to go and still find out what the facts were, find out what he really had done.

We do, indeed, talk to police officers who had made arrests, because the blotter does not reflect enough of what went on.

Mr. SARBANES. Suppose someone has been arrested and acquitted. Do you go out and check that?

Mr. MONDELLO. Absolutely.

Mr. SARBANES. You do?

Mr. EDWARDS. Mr. Sarbanes, may I ask a question at this time?

Mr. SARBANES. Yes.

Mr. EDWARDS. Are you telling the committee that you conduct a mini trial where there is an arrest record and then there is no——

Mr. MONDELLO. No, sir.

Mr. EDWARDS [continuing]. And decide whether or not the man should have gone to trial or in a case where he was acquitted you review the case and decide whether or not the decision of the judge or jury was wrong? That is what you are really telling us, Mr. Mondello.

Mr. MONDELLO. I do not think we are saying that at all. There are many reasons why people get either acquitted or nol prossed or what have you. Things terminate short of conviction, short even of trial, short even of prosecution. There are many cases where U.S. attorneys just do not go to a grand jury with something because they are just too busy doing other things, and you can't take every case in an office and attempt to prosecute it.

But, where somebody makes a credible, sensible, allegation to us about some behavior which, if it occurred on the job would be damaging, we would look into it. I am not suggesting to you that we think we are judges, and that we make a decision about these things in a final or in an irreversible fashion. We are supposed to use our judgment as to whether an event actually, indeed, took place, and if it did whether it is relevant to the kind of position that the person is applying for. We cannot duck. That does not mean we are determining guilt.

Mr. SARBANES. Well, this is a very interesting answer because you really have three situations. You have an arrest and conviction determined by a court. You have an arrest and it is left there and you say that in that instance you feel you have to try and find out why it was left there. And you have an arrest and a judicial determination of innocence. And I understood your answer to my earlier question to be that, without getting into an argument now about category No. 2, that in category No. 3 you go out and investigate, is that correct?

Mr. MONDELLO. There is a category No. 4 where somebody——

Mr. SARBANES. I shudder to think of what is coming.

Mr. MONDELLO. Well, let me tell you. You know, you ought to know about it. When somebody makes an allegation to us that X is guilty of a particular form of behavior and it is relevant to the job situation, we investigate it. That is what we are here for. It does not matter if he never achieved the status of an arrest or a conviction, but we are no

more second-guessing the courts about these other statuses than we are when we hire a rehabilitated offender.

We are not undoing a conviction, we are simply taking a chance.

Mr. SARBANES. Well, I mean I shudder less at that than at the situation in which there has been a judicial determination of innocence. In other words, you totally are discounting the whole court process.

Mr. WIGGINS. Well, would the gentleman yield?

Mr. SARBANES. Well, I have been asked twice. I yield to Mr. Waldie and then I will yield to Mr. Wiggins.

Mr. WALDIE. I just want to bring up a current case which indicates that the responses are not quite as bizarre as they seem, where the Vice President, former Vice President, was seeking employment, and the court record shows that he failed to pay income taxes. But, it might be important for the employer to know that he also committed bribery, or at least the indications were very strong that he did, though he was not convicted of that.

I guess under the responses you have made that you believe that that allegation and those circumstances are important for the employer to understand, and that under the position the committee has generally taken, the allegations as to bribery involving Mr. Agnew could not be made part of an employer's investigation? Would that be your understanding of the restrictions of this bill?

Mr. MONDELLO. No, because as I understand the bill if there were no arrests for bribery, so that it did not——

Mr. WALDIE. But he was not convicted for bribery. He actually was not even arrested.

Mr. MONDELLO. I want to focus on the bribery portion of what you said because that is the portion where there is no public mechanism, like arrest or conviction, or what have you that took place. An employer might still be interested.

Mr. WALDIE. Of course, an employer might. An employer should be interested, including the Federal employer. The question I have is could the Federal employer, if we passed this law that we are proposing, have access to and consider the probability that the Vice President participated in accepting bribes?

Mr. MONDELLO. My difficulty, Mr. Waldie, is that I do not understand how the bribery allegation gets involved in a criminal justice agency record. If I could bridge that gap, then I think, yes, the answer would be the employer would never find out. But, I think again, as I was reminded earlier, getting information from arrest records and conviction records is not the only way to get information. The chairman was suggesting to me that a good investigator should not miss obvious leads and that he will pick up information of this sort that you are talking about.

But, I do not understand that the kind of allegation that you are describing would find its way into a criminal justice record system so, therefore, if it is not there ever, then you are not impeding anybody by denying them access.

Mr. WALDIE. Well, it found its way into the indictment because the indictment was published.

Mr. MONDELLO. Well, then let me put it the other way. If I were, indeed, somehow carried in a criminal justice record, yes, this bill

would potentially deny the employer, the Federal employer the ability to get at it.

Mr. WALDIE. I thank the gentleman for yielding.

Mr. SARBANES. Mr. Wiggins.

Mr. WIGGINS. Well, I wanted to make an observation that we should not easily equate a determination of not guilty with a determination of innocence.

Those are two, in my perception, different concepts, and not every finding of guilty can be truly regarded as a total vindication or a lack of culpable conduct. It is a mixed bag, frankly. I suppose that to use another illustration, you use the case of the Vice President. To use another illustration, Daniel Ellsberg has been found not guilty but I would hate to think that if Daniel Ellsberg made application for employment in some sensitive position that the Government would not be mindful, and have no right to be mindful of the fact, that there were circumstances which bear upon his right to future employment.

So, we should not easily equate findings of not guilty, which are judgments based upon proof beyond a reasonable doubt and the total innocence of the person.

Mr. MONDELLO. Mr. Wiggins, we have experience with that within the Commission or the Federal Government in the sense that on occasion a meat inspector or some Government functionary will be indicted for bribery, or being on the take or what have you, and the case goes on and it aborts short of conviction. Sometimes it is an acquittal and, I think I have even seen the case where it was a directed verdict of acquittal. The Government agency involved then went after the individual because it did not trust him, and tried to fire him. So, they filed the notice of charges, went through the whole routine and some of those cases have gotten into court and the courts have upheld a removal of people who were acquitted. What is important is what individuals actually do, not how they are carried in some records some place. That is what we are trying to get at.

Mr. WIGGINS. I take it you are not bound by law to view the evidence as being conclusive beyond a reasonable doubt?

Mr. MONDELLO. No, sir.

Mr. WIGGINS. In the context of employment?

Mr. MONDELLO. That is correct. We follow the preponderance test.

Mr. MCCLORY. Is it my time, Mr. Chairman?

Mr. EDWARDS. Mr. Sarbanes still has the floor.

Mr. SARBANES. I think this is an interesting line of questioning, but, of course, it raises some rather serious matters as to what constitutes a final judgment and the way our society ought to operate and, in effect, you are saying that if you go to court, and you get an acquittal, that does not really count for very much.

Mr. MONDELLO. It may or may not.

Mr. SARBANES. For purposes of employment. You are still up for grabs with respect to the conduct, even though in a judicial determination you have been acquitted?

Mr. MONDELLO. That is correct.

Mr. EDWARDS. Mr. McClory.

Mr. MCCLORY. Thank you, Mr. Chairman. I want to commend the gentlemen on their testimony. I think it has been most illuminating and I commend them on the administration of their offices in the light

of the restrictions and the limitations, and particularly to commend them for the enlightened manner in which they appear to be treating the cases of prior arrests, even prior convictions which seems to me to be consistent with our efforts to secure a full rehabilitation in those cases where it is possible.

I, in my own case, have introduced a measure which is H.R. 13164, which is designed to reserve the important element of privacy with regard to this whole subject of criminal justice information, and at the same time not restrict governmental agencies.

As a matter of fact, my colleague from Maryland made reference to the fact of county officials, city officials, and so on. I have used the strictly governmental agencies in attempting to encompass all levels of government, and all governmental agencies that might have occasion to desire or to inquire into this type of information in connection with purposes of employment or other purposes of governmental activity.

I would appreciate it if you would, at your convenience, secure a copy of H.R. 13164 and direct a letter to the committee with your comments so that I may know, and perhaps the commitee may also know whether that does not more accurately serve your needs by assuring the kind of privacy that we want to assure without limiting or hamstringing in any way the governmental agencies that are served by the utilization of criminal justice information, records and what we call processing data. And if you would be good enough to do that, I would appreciate it.

Mr. MONDELLO. We will be happy to do that, sir.

Mr. MCCLORY. I think that is the only comment I have to make, Mr. Chairman. Thank you.

Mr. DRINAN. Mr. Chairman?

Mr. WALDIE [presiding]. Yes, Father Drinan,

Mr. DRINAN. Mr. Mondello, you state here at least on one or two occasions, that we feel this—who is we? We oppose the concept of sealing records. You say that on page 13. Is we the Commissioners or the Department of Justice or both?

Mr. MONDELLO. I am speaking only for, and I represent only the Civil Service Commission.

Mr. DRINAN. Have they authorized the statement, the prepared statement?

Mr. MONDELLO. The prepared statement was cleared through the Office of Management and Budget, was sent to them officially by the Commission and I would presume that, yes, the Commission has cleared this.

Mr. DRINAN. All Commissioners agree with this?

Mr. MONDELLO. I have not spoken to any of the three Commissioners about this testimony. It certainly has been made available to them. I have no idea which of them have read it or if all of them have read it.

Mr. DRINAN. Pursuant to the line of questions with Mr. Wiggins, and I followed it very closely, it is my understanding that you say in the opening remarks that the Commission strongly supports the spirits of these bills, although the Commissioners, I take it, have never discussed these bills as such. They have seen your testimony. The Commission strongly supports the spirit of the bills, but they are opposed to every single feature of the bill. Is that right? There is no feature here——

Mr. MONDELLO. I think that is an awkward way to characterize it.

Mr. DRINAN. It is an awkward way, but it is true.

Mr. MONDELLO. No, sir.

Mr. DRINAN. Name one feature that you like.

Mr. MONDELLO. I will read it to you.

The bill states, one of them, H.R. 12574 that particular risks from the standpoint of the individual may be presented.

Mr. DRINAN. I have read that.

Mr. MONDELLO. Yes, sir. And I call to your attention, "including the right of privacy, procedural rights and access to employment," and that is what I am concerned with, and that is right in the bill. And we are telling you that we support that and I thought that I had explained that my purpose in being here was so you would know what we do, so you will know where to draw the line.

And by the way, there is one thing that I neglected to say which I intended to say, and I would like to say it now. The prepared statement ends with the suggestion that we would be pleased to furnish whatever technical assistance may be required in modifying the language to which we have objection. I would like to suggest that that is no small task when you are trying to create the delicate balance that I think you are interested in creating in this bill. It is going to be a real tough job to describe it right, and I simply want to suggest——

Mr. DRINAN. That is very interesting, but would you answer the question? Is there any feature of this bill that you approve of, of any of the bills? Say so if you don't, if that is your position.

Mr. MONDELLO. I do not think that that is our position, and I do not think the question can be answered quite so readily. Our difficulty with this bill is that it has, it makes inroads on our ability to function in the way we have been functioning.

Mr. DRINAN. Therefore——

Mr. MONDELLO. The judgment as to whether that is a good way to function is for you, not for us, and we are perfectly happy with that. I cannot tell you we do not like this bill. If this is what ought to be done with criminal justice information then by all means do it. We are suggesting to you that you should be more careful than the bill apparently is. And I have come up here because the Attorney General suggested to the Congress that these matters had not been adequately explored within the executive branch and, therefore, they took what I think is a very unusual step of saying, "You agencies for whom this bill causes special problems, please go up and explain it to the committee, because we have not."

Mr. DRINAN. If I may just proceed with my questioning, if you will just answer, please.

It is not unusual that this happens. It happens all of the time that agencies come forward. But, as I hear you, and I read this very carefully last night, and then your unprepared testimony that you read from notes, I see no legal or moral concept of privacy that you have.

President Nixon made statements about privacy in the State of the Union address, and he has formed a Commission, and yet I see no indication in all of your testimony here, both written and oral, that you care about privacy. You simply say that this is administratively unfeasible, and will cause a lot of complications. But, that is my reading. If I may just continue, this leads to a question. You speak, and I quote

you directly, of an investigation of a person and you say that involved here is "the exposure of private lives" and you go on to say "God only knows where that information goes."

Now, I find it frightening along the lines of Mr. Sarbanes' questioning as to what could happen when you people go behind judgments or nonjudgments of the courts. And I just would inquire as to what concept of privacy you have, and to make it specific, I wonder if you think the practice as noted on page 12 is fair? The FBI has a policy of notifying Federal agencies of arrests of their employees and you say that this policy aids administrators in making informed judgments about the continuation of these employees in the Government and this would appear to be prohibited by these bills. And I think that you are correct that it would be prohibited.

If I may ask, if the FBI sends a notice to the Commerce Department that somebody who sweeps the floor there has been arrested for drunken driving, what happens to that notice?

Mr. MONDELLO. Well, it depends on where they send it.

Mr. DRINAN. Well, where do they send it? This is precisely the type of a gross violation of privacy that these bills and the administration bill included, is designed to correct. And you come here saying, alleging that the three Commissioners have cleared this. They have never discussed it. They have seen your paper. You have no policy. You just come here and say we have no policy and I want to ask you specifically do you think that is fair?

Mr. MONDELLO. I think the practice described on page 12 is eminently fair. I have spent the last 2 hours this morning trying to explain what we do with private matters. I have tried to explain that anyone who does not like what we do with private matters in many of the cases we investigate can have these matters litigated. How else do you protect due process under our Constitution but to furnish procedures through which people can contest these things? We furnish those procedures. Our procedures have been passed on by the courts.

One of the homosexual cases——

Mr. DRINAN. Mr. Mondello——

Mr. MONDELLO. I am sorry, Father Drinan. You are challenging our ability to deal with this information and I think we do it fairly and justly.

Mr. DRINAN. I am not challenging——

Mr. MONDELLO. You give me a hypothetical——

Mr. DRINAN. I am asking you to whom, just answer the question, to whom does the FBI it send?

Mr. MONDELLO. I do not know the answer to that question.

Mr. DRINAN. You should know.

Mr. MONDELLO. Why should I know?

Mr. DRINAN. You say you do not want this, you are opposed to this screening, to this restriction of that information. I say that when the man who has dropped out of high school has this arrest record sent to his superiors, he does not know, I assume, that this is being sent. I am just asking you, as the General Counsel for the Civil Service Commission, to whom is it sent? What happens to it?

Mr. MONDELLO. And your department was the Department of Commerce?

Mr. DRINAN. Any agency. To your own agency.

Mr. MONDELLO. I know where it would go in our agency. It would go to Mr. Drummond.

Mr. DRINAN. And what happens then?

Mr. MONDELLO. He would evaluate it. If it was significant, he might pass it on to whoever was the supervisor of the individual. If it was not significant, he could ignore it.

Mr. DRINAN. Well, that does not tell me anything.

Mr. MONDELLO. I think it tells you everything. I am suggesting to you, sir, that we treat information fairly. Now, if you have evidence that we do not, I suggested earlier that you can cause us to change the way we treat it.

Mr. DRINAN. I have dozens, I have dozens of examples, sir, of people who somehow are removed, and they are on a tentative status or something, and they do not know why. They have no inherent right to this information, that report or that arrest record may be washed away and that person, it seems to me, should be protected in his job, independently of what happens when he is rightly or wrongly arrested for allegedly drunken driving. That is what it is all about.

Mr. MONDELLO. Sir, if you know of those cases, I wish you would report them to us so we can do something about them. I do not happen to know of such cases.

Mr. DRINAN. We want to protect those individuals and even the administration's bill protects those individuals from this.

I yield to Mr. Sarbanes.

Mr. SARBANES. I am interested in the assertion, and I understand why you make it, but that if you, in effect, treat the information fairly, reasonably, and sensibly, that then you are entitled to have it. Now, that does not really provide for the individual any significant protection of his privacy. His protection, in effect, rests entirely upon the good judgment and the wise discretion of people like you and others who have access to the information.

Mr. MONDELLO. Correct.

Mr. SARBANES. Of course, that is not, in my judgment, what the question of privacy is all about. It is certainly not the way other countries—Western European countries—have handled the question of privacy. And I do not think that it is a sufficient answer, as wise and as discreet as you may be, or as other agencies may be, to leave the protection of the individual's privacy to that approach. Obviously that is the problem, but, what we are looking for here, and I do not think your statement really goes to it, because your statement essentially does take the view that we do things right and, therefore, we ought to be able to get the information because we do not abuse our use of it, but the more fundamental question that may be involved here is that there may be certain kinds of information that government or other people are not entitled to get. That if certain judgments have been made about my past conduct, or unless it could be shown to be in some way very directly relevant, you are just not entitled to have it, no matter how wise and discreet you are.

Mr. MONDELLO. That is a fair way to look at it. You may decide that this bill or something very close to it, or even with more strict provisions will deny us certain information. Mind you, you are not taking on the whole job when you do that, because you are not saying to us, "Do not conduct any investigations." And whether you like it or

not, under the current process that we get our appropriations for, we are going to go out and ask questions nonetheless, and we may discover the very information that is sitting in the data bank in Massachusetts but discover it through other means, and you are not paying attention to that.

I am not suggesting you should in a bill of this character. But, you know, understand that we have tons of files in the Civil Service Commission and very much private data. So far as I know, we are the only agency in town that has regulations published in the Federal Register about the privacy with which it will treat certain data. We bar our people from telling the details of private lives to all comers, depending on who they are .

Mr. DRINAN. Would you respond to Mr. Sarbanes' point, which is the essential point, that even the administration bill says that criminal justice information should not be divulged for civilian purposes. Would you concede the validity of the fundamental principle, at least in some cases, as he said, where Western Europe is ahead of us on this fundamental question of privacy? That is what I tried to say, not quite so well, when I said I see no legal, or social, or moral concept of privacy in everything that you say.

Mr. MONDELLO. Well, I have no response other than what I have given. We do protect privacy. We have more private information probably than anybody in the country on all of our employees.

Mr. EDWARDS. Mr. Wiggins.

Mr. WIGGINS. I want to make an observation and it is the kind of an observation that I would really like to prefer to reflect upon and write it out in advance. But, we easily use the term privacy and attach to it constitutional significance, and that may not withstand careful analysis. The constitutional right of privacy, which has been recognized in a few cases, has been regarded as a right to be left alone rather than insulation from public acts. There is almost an inherent tension between the public interest and a private interest when we are dealing with notorious public acts. And I take it that an arrest is a notorious public act. There is a public interest to be served by giving publicity to the fact of an arrest. It would be unthinkable to believe someone could be arrested privately and in secret and tried, punished, and convicted in secret. There is public interest in seeing that that does not happen.

If we recognize the public's interest in learning of an arrest through the news media, and we do recognize that right, it seems idle to believe that a public agency must garner whatever information it gets in an imperfect fashion from scanning newspapers, and subscribing to clipping services. Rather we ought to recognize that, recognize that it has a legitimate interest in getting precise data with respect to this notorious public act of an arrest.

The underlying problem that bothers me, and I would like to think about it more, is that a recognized right to be left alone is not tantamount to a right to nondisclosure of notorious public acts. And yet, we often make that easy transition without careful analysis.

Mr. SARBANES. Would the gentleman yield then?

Mr. MCCLORY. Would the gentleman yield then?

Mr. EDWARDS. If the gentleman would yield for just a moment, we should also remember that this bill has to do not with whether or not

a notorious public act shall be kept secret, or should not be in the paper, or should not be spread in the records of the courts, available for perusal at any time.

It has to do with the runaway, described by Judge Gesell in the *Minard* case, with the out of control system of criminal recordkeeping and dissemination prevalent in the United States today. It is a very large problem. A number of States, and many, many countries have tried to face up to it and to correct their procedures so that this dissemination should be curbed because there are serious violations of constitutional rights involved, and certainly civil rights involved because minorities in many areas of the country have perhaps been arrested unfairly more than Anglos. And actually, as I see your testimony, sir, you generally approve of the bill, but you say it really should not apply to the Civil Service Commission, because the Civil Service Commission does a bangup job and you are sensitive and you are humane, and have good rules.

Now, however, you would readily admit that it really should apply to a lot of other private agencies in the country, and perhaps some public agencies. Is that not correct?

Mr. MONDELLO. I think that is a good statement of our position; yes.

Mr. EDWARDS. Now, I will make one further observation. Even insofar as the Civil Service Commission is concerned, there are only two main areas where you strongly disagree with the bill.

One with regard to the sealing of records, but you are willing to compromise that perhaps to 15 years, where the FBI is 80 years old. There are big variations all up and down the line on the sealing of records. It seems to me that you have intimated that anyway.

But, second, the big hangup that the Civil Service Commission has, and one that I think that you really have not faced up to, is that you feel that you get an invaluable lead out of an old arrest record somewhere that has no disposition attached to it and that, therefore, because your procedures are confidential, and because they are so well ordered, you should be entitled to pick up on a rap sheet arrest records older than a year that have no dispositions attached to them.

That is something that we are going to have to grapple with, because that goes to the heart of this legislation. Somewhere along the line criminal records should not have—and I am not sure if the 1 year is the right time at all—should not have naked arrest records disseminated all over the country, and even to police organizations to some extent. So, we are going to have to grapple with that and I think that you really ought to think about it because there is a very large public interest in having a cutoff date for a naked arrest record. And I am not at all sure that you should not reconsider your testimony on that when you consider the very large public interest involved there.

