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68 CRIMINAL JUSTICE INFORMATION CONTROL AND
GOVERNMENT PROTECTION OF PRIVACY ACT

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DOCUMENTS

HEARINGS
BEFORE THE
SUBCOMMITTEE ON
CIVIL AND CONSTITUTIONAL RIGHTS
OF THE
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES
NINETY-FOURTH CONGRESS

MAR 22 1977

FARRELL RY
KANSAS STATE UNIVERSITY

FIRST SESSION

ON

H.R. 8227

TO PROTECT THE CONSTITUTIONAL RIGHTS AND PRIVACY
OF INDIVIDUALS UPON WHOM CRIMINAL JUSTICE INFOR-
MATION HAS BEEN COLLECTED AND TO CONTROL THE
COLLECTION AND DISSEMINATION OF CRIMINAL JUSTICE
INFORMATION, AND FOR OTHER PURPOSES

JULY 14, 17, AND SEPTEMBER 5, 1975

Serial No. 68



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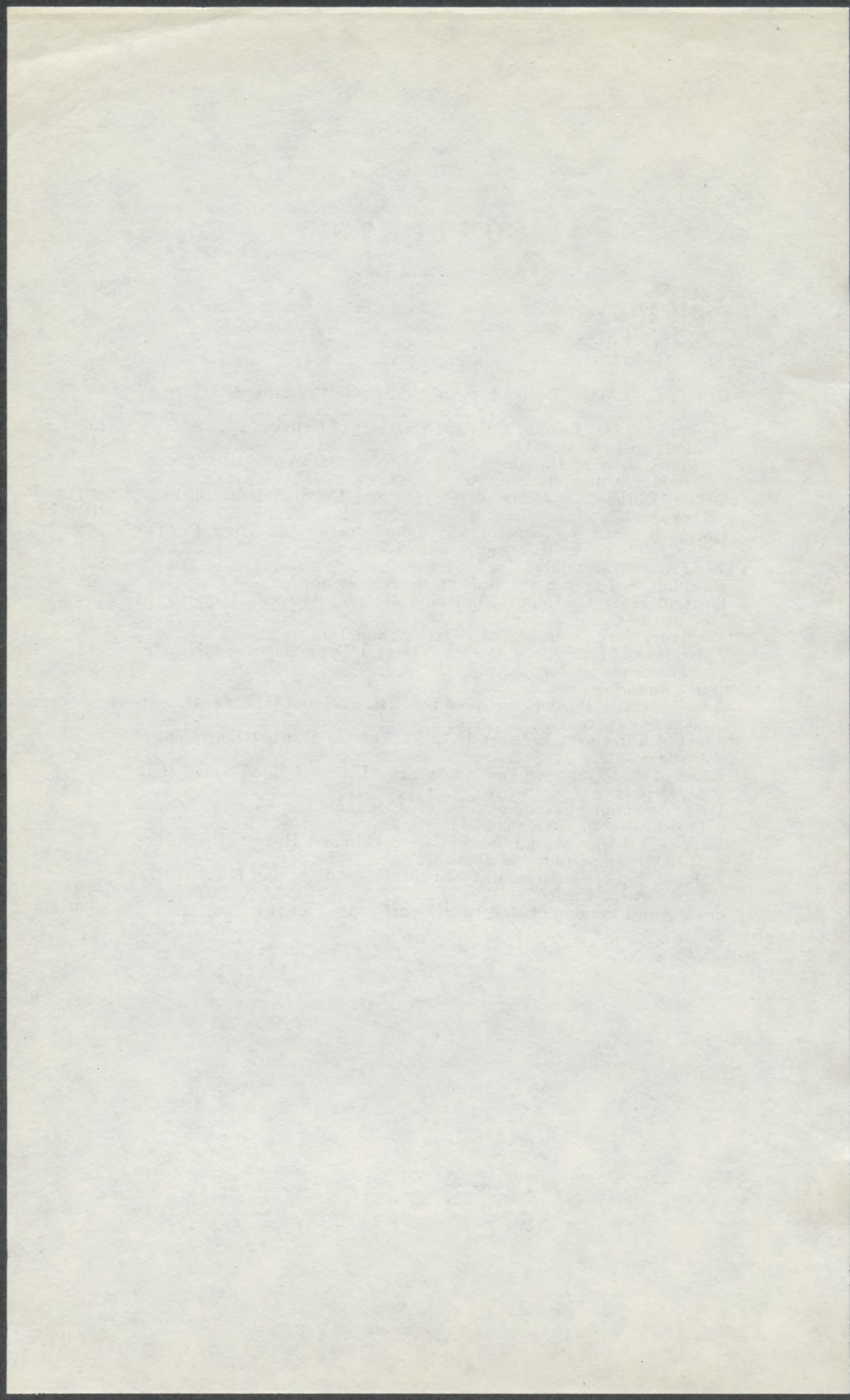
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CRIMINAL JUSTICE INFORMATION CONTROL AND PROTECTION OF PRIVACY ACT

MONDAY, JULY 14, 1975

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

The subcommittee met, pursuant to notice, at 10:10 a.m., in room 2141, Rayburn House Office Building, the Honorable Don Edwards [chairman of the subcommittee] presiding.

Present: Representatives Edwards, Drinan, Dodd, and Kindness.

Also present: Alan A. Parker, counsel; Arden B. Schell, assistant counsel; and Kenneth N. Klee, associate counsel.

Mr. EDWARDS. The subcommittee will come to order.

This morning we are beginning the final phase in our lengthy consideration of legislation to regulate and control criminal justice information systems. We are moving into the last few days in a series of hearings that have spanned almost 4 years.

The history of this proposed legislation began in the 92d Congress, with the introduction of a simple Arrest Records bill, H.R. 13315. During the 93d Congress this bill was reintroduced as H.R. 188. My colleagues and I on this subcommittee became aware of the National Crime Information Center [NCIC] and the focus of our hearings expanded to include the dissemination and use of computerized criminal justice information.

The emphasis of these new computerized information systems was on efficiency to the exclusion of any privacy considerations. In the beginning, the services of the NCIC were used only to a small degree in the everyday operations of our State and local criminal justice agencies.

But over the years, this system has grown. The actual and some of the potential abuses have proliferated. Technological advances in computer sciences have developed, not only an ease in obtaining information, but also an insatiable appetite by public and private agencies to collect information.

This uncontrolled access to a wealth of information collected on private individuals is a serious threat to the principles on which this country is founded.

This subcommittee, although some of my colleagues are neutral, has the responsibility of pushing forward with the proper legislation for the regulation and control of these criminal justice information systems.

The legislative record on the various bills is lengthy. We have been living for 4 years with the challenge of balancing the two major approaches to the delicate issue of individual privacy within a criminal justice system. The challenge has now developed to the point where we must act on this body of information to the best of our ability, and make that balance a reality.

[A copy of H.R. 8227 follows:]

94TH CONGRESS
1ST SESSION

H. R. 8227

IN THE HOUSE OF REPRESENTATIVES

JUNE 25, 1975

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 has been collected and to control the collection and dissemination of criminal justice information, and for other purposes.

- 1 *Be it enacted by the Senate and House of Representa-*
 2 *tives of the United States of America in Congress assembled,*
 3 That this Act may be cited as the "Criminal Justice Infor-
 4 mation Control and Protection of Privacy Act of 1975".

5 TITLE I—PURPOSE AND SCOPE

6 FINDINGS

7 SEC. 101. The Congress hereby finds and declares that—

- 8 (a) The responsible maintenance, use, and dissemina-
 9 tion of complete and accurate criminal justice information

I—O

1 among criminal justice agencies is recognized as necessary
2 and indispensable to effective law enforcement and criminal
3 justice and is encouraged.

4 (b) The irresponsible use or dissemination of inaccurate
5 or incomplete information, however, may infringe on individ-
6 ual rights.

7 (c) While the enforcement of criminal laws and the reg-
8 ulation of criminal justice information is primarily the re-
9 sponsibility of State and local government, the Federal
10 Government has a substantial and interconnected role.

11 (d) This Act is based on the powers of the Congress—

12 (1) to place reasonable restrictions on Federal
13 activities and upon State and local governments which
14 receive Federal grants or other Federal services or
15 benefits, and

16 (2) to facilitate and regulate interstate commerce.

17 DEFINITIONS

18 SEC. 102. As used in this Act—

19 (1) "Automated" means utilizing electronic computers
20 or other automatic data processing equipment, as distin-
21 guished from performing operations manually.

22 (2) "Dissemination" means any transfer of information,
23 whether orally, in writing, or by electronic means.

24 (3) "The administration of criminal justice" means any
25 activity by a criminal justice agency directly involving the

3

1 apprehension, detention, pretrial release, posttrial release,
2 prosecution, defense, adjudication, or rehabilitation of ac-
3 cused persons or criminal offenders or the collection, storage,
4 dissemination, or usage of criminal justice information.

5 (4) "Criminal justice agency" means a court or any
6 other governmental agency or subunit thereof which as its
7 principal function performs the administration of criminal
8 justice and any other agency or subunit thereof which per-
9 forms criminal justice activities but only to the extent that
10 it does so.

11 (5) "Criminal justice information" means arrest record
12 information, nonconviction record information, conviction
13 record information, criminal history record information, and
14 correctional and release information. The term does not in-
15 clude criminal justice investigative information or criminal
16 justice intelligence information.

17 (6) "Arrest record information" means notations of
18 arrest, detention, indictment, filing of information, or other
19 formal criminal charge on an individual which does not in-
20 clude the disposition arising out of that arrest, detention,
21 indictment, information, or charge.

22 (7) "Criminal history record information" means ar-
23 rest record information and any disposition arising therefrom.

24 (8) "Conviction record information" means criminal
25 history record information disclosing that a person has

1 pleaded guilty or nolo contendere to or was convicted of
2 any criminal offense in a court of justice, sentencing informa-
3 tion, and whether such plea or judgment has been modified
4 or reversed.

5 (9) "Nonconviction record information" means crimi-
6 nal history record information which is not conviction record
7 information.

8 (10) "Disposition" means information disclosing that
9 a decision has been made not to bring criminal charges or
10 that criminal proceedings have been concluded, abandoned,
11 or indefinitely postponed.

12 (11) "Correctional and release information" means in-
13 formation on an individual compiled in connection with bail
14 or pretrial or posttrial release proceedings, reports on the
15 physical or mental condition of an alleged offender, reports
16 on presentence investigations, reports on inmates in correc-
17 tional institutions or participants in rehabilitation programs,
18 and probaton and parole reports.

19 (12) "Criminal justice investigative information" means
20 information associated with an identifiable individual com-
21 piled by a criminal justice agency in the course of conduct-
22 ing a criminal investigation of a specific criminal act including
23 information pertaining to that criminal act derived from re-
24 ports of informants and investigators, or from any type of
25 surveillance. The term does not include criminal justice in-

1 formation nor does it include initial reports filed by a crim-
2 inal justice agency describing a specific incident, not indexed
3 or accessible by name and expressly required by State or
4 Federal statute to be made public.

5 (13) "Criminal justice intelligence information" means
6 information associated with an identifiable individual com-
7 piled by a criminal justice agency in the course of conducting
8 an investigation of an individual relating to possible future
9 criminal activity of an individual, or relating to the reliability
10 of such information, including information derived from re-
11 ports of informants, investigators, or from any type of sur-
12 veillance. The term does not include criminal justice in-
13 formation nor does it include initial reports filed by a
14 criminal justice agency describing a specific incident, not
15 indexed or accessible by name and expressly required by
16 State or Federal statute to be made public.

17 (14) "Judge of competent jurisdiction" means (a) a
18 judge of a United States district court or a United States
19 court of appeals; (b) a Justice of the Supreme Court of the
20 United States; (c) a judge of any court of general criminal
21 jurisdiction in a State; or (d) for purposes of section 208
22 (b) (5), any other official in a State who is authorized by a
23 statute of that State to enter orders authorizing access to
24 sealed criminal justice information.

1 (15) "Attorney General" means the Attorney Gen-
2 eral of the United States.

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

6 APPLICABILITY

7 SEC. 103. (a) This Act applies to criminal justice in-
8 formation, criminal justice investigative information, or
9 criminal justice intelligence information maintained by
10 criminal justice agencies—

11 (1) of the Federal Government,

12 (2) of a State or local government and funded in
13 whole or in part by the Federal Government,

14 (3) which exchange information interstate, and

15 (4) which exchange information with an agency
16 covered by paragraph (1), (2), or (3) but only to the
17 extent of that exchange.

18 (b) This Act applies to criminal justice information,
19 criminal justice intelligence information and criminal justice
20 investigative information obtained from a foreign govern-
21 ment or an international agency to the extent such informa-
22 tion is commingled with information obtained from domestic
23 sources. Steps shall be taken to assure that, to the maximum
24 extent feasible, whenever any information subject to this Act
25 is provided to a foreign government or an international

1 agency, such information is used in a manner consistent
2 with the provisions of this Act.

3 (c) The provisions of this Act do not apply to—

4 (1) original books of entry or police blotters,
5 whether automated or manual, maintained by a criminal
6 justice agency at the place of original arrest or place of
7 detention, not indexed or accessible by name and re-
8 quired to be made public;

9 (2) court records of public criminal proceedings or
10 official records of pardons or paroles or any index there-
11 to organized and accessible by date or by docket or file
12 number, or organized and accessible by name so long as
13 such index contains no other information than a cross
14 reference to the original pardon or parole records by
15 docket or file number;

16 (3) Public criminal proceedings and court opinions,
17 including published compilations thereof;

18 (4) records of traffic offenses maintained by depart-
19 ments of transportation, motor vehicles, or the equivalent,
20 for the purpose of regulating the issuance, suspension,
21 revocation, or renewal of drivers' licenses;

22 (5) records relating to violations of the Uniform
23 Code of Military Justice but only so long as those records
24 are maintained solely within the Department of
25 Defense; or

(6) statistical or analytical records or reports in which individuals are not identified and from which their identities are not ascertainable.

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

DISSEMINATION, ACCESS, AND USE OF CRIMINAL JUSTICE
INFORMATION—CRIMINAL JUSTICE AGENCIES

SEC. 201. (a) With limited exceptions hereafter described, access to criminal justice information, criminal justice investigative information, and criminal justice intelligence information shall be limited to authorized officers or employees of criminal justice agencies, and the use or further dissemination of such information shall be limited to purposes of the administration of criminal justice.

(b) The use and dissemination of criminal justice information shall be in accordance with criminal justice agency procedures reasonably designed to insure—

(1) that the use or dissemination of arrest record information or nonconviction record information is restricted to the following purposes—

(A) The screening of an employment application or review of employment by a criminal justice

1 agency with respect to its own employees or appli-
2 cants,

3 (B) The commencement of prosecution, deter-
4 mination of pretrial or posttrial release or detention,
5 the adjudication of criminal proceedings, or the
6 preparation of a presentence report,

7 (C) The supervision by a criminal justice
8 agency of an individual who had been committed
9 to the custody of that agency prior to the time the
10 arrest occurred or the charge was filed,

11 (D) The investigation of an individual when
12 that individual has already been arrested or detained,

13 (E) The development of investigative leads
14 concerning an individual who has not been arrested,
15 when there are specific and articulable facts which,
16 taken together with rational inferences from those
17 facts, warrant the conclusion that the individual has
18 committed or is about to commit a criminal act and
19 the information requested may be relevant to that
20 act,

21 (F) The alerting of an official or employee of
22 a criminal justice agency that a particular individual
23 may present a danger to his safety, or

24 (G) Similar essential purposes to which the in-

1 formation is relevant as defined in the procedures
2 prescribed pursuant to the section; and

3 (2) that correctional and release information is dis-
4 seminated only to criminal justice agencies; or to the
5 individual to whom the information pertains, or his attor-
6 ney, where authorized by Federal or State statute, court
7 rule, or court order.

8 IDENTIFICATION AND WANTED PERSON INFORMATION

9 SEC. 202. Personal identification information, including
10 fingerprints, voice prints, photographs, and other physical
11 descriptive data, may be used or disseminated for any offi-
12 cial purpose, but personal identification information which
13 includes arrest record information or criminal history record
14 information may be disseminated only as permitted by this
15 Act. Information that a person is wanted for a criminal
16 offense and that judicial process has been issued against him,
17 together with an appropriate description and other informa-
18 tion which may be of assistance in locating the person or
19 demonstrating a potential for violence, may be disseminated
20 for any authorized purpose related to the administration of
21 criminal justice. Nothing in this Act prohibits direct access by
22 a criminal justice agency to automated wanted person infor-
23 mation.

1 DISSEMINATION, ACCESS AND USE OF CRIMINAL JUSTICE
2 INFORMATION—NONCRIMINAL JUSTICE AGENCIES

3 SEC. 203. (a) Except as otherwise provided by this Act,
4 conviction record information may be made available for
5 purposes other than the administration of criminal justice
6 only if expressly authorized by Federal or State statute.

7 (b) Arrest record information indicating that an indict-
8 ment, information, or formal charge was made against an
9 individual within twelve months of the date of the request
10 for the information, and is still pending, may be made avail-
11 able for a purpose other than the administration of criminal
12 justice if expressly authorized by Federal or State statute.
13 Arrest record information made available pursuant to this
14 subsection may be used only for the purpose for which it
15 was made available and may not be copied or retained by the
16 requesting agency beyond the time necessary to accomplish
17 that purpose.

18 (c) When conviction record information or arrest rec-
19 ord information is requested pursuant to subsections (a) or
20 (b), the requesting agency or individual shall notify the
21 individual to whom the information relates that such in-
22 formation about him will be requested and that he has the

1 right to seek review of the information prior to its dissemi-
2 nation.

3 (d) Criminal justice information may be made available
4 to qualified persons for research related to the administration
5 of criminal justice.

6 (e) A criminal justice agency may disseminate criminal
7 justice information, upon request, to officers and employees
8 of the Immigration and Naturalization Service, consular
9 officers, and officers and employees of the Visa Office of the
10 Department of State, who require such information for the
11 purpose of administering the immigration and nationality
12 laws. The Attorney General and the Secretary of State shall
13 adopt internal operating procedures reasonably designed to
14 insure that arrest record information received pursuant to
15 this subsection is used solely for the purpose of developing
16 further investigative leads and that no decision adverse to
17 an individual is based on arrest record information unless
18 there has been a review of the decision at a supervisory
19 level.

20 (f) A criminal justice agency may disseminate criminal
21 justice information, upon request, to officers and employees
22 of the Bureau of Alcohol, Tobacco, and Firearms, the United
23 States Custom Service, the Internal Revenue Service and
24 the Office of Foreign Assets Control of the Department of
25 the Treasury, who require such information for the purpose

1 of administering those laws under their respective jurisdic-
2 tions. The Attorney General and the Secretary of the Treas-
3 ury shall adopt internal operating procedures reasonably
4 designed to insure that arrest record information received
5 pursuant to this subsection is used solely for the purpose of
6 developing further investigative leads and that no decision
7 adverse to an individual is based on arrest record informa-
8 tion unless there has been a review of the decision at a
9 supervisory level.

10 (g) The Drug Enforcement Administration of the
11 United States Department of Justice may disseminate crimi-
12 nal record information to federally registered manufacturers
13 and distributors of controlled substances for use in connec-
14 tion with the enforcement of the Controlled Substances Ad-
15 ministration Act.

16 (h) Nothing in this Act prevents a criminal justice
17 agency from disclosing to the public factual information con-
18 cerning the status of an investigation, the apprehension, ar-
19 rest, release, or prosecution of an individual, the adjudication
20 of charges, or the correctional status of an individual, if such
21 disclosure is reasonably contemporaneous with the event to
22 which the information relates. Nor is a criminal justice
23 agency prohibited from confirming prior arrest record infor-
24 mation or criminal record information to members of the
25 news media or any other person, upon specific inquiry as

1 to whether a named individual was arrested, detained, in-
2 dicted, or whether an information or other formal charge was
3 filed, on a specified date, if the arrest record information or
4 criminal record information disclosed is based on data ex-
5 cluded by section 103 (b) from the application of this Act.

6 DISSEMINATION, ACCESS, AND USE OF CRIMINAL JUSTICE
7 INFORMATION—APPOINTMENTS AND EMPLOYMENT
8 INVESTIGATIONS

9 SEC. 204. (a) A criminal justice agency may disseminate
10 criminal justice information, whether or not sealed pursuant
11 to section 208, criminal justice intelligence information, and
12 criminal justice investigative information to a Federal, State,
13 or local government official who is authorized by law to ap-
14 point or nominate judges, executive officers of law enforce-
15 ment agencies or members of the Commission on Criminal
16 Justice Information created under section 301 or any State
17 board or agency created or designated pursuant to section
18 307, and to any legislative body authorized to approve such
19 appointments or nominations. The criminal justice agency
20 shall disseminate such information concerning an individual
21 only upon notification from the appointing or nominating
22 official that he is considering that individual for such an
23 office, or from the legislative body that the individual has
24 been nominated for the office, and that the individual has

1 been notified of the request for such information and has
2 given his written consent to the release of the information.

3 (b) A criminal justice agency may disseminate arrest
4 record information and criminal history record information
5 to an agency of the Federal Government for the purpose
6 of an employment application investigation, an employment
7 retention investigation, or the approval of a security clear-
8 ance for access to classified information, when the Federal
9 agency requests such information as a part of a comprehen-
10 sive investigation of the history and background of an in-
11 dividual, pursuant to an obligation to conduct such an
12 investigation imposed by a Federal statute or Federal execu-
13 tive order, and pursuant to agency regulations setting forth
14 the nature and scope of such an investigation. Arrest record
15 information or criminal history record information that has
16 been sealed may be made available only for the purpose of
17 the approval of a security clearance. For investigations con-
18 cerning security clearances for access to information classi-
19 fied as top secret, criminal justice intelligence information
20 and criminal justice investigative information may be made
21 available pursuant to this subsection. At the time he files
22 his application, seeks a change of employment status, ap-
23 plies for a security clearance, or otherwise causes the initia-
24 tion of the investigation, the individual shall be put on notice

1 that such an investigation will be conducted and that access
2 to this type of information will be sought.

3 (c) Any information made available pursuant to this
4 section may be used only for the purpose for which it is
5 made available and may not be redisseminated, copied, or
6 retained by the requester beyond the time necessary to ac-
7 complish the purpose for which it was made available.

8 SECONDARY DISSEMINATION OF CRIMINAL JUSTICE
9 INFORMATION

10 SEC. 205. Any agency or individual having access to,
11 or receiving criminal justice information is prohibited, di-
12 rectly or through any intermediary, from disseminating such
13 information to any individual or agency not authorized to
14 have such information; except that correctional officials
15 of criminal justice agencies, with the consent of an individual
16 under their supervision to whom the information refers, may
17 orally represent the substance of the individual's criminal
18 history record information to prospective employers or other
19 individuals if they believe that such representation may be
20 helpful in obtaining employment or rehabilitation for the
21 individual.

22 METHOD OF ACCESS TO CRIMINAL JUSTICE INFORMATION

23 SEC. 206. (a) Except as provided in section 203 (d) or
24 in subsection (b) of this section, a criminal justice agency
25 may disseminate arrest record information or criminal his-

1 tory record information only if the inquiry is based upon
2 identification of the individual to whom the information re-
3 lates by means of name and other personal identification
4 information. After the arrest of an individual, such informa-
5 tion concerning him shall be available only on the basis of
6 positive identification of him by means of fingerprints or other
7 equally reliable identification record information.

8 (b) Notwithstanding the provisions of subsection (a),
9 a criminal justice agency may disseminate arrest record in-
10 formation and criminal history record information for criminal
11 justice purposes where inquiries are based upon categories
12 of offense or data elements other than personal identification
13 information if the criminal justice agency has adopted pro-
14 cedures reasonably designed to insure that such information
15 is used only for the purpose of developing investigative leads
16 for a particular criminal offense and that the individuals
17 to whom such information is disseminated have a need to
18 know and a right to know such information.

19 SECURITY, ACCURACY, AND UPDATING OF CRIMINAL
20 JUSTICE INFORMATION

21 SEC. 207. (a) Each criminal justice agency shall adopt
22 procedures reasonably designed at a minimum—

23 (1) to insure the physical security of criminal justice
24 information, to prevent the unauthorized disclosure of the
25 information, and to insure that the criminal justice in-

1 formation is currently and accurately revised to include
2 subsequently received information and that all agencies
3 to which such information is disseminated or from which
4 it is collected are currently and accurately informed of
5 any correction, deletion, or revision of the information;

6 (2) to insure that criminal justice agency personnel
7 responsible for making or recording decisions relating to
8 dispositions shall as soon as feasible report such disposi-
9 tions to an appropriate agency or individual for inclusion
10 with arrest record information to which such disposi-
11 tions relate;

12 (3) to insure that records are maintained and kept
13 current for at least three years with regard to—

14 (A) requests from any other agency or person
15 from criminal justice information, the identity and
16 authority of the requestor, the nature of the informa-
17 tion provided, the nature, purpose, and disposition
18 of the request, and pertinent dates; and

19 (B) the source of arrest record information and
20 criminal history information; and

21 (4) to insure that criminal justice information may
22 not be submitted, modified, updated, or removed from
23 any criminal justice agency record or file without verifi-
24 cation of the identity of the individual to whom the
25 information refers and an indication of the person or

1 agency submitting, modifying, updating, or removing
2 the information.

3 (b) If the Commission on Criminal Justice Informa-
4 tion finds that full implementation of this section is infeasible
5 because of cost or other factors it may exempt the provisions
6 of this section from application to information maintained
7 prior to the effective date of this Act.

8 SEALING AND PURGING OF CRIMINAL JUSTICE
9 INFORMATION

10 SEC. 208. (a) Each criminal justice agency shall adopt
11 procedures providing at a minimum—

12 (1) for the prompt sealing or purging of criminal
13 justice information when required by State or Federal
14 statute, regulation, or court order;

15 (2) for the prompt sealing or purging of criminal
16 justice information relating to an offense by an individual
17 who has been free from the jurisdiction or supervision of
18 any criminal justice agency for a period of seven years,
19 if the individual has previously been convicted and such
20 offense is not specifically exempted from sealing by a
21 Federal or State statute;

22 (3) for the sealing or purging of arrest record in-
23 formation after a period of two years following an arrest,
24 detention, or formal charge, whichever comes first, if no
25 conviction of the individual occurred during that period,

1 no prosecution is pending at the end of the period, and
2 the individual is not a fugitive; and

3 (4) for the prompt purging of criminal history rec-
4 ord information in any case in which a law enforcement
5 agency has elected not to refer the case to the prosecutor
6 or in which the prosecutor has elected not to file an
7 information, seek an indictment or other formal criminal
8 charge.

9 (b) Criminal justice information sealed pursuant to this
10 section may be made available—

11 (1) in connection with research pursuant to sub-
12 section 203 (d) ;

13 (2) in connection with a review by the individual
14 or his attorney pursuant to section 209;

15 (3) in connection with an audit conducted pur-
16 suant to section 304 or 310;

17 (4) where a conviction record has been sealed and
18 an indictment, information, or other formal criminal
19 charge is subsequently filed against the individual; or

20 (5) where a criminal justice agency has obtained
21 an access warrant from a State judge of competent
22 jurisdiction if the information sought is in the posses-
23 sion of a State or local agency, or from a Federal judge
24 of competent jurisdiction if the information sought is in
25 the possession of a Federal agency. Such warrants may

1 be issued as a matter of discretion by the judge in cases
2 in which probable cause has been shown that (A)
3 such access is imperative for purposes of the criminal
4 justice agency's responsibilities in the administration of
5 criminal justice, and (B) the information sought is not
6 reasonably available from any other source or through
7 any other method.

8 (c) Access to any index of sealed criminal justice in-
9 formation shall be permitted only to the extent necessary to
10 implement subsection (b). Any index of sealed criminal
11 justice information shall consist only of personal identifica-
12 tion information and the location of the sealed information.

13 ACCESS BY INDIVIDUALS TO CRIMINAL JUSTICE INFORMA-
14 TION FOR PURPOSES OF CHALLENGE

15 SEC. 209. (a) Any individual shall, upon satisfactory
16 verification of his identity and compliance with applicable
17 rules or regulations, be entitled to review any arrest record
18 information or criminal history record information concern-
19 ing him maintained by any criminal justice agency and to
20 obtain a copy of it if needed for the purpose of challenging
21 its accuracy or completeness or the legality of its mainte-
22 nance.

23 (b) Each criminal justice agency shall adopt and pub-
24 lish rules or regulations to implement this section.

25 (c) The final action of a criminal justice agency on a

1 request to review and challenge criminal justice information
2 in its possession as provided by this section, or a failure to
3 act expeditiously on such a request, shall be reviewable pur-
4 suant to a civil action under section 308.

5 (d) No individual who, in accord with this section,
6 obtains information to any other person or any other public
7 or private agency or organization.

8 CRIMINAL JUSTICE INTELLIGENCE INFORMATION

9 SEC. 210. (a) Criminal justice intelligence information
10 may be maintained by a criminal justice agency only for
11 official criminal justice purposes. It shall be maintained in
12 a physically secure environment and shall be kept separate
13 from criminal justice information.

14 (b) Criminal justice intelligence information regarding
15 an individual may be maintained only if grounds exist con-
16 necting such individual with known or suspected criminal
17 activity and if the information is pertinent to such criminal
18 activity. Criminal justice intelligence information shall be
19 reviewed at regular intervals, but at a minimum whenever
20 dissemination of such information is requested, to determine
21 whether such grounds continue to exist, and if grounds do
22 not exist such information shall be purged.

23 (c) Within the criminal justice agency maintaining the
24 information, access to criminal justice intelligence informa-

1 tion shall be limited to those officers or employees who have
2 both a need to know and a right to know such information.

3 (d) Criminal justice intelligence information may be
4 disseminated from the criminal justice agency which collected
5 such information only to a Federal agency authorized to re-
6 ceive the information pursuant to section 204 or to a crimi-
7 nal justice agency which needs the information to confirm
8 the reliability of information already in its possession or for
9 investigative purposes if the agency is able to point to specific
10 and articulable facts which taken together with rational in-
11 ferences from those facts warrant the conclusion that the indi-
12 vidual has committed or is about to commit a criminal act
13 and that the information may be relevant to the act.

14 (e) When access to criminal justice intelligence infor-
15 mation is permitted under subsection (c) or when such
16 information is disseminated pursuant to subsection (d) a
17 record shall be kept of the identity of the person having ac-
18 cess or the agency to which information was disseminated,
19 the date of access or dissemination, and the purpose for which
20 access was sought or information disseminated. Such records
21 shall be retained for at least three years.

22 (f) Direct remote terminal access to criminal justice
23 intelligence information shall not be permitted. Remote termi-
24 nal access shall be permitted to personal identification infor-

1 mation sufficient to provide an index of subjects of criminal
2 justice intelligence information and the names and locations
3 of criminal justice agencies possessing criminal justice intelli-
4 gence information concerning such subjects and automatically
5 referring the requesting agency to the agency maintaining
6 more complete information.

7 (g) An assessment of criminal justice intelligence in-
8 formation may be provided to any individual when necessary
9 to avoid imminent danger to life or property.

10 CRIMINAL JUSTICE INVESTIGATIVE INFORMATION

11 SEC. 211. (a) Criminal justice investigative informa-
12 tion may be maintained by a criminal justice agency only
13 for official law enforcement purposes. It shall be maintained
14 in a physically secure environment and shall be kept sep-
15 arate from criminal justice information. It shall not be main-
16 tained beyond the expiration of the statute of limitations for
17 the offense concerning which it was collected or the sealing
18 or purging of the criminal justice information related to such
19 offense, whichever occurs later.

20 (b) Criminal justice investigative information may be
21 disclosed pursuant to subsection 552 (b) (7) of title 5 of
22 the United States Code or any similar State statute, or pur-
23 suant to any Federal or State statute, court rule, or court
24 order permitting access to such information in the course of
25 court proceedings to which such information relates.

1 (c) Except when such information is available pursu-
2 ant to subsection (b), direct access to it shall be limited to
3 those officers or employees of the criminal justice agency
4 which maintains the information who have a need to know
5 and a right to know such information and it shall be dissem-
6 inated only to other governmental officers or employees who
7 have a need to know and a right to know such information
8 in connection with their civil or criminal law enforcement
9 responsibilities. Records shall be kept of the identity of per-
10 sons having access to criminal justice investigative informa-
11 tion or to whom such information is disseminated, the date of
12 access or dissemination, and the purpose for which access is
13 sought or files disseminated. Such records shall be retained
14 for at least three years.

15 (d) Criminal justice investigative information may be
16 made available to officers and employees of government
17 agencies for the purposes set forth in section 204.

18 TITLE III—ADMINISTRATIVE PROVISIONS; REG-
19 ULATIONS, CIVIL REMEDIES; CRIMINAL
20 PENALTIES

21 COMMISSION ON CRIMINAL JUSTICE INFORMATION

22 SEC. 301. CREATION AND MEMBERSHIP.—(a) There
23 is hereby created a Commission on Criminal Justice Infor-
24 mation (hereinafter the "Commission") which shall have
25 overall responsibility for the administration and enforcement

1 of this Act. The Commission shall be composed of thirteen
2 members. One of the members shall be the Attorney General
3 and two of the members shall be designated by the President
4 as representatives of other Federal agencies outside of the
5 Department of Justice. One of the members shall be desig-
6 nated by the President on the recommendation of the Judicial
7 Conference of the United States. The nine remaining mem-
8 bers shall be appointed by the President with the advice and
9 consent of the Senate. Of the nine members appointed by the
10 President, seven shall be officials of criminal justice agencies
11 from seven different States at the time of their nomination,
12 representing to the extent possible all segments of the crim-
13 inal justice system. The two remaining Presidential appoint-
14 ees shall be private citizens well versed in the law of privacy,
15 constitutional law, and information systems technology, and
16 shall not have been employed by any criminal justice agency
17 within the five years preceding their appointments. Not
18 more than seven members of the Commission shall be of
19 the same political party.

20 (b) The President shall designate one of the seven
21 criminal justice agency officials as Chairman and such desig-
22 nation shall also be confirmed by the advice and consent of
23 the Senate. The Commission shall elect a Vice Chairman
24 who shall act as Chairman in the absence or disability of the
25 Chairman or in the event of a vacancy in that office.

1 (c) The designated members of the Commission shall
2 serve at the will of the President. The Attorney General
3 and the appointed members shall serve for terms of five
4 years. Any vacancy shall not affect the powers of the Com-
5 mission and shall be filled in the same manner in which the
6 original appointment or designation was made.

7 (d) Seven members of the Commission shall constitute
8 a quorum for the transaction of business.