Mr. MCCLORY. Would the gentleman yield?

Mr. EDWARDS. First let me see. First Mr. Waldie and then Mr. McClory.

Mr. WALDIE. Just a very quick question. I was looking over this Government security and loyalty Executive order and there is much in it with which I disagree, but the question I want to ask of you involves your role as delineated in section 14 where you are supposed to review—that is the last page of the Executive order—you are supposed to review the implementation and make a continuing study to

determine subparagraph 2 tendencies to deny to individual employees rights under the Constituion.

And then if you will turn back to page—well, there is no page, but it is section 8, subsection 8. The grounds for, that you are to relate in your investigation, denying employment is refusal by the individual, upon the grounds of constitutional privilege against self-incrimination, to testify before a congressional committee regarding charges of alleged disloyalty or other misconduct. Do you consider that a tendency to deny an employee rights under the Constitution?

Mr. MONDELLO. I am a little bit lost. Can you give me the citation again?

Mr. WALDIE. OK. Start on the last page——

Mr. MONDELLO. That one I picked up.

Mr. WALDIE. Then go to section 8, subsection 8 where a lot of grounds are set forth for derogatory information in terms of employment. One of those derogatory information items is section 8, refusal by the individual upon the ground of constitutional privilege against self-incrimination to testify before a congressional committee regarding charges of alleged disloyalty or other misconduct. My question is, Is that a tendency to deny an individual employee rights under the Constitution?

Mr. MONDELLO. Yes. I would say that it has that tendency.

Mr. WALDIE. A hell of a lot more than a tendency. It is an absolute denial.

Mr. MONDELLO. My trouble with this order is that while it has not been amended in a good long time, there are a lot of things that deserve review.

Mr. WALDIE. Yes, I know. Sure. But, my question is to you, it was 1958 when it was issued and I presume the direction of section 14 was part of the original order——

Mr. DRUMMOND. 1953 it was, sir.

Mr. MONDELLO. Yes, 1953. It is very old.

Mr. WALDIE. I need a change in my glasses. But, since 1953 that direction to you has been apparent in the order. I do not know when the item involving the denial of the Constitutional privilege against self-incrimination was placed, but have any of your reports suggested that that is somewhat more than a tendency to deny a Constitutional right?

Mr. DRUMMOND. I know of no cases in my tenure, sir, involving that part of the order, and I do not have it before me, the first citation. We do carry out, through our security appraisal program, and I believe I furnished you information last spring or sent you copies of letters to agenices resulting from our appraisal, and we do look at cases that they have investigated, if they did them themselves, or that we have.

Mr. WALDIE. Maybe I had beter rephrase the question this way. Is that subsection eight, in fact, totally inconsistent with subsection two of section 14 if section two of section 14 is an expression of a desire to make certain employees are not denied their Constitutional rights? Does not subsection 8 of section 8 in fact deny them a significant Constitutional right?

Mr. MONDELLO. I think since subsection 8 of section 8 has been passed by in time, and court cases, that would have to be reviewed to see whether it has continuing validity. After all, it is only an Execu-

tive order. It does not have the force of statute, and it does not override case law.

Mr. WALDIE. But only an Executive order is why people do not get employed or discharged, right?

Mr. MONDELLO. Well, all right.

Mr. WALDIE. So the status of it is a lot more than only an Executive order, and therefore, not to be handled lightly. Would you then do this for me, would you give me a legal opinion consistent with your obligations under section 14 of this Executive order if subsection 8 of section 8 is consistent with the direction of subsection 2 of section 14?

Mr. MONDELLO. I will pick that up out of the transcript and we will do our best for you. I would not do it—I am not eager to get on that particular subject, but we will try it for you.

Mr. WALDIE. Well, I did not ask the question with any condition that you be eager to get into it.

Mr. MONDELLO. If you think it will help the committee, we will do it. It is that simple.

Mr. WALDIE. I appreciate it. I have no further questions.

Mr. MCCLORY. Mr. Chairman, I just wanted to make this comment. I think we should recognize that we are focusing attention here on a particular aspect of privacy and that has to do with the tremendous growth and development of criminal justice records and recordkeeping and informationkeeping which has been greatly expanded because of the automated programs that have been developed and the almost indiscriminate dissemination of a great deal of this information without adequate regard to the rights of privacy. So that it seems to me that we should recognize what the principal evil is that we are trying to overcome with this measure. And I am confident that to limit the dissemination of information solely to other criminal justice agencies would hamstring important governmental agencies such as the Civil Service Commission under the guise of protecting privacy, and we might merely be developing other means and devices for invading privacy perhaps, and at the same time hampering a Government agency in performing its statutory responsibility of hiring qualified people who are trustworthy and who have been adequately investigated for the jobs.

So I am hopeful that in our effort to overcome the deficiencies in the present law we will not just arbitrarily decide that we are going to deny access to information, essentially public information which can help the agencies to do the job, the statutory job that we want them to do, or even if they are performing a job under Executive order which is an appropriate Executive order that reposes responsibility for doing that job.

And again, in trying to reach that objective, I have proposed a revised version of this legislation and, again, I will appreciate your comments on that.

Mr. MONDELLO. You will have them, sir.

Mr. EDWARDS. I think Mr. McClory made some very valuable observations there. Just because you get a lead or an investigator gets a lead from an old arrest record, it does not necessarily mean that the public interest is served by you following that practice. You could use—well, let me ask you this question. You could get a valuable lead from a psychiatrist's report, could you not?

Mr. MONDELLO. Sure.

Mr. EDWARDS. But you would not use it? You would not go to a psychiatrist and demand information about a patient who was applying for a job? He would, would he not, tell you where to go, but you also would not indulge in wiretapping, or opening mail to get valuable leads? They would be valuable leads, would they not?

Mr. MONDELLO. That is right. And we have dropped those things to the side.

Mr. EDWARDS. And in very few cases will you use a lie detector.

Mr. MONDELLO. None.

Mr. EDWARDS. All right, none. But, you could get valuable leads, could you not?

Mr. MONDELLO. I do not know. It is not regarded as a terribly trustworthy instrument. But, you are right, I think if I see where you are taking me, yes, we have deliberately put away from ourselves certain techniques of investigation because they raise more problems than they can solve. We do not use wiretaps, or garbage searches, and all of this business. We are not supposed to. We are not in that kind of operation.

Mr. EDWARDS. Yes. Incidentally, you do have a section in the book relating to the use, but your testimony is that you do not use the polygraph, is that correct?

Mr. MONDELLO. That is correct. We have some restrictions in the Federal Personnel Manual that we will permit polygraphs to be used only by counterintelligence and intelligence agencies. We make the determination as to whether they are or are not, and we have to approve their regulations on how they use them, and we are very anxious to look at private rights there.

Mr. EDWARDS. Counsel.

Ms. SCHELL. I just have one question that is more a point of information. I would like to pose a hypothetical situation.

Let us say 20 years ago a man was arrested for something like contributing to the delinquency of a minor, and the case was dropped. Meanwhile he is hired by the government, but every time he is considered for a promotion, or for a lateral transfer or anything of that nature, then this arrest is naturally reviewed in the reviewing process.

Mr. MONDELLO. That is your hypothetical. I am not sure that happens. Does that happen?

Ms. SCHELL. If it is a part of his record——

Mr. DRUMMOND. The promotion panel would not have access.

Mr. MONDELLO. The promotion panel would never see an investigation report.

Ms. SCHELL. My question is, Finally he is hired as an attorney, and the court orders an expungement of the record, and this is accomplished at the local level, and also the FBI returns, at the request of the local law enforcement agency, the record. If this man now comes to your agency, and requests that you remove it from his file, would you do so?

Mr. MONDELLO. Mr. Drummond says that is not a hypothetical. We have had difficulty with the expungement statutes, and we have taken the stand, this necessarily involved the reversal of a previous stand taken by the Board of Appeals, but I succeeded in placing before the Commission, and they reversed the Board on this issue, this problem

of expungement in the sense that when the record has been expunged at the local level, again the individual who has to fill out the next application wants to know if he has got to report that as a conviction, and we have said the rule is that you do not have to report as a conviction an expunged conviction under State law. And so we got that cleared away.

Now, I thik we are currently faced with the problem of what we do when someone says destroy that record. I rather think that we might do what I know was done years ago with respect to FBI records. We had a Federal district order to expunge something from the file and what we did was we simply placed that expungement order in the file next to the documents and left them both there. And there was complaint made about that, and the court was not interested in getting into it or revising its order. But, I know that we destroy certain or some records. We certainly destroy all of the data we got on the NACI's if it is all favorable. We just do not keep it, you know. I do not know what the Commission would do if it had to face the direct decision on whether the record would be destroyed.

Characteristically, whenever there is a State law, expungement, I do not think it has gotten to the Commission.

Mr. DRUMMOND. No. It has not gotten to our Commission.

Mr. WALDIE. Do I understand you correctly that you expunge a file by putting the order to expunge the file alongside the file?

Mr. DRUMMOND. Yes, sir.

Mr. WALDIE. That is sort of a catch 22.

Ms. SCHELL. I have no other questions.

Mr. EDWARDS. Are there other questions?

Mr. BLOMMER. Mr. Chairman, may I ask one question?

Mr. EDWARDS. Yes.

Mr. BLOMMER. Mr. Chairman, thank you.

Mr. Mondello, I would like to refer you to page A of your booklet that you provided for the investigation program and ask you if that listing of your authority is complete?

Mr. MONDELLO. Oh, I doubt it. If you want a complete listing I would much prefer to offer to get it for you and update this. There are a number of things in this booklet that need updating, and I think that Mr. Drummond is thinking of putting out a different booklet currently.

Mr. DRUMMOND. We are currently amending the booklet.

Mr. BLOMMER. Well, I would like to get that and I would also ask you, Mr. Mondello, do any of the statutes that authorize you to investigate expressly provide that you check a criminal justice system?

Mr. MONDELLO. There may be one, but characteristically, they do not. They are very general in their terms. They talk in terms of investigating the relative capacity and fitness of individuals.

Mr. BLOMMER. So if a statute was passed that limited your access to criminal justice records, to performance of a statutory function wherein the statute expressly prohibited you get access, all of these statutes would have to be redrawn?

Mr. MONDELLO. Yes, sir.

Mr. BLOMMER. Or else you would be cut off from the records?

Mr. MONDELLO. Well, we could be under our interpretation of the current proposed bill. Yes, sir.

Mr. BLOMMER. Well, under no stretch of the imagination do any of these expressly provide that you go to the FBI, is that right?

Mr. MONDELLO. I do not know.

Mr. DRUMMOND. By interpretation, you might. The public law that transferred some of the investigations that the FBI was conducting prior to 1952 from the FBI to the Civil Service Commission could possibly be interpreted that if we were to do those investigations that they were doing that we could also have access to criminal record information.

The Atomic Energy Commission legislation expressly authorizes the Atomic Energy Commission to promulgate regulations to carry out their responsibilities and part of their regulations say that they will check police files. We do their investigations.

Mr. MONDELLO. But those regulations are not statutes.

Mr. BLOMMER. I understand that.

Mr. DRUMMOND. Massachusetts would not recognize their regulations, so we cannot give the Atomic Energy Commission any arrest record information from there.

Mr. BLOMMER. I understand that.

Let me ask you, do you perform any other function at the Civil Service Commission that requires, or that you routinely get what could be described as criminal justice information?

What I am trying to determine is if ongoing practices that you get criminal justice information to perform either a statutory function or one given you by Executive order? That is why I am interested in this list.

Mr. MONDELLO. Well, I think the list would be inadequate to fill the bill that is required by the bill, your proposed bill. It sounds far too precise for me in terms of—unless you are authorized to go to——

Mr. BLOMMER. No. No. I understand that. But, I am thinking in terms of going down the line, a statutorily imposed function, an Executive order imposed function, and I want to know if there is any other category there.

Mr. MONDELLO. Well, what do you think of my obligations under the Hatch Act? That is an enforcement function of sorts, but we do not characteristically go to police records for that.

Mr. BLOMMER. What I wish you would do though, Mr. Mondello is to supply that information so that we know exactly what we are going to be cutting off if we say only as authorized by statute. In other words, we want what you say is important, and it is easy for us to say something, but I want to know how it affects you.

Mr. MONDELLO. OK.

Mr. BLOMMER. Thank you.

Mr. EDWARDS. If there are no further questions, we thank you, Mr. Mondello, Mr. Drummond, and Mr. Myers for appearing here. You have been very helpful, and we will be in communication with you.

[At 12:05 p.m., the hearing was adjourned.]

ADDITIONAL MATERIAL

DEPARTMENT OF STATE,
Washington, D.C., August 23, 1974.

Hon. PETER W. RODINO, Jr.
Chairman, Committee on the Judiciary,
House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: The Secretary has asked me to thank you for your letter of April 3 requesting the views of the Department on H.R. 188, a bill to amend title 28 of the United States Code to provide for the dissemination and use of criminal arrest records in a manner that insures their security and privacy.

The Department of State believes that certain features of H.R. 188 may not be sufficiently clear to permit continued access to certain criminal records which our Office of Security considers to be a significant part of the background investigation it is required to conduct of every applicant for employment in the Department of State and the Foreign Service, and that these features would seriously hinder the Department of State in discharging its security responsibilities. This bill would regulate access to dissemination of criminal arrest records, would provide for inspection and correction of arrest records, authorize the Attorney General or an officer of a law enforcement agency to apply for a court order if dissemination or use of such record is necessary, authorize the Attorney General to prescribe regulations to carry out the provisions of the bill, and provide civil and criminal penalties for violations of the provisions of the bill.

The Department has responsibility in making two major types of determinations concerning personnel. The first type of determination concerns acceptability for and retention of employment. By virtue of Executive Order 10450, certain sections of the Foreign Service Act and obligations imposed by the Senate Foreign Relations Committee, the Office of Security of the Department of State investigates applicants for employment with the Department and the Foreign Service. These investigations are intended to permit responsible evaluation of the applicant's general suitability for employment as well as a determination of his fitness for security clearance.

The second category of determinations involves access to classified information. Executive Order 11652 provides that only those persons who are reliable and trustworthy shall be given access to classified information.

An enlightened determination of acceptability, retention, or clearance, as described above, can only be made after consideration of all relevant information, including the checking of criminal arrest records maintained by Federal, state and local authorities. The officials of the Department of State who are charged with making the determinations cannot perform their duties if they are denied access to relevant criminal justice information. Therefore, denial of such information, as contemplated in the bill, may make it impossible for the Department to discharge its responsibilities under executive orders or national policy.

The Department of State strongly believes that the need for access to criminal justice information, including criminal arrest information, is an essential part of adequate security investigation procedures. This should be recognized by clear and unambiguous provisions in the draft bill. Furthermore, inasmuch as major programs under the executive orders mentioned above are administered by the Department of State under directly derived authority, it would be inappropriate either to prohibit the direct acquisition of such information or to subject the use of such information to the approval of another Cabinet officer, in this case, the Attorney General.

It is also the position of the Department of State that any effort to curtail access to criminal arrest records, such as because of a lapse of time or where a prosecuting attorney does not prosecute, no matter what the reason, will impair our ability to fulfill our responsibilities effectively.

I would like to stress that any criminal arrest information obtained by the Department of State is afforded a degree of protection equal to that applied to classified information. Department of State restrictions on access to such information equal or exceed those provided in the bill.

In conclusion, I would like to assure you that the Department of State can certainly support the objectives of the proposed bill, which we understand to be the prevention of unwarranted use of criminal arrest information which tends to stigmatize or otherwise unfairly penalize the citizen on the basis of outdated or inaccurate information. We believe, however, that our investigative and evaluative procedures, which include a requirement for personal interview with every applicant, are fully adequate to preclude such abuse and to assure the basic objectives or fairness sought in the proposed bill.

The Office of Management and Budget advises that from the standpoint of the Administration's program there is no objection to the submission of this report.

I hope you will call on me if you believe we can be of further assistance.

Cordially,

LINWOOD HOLTON,
Assistant Secretary for Congressional Relations.

DEPARTMENT OF STATE,
Washington, D.C., August 23, 1974.

Hon. PETER W. RODINO, Jr.,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: You will recall that on April 12 I wrote you about the views of the Department of State on H.R. 9783, a bill to regulate the collection, storage, and dissemination of information by criminal data banks established or supported by the United States.

The Department of State believes that certain features of H.R. 9783 may not be sufficiently clear to permit continued access to certain criminal records which our Office of Security considers to be a significant part of the background investigation it is required to conduct of every applicant for employment in the Department of State and the Foreign Service, and that these features would seriously hinder the Department of State in discharging its security responsibilities. This bill would regulate access to and use of criminal justice information contained in criminal data banks as defined in the bill. It would also provide for procedures to assure the security of the information in the data banks, to provide for updating of the information and for purging outdated information. It would also provide for certain civil and criminal remedies for violation of its provisions and would authorize the Attorney General to exercise certain controls and issue implementing regulations.

The Department of State has responsibility in making two major types of determinations concerning personnel. The first type of determination concerns acceptability for and retention of employment. By virtue of Executive Order 10450, certain sections of the Foreign Service Act and obligations imposed by the Senate Foreign Relations Committee, the Office of Security of the Department of State investigates applicants for employment with the Department and the Foreign Service. These investigations are intended to permit responsible evaluation of the applicant's general suitability for employment as well as a determination of his fitness for security clearance.

The second category of determinations involves access to classified information. Executive Order 11652 provides that only those persons who are reliable and trustworthy shall be given access to classified information.

An enlightened determination of acceptability, retention, or clearance, as described above, can only be made after consideration of all relevant information, including the checking of criminal records maintained by Federal, state and local authorities. The officials of the Department of State who are charged with making the determinations cannot perform their duties if they are denied access to relevant criminal justice information. Therefore, denial of such information, as contemplated in the bill, may make it impossible for the Department to discharge its responsibilities under executive orders or national policy.

The Department of State strongly believes that the need for access to criminal justice information, and particularly to criminal offender record information, is an essential part of adequate security investigation procedures. This should be recognized by clear and unambiguous provisions in the draft bill. Furthermore, inasmuch as major programs under the executive orders mentioned above are

administered by the Department of State under directly derived authority, it would be inappropriate either to prohibit the direct acquisition of such information or to subject the use of such information to the approval of another Cabinet officer, in this case, the Attorney General.

It is also the position of the Department of State that any effort to curtail access to criminal records, either by sealing such records after a lapse of time or by excluding certain ostensibly insignificant infractions—the latter often used by local authorities to describe more serious offenses including those involving moral turpitude—will impair our ability to fulfill our responsibilities effectively.

I would like to stress that any criminal justice information obtained by the Department of State is afforded a degree of protection equal to that applied to classified information. Department of State restrictions on access to such information equal or exceed those of any criminal justice agency which would be an authorized recipient under the bill.

In conclusion, I would like to assure you that the Department of State can certainly support the objectives of the proposed bill, which we understand to be the prevention of unwarranted use of criminal record information or similar abuses which tend to stigmatize or otherwise unfairly penalize the citizen on the basis of outdated, inconsequential or even imperfect information. We believe, however, that our investigative and evaluative procedures, which include a requirement for personal interview with every applicant, are fully adequate to preclude such abuses and to assure the basic objectives of fairness sought in the proposed bill.

The Office of Management and Budget advises that from the standpoint of the Administration's program there is no objection to the submission of this report.

I hope you will call on me if you believe we can be of further assistance.

Cordially,

LINWOOD HOLTON,
Assistant Secretary
for Congressional Relations.

DEPARTMENT OF STATE,
Washington, D.C., August 22, 1974.

Hon. PETER W. RODINO, Jr.,
Chairman, House of Representatives,
Washington, D.C.

DEAR MR. CHAIRMAN: You will recall that on April 12 I wrote you about the views of the Department of State on H.R. 12574, a bill to facilitate and regulate the exchange of criminal justice information.

The Department of State believes that certain features of H.R. 12574 may not be sufficiently clear to permit continued access to certain criminal records which our Office of Security considers to be a significant part of the background investigation it is required to conduct of every applicant for employment in the Department of State and the Foreign Service, and that these features would seriously hinder the Department of State in discharging its security responsibilities. This bill would regulate access to and use of criminal justice information contained in criminal justice information systems as defined in the bill. It would also provide for procedures to assure the security of the information in the systems, to provide for updating and correction of the information and for sealing certain information. It would also provide for certain civil and criminal remedies for violation of its provisions and would authorize the Attorney General to exercise certain controls and issue implementing regulations. The bill provides for exceptions to some of the restrictions on use and dissemination if necessary because of reasons of national defense or foreign policy upon the decision of the Attorney General.

The Department of State has responsibility in making two major types of determinations concerning personnel. The first type of determination concerns acceptability for and retention of employment. By virtue of Executive Order 10450, certain sections of the Foreign Service Act and obligations imposed by the Senate Foreign Relations Committee, the Office of Security of the Department of State investigates applicants for employment with the Department and the Foreign Service. These investigations are intended to permit responsible evaluation of the applicant's general suitability for employment as well as a determination of his fitness for security clearance.

The second category of determinations involves access to classified information. Executive Order 11652 provides that only those persons who are reliable and trustworthy shall be given access to classified information.

An enlightened determination of acceptability, retention, or clearance, as described above, can only be made after consideration of all relevant information, including the checking of criminal records maintained by Federal, state and local authorities. The officials of the Department of State who are charged with making the determinations cannot perform their duties if they are denied access to relevant criminal justice information. Therefore, denial of such information, as contemplated in the bill, may make it impossible for the Department to discharge its responsibilities under executive orders or national policy.

The Department of State strongly believes that the need for access to criminal justice information, and particularly to criminal offender record information, is an essential part of adequate security investigation procedures. This should be recognized by clear and unambiguous provisions in the draft bill. While the bill does provide that criminal offender record information may be used for purposes which are expressly provided for by executive order, this same provision is not written into the bill respecting criminal offender processing information, which the Department also considers necessary to discharge its responsibilities. The Department of State is also denied direct access to the information the bill authorizes the Department to use. Furthermore, inasmuch as major programs under the executive orders mentioned above are administered by the Department of State under directly derived authority, it would be inappropriate either to prohibit the direct acquisition of such information or to subject the use of such information to the approval of another Cabinet officer, in this case, the Attorney General. This is especially relevant since the bill makes exceptions to its provisions where use of the information is necessary because of reasons of foreign policy. Since the Secretary of State and the Foreign Service of the Department represent abroad the interests of the United States, and are mandated to do so by the Foreign Service Act, it is inappropriate to authorize another Cabinet officer, who is not responsible for foreign policy, to determine access to information deemed necessary for foreign policy reasons.

It is also the position of the Department of State that any effort to curtail access to criminal records, such as by sealing such records after a lapse of time or by prohibiting dissemination of information if an individual is not prosecuted, no matter for what reason, will impair our ability to fulfill our responsibilities effectively.

I would like to stress that any criminal justice information obtained by the Department of State is afforded a degree of protection equal to that applied to classified information. Department of State restrictions on access to such information equal or exceed those provided in the bill.

In conclusion, I would like to assure you that the Department of State can certainly support the objectives of the proposed bill, which we understand to be the prevention of unwarranted use of criminal justice information for non-criminal justice purposes, which may tend to stigmatize or otherwise unfairly penalize the citizen. We believe, however, that our investigative and evaluative procedures, which include a requirement for personal interview with every applicant, are fully adequate to preclude such abuses and to assure the basic objectives of fairness sought in the proposed bill.

The Office of Management and Budget advises that from the standpoint of the Administration's program there is no objection to the submission of this report.

I hope you will call on me if you believe we can be of further assistance.

Cordially,

LINWOOD HOLTON,
Assistant Secretary
for Congressional Relations.

DEPARTMENT OF STATE,
Washington, D.C., August 23, 1974.

Hon. PETER W. RODINO, Jr.,
Chairman, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: You will recall that on April 12 I wrote you about the views of the Department of State on H.R. 12575, a bill to protect the constitutional rights and privacy of individuals upon whom criminal justice information and criminal justice intelligence information have been collected and to control the collection and dissemination of criminal justice information and criminal justice intelligence information, and for other purposes.

The Department of State believes that certain features of H.R. 12575 may not be sufficiently clear to permit continued access to certain criminal records which our Office of Security considers to be a significant part of the background investigation it is required to conduct of every applicant for employment in the Department of State and the Foreign Service, and that these features would seriously hinder the Department of State in discharging its security responsibilities. This bill would regulate access to and use of criminal justice information contained in criminal justice information systems or by criminal justice agencies as defined in the bill. It would also provide for procedures to assure the security of information, to provide for updating of the information and for purging and sealing information. It would also provide for certain civil and criminal remedies for violation of its provisions and would create a Federal Information Systems Board and a Federal Information Systems Advisory Committee to advise the Board. The Board would have the authority to issue regulations to carry out the purposes of the bill.

The Department of State has responsibility in making two major types of determinations concerning personnel. The first type of determination concerns acceptability for and retention of employment. By virtue of Executive Order 10450, certain sections of the Foreign Service Act and obligations imposed by the Senate Foreign Relations Committee, the Office of Security of the Department of State investigates applicants for employment with the Department and the Foreign Service.

These investigations are intended to permit the responsible evaluation of the applicant's general suitability for employment as well as a determination of his fitness for security clearance.

The second category of determinations involves access to classified information. Executive Order 11652 provides that only those persons who are reliable and trustworthy shall be given access to classified information.

An enlightened determination of acceptability, retention, or clearance, as described above, can only be made after consideration of all relevant information, including the checking of criminal records maintained by Federal, state and local authorities. The officials of the Department of State who are charged with making the determinations cannot perform their duties if they are denied access to relevant criminal justice information. Therefore, denial of such information, as contemplated in the bill, may make it impossible for the Department to discharge its responsibilities under executive orders or national policy. Moreover, the restrictions the bill would impose on the Department would appear to be inconsistent with provisions of the bill allowing dissemination of criminal history record information and arrest information on an individual, if he applies for employment in a criminal justice agency.

The Department of State strongly believes that the need for access to criminal justice information, and particularly to criminal offender record information, is an essential part of adequate security investigation procedures. This should be recognized by clear and unambiguous provisions in the draft bill. Furthermore, inasmuch as major programs under the executive orders mentioned above are administered by the Department of State under directly derived authority, it would be inappropriate either to prohibit the direct acquisition of such information or to subject the use of such information to the approval of a Federal Information Systems Board.

It is also the position of the Department of State that any effort to curtail access to criminal records, either by sealing such records after a lapse of time or by excluding certain ostensibly insignificant infractions—the latter often used by local authorities to describe more serious offenses including those involving moral turpitude—will impair our ability to fulfill our responsibilities effectively.

I would like to stress that any criminal justice information obtained by the Department of State is afforded a degree of protection equal to that applied to classified information. Department of State restrictions on access to such information equal or exceed those of any authorized recipient under the bill.

In conclusion, I would like to assure you that the Department of State can certainly support the objectives of the proposed bill which we understand to be the prevention of unwarranted use or exchange of inaccurate or incomplete criminal record information or similar abuses which tend to stigmatize or otherwise unfairly penalize the citizen. We believe, however, that our investigative and evaluative procedures, which include a requirement for personal

interview with every applicant, are fully adequate to preclude such abuses and to assure the basic objectives of fairness sought in the proposed bill.

The Office of Management and Budget advises that from the standpoint of the Administration's program there is no objection to the submission of this report.

I hope you will call on me if you believe we can be of further assistance.

Cordially,

LINWOOD HOLTON,
Assistant Secretary
for Congressional Relations.

CENTRAL INTELLIGENCE AGENCY,
Washington, D.C., August 21, 1974.

Hon. PETER W. RODINO, Jr.,
Chairman, Committee on the Judiciary,
House of Representatives,
Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to your request for our comments on H.R. 188, 9783, 12574, and 12575 concerning the dissemination and use of criminal justice information.

We are strongly committed to the underlying objectives of the proposed legislation which is to protect the right of privacy of citizens of the United States.

The National Security Act of 1947 provides:

". . . That the Agency shall have no police, subpoena, law-enforcement powers, or internal security functions: . . ." (50 U.S.C. 403(d)(3)).

While the Central Intelligence Agency is not a criminal justice agency, certain provisions of the proposed legislation would impinge upon existing functions and responsibilities:

(a) The National Security Act of 1947 provides:

". . . That the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure;" *id*

In the interest of satisfying this statutory requirement, Agency employees are evaluated against strict suitability standards for trustworthiness and freedom from undue external pressures. Investigations undertaken in this connection require access to all relevant information including any relating to possible criminal conduct.

(b) In the pursuit of our foreign intelligence mission information bearing on criminal conduct, e.g., illicit narcotics trafficking, hijacking, and other terrorist activities, that comes into our possession is relayed to the appropriate criminal justice agency..

(c) The dissemination of foreign intelligence information is a principal statutory function of this Agency. H.R. 188, for example, provides in new section 3101 that:

"(a) No officer or employee of the United States or of any federally assisted law enforcement agency may disseminate in any manner any criminal arrest record to any person other than another officer or employee of a law enforcement agency."

This language would appear to prohibit the Agency from disseminating to the President, or others, information concerning the criminal arrest record of a foreign personality of interest, although this surely is not its intent.

If your Committee favorably approves legislation with provisons similar to those discussed above, it is requested that suitable language be incorporated either to exempt the Central Intelligence Agency or to permit it to fulfill the responsibilities referred to above.

We appreciate your giving us the opportunity to comment on the proposed legislation and would be pleased to work out appropriate modifications in language with anyone you may designate.

The Office of Management and Budget advises there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

W. E. COLBY, *Director.*

U.S. ATOMIC ENERGY COMMISSION,
Washington, D.C., August 23, 1974.

Hon. PETER W. RODINO, Jr.,
Chairman, Committee on the Judiciary,
House of Representatives

DEAR MR. RODINO: Thank you for your letters of April 4, 5, and 24, 1974, requesting the views of the Atomic Energy Commission on H.R. 188, 9783, 12574, and 12575.

The AEC supports the general objective of assuring careful control of the dissemination and use of criminal justice information. However, because of their potential impact on our statutory and Executive Order responsibilities relating to the safeguarding of classified information, we do not favor enactment of any of these bills as proposed.

H.R. 188 would limit dissemination of criminal arrest records in the possession of or received from an officer or employee of the United States, or of any federally assisted law enforcement agencies, to law enforcement agencies. It would also, subject to some exceptions, preclude any dissemination of such information on arrests more than two years old on which no prosecution is pending.

H.R. 9783 would prohibit criminal data banks financed in whole or in part by the United States from disseminating data to anyone but an official of a criminal justice agency. It would also require such data banks to remove and destroy certain arrest records that are two years old and certain conviction records that are ten years old, and would prohibit collection by such banks of data relating to an offense for which the maximum penalty is less than six months imprisonment or a fine of not more than $100.

H.R. 12574 would, subject to certain exceptions not clearly spelled out in the bill, limit dissemination of criminal justice information to criminal justice agencies. It would also provide for the sealing of certain records after various specified periods of time.

H.R. 12575 would, with certain minor exceptions, limit dissemination of criminal justice information to criminal justice agencies or for purposes related to criminal justice, and would provide for destruction or sealing of certain such data.

Under Section 145 of the Atomic Energy Act of 1954, as amended (42 U.S.C. § 2165), the AEC may not permit any individual to have access to Restricted Data until it has determined that to do so will not endanger the common defense and security, i.e., until it has granted that person an appropriate security clearance. Section 145 also indicates that this determination is to be based on an investigation and report to the AEC on the character, associations, and loyalty of such individual, and generally charges the Civil Service Commission with responsibility for making such investigations.

In implementation of the above-described statutory provisions, as well as the requirements of Executive Orders 10450 and 10865, the AEC has promulgated personnel security clearance regulations, which are published at 10 C.F.R. Part 10. Under these regulations, when considering an individual's eligibility for access authorization, the AEC reviews in detail any criminal record involved, including the nature and extent of the criminal activities, the period in which they occurred, and the length of time which has since elapsed.

Under the proposed bills, since neither the AEC nor the CSC would qualify as law enforcement or criminal justice agencies, the AEC would be unable to obtain from essentially any official source information on the criminal activities of individuals being considered for security clearance. This inability would fetter and, in some cases preclude, our discharge of the statutory and Executive Order responsibilities mentioned above. In addition, it could redound to the disadvantage of the individual involved. An example would be a case in which incomplete information from secondary sources has disclosed evidence of a criminal record, but the unavailability of the complete official record creates a hiatus in the investigative file which prevents the AEC from determining whether granting a clearance would endanger the common defense and security.

It is our conclusion that enactment of any of the subject bills as proposed could be of significant disservice to the personnel security clearance program of the AEC, to similar programs of other Government agencies, and, in some instances, to the very individuals the legislation is intended to protect.

The AEC recommends that if a bill such as any of the subject bills is to be

enacted, it should provide explicitly for official access to criminal justice information by Government agencies for the purposes of personnel security clearance investigations. Further, it should not allow destruction, or prohibit collection, of any such information except that relating to the most minor offenses, e.g., where the penalty is imprisonment for no more than 30 days or a fine of no more than $100.

The Office of Management and Budget has advised that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely,

JOHN A. ERLEWINE,
General Manager.

INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC.,
Gaithersburg, Md., May 2, 1974.

Mr. DON EDWARDS,
Chairman, Subcommittee on Civil Rights and Constitutional Rights, Congress of the United States, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR MR. EDWARDS: Thank you for your invitation to comment on House Bills 188, 9783, 12574 and 12575.

The International Association of Chiefs of Police, as an organization that represents over 10,000 police executives, is keenly aware of the threats to personal privacy caused by increasingly sophisticated information gathering and storage equipment. Electronic surveillance equipment has a frightening potential for abuse if used by unscrupulous persons. National computer data banks may soon provide a capability of storing and disseminating the details of all of our lives. Incorrect information in these data systems could seriously affect an individual's credit rating, reputation, and ability to get a job.

The IACP is in full agreement with the intent of these four bills. The law enforcement profession has traditionally been zealous in guarding against the improper disclosure of criminal justice information. Such information is highly confidential, and should only be released when disclosure is absolutely necessary. Certain sections of these four bills, however, would work against the interests of law enforcement. All four bills, for example, provide for the purging or sealing of criminal records after a given number of years. This would put out of the reach of law enforcement agencies information which is often of great value in preliminary investigations. Further, it would effectively neutralize all criminal laws establishing a more severe penalty for second offenses. It would destroy the deterrence factor of having a "record," one of the significant qualities of our judicial system.

Several of the bills would require law enforcement agencies to get court warrants in order to have access to certain types of criminal information. This would have the effect of barring vital information from many police departments, especially those in rural areas hundreds of miles from the appropriate courtroom. Situations in which such information is needed are often critical. A preliminary investigation may turn up a small piece of evidence that may be the key to identifying the offender. If this is the case, access to criminal history records is essential if the offender is to be quickly brought to justice. The enormous time delay inherent in the warrent procedure could be a great barrier to effective law enforcement.

Finally, H.R. 12575 would prohibit maintaining criminal justice intelligence information in automated systems, despite the fact that computerization is often the only way that complex elements of investigations, especially those involving gambling or narcotics, can be brought together. Computerization is not the villain. It is the use to which the computerized data is put that constitutes the possible danger. A wholesale ban on computer use of intelligence data would only interfere with legitimate law enforcement.

I hope these remarks will prove useful to you and your subcommittee.

Very truly yours,

QUINN TAMM,
Executive Director.

THE GENERAL COUNSEL OF THE TREASURY,
Washington, D.C., April 30, 1974.

Hon. PETER W. RODINO, Jr.
Chairman, Committee on the Judiciary,
House of Representatives,
Washington, D.C.

DEAR MR. CHAIRMAN: Reference is made to your request for the views of this Department on two bills affecting law enforcement information systems operated by Federal, State, or local governments: H.R. 12574, the "Criminal Justice Information Systems Act of 1974" and H.R. 12575, the "Criminal Justice Information Control and Protection of Privacy Act of 1974." This report addresses each bill individually.

H.R. 12574

This bill would apply to any criminal justice system, whether automated or manual, which is either operated by the Federal Government, as well as any interstate system, or a system operated by a State or local government which exchanges criminal justice information with such a system. The proposed legislation would also cover criminal justice information obtained from a foreign government or an international agency and included in a system subject to the bill. Thus, the bill is designed to ensure that every criminal justice information system would be subject to its provisions.

The principal features of the bill may be summarized as follows: The bill would limit direct access to criminal justice information systems to officers and employees of criminal justice agencies. Criminal offender record information would be disclosed only for criminal justice purposes unless otherwise authorized by law. Criminal offender record information is required to be accurate and complete. Individuals would be permitted to review their records for purposes of correction, and there is a provision for sealing criminal offender record information after a stated period during which the individual was free from supervision by a criminal justice agency. Administrative, civil, and criminal sanctions are provided against persons violating the Act or implementing regulations.

We endorse restrictions on the dissemination of criminal justice information and measures to assure the accuracy of such information. In designing such constraints, however, the individual's right to privacy must be balanced with the need of the government to obtain and use for legitimate official purposes information about individuals. While seeking to prevent abuses of data accumulation about individuals, particularly information relating to a person's encounters with the criminal justice system, we must insure that non-criminal-justice components of the Treasury Department are not deprived of the data without which their governmental obligations cannot be accomplished effectively and beneficially for the public good. This rational utilization by the government of advanced data processing techniques is by no means inconsistent with individual privacy, rather it enhances the individual's right to be secure.

Consequently, we believe that certain restrictions concerning the use of criminal justice information by a non-criminal-justice agency should receive the most careful discussion and review.

The Treasury bureaus engaged in the collection of taxes and duties, such as the Internal Revenue Service, the U.S. Customs Service, and the Bureau of Alcohol, Tobacco and Firearms have both civil and criminal functions and they use criminal intelligence information for licensing and background employment investigations. Although section 5(c)(3) would permit criminal intelligence information to be made available to a non-criminal-justice component of the same agency if the information is necessary for performance of a statutory function of the non-criminal-justice components, this exception does not adequately meet the legitimate needs of this Department for information from other agencies.

For example, when a non-criminal-justice component of a criminal justice agency in Treasury seeks data relating to employees who must occupy positions of great trust and sensitivity, a legitimate and very necessary objective of government will be frustrated if the non-criminal-justice component cannot go outside of Treasury's criminal justice agencies and seek information from the FBI or DEA. The problem is further complicated by the ambiguity of the Section 5(c)(3) "Same agency" clause which can be interpreted to restrict, for example, the IRS Audit Division to criminal intelligence maintained by the IRS Intelligence Division only, or, on the other hand, to view all of Treasury as one agency, thus, permitting IRS Audit to have access to criminal intelligence of IRS, Customs, ATF, and the Secret Service. Adoption of the former, narrow interpreta-

tion of the "same agency" clause would also work to eliminate the Treasury Enforcement Communications System (TECS) which enables all Treasury enforcement agencies to query for certain shared categories of data since they are all parts of one department.

Section 5(b) would limit direct access to criminal justice information systems to authorized officers and employees of criminal justice agencies. Read literally this means that supervisory officials of the Treasury Department and the Internal Revenue Service would not be permitted access to criminal justice information. The section should be revised to permit any official who manages or in any way supervises the investigative activities of a criminal justice agency to have such access. Otherwise, he is not in a position to perform his job effectively. For example, a district director of the Internal Revenue Service has many revenue related activities that consume more of his time than criminal law enforcement. He is not an employee or officer of the Intelligence Division, the only criminal justice agency at the district level in the Internal Revenue Service. This would also be true with respect to: IRS Regional Commissioners, District and Regional Commissioners of Customs, District and Regional Directors of ATF, and top headquarters officials in all Treasury bureaus. Treasury officials in the Office of the Assistant Secretary for Enforcement, Tariff & Trade Affairs, and Operations and other Treasury officials at the Deputy Assistant Secretary level and above are responsible for policy, supervision, and management of Treasury criminal justice agencies and will at times need direct access.

The direct access restriction of Section 5(b) is a serious encumbrance in two other respects. This paragraph would preclude joint investigations by the Audit and Intelligence Divisions of the Internal Revenue Service. Information gathered by the Intelligence Division is frequently used by the Audit Division in determining civil tax liabilities. The discontinuance of this practice would be very costly and disturbing to the witnesses required to provide the same information, first to the Intelligence Division and then, in each business, to the Audit Division.

The U.S. Customs Service would also be adversely affected by this paragraph, since much of its enforcement activity is of a hybrid nature, with both the civil and criminal aspects of a case handled by one person. This would prohibit the use of criminal justice data relating to civil violations of the customs laws or for purposes of licensing or employment where a non-criminal justice agent is performing the hybrid enforcement function.

In particular, the task of the Customs Inspectors at U.S. ports of entry will be seriously encumbered, as will the management responsibilities of the Office of Operations in Customs' headquarters, which supervises the Inspectors. Neither the Office of Operations nor the Customs Inspectors fall within the bill's definition of a criminal justice agency; and under the provisions of Section 5(b) neither could have access to the data maintained in Treasury's criminal justice information system, known as the Treasury Enforcement Communications System (TECS). The anomaly presented by this access prohibition in H.R. 12574 is that the Customs Inspectors, who are the first line of border security for the United States and who make the greatest number of queries to TECS, will be denied the capability to check the millions of people, vehicles, and cargo entering the United States. The total prohibition on Customs Inspectors' direct and nearly instantaneous access to a criminal justice information system is accomplished since H.R. 12574 applies to both automated and manual systems. Furthermore, the availability of access to a non-automated system is not a meaningful alternative since this would reduce dramatically the amount of data available for a border check and because entry into the United States will become a tedious and obstructive burden upon the millions of law-abiding individuals who wish to enter the United States.

We are also concerned that Section 5(c)(3) would have a substantial impact on the work of the U.S. Secret Service. Under its statutory responsibilities to protect the President of the United States, the Vice President and other high officials, including distinguished foreign visitors to the United States, the U.S. Secret Service maintains protective intelligence files on persons likely to endanger the President or others in high position. These files include both "criminal record information" and "criminal intelligence information," as defined in the bill, since the Service's responsibility extends not merely to the prosecution of crime, but also to its prevention. It is uncertain whether the protective intelligence functions of the Secret Service are within the scope of the term "criminal justice purpose." It has an investigative function, but it is directed toward the prevention of crime. This should be clarified in the bill.

We believe that the serious impediments to Treasury operations which are embodied in the bill's prohibitions against the use of criminal justice information for a noncriminal-justice purpose unless a statute specifically authorizes such a use can be corrected most appropriately by amending the bill to grant a specific exemption which would permit the Treasury Department and its enforcement agencies to exchange criminal justice information among themselves and with other Federal, State or local criminal justice agencies for the purposes of employment, licensing or the performance of statutory functions.