9 SEC. 302. COMPENSATION OF MEMBERS.—(a) Each
10 member of the Commission who is not otherwise in the serv-
11 ice of the Government of the United States shall receive a
12 sum equivalent to the compensation paid at level IV of the
13 Federal Executive Salary Schedule, pursuant to section 5315
14 of title 5, prorated on a daily basis for each day spent in the
15 work of the Commission, and shall be paid actual travel ex-
16 penses, and per diem in lieu of subsistence expenses when
17 away from his usual place of residence, in accordance with
18 section 5 of the Administrative Expenses Act of 1946, as
19 amended.

20 (b) Each member of the Commission who is otherwise
21 in the service of the Government of the United States shall
22 serve without compensation in addition to that received for
23 such other service, but while engaged in the work of the
24 Commission shall be paid actual travel expenses, and per
25 diem in lieu of subsistence expenses when away from his

1 usual place of residence, in accordance with the provisions
2 of the Travel Expenses Act of 1949, as amended.

3 (c) Members of the Commission shall be considered
4 "special Government employees" within the meaning of
5 section 202 (a) of title 18.

6 SEC. 303. DURATION OF COMMISSION.—The Commis-
7 sion shall exercise its powers and duties for a period of five
8 years following the first appropriation of funds for its activi-
9 ties and the appointment and qualification of a majority of
10 the members. It shall make a final report to the President
11 and to the Congress on its activities as soon as possible after
12 the expiration of the five-year period and shall cease to exist
13 thirty days after the date on which its final report is sub-
14 mitted.

15 SEC. 304. POWERS AND DUTIES.—(a) For the purpose
16 of carrying out its responsibilities under the Act, the Com-
17 mission shall have authority—

18 (1) after consultation with representatives of crimi-
19 nal justice agencies subject to the Act, and after notice
20 and hearings in accordance with the Administrative
21 Procedures Act, to issue such regulations, interpretations,
22 and procedures as it may deem necessary to effectuate
23 the provisions of this Act, including regulations limit-
24 ing the extent to which a Federal criminal justice
25 agency may perform telecommunications or criminal

1 identification functions for State or local criminal justice
2 agencies or include in its information storage facilities,
3 criminal justice information, or personal identification in-
4 formation relative to violations of the laws of any State;

5 (2) to conduct hearings in accordance with sec-
6 tion 305;

7 (3) to bring civil actions for declaratory judgments,
8 cease-and-desist orders, and such other injunctive relief
9 as may be appropriate against any agency or individual
10 for violations of the Act or of its rules, regulations, in-
11 terpretations or procedures;

12 (4) to make studies and gather data concerning the
13 collection, maintenance, use, and dissemination of any
14 information subject to the Act and compliance of crimi-
15 nal justice agencies and other agencies and individuals
16 with the provisions of the Act;

17 (5) to require from each criminal justice agency
18 information necessary to compile a directory of criminal
19 justice information systems subject to the Act and pub-
20 lish annually a directory identifying all such systems and
21 the nature, purpose, and scope of each;

22 (6) to conduct such audits and investigations as it
23 may deem necessary to insure enforcement of the Act;
24 and

25 (7) to delay the effective date of any provision of

1 this Act for up to one year, provided that such delay
2 is necessary to prevent serious adverse effects on the
3 administration of justice.

4 (b) The Commission shall report annually to the Presi-
5 dent and to the Congress with respect to compliance with
6 the Act and concerning such recommendations as it may have
7 for further legislation. It may submit to the President and
8 Congress and to the chief executive of any State such interim
9 reports and recommendations as it deems necessary.

10 SEC. 305. HEARINGS AND WITNESSES.—(a) The Com-
11 mission, or, on authorization of the Commission, any three
12 or more members, may hold such hearings and act at such
13 times and places as necessary to carry out the provisions of
14 this Act. Hearings shall be public except to the extent that
15 the hearings or portions thereof are closed by the Commis-
16 sion in order to protect the privacy of individuals or the
17 security of information protected by this Act.

18 (b) Each member of the Commission shall have the
19 power and authority to administer oaths or take statements
20 from witnesses under affirmation.

21 (c) A witness attending any session of the Commission
22 shall be paid the same fees and mileage paid witnesses in
23 the courts of the United States. Mileage payments shall be
24 tendered to the witness upon service of a subpoena issued on
25 behalf of the Commission or any subcommittee thereof.

1 (d) Subpenas for the attendance and testimony of wit-
2 nesses or the production of written or other matter, required
3 by the Commission for the performance of its duties under
4 this Act, may be issued in accordance with rules or pro-
5 cedures established by the Commission and may be served
6 by any person designated by the Commission.

7 (e) In case of contumacy or refusal to obey a subpoena
8 any district court of the United States or the United States
9 court of any territory or possession, within the jurisdiction
10 of which the person subpoenaed resides or is domiciled or
11 transacts business, or has appointed an agent for the receipt
12 of service or process, upon application of the Commission,
13 shall have jurisdiction to issue to such person an order re-
14 quiring such person to appear before the Commission or a
15 subcommittee thereof, there to produce pertinent, relevant,
16 and nonprivileged evidence if so ordered, or there to give
17 testimony touching the matter under investigation; and any
18 failure to obey such order of the court may be punished as
19 contempt.

20 (f) Nothing in this Act prohibits a criminal justice
21 agency from furnishing the Commission information re-
22 quired by it in the performance of its duties under this Act.

23 SEC. 306. DIRECTOR AND STAFF.—There shall be a
24 full-time staff director for the Commission who shall be ap-
25 pointed by the President by and with the advice and consent

1 of the Senate and who shall receive compensation at the
2 rate provided for level V of the Federal Executive Salary
3 Schedule, pursuant to section 5316 of title 5. The President
4 shall consult with the Commission before submitting the
5 nomination of any person for appointment as staff director.
6 Within the limitation of appropriations and in accordance
7 with the civil service and classification laws, the Commission
8 may appoint such other personnel as it deems advisable:
9 *Provided, however,* That the number of professional per-
10 sonnel shall at no time exceed fifty. The Commission may
11 procure services as authorized by section 3109 of title 5,
12 but at rates for individuals not in excess of the daily equiv-
13 alent paid for positions at the maximum rate for GS-18 of
14 the General Schedule under section 5332 of title 5.

15 STATE INFORMATION SYSTEMS REGULATIONS

16 SEC. 307. (a) The Commission shall encourage each
17 of the States to create or designate an agency to exercise
18 statewide authority and responsibility for the enforcement
19 within the State of the provisions of the Act and any related
20 State statutes, and to issue rules, regulations, and procedures,
21 not inconsistent with this Act or regulations issued pursuant
22 to it, regulating the maintenance, use, and dissemination of
23 criminal justice information within the State.

24 (b) Where such agencies are created or designated, the
25 Commission shall rely upon such agencies to the maximum

1 extent possible for the enforcement of the Act within their
2 respective States.

3 (c) Where any provision of this Act requires any crim-
4 inal justice agency to establish procedures or issue rules or
5 regulations, it shall be sufficient for such agencies to adopt
6 or certify compliance with appropriate rules, regulations,
7 or procedures issued by any agency created or designated
8 pursuant to subsection (a) of this section or by any other
9 agency within the State authorized to issue rules, regulations,
10 or procedures of general application, provided such rules,
11 regulations or procedures are in compliance with the Act.

12 CIVIL REMEDIES

13 SEC. 308. (a) Any person aggrieved by a violation of
14 this Act or regulations promulgated thereunder shall have
15 a civil action for damages or any other appropriate remedy
16 against any person or agency responsible for such violation.
17 An action alleging a violation of section 209 shall be avail-
18 able only after any administrative remedies established pur-
19 suant to that section have been exhausted.

20 (b) The Commission on Criminal Justice Information
21 System shall have a civil action for declaratory judgments,
22 cease-and-desist orders, and such other injunctive relief as
23 may be appropriate against any criminal justice agency in
24 order to enforce the provisions of the Act.

25 (c) If a defendant in an action brought under this sec-

1 tion is an officer or employee or agency of the United States
2 the action shall be brought in an appropriate United States
3 district court. If the defendant or defendants in an action
4 brought under this section are private persons or officers or
5 employees or agencies of a State or local government, the
6 action may be brought in an appropriate United States dis-
7 trict court or in any other court of competent jurisdiction.
8 The district courts of the United States shall have jurisdiction
9 over actions described in this section without regard to the
10 amount in controversy.

11 (d) In any action brought pursuant to this Act, the
12 court may in its discretion issue an order enjoining main-
13 tenance or dissemination of information in violation of this
14 Act or correcting records of such information or may order
15 any other appropriate remedy, except that in an action
16 brought pursuant to subsection (b) the court may order
17 only declaratory or injunctive relief.

18 (e) In an action brought pursuant to subsection (a),
19 any person aggrieved by a violation of this Act shall be
20 entitled to actual and general damages but not less than
21 liquidated damages of \$100 for each violation and reasonable
22 attorneys' fees and other litigation costs reasonably incurred.
23 Exemplary and punitive damages may be granted by the
24 court in appropriate cases brought pursuant to subsection

1 (a). Any person or agency responsible for violations of
2 this Act shall be jointly and severally liable to the person
3 aggrieved for damages granted pursuant to this subsection:
4 *Provided, however,* That good faith reliance by an agency
5 or an official or employee of such agency upon the assurance
6 of another agency or employee that information provided
7 the former agency or employee is maintained or dissemi-
8 nated in compliance with the provisions of this Act or any
9 regulations issued thereunder shall constitute a complete
10 defense for the former agency or employee to a civil damage
11 action brought under this section but shall not constitute
12 a defense with respect to equitable relief.

13 (f) For the purposes of this Act the United States
14 shall be deemed to have consented to suit and any agency
15 of the United States found responsible for a violation shall
16 be liable for damages, reasonable attorneys' fees, and litiga-
17 tion costs as provided in subsection (e) notwithstanding
18 any provisions of the Federal Tort Claims Act.

19 (g) A determination by a court of a violation of inter-
20 nal operating procedures adopted pursuant to this Act should
21 not be a basis for excluding evidence in a criminal case
22 unless the violation is of constitutional dimension or is other-
23 wise so serious as to call for the exercise of the supervisory
24 authority of the court.

CRIMINAL PENALTIES

1

2 SEC. 309. Any Government employee who willfully
3 disseminates, maintains, or uses information knowing such
4 dissemination, maintenance, or use to be in violation of this
5 Act shall be fined not more than \$10,000.

6

AUDIT AND ACCESS TO RECORDS BY THE GENERAL

7

ACCOUNTING OFFICE

8 SEC. 310. (a) The Comptroller General of the United
9 States shall from time to time, at his own initiative or at the
10 request of either House or any committee of the House of
11 Representatives or the Senate or any joint committee of the
12 two Houses, conduct audits and reviews of the activities of
13 the Commission on Criminal Justice Information under this
14 Act. For such purpose, the Comptroller General, or any of
15 his duly authorized representatives, shall have access to and
16 the right to examine all books, accounts, records, reports,
17 files, and all other papers, things, and property of the Com-
18 mission or any Federal or State agencies audited by the
19 Commission pursuant to section 304 (a) (6) of this Act,
20 which, in the opinion of the Comptroller General, may be
21 related or pertinent to his audits and reviews of the activities
22 of the Commission. In the case of agencies audited by the
23 Commission, the Comptroller General's right of access shall
24 apply during the period of audit by the Commission and for
25 three years thereafter.

1 (b) Notwithstanding any other provision of this Act,
2 the Comptroller General's right of access to books, accounts,
3 records, reports, and files pursuant to and for the purposes
4 specified in subsection (a) shall include any information
5 covered by this Act. However, no official or employee of
6 the General Accounting Office shall disclose to any person
7 or source outside of the General Accounting Office any such
8 information in a manner or form which identifies directly or
9 indirectly any individual who is the subject of such
10 information.

11 PRECEDENCE OF STATE LAWS

12 SEC. 311. Any State law or regulation which places
13 greater restrictions upon the maintenance, use, or dissemina-
14 tion of criminal justice information, criminal justice intelli-
15 gence information, or criminal justice investigative informa-
16 tion or which affords to any individuals, whether juveniles or
17 adults, rights of privacy or other protections greater than
18 those set forth in this Act shall take precedence over this Act
19 or regulations issued pursuant to this Act with respect to any
20 maintenance, use, or dissemination of information within
21 that State.

22 APPROPRIATIONS AUTHORIZED

23 SEC. 312. For the purpose of carrying out the provi-
24 sions of this Act, there are authorized to be appropriated
25 such sums as the Congress deems necessary.

SEVERABILITY

1

2 SEC. 313. If any provision of this Act or the application
3 thereof to any person or circumstance is held invalid, the
4 remainder of the Act and the application of the provision to
5 other persons not similarly situated or to other circumstances
6 shall not be affected thereby.

7

REPEALERS

8 SEC. 314. The following provisions of law are hereby
9 repealed:

10 (a) the second paragraph under the headings en-
11 titled "Federal Bureau of Investigation; Salaries and
12 Expenses" contained in the Department of Justice Ap-
13 propriations Act, 1973; and

14 (b) any of the provisions of the Privacy Act of
15 1974 (Public Law 93-579, 88 Stat. 1896), applicable
16 to information covered by this Act.

17

EFFECTIVE DATE

18 SEC. 315. The provisions of sections 301 through 307
19 and of sections 310 and 312 of this Act shall take effect upon
20 the date of enactment and members, officers, and employees
21 of the Commission on Criminal Justice Information may
22 be appointed and take office at any time after that date.
23 Provisions of the remainder of the Act shall take effect one

1 year after the date of enactment: *Provided, however, That*
2 the Commission may, in accordance with section 304(b),
3 delay the effective date of any provision for up to one addi-
4 tional year.

Mr. EDWARDS. Our witness today is Deputy Attorney General, Harold R. Tyler, Jr., who will represent the Department of Justice view in this critical area of criminal justice information systems.

Although our basic approach to the problem may in some respects differ, over the years this subcommittee and the Department of Justice have grown closer in their appreciation of the substantive problems created by the amassing of information on private individuals.

Today, we will try to identify our areas of agreement and work on our areas of disagreement, so that when this subcommittee reports out a piece of legislation, the Department of Justice may feel that they can support our efforts.

Although we have not seen your testimony for today, Judge Tyler, I know that it will be a valuable comment on the pending legislation and will be of great assistance to this subcommittee in its final consideration of the bill.

I believe you have with you Miss Mary Lawton, attorney on your staff. You may proceed, Judge.

TESTIMONY OF JUDGE HAROLD R. TYLER, DEPUTY ATTORNEY GENERAL, DEPARTMENT OF JUSTICE, ACCOMPANIED BY MARY C. LAWTON, DEPUTY ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL

Judge TYLER. Thank you, Mr. Chairman.

We are grateful to you and the members of this subcommittee for having us up once again. I share your view, looking back in history, that the subcommittee and the Department have grown closer together in their concerns and in their efforts to meet those concerns, particularly the sometimes conflicting problems that arise in trying to run the criminal justice system—trying to insure that it has all available information of a relevant nature, without impairing the rights of privacy needlessly and improperly in the bargain.

I appreciate the opportunity to appear here today to discuss H.R. 61, which you introduced, Mr. Chairman, on January 14 of this year, and also the more recent version of another bill, H.R. 8227, which was introduced by you at the end of last month.

As you have indicated, we have a statement. We had some difficulty in assuring ourselves that the budget people would allow us to say that the administration approves of H.R. 61. This may puzzle you, particularly, Mr. Chairman, because you knew they did last year. Once again, they have said that they support, in substance, H.R. 61.

Certainly the Department of Justice strongly supports the enactment of H.R. 61 as it now stands, in substance. We are unable to support H.R. 8227, in its present form at least, both because of technical drafting problems, as we see them, and indeed, because of certain fundamental disagreements with regard to some of the concepts embodied by the later bill.

As the subcommittee well knows, we are concerned here with trying to protect individual rights of privacy. This necessarily means a tension between the public's right to know—perhaps more particularly, the criminal justice system's right to function effectively and efficiently—and the individual's right to preserve certain zones of privacy into which the system cannot inquire or intrude.

If records of arrest, court proceedings, correctional decisions, and the like, are not publicly available, then the public is not only generally uninformed about its criminal justice processes, but individuals run the risk of all the dangers inherent in secret arrests, something akin to the old Star Chamber proceedings and worse. Yet if past error already paid for can follow an individual for the rest of his life, threatening employment opportunities and his rehabilitation and reacceptance into the community, our hopes for achieving any final rehabilitation through the system are certainly impeded.

Both bills, of course, attempt to accommodate those concerns by preserving, for example, public access to police blotters, formal court records and sentencing decisions, but on the other hand, denying public access to the centralized and compiled history of such matters identified by individual name.

As the members of the subcommittee are of course well aware, law enforcement in the United States has always been a matter of State and local concern, with Federal law enforcement jurisdiction rather carefully circumscribed and narrow.

On the other hand, Federal, State and local law enforcement agencies continue to cooperate with each other on matters of common concern. And they have, routinely, over the years exchanged information of mutual concern. The advent of the computer has increased the capability for this exchange and reinforced the interdependence of law enforcement agencies in this country.

Recognizing this development, both bills here under discussion extend not only to Federal agencies, but also to the State and local agencies in the law enforcement or criminal justice system.

H.R. 61 recognizes the primacy of State and local government in the criminal justice area by avoiding the imposition of strict Federal controls on the operation of these criminal justice agencies.

H.R. 8227, however, establishes a Federal Commission to oversee administration and enforcement of the provisions of that bill with power to issue binding Federal regulations, interpretations, procedures, and the like. While this bill encourages creation of State agencies to perform these functions within a State, nevertheless, those agencies would be bound by the bill to these federally established guidelines. In our view, this approach intrudes far too deeply into the primary responsibility of the States and localities for the administration of criminal justice.

Of all the areas of competing values which must be addressed in this legislation, perhaps the most difficult is that of striking the proper balance between the protection of American society and the preservation of reasonable individual privacy.

On this, I think, Mr. Chairman, you and I have agreed. And you have agreed with others that the difficulty of this problem is one of the reasons why this subcommittee has spent so much time and careful effort here.

I am concerned, or more aptly, I should say the Department is concerned, that neither of the bills, in the direct sense, attempts to do this. Rather, each requires that the politically responsible officials at the Federal and State levels decide on a case-by-case basis whether it is more important that a potential employer know of a past criminal record or that the prospective employee's privacy be protected.

H.R. 8227, however, circumscribes the extent of this decisionmaking by foreclosing access to certain records and providing for the sealing or destruction of other records.

Moreover, that bill permits decisions on access to be made only by the legislature at both the Federal and State levels. H.R. 61, however, permits a decision to make records available to be made by the Chief Executive, as well as the legislature at both Federal and State levels. This decision could extend to all criminal justice records, not just certain types of those records, so long as the decision is made on the public record, so to speak, and specifies the types of records to be made available.

Let me outline, if I may, some of the fundamental concepts involved in these bills and explain in more detail some of our objections to H.R. 8227.

Perhaps the basic difference in approach between H.R. 61 and H.R. 8227 is that the latter attempts a comprehensive regulation of criminal justice information, forbidding uses not specifically authorized. H.R. 61 does not intend or purport to be that comprehensive.

Rather, it establishes goals, provides some minimum standards, and focuses on identifiable problems, leaving room for further refinements as experience is gained in the next several years and expertise developed.

Let me illustrate by pointing out that H.R. 8227 appears to specifically enumerate the only purposes for which arrest records may be exchanged among criminal justice agencies, thus precluding all other exchanges. H.R. 61 does not attempt to anticipate or set forth all of the valid uses of arrest records.

Rather it focuses on such problems as the misuse of these records in determining probable cause and unrestricted access to computerized records by street patrols or individual car patrols. Having focused on these specific problems, it leaves the determination of other valid uses to the individual criminal justice agency concerned.

Although it is somewhat disappointing to have to say this in 1975, despite the number of years we have all worked on issues of criminal justice information and privacy we, in the Department of Justice at least, do not believe that we are in a position to enumerate absolutely all uses, or potential uses, of criminal justice information.

Hence, we believe it would be premature today to apply the preclusive approach of H.R. 8227 to the thousands of State and local agencies that would be covered by this legislation.

Put conversely, we believe it is wiser to address the specific problems identified to date and establish a mechanism such as the Commission proposed in H.R. 61 to recommend refinements as we learn more in the future.

Both bills, to be sure, recognize the interdependent and interconnected role of Federal, State, and local agencies. But the approach is different. H.R. 61 would apply a uniform Federal standard to interstate exchanges of information and exchanges, of course, between Federal and local agencies.

At the same time, H.R. 61 recognizes the primacy of State law, within State boundaries, so long as that State law meets the minimum Federal standards. Parenthetically, we know that even now certain States have quite high standards.

H.R. 8227 provides that State law, on the other hand, will govern all maintenance, dissemination, and use of information within the State, insofar as it imposes stricter standards than Federal law.

That bill suggests that such State law will regulate not only State and local agencies, within the State, but also Federal agencies located within that State. H.R. 8227 could also be read to impose restrictions on information found within the State, even though it originated in another State's agency or in a Federal agency outside that particular State. It might even be interpreted to apply to information being exchanged by two States, but passing through the State in question, with stricter State law.

There is some question whether States, even with the permission of Congress, can impose standards on the use and dissemination by Federal courts of information acquired, maintained, or used by those courts, simply because of their physical location within the State.

Issues of Federal supremacy and separation of powers, therefore, are clearly raised by such a provision. Moreover, aside from the legal or constitutional questions raised, the practical effect of such a provision would be difficult in the extreme, if not chaotic, in the application.

Both bills extend to all major aspects of criminal justice information, criminal histories, investigatory information, intelligence information, correctional information; and both address, to some degree, the collection, retention, use, et cetera, of this information.

But as I am sure we all appreciate, the bills differ substantially in the degree of specificity with which they would regulate this information. The number of subcategories and categories into which they would divide this information, and the differences in definitions make it particularly difficult to compare the bills in a discussion of this kind.

H.R. 61, for example, speaks of "arrest record information," which has no disposition attached, and "criminal record information," which means that a disposition is attached. That bill defines "disposition," of course, with some reasonable specificity. It uses the term "criminal justice information" to encompass all types; that is, arrest and criminal record information, correctional information, investigative and intelligence information.

H.R. 8227, however, refers to "arrest record information," "non-conviction information," "conviction record information" and "criminal history record information," with the latter term particularly unclear as to which of the former it encompasses. It uses "criminal justice information" to mean the terms mentioned above plus "correctional and release information"—but has no general term to encompass all types of information.

Going back to H.R. 61, it defines "disposition" to include a variety of procedures for terminating a case, including pretrial diversion; while H.R. 8227 uses the same term to mean only the dropping of charges or a conviction.

Perhaps more fundamental than the definitional distinctions is the difference in treatment of intelligence information in the two bills. H.R. 61, of course, is cast in general terms, restricting intelligence collection to official purposes, limiting access on a need-to-know basis, and requiring, of course, an accounting of exchanges with other agencies. On the other hand, H.R. 8227 attempts to define standards for

maintenance and dissemination of intelligence. Maintenance, by the way, is a term not defined. Apparently, it would be authorized only if "grounds exist connecting such individual with known or suspected criminal activity and if the information is pertinent to such criminal activity." Information could be disseminated to another agency only to confirm information in that other agency's possession or for investigative purposes if the other agency can "point to specific and articulable facts which taken together with rational inferences from those facts warrant the conclusion that the individual has committed or is about to commit a criminal act."

I will say as forcefully as I can that we have considerable difficulties with these "standards" because of their vagueness and the difficulty, which is an extreme difficulty, of applying them in the intelligence context. We understand that this standard is borrowed from *Terry v. Ohio*, in the Supreme Court, which dealt with a much more simplistic, albeit important, area of concern. *Terry* is the famous stop and frisk decision. And while the standard provides guidance for a policeman on the beat in deciding whether or not to pat down a suspect, we seriously doubt that the standard has any validity or commonsense for determining what information can be volunteered to the Secret Service, for example, concerning a potential assassin.

Put more broadly, the number of possibilities which must be dealt with in our two bills here is much greater than just a stop and frisk decision—as important as that may be in a given case—and thus we doubt, for that simple reason alone, that that standard is really workable.

Going further, as H.R. 8227 is written, dissemination to another agency is authorized only to confirm information that agency already has or when the articulable fact standard is met. But we point out to the subcommittee most earnestly that the nature of criminal intelligence is such that bits and pieces of information of a seemingly unrelated or unconnected nature must be pieced together with utmost patience, with the hope that a whole picture can finally be formed. But if the dissemination cannot be made in an organized crime case, for example, until there is confirmation that the requesting agency already has the information or has facts relating to a criminal case which relate to specific criminal activity, then our present efforts against organized crime are something we will just have to forget about.

We in the Department are also troubled by the standard for "maintaining" information. We think that this standard creates great problems under H.R. 8227, as now drafted. When received by a law enforcement agency, a first item of information may not yet have any established connection with criminal activity. Under the present law of this country, for example, conspirators may in individual actions do something as innocent as making a phone call in a public phone booth in the cities of Boston, New York, Washington or wherever, and yet the verification and interconnection of information can be, and usually is, important. Further inquiry is required to determine whether the item is true and whether it warrants further investigation. If that information cannot be maintained long enough to check it, then no investigation really ever can be begun. If that information may be maintained for a brief time, but never recorded anywhere, then there

will never be a record of the investigations conducted, and it will be impossible to review, audit and check anybody with any efficiency or efficacy whatsoever. Thus, we consider the proposed standards in H.R. 8227, for both maintenance and dissemination of intelligence, to be unreasonable and unworkable, practically or any other way.

Now, of course, in so arguing, we do not suggest that standards for intelligence collection and dissemination should not be established. Quite the contrary, we understand and share the concern of the subcommittee in that regard. Indeed, as you know, the Department is now attempting to formulate guidelines for the FBI with respect to intelligence collection, retention, use and dissemination. I am frank to say, and I am sure the FBI will agree, that the further the Department, including the Bureau, probes these questions, the more difficulties we encounter. It will be some time before we can formulate adequate guidelines to satisfy ourselves and everybody else interested, in the Congress and elsewhere—even for the FBI, with its comparably limited jurisdiction. This being so, we can all understand that it is even more difficult to try to set standards for the thousands of diverse Federal, State, and local agencies that would be regulated by the bills being discussed this morning.

To attempt to formulate such standards in these bills, is therefore premature, if not totally impossible, at this stage. We think the wiser course by far is to require the agencies to formulate their own guidelines in the first instance, subject, of course, to study and recommendation by the proposed commission as it develops expertise, which it will, in this difficult area. This is substantially the approach taken in H.R. 61.

Turning to another subject, we think that the approach to investigative information in H.R. 8227 poses very significant and touchy problems. That bill would require that information could not be maintained beyond the expiration of the statute of limitations for a particular offense or the sealing or purging of criminal history information relating to that offense. Thus, to illustrate as we have in our prepared text, if a marginal securities fraud is not referred for prosecution, both the criminal history record and any investigative files relating to that situation would have to be sealed or destroyed, and any subsequent investigation of a similar or related case would have to start from scratch. Further, an investigatory file would have to be sealed or destroyed upon the running of the statute of limitations, even though that particular case might have clear and significant relevance to later cases involving the same subject matter or some of the same people, for example. We do not believe that this is the intent of H.R. 8227, and yet we think that a literal reading of that bill, as it now is drafted, would require just that.

Parenthetically, but perhaps importantly for our development of better systems, the bill does not pay any attention to the possible retention of investigative files for historic purposes. If this had been the law, the background on some of the most important criminal prosecutions in our history would be lost.

We point out that H.R. 61 focuses on the question of access to investigative files, which we deem important, but it does not, in the bargain, require that the files be destroyed.

Both bills emphasize certain concepts with respect to criminal record information designed to achieve the goals of protection of privacy and protection of society. We know that is our concern and a common concern. These concepts include the requirement of accuracy with respect to the information—a matter with which I know the subcommittee has been properly concerned in the last 4 years.

Both bills stress the reporting of dispositions of criminal charges and the right of access of an individual to criminal history information in order to correct possible inaccuracies in such information. And those inaccuracies do occur, by the way, to my own personal knowledge.

In addition, the bills, in somewhat different fashion, provide incentives to report dispositions by restricting access to and dissemination of stale records; that is, arrest records. As noted earlier, however, the bills define "disposition" in very different ways.

H.R. 61 includes as a "disposition" any action which permanently or indefinitely disposes of the criminal charges. This could include, and very frequently does, incompetence to stand trial, acquittal by reason of insanity, pretrial diversion programs, dismissal in favor of a civil action by discretionary action by the prosecutor, and so on.

H.R. 8227, however, defines "disposition" to include a decision not to bring criminal charges or a conclusion or an abandonment of the proceedings.

I turn now to a significant problem with respect to the provision for access to and correction of records in H.R. 8227. Section 209 of that bill purports to require a criminal justice agency maintaining a record not only to grant access to, but also to undertake the correction of, the records which that agency itself possesses.

This bill does not differentiate, as does H.R. 61, between records originating in the agency having possession and records originating elsewhere. This would pose a serious problem for the FBI which, as we all know, has a large number of State records in its possession, records which it has neither the authority nor indeed even the proper information, to correct if it wanted to do so.

We suggest, therefore, that the better approach is that taken in H.R. 61, which places the onus on the originating agency—that is, the onus of correction—rather than on the agency which happens to have possession of the record.

A concept also common to both bills is that of accountability. Agencies disseminating information are required to keep records of who obtained that information and why. Moreover, H.R. 61 requires special accounting for remote terminal access to information by street patrols—that is, police car patrolmen—in order to insure that information retrieved from computers is properly utilized, right down to the street level.

There is no comparable provision that we see in H.R. 8227.

Accountability is also provided by requiring that politically responsible officers make public decisions as to the propriety of non-criminal justice agencies—most especially licensing boards and employers—receiving criminal justice information about applicants for jobs or licenses. Dissemination of this information could not continue on the basis of custom or agency regulation.

To illustrate, as we do in our printed text, if trucking companies or warehousemen, for example, viewed access to criminal history information as vital to cargo security, they would have to convince a legislature or, as is suggested in H.R. 61, a Governor, that cargo security is a sufficiently important interest to warrant access to such information. Furthermore, the legislature or Governor would be required to decide whether only certain records, such as those bearing dispositions or whatever, should be made available and whether access to arrest records is also warranted. These decisions, of course, would also be subject to public revelation and scrutiny.

The bills specifically provide for access by Federal agencies to criminal justice information for the purpose of providing information for employment or security clearance. However, the details of the bills in this area vary quite a bit. For example, H.R. 8227 would not permit Federal agencies, even Federal law enforcement agencies, to receive investigative or intelligence information for employment purposes unless there was a full field investigation for purposes of access to top secret information. H.R. 61 would permit such information to be made available for law enforcement and other Federal employment, subject to certain conditions on use. H.R. 61 specifies that no criminal justice information may be used as a disqualifying factor for employment unless it is reasonably related to that particular employment, and requires that an employment decision based on criminal justice information be made at a higher supervisory level; that is to say, not in some routine fashion. Conversely, H.R. 8227 does not address the use of information by the employing agency.

Both bills address certain other access by Federal agencies; to illustrate, as we have here in our prepared remarks, the Immigration Service and various components of the Treasury Department and, as will be seen a little later, the drug enforcement agencies. H.R. 61 provides that criminal justice information—that is to say, information which indicated a disposition of charges and does not merely reflect an arrest—may be made available to registered drug manufacturers, federally chartered or insured banking institutions, and so on. H.R. 8227 would permit dissemination of what is called criminal record information, apparently including arrest records without any disposition, to drug manufacturers, but contains no provision with respect to banks or other financial institutions.

I would like to point out here, Mr. Chairman, that present law authorizes such institutions to receive both arrest and disposition information. H.R. 8227, therefore, would appear to repeal the present law on this subject, as it does not contain a new provision having to do with financial institutions.

Having set minimal standards for criminal justice information, and addressed certain specific problems, H.R. 61 leaves the task of fashioning rules and procedures to reach the legislatively defined goals to each criminal justice agency.

H.R. 8227, however, establishes a regulatory agency which would set the guidelines under which Federal, State, and local agencies must operate.

In our view, the approach taken by H.R. 61 is infinitely preferable as a matter of principle and as a matter of practicality. What our

system of government rejects is the idea of Federal intrusion into the management of State and local agencies. It is appropriate for the Federal Government to set standards for information which flows between the States, but we believe the precise regulations to implement these standards should be set at the State and local level. Moreover, we do not think it appropriate for an executive branch regulatory agency to intrude into the management of information systems maintained by the courts on either the Federal or State level.

Once Congress articulates its goals, the courts must be allowed to make independent decisions as to how to achieve these goals. Aside from the substantial legal problems of federalism, separation of powers, and the like, I note that the very diversity and complexity of many Federal, State and local criminal justice information systems, which would be covered by these bills, necessitates that each be allowed to fashion regulations tailored to its own systems.

Considering, as we must, that the bills apply to records of law enforcement, prosecution, corrections, courts, and so on, and that they cover the whole spectrum of manual, semiautomated and fully automated systems, we think it is apparent that a single set of rules imposed by a Federal agency or the Federal Government cannot reasonably, or even possibly, apply with any sense or specificity. Hence, we prefer the H.R. 61 approach, that is the Federal goal—local implementation approach.

To be fair, we should point out that H.R. 8227, of course, contemplates that State agencies, having similar powers to the proposed Federal Commission, would take over supervision of State and local agencies as to the implementation of the bill. But these State agencies would be bound by Commission regulations and interpretations from which they apparently could not deviate.

Moreover, under H.R. 8227, once the proposed Commission expires at the end of the 5-year period, these State agencies would be left with rigid regulations previously issued, which would then be hard, if indeed possible, to change at all, as we read the present bill. The Department argues that this approach is not sensible or workable.

As is already clear, I think, Mr. Chairman, the difference as we see it between the two bills can be simply defined and summarized. H.R. 8227 tends toward the comprehensive code approach. H.R. 61, conversely, does not attempt to reach all areas of information practice, or to resolve all issues. Rather, it contemplates a beginning with Federal standards which presupposes future change and refinement as new problems are identified, as they virtually certainly will be, and as new technologies are developed. The Department of Justice remains convinced that this is the wiser course in this year 1975.

I will pass very quickly, Mr. Chairman, over the bills' approaches to enforcement. As you know, both bills have a similar approach generally, one which visualizes civil and criminal remedies. The details, however, do vary, and in matters of some importance.