Section 5(e)(1) provides that criminal offender record information may be used for criminal justice purposes or for other purposes which are expressly provided for by Federal statute or Executive Order or State statute. We suggest that this provision should specify that background investigation for federal employment, conducted by agencies such as IRS Internal Security, provided for in Executive Order 10450, are sufficiently related to the criminal justice activity of crime prevention to warrant specific mention in the statute. While the Attorney General is given responsibility for this determination, we believe that it should be specified.

The Treasury Department believes that the prohibition set forth in section 8 on dissemination of criminal offender record information should not apply to background investigations with regard to applicants for appointment to the Federal Civil Service, because of the great importance of maintaining the integrity of the various component agencies of the Treasury. Criminal histories are widely used, and properly so, with reference to security investigations by Federal and State government agencies. The Department supports the concept of limited dissemination of arrest records. However, care should be taken not to be too restrictive in this regard and thereby hamper the legitimate needs of government, particularly in assuring that public servants are above reproach and not susceptible to illegal inducements and temptations.

With respect to Section 8(c), which limits dissemination of arrest records, we believe that Subsection (d)(6) should be amended to exempt specifically the Department of the Treasury and its component agencies. For example, the Customs Service's border inspections are essentially non-criminal-justice endeavors, yet a history of prior arrests can be part of the information which provides a "reasonable suspicion" on which to base a secondary Customs search.

Section 9 provides for the sealing of Criminal Offender Record Information. This provision not only deprives Treasury bureaus of information important to discovering longterm patterns of criminal activity, but particularly diminishes the ability of the Bureau of Alcohol, Tobacco and Firearms to perform its duties.

The existence of a prior criminal conviction, however remote, is the basis for various criminal violations of statutes administered by the ATF. 18 U.S.C. 842(d)(2), 842(i)(2) (unlawful distribution, shipment, transportation, or receipt of explosives); 18 U.S.C. 922(d)(1), 922(g)(1), 922(h)(1) (unlawful distribution, shipment, transportation, or receipt of firearms and ammunition); 18 U.S.C. App. 1202(a)(1) (unlawful receipt, possession or transportation in commerce or affecting commerce, of a firearm). If the access to the records of such conviction is restricted by requiring that such records be sealed upon the expiration of time, the ATF's enforcement of the provisions listed above would be severely hampered, because it is essential to prove the individual in question was previously convicted of a felony.

We must direct special attention to Sections 5(f) and 6(c) which provide, respectively, for records maintenance on every request for criminal justice information, and notice to offenders when their criminal offender records are sought. These sections impose an impossible burden on the Treasury Enforcement Communications System (TECS) if Treasury's participating components are treated as separate entities. For example, the Customs Service alone averages 137,000 TECS queries daily. The required records from only Customs' queries could, thus, exceed 50 million a year. For the purposes of these sections, Treasury believes that it must be granted an exemption from the distinctions between its bureaus' criminal justice and non-criminal-justice uses of data and that Treasury and its component agencies must be treated as a single agency.

H.R. 12575

H.R. 12575, the "Criminal Justice Information Control and Protection of Privacy Act of 1974," would impose important restrictions upon law enforcement information systems operated by Federal, State or local governments.

Principal features of the proposed legislation may be summarized as follows: The bill is intended to insure that criminal history records will be used solely for the purpose of the administration of criminal justice, and there is a complete ban on the use of computerized criminal intelligence records. Operators of criminal justice information systems would be required to keep their records as accurate and up to date as is technically feasible. Every citizen would be given a right of access to the information in his file for the purpose of challenge and correction. Operators of data banks would be subject to civil and criminal penalties for violation of the Act. A joint Federal-State administrative agency, the Federal Information Systems Board, is created to enforce the Act, to direct the actual operation of interstate criminal justice data banks such as the National Crime Information Center, and to supervise the installation and operation of any criminal justice information system or criminal intelligence information system operated by the Federal Government.

As we stated in our discussion of H.R. 12574, we endorse restrictions on the dissemination of Criminal justice information and measures to assure the accuracy of such information.

Certainly, it is essential to insure that criminal records are accurate and up to date and that the use of such records protects the rights of the individual while also achieving the legitimate objectives of government; however, we believe that we must also weigh the right of individuals to be secure from criminal predators and transgressors and to enjoy the protection of the law which their governments—Federal, State and local—are obligated to provide. Law enforcement agencies need information which is timely, accurate and responsive to the requisites of the various components of the criminal justice community.

H.R. 12575 would prohibit any non-criminal-justice use of arrest records, and would permit criminal justice uses solely for the purpose of screening an application for employment with a criminal justice agency, adjudication of the charge resulting from the arrest, and in connection with subsequent arrests if the prior arrest is no more than one year old and prosecution is still pending on the prior charge. There are other legitimate needs for arrest data by criminal justice agencies, in addition to those specified. For example, arrest data, even without a conviction, will furnish leads to law enforcement officials. Such data can often identify a pattern of criminal activity, which ultimately can lead to a conviction.

Section 208(a) of H.R. 12575 provides that criminal intelligence information shall not be maintained in criminal justice information systems and subsection (b) of section 208 prohibits automated intelligence systems. These two proposals should receive the most careful discussion and review.

The bill fails to consider and make due allowance for the extent to which various Treasury agencies properly employ criminal intelligence information in carrying out their statutory duties. One of the most significant uses of such information is that made by the United States Secret Service, which performs a unique function in its protection of the President and his family. Instantly available information that only automated systems can provide is necessary if we are to maintain protection at the highest level. Criminal intelligence information is essential for this purpose, since our protectees travel to various parts of the country and abroad. The Secret Service must know what individuals might pose a hazard to its protectees, and everything possible about their background, regardless of the source of information, in order to correctly assess the potential danger to its protectees when they travel. The Report of the Warren Commission specifically recommended that the Secret Service protective intelligence system be automated. The Congress has appropriated funds to automate the system.

The Treasury bureaus which are engaged in the collection of taxes and duties, such as the Internal Revenue Service, the U.S. Customs Service and the Bureau of Alcohol, Tobacco and Firearms have both civil and criminal functions, and they use criminal intelligence information both for licensing and for background employment investigations.

One of our principal concerns with the proposed legislation is to ensure that they permit maximum use of data processing facilities and capabilities for tax-related civil and criminal justice activities and to ensure the availability of information essential to background investigations to avoid placement of employees of demonstrated questionable integrity in positions of trust and responsibility. We believe both of these concerns can be accommodated, while providing the privacy of criminal justice information that is intended with this legislation.

For example, we are concerned with the effect of the proposed legislation upon the Bureau of Alcohol, Tobacco and Firearms' applications for relief from Federal

firearms and explosives disabilities (See 18 U.S.C. §§ 845(b) and 925(c)). In addition, the Bureau's use of criminal record checks prior to the issuance of licenses and permits under Chapter 44 of Title 18 U.S.C. (Title I of the Gun Control Act of 1968), Chapter 40 of Title 18 U.S.C. (Commerce in Explosives), the Federal Alcohol Administration Act (27 U.S.C. §§ 201–211), and the Internal Revenue Code (pertaining to various alcohol and tobacco permits) would be restricted by the proposed Act.

The Treasury Enforcement Communications System (TECS) contains both criminal history and criminal intelligence information. The enactment of section 208 would eliminate one of Customs most efficient enforcement tools. Customs inspectors make over 137,000 TECS queries daily, and the criminal justice intelligence information provided by the system often provides a "reasonable suspicion" on which to base a secondary Customs search. Automated systems have been used to identify persons, methods, and trafficking patterns involved in the illicit importation of narcotics. These systems enable Customs to compare and coordinate diverse patterns of smuggling. To limit the type of information which could be maintained in TECS, or to prohibit its use entirely, would severely impair the effectiveness with which Customs carries out its enforcement mission.

Intelligence systems are vital to law enforcement, which should not be denied the benefits deriving from technological advances in investigating organized crime and other forms of criminal activity that crosses state lines. Access to and use of criminal intelligence information can be properly safeguarded through suitable controls over the collection and dissemination of such information.

The use of automated criminal intelligence systems contributes to the right of our citizens to be free from obstruction and harassment by government inefficiency and can protect their freedom from criminal encroachments on the political life of the United States. Every person who must cross a U.S. border to enter this country benefits from the nearly instant access of Customs Inspectors to criminal records and criminal intelligence by means of TECS. The tremendous delay is avoided which a manual ssytem would require, while a more efficient and effective interdiction of narcotics and other smuggled contraband is achieved. Thus, freedom of movement is enhanced for the vast majority of people while criminals and contraband are prevented from infiltrating society.

The protective intelligence function of the Secret Service provides a bulwark against a political system where the President, some other top public officials, foreign statesmen and Presidential candidates must remain in guarded chambers, out-of-touch with the public because the danger of attack or assassination is not controlled effectively. The freedom to hear and see public officials face-to-face, the right to assemble and to petition peaceably for redress of grievances are all enhanced because our foremost political and government officials can move about in society with some genuine sense of security.

Title III of the bill provides for the creation of a Federal Information Systems Board, a Federal Information Systems Advisory Committee, and state boards. We question the need for and potential effectiveness of such organizations. The responsibility for the collection and dissemination of criminal justice information lies with the criminal justice agency, and management control should remain with that same agency. Lacking adequate management control over the operation of the system, law enforcement officials could not assure that the data is properly protected.

We are concerned that the proposed legislation will require very substantial expenditures for the numerous changes which must be made in the systems for collection, storage and exchange of data and in the recordkeeping operations which must accompany the information systems. Treasury recommends that the budgetary impact of this proposal should receive thorough study by the Congress.

We believe that full utilization of advanced data processing techniques is not inconsistent with the preservation of personal privacy. The mere potential for abuse is not a sufficient reason to dispense with their use in the investigation and prosecution of crime. Careful attention to the potential for abuses will enable us to devise methods for preventing these abuses, without impairing the value of data processing as an important tool of efficient law enforcement.

The Department of the Treasury believes that between the two bills discussed above the provisions of H.R. 12574 constitute a preferable approach to restrictions on the use of criminal justice information and the protection of individual privacy. Therefore, with the inclusion of all those exemptions and amendments discussed above which are essential to the operations of the Treasury Department, we endorse the adoption of H.R. 12574.

The Department was advised by the Office of Management and Budget that there was no objection from the standpoint of the Administration's program to the submission of an identical report to the Senate Committee on the Judiciary on S. 2963, and S. 2964, identical bills.

Sincerely yours,

EDWARD S. SCHMULTZ,
General Counsel.

AMERICAN LIFE INSURANCE ASSOCIATION,
Washington, D.C., April 24, 1974.

Hon. DON EDWARDS,
Chairman, The Civil Rights and Constitutional Rights Subcommittee, Committee on the Judiciary, U.S. House of Representatives, Rayburn Office Building, Washington, D.C.

DEAR CHAIRMAN EDWARDS: There is attached a statement by the American Life Insurance Association with respect to H.R. 188, H.R. 9783, H.R. 12574 and H.R. 12575. These proposals, among other things, would restrict access to certain criminal information by private corporations such as life insurance companies.

We are submitting this statement to the Subcommittee in order to make clear how certain types of criminal information are utilized by life insurance companies. We hope that the information included in this statement will be of assistance to your Subcommittee in assessing the desirability of certain provisions contained in these proposals that are intended as restrict access to criminal information.

We would appreciate having this statement included in the printed record of the Subcommittee's hearings on the proposals referred to above.

If you, other members of the Subcommittee or your staff wish to discuss this statement or other matters relating to these proposals, we would be pleased to meet with you.

Sincerely yours,

R. OTTO MELETZKE,
Assistant General Counsel.

Attachment.

STATEMENT OF AMERICAN LIFE INSURANCE ASSOCIATION

This statement is submitted on behalf of the American Life Insurance Association, a national trade association with a membership of 365 life insurance companies which account for over 90 percent of the legal reserve life insurance in force in the United States.

We are submitting this statement to the Subcommittee in connection with the consideration of H.R. 188, H.R. 9783, H.R. 12574 and H.R. 12575, in order to make clear how certain types of criminal information are utilized by life insurance companies. It is our hope that the information included in this statement will be of assistance to the Subcommittee in assessing the desirability of certain provisions in this legislation that are intended to restrict access to criminal information.

At the outset, it should be made clear that life insurance companies have an interest in criminal information only to the extent it is necessary—

(1) in underwriting life and health insurance applications and investigating certain life and health insurance claims;

(2) to comply with legal requirements of the States for the licensing of life insurance agents, and to afford adequate safeguards for companies in hiring agents and selecting management personnel with important responsibilities; and

(3) to assure compliance with certain other Federal and State laws.

In the discussion that follows, we will outline the types of criminal information necessary to fulfill life insurance companies' underwriting and claims responsibilities, and point out the relevance of this information and how it is utilized. In addition, we will summarize those Federal and State requirements which make it necessary for life insurance companies to obtain certain types of criminal information.

I. UNDERWRITING AND CLAIMS CONSIDERATIONS

Underwriting Considerations

A fundamental principle of life and health insurance is that each policyholder must be expected to pay a premium commensurate with the risk to be insured. Thus, only applicants exposed to comparable degrees of risk can be placed in the

same premium class and, for this reason, the life and health insurance underwriter must have available information bearing on risk classification. This information is elicited from the insurance applicant in the written application, in many cases from a medical examination, and frequently through what are called inspection reports prepared by independent reporting agencies specializing in this business. These firms usually interview the insurance applicant, business associates, and others familiar with the applicant to develop information independent from that submitted on the application and to verify any such information. Their focus in developing information pertinent for underwriting purposes is not on criminal information, as such, but on any information that has an effect on mortality.

Although criminal activity or association can become important as a mortality hazard, as a matter of procedure reporting agencies do not routinely investigate for criminal history on insurance applicants unless their field representatives are informed by the applicant himself or others that there is the possibility of past or current criminal activity. When this is the case, such agencies generally develop criminal information only from public records, such as police blotter information pertaining to arrests, indictments, convictions, parole records, and other evidence of rehabilitation. Their objective, on behalf of their life insurance company customers, is simply to confirm or refute on a factual basis any evidence of criminal activity.

It is also important to the applicant, who allegedly has been involved in criminal activity, that a life insurance company have access to criminal information such as arrest records, trial records, records of final disposition, and parole or other rehabilitation records. Without this information, a life insurance company would be required to make underwriting judgments on the basis of information furnished only by the applicant, or developed through independent investigations through neighborhood, business, or other logical sources. In most cases, it would not be possible to confirm that the information of possible criminal activity obtained through such sources is accurate, reliable, or given without prejudice, since much of the data supplied may be based on personal opinion or may be influenced by "rumor". When an underwriting decision is based on incomplete or inaccurate information—as would be the case if any insurance company (or independent reporting agency) were denied access to criminal records—it could result in (a) the denial of insurance protection to consumers who would otherwise have been eligible had the facts been available, or (b) the charging of unfairly high or unfairly low premiums to consumers who are accepted as insurance risks, since the underwriting decision would not be based on full information, or (c) the issuance of insurance to uninsurable risks.

For example, when there is evidence of a prior conviction, it is extremely important that there be access to information that might indicate a subsequent record free from arrest. This will provide confirmation to the underwriter that the applicant has been rehabilitated. Thus, free access to arrest or parole records can have a highly beneficial effect in making insurance available to an applicant at the earliest time and at the lowest possible rates. Similarly, when there is evidence of repeated arrests, it is essential that the underwriter have complete factual information in order to treat the applicant fairly. In this regard, the reason for arrest may be very significant, e.g., repeated arrests for heroin usage presents different mortality concerns than in other cases. To further illustrate the positive effect of factual criminal information, persons convicted of so-called "victimless" crimes such as income tax evasion are frequently issued life insurance, perhaps with an extra premium. Again, access to arrest and conviction records is essential in order to determine the amount of extra premium, if any.

Aside from the "positive" effect factual criminal information can have on underwriting an otherwise borderline case, it is also necessary to have such information to assure that risks are not accepted where there is a reasonable expectation of greater than normal mortality because of evidence of prior or current criminal activity. Persons with known records of violent crime are more likely to be associated with violence than the normal risk. Crimes associated with violence obviously cause greater concern. For example, persons with repeated arrests and convictions for homicide, aggravated assault, burglary, extortion, narcotics selling or using, or attempted bombing of public buildings or airplanes, are declined for most forms of personal life or health insurance.

Where a threat of violence exists, there is an extreme risk to an insurance company that far surpasses the normal mortality risk presented by persons with no association with criminal activity. In addition, there are documented homi-

cide cases where the sole motive was to collect life insurance proceeds. Furthermore, with absolute evidence of criminal activity, it is not unreasonable to assume that such an applicant may tend to be more dishonest in dealing with the insurance company when he applies for his insurance. Because of the long-term nature of the life insurance contract, and because it will become incontestable two years after issuance, there is an obvious risk presented. Finally, especially in recent years with the advent of so-called "white-collar" criminal activity, another type of risk is presented—that an attempt may be made to convert crime-produced money to life insurance policies or annuities in order to conceal it from government authorities.

In order to offer insurance to persons with known criminal backgrounds, the underwriter must have factual information. The records of all convictions (regardless of when convicted) and arrests (going back for a reasonable period of time, depending on the severity of the charge) are needed. Felony records are more important than misdemeanor records, but both are important, particularly for the repeated offender. The underwriter will, of course, supplement these records with details of the applicant's present occupation, employment record, and family circumstances.

Claims Investigations

In the claims area, there is also need for access to criminal information. It is a well-settled common-law rule that a beneficiary of a life insurance policy who murders or feloniously causes the death of the insured forfeits all rights which he may have in or under the policy. This rule is based upon public policy and upon the principle that no one shall be allowed to benefit from his own wrong. See, e.g., 44 Am. Jur. 2d, Ins., Section 1741.

Approximately 30 states now have statutes concerning the wrongful killing of the insured by the beneficiary. There are three basic types of statutes:

1. The first type disqualifies a beneficiary who has been convicted of the murder of the insured. E.g., Section 64.1–8, Code of Virginia 1950.

2. The second category of statutes disqualifies the beneficiary who has been convicted of feloniously killing the insured. E.g., Minnesota Probate Code, Section 525.87.

3. A third group of statutes is generally considered a codification of the common law, and disqualifies a beneficiary who intentionally and unlawfully kills the insured. This type of statute differs from the second category in that it may cover a "slayer" who participates, as principal or an accessory before the fact, in the willing and unlawful killing of any other person. It is unclear under this type of statute whether or not a homicide conviction is required. E.g., Section 15–2–803 of the Idaho Uniform Probate Court.

Another problem in the claims area is presented by the common-law rule that injury or death sustained by an insured in an encounter brought about by an assault committed by the insured upon another using a deadly weapon, or upon one who the insured knew had such a weapon, is not sustained by accident or accidental means within the meaning of a policy providing accidental death or disability benefits. Under such circumstances, the injury or death is deemed to be the natural and probable consequence of the insured's act. E.g., 44 Am. Jur. 2d, Ins. Section 1248, page 93.

Another area of concern to claim departments is the disappearance of the insured. That a presumption of death arises after an unexplained absence of a number of years—usually seven—is now recognized in some form in every state either through common law or statute. However, it is equally well settled that such a presumption of death "per se" has no weight as evidence. Upon introduction of evidence that the person concerned is alive, the presumption falls. It is therefore important for companies to obtain as much information as possible concerning the policyholder's circumstances immediately prior to the "disappearance", so as to establish a motive for the "disappearance". Any criminal involvement of the insured or his relatives or associates would obviously be significant in such situations.

Access to criminal information is also necessary in connection with claims for long-term disability benefits. In this regard, it is not unusual to have a claim fraudulently perpetrated on the insurance company in order to collect large long-term disability payments or large medical payments. Thus, for example, a prior history of criminal convictions for embezzlement or other crimes of dishonesty tends to alert an insurance company to investigate the validity of such claims, again on grounds that this at least indicates a potential for concealment or mis-

representation of fact in connection with the claim. Here again, confirmation by way of factual information is essential to treat the claimant fairly, on the one hand, and protect other policyholders, on the other.

In conclusion, insurance involves a pooling of risks which makes necessary the grouping of insured persons into comparable classes to achieve the fairest possible means of distributing these risks. For, in the final analysis, the funds to pay life and health insurance claims must come from the premium payments of those who are insured. Criminal activity is a well established risk factor in mortality and morbidity evaluation, and we urge that in developing any legislation that will restrict access to criminal information great care be taken to avoid unfairly imposing the burdens of this risk upon others.

COMPLIANCE WITH LEGAL REQUIREMENTS OF THE STATES FOR THE LICENSING OF LIFE INSURANCE AGENTS AND OTHER RELATED CONSIDERATIONS

Agents' Licensing Requirements

Access to certain criminal information by life insurance companies is also necessary to comply with the legal requirements of the states in connection with the licensing of life insurance agents. All states, except Massachusetts and Wisconsin, request applicants for agents' licenses to provide information with respect to criminal convictions. Some states limit their inquiries to felonies or serious offenses, but others inquire about minor offenses, including such matters as the issuance of worthless checks. In more than half of the states, there are inquiries not only with respect to convictions, but also arrests, charges and indictments, whether or not followed by a conviction.

In approximately half of the states, life insurance companies are required to sign an endorsement on the agent's application to the effect that a diligent inquiry and investigation of the applicant has been made. Furthermore, in Kentucky and Maine, a life insurance company must attach a copy of the investigative employment report on the applicant.

As in the case of underwriting and claims responsibilities of life companies, a typical procedure for a company in connection with selecting agents is to employ the services of an independent reporting agency to conduct a personal background report on the applicant. Because of the various state licensing requirements that require criminal information, life insurance companies must be able to determine that agents applying for licenses have not been involved in prior criminal activity.

The following excerpt from the Colorado agents' licensing law illustrates the type of legal requirements referred to above. We are attaching as Exhibit A a compilation of the pertinent agents' licensing laws of all of the 50 states and the District of Columbia.[1]

Colorado Revised Statute, Chapter 72, Article 1, § 18. Licensing of agents—(1)(a) Every such company shall, through its proper officer or agent, promptly notify the insurance commissioner in writing of the name, title and address of each person it desires appointed to act as agent in this state. Upon receipt of such written notice, when accompanied by the fee required by section 72–1–12, if it appears that the appointee is of good moral character, *has not been convicted in this or any other jurisdiction of a felony or a crime involving moral turpitude*, and has submitted a truthful and accurate statement as required under subsection (2) of this section, and otherwise a suitable and competent person and intends to hold himself or herself out in good faith as an insurance agent, and if the appointee qualifies under the provisions of this section, the insurance commissioner shall issue to such person a license which shall state, in substance, that the person named therein is the constituted agent of the company in this state for the transaction of such business as it is authorized to transact in this state and for which such appointee shall have qualified. The commissioner may at his discretion require that the applicant submit to the department a complete set of fingerprints certified to by a law enforcement official. (Emphasis added)

[1] It is also noteworthy that all of the states in their agents' licensing laws specify the circumstances under which agents may be suspended, have their licenses revoked or refused because of convictions of felonies involving moral turpitude, and in some cases other types of criminal activity. For purposes of enforcing these requirements, state insurance departments frequently utilize the services of independent reporting agencies to discover or confirm evidence of criminal activity. While these requirements may not always directly pertain to criminal information necessary for life insurance company purposes, they do point out the need for state supervisory agencies to have access to certain types of criminal information. (These provisions for all of the 50 states are also included in Exhibit A.)

Related Considerations

Aside from the licensing requirements referred to above, there are other important reasons for companies to have access to criminal information in connection with the employment of agents and other company personnel. For example, there is the possibility of potential liability of a life company to third persons resulting from the illegal acts of agents. There are a number of judicial decisions in this regard that hold an insurer liable for assault and battery committed by one of its agents, and this principle has also been extended to conspiracy cases, false imprisonment, embezzlement, fraud, and even libel and slander.

III. COMPLIANCE BY LIFE INSURANCE COMPANIES WITH CERTAIN OTHER FEDERAL AND STATE LAWS

Federal Securities Requirements

In a number of respects life insurance companies or their affiliates are under the jurisdiction of and subject to regulation by the Securities and Exchange Commission ("SEC") pursuant to the federal securities laws. For example, over 85 investment companies registered under the Investment Company Act of 1940 ("1940 Act") are sponsored, advised by or otherwise affiliated with life insurance company members of the American Life Insurance Association. Each of these registered investment companies files with the SEC registration statements under the 1940 Act and the Securities Act of 1933, as well as proxy material and periodic reports under the 1940 Act and the Securities Exchange Act of 1934 ("1934 Act"). To each of these filings attach certain obligations and potential liabilities which are described below.

In addition to the foregoing, life insurance companies, in recent years and in increasing number, have begun to market variable annuities and/or mutual funds. As a result over 170 life insurance companies, or ther subsidiaries or affiliates, have registered with the SEC as broker-dealers under the 1934 Act and with self-regulatory associations such as the National Association of Securities Dealers, Inc. ("NASIC").[3] Such broker-dealers are also subject to regulations, as described below.

These requirements point up the necessity for inquiries on the part of life companies as to criminal information pertaining to personnel involved in these special capacities.

Section 9(a) of the Investment Company Act makes it unlawful for any person to serve or act in the capacity of employee, officer, director, member of an advisory board, investment adviser, or depositor of any investment company, or principal underwriter for any open-end company, unit investment trust or face amount certificate company, if such person has been:

(1) convicted (which, by definition, includes a plea of *nolo contendere*), within ten years in connection with any felony or misdemeanor involving the purchase or sale of any security or in connection with such person's conduct, either as an underwriter, broker, dealer or investment adviser, or as an affiliated person, salesman or employee of any bank, investment company or *insurance company;* and

(2) any person who has been permanently or temporarily enjoined from acting as an underwriter, broker, dealer or investment adviser or affiliated person, salesman, or employee of any bank, investment company or *insurance company*, or has been enjoined from engaging in any conduct in connection with such activity, or has been enjoined in connection with the purchase or sale of any security. (Emphasis supplied)

Section 9(a) also bars from acting in the above-stated capacities any companies affiliated with a person who has been convicted or enjoined.

Section 9(a) operates as a matter of law. Upon the entry of a conviction or injunction, the enjoined or convicted person is automatically barred, and must resign from any enumerated capacity in which he is serving or face civil and/or criminal prosecution.

Section 9(b) of the Investment Company Act authorizes the Commission to bring an administrative proceeding to prohibit, conditionally or unconditionally, either for life or a lesser period of time, any person from serving or acting as

[3] We are attaching as Exhibit B a copy of the application for registration with the NASD. Attention is specifically directed to questions 16(d) and 17, pertaining to criminal information.

an employee, officer, director of an advisory board, investment adviser or depositor of, or principal underwriter for a registered investment company or an affiliated person of an adviser, depositor or underwriter, if the Commission finds that such person has (1) filed a false statement with the SEC; (2) willfully violated any provision of the federal securities laws; or (3) willfully aided and abetted such a violation.

Section 9(b) is made operative by an order for proceedings which issues at the Commission's discretion.

Sections 15(b)(5) and 21 of the Securities Exchange Act of 1934 authorize the Commission to bring a proceeding aaginst any person who (1) has filed a false statement with the Commission; (2) has been convicted within ten years of a felony or misdemeanor as described above; (3) has been permanently or temporarily enjoined as described above; or (4) has either willfully violated or aided and abetted the violation of any provision of the federal securities laws. Under these procedures, the Commission may bar such person from being a broker or dealer. In recent cases, the Commission has, through court actions, barred such persons from serving on the board of directors of industrial companies. Assumedly, the Commission could seek to bar, through injunctive action, a person from service with an insurance company.

As is the case in agents' licensing, a significant number of life insurance companies utilize independent reporting agencies to verify the information furnished by personnel subject to the securities laws mentioned above. Thus, it is extremely important in order to comply with these Federal laws that insurance companies or independent reporting agencies acting on their behalf be able to have access to certain types of criminal information.

State Securities Laws

As in the case of the Federal requirements listed above, most of the states have similar requirements under their respective securities laws that require as a requisite to registration of broker-dealers, agents, or investment advisors information pertaining to convictions involving securities or any aspect of the securities business. In some states, the applicant broker-dealer, agent, or investment adviser must furnish information on any arrest regardless of whether a conviction subsequently took place. Other states require information as to whether the applicant has been convicted of a security-related offense. Still others require information as to whether the applicant has been convicted or charged with a felony or misdemeanor involving fraud.

A typical requirement of these securities laws appears in the Uniform Securities Act ("Blue Sky" law) which has been adopted in varying forms by 28 states. Section 202(a) of that Act provides, in part, as follows:

"A broker-dealer, agent, or investment adviser may obtain an initial or renewal registration by filing an application . . . [which] shall contain whatever information the [Administrator] by rule requires concerning such matters as . . . (3) the qualifications and business history of the applicant; in the case of a broker-dealer or investment adviser, the qualifications and business history of any partner, officer, or director, any person occupying a similar status or performing similar functions, or any person directly or indirectly controlling the broker-dealer or investment adviser; and, in the case of an investment adviser, the qualifications and business history of any employee; (4) *any injunction or administrative order or conviction of a misdemeanor involving a security or any aspect of the securities business and any conviction of a felony . . .*" (Emphasis supplied)

Usually, information necessary to comply with the state securities laws is requested on the licensing application of the individual state. Further, the states of Alabama, Nebraska, Tennessee, West Virginia and Wisconsin require that a background report prepared by an independent reporting agency must be forwarded along with the applicant's application. The Alabama Securities Commission application for a salesman's registration, for example, specifies that—

"the principal must furnish with this application a background report on the applicant. This report must be prepared by an independent reporting service (Example—Personnel Selection Reports by Retail Credit Company)." That application also includes the following question:

"Have you ever been charged with or convicted of any crime or suspended or disbarred from the practice of any profession?_____
Explain: _____
_____
_____
_____."

While some states require that an investigative background report must accompany these applications, it is reasonable to expect that life insurance companies must take the precaution—as in the case of licensing insurance agents under state licensing laws—of having an independent employment report prepared by a reporting agency to assure that their representatives comply with the state securities laws. We are attaching as Exhibit C several illustrative examples of these state registration applications.

Other State Requirements Requiring Compliance by Life Insurance Companies

All states, of course, require a showing on the part of a life insurance company as to its qualifications for conducting the life insurance business. Most frequently, this will include reporting requirements on the part of officers and directors of insurance companies pertaining to the disclosure of criminal violations.

In summary form, states which require the disclosure by officers or directors of previous convictions or indictments include Arkansas, California, Illinois, Indiana, Kansas, Maryland, Michigan, Tennessee and Texas. In addition, at least one state, Colorado, prohibits officers and directors from serving in a life insurance company if they have been convicted of fraud or a felony. Those states in which the insurance department may refuse a certificate of authority or revoke an existing certificate if an officer or director has been convicted, indicted, or has been found to be untrustworthy, include California, Indiana, Minnesota, New York and Texas. Examples of these requirements are attached as Exhibit D.

The NAIC adopted a Uniform Biographical Data Regulation in 1967, and last year substantially revised the form of affidavit, concerning the reporting of biographical data on company officers and directors. One provision in the regulation relating to biographical data requires that the affiant affirmatively state that he has never been convicted of a felony in certain circumstances. As example of this reporting requirement is attached as Exhibit E. As is the case in the illustrations set forth previously in our statement, it is frequently necessary in connection with this biographical information for companies to order from an independent reporting agency a report designed to verify the information submitted on the affidavit pertaining to possible criminal activity.

Finally, a further aspect of this problem is included in the National Association of Insurance Commissioners' Model Insurance Company Holding System Regulatory Act, adopted by the NAIC in 1971. Here there is a requirement relating to the identity and background of individuals associated with the applicant that, in certain cases, provides for disclosure of whether or not such person has ever been convicted in a criminal proceeding during the last ten years, including further subsequent information as to the date, nature of the conviction, name and location of the court and information regarding disposition of the case. The Model Regulation is attached as Exhibit F.

Other Federal Requirements

The advisability of restrictions on the availability of certain criminal information should also be considered in the context of pension plans, and in particular the provisions which exist in the pension reform bill as passed by the House on February 28, 1974 and the Senate on December 13, 1973. Both bills prohibit individuals who have been convicted of a number of specified crimes from serving as an administrator, officer, trustee, custodian, counsel, agent, employee (other than a clerical or janitorial employee) or fiduciary of any employee benefit plan, or as a consultant to any such plan, for a period of five years after such a conviction, with certain powers placed in the Board of Parole of the United States Department of Justice to waive such incapacity. These bills would make it unlawful for a person to willfully violate this provision or to knowingly permit another person to violate this provision.

Compliance with this type of provision is, of course, extremely important to life insurance companies. As an example, the members of our Association hold 99 percent of the reserves of insured pension plans in the United States.

The pertinent provisions of both House and Senate proposals referred to are set forth below:

H.R. 4200, as PASSED BY THE SENATE

"PROHIBITION OF FIDUCIARY SERVICES

"SEC. 16. (a) No person who has been convicted of, or has been imprisoned as a result of his conviction of, robbery, bribery, extortion, embezzlement, grand larceny, burglary, arson, a felony violation of Federal or State law involving substances defined in section 102(6) of the Comprehensive Drug Abuse Preven-

tion and Control Act of 1970, murder, rape, kidnaping, perjury, assult with intent to kill, assault which inflicts grievous bodily injury, and any crime described in section 9(a)(1) of the Investment Company Act of 1940 (15 U.S.C. 80a–9(a)(1)), a violation of any provision of this Act, a violation of section 302 of the Labor-Management Relations Act of 1947 (61 Stat. 157, as amended; 29 U.S.C. 186), a violation of chapter 63 of title 18, United States Code, a violation of section 874, 1027, 1503, 1505, 1506, 1510, 1951, or 1954 of title 18, United States Code, a violation of the Labor-Management Reporting and Disclosure Act of 1959 (73 Stat. 519, as amended; 29 U.S.C. 401), or conspiracy to commit any such crimes or attempt to commit any such crimes, or a crime in which any of the foregoing crimes is an element, shall serve—

"(1) as an administrator, officer, trustee, custodian, counsel, agent, employee (other than as an employee performing exclusively clerical or janitorial duties), or fiduciary of any employee benefit plan, or

"(2) as a consultant to any employee benefit plan, during or for five years after a conviction or after the end of an imprisonment for any crime listed in this paragraph, unless prior to the end of such five-year period, in the case of a person so convicted or imprisoned, the Board of Parole of the United States Department of Justice determines that such person's service in any capacity referred to in subparagraph (A) or (B) would not be contrary to the purpose of this Act. Prior to making any such determination the Board shall hold an administrative hearing and shall give notice of such proceedings by certified mail to the State, county, and Federal prosecuting officials in the jurisdiction or jurisdictions in which such person was convicted. The Board's determination in any such proceeding shall be final.

"(b) Any person who willfully violates this section, or knowingly permits another person to violate this section, shall be fined not more than $10,000 or imprisoned for not more than one year, or both.

"(c) For purposes of this section—

"(1) any person shall be deemed to have been 'convicted' and under the disability of 'conviction' from the date of the judgment of the trial court or the date of the final sustaining of such judgment on appeal, whichever is later, regardless of when such conviction occurred;

"(2) the term 'imprisonment' shall not include any period of parole; and

"(3) 'consultant' means any person who, for pecuniary benefit, direct or indirect, advises or represents an employer benefit plan, concerning the establishment or operation of such plan.".

H.R. 2, as Passed By the House

PROHIBITION AGAINST CERTAIN PERSONS HOLDING OFFICE

SEC. 113. (a) No person who has been convicted of, or has been imprisoned as a result of his conviction of, robbery, bribery, extortion, embezzlement, fraud, grand larceny, any crime described in section 9(a)(1) of the Investment Company Act of 1940 (15 U.S.C. 80a–9(a)(1)), or a violation of any provision of this title, or a violation of section 302 of the Labor Management Relations Act, 1947 (29 U.S.C. 186), or a violation of chapter 63 of title 18, United States Code, or a violation of section 874, 1027, 1503, 1505, 1506, 1510, 1951, or 1954 of title 18, United States Code, or a violation of the Labor-Management Reporting and Disclosure Act of 1959 (29 U.S.C. 401), or conspiracy to commit any such crimes or attempt to commit any such crimes, or a crime in which any of the foregoing crimes is an element, shall serve or be permitted to serve—

(1) as an administrator, officer, trustee, custodian, counsel, agent, or employee of any employee welfare or pension benefit plan, or

(2) as a consultant to any employee welfare or pension benefit plan,

during or for five years after such conviction or after the end of such imprisonment, whichever is the later, unless prior to the end of such five-year period, in the case of a person so convicted or imprisoned, (A) his citizenship rights, having been revoked as a result of such conviction, have been fully restored, or (B) the Board of Parole of the United States Department of Justice determines that such person's service in any capacity referred to in paragraph (1) or (2) would not be contrary to the purpose of this title. Prior to making any such determination the Board shall hold an administrative hearing and shall give notice of such proceeding by certified mail to the State, county, and Federal prosecuting officials in the jurisdiction or jurisdictions in which such person was convicted. The Board's determination in any such proceeding shall

be final. No person shall knowingly permit any other person to serve in any capacity referred to in paragraph (1) or (2) in violation of this subsection. Notwithstanding the preceding provisions of this subsection, no corporation or partnership will be precluded from acting as an administrator, trustee, custodian, counsel, agent, or employee of any employee benefit plan or as a consultant to any employee, welfare, or pension benefit plan without a notice, hearing, and determination by the Secretary that such service would be inconsistent with the intention of this section.

(b) Any person who intentionally violates this section shall be fined not more than $10,000 or imprisoned for not more than one year, or both.

(c) For the purposes of this section:

(1) A person shall be deemed to have been "convicted" and under the disability of "conviction" from the date of the judgment of the trial court or the date of the final sustaining of such judgment on appeal, whichever is the later event.

(2) The term "consultant" means any person who, for compensation, advises or represents an employee benefit plan or who provides other assistance to such plan, concerning the establishment of operation of such plan.

(3) A period of parole shall not be considered as part of a period of imprisonment.

(d) This section shall not apply to a conviction for a crime committed before the date of enactment of this Act.

We appreciate this opportunity to bring to the attention of the Subcommittee some of the problems which are raised by the proposed bills as they may affect life insurance companies. We will be pleased to provide any further information which you may need and we hope that we may have the opportunity to work with the members of the Subcommittee and its staff in developing legislation which will protect the rights of citizens and at the same time recognize the legitimate needs of life insurance companies for full and accurate information.

AMERICAN TRUCKING ASSOCIATIONS, INC.,
Washington, D.C., April 9, 1974.

Hon. DON EDWARDS,
Committee on the Judiciary,
U.S. House of Representatives,
Washington, D.C.

DEAR CONGRESSMAN EDWARDS: The motor carrier industry, which we represent, has a keen interest in proposed legislation dealing with Criminal Justice Data Banks which are under consideration in both the House of Representatives and the Senate. While we agree with the laudatory purposes these bills are meant to serve, we have found that some of their provisions may have a seriously negative effect on the industry's attempts to improve the safety record of truck operations and to assure the security of the cargo it transports. We hope consideration can be afforded to the problems discussed in this letter and that appropriate modifications can be made in these pending bills. As there are two considerations underlying our concern, I will treat them separately.

COMMERCIAL VEHICLE SAFETY

This industry is proud of the substantial effort and resources it has devoted for many years to programs related to motor carrier safety. Much has been accomplished in obtaining safer vehicles, and still further improvements are continually under development. However, it is well established that driver fitness remains the most crucial single element in the prevention of motor vehicle accidents, whether they involve commercial vehicles, passenger cars, or both.

Since the beginning of Federal regulation of the motor carrier industry in 1935, the Interstate Commerce Commission, and later the Department of Transportation, have established rules relating to the qualifications of drivers of motor carriers engaged in interstate commerce. Many states have adopted comparable requirements with respect to intrastate commercial vehicle operations. These rules recognize that knowledge of a driver's past performance behind the wheel is a vital element in any accident prevention program, and that public safety requires that drivers with recent convictions for serious traffic violations should be disqualified from access to our highways.

The regulations of DOT's Bureau of Motor Carrier Safety *require* motor carrier employers to collect and maintain an extensive amount of the information regard-

ing the general suitability and past records of their drivers. (49 C.F.R. 391.23) Upon application for employment, employers must seek and applicant must provide, a list of all motor vehicle accidents in which the applicant was involved during the previous three years, a list of all violations of motor vehicle laws or ordinances of which applicant was convicted or forfeited bond or collateral during that period, and a detailed statement setting forth the facts and circumstances of any denial, suspension or revocation of any driver's license, permit or privilege issued to the applicant. Moreover, motor carrier employers are required to make an inquiry into the prospective employee's driving record with the appropriate agency of every state in which the driver held a motor vehicle operator's license or permit within the last three years and to keep a copy of the response by each state agency (whether affirmative or negative) as part of the driver's qualification file.

If an applicant is hired, his file must be reviewed annually, and a list of accidents and driving infractions that have occurred in the past year must be noted in it. Drivers are disqualified from operation for a prescribed period of time if found guilty of certain serious traffic violations.

The need to make the type of driver fitness information outlined above available to appropriate agencies and persons was underscored by Congress when it established the National Driver Register. The Register, as you know, is a compilation of names of persons who, by action of state agencies, have had their driving privileges denied, suspended or revoked. The information is furnished to the Register by the states, and in turn, is supplied to state agencies which inquire with respect to persons applying for driver licenses. Currently the National Driver Register contains 3,300,000 names.

As noted, motor carriers are required to "check out" the accuracy of the information supplied by applicants for driver positions. State licensing agencies, and the National Driver Register, are the most reliable, and often the only available sources of information for this purpose. We believe such information in state agency files, and the National Driver Register, will fall within the scope of information which the legislation will bar from dissemination, particularly to prospective employers.

There also is serious question as to whether information regarding denial, suspension or revocation of driving licenses may be disseminated by state agencies to the National Driver Register, as such denials, suspensions or revocations, for the most part, result from arrests and/or convictions for traffic offences. Dissemination of this type of information by the licensing agencies to third parties may be viewed as equivalent to providing them with "criminal justice information" within the meaning of the bills, and thus be prohibited by the proposed legislation. Moreover, license denial, revocation or suspension information was probably not thought of as "criminal justice information" at the time of passage of the National Driver Registration Act. It would be questionable then, whether or not that Act is an "expressly" authorized exemption to the terms of the pending legislation.