I note, for example, that under H.R. 8227 the Federal Commission itself has authority to seek declaratory judgments and cease and desist orders. This provision, which is not found in H.R. 61, would permit the Federal Commission to stop a criminal investigation or an intelli-

gence investigation at any time to litigate the issue of whether a particular recipient of information had a "need to know," or whether the information was maintained on the basis of "specific and articulable facts."

As one who has lived most of his professional life in this system, I know how long it takes to work. This interruption almost certainly would delay things even further. And I doubt whether the American public can tolerate any further delays than we already have in our system as we know it.

Worse than that, I fear that this kind of procedure would almost certainly abort most investigations, even if it turned out that the challenge brought by the Commission was thought to be groundless by the courts. Infringements of constitutional rights during investigations can be challenged at the prosecutive stage, and I point out to you that the courts are already supposed to be in that business. For this simple reason, the Department is strongly opposed to this particular provision of H.R. 8227.

The criminal provision of H.R. 8227 applies to any willful or knowing violation of the act by a Government employee. However, as written, H.R. 61 is different. Its criminal provision only applies to unauthorized disclosure of intelligence or investigative information, in knowing violation of a duty imposed by a law.

We think after reflecting on H.R. 8227 and what it suggests that its broader penalty approach is probably preferable. There is probably not a good reason for differentiating between unauthorized disclosure of criminal record information and correctional and release information on the one hand, and intelligence and investigative information on the other. Although we do not consider the culpability standard of H.R. 8227 adequately defined, we prefer its approach, as I have said. Thus, we have taken the liberty to develop alternative language for a new criminal provision in H.R. 61, which is attached as appendix A to our printed testimony this morning.

There is another difference in the enforcement area which we consider important, if not critical. H.R. 61 provides that nothing in the act, or regulations or procedures adopted to implement that act, can provide a basis for excluding otherwise admissible evidence in court.

The somewhat parallel provision in H.R. 8227 troubles us because it is limited, apparently, to violations of internal operating procedures adopted by agencies. This suggests that any violation of the act itself or of Commission regulations would provide a basis for the exclusions of valid evidence in criminal proceedings. And this would provide, in other words, gentlemen, a new extension to the so-called exclusionary rule in the American criminal justice system. In a bill as important and far reaching as the kind we are talking about, we suggest that such an extension, particularly at a time when the Supreme Court is about to reconsider the exclusionary rule, is an untenable approach.

To try and bring my remarks to a close, Mr. Chairman and members, we reiterate that we strongly support H.R. 61 and urge the Congress to give it prompt attention. For the reasons suggested here in my testimony, as well as a member of other technical drafting problems which we have not enumerated here this morning, we cannot and do not support H.R. 8227.

When criminal justice privacy legislation is enacted, we urge that it be the sole basis for regulation of such information and that criminal justice information be excluded entirely from the coverage of the Privacy Act of last year.

We know this is your intention, Mr. Chairman, since section 314 of H.R. 8227 seeks to accomplish just this. However, we should point out that as written, section 314 has the effect of repealing the Privacy Act entirely, a result which we are quite sure is not intended. Hence we have taken the liberty to attach, in appendix B to our testimony, language which would accomplish the effect which we think is intended.

Also, Mr. Chairman and members of the subcommittee, the Law Enforcement Assistance Administration has prepared a compendium of State laws as they now exist on criminal justice systems and privacy. We offer to hand that compendium to you this morning in connection with your considerable efforts on this legislation.

Again, I thank you for our opportunity to come up here this morning and to express our concerns. We, of course, stand ready to answer any questions which you or the members of the subcommittee may have.

Mr. EDWARDS. Thank you, Judge Tyler.

Miss Lawton does not have a statement. Is that correct?

Judge TYLER. That is correct.

Mr. EDWARDS. The Department of Justice has, indeed, in the last 4 years come quite a way insofar as its views on the collection/dissemination of criminal records are concerned and what you are advising the committee today is that you are ready, willing and anxious to have us proceed in that particular area where we have, after considerable negotiations, reached substantial agreement on the fact that these rap sheets should be correct; that there should be disposition within a reasonable time; that there should be criminal penalties attached to the inappropriate, illegal dissemination of these records.

And I believe you even would agree that there should be some provision along the lines of purging and sealing under unusual circumstances. Is that also correct? I think your purging provision right now is that when someone is 80 years old the FBI will throw his record away. We can do better than that, can we not?

Judge TYLER. I think we can. And you are quite right, Mr. Chairman, that this co-partnership, if I may call it that, between this subcommittee and the Department has brought us together closely on that and other matters.

I really think it is fair to say that our only disagreements now are the methodology, the provisions, and I do not even think those are terribly grave.

Mr. EDWARDS. When the Attorney General was here in February, we discussed at some length the second and third portions of our problem—investigative files and intelligence files.

There might be some difference, because criminal activity is involved in some, and criminal activity is not involved in some others. We found out from the FBI in February that every letter that comes into the FBI, whether anonymous or not, is indexed and made a part of a file or index card.

I believe that you are now in the midst of working out guidelines to completely revise the system for the collection and dissemination and the use of intelligence records. I am talking about records on alleged subversives, or radical people. Is that correct?

Judge TYLER. Yes, and those guidelines are what I was referring to earlier this morning in my prepared testimony. It is no secret. It is an extraordinarily complex subject. But we are pressing ahead, and as you point out, the Attorney General did testify about that.

The Bureau and the Department are trying to come up with some regulations which would achieve the goals that interest this subcommittee, but which would not undercut legitimate law enforcement with which the Bureau must be concerned.

This raises a point concerning H.R. 8227. We do not quarrel with the goals which are obviously intended in H.R. 8227, but we do think there are certain aspects of H.R. 8227, as now drafted, which would seriously undermine fair and appropriate law enforcement, fair and appropriate gathering of so-called criminal intelligence data of a current nature. That is one of our concerns with H.R. 8227, and is one reason why we are so grateful for your having us up here today to comment on this most recent bill.

Mr. EDWARDS. I believe the Attorney General was obviously over-optimistic in his promise to this subcommittee that it would take 3 or 4 weeks to draw up these guidelines. Obviously, it is going to take a number of months. I believe that they are getting close to their final stage.

Will they be presented to the committee? And will there be appropriate bases for legislation?

Judge TYLER. Well, as I recall it, there has never been any doubt, even going back to—when was it?—February—

Mr. EDWARDS. Yes.

Judge TYLER. It was my understanding that at that time it was agreed that these regulations, whenever they are proposed, will not be a secret from this committee or other interested groups.

I believe also that there will have to be consultation. As you know from your own experience, these things have proved a little bit more difficult than perhaps the Department and the Attorney General originally contemplated. And you are quite right that a few weeks was overly optimistic. But I think that this difficulty has been all to the good, if I may say so. We have learned some things in the effort; certain things have come up that I doubt any of us thought about in the early days of the winter when this was all discussed at some length here and elsewhere. But I assure you, there was no intention to keep whatever is being done a secret from this subcommittee or anybody else.

Mr. EDWARDS. My last question, Judge, will be with regard to the correction of one's own criminal record.

Would these procedures in the Justice Department's bill handle a situation like the *Menard* case, where the young man was arrested although it was a mistake to arrest him, and had no luck whatsoever in going to either the FBI or to, I believe it was, the Los Angeles Police Department—to a local police department—to have his record

changed? Even the court felt that it could not order the correction in the record.

Judge TYLER. We feel that H.R. 61 can do as much as is humanly possible in the legislative context to avoid that problem.

Now, Mr. Chairman, it would be idle of me to suggest that with the best bill in the world you could not possibly have a dreadful mistake. For example, let us assume that we have every reasonable procedure we can think of—I think H.R. 61 does—I would have to say to you or anybody else that an arrest of the wrong person could be effectuated on a case of mistaken identity, which in turn turned on inaccurate information of a relatively green or fresh nature. Though that possibility would always exist, nevertheless, I think that H.R. 61, represents the best we could do, the most that is humanly possible with a bill, in order to guard against such things as that case or others.

What I am trying to say, I guess, is that even with the best system in the world, I suppose you always have to recognize the possibility of an occasional gaffe, such as a mistaken identity on the basis of relatively fresh information. Even though H.R. 61 provides that you can have the information corrected on a regular basis—and if the agencies in question will not do so, you have got judicial review and the like—there is always, I suppose, room for that one aberrant mistake. But that is true in almost everything. And I believe H.R. 61, as now drafted, is excellent for your purposes.

Mr. EDWARDS. Miss Lawton, would H.R. 61 take care of the *Menard* case?

Miss LAWTON. Yes, Mr. Chairman. *Menard* had a copy of his California record, I believe, which clearly established that it was a detention not deemed an arrest. As H.R. 61 is written, any agency having possession of a record would have to change it when there is no fact dispute. Thus, the Bureau would have had the obligation, where there was not dispute of fact, to change that record. It is only when there is a fact dispute beyond the competence of the possessing agency that the referral to the originator would be required by H.R. 61.

Mr. EDWARDS. Thank you.

Mr. Kindness.

Mr. KINDNESS. Thank you, Mr. Chairman.

Judge Tyler, I would just like to solicit your further expressions on a couple of points. I am a little uncertain about this matter of purging criminal justice information from records and how it is justified that this ever be done.

Would you care to make a further expression about the basic justification for ever purging criminal information from the records that have been put together and maintained?

Judge TYLER. There are a number of examples I could give. For example, in H.R. 61, it is provided that record repositories such as the Federal Bureau of Investigation or State identification agencies or bureaus, are to expunge arrest records—I emphasize arrest records—which are 5 years old, if there is no disposition in that period or if there is no subsequent arrest, and the individual is not wanted as a fugitive by a responsible law enforcement agency. That is one example where purging, if you will, or striking, probably makes a good deal of sense. I suppose we could go on and think of other examples even where a man has got a disposition record. Let us assume he is a young

man when his case is disposed of, if you will, by the criminal justice system. Thereafter, year upon year goes by in which he demonstrates he is rehabilitated and so on, and gets to a very advanced age. One could reasonably say that the actual disposition affecting him by name is a piece of information which really does not do anybody any good any more. In fact, it could be said possibly to do him harm, even though, in my example, he has led a blameless life thereafter.

On the other side of the purging coin, we are very troubled about purging criminal information when it has it to do with a case such as a trial or when it is criminal intelligence information which, though of 4, 5, or 6 years duration or existence, might always have a bearing on a fresh, contemporaneous criminal intelligence investigation, when it would be nice to check back and see some related information 5 or 6 years ago.

We are concerned from an archival point of view about purging or destroying information which concerns a celebrated or unusual type of criminal prosecution; information which is very useful later on; even where there has not been a disposition. To give you an illustration, in some of these difficult cases to prosecute, like obstruction of justice, securities fraud and other white collar cases, it is very useful to retain such information—even when that information did not lead to a formal prosecution—so that later on, the prosecutor can check back and use that information to assist in preparing another case involving either some of the same persons or similar methods, technologies, or techniques as in the earlier case.

It is a very difficult subject to speak about categorically so as to cover all cases, as I am sure you appreciate, Mr. Kindness. I think H.R. 61 is quite restrained in this and other areas because it allows for a development of expertise subject to continued review by the Commission as well as by the State and local agencies. That is one of the reasons we like H.R. 61, because it does not intend to lay down cold law for every exigency that we can think about, plus a lot that we perhaps cannot think about even today.

Mr. KINDNESS. I recognize that point and I am in sympathy with it. Just as I feared; my time has expired.

Mr. EDWARDS. Mr. Drinan.

Mr. DRINAN. Thank you, Mr. Chairman.

Judge TYLER. I thank you for your testimony. And before I ask some questions, I would like to raise the difficulties that apparently you ran into with the result that you were not able to give us the testimony pursuant to the rule of Congress, 48 hours ahead of time. As you mentioned, and I learned from the staff of the committee, OMB had to see it.

Would you tell us when precisely, what time, what day, the OMB cleared it?

Judge TYLER. Mr. Drinan, I am going to have to find out because I am not even sure at this late hour.

Mr. DRINAN. Do you have any explanation why you are in defiance of the rule of Congress? You are a Federal judge, and a distinguished one for many years. What would you do to counsel if they did not give you documents that by law, by rule of court, they had to give 48 hours ahead of time?

Judge TYLER. Well, we are not quite out of compliance to that extent, as I understand it. We did have drafts and discussion with committee staff last week. But I would have to admit, as I did at the outset, that it was not until 15 minutes before I arrived here this morning that I knew whether or not the OMB people had approved our testimony finally. The result is that we did not have the final draft.

Mr. DRINAN. No one on this committee got a draft or anything. In any event, sir, this has been our history with the Justice Department. There are several Attorneys General and other people from the Justice Department, who are often in open defiance.

How can we make sensible comments when we got this as we came in? And other people have been begging the Justice Department—we called Thursday and Friday, with no results whatsoever.

Judge TYLER. I sympathize and agree that you should have this. The rule makes considerable sense, to put it kindly. You are absolutely right. I am not pleased with our posture, either. But we seem to have this on a continuing basis.

Mr. DRINAN. What should Congress do about it, sir? I am sorry to be angry about this, but I am. This is not your fault. You are new in the Department—this is the fault of the Department. They consistently have a practice of not giving any testimony ahead of time because then they will have more sensible and difficult questions.

Judge TYLER. That part, I do not agree with, because at least in this instance we were struggling to meet the deadline. We did not achieve it, and I do not want to excuse us entirely, but you seem to suggest, sir, that there was a willful intent to obfuscate this hearing, and I would assure you there was not. As a matter of fact, that is one of the reasons that I was very unhappy, particularly since I was dealing with your chairman and others last week on a closely related issue. I am very interested in this because I realize how difficult it is. And I am embarrassed. I will put it very bluntly. I will not mince words with you or anybody, but there was no intention to withhold this information. I wish we could have had it up a fortnight ago.

Mr. DRINAN. Thank you very much, Judge

I want to congratulate Congressman Edwards on all the work he has done. I like to hear the word co-partnership that you, Judge Tyler, have enunciated. And I hope you are right in your oral testimony here rather than in your written testimony. In your written testimony, you say there are fundamental differences between H.R. 61 and H.R. 8227. Then, in response to the chairman's comments, you say, well, it is a difference of methodology.

Judge TYLER. That is right.

Mr. DRINAN. There are no fundamental differences, then?

Judge TYLER. Oh, no. I think, Mr. Drinan, we do have the same goals. What we are trying to testify to and what I am trying to say here today is that we do not think that H.R. 8227 achieves those common goals. Moreover, that bill raises a great many problems that we do not think this subcommittee, among others, wants. But I do not back off at all from what I told the chairman. I think he is absolutely right. The subcommittee's deliberations have brought the Department of Justice a great deal of benefit—not just recently, but over this 4-year period. That, I do not recede from. But H.R. 8227, sir, has an awful lot of difficulties with it. Though I realize I cannot know what is in your

collective minds, I really do not think that some of the provisions of H.R. 8227 as presently drafted achieve the kind of things that are intended by the subcommittee.

More than that, we are concerned about certain aspects of the bill which I think might be counterproductive, and that is why we are here to testify this morning about H.R. 8227.

Mr. DRINAN. Well, Judge, in your statement you say you have referred to numerous technical drafting problems. You do not enumerate those. Maybe later on we could find out what they are.

Judge TYLER. Well, we talked about that.

Mr. DRINAN. My time has expired. I am sorry if I am impatient, but just let me conclude by saying this: As far back as February 26, 1974, we had Attorney General Saxbe here. I asked him at that time, 18 months ago, whether or not he thought that the proposal at that time complied with *Menard v. Mitchell*. Mr. Saxbe said, I am not familiar with the case. I told him what the case was. So, if I am impatient, I admit that I am impatient. All I can say is that I am glad that the Justice Department at least is now in favor of this one bill. I hope that we can continue constructively and get a bill that will become law.

Thank you.

Judge TYLER. May I say I share your hope, Mr. Drinan. I think we will achieve such a bill. This is too important a matter to overlook. There are an awful lot of people in the whole system and thousands of agencies who are waiting for us to do something. You are absolutely right. We have got to do something.

I would also say to you, sir, and the entire subcommittee, that the last thing I wanted to do this morning was to come up and speak with you gentlemen without advance copies of this testimony. As a matter of fact, I myself did not even see it in its final form until this morning. I will assure you that if we have any other occasion to come up here at your request, we will try to do much better.

Mr. DRINAN. Judge, I will give you absolution, assuming that you will never do it again. [General laughter.]

Mr. EDWARDS. Mr. Dodd.

Mr. DODD. Thank you, Mr. Chairman.

Judge Tyler, thank you. I have the same problem that Father Drinan had in reviewing the testimony. It is a highly complex issue, and quite frankly, reviewing the testimony, reading it with you, going along with you, made it very, very difficult in terms of trying to come up with intelligent questions regarding your objections to the committee bill, as well as your points in regard to H.R. 61.

However, I would just like to ask one question, a followup on what Mr. Kindness was asking with regard to purging and sealing. I hope I will make myself clear to you with a question. I am trying to get some indication from the Department as to where the burden should lie with regard to the continuance or maintenance of criminal records. What I am getting at is an attitude. Should the policy or posture be one of trying to purge and seal as many criminal records as we can, or should the posture be one of allowing the records to be as open as we can, and the exception being the sealing or purging.

Do you see what I am getting at—the thrust of purging and sealing?

Judge TYLER. Yes; I think that what this subcommittee is trying to accomplish and what we in the law enforcement business probably

should more than support, is this: We should not want to put any more information in the system, or once it is there, keep it any longer than is necessary to serve a legitimate public function. We should expect—and this is one of the reasons we like the approach in H.R. 61—that if some legislation like that is passed, that in the work carried on by the Federal Commission, in partnership with the State and local, as well as the Federal, law enforcement agencies, that every predisposition can be favored in excluding information which is aged and therefore not useful or which for some other reason does not belong in the system. The burden should always be to get it out of the system or the informational category within the system where it is lodged.

Mr. DODD. In other words, the approach to a given piece of information would be to eliminate it unless there is some justification for maintaining it?

Judge TYLER. I would think so. Really, this is what brings the subcommittee to its task.

Now, at the same time, as somebody who has been long involved in law enforcement, I would hate to see us throw the baby out with the bath—in other words, discard information for which there is a legitimate, relevant, law enforcement usage. The Commission in its work should always try to recognize that the public would like to see its law enforcement agencies have information with which they can work. On the other hand, I do not think we in the law enforcement business want to take an intransigent attitude and say once something is in the system it has got to stay. For example, a piece of information about John Jones may have been hanging around for 25 years and he is now 86 years old and dying of terminal cancer. We do not want to take the position, under those grievous circumstances, of hanging on to a piece of stale information.

Mr. DODD. I completely appreciate and agree with what you are saying. I think probably the whole question that has given birth to this issue and this legislation has been that concept, of how do you deal with that given factor, information. What is the thrust? Is the thrust to maintain it and then try to establish some reason why we should maintain it, or should the thrust be to get rid of it unless someone can justify the maintenance of that record?

Judge TYLER. Yes, that is right. One of the things that has happened in our history of dealing with this issue, which history the chairman recited very briefly, is that we have been coming to grips with the problem of balancing the two polar considerations of effective law enforcement and individual privacy. We think that H.R. 61 provides the best combination of approaches to the two polar concerns which confront this subcommittee and which make this whole subject so difficult.

We have mentioned this morning a couple of provisions in H.R. 8227 which could be engrafted upon H.R. 61, but one of the reasons, Mr. Dodd, that we prefer H.R. 61 is that it is about the best possible piece of machinery for getting at these two concerns—not allowing law enforcement people to keep irrelevant, needless information forever, but at the same time not constantly denying them the necessary tools to do their job because somebody says, “Oh, well, we have got to have the privacy of somebody advanced” without considering any legitimate law enforcement needs. Nobody wants that. We want to ride both these

horses which are so important in American society. That is what we think we can do with a bill substantially like H.R. 61.

Mr. DODD. Thank you very much, my time is up.

Mr. EDWARDS. Judge, the FBI gets rid of records when the person reaches age 80.

I noticed in California, my home State, that if the subject lives to age 70 and has had no contacts with the criminal justice since age 60, the record is purged. So if you are clean for 10 years and you are over 60 in California, you can be rehabilitated and have a fresh start in life. [General laughter.]

Can we not do better than that, do you think? What about someone who is a young person who has come in contact with the criminal justice system in a felonious way. He does his time, he does his parole, and then is arrested for writing a bad check.

He is clean for 7 years, employed and never arrested: do you think that that record, from his youth, should still follow him around for another 10 years? We do not do it with juveniles.

Judge TYLER. Well, you raise a good subject. I do not want to sound as though I am trying to top your example, but you remember back in the early 1960's where a lot of young people were arrested for criminal trespass when they protested discrimination at lunch counters, and things like that.

In certain instances, some of the offenses for which they were arrested were regarded as felonies. This is an agonizing matter, because some of those youngsters have never done anything to come in violation of the criminal law of any one of our jurisdictions.

Query: Should this kind of information be kept? Should it be used against them if they seek Federal employment? Or private employment?

I personally think not. Nor do I disagree with you on the example you just posed, Mr. Chairman. But these are just a few of the myriad problems which will arise—so many that I would suggest to the subcommittee that it would be extremely difficult to try to have a code arrangement anticipating all these various problems and providing for them in black letter prose for ever and ever. You and I and the rest of us could sit here all morning and come up with all kinds of problems.

The age problem is a very important one. There are certain men and women who have a perfectly dreadful criminal record until, they reach the age of, say, 52 or 53. Then all of a sudden something happens, divine inspiration, chemical change, whatever it is, and they appear to be rehabilitated. It is very difficult for those of us in law enforcement to say that a fellow like that is going to be good for the rest of his natural life. And, yet, in fact, some people are.

Should there not be a cutoff date? But I like the approach in H.R. 61. There are just too many multifaceted factual and legal situations. I think that they should all eventually be dealt with. And I think H.R. 61 offers us a good start. If I were a member of the Commission, I would be just as concerned about all these problems, plus a few more, as you are.

I think the Commission, whatever its makeup, will be the kind of people who share these concerns.

Mr. EDWARDS. Thank you. Mr. Kindness.

Mr. KINDNESS. Thank you, Mr. Chairman.

Judge TYLER. I think there are some considerable numbers of questions that might be raised here. And it appears that the time allotted to me is not going to be very adequate.

I would like to suggest that there may be some information that I would like to elicit that might be responded to by subsequent writing, or something of that nature.

If that, perhaps, could be made a part of the record, I could quickly enumerate those questions.

Judge TYLER. All right, sir.

Mr. EDWARDS. Without objection, it will be made a part of the record, Mr. Kindness.

Mr. KINDNESS. I would very much appreciate an expression from the Department, or on behalf of the Department with respect to the administrative burden accruing with respect to the two bills, H.R. 8227 and H.R. 61.

It appears to me that there are administrative burdens that have to be considered here in terms of the cost of complying with the provisions of either of those bills.

It looks as though, on a quick overview, H.R. 8227 would require a greater amount of administrative concern. There would be a greater administrative burden imposed. But I would appreciate an expression from the Department as to which appears to be the greater in burden and whether there are administratively any concerns that, perhaps, have not been commented on in your testimony, that might make this a pretty expensive procedure.

Number two, is the matter of a Commission, and I might elicit your comment at this time on whether it is necessary to have a Federal Commission to administer the act at all or whether establishing guidelines that are sufficiently clear in statutory form might negate that necessity.

I realize we are dealing with a somewhat nebulous field. But the States, it seems to me, in the concept of H.R. 61 might be dominant in the enforcement or application of the law. Anyway, I am not sure that the Commission would not be an excessive administrative burden in itself.

I would appreciate any comments you have on that.

[The information referred to follows:]

ADMINISTRATIVE BURDENS IMPOSED BY H.R. 8227 AND H.R. 61

The Department of Justice was requested by Mr. Kindness to assess the administrative burdens that would be imposed on criminal justice agencies by the provisions of H.R. 8227 and H.R. 61.

That there will be some new administrative burdens imposed by enactment of either bill is clear beyond question. The extent of the burdens is difficult to assess because of the variance in criminal justice practices in States and localities. Some states already have criminal justice and privacy legislation imposing many of the same requirements as these bills. The additional burdens imposed on them by federal legislation would be minimal. Moreover, criminal justice systems are highly sophisticated in some states, and only minor changes would be required to comply with these bills. In other states, a major effort would be necessary because of less sophisticated systems, or lack of similar legislation.

In both bills, the burdens that would be imposed concern such matters as accounting for dissemination, determining who by law has access to information, adopting regulations and procedures to ensure compliance with the bills' requirements, ensuring disposition reporting, handling requests for access to and cor-

rection of records, carrying out any sealing or purging requirements, and responding to litigation.

Most federal agencies are already required by the Privacy Act of 1974, P.L. 93-579, to ensure accounting, updating of records, and determinations on lawful dissemination, and must adopt regulations for this purpose. The Federal Bureau of Investigation is already required by regulation to provide access to criminal history records, so the only new burden which H.R. 8227 would impose would be the correction of State records in FBI possession. Similarly, the Department is already handling litigation on issues relating to criminal records, so that no new burden with respect to litigation is anticipated under H.R. 61. As noted in my testimony, however, H.R. 8227 would impose the added burden of litigation with respect to investigations and dissemination of investigative and intelligence information.

Subpart B of the regulations issued by the Law Enforcement Assistance Administration on May 20, 1975, 40 F.R. 22114 (effective June 19, 1975), requires all States receiving LEAA funds for criminal justice information to prepare plans to ensure accounting for dissemination of information, completeness and accuracy of records, reporting of disposition, and restrictions on dissemination of records. Many States are thus already required to perform the administrative tasks that would be required by these bills.

In light of these existing requirements of federal and State law and federal regulations, the burdens imposed by H.R. 8227 and H.R. 61 would not be as great as might first appear.

There are, of course, provisions in the bills which go beyond the existing requirements. For example, H.R. 61 requires accounting for patrol car access to criminal justice information in a computerized system. This would impose an additional burden. H.R. 8227 requires a non-criminal justice agency investigating record information on a potential employee to notify the individual that such information is being sought. Where large numbers of records are checked daily, this will impose an enormous burden. H.R. 61 attempts to minimize this burden by requiring only that the potential employee be "put on notice," that is, given some general notice, probably on the employment application form, that such a record check is likely. Although this may require altering existing forms, it is far less burdensome than the individualized notice required by H.R. 8227.

We have attempted in H.R. 61 to keep administrative burdens to the minimum consistent with good record keeping practices and with the needs of both effective law enforcement and individual privacy. Such burdens as are imposed, we believe, are justified by the values which they would protect.

NEED FOR A COMMISSION TO OVERSEE COMPLIANCE WITH CRIMINAL JUSTICE AND PRIVACY LEGISLATION

The Department of Justice was requested by Mr. Kindness to elaborate on the need for a Commission to oversee the implementation of criminal justice and privacy legislation.

Both H.R. 8227 and H.R. 61 would create commissions but there is a substantial difference in the role of the commission as set forth in the two bills. The Commission in H.R. 8227, as in the original Ervin bill, is a regulatory body with incidental oversight and study functions. The Commission included in H.R. 61 is modeled generally after the Civil Rights Commission and would exercise only study and watchdog functions.

If legislation is intended to provide tight, day-to-day control over the operations of criminal justice agencies in order to police compliance with the statutory requirements, then some regulatory body, whether a commission or otherwise, is necessary to exercise this control. The Department, of course, does not favor this approach to the legislation.

If responsibility for implementation is to be left to each criminal justice agency, as is the case in H.R. 61, then the need for a Commission is less apparent. It is useful to have a body to study new issues as they arise and to point out egregious failures to comply with the legislation, but it is not essential. Existing entities, either governmental or private, could perform the study function. Similarly, the enforcement and oversight could be left ultimately to the courts, counting on a vigorous press to point out such other problems as may arise.

In all candor, the Commission included in the Department's bill was designed to satisfy what was perceived at the time as a congressional insistence upon a Commission. The Department is not wedded to the concept.

Mr. KINDNESS. Perhaps it would be more appropriate to comment on that one at this time.

Judge TYLER. All right, sir, I think it is fair to say that I have given a great deal of thought to this basic question. I believe probably the subcommittee has too. We are not anxious to set up still another Federal Commission if we can avoid it. But, on balance, we have decided that the Commission form, if I may put it that way, Mr. Kindness, is probably a good idea here because, first of all there are so many issues that we do not really know about, let alone know the answers to.

Second, computer technology is so fast moving that for that reason alone we rather thought that the Commission ought to be created so as to keep up with such developments.

Then there are the problems that the chairman and I were just discussing, the myriad fact situations, the difficulty you have hinted at earlier by your question as to purging or destroying—once you start trying to legislate, it becomes almost frightening to think about how we would overlook certain things, or how in the legislative process we would come up with meticulous black letter prose disposing of various issues only to regret it later.

These are some of the reasons why we felt that even though a Commission will cost money, of course, it is probably money well spent because of the peculiar problems that I have mentioned.

Now, we would be glad to deal further with your question in writing if you would like.

Mr. KINDNESS. Mr. Chairman, if I just might, as a tag on that, I would appreciate that sort of an expression, particularly in view of the fact that the courts will finally determine questions of fact that arise under the application of the statute.

In any event, it appears there is duplication in that respect and that is what concerns me.

Thank you, Mr. Chairman. My time has expired.

Mr. EDWARDS. Thank you, Mr. Kindness.

Mr. Drinan?

Mr. DRINAN. Thank you, Mr. Chairman.

Judge, I wonder if you would want to expand a bit on the provision in H.R. 61 that allows information to be disseminated to federally chartered insured financial institutions for purposes of employment review. The key words in this section are not in the other bill at all—the key words are “criminal record information” and in your definition, the definition of H.R. 61, page 3, I am in doubt whether or not this can be merely an arrest without any disposition?

Judge TYLER. No, there must be a disposition—the key words there, Mr. Drinan, are the last phrase—

Mr. DRINAN. All right, I get that. Therefore, any individual who has this arrest and disposition, that can be sent to any federally chartered or insured financial institution if he wants to be the night janitor. Should there be a time limitation on this? Or is it provided elsewhere that any time limitation is on this?

Judge TYLER. No, as I understand it, in H.R. 61, or any other proposed bill in this area, there is no time limitation as such. In other words, a fellow could have an ancient conviction.

Mr. DRINAN. That is right, and any American citizen who happens to have an arrest record from 20 years ago has fewer rights applying

for a position with a federally insured bank than an individual with a similar record who is applying to a Federal agency.

Because in the language above, it says "employment decisions are made only at the supervisory level and such information is considered as a disqualifying factor only when it is reasonably related to the employment." So, how do you answer that—that you have placed this burden on all individuals so that they cannot get a job in the bank?

Judge TYLER. Well, one thing, and you may not have intended this, sir, but you used the words, "arrest record" in your—

Mr. DRINAN. No, with the disposition.

Judge TYLER. If you add that then I am not sure I follow you. It is true, as you say, that under the definition on page 3, this means a person who has a conviction—you are pointing to another section.

Mr. DRINAN. It is right above that, sir, it is the identical situation. There is complete analogy that if "criminal justice information" is given to a Federal agency where this individual has applied for a job then that individual has at least a few rights.

Judge TYLER. What I am checking for is the—what phrase?

Mr. DRINAN. "Criminal justice information," all right, just talk to it, if you will, Judge, as to—

Judge TYLER. I am trying to catch up with you. I am going through here to catch that section in the bill.

Mr. DRINAN. Page 16.

Judge TYLER. That is what I am looking for, thank you.

Mr. DRINAN. In the case of someone who applies to a Federal agency is "criminal justice information" not criminal record information?

Judge TYLER. Right.

Mr. DRINAN. But, he does, nonetheless, have some rights which an individual applying to the bank does not have. This has come up before, sir, and no one from the Department of Justice has given me a satisfactory answer. So it is an old problem. Do you have an answer?

Judge TYLER. Looking at (B) and (C) together?

Mr. DRINAN. Yes.

Judge TYLER. It would seem that all that is being said there is that in the Federal agency there would have to be decisions at a supervisory level and the information, that is the criminal justice information, of course, would have to be reasonably related to the employment under consideration.

Mr. DRINAN. Why do you not apply them to the bank situation? Why do you not take one and two and say that this also applies to an insured bank? Maybe they should have some shadow of a right.

Judge TYLER. Apparently, under the present language, nothing is said as to what that bank should do or what standards it should follow. You are quite right.

[The following information was subsequently supplied for the record:]

LACK OF RESTRICTIONS ON BANK USE OF CRIMINAL HISTORY RECORDS
IN H.R. 61

The Department of Justice was asked by Mr. Drinan to explain why agency use of criminal justice information obtained for employee screening is restricted in section 205(b) of H.R. 61 but no similar restrictions on use are imposed on federally chartered or insured banking institutions in section 205(c).

At the outset it should be noted that different types of information are provided in the two subsections. Federal agencies would have access not only to all criminal history records and arrest records but also to other criminal justice information under the terms of subsection (b). The access of financial institutions is limited only to criminal history records that include dispositions of the charges. Thus, far less sensitive information is being provided.

The restrictions on federal agency use of criminal justice information were worked out over a long period of time in consultation with the Domestic Council Committee on Privacy and other federal agencies. The reference to federally chartered or insured institutions was included toward the end of the drafting process when it was realized that, in repealing the Bible Rider in section 311 of the bill, this one provision had not been included elsewhere in the text.

The Department made only one change in the Bible Rider provision, limiting access to only those records which have a disposition, rather than permitting access to arrest records as well. We have no objection, however, to adding other restrictions on the use of these records by banks, such as the limitations in section 205(b) and, perhaps, a prohibition on retention similar to that included in section 204(b).

Mr. EDWARDS. The gentleman's time has expired.

The gentleman from Connecticut has allotted his time to the gentleman from Massachusetts.

Mr. DRINAN. Thank you, Mr. Dodd, for yielding.

Judge TYLER. So, it would seem to me that what is going on here is that under the present draft the bill does not purport to tell the bank what or what not to do with the information.

Mr. DRINAN. Do you think that is fair? The lowest person in the bank will take this information and another person would never darken its doors as a janitor. That is what is going to happen. Why provide all these sophisticated regulations for people who are applying to the Agricultural Department and not apply them to the bank that is down the street that has a far, far more remote connection with the Federal Government? There is a discrepancy, I do not understand how you can justify it.

Judge TYLER. I am not sure anybody really has thought about this.

Mr. DRINAN. I have thought about it for 3 years and I have a constituent who is involved in this situation. I hope that you and your associates will think about it. It is an obvious discrepancy.

Let me come to another point about the FBI regulations, and I have them here before me.

They do not become operative until January 1, 1978 and reference was not made to them this morning. Would you have any comment on them?

I have a lot of difficulty with them and I made comments on them myself in the Congressional Record of May 22.

Would you comment on these in relation to your testimony this morning?

Judge TYLER. I am somewhat at a loss to comment. I do not have a copy with me, and I did not come here prepared to testify on those. Perhaps you have something else?

Mr. DRINAN. No, I am just wondering whether you found them satisfactory, or whether you think that is a good first step, or do you think they would be superseded by this bill, or what. In any event, Judge, let them go, although they are very relevant, at least indirectly.

Judge TYLER. Certainly, they are indirectly related to the subject matter, but I just had not been focusing on the latest draft of those regulations. I am sorry, Mr. Drinan.

Mr. DRINAN. Coming back to what you were saying about the presumption running here that, I assume that, from what you said, you would have felt that the arrest records of the May Day demonstrators should not have been kept, and they should not have been required to go to court, and so on. I do not seem to follow, after you said that, how you can add that we do not want to keep the information in the system any longer than it is necessary, after they were exonerated by the court. So I would assume, under your principle, we would have said, expunge these things completely.

Judge TYLER. It depends on what matters you are talking about. I am not following you. You mean the May Day demonstrations here in the city of Washington?

Mr. DRINAN. 12,000 people were arrested; all the arrests were vacated.

Judge TYLER. I would assume that raises a good illustration of a type of case where such arrest information should not be retained any longer.

Mr. DRINAN. Is that provided for in H.R. 61?

Judge TYLER. Absolutely not, because, in order to cover the myriad possibilities, sir, we would have a bill from here down to the southern end of Virginia, not to mention across a few miles of—

Mr. DRINAN. All right, Judge, but H.R. 8227 does not have a myriad of exceptions, and it does provide, specifically for a case like that, where those kids, under H.R. 8227 would not have to go to court, but would be vacated, where they would not be precluded from occupations in federally insured banks for the rest of their lives.

Judge TYLER. Wait a minute. I must say, I would like to see the section you are now talking about.

Mr. DRINAN. I defer to the chairman or to counsel. I think it is provided. I do not have the section here myself. The seventh year, they get absolution after 7 years.

Judge TYLER. I am at a loss, sir. I have the analysis of H.R. 8227, but—

Mr. DRINAN. I judge—from the actual language, I am sure that it is contained there. And if you feel that it is wrong to keep those records after this arrest was completely vacated, then why do you not provide for it in H.R. 61? Your only reason is that we cannot have too many exceptions. I think this is an exception that could be and is included in Mr. Edwards' bill. I just want you to talk to that. Why do you not endorse that, and say that, yes, there is one provision of that bill we should have in H.R. 61?

Judge TYLER. Since I have not been able to fasten my eyes on what you are really talking about, I cannot discuss that specific section, because I do not know what it is.

Let me go back—I do not have any quarrel with the notion that perhaps the May Day incident, whatever the facts may have been about that, is an example of a case where a lot of young people have records that ought not to be records, if you will. I do not have any quarrel with my analogy of the lunchcounter demonstrations, going back to what is recorded today as quainter and not very important times. I do not have any problem with the chairman's example.

Mr. DRINAN. Except that you do not provide for that in H.R. 61.

Judge TYLER. Not on a specific case by case basis. I am happy to say we certainly do not, because, if we did, it would be an idle effort. There are too many patterns that one can imagine, and if you start specifying them in the codes, you are going to overlook some things you do not want to overlook, or I would not want to overlook.

Mr. DRINAN. My time is expired, but I would hope that the chairman or counsel would point out that specific provision in the bill, H.R. 8227, and point out that it does not require us to spell out all types, an infinite variety of examples to reach that particular case.

Thank you very much.

Mr. EDWARDS. Yes, Judge, I would agree with the gentleman from Massachusetts that this is a very important area that I do not think you have addressed.

Judge TYLER. Would someone—

Mr. EDWARDS. I hope you would study it further.

Judge TYLER. What section is this, Mr. Chairman, do you know?

Mr. EDWARDS. It is—

Mr. KLEE. Judge, it is section 20882 and possibly 20883, depending on whether conviction vacated is the same as no conviction. This is in H.R. 8227.

Mr. EDWARDS. Page 19, Judge. It seems to me that in modern penology and corrections philosophy, it is terribly important to keep in mind that we have not only a responsibility to punish people for crimes they commit, but also to assist them in getting back into the mainstream of American life. If someone has committed a crime, and we will say for purposes of argument that he is a model citizen after serving his time and after serving his probation, that there should be some provision in the law, so that he would not be handicapped and that his rehabilitation would be rewarded.

I would hope that, in the few days we have remaining before we actually mark up the bill and bring it from this subcommittee to the full committee, that we would have further communication on this problem.

Judge TYLER. We would be glad to. You are right. We did not deal with this, as such, this morning. And I would be glad to fill in that gap.

[The material referred to follows:]

SEALING AND PURGING OF RECORDS

The Department of Justice was asked by Mr. Edwards to comment further on the sealing and purging provisions of H.R. 8227, comparing them with H.R. 61.

Since our comments on the sealing and purging of investigative files are set forth in the prepared testimony, we will confine this comment to the provisions dealing with criminal history records.

H.R. 61 provides for the sealing or purging of arrest record information and criminal record information in accordance with applicable Federal or State *statutory* requirements or an order of a court of competent jurisdiction. Sec. 207(c). H.R. 8227 contains a somewhat similar provision, but it applies to correctional information as well and requires sealing or purging when this is provided for in a Federal or State *regulation*. There are jurisdictional problems to be worked out with respect to one agency's regulations binding another, and other problems arising from the fact that one court's records may be included in a correctional file that another court orders purged. However, we have no conceptual problems with these provisions.

Section 207(d) of H.R. 61 requires a central repository of criminal histories at either the Federal or State level to expunge five-year old arrest records that

show no disposition provided that there have not been subsequent arrests or the individual is not a fugitive.

H.R. 8227 provides for the sealing or purging of arrest records after two years if there has been no conviction, no prosecution is pending, and the individual is not a fugitive. Where a law enforcement agency has not referred a case for prosecution, "criminal history record information" must be purged "promptly." This latter provision is of primary concern to the Department.

In its purging provisions, H.R. 8227 does not differentiate between central state record repositories and records at the departmental or even stationhouse level. Thus, the prompt purging of data on arrests not referred for prosecution would eliminate the record at all levels. This may disadvantage an individual who wishes to establish officially that while he was arrested, no charge was brought. It would also prejudice those who wish to prove in a later prosecution for the same offense that they were arrested earlier and the prosecutor delayed unduly in bringing the final charges.

Purging such records at so early a stage may effectively diminish the accountability of the arresting officers as well. It is important for internal inspections to be able to determine which officers are consistently bringing "bad charges" which are rejected by the prosecution. Finally, there are a number of potentially valid uses of these records for law enforcement which would be eliminated by purging. A seemingly valid alibi resulting in the dropping of charges may later be disproved, but the original record of the arrest and attendant circumstances would be lost. A pattern of increasingly violent inter-family assaults, not prosecuted because of the injured party's hopes for reconciliation, would not be available. Yet this information is important in determining, in each subsequent incident, whether a charge should be brought or some alternative procedure, such as a peace bond or an intra-family offense proceeding, should be initiated.

Sealing of records, rather than purging, might avoid some of these problems, but it creates problems of its own. The administrative burden of segregating quantities of records and providing separate indices is enormous in a manual system. In a computerized system it would require constant reprogramming. Moreover, the provisions for breaking the seal in subsection (b) (5) are probably so cumbersome that the records would be effectively lost in circumstances such as the family assault case.

Section 208(a) (2) of H.R. 8227 provides for the sealing or purging of criminal justice information, including convictions and correctional information, seven years after the individual has been released from supervision, unless the particular offense has been exempted by statute. With respect to the inclusion of correctional records in this provision, the problem alluded to above, of one court ordering the sealing of another court's presentence report is presented. We do not know the extent to which such records are included in state correctional files, but it is customary for federal prison records to include the presentence report. There may be delicate problems within the judiciary if a federal court in Atlanta can order the sealing or purging of a presentence report prepared for a federal court in New York.

We assume that the reference to express statutes exempting records of certain offenses from sealing or purging is designed to deal with permanent disabilities, such as those barring from public service a person convicted of bribery in office, now contained in federal and state statutes. Under the bill, however, legislatures would have only one or, at the most, two years in which to identify all of these statutes and amend them to comply with the provisions of the bill. We question whether this affords enough time.

Aside from these specific problems, the desirability of purging or sealing conviction records is a conceptual issue. These records relate to facts. To destroy them or, at the least, make them unavailable is to deny the existence of a fact. Facts potentially useful to law enforcement would be forever lost with consequent impairment to its effectiveness. On the other side, the argument is made that there must be some point at which an individual's past is forgotten and he can start with a clean slate. It is a question of weighing the two competing values. As is natural, the Department of Justice leans toward the preservation of records useful to law enforcement.

One final observation should be made. We find no provision in H.R. 8227 exempting records accumulated prior to the effective date of the Act from these sealing and purging provisions. Within the FBI, and populous states, such as New York, Pennsylvania and California, the systematic purging of old records

will be an enormous, if not impossible, burden. We urge you to consider the practical desirability of a "grandfather" clause requiring the sealing of those records as they come to an agency's attention, but not mandating a systematic search for them.

Mr. EDWARDS. Thank you.

Mr. PARKER.

Mr. PARKER. Judge Tyler, there were two reasons given in your statement this morning as to why you were unable to support H.R. 8227. One deals with technical drafting problems. The other deals with fundamental disagreements, which, as I understand now are differences in methodology. With respect to the technical drafting problems, in the past, we have enjoyed the expertise and assistance of various lawyers through the Justice Department, who work over technical drafting problems with us, we generally find we can solve those. I would assume that we could have the same benefit of that expertise within this area of the law, as well. Is that true?

Judge TYLER. I hope it is expertise, but certainly there will be assistance.

Mr. PARKER. Thank you.

It would also be of some assistance to us—and because of the limitations of time, it might be best to do this in writing—if you can provide, for the subcommittee, those sections of H.R. 8227 which you are substantially in agreement, not necessarily setting aside differences in methodology, but where you substantively agree with what the position of the bill is. We could then, obviously concentrate our efforts and yours in those areas where we have some difference of methodology or disagreement.

[Subsequent to the hearing the following information was received for the record:]

AREAS OF AGREEMENT BETWEEN H.R. 8227 AND H.R. 61

Mr. Edwards requested the Department of Justice to set out the areas of agreement between H.R. 8227 and H.R. 61. We will attempt to indicate this by reference to the sections of H.R. 8227.

Title I—Obviously there is agreement as to the general scope and purpose of the two bills. Disagreement over definitions is largely technical and probably does not raise any fundamental issues. The provisions on the applicability of the bills are very similar. We suggest only that the specific authority to continue announcements of Executive clemency, contained in section 103(b)(7) of H.R. 61, and the protection afforded classified information in section 103(b)(8) be added to H.R. 8227.

SEC. 201. Our objection to this provision is its preclusive approach—nothing that is omitted here may be done—rather than its actual content. The use of the *Terry* standard for criminal investigations, in this context, does cause some concern, however, as we have noted to the Committee.

SEC. 202. We concur in the substance of this section.

SEC. 203. There are many similarities between this provision and the comparable provisions of H.R. 61 and many areas of agreement. The areas of disagreement include the failure to include provisions for executive orders authorizing noncriminal justice access to information, which access is particularly important in States whose legislatures meet only every two years. Another area of disagreement is the rigidity of the stale arrest record provision in H.R. 8227. That bill does not allow any leeway to the States for deliberately choosing to make such records available in certain circumstances, while this would be permitted in H.R. 61. Our disagreement with the notice provision in section 203 may be the result of a drafting accident, rather than a real issue. H.R. 61 refers to putting employees on notice that record information may be sought—thus permitting such notice to be included in an employment application form. H.R. 8227 appears to require individualized notice in each instance. We have no

disagreement with the research provision but suggest that it might be wise to include the added safeguards provided in H.R. 61. Our disagreement with the provisions for access to information by certain federal agencies in subsections (e), (f) and (g) is a result of differences in definitions. In the comparable provision in H.R. 61, the term "criminal justice information" encompasses intelligence and investigative information as well as record information. H.R. 8227 uses the same term but defines it only to include record information, thus denying to INS and Treasury investigative and intelligence information necessary to their operations. We are in accord with the press provision of section 203.

SEC. 204. We agree with subsection (a) of this section. We disagree with the limitations on federal agency access for employment investigations contained in subsection (b). It is normally through a National Agency Check, involving investigative and intelligence information, that a determination is made as to whether a full field investigation is necessary. If National Agency Checks are precluded, as they are in H.R. 8227, the result may be more, rather than fewer, full field investigations in order to determine the relevant suitability information. Further, we believe it is important to include restrictions on the use of the information by employing agencies, such as those contained in section 205 (b) of H.R. 61. Finally, we note that there is no authorization for access to intelligence and investigative information for law enforcement employment in H.R. 8227—we view such access as necessary.

SEC. 205. We concur in this section.

SEC. 206. Our problems with this section are largely technical drafting problems rather than conceptual ones.

SEC. 207. We have no substantial disagreement with this section.

SEC. 208. The sealing and purging provisions are a major area of disagreement.

SEC. 209. We have no disagreement with the concept of access and correction. Our problem is with the absolute correction obligation imposed on the possessing agency regardless of where the information originated.

SECS. 210 and 211. As our testimony indicated, there is fundamental disagreement over the provisions relating to intelligence and investigative information.

Title III—Our disagreement with the enforcement provisions is set out in our testimony. The primary issues are the Commission itself, the cease and desist powers, the exclusionary rule provision, and the provision on precedence of State laws. We would also suggest that the effective date provides too little lead time for the States.

Mr. PARKER. Speaking of that, I have been casually glancing at the Criminal Justice Information Systems regulations—excuse me—which were just put forth by the Department of Justice. And I assume that this represents the position of the Department of Justice, with respect to criminal justice systems anyway. They should be dealing with criminal history record information, and so forth. Those regulations parallel H.R. 8227 to some degree.

You indicate in your statement that, for example, H.R. 8227 specifically enumerates the only purposes for which arrest records may be exchanged among criminal justice agencies, thus precluding all other exchanges. The wording of your regulations is, under limitations on dissemination insure the dissemination of criminal history record information that has been limited either directly or through any intermediary. Only two—and then it enumerates following sets of circumstances. I find that to be the same approach that is used in 8227.

Further, you talk about the fact that, with respect to records which are in the possession of an agency—in your statement this morning, you told us that you felt it would be a serious problem for the FBI or for other agencies, when you have to correct records which are in their possession, but which originated somewhere else. Again, turning to the regulations of the Department of Justice, they talk about access and review by individuals, and it says that, any individual shall, upon satisfactory verification of his identity, be entitled to review, without undue burden to either the criminal justice agency or the individual,

any criminal history record information maintained about the individual. That would seem to me to mean information in their possession, so I have here at least two examples where the Department's position and H.R. 8227 seem to be not only in substantial but identical agreement.

Judge TYLER. Maybe we did not do as good a job of drafting as we should, but I am sorry—I do not have those regulations in front of me. I think probably two things ought to be observed. If you will notice, we are not so much quarreling with the concept as making sure, as best we can, that the language is very clear in these two areas you point out. So I do not think there is any great difference between the two positions. It is just a matter of clarification there. Of course, if it turns out that we are disagreeing on substance, why, we would have to call it to your attention. But I am not sure we are there yet.

I do not know how to explain, because I do not have the draft of the regulations in front of me. So I really cannot say any more on that.

Mr. PARKER. May I just ask one further question, because you also refer in your statement to the fact that you consider the primacy of State and local government in the criminal justice area to be of prime importance, and you want to avoid the imposition of Federal controls on the operations of criminal justice agencies. Is that not exactly what these regulations do?

Judge TYLER. No, I do not think so. I really do not think that that is the intention. As you know, we are facing a concern that many people have in dealing with our message-switching—NCIC business. What we are trying to say here this morning is that we have no objection to Federal involvement, so far as setting minimum standards, but we do not think that the Federal Government should tell each State how their criminal justice institutional setup should operate. That is quite a different thing. At least, I think it is. It is a matter of degree, in other words. Surely, there must be some Federal involvement here. Surely, there should be minimum Federal standards. But we think the job can be done without the Federal Government saying how it must be done in each and every State and locality, in each court, each correctional system, each prosecutor's office and each police department. It should be handled like the Federal role in the area of interchange of records—the States and localities are not told how they must keep records or how they must use their computer, so long as they conform with minimal Federal standards.

When it comes to the regulations you are talking about, I am not sure that anything in those regulations undercuts this point. At least I do not understand them to do so.

Mr. PARKER. Thank you. My time has expired.

Mr. EDWARDS. Mr. Klee.

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

Judge Tyler, I have a few questions in the area of Federal-State relations, and the provisions that these bills provide for dissemination of information pursuant to an applicable Federal or State statute or Executive order or court rule or court order. The sections 201(b)(2), 204, 207(c), and 209(d) in H.R. 61 are examples. There is ambiguity whether these sections allow a State, a statutory State court to regulate dissemination of information by Federal law enforcement agencies. There is also an ambiguity whether a Federal statute or a Fed-

eral court is intended to regulate the dissemination by a State criminal justice agency. I wonder if you could clarify the intent there and perhaps suggest that there is some way to remedy an apparent drafting ambiguity.

Judge TYLER. I suggest you are referring to H.R. 61.

Mr. KLEE. Yes.

This drafting problem occurs in both bills. If we could just take one section that I mentioned as an example, section 201(b)(2) in your bill, as substantive language in it says "when authorized by Federal or State statute, court rule or court order," while this bill does regulate information both in the Federal and State systems, it is unclear as to whether a State court, for example, in Massachusetts, can pass a rule that will have an effect throughout the entire country.

Judge TYLER. Well, I would think that that is not the intention of either bill.

Mr. KLEE. I guess I would agree with you on a prima facie reading of these bills. But, the problem is that there is no careful delineation of exactly when a State or Federal board or Executive order, or a statute will have jurisdiction, and over what information it will have jurisdiction, whether it is only information that originated in that State or within the Federal system. I suppose if you could respond to this maybe in writing or work with us in resolving this ambiguity as to exactly what is intended, it could clear up this problem which is pervasive in both pieces of legislation.

[The information referred to follows:]

EFFECT OF STATE LAWS ON FEDERAL AGENCIES UNDER H.R. 8227 AND H.R. 61

The Department of Justice was asked by minority counsel to discuss further the problems presented by providing for the supremacy of stricter State laws within State boundaries.

Both H.R. 8227 and H.R. 61 provide that a State law imposing stricter standards of privacy than the federal legislation shall remain in effect within the State. Differences in language between section 211 of H.R. 8227 and section 309 of H.R. 61, however, produce quite different results.

H.R. 61 contains a disclaimer of any intent to affect stricter State laws within a State but makes clear that interstate systems and interstate transfers of information are to be governed solely by federal law. By using this disclaimer form, it does not expand the scope of jurisdiction of State laws beyond the present reach but merely preserves it.

H.R. 8227, on the other hand, is written as an affirmative mandate. Stricter State laws are to govern any maintenance, use, or dissemination of information within that State. We are not sure that this is the intended effect, but in our view, this incorporates by reference such State laws and makes them binding on federal courts, law enforcement, prosecutors, and correctional officials within the State.

There is, of course, no general prohibition against Congress incorporating by reference certain state laws. This is the effect of the Assimilated Crimes Act, 18 U.S.C. 13. But where the incorporation is of laws regulating the management and operation of the courts with respect to the use and dissemination of federally developed information, it seems to us that serious questions of separation of powers and federal supremacy are raised. If Congress is to adopt legislation concerning criminal justice legislation, we urge that the federal legislation govern federal courts and agencies exclusively.

We will not belabor the practical problems involved in a provision such as this beyond pointing out that the application of diverse rules to information maintained by a single federal agency would be chaotic. It could result in information at FBI headquarters being governed by federal or D.C. law, whichever is stricter, and the same information when transmitted to a field office being governed by the laws of the State in which the field office is located. We submit that it would be possible to operate in this manner.

Mr. KLEE. I have one other question concerning the Federal and State relations.

Mr. Drinan, in his comment on your regulations in the "Congressional Record," noted that you treat States differently from Federal agencies in your regulations. I do not want to harp on the regulations, but in H.R. 61 you seem to regard the State and Federal needs as being on an equal footing in most cases except in the case of section 205(b), where it comes to employment. State governmental agencies are denied access to information given to Federal agencies. I was wondering why you testified to this distinction.

Perhaps Miss Lawton might want to comment on this.

In the area of appointments under 205(a), both the State and Federal Government are given the information. But then, when you come to employment under 205(b), it is restricted to an agency of the Federal Government.

Judge TYLER. Right. This also, of course, brings up a problem Father Drinan raised. I am trying to say I do not recall—indeed, I am not even sure I ever knew—how this particular provision or this section evolved. Perhaps Miss Lawton knows, but I am not sure I do.

MISS LAWTON. The idea of the act generally is that noncriminal justice uses will be specified primarily by statute. 204(a) says that in a State, and there are similar provisions throughout which you referred to, where authorized by State statute, access will be permitted. The more detailed provisions on Federal employment here were considered to be the Federal statute for Federal purposes. It is left to the States to develop their own for their purposes.

Mr. KLEE. I might point out that these States are more restricted than the Federal Government, because 204(a)—well, you are quite right, does allow criminal record information to be handled by State statute; if the State deems that arrest records are pertinent, it has no access to those except under the very limited restriction you have set forth in 204(b); whereas, it seems under your definition in 205(b), that criminal justice agencies may disseminate criminal justice information which includes arrest records, to an agency of the Federal Government. This might also be a time to point out a distinction to Father Drinan's question that 205(b) does not allow the dissemination of raw arrest records and would require these limitations; whereas 205(c), the Bible rider, deals with criminal record information and requires a disposition.

MISS LAWTON. As you go throughout the bill, 204(a), yes, is limited to record information; but (b) includes arrest information and refers again to statute. When you get back to 209 and 210, you will find references to State statutes. I think you will find that eventually the State statutes would be able to cover the same area.

That is specifically covered in the congressional provision for employment.

Mr. KLEE. If that is the intent, I am sure we can work out the drafting.

Thank you very much.

My time has expired.

Mr. EDWARDS. Are there other questions by members of the committee or staff?

Father Drinan?

Mr. DRINAN. One last point on that. Either Judge Tyler or Miss Lawton. In Massachusetts, as you know, there has been a good deal of difficulty. But they have refused to give access to arrest records and so on on the basis of privacy. I am not entirely certain that has been resolved completely. But suppose that a State does take a position that is higher with respect to privacy than H.R. 61. Are there any provisions that there would be no discrimination against this State as there was attempted discrimination against Massachusetts in the letting of Government contracts and that type of thing?

In other words, is it so preemptive that a State cannot go to a higher level of privacy?

Judge TYLER. Well, Mr. Chairman, generally we think that H.R. 61 is now drafted so that there would be no prejudice to a State, such as Massachusetts, which does have higher standards. We think that H.R. 61 contemplates that there will be a Federal floor, which means, in other words, that there will be States like Massachusetts, and undoubtedly others, that will have higher standards than that Federal floor.

Mr. DRINAN. But H.R. 8227 does that also.

Judge TYLER. Yes, I think that is right.

Mr. DRINAN. In other words, there is no problem. We are united on that particular area.

Judge TYLER. That is right.

Mr. DRINAN. I just want to go back.

I know, Judge, you do not have the regulations before you. But the more I read these regulations that came out on May 20 in the Federal Register, the more I am disturbed that somehow the proposals that you are making, if they became law might supersede these regulations that do not take effect until January 1, 1978. In the absence of the bill we have no regulations whatsoever in this area until January 1, 1978.

Judge TYLER. Father Drinan, I have been having a little trouble with this. As you know better than I, I guess, because I was not here, Congress required these regulations. On the other hand, and here I am not sure I understand the force of your question, so please correct me if I am wrong, I would certainly think that we through these regulations would have to comply with a bill of the kind we are discussing here this morning if it becomes law. To say that, I guess, does not say very much; so, I am a little bit unsure as to just what you are asking.

[Subsequent to the hearing, the following information was submitted for the record:]

RELATIONSHIP OF DEPARTMENT OF JUSTICE REGULATIONS AND H.R. 61

During the hearings on H.R. 8227 and H.R. 61 a number of questions were raised concerning the criminal justice privacy regulations published by the Department of Justice on May 20, 1975 and the relationship of those regulations to the proposed legislation.

In section 524(b) of the Safe Streets Amendments of 1973, 42 U.S.C. 3771(b), Congress, in effect, required the Law Enforcement Assistance Administration to issue regulations concerning criminal history record systems it funds. Work on these regulations began immediately. At the same time, a petition for proposed rule-making was received by the Attorney General requesting that regulations be issued for the Federal Bureau of Investigation. The Attorney General instructed

the FBI to work with LEAA to develop joint regulations. These joint regulations were finally published on May 20 and became effective June 19, 1975.

While many of the same people that worked on the drafting of H.R. 61 were also involved in the regulations, the provisions differ. There are a number of reasons for this. First, Congress can by legislation provide for judicial review, civil remedies, and regulation of other federal agencies.

The Department's rule-making authority could not extend to these areas. Regulations concerning security of computerized systems funded by LEAA can legitimately be more specific in their requirements than is appropriate for general legislation covering many more State and local systems. Similarly, regulations which set out provisions to be included in State plans for criminal justice systems may properly contain more detail than legislation which is directly operative on a wide range of federal, state or local agencies. Finally, it should be noted that the regulations deal only with criminal history records, while the legislation encompasses investigative and intelligence information and correctional information—a more complex subject.

The FBI portion of the regulations deals only with the operations of the Identification Division and the National Crime Information Center. It does not regulate anyone outside the FBI other than to state the conditions on which the FBI will provide services to other criminal justice agencies. The Attorney General, of course, has no direct authority to regulate other federal agencies or State or local agencies.

Unless Congress repeals or amends section 524(b) of the Safe Streets Act, LEAA will be required to keep the regulations in effect, regardless of the enactment of separate criminal justice legislation. These regulations would, of course, be amended to be consistent with any criminal justice legislation which may be enacted. Similarly, if legislation is enacted calling upon each criminal justice agency to adopt regulations or procedures to implement it, the Attorney General would be required to amend the FBI portion of the regulations to meet the implementation requirements of such legislation.

In summary, the regulations differ from the provisions of H.R. 61 because of their different origin, scope and purpose. They would not automatically be rendered inoperative because of the enactment of legislation but would be required to be changed to conform to legislation.

Mr. DRINAN. I am just pointing out what is again the inconsistency of the approach of the Department of Justice. Each time we have tried to pry them a little bit more but the FBI regulations here are not very good. As you know, this subcommittee has worked for 4 years now. I have been a member for only 2. There has been no, as I read it, overall approach that the Department of Justice has taken on a consistent basis. It may be explainable by the several Attorneys General we have had; but I hope, Judge, with you coming into this area, we can get an approach that will have an underlying philosophy that will make the implementation very easy. I frankly see the beginning of it today, despite the inconsistencies in your presentation, saying first there is a fundamental difference, then saying there is really nothing but methodology.

Let me repeat what I have said before. I hope it is only methodology. I hope we can go forward at a very rapid pace.

Thank you very much.

Mr. EDWARDS. Mr. Kindness?

Mr. KINDNESS. Judge Tyler, there are two other areas on which I would appreciate comments. Whether it is better to do it in writing subsequent to this hearing, or to respond now—I will enumerate the two areas—I will leave that to your discretion. But in the event that it should be in writing, I would appreciate having it made a part of the record.

No. 1 is, I would like to have your comment as to whether information of the types designed in these bills which become public information or is public information at any time, and reposes in some place

other than the house of a criminal justice law enforcement agency, can ever come within the control of the bill, either one of these bills, such as newspaper files and other records that may be maintained, for example, by credit bureaus and the like? In that connection, also the first amendment implications related to that.

Second, I find myself sitting here wondering whether either one of these bills is going to give rise to the kinds of problems that were fostered or engendered by the legislation that stirred up so much controversy with respect to school records, students records, in the universities, high schools, schools all over the country. I think that is still in turmoil. It seems to me there may be some parallel considerations here where we may not be able to find the answers very readily, if we first enacted either one of these measures without consideration of those types of problems.

Those are the two areas.

Judge TYLER. Let me comment or try to answer your first question, Mr. Kindness.

You are quite right in suggesting, as I understand you to do, that this testimony today makes no reference whatsoever to what we call public information type records—that is, newspaper or magazine clips. The thought among many people in law enforcement, including myself, is that there should be no prohibition against dissemination of computerized public record information. I really think that should be permitted. It is often very useful. Therefore, I would hope, if it ever becomes an issue, that there would be no doubt the public record information should be disseminated. Of course, it could be made subject to the limitations placed on collection maintenance, and so on, such as those set forth in the bills we are discussing today.

Now, on your second question, I must confess I am a little bit unsure what you are asking. Are you asking about information which finds itself into school files?

Mr. KINDNESS. No. To clarify, I foresee that there may be some problems that are parallel in this legislation to those problems that have come up in connection with the legislation passed by the 93d Congress relating to school records.

Judge TYLER. Yes, I see what you mean.

I must say I cannot really answer that. In other words, is there something here with regard to which we might take a lesson from that school legislation to the 93d Congress?

Mr. KINDNESS. All right.

This is obviously not a question that is easy to respond to right at the moment. But I would appreciate if you would get that for us.

Judge TYLER. We will try to cope with that, if you do not mind, by something in writing. Is that all right?

Mr. KINDNESS. Thank you, sir.

[The information referred to follows:]

FIRST AMENDMENT IMPLICATIONS OF CRIMINAL JUSTICE AND PRIVACY LEGISLATION

The Department of Justice was asked by Mr. Kindness to elaborate on the First Amendment Implications, particularly press implications, of H.R. 8227 and H.R. 61.

Both bills recognize that there is a tension between the public's right to know and the individual's right of privacy and both have attempted to accommodate this. For example, neither bill applies to police blotters, court records and court

proceedings which are, and ought to remain, publicly available. The thrust of both bills is to protect the compiled history of criminal records and intelligence and investigative material. Neither bill would prevent the press from obtaining criminal justice information and publishing it. However, government would not be permitted to assist the press by compiling a number of facts into consolidated form and furnishing them to the press.

In virtually identical words, section 204(i) of H.R. 61 and section 203(h) of H.R. 8227, make clear that agencies may continue to issue press releases or answer questions concerning on-going investigations—announcing an arrest, providing copies of an indictment, confirming that an individual was indeed released from prison last week, etc. There is no intention to restrict the flow of information of this sort. Further, both provisions also permit criminal justice officials to confirm information which is a matter of public record when a specific inquiry is made. To use an illustration, if the Department were asked, "Isn't it true that you indicted John Doe in March 1957 for mail fraud?", it would be free to respond that this is accurate or inaccurate. On the other hand, the Department could not answer a general inquiry such as, "Do you have any record on Mary Roe?"

At the outset, both bills make clear that they apply to agencies at the Federal, State and local level. Neither bill purports to regulate private organizations or individuals. Thus, the bills do not apply to newspapers or credit bureaus simply because they have criminal justice information in their files. Aside from a requirement that private parties who officially receive arrest information pursuant to Federal or State statute dispose of it as soon as it has accomplished its purpose, the bills do not affect the private sector at all.

Similarly, the civil remedy and criminal penalty provisions of the bills apply only to those on whom the bills impose obligations. They do not authorize either suit against, or prosecution of, members of the news media for acquiring, retaining, or publishing criminal justice information. In our view, both bills adequately protect First Amendment rights in this respect.

POSSIBILITY OF UNFORESEEN PROBLEMS SUCH AS THOSE RESULTING FROM EDUCATIONAL RECORDS LEGISLATION

The Department of Justice was asked by Mr. Kindness to comment on the possibility that H.R. 8227 or H.R. 61 might raise unforeseen problems such as those arising under the so-called "Buckley Amendment."

The Department has always been concerned that legislation in such a complex area might not adequately anticipate problems or might unwittingly create new problems. This is the reason for the fundamental difference between H.R. 61 and H.R. 8227. In H.R. 61 we have dealt with specific problems already identified and have set general goals, but have not attempted to regulate with specificity. This restrained approach is designed to avoid unforeseen problems. Our major objection to H.R. 8227 is its preclusive approach—listing categorically the only permissible uses of records. This approach risks the creation of unanticipated difficulties.

As indicated in my testimony, the Department has been working on various forms of this legislation since 1971 and has discussed it with other federal agencies, with State and local government officials, and with private groups such as Project Search. In developing our regulations on criminal justice records, we held six days of hearings and received oral or written comments from over 100 federal, state and local officials and private individuals. These comments were extremely helpful in formulating the legislation as well as the regulations, and in identifying problems that had not been readily apparent.

The actual drafting of H.R. 61, began after we had had the benefit of hearings on the regulations, and was done in close consultation with the Departments of Defense and Treasury, the Civil Service Commission, the Domestic Council Committee on Privacy, and the Office of Management and Budget. In addition, the provisions under consideration were discussed with State and local criminal justice officials wherever the opportunity presented itself. This consultation was also designed to avoid problems which might arise at the drafting stage.

Extensive study has gone into this legislation in an effort to minimize unforeseen problems. With all this study, however, we are not confident that it is possible to identify all existing problems or to avoid creating new ones. Accordingly, we urge that legislation be approached cautiously and that an attempt to enumerate all valid uses of criminal justice information, as in H.R. 8227, be avoided.

Mr. EDWARDS. I believe that we will terminate this particular hearing.

The subcommittee will have its last public hearing on this subject on Thursday, in room 2247, at which time we will hear from Project Search.

Judge Tyler and Miss Lawton, it has been a pleasure to have you here today. We especially welcome you for having appeared for the first time before this subcommittee. We are looking forward to hearing from you again. In particular, we are looking forward to having your comments within a very short period of time—a week or so—because we have a time schedule that we are going to be very strict with. We are going to have this bill out and on the floor of the House in early September. We think that we have considered it long enough. So, we are going to be drafting the final version of the bill very soon.

Thank you for appearing here today.

Judge TYLER. Let us hope, Mr. Chairman, we are more timely with our followup writings than we were with our writings this morning.

[The prepared statement of Judge Tyler follows:]

STATEMENT OF HAROLD R. TYLER, JR., DEPUTY ATTORNEY GENERAL, DEPARTMENT OF JUSTICE

Mr. Chairman and Members of the Subcommittee: I appreciate the opportunity to appear before this Subcommittee to discuss H.R. 8227, the "Criminal Justice Information Control and Protection of Privacy Act."