We do not believe the sponsors of this legislation intended to deny the state licensing agencies and/or motor carrier employers important driver fitness information they are legally required to seek. To prevent any misconceptions, we believe the bill(s) should be amended to specifically exempt information regarding motor vehicle violations from the definition of "criminal justice information" and the other related definitions.

In addition to excluding driver license suspension and revocation information from the provisions of the pending bills, we ask that legislation be initiated to mandate the Department of Transportation to allow motor carriers who are subject to its safety jurisdiction, access to the National Driver Register to obtain the license record of persons seeking to enter the service of the carrier as a commercial vehicle driver. To do this will significantly increase carrier safety effectiveness.

Finally, we believe that the kind of information discussed herein can be made available to state licensing agencies, and through them to motor carrier employers, without injustice to the individual. The DOT Motor Carrier Safety Regulations require that driver applicants be notified that their background records are to be checked. Thus, they will have the safeguard needed to assure that such records are complete and correct. In this way, a proper balance between the essential public need to protect users of the highways and the legitimate rights of the individual will be maintained.

CARGO SECURITY

The trucking industry has always been plagued by loss of cargo due to theft. Eighty to eighty-five percent of the annual loss in this category is attributable to the cumulative effect of individually small thefts committed by employees of the carrier, shipper or consignee who have access to the freight.

As one means to stem these losses, we continually urge motor carriers to conduct a thorough background check of each person considered for employment. We suggest emphasis on the past seven years of the applicant's work history and other data in the employment application, during interviews, and the subsequent check of appropriate sources to verify the information furnished by the applicant. Certainly, job applicants expect to be asked questions reasonably related to their conduct at work and in the community during that period. Further, they expect the prospective employer to verify the information he has furnished regarding himself.

Our view on pre-employment checks is supported by the general public according to a 1972 nationwide survey by the Opinion Research Corporation, Princeton, New Jersey, conducted for the Retail Credit Company. Among other questions, that survey dealt with the public's attitude on the right of an employer to investigate a job applicant. By a 3 to 1 margin, the survey supports inquiries into an applicant's moral character, employment history, stability and reliability, personality traits, skills, aptitude, and education. The existence or absence of a criminal record is but one piece of information in the selection of the applicant who is best qualified for employment.

We are greatly concerned that enactment of this legislation will significantly impede motor carriers' efforts to determine the trustworthiness of prospective employees. Many motor carriers have had access to information of the type which the bill would regulate from local police departments, for use together with other background information in evaluating job applicants to select those whose qualifications make them most suitable for employment.

Sweeping Federal prohibition on release of criminal record information for pre-employment screening by law enforcement agencies appears to be inconsistent with the purpose of the Congress as expressed in the "Omnibus Crime Control and Safe Streets Act of 1968." That Act recognizes "that crime is essentially a local problem that must be dealt with by state and local governments if it is to be controlled effectively." The Law Enforcement Assistance Administration was created by that Act to provide Federal funds to assist non-Federal law enforcement agencies. The Act defines law enforcement to mean "all activities pertaining to crime prevention or reduction and enforcement of the criminal law."

We assume that Congress would not deliberately place roadblocks in the way of employers designed to make it more difficult to assure the hiring of trustworthy employees. We are deeply concerned that existing local practices on dissemination of information to aid that purpose may be prohibited by provisions of the pending legislation. One provision of the bills under consideration would deny employers access to information that a prospective employee had been convicted of a criminal offense unless the release of such information was "expressly authorized by applicable state or Federal statute."

We submit that there is a substantial public interest in reducing theft losses, since in the final analysis the cost of dishonesty is included in the ultimate price the consumer pays for goods and services. The United States Department of Commerce estimated that crimes against business in 1971 cost 16 billion dollars (not including the business share of governmental expenditures), including $1.5 billion attributable to cargo thefts. Roughly $800 million of these cargo thefts were attributed to the trucking industry. The public interest in reducing these losses is also evident from legislation passed by the Senate in the 92nd Congress and similar legislation passed by the House in the 92d Congress, as well as bills which have been introduced into both bodies of Congress in the current session. In addition, the Inter-Agency Committee on Transportation Security was created in the Executive Branch of the Federal government to help reduce losses and continues to function to date.

We believe a reasonable balance between the individual's right to privacy and the public's right to a decrease in property crimes was reached in the District of Columbia in 1968. Following hearings by a Commission regarding the availability of criminal record information to the private sector, the Commisison recommended that private employers be given access to records of the Metropolitan

Police Department, to obtain a record of the convictions and forfeitures for the past ten years on job applicants, provided the applicant authorized the release and the employer paid a processing charge of $1.50. The form used is supplied by the Police Department. This system has been in effect since 1968, and we are not aware of justifiable complaints from any quarter regarding this procedure.

Adequate safeguards exist in that release of this information is authorized for a specific purpose by the applicant himself. The information to be obtained is itself, at one time or another, a matter of record available to the public. A final safeguard is that in the event of misuse of information, legal remedies are available to the injured party.

Our request for access to criminal information regarding a job applicant appears to be consistent with the Congressional intent expressed in Public Law 91-508, the Fair Credit Reporting Act. One of the findings, expressed in Section 602, was that "consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to confidentiality, accuracy, relevancy and proper utilization . . ." That the Congress was aware that reports would be used for employment purposes is evident in Section 604(3)B with the phrase "intends to use information for employment purposes."

That the Congress was aware that reports for employment purposes would contain information regarding criminal records is evident in Section 605 which defines types of obsolete information which cannot be furnished, except for certain transactions. Specifically, Section 605(a)(5) provides that "Records of arrests, indictment or conviction of crime, from date of disposition, release, or parole, antedate the report by more than seven years," may not be included in reports by consumer reporting agencies.

We urge the pending legislation be revised to permit access by motor carriers to the files of the Federal Bureau of Investigation to obtain, for use in pre-employment screening, arrest record information for the past seven year period (excluding juvenile offenses) such access to be conditioned upon the applicants' signed authorization.

Respectfully yours,

WILLIAM A. BRESNAHAN.

STATEMENT OF THE UNITED STATES LEAGUE OF SAVINGS ASSOCIATIONS [1]

The United States League of Savings Associations appreciates this opportunity to file a statement on the "Criminal Justice Information Control and Protection of Privacy Act," HR 12575, and the "Criminal Justice Information Systems Act," HR 12574.

We favor legislation which would authorize our members (and other financial institutions) to have access to FBI criminal offender record information (arrest and conviction records). We believe that the present section of the Department of Justice Appropriations Act of 1973 (PL 92-544), which authorizes savings and loan associations access to FBI arrest record information, should remain in effect. We feel that the language of HR 12574 provides our members with the necessary authority, along with the Appropriations Act, to continue to receive FBI criminal offender record information. We understand that there is some question as to the continuing applicability of this Appropriations Act in this area, and therefore, suggest that any legislation reported by this Subcommittee specifically authorize our members continued access to criminal offender record information.

We support legislation which would protect the individual's right to privacy; provide the individual with access to his own records for correction and verification; establish standards for dissemination of criminal justice information; and insure the accuracy and thoroughness of criminal justice records. At the same time, we urge the Subcommittee to recognize the legitimate needs for access to

[1] The United States League of Savings Associations (formerly the United States Savings and Loan League) has a membership of 4,600 savings and loan associations, representing over 98% of the assets of the savings and loan business. League membership includes all types of associations—Federal and state-chartered, insured and uninsured, stock and mutual. The principal officers are: George B. Preston, President, West Palm Beach, Florida; Lloyd S. Bowles, Vice-President, Dallas, Texas; Tom B. Scott, Jr., Legislative Chairman, Jackson, Mississippi; and Norman Strunk, Executive Vice-President, Chicago, Illinois. League headquarters are at 111 East Wacker Drive, Chicago, Illinois 60601; and the Washington Office is located at 1709 New York Avenue, NW., Washington, D.C. 20006; Telephone: 785-9150.

criminal justice information by criminal justice agencies, as well as, certain noncriminal justice agencies including savings and loan associations. Our comments are directed at those sections of the bills which affect the access by savings and loan associations to the criminal record information system provided by the FBI.

Savings and loan associations[2] are authorized by the Department of Justice Appropriations Act of 1973 to receive FBI identification records on employees or applicants for employment "to promote or maintain the security of those institutions." This service has been an invaluable aid to savings and loan associations because it usually brings to their attention, the prior criminal record of any potential employee who would handle or have access to the monies of not only private citizens and business firms, but also local, State, and Federal government agencies. The embezzler, thief, or individual who has been convicted of a crime involving breach of trust or dishonesty, or has a history of such conduct, generally has no place as an employee of a finacial institution. Our experience has demonstrated that access by our members to FBI criminal offender record information is essential if they are to meet their obligation to depositors, borrowers, and the general public who see the integrity of financial institutions as a reflection of the character of the institution's employees, officers, and directors.

This obligation to know the background of potential employees is not only one of common sense and good management practice, but is incident to the proper conduct of the institution as prescribed by Federal statute and regulation. 12 USC 1730(h) and 12 USC 1464(d)(5)(a) authorize the suspension of any officer or director of a Federally-insured savings and loan association if the individual is charged with a felony involving dishonesty or breach of trust. A conviction for such an offense could then result, and in almost all cases does result, in automatic removal from office and a specific prohibition from further involvement in the business affairs of the institution. Also, except with the prior written consent of the Federal Home Loan Bank Board or the FSLIC, the primary regulatory agency and insuring agency for Federal and many State savings and loan associations, no individual who has been convicted of a criminal offense involving dishonesty or breach of trust can serve as an officer, director, or employee of a savings and loan association. Willful violation of this requirement subjects the savings and loan association to a penalty of up to $100 for each day that the prohibition is violated. (12 USC 1464(d)(12)(B); 12 USC 1730(p)(2)).

The significance of the receipt of FBI criminal offender record information by savings and loan associations is also demonstrated by an official memorandum of the Federal Home Loan Bank Board's Office of Examinations and Supervision which requires that every Federally-insured institution be informed of the availability of this service and recommends that all savings and loan associations provide the FBI with fingerprint cards of their officers, directors, and employees. (Memorandum 44-2, December 22, 1971).

HR 12575 provides for the dissemination of conviction record information to non-criminal justice agencies provided that this dissemination is expressly authorized by State or Federal statute (HR 12575—Section 201(c)). HR 12575 also specifically repeals the existing statutory authority for access by savings and loan associations to arrest record information (HR 12575—Section 313). Specific statutory language would be required to continue savings and loan access to this information.

HR 12574 (Section 5(e)(1)) provides for the dissemination of both conviction and arrest records if specifically authorized by Federal or State statute or Executive Order. HR 12574 does not repeal the present authority under the Department of Justice Appropriations Act.

The U.S. League believes that both of these bills would have the most beneficial impact on the savings and loan association and its prospective and present employees, officers, and directors by their provisions which insure that criminal

[2] The Department of Justice Appropriations Act gives special recognition to Federally-chartered and Federally-insured savings and loan associations. All Federally-chartered associations are regulated by the Federal Home Loan Bank Board and insured by the Federal Savings and Loan Insurance Corporation (FSLIC). Most State-chartered associations are insured by FSLIC. These associations account for approximately 89% of our members. For purposes of this statement, the term "savings and loan association" refers to Federally-chartered and Federally-insured savings and loan associations.

We also believe that all savings and loan associations should have access to FBI criminal offender record information. This would include not only Federally-chartered and Federally-insured associations, but also members of the Federal Home Loan Bank System, such as, the co-operative banks in Massachusetts and various savings and loan associations in Maryland and Ohio, the accounts of which are insured by State-chartered insurance corporations.

offender record information received by the association is accurate and complete. Arrest records which reflect a case of mistaken identity are inherently damaging to the individual. Further, they are of no value to the savings and loan association. An arrest record which does not reflect a disposition of the arrest, where such is available, does a disservice to both the individual and the savings and loan association. Our members which use FBI arrest record information, do so with discretion and with an attitude which recognizes that this information is only one of several factors to be considered in evaluating potential employees. The result is not a blanket denial of employment because of the mere fact of an arrest, a youthful indiscretion, or an unwarranted arrest. Instead, each item of arrest record data is only one element to be balanced with the other aspects of an individual's background upon which the savings and loan association selects its employees. At the same time, we feel that the arrest of an individual for embezzlement, even though standing alone should not be a bar to employment, is a fact which deserves further explanation by the prospective employee who will have access to funds of the association.

We would also like to briefly comment on the provisions of both bills which provide for the sealing or purging of criminal justice information. We understand the need to give an individual a fresh start so that his record does not unnecessarily or unfairly follow him throughout his life. At the same time, we feel that more study should be given to the impact on the individual and the institution of the purging or sealing of records with an eye to establishing an initial period for purging or sealing after fifteen years rather than the proposed five- or seven-year period. Savings and loan associations still have the same responsibility under 12 USC 1464(d)(12)(B) and 12 USC 1730(p)(2) whether a conviction involving dishonesty or breach of trust is five- or fifty-years olds, and any legislation in this area should give recognition to this potential conflict.

In conclusion, we believe that savings and loan associations should continue to have access to FBI arrest record information, and therefore, favor the language of HR 12574. We feel that adequate protection for the individual is provided by the section of the bill (HR 12574—Section 8) with its restrictions on the dissemination of arrest records.

In any case, we urge the Subcommittee to recognize the legislative and regulatory requirements placed on savings and loan associations as cited above, and in any reported bill, specifically authorize access by Federally-insured and Federally-chartered savings and loan associations, at the very least, to criminal offender record information which would satisfy these requirements. We will be happy to assist the Subcommittee and respond to any further inquiries on what we believe represents an issue of vital concern to the individual, as well as, the savings and loan association.

AMERICAN CIVIL LIBERTIES UNION,
Washington, D.C., April 9, 1974.

Hon. DON EDWARDS,
2240 Rayburn House Office Building,
Washington, D.C.

DEAR CONGRESSMAN EDWARDS: On behalf of the American Civil Liberties Union, I would like to submit the enclosed statement originally presented to the Senate Subcommittee on Constitutional Rights for inclusion in the record of your hearings on criminal justice information. This testimony will supplement our earlier presentation to your Subcommittee which was prepared prior to the introduction of H.R. 12575 and H.R. 12574.

We want to thank you for all the hard work which you and your staff have put in on this important issue. Please call upon us if we can be of any further assistance.

Sincerely,

HOPE EASTMAN,
Associate Director.

Enclosure.

STATEMENT OF ARYEH NEIER, EXECUTIVE DIRECTOR, AND JOHN H. F. SHATTUCK, STAFF COUNSEL, AMERICAN CIVIL LIBERTIES UNION

The American Civil Liberties Union is a nationwide, non-partisan organization of more than 275,000 members devoted to the protection of the Bill of Rights. We strongly endorse H.R. 12575 as a major step toward dismantling the "record prison" which has grown up in the shadow of our criminal justice system. Before

discussing the specific features of both H.R. 12575 and H.R. 12574, we offer some general comments on the values and social policy considerations which we believe are at stake.

Arrest and conviction records are collected and disseminated in the belief that such practices are necessary to control and reduce crime. At the same time, there is a growing recognition that the right to privacy and the right to employment are severely damaged by the promiscuous dissemination of such records. If both of these propositions were accurate, than the task before you would be to weigh the competing interests and draw legislation accordingly.

On the basis of extensive study of the impact of disseminating arrest and conviction records, however, we submit that it would be a serious mistake to approach the problem addressed by H.R. 12575 and H.R. 12574 as if there were a conflict between the interest in security against crime and the interest in the right to privacy. The wide dissemination of these records has not contributed to solving the problem of crime in America. It has helped to create the problem.

Millions of Americans are labelled by their records. As a consequence, they are unable to obtain decent jobs or homes, insurance, credit, or admission to educational programs. The many surveys of the impact of personal records on people's lives point to a single inescapable conclusion: that arrest and conviction records often create social lepers who must exist as best they can on the fringes of society. Crime in America is committed mostly by young males on the run. Much of the time, they are on the run because they have already acquired records, and by moving to a new place they hope to escape the records which make it impossible to get jobs. However, the dissemination of their past records by our law enforcement agencies insures that many of these branded persons will not escape. It may take years until they are able to get steady jobs and put down the roots which take them out of the criminal class and make them law-abiding citizens. When that finally happens, it is often because they have successfully concealed or indeed lied about their records. If the lies are discovered, however, they may lose their jobs and go on the run again.

The dissemination of records places a series of obstacles in the path of persons who wish to enter society's mainstream and end the half-life of the world of crime. Is it any wonder, then, that recidivism rates should be so high? How can we seriously hope to reduce crime if we disseminate records which have the unintended effect of making it impossible for people to stop being criminals?

In all probability, law enforcement agencies will be able to come forward and describe instances in which crimes were prevented or criminals were apprehended because of the availability of records. Similarly, it may be possible to formulate examples of jobs which no sane person would want to be given to people with particular kinds of records. Curiously, the records of legislative hearings and court cases on arrest records lack any acutal cases where the things people feared actually occurred. But we urge you not to permit such examples, even if they appear, to obscure the broad consequences of record dissemination practices. The United States disseminates arrest and conviction records more widely than any other country in the western world. While there may be no proof of a cause and effect relationship, it certainly can be inferred from the facts.

When arrest records not followed by conviction are at issue, there are additional compelling reasons to prohibit dissemination. The most elementary premise which underlies our commitment to due process of law is that a person is presumed innocent until proven guilty. That commitment is destroyed by criminal justice systems which punish persons not proven guilty through dissemination of their records. The impact of an arrest record is almost as severe as that of a conviction record in limiting opportunities for employment. Some people are started on the road to crime when they are arrested for things they did not do, and thereby labelled with arrest records.

Different considerations should govern our attitude to persons who have been convicted of crimes. No violation of the presumption of innocence is at issue when their conviction records are disseminated. However, in addition to society's need to reabsorb convicted persons once they have been punished for their crimes in order to protect itself, there is a due process consideration in limiting punishments to those specified by the criminal law. If a legislature authorizes a judge to sentence a criminal to no more than a year in prison, that should be the limit of the punishment imposed. In practice, the dissemination of conviction records imposes life sentences, regardless of the crime committed or the penalty specified by law.

The right to privacy is of vital significance. However, the concept of privacy is inadequate to describe the issues at stake in the measures you consider today. The dissemination of arrest and conviction records causes millions of people

to lead furtive existences in which they either try to escape the criminal labels attached to them or, finding that struggle hopeless, conform to the labels. This country cannot afford to continue labelling an ever-increasing number of its citizens as criminals, just as it cannot afford to have so many criminals. We must seeks ways to reduce the criminal population, and one way is to stop disseminating the records which label people as criminals, thereby often causing them to act as criminals.

We have appended to this testimony an article by Aryeh Neier which appeared in *The New York Times Magazine* on April 15, 1973. The article attempts to document the multiple injuries suffered by persons with arrest records. In addition we offer some examples which have come to our attention since the publication of that article.

Brian N. was arrested in the state of Washington in 1970 as a "public nuisance." He was tried and acquitted. In 1971, he was arrested in California on charges of marijuana possession. The charges were dismissed. In 1973, he was hired by a firm installing alarms in banks and other businesses in Prescott, Arizona. The Prescott police checked Mr. N. with the F.B.I., were informed of his arrests but not of the dispositions, and reported the information to Mr. N.'s employer. He was fired.

In 1947, at the age of 20, Jane D. married a man of whom her parents disapproved. They moved to California and lived under a different name. Her husband was arrested there and charged with transporting stolen property across state lines. She and her husband were returned to Michigan where he pleaded guilty and went to prison. The charges against her as an accessory to the crime were dismissed. She secured an annulment of her marriage and full custody of her infant son.

Subsequently, Jane D. started a new life and was remarried. She obtained a Ph.D. and an educational doctorate, published numerous articles in professional journals and became a senior education official in a large city school system. She has received certificates and awards for distinguished accomplishments in her profession. Nevertheless, she must live in constant apprehension because the F.B.I. continues to record her youthful arrests, and shows no dispositions for these arrests. She has written to the ACLU:

"I am left with the burden of providing proof that my case has been disposed of.

"WORSE—I am forced to reveal the unpleasant details and relive the traumatic experience all over again.

"WORST OF ALL—I am at the mercy of any employer, actual or potential, who, in essence, has been granted the right by the F.B.I. to examine these facts and to serve as judge and jury all over again."

She also notes that the fact that the F.B.I. makes this information available has "prevented me from applying for many other positions. At this very moment, this information still serves to threaten my professional life." She was disturbed recently to learn of a statute which, if duplicated in other states, would be a grave threat to persons in her position: New York State has enacted a statute authorizing the New York City Board of Education to request the F.B.I. to conduct fingerprint checks on employees of the city school system.

William M. was arrested in 1964 and adjudged under a state youthful offender statute which provides that such an adjudication is not a conviction and that it should be sealed. Since then, he has tried to secure return of his fingerprints from the F.B.I. Most recently, he made a request through a member of Congress and received a response from Clarance Kelley that it is F.B.I. policy "to return fingerprints upon being advised that the record has been ordered sealed." That is what the state law provides. However, because Mr. M. is unable to get the local Police Department which submitted his prints to seek their return, the F.B.I. holds on to them and disseminates them in a manner forbidden under the laws of the state in which the arrest and adjudication took place.

Robert G. is a black college student who was arrested and acquitted of a robbery charge in Washington, D.C. As a result of his arrest record, the police have on at least three occasions shown his photograph in neighborhoods where crimes have been committed, seeking to have him identified as the criminal. Apart from his arrest record there is no evidence to connect him with any crime, but he and his family and friends have been interrogated many times.