Legislation relating to the protection of privacy with respect to criminal justice information is a matter of high priority with the Department of Justice and with other Departments and agencies concerned with law enforcement.

The Department of Justice began drafting legislation on the subject of the exchange of criminal justice records in 1971. A new and broader proposal submitted in February 1974, placed greater emphasis on individual privacy than had earlier bills. We were unable to obtain Administration clearance since other agencies were dissatisfied with this proposal. However, in November 1974 we submitted a total revision of our criminal justice privacy bill to the Congress. This time as an Administration bill. This final proposal, Mr. Chairman, you introduced on January 14 as H.R. 61. I review this history to emphasize the complexity of the issues involved in balancing the interests of the administration of criminal justice and rights of personal privacy and our own struggle with these issues. We are satisfied that the proper balance is struck in H.R. 61 and we strongly support its enactment. We are unable to support H.R. 8227, in its present form, both because of technical drafting problems and because of fundamental disagreement with some of the concepts it embodies.

I.

All legislation designed to protect individual rights of privacy involves a tension between the public's right to know and the individual's right to preserve a certain zone of privacy into which the public cannot intrude. Nowhere is this more evident than in legislation dealing with criminal justice information. If records of arrests, court proceedings, and correctional decisions are not publicly available, then the public is not only generally uninformed about its criminal justice process, but individuals risk all of the dangers inherent in secret arrests, Star Chamber proceedings, and banishment to secret prisons. Yet if a past error, already paid for, can follow an individual for the rest of his life, threatening his employment opportunities and his acceptance in the community, our hopes of rehabilitating offenders through improved correctional services are impeded. Both H.R. 61 and H.R. 8227 attempt to accommodate these concerns by preserving public access to police blotters, court records, sentencing and parole decisions, but denying public access to the centralized and compiled history of such matters, identified by individual name.

Traditionally, law enforcement in the United States has been a matter of State and local concern, with Federal law enforcement jurisdiction carefully circum-

scribed. At the same time, Federal, State and local law enforcement agencies continue to cooperate with each other on matters of common concern and routinely exchange information of mutual interest. The advent of the computer has increased the capability for this exchange of information and reinforced the interdependence of law enforcement agencies throughout the country. Recognizing this, both bills extend not only to federal agencies but also to State and local agencies which operate with federal funds, exchange information interstate, or exchange information with federal agencies.

H.R. 61 also recognizes the primacy of State and local government in the criminal justice area by avoiding the imposition of strict federal controls on the operations of criminal justice agencies. H.R. 8227, on the other hand, establishes a federal commission to oversee administration and enforcement of the provisions of the bill with power to issue binding federal regulations, interpretations and procedures. While the bill encourages creation of State agencies to perform these functions within a State, those agencies would be bound by the federally established guidelines. In our view, this approach intrudes too deeply into the primary responsibility of the States for the administration of criminal justice.

Of all the areas of competing values which must be addressed in such legislation, perhaps the most difficult is striking the proper balance between the protection of society and the preservation of individual privacy. In most respects, neither bill attempts to do this. Rather, each requires that the politically responsible officials at the Federal and State levels decide on a case-by-case basis whether it is more important that a potential employer know of a past criminal record or that the prospective employee's privacy be protected. H.R. 8227, however, circumscribes the extent of this decision-making by foreclosing access to certain records and providing for the sealing or destruction of other records. Moreover, it permits decisions on access to be made only by the legislature at both the federal and State levels. H.R. 61, on the other hand, permits a decision to make records available to be made by the chief executive as well as the legislature at both Federal and State levels. This decision could extend to all criminal justice records, not just certain types, so long as the decision is made on the public record and specifies the types of records to be made available.

II.

With this introduction, let me outline some of the fundamental concepts involved in these bills and explain our objections to H.R. 8227.

The basic difference in approach between H.R. 61 and H.R. 8227 is that the latter attempts a comprehensive regulation of criminal justice information—prohibiting uses not specifically authorized. H.R. 61 does not purport to be comprehensive. It establishes certain goals, provides some minimum standards, and focuses on identifiable problems, leaving room for further refinements as experience is gained and the expertise developed. For example, H.R. 8227 specifically enumerates the only purposes for which arrest records may be exchanged among criminal justice agencies, thus precluding all other exchanges. H.R. 61 does not attempt to anticipate or enumerate all of the valid uses of arrest records; rather, it focuses on such problems as the misuse of arrest records in determining probable cause and unrestricted access to computerized records by street patrols. Having focused on these specific problems, it leaves the determination of other valid uses to the individual criminal justice agency.

Quite frankly, despite the number of years we have worked on issues of criminal justice information and privacy, we do not feel that we are in a position to enumerate all uses of criminal justice information. We believe it would be premature to apply the preclusive approach of H.R. 8227 to the thousands of State and local criminal justice agencies that would be covered by this legislation. In our view, it is far wiser to address the specific problems identified to date and establish a mechanism, such as the Commission proposed in H.R. 61, to recommend refinements in the future.

Both bills recognize the interdependent and interconnected role of Federal, State and local criminal justice agencies, but the approach differs. H.R. 61 would apply a uniform federal standard to interstate exchanges of information and exchanges between federal and State agencies. At the same time, it recognizes the primacy of State law within the State boundaries so long as the State law meets the minimum federal standards. H.R. 8227 provides that State law will govern all maintenance, dissemination and use of information within the State insofar as it imposes stricter standards than the Federal law. It suggests that such State laws will regulate not only State and local agencies within the State but also

federal agencies located within the State boundaries. It could also be read to impose restrictions on information found within the State even though it originated in an agency of a different State or in a federal agency outside the State. It might even be interpreted to apply to information being exchanged by two States but passing through the State with the stricter State law. There is some question whether States, even with the permission of Congress, can impose standards on the use and dissemination by federal courts of information acquired, maintained or used by those courts simply because of their physical location within the State. Issues of federal supremacy and separation of powers are clearly raised by such a provision. Aside from the constitutional issues, the practical effect of such a provision is chaotic.

Both bills extend to all major aspects of criminal justice information—criminal histories, investigatory and intelligence information, and correctional information—and both address to some degree the collection, retention, use and dissemination of this information. The bills differ substantially, however, in the degree of specificity with which they regulate this information and in the number of subcategories into which they divide it. The differences in definitions make it particularly difficult to compare the two bills. H.R. 61 speaks of “arrest record information,” which has no disposition attached, and “criminal record information,” which means that a disposition is attached. It defines “disposition” with some specificity. It uses the term “criminal justice information” to encompass all types—arrest and criminal record information, correctional information, and investigatory and intelligence information. H.R. 8227 refers to “arrest record information,” “nonconviction information,” “conviction record information” and “criminal history record information,” with the latter term unclear as to which of the former it encompasses. It uses “criminal justice information” to mean the terms mentioned above plus “correctional and release information” but has no general term to encompass all types of information. Moreover, H.R. 61 defines “disposition” to include a variety of procedures for terminating a case, including pretrial diversion, while H.R. 8227 uses the same term to mean only a dropping of charges or a conviction.

More fundamental than the definitional distinctions is the difference in treatment of intelligence information in the two bills. H.R. 61 is cast in general terms, restricting intelligence collection to official purposes, limiting access on a need-to-know basis, and requiring an accounting of exchanges with other agencies. H.R. 8227 attempts to define standards for maintenance and dissemination of intelligence. Maintenance—a term not defined—would be authorized only if “grounds exist connecting such individual with known or suspected criminal activity and if the information is pertinent to such criminal activity.” Information could be disseminated to another agency only to confirm information in the other agency’s possession or for investigative purposes if the other agency can “point to specific and articulable facts which taken together with rational inferences from those facts warrant the conclusion that the individual has committed or is about to commit a criminal act.” We have real difficulties with these “standards” because of their vagueness and the difficulty of applying them in the intelligence context. The articulable fact standard is borrowed from *Terry v. Ohio*, 392 U.S. 1 (1968), the stop and frisk decision. While the standard provides guidance for the policeman on the street in deciding whether to pat down a suspect, we seriously question whether the same standard has validity when determining what information can be volunteered to the Secret Service concerning a potential assassin.

As H.R. 8227 is written, dissemination to another agency is authorized only to confirm information that agency already has or when the articulable fact standard is met. But the nature of intelligence is such that bits and pieces of information of a seemingly unconnected nature must be pieced together until the whole picture is formed. If dissemination cannot be made in an organized crime case until there is confirmation that the requesting agency already has the information or has facts relating to a criminal case which relate to specific criminal activity, then our present efforts against organized crime must be shut down completely.

The standard for “maintaining” information creates equally great problems. When received by a law enforcement agency, a first item of information may not yet have any established connection with criminal activity, though verification of the information might reveal such a connection. Further inquiry is required to determine whether the item is true and whether it warrants further investigation. If that information cannot be “maintained long enough to verify it,

then no investigation may ever be begun. If it may be maintained for a brief period but never recorded in files, then there will never be a record of the investigations conducted and review and oversight will be effectively avoided.

In our view, the proposed "standards" in H.R. 8227 for both maintenance and dissemination of intelligence are unreasonable and unworkable.

We do not suggest that standards for intelligence collection and dissemination should not be established. As you know, the Department of Justice is now attempting to formulate guidelines for the FBI with respect to intelligence collection, retention, use and dissemination. But the further the Department's committee probes the issues, the more complex they appear. It will be some time before we can formulate adequate guidelines for the FBI, with its limited jurisdiction. It is even more difficult to set standards for the diverse federal, State and local agencies that would be regulated by these bills. To attempt to formulate such standards in these bills is, in our view, premature. The wiser course is to require agencies to formulate their own guidelines in the first instance, subject to study and recommendation by the proposed commission, as it develops expertise in this most difficult area. This is the approach taken in H.R. 61.

The approach to investigative information in H.R. 8227 poses equally difficult problems. The bill would require that such information could not be maintained beyond the expiration of the statute of limitations for the particular offense or the sealing or purging of criminal history information relating to that offense. Thus, if a marginal securities fraud case is not referred for prosecution, both the criminal history record and any investigative files would be required to be sealed or destroyed and any subsequent investigation of a similar case would have to begin from scratch. Moreover, an investigatory file would have to be sealed or destroyed upon the running of the statute of limitations regardless of its relevance to later cases. We cannot believe that this is the intent of the bill and yet this is what it requires. I might also note that the bill pays no attention to the possible retention of investigative files for historic or archival purposes. Had it been in effect some years ago, the background on some of the most important criminal cases in our history would be forever lost. H.R. 61, in contrast, focuses on the question of access to investigatory files; it does not mandate their destruction.

Both bills emphasize certain concepts with respect to criminal record information designed to achieve the twin goals of protection of privacy and protection of society through effective law enforcement. These include the requirement of accuracy with respect to the information. Both bills stress the reporting of dispositions of criminal charges and the right of access of an individual to criminal history information in order to correct inaccuracies in it. In addition, the bills, in somewhat different fashion, provide an incentive to report dispositions by restricting access to and dissemination of stale arrest records. As noted earlier, however, the bills define "disposition" in very different terms. H.R. 61 includes as a "disposition" any action which permanently or indefinitely disposes of the charges. This would include incompetence to stand trial, acquittal by reason of insanity, pretrial diversion programs, dismissal in favor of a civil action, etc. H.R. 8227 defines "disposition" to include a decision to bring criminal charges or a conclusion or abandonment of the proceedings.

There is one significant problem with respect to the provision for access to and correction of records in H.R. 8227. Section 209 requires a criminal justice agency maintaining a record not only to grant access but also to undertake the correction of the records it possesses. It does not differentiate, as does H.R. 61, between records originating in the agency having possession and records originating elsewhere. This presents serious problems for the FBI which has a large number of State records in its possession—records which it has neither the authority nor the information to correct. We suggest that the better approach is that taken in H.R. 61 which places the obligation to correct on the originating agency, rather than on any agency having possession of the record.

A concept common to both bills is that of accountability. Agencies disseminating information are required to keep records of who obtained the information and why. In addition, H.R. 61 requires special accounting for remote terminal access to information by street patrols in order to insure that information retrieved from computers is properly utilized. There is no comparable provision in H.R. 8227.

Accountability is also provided by requiring that politically responsible officials make public decisions as to the propriety of noncriminal justice agencies, particularly employers and licensing boards, receiving criminal justice information.

about applicants. Dissemination of this information could not continue on the basis of custom or agency regulation. For example, if trucking companies or warehousemen viewed access to criminal history information as vital to cargo security, they would have to convince a legislature, or in the case of H.R. 61 a Governor, that cargo security is a sufficiently important interest to warrant access to such information. Moreover, the legislature or Governor would be required to decide whether only certain records, such as those bearing dispositions, should be available or whether access to arrest records is also warranted. These decisions would, of course, be subject to public scrutiny.

The bills specifically provide for access by federal agencies to criminal justice information for the purpose of providing information for employment or security clearance although the details of the bills vary considerably. For example, H.R. 8227 would not permit federal agencies, even federal law enforcement agencies, to receive investigative or intelligence information for employment purposes unless there was a full field investigation for purposes of access to "Top Secret" information. H.R. 61 would permit such information to be made available for law enforcement and other federal employment subject to certain conditions on use. H.R. 61 specifies that no criminal justice information may be used as a disqualifying factor for employment unless it is reasonably related to the particular employment and requires that an employment decision based on criminal justice information be made at a higher supervisory level, not in a routine fashion. H.R. 8227 does not address the use of information by the employing agency.

Both H.R. 61 and H.R. 8227 specifically address certain other access by federal agencies, such as the Immigration Service and various components of Treasury. H.R. 61 provides that criminal record information, that is information which indicates a disposition of charges and does not merely reflect an arrest, may be made available to registered drug manufacturers and federally-chartered or insured banking institutions. H.R. 8227 would permit dissemination of "criminal record information"—apparently including arrest records without any disposition—to drug manufacturers, but contains no provision with respect to the financial institutions. I might note, Mr. Chairman, that present law authorizes such institutions to receive both arrest and disposition information. While H.R. 8227 would repeal the present law on this subject, it does not contain a new provision relating to the financial institutions.

Having set minimum standards for criminal justice information and addressed certain specific problems, H.R. 61 leaves the task of fashioning rules and procedures to reach the legislatively-defined goals to each criminal justice agency. As noted earlier, H.R. 8227 establishes a regulatory agency which would set the guidelines under which federal, State and local agencies must operate. In our view, the approach taken by H.R. 61 is preferable as a matter of principle and necessary as a practical matter. Our system of government rejects the idea of federal intrusion into the management and operation of State and local agencies. It is appropriate for the federal government to set standards for information which flows interstate but the precise regulations to implement those standards should be set at the State and local level. Moreover, it would be inappropriate for an Executive Branch regulatory agency to intrude into the management of information systems maintained by the courts at either the federal or State level. Once the goals of Congress are articulated, the courts must be allowed to make independent decisions as to how those goals are achieved. Aside from these fundamental principles of federalism and separation of powers, the very diversity and complexity of the many federal, State and local criminal justice information systems covered by the bill necessitates that each be allowed to fashion regulations tailored to its particular systems. Considering that the bills apply to records of law enforcement, prosecution, corrections and courts, and that they encompass manual, semi-automated, and fully-automated systems, it becomes apparent that a single set of rules imposed by the federal government cannot possibly apply with any specificity. It is for these reasons that H.R. 61 adopts the federal goal—local implementation approach.

It is true that H.R. 8227 contemplates that State agencies having similar powers to the proposed federal commission would take over supervision of State and local agencies as to implementation of the bill, but these State agencies would be bound by Commission regulations and interpretations from which they could not deviate. Moreover, once the proposed Commission expires at the end of 5 years, these State agencies would be bound by rigid and unchangeable reg-

ulations, previously issued, regardless of changes in circumstances. The Department cannot support this concept.

I have just outlined some of the fundamental differences between H.R. 8227 and H.R. 61. The former leans toward a comprehensive code approach. H.R. 61, on the other hand, does not attempt to reach all areas of information practice to which federal power might extend, or to resolve all issues. Rather, it is a beginning and one which presupposes future change and refinement as new problems are identified, new technologies developed, and knowledge of the diverse information systems and their uses increases. The Department of Justice is convinced that this is the wiser course at this time.

III.

The two bills have a similar approach to enforcement, except for differences in the proposed commission. They visualize civil remedies and criminal penalties. The details differ considerably, however, and in matters of some importance.

The bills provide injunctive and tort relief for violations of the Act but make good faith a defense to tort relief. The chief difference with respect to civil remedies is that H.R. 8227 authorizes the commission itself to seek declaratory judgments and cease and desist orders. This provision, not found in H.R. 61, would permit the commission to stop a criminal investigation or an intelligence investigation at any time to litigate the issue of whether a particular recipient of information had a "need to know" that information or whether the information was maintained on the basis of "specific and articulable facts." Such an interruption would almost certainly abort the investigation itself, even if the challenge were found to be groundless. In the view of the Department, the criminal justice systems in this country cannot tolerate such potential interruptions of investigations at this early stage. Infringements of constitutional rights during investigations can be, and are, challenged at the prosecutive stage and this has proved adequate to protect individual rights. The Department is strongly opposed to this provision of H.R. 8227.

The criminal provision of H.R. 8227 applies to any willful or knowing violation of the Act by a government employee. As written, the criminal provision of H.R. 61 applies only to unauthorized disclosure of intelligence or investigative information, in knowing violation of a duty imposed by law. We have concluded that the broader penalty approach is preferable. There is not a valid reason for differentiating between unauthorized disclosure of criminal record information and correctional and release information, on the one hand, and intelligence and investigative information on the other. We do not consider the culpability standard of H.R. 8227 adequately defined, however, and we have developed alternate language for a new criminal provision in H.R. 61 which is attached as Appendix A of this testimony.

There is another difference in the enforcement provisions which we consider critical. H.R. 61 provides that nothing in the Act or regulations or procedures adopted to implement it can provide a basis for excluding otherwise admissible evidence in court. The parallel provision in H.R. 8227 is limited to violations of internal operating procedures adopted by agencies, thus suggesting that any violation of the Act itself or of commission regulations would provide a basis for the exclusion of valid evidence in criminal proceedings. In a bill as far reaching and sweeping as this, such an extension of the exclusionary rule is intolerable.

IV.

The Department of Justice strongly supports H.R. 61 and urges Congress to give it prompt attention. For the reasons suggested in my testimony, as well as a number of technical drafting problems which we have not enumerated, we cannot support H.R. 8227.

When criminal justice privacy legislation is enacted, we urge that it be the sole basis, for regulation of such information and that criminal justice information be excluded entirely from the coverage of the Privacy Act of 1974. This is obviously your intention, Mr. Chairman, since section 314 of H.R. 8227 seeks to accomplish this. We should point out, however, that, as written, section 314 has the effect of repealing the Privacy Act entirely—a result not intended. We have alternate language to suggest, in Appendix B, which would accomplish the intended effect.

Finally, Mr. Chairman, the Law Enforcement Assistance Administration has prepared a Compendium of State laws on criminal justice and privacy. The Committee may find it useful in connection with your efforts on this legislation and I will be happy to provide you with a copy today.

Again, I appreciate the opportunity to discuss this important legislation with you and to express the Department's deep concerns about H.R. 8227. I will be happy to respond to any questions you may have.

APPENDIX A

Proposed new criminal provision in H.R. 61.

Delete subsection (f) of § 209, add a new section 309, and renumber existing sections 309 through 312 as 310 through 313.

"Sec. 309. A person is guilty of a misdemeanor if he knowingly discloses criminal justice information to which he has or had access in an official capacity, to a person not authorized by law to receive such information, in violation of a specific duty imposed upon him as an officer or employee or former officer or employee of government, by statute, or rule, regulation or order issued pursuant thereto. The offense shall be punishable by imprisonment not to exceed one year, a fine of not to exceed \$10,000, or both."

APPENDIX B

Proposed new section 314 removing criminal justice information from the scope of the Privacy Act of 1974.

"Sec. 314. (a) The provisions of section 552a of Title 5, United States Code are amended:

"(1) By deleting the word 'criminal' in paragraph (4) of subsection (a);

"(2) By amending subsection (j) by striking the dash in the first sentence thereof, deleting the designation (1) and deleting the ';' or' and inserting in lieu thereof a period, and by deleting all of the paragraph numbered (2); and

"(3) By striking from paragraph (2) of subsection (k) the words 'subsection (j) (2) of this section' and inserting in lieu thereof, 'the Criminal Justice Information Control and Protection of Privacy Act of 1975'.

"(b) Section 5 of the Privacy Act of 1974, Public Law 93-579, is amended by striking the period at the end of clause (C) or paragraph (2) of subsection (c) and adding at the end thereof, 'or subject to the jurisdiction of the Commission on Criminal Justice Information.'"

Mr. KINDNESS. Mr. Chairman, I would just ask to reserve the right, not knowing at this time whether it would be used, to have a day of minority witnesses scheduled, if that is appropriate.

Mr. EDWARDS. Yes, you always have that right, Mr. Kindness.

Mr. KINDNESS. Thank you Mr. Chairman.

[Whereupon, at 12:10 p.m., the subcommittee recessed, to reconvene on Thursday, July 17, 1975.]

CRIMINAL JUSTICE INFORMATION CONTROL AND PROTECTION OF PRIVACY ACT

THURSDAY, JULY 17, 1975

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

The subcommittee met, pursuant to notice, at 10:05 a.m., in room 2247, Rayburn House Office Building, the Honorable Don Edwards [chairman of the subcommittee] presiding.

Present: Representatives Edwards, Seiberling, Drinan, Badillo, Butler, and Kindness.

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

Mr. EDWARDS. The subcommittee will come to order.

Today, we continue this series of hearings on H.R. 8227, legislation that would regulate and control criminal justice information systems. This past Monday, we initiated our deliberations on H.R. 8227, a new draft of this legislation which sought a balance between H.R. 61 and H.R. 62, with Deputy Attorney General Tyler commenting for the Department of Justice. Although we still find ourselves in some disagreement, basically on methodology, I am heartened by the numerous areas of basic agreement.

This morning our approach will be to elicit comments from an organization which is representative of the attitudes of State and local law enforcement agencies, Search Group, Inc. This organization began as a model project of the Law Enforcement Assistance Administration. This project was instrumental in the development of security and privacy guidelines for law enforcement agencies and the dissemination of criminal justice information. Project Search has had great influence on subsequent thinking on this subject.

Although now a private corporation, each State and territory is represented by a gubernatorial appointee. It is a nonprofit, justice technological research organization, whose sole financial support is still LEAA.

Because of the broad-based membership of Search Group, Inc., and its pioneering work in the area of security and privacy of criminal justice information systems, we are pleased to welcome to testify this morning Gary D. McAlvey, chairman, and our friend, O. J. Hawkins, executive director of this organization. I believe Mr. McAlvey will deliver the testimony and then both gentlemen will answer questions.

You may proceed.

**TESTIMONY OF GARY D. McALVEY, CHAIRMAN, AND O. J. HAWKINS,
EXECUTIVE DIRECTOR, SEARCH GROUP, INC.**

Mr. McALVEY. Thank you, Mr. Chairman.

Mr. Chairman and members of the subcommittee, I appreciate the honor of appearing before you to testify on H.R. 8227, a bill dealing with the important matters of accuracy and security of criminal justice records and the protection of privacy rights of the subjects of such records. I am appearing as the chairman of Search Group, Inc., and I am testifying on behalf of that organization. Appearing with me is Mr. O. J. Hawkins, the organization's executive director.

Background on Search: I believe you are familiar with Search Group, Inc. We are the successor organization to Project Search, which was established in 1969 by an LEAA grant to provide coordination and evaluation in the utilization of automated data processing technology in criminal justice systems. We are now a nationwide representative body, with a member appointed to our policymaking group by the chief executive of each of the States, the District of Columbia, and the territories. These members represent every facet of the criminal justice system, from police through courts and corrections. All of them are knowledgeable about criminal justice information systems and almost all of them are personally involved with the operation or development of systems in their States.

In addition to the appointed members, the organization has a great number of State and local officials serving on project committees which coordinate justice information systems, and others serving on standing committees, such as the Committee on Security and Privacy, which advise the Search membership on important issues concerning criminal justice information systems. The organization has the benefit of a highly qualified technical staff, both on our permanent staff and under contract to the various project committees.

Search has been deeply involved with the security and privacy issues dealt with in H.R. 8227 since 1969. In fact, many of the problems and suggested solutions were first delineated by Search in a July 1970 publication entitled "Security and Privacy Considerations in Criminal History Information Systems," which has been widely used in the development of the pending Federal bills and numerous State laws. Mr. Hawkins testified in March of last year before this subcommittee and before the Senate Constitutional Rights Subcommittee on several bills dealing with security and privacy. Since then we have submitted comments to the subcommittee staffs on both H.R. 61, the Department of the Justice bill, and H.R. 62, the bill developed by Senator Ervin. Although we have not before had the opportunity to review and formally report on H.R. 8227, the bill was reviewed in draft form by our Committee on Security and Privacy and some personal comments and suggestions by committee members were reported to the subcommittee staff.

We are pleased to note that many of the suggestions in our reports on H.R. 61 and H.R. 62 have been incorporated into your bill, Mr. Chairman. We believe that H.R. 8227 is an excellent bill on balance and that it accomplishes what you and Senator Tunney set out to do—to utilize the best features of both H.R. 61 and H.R. 62 and produce a

bill that provides adequate protections of individual rights without unduly restricting the effectiveness of criminal justice agencies.

The views that I present in commenting on the legislation are based upon policy positions adopted by the full national membership of Search and, I might add, were agreed upon after lengthy and painstaking deliberations by the group.

There is no question that legislation on this subject is vitally needed to provide national standards for the guidance of the States in the implementation of new information systems and in the enactment of State legislation. In the absence of national statutory standards, Search has attempted to promote some uniformity in State laws by developing and making available a "Model State Act for Criminal Offender Record Information" and "Model Administrative Regulations for Criminal Offender Record Information." These documents have been utilized by some States, notably Massachusetts and Alaska, as models for comprehensive State laws and regulations on security and privacy of criminal justice information systems, and numerous other States have enacted laws covering at least some of the areas of concern. However, there is a great lack of uniformity among these State laws, and some States have not acted at all. We believe the national legislation will encourage every State to enact security and privacy laws and will promote uniformity among them.

There is another reason why the legislation is needed promptly. The States are now in the process of developing plans to comply with the Department of Justice regulations issued pursuant to section 524(b) of the Safe Streets Act. Those plans are due on December 17. It would be extremely helpful if the comprehensive national legislation could be enacted before the planning process is completed in order that the States may know as soon as possible what additional procedures will be required of them so that they may make provisions for compliance in their plans. In addition, the Privacy Act of 1974 has raised troublesome questions concerning its application to criminal justice systems. Hopefully, the pending bill will become law before the effective date of that act and will resolve the issues concerning it.

Although we believe the legislation should be limited to minimum national standards with maximum latitude left to the States to establish their own procedures for compliance, we believe the standards should be comprehensive and should address all of the subjects that have been identified as problem areas. For example, we believe some standards for the maintenance and use of intelligence files should be included in the legislation. Some minimum standards on sealing and purging should be set out, as well as some limits on the use of arrest records without dispositions. We also believe some provisions should be included expressly delineating the role that the FBI or other Federal agencies may play in the national computerized criminal history system. Issues such as these are critical to the system planning and development processes that are now going on in the States, and some legislative resolution of them is needed. I might add that all of these issues were identified as problems by Search in the 1970 document I mentioned a moment ago; so they are certainly not new issues.

For these reasons, Search has favored the more comprehensive approach of H.R. 62 over the much more limited approach of H.R. 61. We are pleased to see that H.R. 8227 takes the comprehensive ap-

proach while still reserving to the States considerably more flexibility than was provided in H.R. 62.

With these general remarks, I would like now to turn to specific provisions of the bill.

With regard to arrest records, we agree with the concerns that you have so well stated, Mr. Chairman, concerning the dissemination and use by criminal justice agencies of arrest records with no indication of a disposition or where the disposition indicates that the individual was not charged, that he was acquitted or that the case was otherwise terminated in his favor. Such records are particularly subject to abuse, and limits on their use and dissemination certainly should be included in the legislation. These limits should not unnecessarily restrict the legitimate use of such records, however, since arrest records, even without dispositions, are useful in criminal investigations and for other criminal justice purposes.

We believe that relatively free use of arrest records by criminal justice agencies should be permitted, so long as the agencies have rules and procedures to restrict such uses to legitimate purposes and to guard against the most prevalent potential abuses arising from the use of such records. We believe the bill accomplishes these purposes.

Section 201(b), beginning on page 8, line 18, sets out a number of specific purposes for which arrest records and nonconviction records may be used and then permits their use for "Similar essential purposes to which the information is relevant as defined in the procedures prescribed pursuant to this section"—line 24 on page 9 through line 2 on page 10. We understand this to authorize criminal justice agencies to formulate rules permitting the use of arrest records and nonconviction records for any reasonably necessary criminal justice purpose to which such use is relevant, so long as the rules are specific as to permitted uses and some mechanism, such as an audit procedure, is in effect to insure that the rules are being complied with. This seems to us to provide adequately for the needs of criminal justice agencies. And, considering the other protections against abuse set out in the bills, such as the sealing and purging requirements and the disposition-reporting requirements, we believe there are adequate protections against abuses of these records.

We do have a suggested amendment to section 201(b) to clarify a possible ambiguity that arises from reading this section together with section 206(b).

Paragraph (e) of section 201(b)(1), which appears on page 9 of the bill, limits the use of arrest records for investigative purposes to those instances where enough information exists on a particular suspect to satisfy the Supreme Court's *Terry* standard. However, section 206(b), which appears on page 17 of the bill, suggests that a broader use of arrest records is permitted for investigative purposes. That section deals with access to records on some other basis than name and personal identifiers, such as access on the basis of geographic location, physical description or modus operandi characteristics. These methods of access are commonly used in investigations when not enough evidence has been accumulated to identify a particular suspect. Section 206(b) permits such access to arrest records under criminal justice agency procedures designed to insure that such information is used only for "developing investigative leads for a particular criminal of-

fense" and that access to the information is limited on a need-to-know, right-to-know basis—page 17, lines 8 through 18. Since there is no requirement that a particular suspect must have been identified, the uses permitted by this section seem to be in conflict with the limits set out in section 201(b)(1)(E).

We suggest that the latter section be amended to permit the use of arrest records for investigative purposes, even where no suspect has been identified, under the limitations and requirements set out in section 206(b). These limitations and requirements, together with other provisions of the bill relating to sealing and purging, constitute adequate protections of individual rights, in our view, to insure that this authority will not be misused by criminal justice agencies.

As I have indicated, we believe the legislation should include at least some minimum standards on the maintenance, use and dissemination of intelligence and investigative information. Such information, particularly intelligence information, is often unverified and can be highly prejudicial if disseminated to an unauthorized source or used for an improper purpose.

We believe the legislation should include, as a minimum, some standard for the maintenance of intelligence files on individuals, some requirement for periodic review of such files to insure that unverified information is not maintained beyond a reasonable period of usefulness and some limitations on the use and dissemination of intelligence information, both within the agency that collects the information and by other agencies or individuals. In addition, we believe there should be some limitation on access to such information by means of computer terminals.

Search has endorsed the provisions of H.R. 62 relating to intelligence and investigative information. We believe those provisions constitute a reasonable approach, on balance. We urge the subcommittee to give careful consideration to retaining them in the bill. If other witnesses suggest that there are problems with the language of the provisions, we urge you to require those witnesses to suggest alternative language.

We believe every reasonable effort should be made to insure that the legislation does not unduly hamper legitimate criminal intelligence activities, for we recognize the great value of such information to effective law enforcement. However, we are firmly convinced that minimum standards of the kind we have suggested can be developed for inclusion in this legislation and we urge against any decision to omit this important subject from the bill.

We strongly support the provisions of section 208 of the bill relating to the sealing and purging of arrest records and criminal history records. We believe that there are certain records—such as records of mistaken arrests, records of arrests that are not followed by prosecution or a disposition within a reasonable period, and criminal records of individuals who have not been involved with criminality for a considerable period of time—that should either be purged or sealed and thus removed from routinely available status. If sealed records are subsequently required for a justifiable purpose, such as the processing of recidivists, they can be unsealed under procedures set out in the bill.

We do see one problem with section 208. While it is feasible and reasonable to require fully automated systems to purge or seal records

automatically and promptly after the records become eligible for sealing or purging, it would be extremely difficult and costly for manual systems to accomplish this. For this reason, we believe the bill should contain a provision similar to section 208(b)(3) of H.R. 62 permitting manual systems to seal or purge records upon receipt of a request for use or dissemination of the records or upon court order or formal request of the individual subject of the record. Since the potential abuses of such records derive from their use and dissemination, we believe that procedures relating to sealing or purging to requests for use or dissemination would adequately protect personal privacy rights while considerably reducing the cost of compliance with this section by manual systems.

We support the provisions of section 204 limiting the uses of criminal records—both criminal history records and intelligence and investigative information—for purposes of appointments and employment investigations. We have several suggested amendments, however.

First, we recommend that subsection (a)—page 4 of the bill—be amended to permit sealed and unsealed criminal history records, as well as intelligence and investigative information, to be used in connection with the appointment and confirmation of State and Federal cabinet officials and other executive appointments instead of limiting such authority to the appointment of judges and criminal justice executive officials as set out in the section as it now appears. We believe the President should have such information available when he makes executive appointments and that the information should be available to the Congress when it passes on Presidential appointments. We also believe such information should be available to State governors and legislatures in connection with State executive appointments.

Mr. DRINAN. Mr. Chairman?

Mr. EDWARDS. Mr. Drinan.

Mr. DRINAN. May I ask a point of clarification now, because I do not quite understand the State cabinet officials. How low do you go? We would have to have language and it would not be applicable to 50 States. How can you limit this just to governors of legislatures? It seems to me that opens the door very wide. Maybe we can come back to that, but I am troubled by this, that you are suggesting that we diffuse this information on a very broad basis.

Mr. McALVEY. I would say that basically our opinion on this is that the governors, the executive branch in the States—

Mr. DRINAN. And the legislatures.

Mr. McALVEY. And the legislatures in confirming executive appointments have the same needs as the President and the Congress. We feel that the States' needs and rights in this area are equal to those at the Federal level.

Mr. DRINAN. All right. I have your thought on it. Just continue. I am sorry for the interruption.

Mr. McALVEY. Second, we recommend that the bill be amended to make it clear that sealed and unsealed records, as well as intelligence and investigative information, may be available to criminal justice agencies for use in connection with the employment and retention of criminal justice personnel. Section 204(q) makes all such information available in connection with the appointment of executive officials of criminal justice agencies, and section 201(b)(1)(A)—page 8 of the

bill—makes arrest records and nonconviction records available for criminal justice agency employment generally. We believe the bill should expressly provide for all forms of information covered by the bill be utilized for employment screening by criminal justice agencies.

Finally, we recommend that the bill afford to State and local governments the same authority to use criminal history records and intelligence and investigative information for employment with such governments as is afforded to the Federal Government by subsection (b) of section 204—page 15 of the bill. Although it is true that the States could authorize such uses by legislation pursuant to section 203, which covers noncriminal justice uses generally, such State legislation should be limited by several restrictions in section 203 that would not limit the Federal Government because the specific authority granted in section 204(b). We strongly believe that State and local governments and the Federal Government should be treated equally in this regard.

Sections 301 through 306 of the bill provide for the establishment of a Commission on Criminal Justice Information to administer the legislation. A majority of the members of the Commission would be State and local criminal justice agency officials and the Commission would be empowered to issue regulations binding on all agencies subject to the legislation. Search recommended the creation of such a governing board as early as 1970, in the Security and Privacy document I mentioned earlier in my testimony. We later endorsed the Board concept as set out in H.R. 62, and in our report on H.R. 61 we recommended amendments to give enforcement authority to the “advisory” commission set up in that bill and to give it a majority of State and local criminal justice agency members. We consider the creation of such a mechanism for insuring State and local primacy in the determination of policy in the matters covered by the bill to be the most important part of the legislation. After all, the overwhelming majority of the records covered by the legislation are State and local records, and the legislation impacts most heavily on State and local criminal justice agencies, which are by far the primary users of the information. The needs and concerns of State and local agencies must be reflected in policy decisions affecting implementation of the legislation, and in our experience there is no effective way to accomplish this other than to give State and local representatives a mandatory paramount role in rulemaking pursuant to the legislation. We therefore vigorously support these sections of the bill.

We recommend against limiting the life of the Commission to 5 years, as is done by section 303—page 28 of the bill. Although it may appear now that all of the critical issues thus far identified will be resolved in that period, it is not possible to foresee what additional important issues may arise to make the continued life of the Commission necessary. We therefore recommend that the Commission be given an indefinite term and that the issue of its continued existence be determined by the normal methods of congressional review such as oversight hearings and appropriations proceedings. We feel that the issue of the size of the Commission’s professional staff should be handled in the same way, and for that reason we recommend against the provision in section 306 limiting the staff to 50 professions—lines 9 and 10, page 32.

As I mentioned earlier, we believe that the legislation should resolve the several issues now under heated debate concerning the proper role

of the FBI or any other Federal agency in a national interstate computerized criminal history system. Since the records exchanged through such a system are for the greatest part State records, we believe the Federal role should be defined.

We recommend that there should be no storage at the Federal level of records related to State offenses unless the subject offender has a record of violations in two or more States. As to all other offenders, the Federal role should be limited to providing an index of records stored at the State level. This index should consist, therefore, of any personal identification information on offenders whose records are maintained by States and information necessary to refer an inquiring agency to the State agencies that maintain the full records.

We would permit exceptions to this multistate/single-State offender distinction only to allow Federal storage of single-State offender records for a reasonable period to facilitate participation in a national CCH system by States that otherwise would not be able to participate because of the lack of facilities or other compelling reasons.

This concept of storing records at the State level and limiting the national role to the provision of a central index was developed in 1969 by the State representatives who comprised the original Project Search. It is consistent with concepts of Federal-State relations—notably the principle that the primary responsibility for enforcement of the criminal laws should remain with the States. It is particularly consistent with current developments in the States in the area of criminal justice information systems. Practically every State now has or is developing a central State identification bureau. Search has assisted in these efforts by developing and making available a technical document entitled “Design of a Model State Identification Bureau,” dealing with the application of advanced technology to raise the efficiency and effectiveness of identification bureaus. We have also just recently published a document entitled “Search Group Masterplan for Identifications Systems Upgrade,” which presents a set of goals for a comprehensive program to upgrade the State identification function throughout the Nation. When these State identification bureaus are fully operational, they will have sufficient record facilities, aided by appropriate automated equipment, to provide criminal identification and criminal history record services to criminal justice agencies throughout the State. We believe this trend should be encouraged and supported by the legislation. Provisions of the kind we have suggested will provide this support.

Mr. EDWARDS. Mr. McAlvey, is not the FBI on the road to going about this now?

Mr. McALVEY. Yes, they are, and we feel that because of the controversy that now exists, that perhaps it would be appropriate if there were legislation which delineates the role of the Federal Government and the role of the States in this identification area.

Mr. EDWARDS. So far, in your description of how it should be, their new regulations are providing for the same aim, the same goals.

Mr. McALVEY. The 524 of Justice Regulations.

Mr. EDWARDS. OK. Go ahead.

Mr. McALVEY. We endorse section 311 of the bill which permits a State to enforce its own stronger security and privacy laws with respect to transactions within the State, but makes all interstate trans-

actions subject exclusively to the Federal legislation. This provision is necessary to make it clear that limitations imposed by law on the use or dissemination of information in the State where a record originates do not apply to the use or dissemination of that record in other States into which it may be disseminated. If this were not the case, the operation of interstate systems would be severely inhibited. Since interstate transactions will be subject to the comprehensive protections set out in the act, we believe that no State will be unwilling, as some States have been in the past, to participate in interstate systems because of the lack of adequate privacy and security protections in some other States.

The criminal penalty set out in section 309 is applicable to violations of the act involving any information covered by the act. We favor this provision over the criminal penalty provision of H.R. 61, which applies only to misuse of intelligence and investigative information. However, section 309 applies only to government agencies. We suggest that the section be amended to apply the criminal penalties to any agency, organization or individual who willfully and knowingly violates the act. This would cover, for example, private individuals or organizations who receive information for authorized noncriminal justice purposes and then use the information for unauthorized purposes or disseminate it to unauthorized persons.

Finally, we support section 315 of the bill which delays the effective date of most of the bill's substantive provisions until 1 year after enactment, and empowers the Commission created by title III to delay the effective date of particular provisions up to another year. We believe that a 2-year delay of the effective date of many provisions will be necessary to accommodate States whose legislatures do not meet during the first year after enactment of the legislation and thus are unable to pass necessary enabling State legislation. Section 315 provides that the Commission "may" grant such additional 1-year delays. We assume that the legislative history will make clear that the Commission normally "shall" grant delays in such cases, and, on this assumption, we endorse section 314 as now drafted. However, if there is any substantial doubt that the section will be implemented in this manner, we suggest that it be amended to provide for a 2-year delay in the effective date of all substantive provisions.

That concludes my comments on the bill. We have not commented on many sections of the bill, including the sections covering noncriminal justice uses of criminal justice information, security requirements for information systems and facilities, the updating and correction of criminal history records, and the right of individuals to review and challenge records maintained concerning them. We are in substantial agreement with these sections as they appear in the bill, and we urge that they be included in the legislation. Our positions on these issues are set out in some detail in the documents we have noted above, as well as in several other technical reports and memoranda we have published.

We thank you again for the opportunity of appearing today, Mr. Chairman. Mr. Hawkins and I will now be pleased to respond to any questions that members of the subcommittee may wish to ask.

Mr. EDWARDS. Thank you, Mr. McAlvey, for a very helpful statement.

Mr. Drinan?

Mr. DRINAN. I have several questions, and I guess they go to the essence of the question of precedence of State laws, and that no one can quarrel with. But, I am just troubled that the storage at the State level, with safeguards, I am just worried about the adequacy of those safeguards.

Mr. Chairman, if I may, I will defer to others on the panel and then the questioning will come back to me, and by that time perhaps I will have had a chance to have read the actual language of the bill in connection with the various useful recommendations I think you make.

Mr. EDWARDS. Mr. Butler?

Mr. BUTLER. Well, first I have to apologize for being late, but I want to assure you that I have had an opportunity to review your testimony in advance, and I appreciate your very careful analysis of the problem.

Let us start on page 5, arrest records. You indicate that arrest records with a disposition indicating acquittal or that the individual arrested was not charged are particularly subject to abuse. I would like to have the record show what abuses you had in mind in this area, and some concrete examples, if you have them.

Mr. McALVEY. I think our primary concern is in the area of employment, in those States where provisions are made for the utilization of criminal offender records for employment purposes. And the fact that those records, which contain no dispositions, arrest records only, often play an important part in decisions made by managers and executives in determining who will be employed. We feel that it is important that all of the information be present in those instances so that the person does have knowledge whether or not there was a determination in the favor of the applicant, or whether the determination was a finding of guilty.

Mr. BUTLER. So, it is your feeling that in an employment application situation the abuse would be that incorrect information is made available; is that correct?

Mr. McALVEY. I believe another area that perhaps is equally as important is that in the pretrial area where individuals are coming before the court to have bail set, to determine whether or not they will be held, the amount of bail to be set. And I feel that it is important that the judge likewise have complete information available to him, and not have to rely solely on arrest record information.

Mr. BUTLER. So you think it is subject to abuse there in that the judge might have the wrong conception?

Mr. McALVEY. The judge really does not know, and today, with the large number of arrest records that we have with no disposition information, they have to rely on their own experience, at least on past experiences, and I feel often with the large number of dispositions that do come out in favor of a suspect in a case, that it is very important to that particular adjudication that the individual have the benefit of all of the information available to him on past contacts with the criminal justice system.

Mr. BUTLER. All right. I begin to get the thrust of your view in this area.

Let me ask you another question along these same lines. Basically, what would be your feeling under this legislation or generally in the situation where a person puts in an application for employment of

military service, recruitment, and is asked the question, "Have you ever been arrested?" and the arrest record is either sealed or no longer a public record and so the gentleman answers no, in the negative, or if it took place as a juvenile, he answers in the negative, and a subsequent investigation reveals that he has, in fact, not stated the truth, because he has, in fact, been arrested. Does this bill, in your view, have any protection for that man and give him authority to misstate this record, give him the power to misstate this record, or what is the consequence of, in fact, answering that question wrong, or does it place any limitations on the ability of the military or a prospective employer to ask that question?

Mr. HAWKINS. Mr. Chairman, if I may, this bill does not, and if my memory serves me, I think the only bill that the Congress has had before it in the past is H.R. 188 that I think made some remark that the chairman had introduced. In the State of California, as an example, I think our law enacted by the State legislature, specifically states that they are permitted to answer "no" if the record is sealed or purged, and that is handled at a State level. Now, in this legislation it is not handled.

Mr. BUTLER. What is your feeling—

Mr. EDWARDS. Would you yield for a minute?

Mr. BUTLER. Yes.

Mr. EDWARDS. I thought that there were no questionnaires any longer that had that kind of a question, that all questionnaires coming from at least Government agencies have the question "Have you ever been convicted of a felony?"

Mr. HAWKINS. I believe this is true. I am not sure of every State.

Mr. McALVEY. That is the case in Illinois. I can speak for Illinois on it.

Mr. BUTLER. Well, if the chairman may be corrected, that is not true in recruitment for the military service.

Mr. EDWARDS. It is not, I understand.

Mr. BUTLER. It may be in application for employment with the Federal Government that is true. What is your feeling about the appropriateness of that kind of protection in this Federal statute?

Mr. McALVEY. I think, speaking personally, I feel that there should be some provision and some protection afforded in that area.

Mr. BUTLER. But, is it your feeling that when you are protected on the State level by a California statute, and you make application elsewhere, that you are, you as an individual, are protected by the State of the arrest?

Mr. McALVEY. I do not know for sure, but I would think not.

Mr. BUTLER. There is no clarification in the statute?

Mr. McALVEY. No.

Mr. BUTLER. Mr. Chairman, I feel like my time has expired.

Mr. EDWARDS. Mr. Kindness?

Mr. KINDNESS. Mr. Chairman, I will pass for the moment.

Mr. EDWARDS. Mr. Drinan.

Mr. DRINAN. Yes. Coming back to the opening of your valuable testimony, I am troubled at the language at the bottom of page 9 that similar essential purposes to which the information is relevant as defined in the procedures prescribed pursuant to the section. Now, in your statement here, I take it on page 6 that you do not quarrel with sec-

tion (g), similar essential purposes. You do not feel that that can be misused?

Mr. McALVEY. No, not in line with other protections that are contained within the overall bill.

Mr. DRINAN. I defer to the Chair on this, but I am always afraid of an ejusdem generis clause like that.

Mr. BUTLER. Excuse me, what kind of a clause?

Mr. DRINAN. Ejusdem generis, of the same type. It is in the law everywhere, and if counsel will sustain me, they teach it at Harvard Law School, I think. Similar essential purposes, and I am just troubled because essential to what, to what does essential apply, to modify the purposes, and what purposes are essential and what purposes are similar. I am just troubled by it as I am by all clauses like that.

In any event, Mr. McAlvey, would you spell out exactly what you mean at the bottom of page 6 and at the top of page 7? I think I know what you mean, but I am not entirely certain. When you bring this over to 206(b), you broaden it a bit, but would you state it again?

Mr. HAWKINS. I believe what we are trying to point out, Mr. Drinan, in section 201(b), which we referred to at the top of page 6, it does set forth the specific purposes for the use of these records, nonconviction records, and then what we are pointing out in 206(b) is that there is a limitation where dealing with a suspect, to have his record for investigating purposes, both beneficial to a suspect in clearing him, that he is not involved, or to aid in the investigation to show that he was involved, we are recommending that language be clarified between those two sections to remove the ambiguity.

Mr. DRINAN. You do broaden it, do you not, so that the *Terry* standard is not a limitation?

Mr. HAWKINS. No, I do not believe we do, sir.

Mr. DRINAN. That is the precise point. Tell me why you have not.

Mr. HAWKINS. Well, I believe that what we are saying is that in the language that we have proposed, that we would ask that a particular suspect be identified and the user be permitted to use that record information.

Mr. DRINAN. All right. I defer to the chairman or counsel on that. It had not occurred to me, and I think it is a good suggestion. But, I am not entirely certain.

Mr. EDWARDS. Do you have a comment, Ms. Schell?

Ms. SCHELL. I am sorry?

Mr. DRINAN. Well, later on, maybe in markup, we could take this up. But it seems to me a good suggestion. But, I am still troubled by it. It seems to broaden the scope of this in ways that I did not think it should be. But these two gentlemen are so sophisticated in it that I take their suggestions very seriously, and in any event, I think you have made an essential point that we simply have to clarify for ourselves.

Mr. EDWARDS. I would like to ask you what would be left here to the FBI? Now, what is the physical picture of the Bureau's recordkeeping when all of these reforms have been put into effect? Are they still going to have 25 million fingerprint cards? Are they going to ship them back to the States?

Mr. McALVEY. I certainly would not envision that. Speaking for the Bureau of Identification in Illinois, we certainly would not want

to see all of our Illinois records that have come in from the many agencies in the past, back to us, because in most instances we do have a duplicate of that same record.

Mr. EDWARDS. But, Illinois would not send them as many fingerprint cards as they did in the past?

Mr. McALVEY. There is a provision now that a State identification bureau, upon certifying to the Federal Bureau of Investigation that they are ready to become a contributing State, may initiate procedures where all arrest, fingerprint cards, must first go through the State identification bureau, and only in the instances where the individual cannot be identified in State records, may the card then be forwarded on to the Federal Bureau of Investigation for processing. There are some States, I believe, that at the present time have begun participation in this program, and it is something that we are all striving for, something that the Bureau is urging us to work for, because it will greatly reduce the workload that they have today in processing information which is often a duplicate of what the States are doing at their level.

Mr. EDWARDS. But, there will be an index at the FBI, a central index. Will that include intrastate records, someone who just commits or has committed crimes in the city of Chicago?

Mr. McALVEY. That is correct. That will. As that record is entered into the Illinois computerized criminal history system, the identifying information, the identification segment of that CCH record will be transferred to the national files so that if California, for instance, wants information on that individual, that they had nothing in their file, or they want to know if there is information available elsewhere in the Nation, they will be able to go to the national index and find out that Illinois, and perhaps other States, also have information on this individual. And they can then, in the case of a multi-State offender, extract it directly from the national level. In the case of a single State offender, they can get it directly from that State.

Mr. EDWARDS. So, this will substantially reduce the FBI's daily work?

Mr. McALVEY. Certainly in the area of information coming from the States.

Mr. EDWARDS. They also would not have to have these technicians take the fingerprints, and getting the formula out of fingerprints, although they have a machine that does that now.

Mr. McALVEY. I think they are hoping that very soon they will be able to do that by automation also.

Mr. HAWKINS. Mr. Chairman, I think probably the important factor here is that so much has been said, so much concern expressed in various ways about what the role is here at the Federal level that we feel legislation is needed to define it and eliminate this confusion and uncertainty that exists. Now, the Bureau does have a policy of the single-State, multi-State offender record, as we set forth here. They also have, as Mr. McAlvey just pointed out, that when a State is able to, the fingerprint cards will go through the State identification bureau. If they are not identified then, one card would be maintained at the Bureau, and if that State was the only State of record, the detailed record would remain at the State level with an index at the Federal level.

Mr. EDWARDS. Will the identifying information in the index always be a fingerprint card?

Mr. HAWKINS. Yes, to support just one card, instead of perhaps, as it has been in the past, which each agency in that State that had an arrest sent in a card.

Mr. EDWARDS. So you now have a central index in Washington to all of these criminal records throughout the country?

Mr. HAWKINS. Correct.

Mr. EDWARDS. Right. Now, there is another area where you are not in favor of the FBI receiving and transmitting information, and I think that is what we call message switching. Would you explain what is done, and what the FBI wants to do and how this amendment to this bill would establish the law in a way that would be most agreeable to the States.

Mr. HAWKINS. Well, first of all, Search Group itself, and we have been expressing the official position of Search here this morning, the Search Group itself has addressed itself in the message switching area one time, when we had an ad hoc committee in which they addressed the problem of dedication as part of the message-switching concern.

Mr. EDWARDS. Would you explain to the committee what message switching is?

Mr. HAWKINS. Message switching is the capability of the NCIC-FBI component of it being connected by telecommunications with a State control agency, or in some States, more than one control point. But, in most cases, it is one central State central control point from the NCIC operation to that State, and all traffic dealing with what they define now as NCIC related matters are transmitted and carried, the traffic is carried over that NCIC of State telecommunications system. Search addressed itself to the one issue in the message switching total picture, and that was the dedication, which their policy requires that the system be at the States and in the local level under or dedicated and under the direct management and control of a law enforcement agency. That posed some problems fiscally and operationally to some of the cities and counties, and even States that could not afford an independent computer system at the city level or the county level, but must share with a computer system providing other services to that city or to that county or to that State. The Search position was that it should be dedicated at the State level, but that other appropriate arrangements, such as the order of a Governor and proper policy and regulations allow sharing of that information, computer system, at the local level, because of the factors of the operational and fiscal implications.

Mr. EDWARDS. Well, the information goes through NCIC anyway, and that is controlled by the FBI. And the information that goes through the NCIC system is rather strictly defined, is that not correct?

Mr. HAWKINS. Correct.

Mr. EDWARDS. For example, there is no real intelligence information, no subversive information or anything like that. What, in addition, would be going through the NCIC machinery in message switching that the States would object to?

Mr. HAWKINS. Well, I guess we are trying to stay out of something here, Mr. Chairman. There has been a discussion between what is

called the National Law Enforcement Telecommunications System, which is State telecommunication systems——

Mr. BUTLER. That is NLETS?

Mr. HAWKINS. Yes, sir, all NLETS and the NCIC issue. Search, not because we are cowards, but because we have been involved in other things, have not become directly involved in that particular issue.

The concern, I assume, from what I have read and heard, is that the NCIC was trying to take over all message switching, which would include administrative traffic and non-NCIC related traffic. Now, I believe, at a recent meeting, that they had some agreement and, as I understand it, between the NLETS people and the NCIC policy board, in defining what is limited message switching relating to the NCIC issues.

Mr. EDWARDS. They are trying to enlarge the NCIC service and include a lot of the work being done by NLETS now, is that correct?

Mr. HAWKINS. I think that is the main concern.

Mr. EDWARDS. I do not want to take too much time here. Caldwell, do you want to go ahead?

Mr. BUTLER. You would consider that a duplication of service?

Mr. HAWKINS. Well, you could look at it that way, Mr. Butler. They are serving two purposes, I believe. NLETS, as an example, is providing services on motor vehicle registration, driver's licenses, on administrative traffic, things of that type, whereas the NCIC traffic, by their policy, has been defined to handling the NCIC-related subject matter traffic.

Mr. EDWARDS. NCIC is much larger than NLETS, is that not correct? It is a much larger system?

Mr. HAWKINS. Well, statistically, I am not sure where they stand today. I think NLETS is handling over a million messages a month.

Mr. EDWARDS. Counsel advises me that NCIC handles 12 million a month.

Mr. BUTLER. I have no further questions.

Mr. EDWARDS. Mr. Kindness?

Mr. KINDNESS. Mr. Chairman, I am still reading here.

Mr. EDWARDS. Counsel?

Mr. KLEE. Thank you, Mr. Chairman.

I would like to follow up on a few questions that have already been posed this morning. The first one has to do with your statement on page 5 pertaining to abuse of arrest records, and also of arrest records where dispositions have indicated that the individual was not charged or that the individual was acquitted or that the matter was otherwise disposed of in his favor. Was your statement of abuse which follows that language only speaking of the arrest record without any form of disposition, or do you also think there is potential for abuse in the so-called favorable disposition situations?

Mr. McALVEY. I believe our feeling is that with the protections provided, and with the abilities of the States to also enhance these protections, such as expungement legislation and things like this at the State level, that our main concern is with the arrest record only and not with those where there is a disposition favorably. I believe the provisions for sealing and purging, that are provided in the legislation, adequately protect that particular area.

Mr. KLEE. Thank you for clarifying your statement.

On the second question that was asked this morning by Representative Drinan, the focus was on whether section 201(b)(1)(G) is essentially a loophole in allowing the FBI or other enforcement agencies to specify "similar essential purposes." This goes to a fundamental question as to the approach between the administration bill, H.R. 61 and the other two proposals. Do you feel that a general system that excludes or prohibits dissemination except in specified cases, with this open-ended provision, is feasible, compared with a system that would allow dissemination in general while prohibiting it in certain circumstances where abuses have been perceived?

Mr. McALVEY. I believe with protections provided that it would be a workable solution. I think our primary concern, and I believe you are referring to the area that I discussed on pages 6 and 7?

Mr. KLEE. Yes, that is correct.

Mr. McALVEY. And the expansion on the *Terry* standard in one particular area, what we are trying to point out here is that there is a need for a class-type search for investigative purposes where no identification—

Mr. KLEE. No, we are speaking, we are speaking to different questions. The ambiguity that you point out between sections 206 and 201, I agree with. This goes to the open-ended provision in section 201(b)(1)(G) of H.R. 8227 and questions the general approach of a bill which prohibits dissemination except in certain specified areas, and then has at the end a general, open-ended, vague allowable approach. The question is: Is that feasible from a drafting standpoint, as opposed to the approach in the administration bill, which says dissemination is all right, but we perceive these abuses and, therefore, we prohibit it in these specific circumstances? Could you address that problem? Is that the problem that you were trying to get to earlier?

Mr. DRINAN. If I could, I would intervene. Would you say that the approach between the administration bill and this is essentially different? I thought it was the same. The following information is forbidden, it may not be disseminated under these circumstances. And what I quarrel with or wonder about is the similar essential purposes. Is there any language like that in the administration bill?

Mr. KLEE. No. And Representative Drinan, this was the point that my question was intended to elicit. The administration bill takes the position that dissemination within a criminal justice agency is allowable, except in the certain following areas, and then it restricts specific abuses outright. The approach of section 201(b)(1) in particular is that the use of dissemination of arrest records or nonconviction record information is restricted to certain enumerated purposes.

In other words, it is not allowed overall, but it is allowable in these six specified areas, and then there is the seventh area, and that is the "similar essential purposes" that is wide open. And the question is, between these two approaches, is the approach taken in 8227 viable with this "similar essential purposes" language, or does that in reality become a loophole, through which unknown kinds of dissemination can be permitted?

Mr. HAWKINS. If I may answer that, in my opinion, I assume two things. One, having seen considerable legislation at the State level in the past that these are somewhat common phrases to cover the future activities of not knowing what may present itself at a later time, with-

out addressing itself with new legislation each time, particularly if there are rules and regulations that are going to set forth the type of information that supports the bill generally. If you are following what I am saying—

Mr. KLEE. I suppose this is something the committee will have to resolve as to whether, in this particular context, it is more feasible to strike out things where abuses are perceived, or whether it is more feasible to delineate areas in which dissemination is permissible. And I would like to, with the permission of the Chair, move on to another question.

Mr. EDWARDS. Sure. You can go ahead.

Mr. DRINAN. One last point, if I may. What is the legislative history of section (G)? I mean, who put that in there and why?

Mr. EDWARDS. Ms. Schell?

Ms. SCHELL. Similar essential purposes were in H.R. 62, and it has always been the intention, just as Mr. Hawkins has said, to allow something that would not prohibit any new kind of dissemination that would come up in the future that would actually tie the hands of law enforcement, so there would be some provision that could be reviewed. But all of these sections, the way I view it, go hand-in-hand with a commission, or somebody that oversees with rules and regulations, that watches this on a day-to-day basis, so that if there is an abuse, then it is taken care of by either further legislation or by rules and regulations.

Mr. DRINAN. Why is the word "essential" there? Purposes which are essential to what? I could understand similar purposes to which the information is relevant, but what do you mean "essential"?

Ms. SCHELL. Essential to law enforcement practices. If that is vague—

Mr. DRINAN. But that is not defined, is it?

Ms. SCHELL. Obviously not, but that could be taken care of.

Mr. DRINAN. In due course, in markup, I think we should talk about that, because, as Mr. Klee suggested, this is a loophole. Thank you.

Mr. KLEE. Mr. Chairman, I would like to direct some questions into the intelligence and investigative information area. The witnesses this morning have indicated that they agree with the approach taken in H.R. 62, and prior witnesses have indicated some reservations about this approach. I wonder if you could, for the moment, focus on section 210(c) in H.R. 62, or for those looking at H.R. 8227, it is section 210(b). It seems to me that this section has the potential to gut the complete intelligence operations of the FBI, and I would like to pose the question: Would an organized crime person constantly be going into court under the other sections to utilize section 210(c) of H.R. 62 to purge his intelligence file? It appears that every time he is followed, he can go into court and get an injunction and ask the FBI if they have any reason for following him, and if they do not, then everything has to be purged in the intelligence file. Could you respond to that?

Mr. HAWKINS. Well, we have stated, Mr. Klee, what the Search position is in our testimony. Now, this was based on the limited amount of work we had done in the field of intelligence, organized crime. I cannot speak for Search as such, but as an individual, I think our main concern that the issue be addressed. Even if you follow what our

testimony is in recommending that it not be deleted or omitted from this bill, I think the essential thing is that the issue be addressed and clarified, if not in this bill, in a later bill, that would deal with the problem, and either not ignore it, and I do not mean that in the sense it sounds, but there is a great deal of uncertainty and confusion yet about what legislation will be. I think it is a subject that certainly warrants the attention and studied consideration of the Congress, and it well may be that if you so choose, in my personal opinion, it could be addressed in a separate bill in light of other activities of the Congress.

Mr. EDWARDS. Would you yield?

Mr. KLEE. Surely.

Mr. EDWARDS. Does Project Search know of any wrongful dissemination of intelligence information that occurs in this country from police agencies?

Mr. McALVEY. No.

Mr. HAWKINS. I certainly do not. But I think, as I testified before, Mr. Chairman, last March, my recommendation, which seemed an easy way out maybe, but I was very honest about it, is that there are experts in the field of intelligence, and I would be more comfortable if you relied on their knowledge, experience, ability and so forth, because I have not worked in that area.

Mr. EDWARDS. A lot of this is philosophical, and you do not have to answer. But, do you think that law enforcement organizations, such as the FBI, should collect intelligence information where there is not a possible criminal activity involved?

Mr. HAWKINS. I certainly do. In the field of organized crime, to my knowledge, I think that the—

Mr. EDWARDS. Well, there is criminal activity suspected there.

Mr. HAWKINS. It is suspected. You do not have a crime, perhaps, and that is the differentiation that I am trying to make.

Mr. EDWARDS. How about the Black Panthers or the Socialist Workers Party?

Mr. HAWKINS. Correct. And I think that this type of activity is needed and is warranted. I think what we are pointing out is that there be standards set, and that you have people that know the field that can work on these types of standards. If it is in this bill, fine. That is our position. If not, I would certainly recommend it be addressed.

Mr. KLEE. It seems particularly difficult from your answer to distinguish between an organized crime person and perhaps a member of some domestic group such as the Socialist Workers Party or the Black Panther organization in a statute in terms of saying that the FBI can collect intelligence information because it suspects criminal activity against organized crime, but that its suspicions are somehow not warranted in another context. And of course, if this were the type of standard that would be susceptible to the discretion of a court, I suppose we have some very different considerations operating here than we do in the area of arrest records and that type of thing. That is why your suggestion, that perhaps separate legislation is needed, is the route to go.

Mr. HAWKINS. Correct.

Mr. KLEE. And maybe considered.

Mr. EDWARDS. Mr. Drinan.

Mr. DRINAN. I have one last question. I have to go to another subcommittee, but my mind goes back and forth on your recommendation that we qualify the 5 years of life of the Commission. And I can see, from the language of the bill here, of people down the line 5 years from now who could look back and say that it was the intention of the authors of this bill that this particular Commission absolutely cease to exist. And, as you point out, the problems are not going to be solved in 5 years. And so, Mr. Chairman; and witnesses, I would welcome any language that would suggest somehow that this Commission could be revived in the discretion of Congress. But, I am troubled by the finality, to repeat, that is in the language here that this shall cease to exist and so on. And obviously, they are going to have cease and desist orders in the courts, civil actions for declaratory judgments, and there is nothing indicated in the language here as to who takes them over. I do not want the Department of Justice to take them over. So, I think that you make a good point. Obviously, there is a political consideration that people viewing this say one more bureaucracy, and we have to assure them, insofar as we can, that this goes away after 5 years and it will never have more than 50 employees. I do not have a full resolution of it, but you do make a point.

I want to thank you very, very much for your testimony. It has been extraordinarily valuable.

Mr. HAWKINS. Thank you.

Mr. McALVEY. Thank you.

Mr. EDWARDS. It is my personal opinion that the committee will be unable to include in the first bill, which we expect to enact in September, intelligence information, the chief reason being that we have not held hearings on the problems of intelligence gathering and dissemination. And there is a rather neat break in the two subjects, because the collection, dissemination and storage of criminal record information are all public records; and the problem is the collection of public records in one place by a Government agency, and how fairly and efficiently it is disseminated. But, the moment that you get into intelligence information, you get into a completely different field. The FBI, the Department of Justice, is right at this moment working on guidelines. I believe there are already 25 pages. And I am sure that when they are made available to the committee, that we will be in a much better position to continue the hearings and to write legislation, because we certainly intend to write legislation in that area, too. It is an area that cries for legislation.

The COINTEL program that has to do with intelligence information has been in the nature of a national scandal, and that is involved in the review that we are undertaking right now through the General Accounting Office of the FBI intelligence files, 19,000 files. So, we would seek your assistance, as we have in the past, in at least talking to our staff about the bill that we will try to enact in September that will, of necessity, I believe, have to have the intelligence information coverage not included.

Mr. KLEE. And investigative information also?

Mr. EDWARDS. And investigative information also. I think almost everything that is not official public information would have to be left out.

Mr. HAWKINS. We will certainly work with your staff or anyone else.

Mr. EDWARDS. We do that with reluctance, but we have to be realistic too.

Mr. HAWKINS. Our concern is that there be some recommendation, that there be some action taken by the Congress in this important field. And that is our main concern, Mr. Edwards. How you handle it, as I said, my own personal feeling is maybe it is better out of this bill, or handled separately at a later time.

Mr. EDWARDS. Mr. Klee.

Mr. KLEE. Thank you, Mr. Chairman. I would like to ask a question that was probed in some detail in a prior hearing concerning the ambiguity in some of the sections of this bill as to the impact of a State or Federal statute upon information contained in a system outside of the State or the Federal system, and I would like to get your opinion as to what you think ought to be in the bill. If we could just take, for example, section 208(a) (1) of H.R. 8227, which says that a State or Federal statute, regulation or a court order can require sealing or purging of criminal justice information, what is your view on whether a State court, or State legislature, one State in the Union, can pass a statute requiring the purging of criminal justice information across the whole Nation, or whether a State can pass a statute or regulation requiring the sealing of Federal information within that State? Exactly how do you break down the language here, and how do you interpret it?

Mr. HAWKINS. Well, I believe that what your bill is providing is a statement that there will be either sealing or purging as a result of State statute or court order or regulation and so forth. Now, if a State passes a statute that says we will purge all records *x* years old, or whatever criteria they use, I am sure that that statute has no effect in any other State. But, I think what your statute, what your bill proposes to do is to serve notice on the States that there will be some uniformity in the general field of sealing and purging, and that they either do it by statute or by other appropriate means.

Now, in California, we have a sealing statute dealing with the juvenile area, but also by regulation, the Attorney General set up certain criteria for purging of old criminal record files.

Mr. KLEE. Could the State of California pass a statute that would have the effect of requiring Federal records within the State to be sealed or purged under this bill, as you read it?

Mr. HAWKINS. Yes; I think that they would ask that the Federal Government maintaining that record hold that record out, and I am sure that they have, in the past, and would; the FBI.

Mr. KLEE. Just to make sure this is crystal clear, if the FBI's Los Angeles office has an Arizona record stored in California, can the State of California, through a statute, under the authority of this act, require the FBI to seal or purge that record, if it meets a particular type of standard?

Mr. HAWKINS. I would say not. I would say not, if it was an Arizona record only.

Mr. KLEE. So, then, the State really only has control over its own records. But it has—

Mr. HAWKINS. Over the offenses that exist in the State.

Mr. KLEE. Would it have control over those records if they were stored in another State, so that California could pass a statute saying all original California records, wherever they may be stored, be it NCIC or in Florida, are now sealed, or do you perceive the State as only having jurisdiction over the records physically within the State?

Mr. HAWKINS. I think our procedure, when I left the Department of Justice, that is of California, is that we would ask the other State and notify them that we have purged the record, the same as we would notify the local agency in California, and ask that they destroy the record or return the record to us for destruction at that time.