Calvin L. joined the Marine Corps in 1965. In August, 1969, he deserted and remained at large until he was arrested on January 10, 1973. He was taken to a military base in California and placed in the brig until March 23, 1973. At that time he was given an undesirable discharge, and released from military author-

ity. He was never court-martialed, and was told that the desertion charges would not be prosecuted because of the discharge.

In June 1973, he was a passenger in an automobile stopped by the Dallas police. The driver had some outstanding violations and the police apparently ran a National Crime Information Center ("N.C.I.C.") check, and arrested him on a "hold" for the military. After four hours, he was released. In August, 1973, Mr. L. was hitchhiking, was stopped by the Dallas police who again apparently ran a N.C.I.C. check, and was detained for over 24 hours on a military "hold" before being released. On December 3, 1973, Mr. L. was stopped by the Dallas police because he was driving a friend's car with Ohio license plates, and no Texas inspection sticker. Again, a N.C.I.C. check was made, and Mr. L. was placed in custody for four hours on a military "hold" before being released.

I. PROPOSED CONGRESSIONAL FINDINGS

Both H.R. 12574 and H.R. 12575 recognize in their opening provisions that the dissemination and use of criminal justice information can be severely detrimental to individuals. We applaud this proposed Congressional finding. On the other hand, we believe that several of the assumptions underlying both bills are deficient.

First, both of the bills propose to give statutory validity to an assumption that the utility of arrest and conviction records to law enforcement agencies ultimately outweighs the harm that such records can cause to individuls. S. 2964 goes even further and proposes that criminal justice informaton should be used for non-law enforcement purposes when "the needs of government or of society" clearly outweigh "the interests of the individual" (Sec. 2(b)), This assumption—that arrest and conviction records help to control crime—is totally at odds with what we have said above about the "record prison."

Second, both bills in varying degrees assume that the completeness and accuracy of a criminal record cures its deficiencies and justifies its maintenance, even when no conviction resulted from an arrest. To be sure, both bills would restrict the dissemination and use of arrest records (S. 2963 to a considerably greater degree than S. 2964), but neither prohibits the making of adverse judgments about persons based solely upon their arrest records.

Our perspective on criminal justice information suggests that as a matter of social policy and constitutional principle no judgments should be made about people solely on the basis of their arrest records. Similarly, no social disabilities should be imposed upon people solely on the basis of their conviction records, and such records should be used only for law enforcement purposes until the sentence is served.

Conviction records are the cause of severe discrimination when their use is not tightly restricted to these law enforcement purposes. An arrest record, which is in no way an adjudication of guilt, does not even have this integrity, regardless of its "accuracy" or "completeness."

The probability of a black urban male being arrested at least once during his lifetime has been estimated to be as high as 90%. For white urban males, the figure is 60% and for all males, it is 47%. *President's Commission on Law Enforcement and the Administration of Justice, Task Force on Science and Technology*, Appendix J at p. 216 (1967). Fewer than 25% of those arrested per year are found guilty of the offense for which they were arrested and only a little more than another 25% are found guilty of any crime at all. Despite their innocence before the law, persons with an arrest record are subjected to the severe, continuing and pervasive punishment that attaches to the commission of a crime, namely the lifelong disabilities of a "criminal record." Furthermore, that disability has the same damaging effect on a person's opportunity for employment and acceptance by society as a conviction record. *President's Commission on Law Enforcement*, *supra*, at pp. 75, 77. Unlike the conviction record, however, the arrest record is an illegitimate offspring of the criminal justice system, and poses a grave threat to the entire scheme of constitutional protection which our system of justice offers to citizens innocent of legal wrongdoing.

Because of the presumption of innocence it is not surprising that the Supreme Court has several times commented that arrest records do not prove anything in and of themselves. "The mere fact that a man has been arrested has very little, if any, probative value in showing that he has engaged in any misconduct. An arrest shows nothing more than that someone probably suspected the person apprehended of an offense. When formal charges are not filed . . . whatever

probative force the arrest may have had is normally dissipated." *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 241 (1957). Similarly, "arrest without more does not, in law any more than in reason, impeach the integrity or impair the credibility of a [person]. It happens to the innocent as well as the guilty." *Michelson* v. *United States*, 335 F. 2d 524 (4th Cir. 1963).

Conviction records, on the other hand, are conclusive proof that crimes have been committed. They are also proof that the persons convicted have been punished, so the fact of a conviction record should not cause that punishment to continue after a sentence imposed by law has been served. Unfortunately, this is not the way things work, as one ex-convict who served his time in Attica has trenchantly observed:

"Once you have a 'jacket'—a dossier with all the past details of your life, all the detrimental ones they can put together, that is—you are a criminal. The jacket does not disappear; it grows fat and follows you around wherever you go. Some day this sentence you are serving will chronologically run out, but society does not forgive; it keeps tabs . . . ." William R. Coons, "An Attica Graduate Tells His Story," *New York Times Magazine*, October 10, 1971.

The widespread discrimination against persons with conviction records is so well documented that the proposed findings of H.R. 12574 and H.R. 12575 on this issue are virtually indisputable. Of 475 private employers interviewed in New York City, for example, 312 stated unequivocally that they would never hire an ex-convict and 311 stated that they would fire an employee if they discovered that he had a criminal record. See Portnoy, *Employment of Former Criminals*, 55 Cornell L. Rev. 306, 307 (1970).

Nor is the private sector the only source of prejudice against persons with conviction records. Virtually all states and many municipalities have licensing laws like those in California where thirty-nine of sixty licensed occupations permit or require denial, revocation, or suspension of a license for conviction of any felony or misdemeanor involving moral turpitude. See Note, *The Effect of Expungement on a Criminal Conviction*, 40 S.Cal.L.Rev. 127, 136–37 (1967). *Cf.* Shattuck, *Admission to the Bar Following Conviction: Survey* of State Law, 78 Yale L.J. 1382 (1969). Employment in the public sector is even less available to the former offender than employment in a licensed occupation. In more than half the states there is a flat statutory prohibition against government employment of persons with felony convictions, and in all other states government agencies are given the right to turn down a person with a conviction record. See Rubin, *The Law of Criminal Correction*, pp. 613–14, 625–62 (1963).

These considerations indicate that the proposed Congressional findings of H.R. 12574 and H.R. 12575 do not sufficiently express the demonstrable harm that individuals suffer as a result of widely disseminated criminal justice information, and at the same time make speculative assumptions about the utility of much of this information to law enforcement agencies (H.R. 12575), or more broadly, to "society" (H.R. 12574).

II. MAINTENANCE, DISSEMINATION AND USE OF CRIMINAL JUSTICE INFORMATION

A. Arrest Records

Both of the bills under consideration contain restrictions on the maintenance, dissemination and use of raw arrest records—records of arrests not resulting in conviction. In view of our position that arrest records can cause great harm to individuals but are not demonstrably useful for law enforcement, we favor the more restrictive approach of H.R. 12575.

Senator Ervin's bill would flatly prohibit all non-law enforcement uses of criminal justice information or arrest records where no convictions resulted (Secs. 202 and 203). Such records are divided into two classes—records of "open" arrests where no disposition is recorded (Sec. 202(b)) and "criminal history records" of arrests resulting in dispositions other than conviction (Sec. 202(c)).

The bill provides that both classes of records could be disseminated only for three narrowly defined law enforcement purposes—(1) screening employment applications in law enforcement agencies, (2) referring cases from one law enforcement agency to another, and (3) use in a criminal proceeding against a person who was arrested for a different offense within the last year (Secs. 202 (b), (c)). Finally, H.R. 12575 would require all criminal justice information systems to adopt procedures "for the prompt sealing or purging of criminal history record information in any case in which the police have elected not to refer the case to the prosecutor or in which the prosecutor has elected not to commence criminal proceedings" (Sec. 206(b)(2)).

H.R. 12574 contains a similar prohibition against the dissemination of both "open" and "closed" arrest records for non-criminal justice purposes (Sec. 8), but there are several exceptions which would undercut the effect of the ban. The two principal and broadest exceptions are: (1) "when the Attorney General determines, with regard to the particular case *or class of cases*, for reasons of national defense or foreign policy it [the prohibition] should not apply" [emphasis added], and (2) "where a Federal statute expressly provides that the prohibition shall not apply" (Sec. 8(d)). Furthermore, unlike the Ervin bill, H.R. 12574 does not in any way restrict the dissemination of arrest records for asserted law enforcement purposes, although it does prohibit the "subsequent use" of a record for a purpose other than that for which it was disseminated (Sec. 8(b)). Finally, there is no provision in H.R. 12574 for purging arrest records, which are to be sealed only when the person arrested is not convicted of any offense for a five year period following his arrest (Sec. 9(b)(3)).

Our support for the more restrictive approach of the Ervin bill with respect to the use of arrest records is based on two main factors: *first*, the damaging effect of arrest records on employment and credit opportunities, and *second*, the deprivation of constitutional rights which individuals suffer when their arrest records are disseminated and used against them.

Examples of employment discrimination against persons with arrest records are legion. A study of the New York area employment agencies, for example, indicated that 75% would not accept for referral an applicant with an arrest record and no conviction. See Sparer, *Employability and the Juvenile Arrest Record*, at 5 (Center for the Study of Unemployed Youth, New York University). Despite administrative attempts to prevent the dissemination of arrest records, it has been found, for example, that employers in the District of Columbia have often obtained records from police sources, and that as a direct result job applicants are not hired. See *Report of the Committee to Investigate the Effect of Police Arrest Records on Employment Opportunities in the District of Columbia* (hereinafter "Duncan Report") (1970). The Chief of the Employment and Employee Relations Section of the District of Columbia Personnel Office told the Duncan Committee that many interviewers, receptionists, and employers automatically rule out arrestees whenever a risk is involved in the job. *Id.*, at 10. A representative of the Work Training Opportunities Center of the D.C. Department of Public Welfare declared that employers attitudes engendered a defeatism among unemployed persons with arrest records. *Id.*, at 12. The Director of the local U.S. Employment Service in Washington stated that many employers required a "clean" arrest record as a condition of employment, and that the Service was able to place only about 15% of applicants with records of convictions *or* arrests.

Perhaps more disturbing than informal discrimination is the type of discrimination against arrested persons which is promoted by state record-keeping laws. In 1969 New York enacted a law requiring the fingerprinting of securities industry employees. Of the first 20,000 persons fingerprinted, 361 were found to have arrest records, and 54 lost their jobs. Approximately one-half of those with arrest records had never been convicted of any offense. An estimated 56% of all states, 55% of all counties, and 77% of all cities ask whether an applicant has ever been arrested on their civil service application forms. See Miller and Marietta, *Guilty But Not Convicted: Effect of an Arrest Record on Employment*, at n. 15 (Georgetown University Law Center 1972). Many more jurisdictions have vague character standards for civil service jobs which give hiring officials great discretion in rejecting applicants with arrest records. *Id.* Finally, arrest records have adverse consequences under state law on applications for professional and occupational licenses and on applications to surety companies for the bonding necessary for licensed employment.

When these governmentally sanctioned employment discriminations are placed in a constitutional context, the use of arrest records becomes even less defensible. The principle is clear: "imposition of punishment upon a person who has not been found guilty violates the most rudimentary concept of due process of law." *Giaccio* v. *Pennsylvania*, 382 U.S. 399 (1966) (Stewart, J., concurring) invalidating statute permitting juries to impose court costs on acquitted defendants). See *Menard* v. *Mitchell*, 328 F. Supp. 716 (D.D.C. 1971), on remand from 430 F. 2d 486 (D.C. Cir. 1970); *Davidson* v. *Dill*, 503 P. 2d 157 (Colo. 1972).

In *Menard*, a case brought by the ACLU, a 26 year old Marine veteran had been arrested for "suspicion of burglary," but was not convicted, indicted, or even charged. In fact, it was never even established that the "crime" for which he was arrested, following a telephone complaint about a "prowler" in the neighborhood where Menard was sitting on a park bench, was committed by anyone.

Seeking removal of his arrest record from the files of the F.B.I., Menard was denied relief in the District Court. On appeal it was held that since "information denominated a record of arrest, if it becomes known, may subject an individual to serious economic difficulties," 430 F. 2d at 490, Menard was entitled to a trial on the issue of complete expungement. On remand, District Court Judge Gesell ruled that while the F.B.I. may maintain the record of Menard's arrest for distribution to and use by federal, state and local law enforcement agencies for law enforcement and federal employment purposes only, all other distribution and uses of the record would be enjoined (but see P.L. 92-544, nullifying the effect of the injunction). Viewing the District Court's decision as inadequate, Menard has taken a second appeal in which he contends that he is being subjected to punishment by arrest record. Thereby depriving him of equal protection, constituting a cruel and unusual punishment for his status as an arrestee, violating the presumption of his innocence, and invading his privacy.

The equal protection argument is grounded on the simple claim that since Menard has not been convicted of a crime, he is entitled to be treated like other non-convicts. Instead, his arrest record classifies him with the guilty, and he is exposed to all the risks, disabilities and disadvantages that flow from maintenance and dissemination of his record. While Menard's own equal protection claim is strong, the burdens imposed by arrest records are likely to fall even more heavily and unfairly upon members of ethnic minorities, see *Gregory* v. *Litton Systems, Inc.*, 316 F. Supp. 501 (D.C. Cal. 1970) judicial finding that blacks are arrested substantially more frequently than whites in proportion to their numbers) or groups whose unconventional life styles, unorthodox political views or social modes are offensive to community attitudes. See *Hughes* v. *Rizzo*, 282 F. Supp. 881 (E.D. Pa. 1968) (use of arrest records to harass hippies). Indeed, the D.C. Circuit in its opinion remanding *Menard* to the District Court noted that "[hippies] and civil rights workers have been harassed and literally driven from their homes by repeated and unlawful arrests . . . Innocent bystanders may be swept up in mass arrests made to clear the streets either during a riot or during political demonstrations." 430 F. 2d at 494.

The second element of the constitutional argument is that the maintenance of an arrest record constitutes cruel and unusual punishment. Since "[t]he due process clause . . . prohibits as cruel and unusual the punishment of status," *Wheeler* v. *Goodman*, 306 F. Supp. 58, 62 (W.D.N.C. 1969) (three-judge court), statutes which impose punishment because of a physical condition, such as narcotics addiction, *Robinson* v. *California*, 370 U.S. 660 (1962) or because of one's status as an indigent or a vagrant, *Wheeler* v. *Goodman*, *supra*, have been held unconstitutional. In Menard's case, there has been no legitimate judicial or other determination that his status as an arrestee resulted from any affirmative misconduct on his part. Since he is even less accountable for his status as an arrestee than an addict or a vagrant, the injury to his character and reputation which stems from his arrest record is even more cruel and unusual punishment than theirs.

Nor can a legitimate public interest in identifying the guilty overcome the denial of due process and equal protection and the infliction of cruel and unusual punishment caused by the attaching of a stigma to an innocent person. In *Boorda* v. *Subversive Activities Control Board*, 421 F. 2d 1142, 1143, (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1042 (1970), for example, the D.C. Circuit invalidated the disclosure provisions of the Subversive Activities Control Act on the ground that the Act was "constitutionally defective in allowing public disclosure of an individual's membership to be made without a finding that the individual concerned shares in any illegal purposes of the organization to which he belongs." Citing *Boorda* in its *Menard* opinion, the D.C. Circuit held that "[t]here is a limit beyond which the government may not tread in devising classifications that lump together innocent with the guilty." 430 F. 2d at 492.

Finally, the maintenance and dissemination of an arrest record is an unwarranted invasion of privacy. It has been held that disclosure of arrest records to employers constitutes an "unjustified invasion of privacy, particularly where innocent persons are arrested." *Morrow* v. *District of Columbia*, 417 F.2d 728, 742 (D.C. Cir. 1969). Other courts have gone so far as to hold that the mere retention of the criminal identification records of an acquitted defendant infringes on his right of privacy. See, *e.g.*, *United States* v. *Kalish*, 271 F. Supp. 968, 970 (D.P.R. 1967); *Eddy* v. *Moore*, 487 P.2d 211 (Wash. 1971). In this spirit, the District Court in *Menard*, relying on the landmark decision of *Boyd* v. *United States*, 166 U.S. 616 (1886), declared that "systematic recordation and dissemination of

information about individual citizens is a form of surveillance and control which may easily inhibit freedom to speak, to work and to move about in this land, [and consequently that] the overwhelming power of the Federal Government to expose must be held in proper check." 328 F.Supp. at 726.

B. Conviction Records

Considerable leeway is granted by both S. 2963 and S. 2964 to law enforcement agencies to disseminate conviction records. Both bills permit unlimited exchange of conviction record information for law enforcement purposes, and allow wide dissemination of such records for non-law enforcement purposes when such dissemination is otherwise authorized by state or federal law. To the extent that it is the mere restrictive of the two, we favor H.R. 12575, although neither bill would do much to prevent ex-convicts from becoming pariahs in the job and credit markets because of their status as "marked" men or women.

The information about ex-convicts that could be disseminated differs considerably under each bill. "Conviction records information" is defined in H.R. 12515 as "information disclosing that a person has pleaded guilty or nolo contendere to or was convicted on any criminal offense . . ." (Sec. 102(11)). This information may be disseminated to any recipient authorized by a state or federal statute to receive it (Sec. 201(c)).

Under H.R. 12574 however, a much broader category of information about convicted persons could be disseminated. "Criminal offender processing information"—defined as "all reports identifiable to an individual compiled at any stage of the criminal justice process . . ." (Sec. 3(e))—could be used under S. 2964 for any non-law enforcement purpose which is authorized by a federal or state statute, or a court order, and the Attorney General would have the power to make a "conclusive determination" whether any such use is in fact so authorized (Sec. 5(d)(4)). S. 2964 would permit even broader dissemination for "criminal offender record information" (a summary of the "processing" information). This information could also be used for any purpose expressly provided for by executive order, and the Attorney General again would be given the authority to make conclusive determinations about the information which is to be disseminated "with regard to the particular case *or class of cases*" (Sec. 5(e)).

Under both bills, the only limit on dissemination of conviction information is the requirement that the records be distributed only to those "authorized" to receive them under federal or state law. Each bill also contains a provision for sealing or expunging conviction records after seven years (felonies) or five years (misdemeanors). H.R. 12574 however, would exempt "manual systems" from "full compliance" with the sealing requirement (Sec. 9(c)(1)). Presumably, this exemption would include the F.B.I.'s Identification Division, at least until such time as it were to become independently computerized, or to be absorbed by the National Crime Information Center.

Without repeating what we have already said about the adverse effects of both arrest and conviction records on job opportunities, it is worth pointing out that the sealing and expungement provisions of both of the bills under consideration would not be of any significant help to ex-convicts looking for jobs. The five and seven year waiting periods would negate the effect of expungement at the very time when convicted persons are most in need of assistance in overcoming employment disabilities and other forms of discrimination resulting from their criminal records. The principle underlying the waiting-period provision—that recent convicts are too great a risk to employers because they have not shown by a period of "good behavior" that they are rehabilitated—is not supported by much evidence. Indeed the work release programs which have been adopted by nearly half the states and the federal government have registered favorable reactions among the overwhelming majority of employers participating in them. See, *e.g.*, Carpenter, *The Federal Work Release Program*, 45 Neb. L. Rev. 690 (1966). Successful attempts to cut recidivism by using community pre-release employment centers resulted in a federal statute authorizing their expansion (18 U.S.C. § 4082). See generally *Hearings on H.R. 6964 before Subcomm. No. 3 of the House Judiciary Committee*, 89th Cong., 1st Sess. (1965); Long, *The Prisoner Rehabilitation Act of 1965*, 29 Fed. Probation (Dec. 1965).

We believe that convictions should not be used to make judgments about people once their sentences have been served. We, therefore, believe that no non-law enforcement use of convictions should be authorized. If any exceptions are to be made, they should be very narrowly circumscribed. It is not in any way sufficient to rely entirely on other statutes, executive orders or "conclusive determinations"

of the Attorney General to define what uses are proper. The F.B.I.'s Identification Division, for example, disseminates criminal records to any agency authorized by law to receive them, but often cannot prevent misuse of the information by local recipients. See, e.g., *Menard* v. *Mitchell*, 328 F.Supp. at 726–27. The Federal Information Systems Board created by S. 2963 (Sec. 301) could be given the task of making determinations as to the very narrow category of circumstances under which conviction records could be made available. A good working model is the Massachusetts Criminal History Systems Board, which screens all agencies seeking access to the state's history databank.

C. Intelligence Records

The third general category of criminal justice records covered by H.R. 12574 and H.R. 12575 are records of "intelligence information." Neither bill focuses very clearly on these records, although in many respects their misuse represents an even greater threat to civil liberties than either of the more visible components of a criminal justice information system.

"Intelligence information" is defined in roughly the same way in both bills. In H.R. 12574 it is "information compiled by a criminal justice agency for the purpose of criminal investigation, including reports of informants and investigators, . . . associated with an identifiable individual" (Sec. 3(d). S. 2963 defines it simply as "information on an individual on matters pertaining to the administration of criminal justice, other than criminal justice information, which is indexed under an individual's name . . ." (Sec. 102(14)). It is, in short, the raw material of an investigation which may or may not have resulted in a prosecution, or even an arrest.

Senator Ervin's bill (H.R. 12575) does not attempt to come to terms with intelligence records in the same detailed manner as it does with arrest and conviction records. Since intelligence information is defined as "other than criminal justice information," its dissemination and use are not covered by the broad terms of Section 201(b), which restricts "criminal justice information" to "officers and employees of criminal justice agencies." Apparently, the only restrictions applicable to intelligence records under H.R. 12575 are that (1) they must be kept segregated from "criminal justice information systems" (*i.e.*, arrest and conviction records), and (2) they cannot be placed in automated or computerized systems (Sec. 208).

H.R. 12574 is certainly no more restrictive on the subject of intelligence records, but it is at least more explicit. Under Sections 5(a)(2) and (3) of that bill criminal intelligence information: (1) "may be used for a purpose not related to criminal justice if the Attorney General determines, with regard to the particular case or class of cases, that such use is necessary because of reasons of national defense or foreign policy," and (2) "may be made available to a non-criminal justice component of [a criminal justice agency] . . . if the information is necessary for the performance of a statutory function . . ."

Intelligence information is not generally contained within an arrest or conviction record. Often its existence is entirely separate from any action which may or may not have been taken against an individual by a law enforcement agency. It is at once more particularized and less concrete than the record of a formal contact between an individual and the police, and its recorded existence is rarely even known by the person to whom such information relates. An intelligence record, therefore, can be a secret time bomb or a deadly weapon, the misuse of which can destroy a person's reputation or career.

One serious abuse in intelligence gathering in recent years has resulted from the inability or unwillingness of law enforcement agencies to distinguish between criminal acts and controversial but lawful political activities. Thanks to the efforts of this Subcommittee, we have learned about the domestic intelligence gathering program of the United States Army which was developed in response to the civil disorders of the late 1960s but which resulted in the recording of the names of nearly twenty-five million civilians in Army databanks. See *Hearings Before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee*, 92nd Cong., 1st Sess. (February 23–25, March 2–4, 9–11, 15 and 17, 1971). See also *Laird* v. *Tatum*, 408 U.S. 1 (1972). Indeed, military intelligence gathering about civilian politics appears to be continuing overseas, even if it has been curtailed domestically. See *New York Times*, February 20, 1974, p. 7, col. 1; *Berlin Democratic Club* v. *Schlesinger*, Civil Action No. 310–74 (D.D.C.). Meanwhile, intelligence gathering by the F.B.I. and state and local police about the activities of political dissenters has increasingly come to the attention of the courts, which have commented on the dangers of such intelligence practices. See,

e.g., United States v. *United States District Court*, 407 U.S. 192 (1972); *Fifth Avenue Peace Parade Committee* v. *Hoover*, 480 F.2d 326 (2d Cir. 1973); *Yaffe* v. *Powers*, 454 F.2d 1362 (1st Cir. 1972); *Philadelphia Resistance* v. *Mitchell*, 58 F.R.D. 139 (E.D. Pa. 1972); *Handschu* v. *Special Services Division*, 349 F.Supp. 766 (S.D.N.Y. 1972); *Anderson* v. *Sills*, 106 N.J. Super. 545 (Ch. Div. 1969), *rev'd and remanded*, 56 N.J. 210, 265 A. 2d 678 (1970).

What happens to intelligence information once it has been recorded? The informality and secrecy which characterize most intelligence records make it possible for them to be widely disseminated almost without restriction and without the knowledge of their subjects. When the individual concerned finally discovers what is being said, it is often too late. One current ACLU case which may result in litigation, for example, involves a former overseas employee of A.I.D. whose personnel file contains derogatory information about his wife. He learned about this only after leaving A.I.D. to work for the F.A.A. After several years at F.A.A. he was promoted to an overseas position and passed a full security check. Shortly before he was to leave he was given an unsuitability rating for overseas assignment because "of information received from A.I.D. about your wife." His attempts to challenge the information were to no avail because (1) A.I.D. intelligence files cannot be expunged; (2) A.I.D. has no control over information in the files of the F.A.A.; and (3) the F.A.A. does not question intelligence information it receives from other federal agencies. Although he probably would have had a right to challenge his record under *Greene* v. *McElroy*, 360 U.S. 471 (1959), had he known about it and had it been used against him by A.I.D., he will have considerably more difficulty doing anything about it now that it has been widely disseminated within the federal government, and, perhaps, outside the government as well.

Obviously, neither of the bills under consideration adequately deals with the variety of ways in which intelligence records can be compiled and used to deny individual rights. Several minimal protections should be incorporated into the legislative scheme. First, the gathering and storage of intelligence information relating to political or religious activities, or any other form of speech or conduct protected by the First Amendment, should be sharply restricted. Such information should be gathered only when necessarily incident to a specific criminal investigation, and should not be independently recorded and indexed under the name of the individual to whom it relates. Second, hearsay or other forms of uncorroborated information about individuals should not be independently recorded and indexed under their names, although such information could be recorded during the course of a specific criminal investigation on the condition that it be purged from any permanent record of that investigation after its completion. Third, intelligence information about individuals should be prohibited from being disseminated to or used by any agency other than the one which has collected such information, except that certain narrowly defined categories of intelligence information could be made available by the collecting agency on a need-to-know basis to other government agencies authorized by statute to screen employees by conducting security clearance investigations.

III. CONCLUSION

The proliferation of records which has taken place in the shadow of our criminal justice system is itself, ironically, a contributing factor to rising crime rates and social disruption. We have discussed what we regard as some of the more important technical solutions to this problem which could be accomplished by legislation. There are other significant features shared to varying extents by H.R. 12574 and H.R. 12575 which we support—notably, the private remedies which are essential to enforcement of the legislative scheme; the administrative requirement that records be updated so that none are disseminated without reflecting their dispositions; and the provision permitting individuals to gain access to their files in order to challenge their accuracy.

In final analysis, however, the social problem addressed by H.R. 12574 and H.R. 12575 is not amenable to a technical solution. To solve the problem it is necessary to challenge the assumption underlying the maintenance and dissemination of criminal justice records. That assumption is that crime can be controlled and reduced by utilizing records to keep track of all persons who have ever come into contact with the criminal justice system. That assumption is wrong because it imprisons people in their records, punishes them when they are not guilty or have already been punished, preventing them from escaping their past and forcing them to repeat it.

Thank you for this opportunity to appear before you today.

STATEMENT OF THE NATIONAL CONFERENCE OF STATE CRIMINAL JUSTICE PLANNING ADMINISTRATORS BY RICHARD C. WERTZ, CHAIRMAN, NCSCJPA AND EXECUTIVE DIRECTOR, GOVERNOR'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, STATE OF MARYLAND, AND LEE M. THOMAS, LEGISLATION COMMITTEE CHAIRMAN, NCSCJPA AND EXECUTIVE DIRECTOR, LAW ENFORCEMENT ASSISTANCE PROGRAM, STATE OF SOUTH CAROLINA

During recent years the United States and its territories have experienced rapid growth and tremendous expansion in the use of automated data systems. An increasingly large part of this use has been devoted to the collection and storage of information about people. The ease and rapidity of data retrieval has greatly increased the need for some meaningful controls to be placed on the dissemination of this information as well as its collection and storage. If such computerized information systems, both in the public and private sectors, are allowed to grow unchecked, with no control on their use, then a citizen's constitutionally protected right of privacy is indeed lost. Today, the very mechanism which has been charged by society with the protection of these rights, the criminal justice system, is in the process of rapid change as a result of the new computerized technology.

The potential impact of computerized information systems on our criminal justice system cannot be underestimated. The collection, storage, and rapid dissemination of criminal offender data is currently having a positive impact on the apprehension of criminals throughout our country. The utilization of additional criminal justice data in these systems will provide significantly increased capabilities for crime deterrence, judicial caseflow management, rehabilitation programming, and comprehensive system planning.

It is obvious that there are major advantages and disadvantages for society as a result of the development of automated criminal justice information systems. Through the development of fair, well founded controls, society can benefit from such system while still retaining the right to individual privacy. To be most effective, such controls must eliminate problems inherent in such a system, while at the same time deriving the maximum benefits it has to offer. The proper forum to place such controls on these systems is the Congress through its legislative powers. Indeed, this authority is aptly stated in Title I Section 101 of S. 2963 and H.R. 12575 enttiled "Criminal Justice Information Control and Protection of Privacy Act of 1974," proposed legislation to be discussed later.

Specifically, it is our position that uniform controls should be placed on the collection, storage, and dissemination of information within the criminal justice sector of government at the federal, state and local levels. These controls must protect the right of privacy which is fundamental to every citizen, while at the same time securing and allowing criminal justice agencies access and use of the system capabilities. In this regard, we feel that neither segments of government not specifically authorized to operate in the area of criminal justice, nor private enterprise, should be allowed to collect, store, disseminate, receive, or use criminal justice information. We understand that there are exceptions to every rule and that none covering the area of computerized data banks can be "cast in concrete." We feel that statistics and research play a vital role in planning but that these areas should not serve as a "catchall," thereby sacrificing adequate controls placed on dissemination and use of criminal justice information system by criminal justice agencies—that of providing the basic data needed to apprehend, prosecute, sentence, and rehabilitate the criminal offender. Such systems must not be used nor misused by other agencies for indirectly related reasons.

In general, the numerous pieces of legislation concerning computer data banks have dealt with the specific issues of protection of an individual's right to privacy by insuring the security of the information. Two of the most recent and most comprehensive bills dealing with security and privacy of criminal justice information are S. 2963 and H.R. 12575, "The Criminal Justice Information Control and Protection of Privacy Act of 1974," and S. 2964 and H.R. 12574, "Criminal Justice Information Systems Act of 1974."

We feel that these two bills are a positive step in the right direction and that few will disagree with the fundamental objectives they define. However, as witnessed by these hearings, the texts of these bills are open for debate and must receive much further study. These hearings and the material being discussed serve as excellent vehicles for the development of positive and meaningful legislation.

There are certain areas of concern that must be addressed in this type of regulatory legislation: Proper and sufficient justification must be demanded for the

collection and storage of criminal justice data; controls must be imposed on the storage of this data in the system as well as its dissemination and use; a distinction needs to be made as to the type and classification of information within the system; provisions must be made for verification of the information collected and stored and for its destruction when obsolete; questions about an individual's access to his own records, and the review and correction of inaccurate or incomplete information in these records, must be answered; finally, there must be a determination made as to where authority should rest for monitoring the operating procedures of criminal justice information systems at the federal, state and local levels. We feel that both pieces of legislation attempt to cover all of these areas. The first sections of both bills identify the inherent risks of such vast information systems and further adequately state Congress' power to control the systems.

A. CONTROL OF CRIMINAL JUSTICE DATA BANKS

Notwithstanding the expenditures of federal money on criminal justice data systems, the majority of actual operation and maintenance will be at the state and local level. Therefore, we feel that the majority of control necessarily placed on these computer systems must likewise remain at the state and local level. Indirect guidance and broad guideline development would, of course, rest with the federal government due in part to the utilization of federal funds for systems development and in part to the interface necessary between federal, state and local information systems.

We feel that specific statutory control as well as administrative rules and regulations must be developed by state legislatures and the agencies charged with the operation, maintenance, and control of individual criminal justice information systems. However, we do not feel that states can formulate these rules and regulations governing computer data banks and criminal justice information systems without some guidance from the federal government. We feel that H.R. 12575 attempts to reach a median ground between federal control and guidance while maintaining the identity of the rights of states to govern themselves. We feel that H.R. 12574 removes too much control from the states and vests not only detailed statutory control but also administrative control in the federal government. The establishment of the Federal Information Systems Board in H.R. 12575 is a step in the right direction. However, we feel that there must be more state and local representation on that board. Such local membership could possibly be obtained through gubernatorial appointments or recommendations.

The formation of such a board is not the final answer; however, it is in the spirit of broad federal guidance. Federal legislation must be broad enough in scope to cover all possible contingencies but not too specific or restrictive so as to stifle state participation. Likewise, we feel that proposal and promulgation of federal rules and regulations must be broad in scope while allowing states to formulate and adopt specific rules and regulations governing their own local systems.

B. RIGHT OF THE INDIVIDUAL TO ACCESS AND REVIEW HIS OWN RECORD

The majority of pending legislation dealing with criminal justice information systems which has come to our attention has recognized that an individual has the right to review that information contained in a data bank which pertains to him. We feel that this is one of the central issues that must be dealt with in federal and state legislation and regulations. At this point, we must distinguish that an individual must be granted access to his own information files, but should not be granted access to his or other intelligence files. Implicit with this right of review is the requirement that certain records must be maintained by the data bank in addition to those specifically oriented to the criminal information needs of law enforcement, courts or corrections; i.e., criminal justice. In addition to general administrative records, we feel that agencies operating such criminal justice data systems must be required to maintain records identifying the source of information and to whom it was disseminated. For lack of a better term, this could be called a transaction log. We feel that with some revision Section 5(f) of H.R. 12574 achieves the basic necessities for such a log while H.R. 12575 does not. Such a transaction log is useful in at least three ways: it will notify the individual who received what information; it will assist the data bank in easy retrieval of records disseminated; and from a management standpoint it will allow monitoring of the usage of active files.

Obviously, before an individual is given access to his file, he must be properly identified. Once he is granted access, he must be given as much information as is necessary to thoroughly review his file for completeness and accuracy. Additionally, the proper forum and assistance for challenging inaccurate or incomplete data should be provided, and provision must be made to provide for the costs of such review and possible challenge.

We feel that both H.R. 12574 and H.R. 12575 address the individual's right to review but that the approach taken in H.R. 12575 is more positive. H.R. 12575 places an undue burden on the individual by requiring him to seek out the agency responsible for an inaccurate entry. This requirement, we feel, should rest with the operating agency as does the responsibility for keeping the data complete, accurate, and up-to-date. This follows since control over entry of the data is placed in the operating agency, not the individual. Inclusion of this requirement will not only insure the individual's right of privacy but insure that the operating agency verifies data and excludes that which is unsupported or questionable thus addressing the overriding need for accuracy.

We feel that the individual must bear some of the administrative costs of his access and possible challenge to determine unnecessary entry. However, such costs should not be prohibitive; and if a challenge is indeed successful in showing that the data bank was maintaining inaccurate or incomplete data, it should bear the bulk of such costs.

C. ACCESS AND USE OF CRIMINAL DATA SYSTEMS

1. Content of System—The primary purpose for the establishment and maintenance of criminal justice data systems is so the information they contain can be used by criminal justice agencies in the successful completion of their assigned duties. The often-used phrase "need to know" must play an important part when granting or regulating access to data bank and use of the information it contains.

There must at the outset be a clarification of the type of data to be contained in the system. This content will depend on the primary use for which the information is collected and stored. An overview of the type of information normally contained in a criminal justice data system can be discerned by reviewing the definitional sections of the proposed legislation currently under consideration. Although not totally exhaustive, both of the bills under present consideration cover the general types of information to be contained in such systems and thereafter used. However, we feel that certain specific definitions need addition, amplification, or clarification.

The term "criminal justice intelligence information" as explained in both bills and distinguished from "criminal justice information" is confusing. We feel that for proper administration and use of criminal justice data and to insure that law enforcement agencies have access to necessary information pertinent to the deterrence of crime and apprehension of criminals, these two terms must be fully distinguished. Simply requiring that one be for the "administration of criminal justice, other than criminal justice information, which is indexed under an individual's name . . ." is not enough. A chief difference between the two terms which is not mentioned in either bill is that one type of information is specifically oriented to present criminal justice activity and the other is retained for possible future use. That is, criminal justice information is maintained for general criminal justice agency use and should contain each and every transaction presently pertaining to an individual; whereas, "intelligence" information is specifically oriented to law enforcement and maintained for possible future apprehension and surveillance. Intelligence records may contain information about individuals which have never been convicted of a criminal offense but are suspect for criminal activity. This type of information will be helpful for future apprehension, whereas no present violations or other criminal justice agency information may appear on the individual's record.

This difference would lead legislation drafters to consider another difference—that intelligence information may not be as fact oriented and verifiable as criminal justice information. We feel that these two considerations may not be true in every occasion but are representative and would better portray the use for which such information was maintained. We feel that simply to require that intelligence information not be maintained in a criminal justice information system, or to fail to recognize that such information exists and not control it, is a serious shortcoming with both bills. Thus, we feel that provisions must be made for the collection and storage of intelligence information with strict controls placed on

its dissemination, and under no circumstances should this type of information be allowed dissemination to non-criminal justice agencies or private industry.

2. Access Restricted—Access to criminal justice information systems by non-criminal justice agencies, and especially private industry, must not be allowed unless by specific statutory authority. If good reason can in fact be provided for allowing certain non-criminal justice agencies access to certain data for specific reasons, more stringent restrictions and regulations must be mandated than those in the proposed legislation. In H.R. 12575 under Section 5, there are virtually no controls placed on the access to criminal justice information systems and the use of records therein by non-criminal justice oriented agencies. H.R. 12575 attempts these limitations and controls, but we feel much clarification is necessary.

3. Second Dissemination—Once information has been disseminated from a criminal justice data bank, direct control over that information is impossible to maintain by the disseminating agency or data bank. We understand that absolute control is a practical impossibility but feel that much needs to be done to insure the necessary control. The problem of indirect or secondary dissemination is addressed in H.R. 12575 but not to the degree which we suggest.

One of the most meaningful controls over secondary dissemination is to not allow direct dissemination of printed information or record copies. This, of course, is impractical due to differing translations, unreliability of verbal communications, and possible infringement on the individual's right of review—not to mention the impediment placed on law enforcement. We do feel, however, that a practical solution would be to require the return to all document copies, printed transmittals, and original correspondence to the original sender with stiff penalties for secondary dissemination and noncompliance.

4. Purging and Sealing—There must be provision made for the destruction or sealing of documents and records because of obsolescence, court order, or administrative review. There must be legislative provision allowing for the purging of records in criminal justice data banks. To a certain degree, we feel that H.R. 12575 accomplishes this. It identifies the term purge and distinguishes it from the sealing of a record. However, when the two terms are used in the text of H.R. 12575 they are placed together and the distinction is negated.

H.R. 12574 on the other hand, does not even provide for the destruction of records or documents whatever reason. It does provide for the sealing of records, but the lack of adequate controls placed on "sealing" makes the term meaningless.

We feel that in most cases arrest information should only be disseminated to law enforcement agencies. Such dissemination must be within rules and regulations established at the state level. H.R. 12575 has an adequate definition of both the term "purge" and "seal" and recommends that they be inaugurated in final positive legislation.

D. REMEDIES: ADMINISTRATIVE, CRIMINAL, CIVIL

For any regulatory legislation to be meaningful and in fact adhered to, that legislation must provide a remedy for non-compliance or violation of its mandates. Remedies are necessary not only to require compliance but also to deter non-compliance and to compensate those individuals aggrieved by violations. These remedies must be in the form of criminal penalties for violations of the law, civil actions for violations of an individual's rights, and administrative procedure to allow for managerial control.

H.R. 12574 distinguishes to some extent between administrative, civil, and criminal remedies in Sections 13 and 14 respectively; whereas Section 303 of H.R. 12575 refers to the provisions of the Administrative Procedures Act for administrative remedies, while clearly distinguishing between civil and crimnal remedies. We feel that federal legislation dealing with the regulation of criminal justice information systems must identify the need for administrative remedies but not delineate them. This is another area that must be dealt with at the state level within the purview of general federal guidelines. Such remedies are managerial tools and since the federal government cannot and will not manage each and every criminal justice data bank, this must remain at the state level.

Likewise, when providing for civil and criminal remedies, the forum for action should not be exclusively in the federal courts. This is neither advisable nor practical. Again, operation of the criminal justice information systems at the state and local level dictates a remedial forum at that level. The sanctions

themselves for civil and criminal remedy may and possibly should be within the auspices of federal legislation. This was in fact done in H.R. 12575, but we feel that certain minimums must be specified as well as maximums when denoting fines.

E. SUMMARY

Regulatory legislation at the federal level as well as rules and regulations serve a useful and necessary function when attempting to control the collection, storage, and dissemination of information in computerized data banks. As was stated in H.R. 12575, the federal government does have the authority for such control and legislation. However, as we have attempted to point out, much of the specific administration and control of criminal justice information systems must remain at the state and local level pursuant to broad, general federal guidance.

We feel that both H.R. 12574 and H.R. 12575 have considerable merit in securing an individual's right of privacy while allowing legitimate use of information by criminal justice agencies. However, neither of the two bills nor any of the numerous pieces of pending federal legislation including the project SEARCH proposals, in and of themselves, are the final answer to positive regulatory control of criminal justice information systems. The basic issues of such systems have been identified but deserve further extensive study and deliberation.

We feel that the form of open Congressional hearings as chosen by this subcommittee are by far the best method yet devised to gain a desirable and workable end product.

The national conference of State Criminal Justice Planning Administrators represents the directors of the 55 criminal justice state planning agencies (SPAs) operating under provisions of the Omnibus Crime Control and Safe Streets Act of 1968 and its 1973 amendments. SPAs exist in the 50 states, District of Columbia, Puerto Rico, American Samoa, Guam and the Virgin Islands. Members serve by virtue of their positions as SPA administrators.

Under the Safe Streets program, State and localities have been given a major responsibility to develop and implement efforts to reduce crime and juvenile delinquency and improve the criminal justice system. The national conference of state criminal justice planning administrators was formed in June, 1971. It serves to provide a formal mechanism through which SPA administrators can exchange information and develop consensus views on the nation's crime control problems.

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