Mr. KLEE. You perceive this statute—

Mr. HAWKINS. If they did not, you know, I do not think we would have somebody to try to arrest him for it, or anything, because we have no jurisdiction in that State.

Mr. KLEE. The question would be, though, would this statute give you the authorization to force them to purge? Is that how you construe it?

Mr. McALVEY. No.

Mr. HAWKINS. I do not believe so.

Mr. KLEE. You do not believe so?

Mr. HAWKINS. No.

Mr. KLEE. Well, I think this is an ambiguous section, and I do thank you for stating your view as to how it could be clarified. I have no further questions, Mr. Chairman.

Mr. EDWARDS. Why do you think there should be purging of records and sealing at all? There are a lot of people in Congress, and we are going to have a terrible fight on that issue.

Mr. HAWKINS. I think we went through this when I was with the Department of Justice when the Attorney General decided to do this. I think it was traumatic. I think it did create a great deal of concern by law enforcement and criminal justice agencies in the State. There were hearings throughout the State in which the proposals were given to—

Mr. EDWARDS. You are talking of what State?

Mr. HAWKINS. California.

Mr. EDWARDS. California, right.

Mr. HAWKINS. And there were some interesting side lines, Mr. Chairman, on that, in that probably one of the most vocal groups that were concerned about destroying the old records were the coroner's offices and this was because of attempting to identify deceased persons and running down the nearest of kin in the State and establishing the estate for the individual and so forth. There were concerns expressed, obviously, by law enforcement as to why they did not have the records available to them at that time. But, I think many of the studies, if not all, showed that after a period of 7 or 8 years, if the recidivist is going to come back into the system, he is going to come back into it before that period of time.

Now, there is a great deal of concern about all of these issues, and amazingly so, the regulations to purge went through, without as violent an opposition as we thought. Now, this is a personal experience which we went through in California.

Mr. EDWARDS. So California now has a 7-year purging regulation, not a law?

Mr. HAWKINS. No, it is a regulation.

Mr. EDWARDS. And it is 7 years from the last contact with the criminal justice system?

Mr. HAWKINS. Yes.

Mr. EDWARDS. It would be 7 years after the end of the offender's probation, for example?

Mr. HAWKINS. Correct.

Mr. KLEE. If I could distinguish between sealing and purging for just a moment; with the option available of sealing a record and preventing its dissemination except under very narrow circumstances, why should purging and total destruction of a record ever be justified? Those terms have been used together so much, but they really are different.

Mr. HAWKINS. Well, from a former law enforcement officer standpoint, I suppose I am no different. I would like to see a lot of information, if I was investigating a crime, that I had available. But there are, I assume, reasons, such as the death of an individual. I do not think we would want to keep records 200 years old on somebody that had been convicted at one time. There are concerns, as I have mentioned and, in fact, this is one of the purposes of the bill, that the records be kept only for a legitimate, needed time, and in defining legitimate, needed time, sealing may provide greater use than the purging will.

But, I do know this, that in our files in California, we would seal a record and then have to create a file to tell us where we had sealed the record and where it was sealed at. So we have records on top of records in that sense. But, the sealing does provide access under defined and controlled purposes for later use. Purging does do away with the record, except in the public records of the county clerk's office or the court's files, or the newspapers.

Mr. EDWARDS. I think that is a very important point. And purging just has to do with recordkeeping. It does not have to do with the original record at all, or newspaper accounts or anything else.

Mr. Butler.

Mr. BUTLER. Well, how long has California had this 7-year limitation?

Mr. HAWKINS. The procedures for establishing it, Mr. Butler, were started about, I would say, 2 years ago, and it was over a year in promulgating the proposed draft rules and in turn taking those to the field, holding hearings and submitting it to various concerned organizations and individuals, getting back that information, amending it, then going through a formal procedure of hearings under the Administrative Hearing Act of the State, including public hearings, all of them, and then the Attorney General established a procedure. The interesting thing, probably the interesting part of that—

Mr. EDWARDS. One of the goals of the Ronald Reagan administration.

Mr. HAWKINS. They ran into problems because it costs money to purge records.

Mr. EDWARDS. So you really have not had enough experience to say whether the objectors have been satisfied or not, have you?

Mr. HAWKINS. Well, I think they have had this type of experience, and I have been away a year, so I want that recognized, they have set

forth, set aside the files they were going to purge, and I assume they have experience based on how many occasions they have to go to those files. It is my understanding they have been very, very rare.

Mr. BLOMMER. Would you yield, Mr. Edwards? Do you have in the State of California a recivist statute of any kind?

Mr. HAWKINS. Yes, I believe so.

Mr. BLOMMER. Well, there is where I have quite a problem. How would you enforce the recivist statute?

Mr. HAWKINS. In the regulations, the various sections of the law, such as we will say a crime that would make a recivist, the recivist statute applicable, that was not put in the purge criteria. It was kept for a longer period of time. Or, if there was some statute of limitation case.

Mr. BLOMMER. Well, a number of States have statutes that provide that on the conviction of your third felony, a certain penalty, different than the penalty for that third felony, whatever it is, attaches. But if you are going to destroy records, it seems to me you end that type of statute, because how would you find out?

Mr. HAWKINS. I said we did have a recivist statute. I am not sure we do any longer. I think they did repeal it. But, I will take the case of even petty theft. Petty theft, with a prior in California becomes a felony, so they set the regulations so that that was not destroyed, just the same as other misdemeanor offenses were, so that it would be available.

Mr. BLOMMER. Well, of course, the Federal Government has less of those, but there are certain Federal statutes where a second offense carries a higher penalty, and it does not matter if there are 20 years in between.

Mr. HAWKINS. Right, but this was recognized in trying to set forth the regulations for purging.

Mr. BLOMMER. I see.

Mr. McALVEY. I think it should be pointed out that we are not advocating destroying records. We are talking about sealing or purging them, and there will be an index that will allow access to those records if a situation such as a recivist comes up.

Mr. BLOMMER. Well, now, that is something different. Purge means to me wipe away and destroy.

Ms. SCHELL. Would you yield for a minute?

Mr. BLOMMER. But purge does not mean that to you?

Mr. McALVEY. No.

Mr. BLOMMER. I see.

Ms. SCHELL. The bill does not require purging. It requires a standard of sealing or purging. The only purging that is required is on arrest records.

Mr. KLEE. And intelligence information.

Ms. SCHELL. But intelligence is being pulled out of the bill. We are just talking about criminal records, and if the State decides that they want to purge their records after 7 years or 10 years, or whatever it is, then the Federal Government cannot step in and say well, you cannot purge those records. Then they will take into consideration their own recivist statutes that they have in the State. But there is no firm requirement of purging. There is only a standard of sealing or purging, whichever the State or agency decides to do.

Mr. KLEE. It is within their jurisdiction.

Mr. BLOMMER. But I would say this bill applies, for instance, to the California central repository for the records.

Ms. SCHELL. That is right.

Mr. BLOMMER. So, that if this bill would provide that any record is destroyed, California would have to destroy a purely intrastate record that is reposed in the California system. Therefore—

Ms. SCHELL. You mean California law?

Mr. BLOMMER. That is right. Therefore, if the district attorney in San Francisco is prosecuting someone, he might not know that down in San Diego there is reposing in some other court a record of that felony committed by that person, because in the central system that would be destroyed.

Ms. SCHELL. But we are still getting into State laws, not into this bill.

Mr. EDWARDS. Thank you very much, gentlemen; for your testimony.

Mr. McALVEY. Thank you, Mr. Chairman.

Mr. EDWARDS. It has been most enlightening, and we will keep in communication with you.

Mr. HAWKINS. Fine. Thank you.

[Whereupon, at 11:30 a.m., the hearing was recessed, subject to the call of the Chair.]

CRIMINAL JUSTICE INFORMATION CONTROL AND PROTECTION OF PRIVACY ACT

FRIDAY, SEPTEMBER 5, 1975

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS
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 and Butler.

Also present: Alan A. Parker, counsel; Thomas P. Breen, assistant counsel; and Kenneth N. Klee, associate counsel.

Mr. EDWARDS. The subcommittee will come to order.

Today we will hold the last of our series of hearings on legislation designed to protect the constitutional rights and privacy of individuals upon whom criminal justice information has been collected and to control the collection and dissemination of criminal justice information.

Today's witnesses have been called upon request of the minority party members pursuant to rule XI(j) (1).

Our first witness today will be Mr. David O. Cooke, Deputy Assistant Secretary of Defense.

Before we ask Mr. Cooke to introduce his colleagues, I yield to the ranking Republican, my colleague, Mr. Butler.

Mr. BUTLER. Thank you, Mr. Chairman. I too want to welcome Mr. Cooke and express my appreciation for your taking time once more to come before this committee.

I won't trespass further on your time except to apologize for the lack of consideration of the House of Representatives in meeting at this time. It was without consultation with me or the Chairman.

Mr. EDWARDS. I believe now that they have passed the rule over in Chamber, there will be a debate of considerable time, and we will have time to hear your testimony and very useful dialog with you and your colleagues.

You may present the other witnesses you have accompanying you, and then please proceed with your testimony.

**TESTIMONY OF DAVID O. COOKE, DEPUTY ASSISTANT SECRETARY
OF DEFENSE, ADMINISTRATION, ACCOMPANIED BY CHRISTOPHER
GRINER AND WILLIAM T. CAVANEY**

Mr. COOKE. Thank you very much.

Mr. William T. Cavaney of my office is seated on my right; and to my left, Mr. Christopher Griner of the Office of General Counsel, Department of Defense.

I appreciate the opportunity to testify before this committee on H.R. 8227, which deals with the access and use of criminal justice information.

As Deputy Attorney General Tyler has informed you, we participated with the Department of Justice, the Office of Management and Budget, and other interested agencies in the development of an administration bill on this subject. The views of the Department of Defense and other agencies involved received full consideration, although as you might expect, not all were incorporated into the final bill which you introduced as H.R. 61. We believe that, in general, H.R. 61 represents a practical and realistic resolution of the competing needs of the Government and the individual.

In previous appearances before this committee, I described in detail the interest of the Department of Defense in obtaining and using criminal justice information. It might be helpful if I could summarize our requirements briefly:

Under the Uniform Code of Military Justice, the Department of Defense has criminal jurisdiction over about 2 million men and women of the Armed Forces. The Department consequently generates and uses internally a considerable amount of criminal justice information.

In addition, the Department requires criminal justice information to insure that hiring and retention of approximately 1 million civilian employees is clearly consistent with the interests of national security as required under Executive Order 10450. The Department also needs criminal justice information for an essentially similar program covering its 2 million military members which it operates in accordance with the national policy expressed in the same executive order.

Finally, the Department has a need for criminal justice information to determine eligibility of individuals for access to classified information in accordance with Executive Order 11652. Our responsibility for security clearance is not limited to civilian and military personnel of the Department of Defense. Under the provisions of Executive Order 10865, we also must clear personnel in industry who require access to classified information. We make these determinations not only for the Department of Defense but for 14 other Government agencies.

As I stated earlier, we support H.R. 61 as a workable resolution of competing interests. We also concur in the views expressed by Deputy Attorney General Tyler on H.R. 8227. I will not repeat these views but would like to discuss briefly some of the major problems which H.R. 8227 cause the Department of Defense.

They center around section 204(b) of the proposed bill which appears to recognize the need for using criminal justice information in making employment and security determinations. We strongly support the intent of this provision. The determination to hire a person or grant him a security clearance should be made in the light of all relevant information about him.

When S. 2008, a bill identical to H.R. 8227, was introduced in the Senate, the sectional analysis that accompanied the Senate bill commented on section 204(b) as follows and I quote:

* * * it is intended that it be narrowly construed so that such information would be available only for "full field background investigations" similar to those conducted pursuant to section 3(b) of Executive Order 10450 on "Security Requirements for Government Employment" * * *

Such an interpretation would eliminate the use of the national agency check as a basis for determining eligibility for civilian employment for membership in the Armed Forces, or for secret and confidential clearance. The national agency check is the cornerstone of personnel and security programs.

Proposed section 204(b) also prescribes that Federal investigative agencies may receive criminal justice investigative and intelligence information only for purposes of determining access to top secret information. The section does recognize that top secret positions, because of their sensitivity, require a full field investigation including consideration of criminal justice investigative and intelligence information. There are equally sensitive positions in the Department of Defense that do not require a top secret clearance but nonetheless warrant a full field investigation. For example, not all people involved in safeguarding nuclear weapons require top secret clearance.

Another problem is raised by the retention provision of section 204(c). As it stands, an agency, not a criminal justice agency, which receives criminal justice information for the employment or clearance determination must return it as soon as that determination is made. Employment suitability determinations and security clearance determinations are continuing processes and the retention of criminal justice information is essential if only to eliminate the need for and expense of recurring investigations.

Mr. Chairman, this completes my short statement. We are not Johnny-come-latelys to the business of protecting privacy. Our procedures and policies are designed to safeguard and restrict access of any information about an individual to the minimum necessary to meet essential Government needs. We are constantly checking to insure an equitable balance is maintained.

We therefore, support fully the principles underlying both H.R. 8227 and H.R. 61. For the reasons suggested in my statement as well as those described by Deputy Attorney General Tyler we cannot, however, support H.R. 8227. We urge you give H.R. 61 your prompt attention.

This completes my statement. We will be pleased to answer any questions you may have.

Mr. EDWARDS. Thank you, Mr. Cooke.

Mr. Butler.

Mr. BUTLER. Thank you, Mr. Cooke. I appreciate your statement and, of course, we have your earlier position with reference to this matter, so I don't think we will plow that ground too much right now unless there is something you want to add.

Mr. COOKE. There is nothing I want to add.

Mr. BUTLER. Let me turn to a matter which concerns me. Basically I am concerned with the effect of this legislation as regards the opportunities to enlist in the Armed Forces and whether this will change current practices; and, if so, in which way?

My first question would be what is the current practice in the military with respect to the consideration of criminal justice information with respect to enlistment, promotion, and reenlistment.

Mr. COOKE. With respect to initial enlistment, let me say at the onset in considering a man for enlistment in the Armed Forces, we feel we need criminal justice information in the same way we need

information as to his educational background, his physical health, the complete story of the man, to be sure we have qualified, suitable individuals in the armed services.

With respect to initial enlistment, this may be precluded by civilian conviction record information. As a matter of fact, there is a statute which requires a waiver to enlist a man with a felony conviction. Arrest information normally, per se, doesn't preclude enlistment, but we are interested in an arrest record. A man can be arrested, the case may not have come to trial, it may be pending. We are interested in criminal information for initial enlistment. As I said, a conviction may preclude enlistment, not always, but could. An arrest record, per se, does not, but it is something which is a signal we would have to check further.

When it comes to reenlistment, I think it would be useful to distinguish two types of criminal justice information. There is criminal information which is internally generated. That is, once a man or woman enters the armed service, he or she becomes subject to the Military Code of Justice and it is possible during the term of enlistment, we could generate information on the individual under the Uniform Code.

It is also conceivable that during the course of enlistment, there may be situations where the individual has been convicted in a civilian court outside the Uniform Code of Military Justice system.

On reenlistment, a civilian conviction or a military conviction may be, not necessarily, depending on the nature of the offense, a bar in reenlistment. As a matter of fact, of course, as you know, a violation of the Uniform Code of Military Justice may also, during the course of enlistment, result in a discharge for cause or a discharge under a sentence of court martial. The records must necessarily be considered for the purposes of reenlistment.

Promotion.—If a situation occurs, obviously the fact of a conviction either in a military court martial or possibly in the civilian community, an individual's record has to be considered when promoting him in the service.

Discharge.—A violation of military law may result in discharge administratively or under court martial. A conviction under civilian law may result in discharge for the convenience of the Government particularly if a man is convicted of a felony and incarcerated.

It is impossible to generalize beyond that except to say each case is a tub which stands on its own bottom and to urge that we do need criminal justice information for enlistment, promotion and retention.

Mr. BUTLER. I appreciate your statements, particularly as to criminal conviction but I want to narrow it down a little bit to the arrest record. Are the policies of the various services determined by the Department of Defense or the Uniform Military Code, or the branch of service itself?

Mr. COOKE. The basic policies of the service are provided by Assistant Secretary of Defense, Manpower Affairs, and Deputy Secretary of Defense for Military Personnel Policy. The basic policies would be uniform throughout the service.

Let me add one caveat. There are at times, requirements for enlistment obviously would vary from one service to another. Once a man meets the basic requirements, was not completely disqualified for a

prior record, it may well be the competition for joining the service was so intense, the standards would be higher as to former brushes with the law, education, and the whole thing.

I am suggesting to you that the application of uniform policies could in a given case differ among the branches of services.

Mr. BUTLER. What you are saying is the policies are substantially the same except in application?

Mr. COOKE. Any given policy has to be applied to a given situation.

Mr. BUTLER. I am still concerned as to the matter of an arrest record insofar as it concerns a person's arrest who is on the record and dismissed for any reason. There may be at the motion of the prosecuting attorney or for any number of reasons. Customarily, I recall many times we have obtained a dismissal of a youngster on the grounds that he is going to enlist in the armed services and the conviction would preclude his enlistment. What is the current policy with reference to the use of those records in determining whether a person should be admitted to the services or not?

Mr. COOKE. I take it you are talking about an initial enlistment and an arrest record generated in the civilian community.

Mr. BUTLER. Yes.

Mr. COOKE. An arrest record, per se, does not preclude enlistment, but we would like to look at that arrest record and see some of the circumstances surrounding it. It is, if you will, at best a signal not a barrier.

Mr. BUTLER. The present policy considers that a signal you are entitled to evaluate?

Mr. COOKE. Yes. As a matter of fact, a felony conviction is not necessarily a barrier.

Mr. BUTLER. I am not concerned in this line of questioning as to conviction. I want to zero in on arrest records and the significance of them on the Armed Forces and particularly as to dismissal.

Mr. COOKE. We would like to know more about the circumstances, but it is not a barrier.

Mr. BUTLER. What is the policy of the Department of Defense with reference to those instances in which the enlistee misrepresents an arrest record on the theory that dismissal is not a conviction and it is none of your business. Therefore, in response to the question, "Have you ever been convicted or arrested?" he says, "No."

What is the effect of that when subsequently it is established yes, he had been arrested for an offense which would not have been disqualifying for enlistment originally.

Mr. GRINER. There would be a problem as to this individual not coming forward with true facts. That would be another indication if, as you say, the incident itself was not a limiting factor. It would be considered. But, of course, the fact that he hadn't come forward with an accurate statement would be another consideration in evaluating the whole package.

Mr. BUTLER. You accept an enlistee on the basis of his application.

Mr. COOKE. Yes. I would like to supply a specific answer to that question. As to a conviction, I will check with our military personnel manpower people on that. These security clearance forms are given—

Mr. BUTLER. I am not inquiring about a conviction. I am asking about an arrest record.

Mr. COOKE. May I supply that?

Mr. BUTLER. I hope you will explore that with each one of the services. My experience has been it depends a great deal on how the commanding officer of that particular force feels on the morning that question comes to him.

Mr. COOKE. I will be able to detail to you the difference in the application of that policy among the branches of the services.

Mr. BUTLER. I want you to go into the question of what effect it has on the enlistee when this information is solicited by the recruiting officer or recruiting personnel.

In your judgment, will H.R. 8227 or H.R. 61, put you in a position where you will have to alter your position on this legislation and do you believe you might be happy with the changes which might come about?

Mr. COOKE. We are pleased that both bills recognize the importance of the military justice system, when we feel there is provided a relatively free flow of criminal justice information within the Department of Defense.

Mr. BUTLER. I am concerned with the information generated prior to the enlistment.

Mr. COOKE. Or during the period of enlistment because there is a large area of interface between the military and civilian industries. We are interested in knowing whether a man has been arrested or convicted of drug abuse downtown because that certainly would affect his flying status.

Mr. BUTLER. My basic question goes to whether you are satisfied with availability of arrest record information to the armed services, on enlistees provided for in these two proposed bills.

Mr. COOKE. As my statement indicated with respect to the bill now under consideration, H.R. 8227, at least as interpreted in the other House and the record in the other body, we would find that almost impossible to live with in carrying out our duties, where we are satisfied we can work effectively under the provision as it appears in H.R. 61.

Mr. BUTLER. Mr. Chairman, I think my 5 minutes are up.

Mr. EDWARDS. Mr. Cooke, there is nothing in the legislation which will interfere with what you do on a daily basis, referred to as the national agency check, is that right?

Mr. COOKE. We are talking about H.R. 8227.

Mr. EDWARDS. What you want to be able to continue to do is when you have an enlistment or security check or reenlistment, promotion or discharge—I will have to ask you about those others in a moment—you want to be able to send the name, description, and date of birth, or do you also send the fingerprints to the FBI?

Do you send this information to anybody else but the FBI?

Mr. COOKE. Our national agency check is performed by the Defense Department. It involves at a minimum, a check with the FBI, provided for under Executive Order 10450, and with the military, immigration. But the minimum is a check of the FBI, criminal records in the identification section as to name, date of birth, fingerprints.

Mr. EDWARDS. Do you get back a rap sheet?

Mr. COOKE. We get back the information, if available, on the man.

Mr. EDWARDS. Under the regulations which have been issued by the Attorney General, the FBI and the State agencies maintaining crimi-

nal records are required to have a disposition after every arrest within a certain amount of time. Is that correct?

Mr. COOKE. Yes.

Mr. EDWARDS. So almost immediately, they will have to have a disposition, and if no one is there, it is not going to show on the rap sheet. There will be no reference to it. However, the effort will be made to have a disposition in every case or if the case is actively pending. You have no difficulty in living with that?

Mr. COOKE. I don't think so. In the balancing of equities we are willing to accept that.

Mr. EDWARDS. You agree it is certainly unfair to have an arrest on someone's record which may be several years old with no disposition. The man has not had a fair shake, has he?

Mr. COOKE. No.

Mr. EDWARDS. Do you recheck for promotion or reenlistment? Do you send the record over to the FBI and ask for a new sheet?

Mr. COOKE. Not on promotion and reenlistment, but if we did not already have the information available for a bring-up security clearance or security clearance, in that arena, we would, but not for reenlistment. Unless there was a break in service.

Mr. EDWARDS. Yes, it would seem unnecessary.

Mr. COOKE. We should know more about him at that stage of the game, than the Bureau or anybody else. At least we like to think so.

Mr. EDWARDS. A provision of the bill, but not of the regulations which have been issued by the Attorney General, provides that after a certain period of time, I think in the bill it is 7 years since the person about whom the record is being kept by the criminal justice agency, if the person has been clean of the criminal justice system—end of probation, no arrests, no real connection with the criminal justice system for a period of 7 years—then the record would be sealed. This would not apply for purposes of a security check or top security check or reenlistment but for purposes of employment.

I think you are specifically preempted for that. Do you have any views on sealing after 7 years?

Mr. COOKE. My own feeling of policy, excluding the important considerations of security clearance as you mentioned, we can live with that policy and support it. As you can observe, Mr. Chairman, we are essentially in a very difficult business as you know from having worked in this field for many years, of competing equities.

Mr. EDWARDS. The Chair appreciates your view on this, and there is no desire on the part of any member of the committee to throw obstacles in the way of your performance of this very important job. But there does remain important work to be done in this field.

Are there agencies collecting criminal records throughout the country who will not send you, if you asked, an arrest record with a disposition which happens to be a dismissal referred to by my colleague from Virginia, Mr. Butler. There are a number of areas in the country where that is felt to be prejudicial. That the man or woman was arrested, yes, but that the charge was dismissed. That should not follow him or her around for the rest of their lives. That is not provided for in this bill, but do you have any views on that?

Mr. COOKE. As you noted and I believe I testified before, in some jurisdictions local State law has impeded us from a full—what we

normally consider—a full investigation of a man. I am speaking particularly of the background investigation for our top security clearances.

I regret to note the absence of your colleague, Mr. Drinan, because the State of Massachusetts is the State which comes to mind immediately. This situation means we can't do as full a job of investigation as we would like. For that reason, we have some problems as the Deputy Attorney General had with the provisions of State law supremacy, particularly as they appear in the bill now under consideration and to a lesser degree, those which occur in H.R. 61, but as I say, we can live with that.

Mr. EDWARDS. Mr. Drinan is in Mr. Kastenmeier's subcommittee marking up legislation. I met him in the Chamber and he expressed regrets that he could not be here.

However, in such a case as you mentioned, the records are still available. This legislation does not have anything to do with original records which have appropriately been made available to the press and to the public.

I think we certainly ought to keep close ties with this bill.

Mr. COOKE. That is true.

Mr. EDWARDS. They are regarded as public, in the public records, and disseminated thereof by criminal justice agencies. And it is convenient for your agency to have this information available, but it is all public information we are talking about.

Mr. COOKE. I quite agree but the public records of trial or public records in the court, as I understand, in most record systems of courts they are not indexed by name. That is what I am saying. It would represent a very considerable investigative burden and would require the expenditure of considerable more resources, and resources of our investigative committee are limited and under the same pressures as investigative committees, and we have to cut down on these sources. I agree it is practical but would present a difficult problem.

Mr. EDWARDS. Mr. Parker?

Mr. PARKER. For the record, Mr. Cooke, you use the term "civil conviction." I assume you are using—

Mr. COOKE. I mean a criminal conviction in a court other than a court martial.

Mr. PARKER. You use it in terms of civilian?

Mr. COOKE. Civilian, yes.

Mr. PARKER. The practice which you refer to of getting national agency checks, is that based presently on statute or Federal Executive order?

Mr. COOKE. It is based presently with respect to our civilian personnel on Executive Order 10450. With respect to military personnel it is based on a regulation issued by the Secretary of Defense which parallels completely the provision of Executive Order 10450.

I might add we have under consideration the issuance of an Executive order to replace those regulations.

Mr. PARKER. But at the present time the military policy is based on Department of Defense regulations?

Mr. COOKE. Yes, which parallel completely the Executive order policy as expressed in Executive Order 10450 as amended.

Mr. PARKER. But not based on Executive order directly with respect to military personnel?

Mr. COOKE. That is quite correct. Although, as I noted there are statutes regarding the enlistment of an individual in the service on a felony conviction.

Mr. PARKER. Would you equate the enlistment policy on an individual as analogous to an employment application to the service?

Mr. COOKE. I think it is somewhat analogous, but an imperfect analogy in the sense we have considerations for enlisting a man perhaps who is going to be employed by the local gas station whose employer doesn't have quite the same consideration. But certainly analogous.

Mr. PARKER. When talking about a national agency check, are you talking about the simple procedure of running the names through the FBI?

Mr. COOKE. There are other courses. Let me emphasize well over 90 percent of our check is completely negative, but the national agency check is to essentially see if there are, to use the phrase we used before, any signals that would require the national agency check to be expanded to insure ourselves that the employment is within the requirements.

Mr. PARKER. What other sources would the Department of Defense use in a national agency check other than that?

Mr. COOKE. As I indicated, civil service.

Mr. PARKER. You are talking about Civil Service Commission files?

Mr. COOKE. The Commission. Depending upon the information on the enlistment form it could be the Bureau of Immigration. But the one sine qua non to this is the Bureau.

Mr. PARKER. You are also talking only about some form of communication, such as writing or otherwise, and not talking about sending an investigator out to get information. I am talking about the national agency check.

Mr. COOKE. At the best the investigator would be checking the source, not going out in the field and interviewing.

Mr. PARKER. When you talk in terms of granting someone a security clearance for access to top security clearance information, you are talking in terms of a full background check?

Mr. COOKE. If we are talking about someone who either requires access to top secret information or in some cases, as I pointed out in my statement, other critical sensitive positions, a fiduciary relationship, or examining someone who is going to be an investigator, then we would require a so-called full field investigation which involves neighborhood checks, reference checks and a considerably more detailed profile, if you will, of the individual.

Mr. PARKER. If you were to determine that a person would have access only to classified information other than secret or top secret, there is a different kind of check?

Mr. COOKE. Other than top secret. For secret and confidential information we would simply go through the national agency check.

Mr. PARKER. That is the same check you would make on anyone who wishes to enlist in the service of the United States or any civilian employee of the Department of Defense?

Mr. COOKE. Yes.

Mr. PARKER. Does that include every single employee of the Department that goes through a national agency check?

Mr. COOKE. Yes. May I point out we are talking about two interrelated but nonetheless separate programs. One is the eligibility for employment in the U.S. Government, which is covered by Executive Order 10450. We also have under provisions of Executive Order 1165 the responsibility for access to security clearances. In many respects the criteria initially are the same. But, yes. As a matter of fact I recall the testimony of my colleagues from the Civil Service Commission the last time I was up here, and everyone who works for the Federal Government in civilian capacity goes through the national agency check.

Mr. PARKER. Thank you. I have no further questions.

Mr. EDWARDS. Mr. Klee.

Mr. KLEE. Thank you, Mr. Chairman.

Mr. COOKE, what is the frequency and volume of the exchange of criminal justice information between the Department of Defense and other Federal agencies?

Mr. COOKE. I think the answer to that is we don't know in this sense. We don't maintain a record of frequency and volume of exchange of criminal justice information with other agencies. In accordance with our responsibility under the Privacy Act we will, of course, maintain a record of all personnel information, including criminal justice information, which we get from the agencies. So we would be able to give you any particular individual. We don't plan at least for the present an account of the total volume of information under control of the Privacy Act until we can determine what the procedure would cost.

Let me elaborate a bit, however. Normally we do not exchange criminal justice information with other Federal agencies. The situation comes up in this fashion—and I think probably it is much less than popular opinion might believe—that if an individual—let's take a civilian employee of the Department—is moving to the Department of State and he transfers from Defense to State, the question of a security clearance granted by State comes up. The State security officer rather than reintroducing the wheel would come to our security office and say, "Look, I have a legitimate need." It has to be on a need to know basis. "Can we review for the purpose of granting a security clearance the information file?"

Yes. We would then transmit that information with the exception we would not transmit any information coming from a third agency under the third agency rule.

Mr. KLEE. I was more interested in the transmission of Uniform Code of Military Justice. Do you ever have occasion to transmit that kind of criminal justice information to other agencies or is it a de minimis occurrence?

Mr. COOKE. I would say it is a de minimis occurrence. There would be exceptions.

Let me see if I can think of an exception. We have any number of military bases throughout the country. In some cases we have exclusive jurisdiction on those bases, sometimes concurrent, sometimes on proprietary jurisdiction.

Mr. KLEE. Are some of those agencies entered outside of the Department of Defense?

Mr. COOKE. No. But let me take a case of a naval air station in California where the proprietary jurisdiction is exclusively in the State of California. If there were a felony committed by a uniformed person on that base where our jurisdiction was only a proprietary jurisdiction, the State of California would try the individual, and I am quite certain if we had an initial investigation by our military criminal investigative agency we would supply that information.

Mr. KLEE. There was some concern, Mr. Cooke, that the provision in 103(c) (5) exempts only records of violations of the Uniform Code of Military Justice solely within the Department of Defense, as drafted, might be constructed to require the Department of Defense to keep a dual set of records, one set for records maintained solely within the Department of Defense and another set for records transmitted to other criminal justice agencies. But you seem to present testimony today that really wasn't that much of a problem because you don't have that many records.

Mr. COOKE. We don't consider it a problem. I would like to have an opportunity to check in more detail with the three Judge Advocate Generals of the military department to see whether they foresee that. Our examination indicated that the problem was not of great moment.

Mr. KLEE. I have one final question and that pertains to your consideration of the arrest records. I take it you record the existence of an arrest record after it is made and listed. It is other than normal or typical. It is your feeling that the presumption of innocence that follows the criminal for a person accused of committing a crime only accompanies him once it goes into the courtroom, and for purposes of enlistment, or that record does not exist but only exists as a part of evidence to be used in court?

Mr. COOKE. I wouldn't want to characterize it precisely in that fashion. I would think the arrest itself is a presumption, not a presumption, but an indication of conduct that we would like to further examine, and if an indication of arrest was followed by acquittal it would be one thing. But if the arrest was not processed because of the death of the principal witness it is another situation. That is why I emphasize each case is a tub that stands on its own bottom.

Mr. KLEE. It does have relevance?

Mr. COOKE. It has relevance, yes.

Mr. KLEE. Thank you very much. Thank you very much, Mr. Chairman. I have no further questions.

Mr. EDWARDS. I believe that concludes the testimony of these three witnesses. Mr. Cooke, Mr. Cavaney, and Mr. Griner, we are grateful for your testimony today. It is very useful, and it is very nice to see you again.

Mr. COOKE. Thank you, it is very nice to appear before you.

[The prepared statement of Mr. Cooke follows:]

STATEMENT OF D. O. COOKE, DEPUTY ASSISTANT SECRETARY, DEPARTMENT
OF DEFENSE

Mr. Chairman, Members of the Subcommittee: I appreciate the opportunity to testify before this Committee on H.R. 8227, which deals with the access and use of criminal justice information.

As Deputy Attorney General Tyler has informed you, we participated with the Department of Justice, the Office of Management and Budget, and other interested agencies in the development of an Administration bill on this sub-

ject. The views of the Department of Defense and other agencies involved received full consideration, although as you might expect, not all were incorporated into the final Bill which you introduced as H.R. 61. We believe that, in general, H.R. 61 represents a practical and realistic resolution of the competing needs of the Government and the individual.

In previous appearances before this Committee, I described in detail the interest of the Department of Defense in obtaining and using criminal justice information. It might be helpful if I could summarize our requirements briefly:

Under the Uniform Code of Military Justice, the Department of Defense has criminal jurisdiction over about 2 million men and women of the Armed Forces. The Department consequently generates and uses internally a considerable amount of criminal justice information.

In addition, the Department requires criminal justice information to insure that hiring and retention of approximately one million civilian employees is clearly consistent with the interests of national security as required under Executive Order 10450. The Department also needs criminal justice information for an essentially similar program covering its two million military members which it operates in accord with the national policy expressed in the Executive Order.

Finally, the Department has a need for criminal justice information to determine eligibility of individuals for access to classified information in accordance with Executive Order 11652. Our responsibility for security clearance is not limited to civilian and military personnel of the Department of Defense. Under the provisions of Executive Order 10865, we also must clear personnel in industry who require access to classified information. We make these determinations not only for the Department of Defense but for 14 other Government agencies.

As I stated earlier, we support H.R. 61 as a workable resolution of competing interests. We also concur in the views expressed by Deputy Attorney General Tyler on H.R. 8227. I will not repeat these views but would like to discuss briefly some of the major problems which H.R. 8227 cause the Department of Defense.

They center around Section 204(b) of the proposed Bill which appears to recognize the need for using criminal justice information in making employment and security determinations. We strongly support the intent of this provision. The determination to hire a person or grant him a security clearance should be made in the light of all relevant information about him.

When S. 2008, a Bill identical to H.R. 8227, was introduced in the Senate, the sectional analysis that accompanied the Senate Bill commented on Section 204(d) as follows:

"... it is intended that it be narrowly construed so that such information would be available only for 'full field background investigations' similar to those conducted pursuant to section 3(b) of Executive Order 10450 on 'Security Requirements for Government Employment'..."

Such an interpretation would eliminate the use of the National Agency Check as a basis for determining eligibility for civilian employment for membership in the Armed Forces, or for Secret and Confidential clearance. The National Agency Check is the cornerstone of personnel and security programs.

Proposed section 204(b) also prescribes that Federal investigative agencies may receive criminal justice investigative and intelligence information only for purposes of determining access to Top Secret information. The section does recognize that Top Secret positions, because of their sensitivity, require a full field investigation including consideration of criminal justice investigative and intelligence information. There are equally sensitive positions in the Department of Defense that do not require a Top Secret clearance but nonetheless warrant a full field investigation. For example, not all people involved in safeguarding nuclear weapons require Top Secret clearance.

Another problem is raised by the retention provisions of section 204(c). As it stands, an agency, not a criminal justice agency, which receives criminal justice information for the employment or clearance determination must return it as soon as that determination is made. Employment suitability determinations and security clearance determinations are continuing processes and the retention of criminal justice information is essential if only to eliminate the need for and expense of recurring investigations.

This completes my short statement. We are not Johnny-come-latelys to the business of protecting privacy. Our procedures and policies are designed to safeguard and restrict access of any information about an individual to the

minimum necessary to meet essential government needs. We are constantly checking to insure an equitable balance is maintained.

We, therefore, support fully the principles underlying both H.R. 8227 and H.R. 61. For the reasons suggested in my statement as well as those described by Deputy Attorney General Tyler we cannot, however, support H.R. 8227. We urge you give H.R. 61 your prompt attention.

Mr. EDWARDS. Our next witness will be Mr. Richard Harris, director, Division of Justice and Crime Prevention of the State of Virginia.

Mr. Harris, we are pleased to have you here today, and before you introduce your colleague and before you proceed with your statement, I yield to my colleague from Virginia, Mr. Butler.

Mr. BUTLER. Thank you, Mr. Chairman.

Mr. Harris. I welcome you here, also.

Mr. Chairman, Mr. Harris and I have had a long association during my term in the General Assembly of Virginia. He has been active in his present capacity and various titles, both with the Democratic and Republican administration. He is uniformly highly regarded and his efforts are appreciated, and I am very grateful he has taken his time to appear before us.

TESTIMONY OF RICHARD N. HARRIS, DIRECTOR, DIVISION OF JUSTICE AND CRIME PREVENTION, OFFICE OF THE GOVERNOR, STATE OF VIRGINIA, ACCOMPANIED BY RICHARD B. GELTMAN, GENERAL COUNSEL, NATIONAL CONFERENCE OF STATE CRIMINAL JUSTICE PLANNING ADMINISTRATORS

Mr. HARRIS. Thank you for those kind remarks and thank you for inviting us to appear here.

[Discussion off the record.]

Mr. EDWARDS. You may proceed.

Mr. HARRIS. You will find before I begin my formal remarks that I have addressed them primarily to H.R. 8227. In previous communications to the committee we have indicated that with respect to H.R. 61 and H.R. 62 we felt that H.R. 8227 represents a good melding of those two bills in that essentially it picks up titles I and II of H.R. 61 and title III of H.R. 62. The basic approach in H.R. 8227 is to do that.

You will find also in my remarks that I refer rather frequently to the testimony given by Mr. Gary McAlvey July 17 on behalf of Search Group, Inc., because much of what I have to say is concurrent with the views of that gentleman and that organization. I happen to also be the Commonwealth of Virginia's representative to Search Group, Inc. and voted in favor of the positions taken by that organization.

The National Conference of State Criminal Justice Planning Administrators represents the heads of the 55 territorial and State criminal justice planning agencies (SPA's) operating under the provisions of the Crime Control Act of 1973. The SPA's have been allocated a substantial amount of Federal money from the Law Enforcement Assistance Administration for the purposes of improving criminal data systems, enhancing the security of such systems, and protecting the privacy of the individuals whose records are being kept.

Both the National Conference and the SPA which I head are very concerned about the possibility of undue Federal intrusion into this

vital area of criminal justice. We feel that the operation of criminal justice information systems is essentially a State and local matter. We therefore feel that it is important that any legislation Congress enacts to insure the security and privacy of criminal information give adequate weight to the concerns of the States and localities, which have the primary responsibility in the criminal justice field. And, of course, that thought is consistent obviously with the philosophy approach of the Safe Streets Act in any event.

For this reason, we consider the concept of a Commission on Criminal Justice Information, as envisioned in sections 301 through 306 of H.R. 8227, as the most important component of the bill. It is essential that any security and privacy legislation embody such a concept, and that the resulting Commission have regulatory authority. Our reasons for stressing this most important provision are the same as those expressed by Gary McAlvey, chairman of Search Group, Inc., before this subcommittee on July 17 of this year. To avoid repeating those reasons before you today, I simply refer you to Mr. McAlvey's testimony.

There are other reasons, besides maintaining State primacy, why legislation is needed in this field. One is to encourage some uniformity among the States. Some States have yet to act in this area at all; and there is a lack of uniformity among those which have.

Another reason is to assure a careful delineation of the role the FBI and other Federal agencies will play in a national computerized criminal history system. As I mentioned, we are very concerned about heavy Federal incursions into State and local prerogatives in this area and carefully drawn legislation, such as this bill, will remove this problem, in our view. The language of the bill places in the hands of the Criminal Justice Information Commission the direct responsibility for dealing with this issue. That is an excellent approach.

While we support the concept of allowing the States maximum latitude in complying with security and privacy legislation, it is important that the legislation be comprehensive. We feel that this bill meets that test of comprehensiveness.

It is also important that legislation be forthcoming quickly. The States are preparing plans to implement Department of Justice regulations promulgated pursuant to section 524(b) of the Crime Control Act of 1973. These regulations became effective on May 20, 1975. This planning process must be completed by December 16, 1975; and it would be helpful if any comprehensive national legislation were enacted before that process has been completed.

As indicated, we support H.R. 8227. However, we do have some suggestions that we feel would strengthen the bill and some of the suggestions come from our experiences in working with the new Department of Justice regulations. I speak now as an administrator whose agency is in the process of drafting Virginia's plan for compliance with those regulations. We feel that the regulations in many ways tend to strengthen what Virginia and other States are trying to do in creating effective, secure, and accurate criminal justice information systems. To us, the thrust of the Justice Department regulations is that criminal history records are compiled in a step-by-step process in which certain information is recorded at each stage of a person's movement through the criminal justice system.

That data dealing with the completion of formal transactions is termed criminal history record information; and it is vital if the next stage of the criminal justice process is to begin. There are parts of H.R. 8227 which we feel are contrary to this thrust; and I would like to point them out to you now:

In section 102, paragraph (10), we would like the term "Disposition" to include corrections and release data of a dispositional nature. The Justice Department regulations define the term this way and we concur in that definition.

Section 103(c) (1) should not exempt any automated system, since any automated system can be searched to retrieve information by some identifier, even though "not indexed or accessible by name."

The point here is that there are other means to search than by indexing or name, and you confine the limitation only to index or names.

We concur with the amendment proposed by Search Group, Inc., to section 201(b) which would permit the use of arrest records where no suspect has been identified, as under the requirements set out in section 206(b). I think Mr. McAlvey pointed out some inconsistency in those two sections and made some specific recommendations as to how they might be merged to be consistent, and I simply concur with his views there.

Under section 204 dealing with appointment and employment investigations, we would suggest that both sealed and unsealed criminal history records, as well as intelligence and investigative data, not be restricted to the appointment of judges and criminal justice executives. It should be available for State and Federal cabinet officials and other executive appointments. We believe that all forms of information encompassed by the legislation should be available for employment screening by criminal justice agencies. Again this is consistent with the views expressed by Search Group, Inc.

Again, I point out this is consistent with the views expressed by Search Group, Inc., in their testimony and I merely reiterate that point here.

An additional point I don't believe was made by Mr. McAlvey is this: State and local governments should be able to use criminal history records and intelligence information for employment purposes, just as is the case for the Federal Government under the provisions of the bill. Certainly that should be particularly true with respect to State and local criminal justice agencies. At the moment such authority does not exist under the bill. So we are talking really about the employments of high-level State and local officials and employment in State and local criminal justice agencies, where there should be authority to utilize the information in the same way the Federal Government could utilize it.

We read section 207(a) (1) as requiring, for each time additional disposition data is added to a criminal history record in a central State repository, the notification of all criminal justice agencies which have ever previously requested the record. This would place an ever-increasing burden on central repositories.

We propose instead a provision similar to that in the Justice Department regulations which would require the data user to inquire of the repository for the most up-to-date disposition data each time he wants to disseminate criminal history record information for crim-

inal justice purposes. This, we feel, is a more reasonable method of insuring completeness and accuracy of the data before it is disseminated.

You fully realize this argument, gentlemen, is an old chestnut. Some feel that the initiative ought to come from one direction and some feel the initiative ought to come from the other. I simply opt in favor of the initiative coming from the data user rather than the data storer.

Section 207(a)(3)(A) asks more information than we feel is needed. All that is necessary here is to record—this is the transaction log I am speaking of—who made the inquiry, what segment of information was provided, and the date of the inquiry.

The language of section 207(a)(4) could pose an obstacle to normal agency operations. As pointed out in the amplifying instructions to the Justice Department regulations, dissemination means transmission of criminal history record information to individuals and agencies other than the criminal justice agency which maintains the information. The regulations do not impose controls on a system internally as long as data contained therein is not disseminated outside the agency. We feel that this is a much more reasonable approach than that presently proposed in section 207(a)(4) of H.R. 8227.

Section 208(a)(2) dealing with sealing and purging imposes the burden upon a State's central repository of determining that an individual has been free from the jurisdiction or supervision of criminal justice agencies in all other States. As it stands in the bill now that paragraph would appear to necessitate creation of some type of national repository which States could query before sealing or purging records; or it would require a State to make a State-by-State search to determine if an individual's records were eligible for sealing or purging.

Mr. EDWARDS. Do you do that now?

Mr. HARRIS. Yes, sir.

We understand your concern about the retention of inactive files. However, we feel that other provisions of the bill provide for sufficient protection of individual records by a criminal justice agency without the necessity of the requirement contemplated in section 208(a)(2), particularly considering the enormous effort and potential cost that would be involved if strictly required under H.R. 8227.

Mr. EDWARDS. Could not this be done when there was a request for dissemination instead of having to go through the files?

Mr. HARRIS. Yes, sir; instead of waiting until you actually got ready to seal and purge you could keep it up to date, in a sense. But with the 7-year provision now in the bill you would have one enormous effort checking around the country to do that. There needs to be a process of keeping it up to date so when you get ready to seal and purge it is up to date. That is much less costly, and consistent with the rest of the bill in any event.

Mr. EDWARDS. That is what we have in mind to do.

Mr. HARRIS. Another problem in section 208(a) is the requirement that both automated and manual systems purge or seal records promptly. This could be very costly in the case of a manual system, as pointed out by Search Group, Inc. We support their alternative proposal to deal with this problem. So I will not repeat it here.

I understand there is a possibility that sections 210 and 211 dealing with intelligence and investigative information, may be deleted from

H.R. 8227. We would urge the subcommittee not to delete these sections. Further, we urge that the two sections be enacted as presently proposed in the bill. It is important to realize that any well-managed police intelligence operation would be able to comply with these sections with no difficulty, and we feel the bill's requirements in these two areas are entirely reasonable and necessary. I make that statement with the full realization that you are not considering what you are considering because any police agencies are complaining they can't do it. I understand there are other factors. I still suggest what I just got through saying, that I think they are important provisions.

Mr. EDWARDS. We have not had hearings on it.

Mr. HARRIS. I know that.

Mr. EDWARDS. We certainly intend to address that problem in legislation. We have some reservations about putting it in a bill where we have made this several year study of actual criminal arrest records, recordkeeping, and dissemination, but we really have not made any study of the other.

Mr. HARRIS. I understand that. So I make my next comment in my written testimony. If the subcommittee decides to consider these two areas in separate legislation, we urge you to act quickly; and we caution you that these sections ought not to be confused with the foreign intelligence matters or military intelligence matters or CIA intelligence matters which have recently made so much news. They are, rather, integral and legitimate parts of the day-to-day operation of many criminal justice agencies in this country.

Section 304(a) (5) seems to be unnecessary, since the proposed bill will cover virtually every criminal justice agency anyway; and all that would be accomplished is that yet another list, this one containing all criminal justice agencies, would be created. We simply say why require yet another list of all the criminal justice agencies in the country.

We support the provisions of section 307(c). However, we feel that simply requiring the submission of a certificate of compliance with appropriate rules and regulations is not sufficient and that, in addition, there should be a requirement that annual audits be conducted at the State level of a representative sample of State and local criminal justice agencies on a random basis to verify adherence to the Commission's regulations or State regulations, or both as the case may be, very much as is presently required in the Justice Department regulations. In fact you could get by in the present language with less than certificate. I think it uses certificate or approval. I don't recall the language without looking at it. We don't feel that is sufficient.

Finally, we support section 311 establishing the precedence of State laws. Let me add one other remark. I apologize for not having included it in my written testimony.

There is no provision in this bill nor did I find any in H.R. 61 or H.R. 62 for appeals by agencies from decisions of the Commission. You have all sorts of appellate processes for those individuals affected by actions of the information systems. But given the fact that this Commission will obviously be a quasi-judicial body, a regulatory body, it seems to me there ought to be some appellate process from its decisions.

I suggest several alternatives directly to the courts of record or to the appointing authority. But in this case the appointing authority would be the President, so that perhaps doesn't make much sense.

I know in my own State we, in many instances, use that approach—appeals are to the appointing authority of whichever board is concerned. I simply suggest there needs to be a solution.

I apologize for not having more precise alternatives. But, the point is that presently there is no appellate procedure for agencies.

In conclusion, let me reiterate what I emphasized in the beginning that the operation of criminal justice information systems is essentially a State and local matter and that it is important that legislation in the security and privacy field be designed with that in mind. In my view, subject to the suggestions I have made, H.R. 8227 emphasizes that important fact.

This concludes my prepared remarks and I now will be happy to respond to any questions with one caution. I don't pretend to be an expert in the operations, technically, of criminal justice information systems. So in asking your questions I hope you will bear that in mind.

Mr. EDWARDS. Mr. Harris, though you don't hold yourself out as an expert, you certainly have made a splendid presentation to this subcommittee, and your statement is just loaded with valuable suggestions and we are really very grateful. I now yield to the gentleman from Virginia, Mr. Butler.

Mr. BUTLER. I would like to reiterate what the chairman said. I am very grateful for your very careful analysis of this legislation.

I wonder if you would identify your colleague.

Mr. HARRIS. I apologize to my colleague and to you gentlemen. This is Mr. Richard Geltman, general counsel, National Conference of State Criminal Justice Planning Administrators, who has assisted me in dealing with this legislative matter.

I apologize to you, Richard.

Mr. EDWARDS. Does he generally agree with this testimony?

Mr. HARRIS. Yes, sir.

Mr. EDWARDS. Go ahead, Mr. Butler.

Mr. BUTLER. I have no further questions. I think you have taken care of what I wanted to know. I appreciate it very much.

Mr. EDWARDS. Mr. Harris, you emphasized that the operation of the criminal justice information system is essentially a State and local matter. While Mr. Butler and I have not had the opportunity, at least I have not, of seeing your system in operation, I presume it is similar to other establishments. Do you have computers?

Mr. HARRIS. Yes, sir. We have a system not as sophisticated as the one you saw in California, but we have a system very similar in design.

Mr. EDWARDS. When you want to make an inquiry of another State agency, not with regard to an actual criminal record but with regard to some other matter having to do with probation or status of a case, do you use another NLETS?

Mr. HARRIS. Yes.

Mr. EDWARDS. That is in a separate computer?

Mr. HARRIS. Yes, sir.

Mr. EDWARDS. On the other side of the room?

Mr. HARRIS. You mean in our own?

Mr. EDWARDS. Yes.

Mr. HARRIS. Right. It is a terminal.

Mr. EDWARDS. The Attorney General is of the opinion that it would be more convenient to you and to other State agencies if the information that is provided through an NLET could be combined with NCIC so that NLET's, which is a State and local operation, would in effect be done away with.

Mr. HARRIS. I am aware of his views and I am aware of the varying points of view among others on that subject. With all due respect to the Attorney General, I don't agree with him.

Mr. EDWARDS. You think it is working pretty well?

Mr. HARRIS. Yes, sir.

Mr. EDWARDS. In connection with something you mentioned in your statement, do you also think it would add to the peril of more Federal control over State and local records?

Mr. HARRIS. Yes, sir. They are my views precisely, and I think it is essential that that not be the case.

Mr. EDWARDS. You have your police officers in Virginia go to the FBI Academy, and I understand the Academy is very heavily involved with the University of Virginia. Does that bother you?

Mr. HARRIS. No, sir. You have asked me two questions. The fact that our officers attend the FBI Academy doesn't bother me in the least. I think that is an absolutely marvelous service they provide. But that has nothing to do with information systems, or whatever, serving State and local government. That is simply an educational process in a professional community.

With respect to the service the FBI renders by way of assistance to law enforcement agencies in other fields besides education, I think that is also again an informal relationship which should continue to exist. But I am afraid that to do what the Attorney General, and others, are suggesting would formalize something from a management and control perspective that I would find very detrimental to State and local governments.

Mr. EDWARDS. The criminal record information you keep in Richmond generally refers to intrastate crime, crime which takes place in Virginia?

Mr. HARRIS. Yes, sir. At the present we provide to the NCIC some criminal history data because we are still in the process, unlike California, of finishing off the construction of our CCH system. We are almost ready to put it on line. While we were getting ready to put it on line, like many States we were using the FBI facilities to store other criminal history. Of course, they have been encouraging some of that. Once our CCH system is completed they will be pulled back and put into our own system.

You know you have the old question with respect to criminal histories of where should they be retained. I think Mr. McAlvey addressed that in his testimony.

My feeling is that each State should maintain its own criminal history bank. That is simply what I was talking about when I was talking about States maintaining their own criminal history files with respect to their State cases, that the FBI files should only have a record of names and place of access with respect to those who hold the full State records. The FBI should not in fact have any files or histories

held in their bank in my view. They should only have a record of multistate offenders, where if Pennsylvania wanted to find out about John Jones' convictions elsewhere in the country they could query the national file and be told there are records on John Jones in Pennsylvania, Virginia, Florida, or wherever, and they could inquire by message switching to Pennsylvania, Florida, or wherever, to get the information.

Mr. EDWARDS. The FBI would agree with you on that; is that correct?

Mr. HARRIS. As I understand it that is correct.

Mr. EDWARDS. I understand the FBI is going to make those changes and not have a central depository for the entire country where very little of it is actually useful, because wherever we have inquired—and this is in California and around here and other areas—80 to 95 percent of the crime has to do with local criminals.

Mr. HARRIS. Right.

Mr. EDWARDS. To make their fingerprints and send the entire history off to Washington, D.C., is unnecessary, and this is to the credit of the FBI that they understand it now, and they are going to make those changes.

Mr. HARRIS. Right. I must confess, as you are recognizing in your comment, that these are two separate issues—the retention of the files and the operation of the communications system. But on the NCIC versus NLET's question, that is really a communications system "controversy," if that is the proper word. Although I think local governments have striven to prevent it from becoming any kind of controversy, let's admit to some degree it is.

I really believe administrative traffic, what we are talking about, should be in the hands of NLET's under an operational system controlled by the States. After all, the States and localities are the organizations primarily served by such a system.

There was no intent on the part of LEAA, I am sure, in funding NLET's or on the part of the States in setting up NLET's to set up anything to compete with NCIC, but to simply create a mechanism to provide the States, together, with a more effective communications network.

You could make the reverse argument from that or the Attorney General—why not have NCIC hook in to NLET's for switching purposes. In other words, you could make the argument the other way—if you are going to have one system let the States run the system and the Federal Government be a part of it. But not the reverse, not have the Federal Government run the system and the States be a part of it.

Mr. EDWARDS. I think you would find that your colleagues in the 49 other States would agree.

Mr. HARRIS. I certainly found they do agree.

Mr. EDWARDS. Mr. Parker?

Mr. PARKER. No questions.

Mr. EDWARDS. Mr. Klee?

Mr. KLEE. I have a few questions which I consider to be the most important component of this bill. You have expressed a desire for State crime control in the area, but you also at the same time expressed a desire for uniformity among States and for a commission that would have direct regulatory power.

I wonder what your reaction would be to a commission that would have advisory power only where every State could have its own regulations with respect to its own functions, intrastate criminal justice exchange and exchange of criminal justice information, but the commission would only have binding power in the area where there was an interstate exchange. Why do you deem it necessary for the commission to have direct regulatory power and that the power be uniform among the States?

Mr. HARRIS. Let me answer your question by saying an ideal system, even more ideal a system than that proposed in this bill, would be in fact the existence of two commissions, one to control the Federal systems and another purely in the hands of the State to regulate the interstate systems and address the interstate and intrastate problems. From a realistic point in my view that isn't very practical because you end up having two hierarchies.

If you are going to be a purist in the sense of the position I am taking about uniformity and lack of Federal intrusion, or absence of Federal intrusion, then logically you would have to say there ought to be no Federal involvement at all in a commission that deals with regulations of systems as between States. But from a practical point of view that doesn't make a lot of sense.

Mr. EDWARDS. The Commission now consists of the Attorney General.

Mr. HARRIS. Yes, sir. The Commission as proposed in the bill is a combination really of Federal systems and State and local systems all under one regulatory process.

Mr. EDWARDS. But because of the LEAA contribution made to State and local governments and other factors at the present time, the Attorney General takes the role of the Commission. Is that correct?

Mr. HARRIS. Yes, I guess that is one way of stating it. He has the authority, was given the authority by the Congress under 524 of the Crime Control Act to issue regulations and he issued regulations which in effect do what you said, Mr. Chairman. They put him in the posture of being the head of this entire complex. And many of us quarreled with that approach in the regulations. We thought the regulations should have taken the tack Senator Ervin took in his bill, and taken in H.R. 8227, with respect to the establishment of a regulatory commission that is broadly representative of State and local government officials, but he did not choose to pursue that course of action and instead came up with a regulatory approach that turned out to be very similar to what the administration submitted in H.R. 61, its bill. That is what I quarrel with.

The gentleman, as I understand it, is going beyond that. He is asking whether we might even drop back from the proposal in the bill and go further.

Mr. KLEE. Yes, I suppose that is my question. It seems as if of the 13 members of the Commission only 7 members of 7 different States are guaranteed to represent the States. I was wondering what your reaction is to some States or the Commission represented by some States intruding on the internal intrastate exchange of criminal justice information by other States. Is that a matter that should be left to each State to be done by its own regulation?

Mr. HARRIS. Yes.

Mr. KLEE. I have one last question and that concerns one of the few sections you did not testify on in your extensive statement, the section relating to criminal sanctions of section 309. In your view should the criminal sanctions of 309 in H.R. 8227 apply to any violation of the act, including, for example, the failure to keep proper records in accordance with section 207? Or do you think the criminal section is perhaps a little bit overbroad in its drafting?

Mr. HARRIS. I do not react to it or have not yet reacted to it as being overbroad. You use the words "willfully" and "knowingly" and I think that restricts it adequately.

Mr. KLEE. The willful and knowing part is right in the statute, but my question was more directed to the violation of the act. The act has some very severe restrictions in many other important areas, but also has some minor administrative recordkeeping and records security. I was wondering if you thought the willful violation of the security of records, even though it might result in no detrimental leak of the records, should result in a fine of not more than \$10,000?

Mr. HARRIS. You are really asking me a question having to do with matters of degree in terms of seriousness of an offense.

When you think about the seriousness of the offense you have to then translate that into the degree or seriousness of the penalty.

My own view is that a willful or knowing violation of any type should be subject to the same mandate or guilt. So if you are going to qualify, then you should qualify in terms of the penalty and not in terms of the finding of guilt. Let's put it this way. There ought to be a finding of guilt, but then if you wanted to reduce the fine for a lesser offense, you would then have to define what you mean by lesser offense in the bill.

Mr. KLEE. Thank you very much.

Mr. Chairman, I have no further questions.

Mr. EDWARDS. One last question. Where there is an arrest in Richmond or Charlottesville or someplace, it is recorded in your system?

Mr. HARRIS. Yes, sir.

Mr. EDWARDS. Then the disposition occurs and the person is found innocent thereafter an employment check is made authorized by Virginia State law or local law, and you send out a rap sheet. Does the arrest and disposition "found innocent" show?

Mr. HARRIS. It is supposed to.

Mr. EDWARDS. On these unemployment checks?

Mr. HARRIS. Yes, sir.

Mr. EDWARDS. Does that bother you?

Mr. HARRIS. No.

Mr. EDWARDS. You said it did, I thought?

Mr. HARRIS. If you are asking me whether the employment records should be up to date my answer is yes, it should be. Any information disseminated for any purpose should be up to date. Maybe I am misconstruing your question.

Mr. EDWARDS. I am not talking about another criminal justice sheet which a detective or someone is looking at. I am talking about an application of employment for a barber on which, according to Virginia law, you have to get a State license; and he has been arrested for breaking and entering, went before the judge in the court and is found to be the wrong person and is found innocent. However, you are

still going to disseminate that information to the city for licensing him as a barber.

Mr. HARRIS. As long as the information goes to the city in the complete form. In other words, if it does report that he was charged with breaking and entering and then gives the disposition, I am happy. I am terribly unhappy, however, if all it does is present the fact as to the charge. That is where in any view the matter is very, very crucial because that is where the potential for violation really exists. Given momentarily around the country the difficulty most agencies are having in obtaining the disposition data, as a very practical matter it is just tough to do.

Mr. EDWARDS. Thank you very much.

Mr. Klee?

Mr. KLEE. Thank you, Mr. Chairman.

This is to follow up your question concerning the use of arrest information with a verdict of innocent or even dismissal.

We heard the previous witness testify he considered the mere fact of arrest to be probative for mere issues of employment. The chairman posed the question of a verdict of innocent. If there is arrest and another disposition other than conviction, dismissal, something like that, do you feel that kind of information is relevant to employment?

Mr. HARRIS. Yes, I do. Criminal history is criminal history. If you are going to ask for the answer on the criminal history you should get the entire criminal history. I don't care who is asking for it or who is receiving it.

Mr. EDWARDS. Thank you very much, Mr. Harris. It is splendid testimony, and we are glad to have welcomed you here today. You have been very helpful.

Mr. HARRIS. Thank you for having us.

[The prepared statement of Mr. Harris follows:]

STATEMENT OF RICHARD N. HARRIS, CHAIRMAN OF THE NATIONAL CONFERENCE OF STATE CRIMINAL JUSTICE PLANNING ADMINISTRATORS AND DIRECTOR OF THE VIRGINIA DIVISION OF JUSTICE AND CRIME PREVENTION

Mr. Chairman, members of the Subcommittee, I appreciate your invitation to appear and testify on H.R. 8227 and related topics.

The National Conference of State Criminal Justice Planning Administrators represents the heads of the fifty-five (55) territorial and state criminal justice planning agencies (SPA's) operating under the provisions of the Crime Control Act of 1973. The SPA's have been allocated a substantial amount of federal money from the Law Enforcement Assistance Administration for the purposes of improving criminal data systems, enhancing the security of such systems, and protecting the privacy of the individuals whose records are being kept.

Both the National Conference and the SPA which I head are very concerned about the possibility of undue federal intrusion into this vital area of criminal justice. We feel that the operation of criminal justice information systems is essentially a state and local matter. We therefore feel that it is important that any legislation Congress enacts to ensure the security and privacy of criminal information give adequate weight to the concerns of the states and localities, which have the primary responsibility in the criminal justice field.

For this reason, we consider the concept of a Commission on Criminal Justice Information, as envisioned in Sections 301 through 306 of H.R. 8227, as the most important component of the bill. It is essential that any security and privacy legislation embody such a concept, and that the resulting Commission have regulatory authority. Our reasons for stressing this most important provision are the same as those expressed by Gary McAlvey, Chairman of Search Group, Inc. before this Subcommittee on July 17 of this year. To avoid repeating those reasons before you today, I simply refer you to Mr. McAlvey's testimony.

There are other reasons, besides maintaining state primacy, why legislation is needed in this field. One is to encourage some uniformity among the states. Some states have yet to act in this area at all; and there is a lack of uniformity among those which have.

Another reason is to assure a careful delineation of the role the FBI and other federal agencies will play in a national computerized criminal history system. As I mentioned, we are very concerned about heavy federal incursions into state and local prerogatives in this area, and carefully drawn legislation, such as this bill, will remove this problem, in our view. The language of the bill places in the hands of the Criminal Justice Information Commission the direct responsibility for dealing with this issue. That is an excellent approach.

While we support the concept of allowing the states maximum latitude in complying with security and privacy legislation, it is important that the legislation be comprehensive. We feel that this bill meets that test of comprehensiveness.

It is also important that legislation be forthcoming quickly. The States are preparing plans to implement Department of Justice regulations promulgated pursuant to Section 524(b) of the Crime Control Act of 1973. These regulations became effective on May 20, 1975. This planning process must be completed by December 16, 1975; and it would be helpful if any comprehensive national legislation were enacted before that process has been completed.

As indicated, we support H.R. 8227. However, we do have some suggestions that we feel would strengthen the bill and some of the suggestions come from our experiences in working with the new Department of Justice regulations. I speak now as an administrator whose agency is in the process of drafting Virginia's plan for compliance with those regulations. We feel that the regulations in many ways tend to strengthen what Virginia and other states are trying to do in creating effective, secure and accurate criminal justice information systems. To us, the thrust of the Justice Department regulations is that criminal history records are compiled in a step-by-step process in which certain information is recorded at each stage of a person's movement through the criminal justice system. That data dealing with the completion of formal transactions is termed criminal history record information; and it is vital if the next stage of the criminal justice process is to begin. There are parts of H.R. 8227 which we feel are contrary to this thrust; and I would like to point them out to you now:

In Section 102, Paragraph (10), we would like the term "Disposition" to include corrections and release data of a dispositional nature. The Justice Department regulations define the term this way and we concur in that definition.

Section 103(c) (1) should not exempt any automated system, since any automated systems can be searched to retrieve information by *some* identifier, even though "not indexed or accessible by name."

We concur with the amendment proposed by Search Group, Inc. to Section 201(b) which would permit the use of arrest records where no suspect has been identified, as under the requirements set out in Section 203(b).

Under Section 204 dealing with appointment and employment investigations, we would suggest that both sealed and unsealed criminal history records, as well as intelligence and investigative data, not be restricted to the appointment of judges and criminal justice executives. It should be available for state and federal cabinet officials and other executive appointments. We believe that all forms of information encompassed by the legislation should be available for employment screening by criminal justice agencies. Again this is consistent with the views expressed by Search Group, Inc.

Likewise, state and local governments should be able to use criminal history records and intelligence information for employment purposes, just as is the case for the federal government, under the provisions of the bill.

We read Section 207(a) (1) as requiring, for each time additional disposition data is added to a criminal history record in a central state repository, the notification of all criminal justice agencies which have ever previously requested the record. This would place an ever increasing burden on central repositories.

We propose a provision similar to that in the Justice Department regulations which would require the data user to inquire of the repository for the most up-to-date disposition data each time he wants to disseminate criminal history record information for criminal justice purposes. This, we feel, is a more reasonable method of insuring completeness and accuracy of the data before it is disseminated.

Section 207(a) (3) (A) asks more information than we feel is needed. All that is necessary here is to record who made the inquiry, what segment of information was provided, and the date of the inquiry.

The language of Section 207(a) (4) could pose an obstacle to normal agency operations. As pointed out in the amplifying instructions to the Justice Department regulations, dissemination means transmission of criminal history record information in individuals and agencies other than the criminal justice agency which maintains the information. The regulations do not impose controls on a system internally as long as data contained therein is not disseminated outside the agency. We feel that this is a much more reasonable approach than that presently proposed in Section 207(a) (4).

Section 208(a) (2) dealing with sealing and purging imposes the burden upon a state's central repository of determining that an individual has been free from the jurisdiction or supervision of criminal justice agencies in all other states. As it stands, that paragraph would appear to necessitate creation of some type of national repository which States could query before sealing or purging records; or it would require a State to make a State-by-State research to determine if an individual's records were eligible for sealing or purging.

We understand your concern about the retention of inactive files. However, we feel that other provisions of the bill provide for sufficient protection of individual records by a criminal justice agency without the necessity of the requirement contemplated in Section 208(a) (2), particularly considering the enormous effort required in order to comply.

Another problem in Section 208(a) is the requirement that both automated and manual systems purge or seal records promptly. This could be very costly in the case of a manual system, as pointed out by Search Group, Inc. We support their alternative proposal to deal with this problem.

I understand there is a possibility that Sections 210 and 211 dealing with intelligence and investigative information, may be deleted from H.R. 8227. We would urge the Subcommittee not to delete these sections. Further, we urge that the two sections be enacted as presently proposed in the bill. It is important to realize that any well managed police intelligence operation would be able to comply with these sections with no difficulty, and we feel the bill's requirements in these two areas are entirely reasonable and necessary.

If the Subcommittee decides to consider these two areas in separate legislation, we urge you to act quickly; and we caution you that these sections ought not to be confused with the foreign intelligence matters which have recently made so much news. They are, rather, integral and legitimate parts of the day-to-day operation of many criminal justice agencies in this country.

Section 304(a) (5) seems to be unnecessary, since the proposed bill will cover virtually every criminal justice agency anyway; and all that would be accomplished is that yet another list, this one containing all criminal justice agencies, would be created.

We support the provisions of Section 307(c). However, we feel that simply requiring the submission of a certificate of compliance with appropriate rules and regulations is not sufficient and that, in addition, there should be a requirement that annual audits be conducted at the state level of a representative sample of state and local criminal justice agencies on a random basis to verify adherence to the regulations, very much as is presently required in the Justice Department regulations.

Finally, we support Section 311 establishing the precedence of state laws. In conclusion, let me reiterate what I emphasized in the beginning that the operation of criminal justice information systems is essentially a state and local matter and that it is important that legislation in the security and privacy field be designed with that in mind. In my view, subject to the suggestions I have made, H.R. 8227 emphasizes that important fact.

[Whereupon, at 11:50 a.m. the hearing was adjourned.]

