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EMPLOYER ACCESS TO CRIMINAL BACKGROUND CHECKS: THE NEED FOR EFFICIENCY AND ACCURACY

HEARING

BEFORE THE

SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

OF THE

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EMPLOYER ACCESS TO CRIMINAL BACKGROUND CHECKS: THE NEED FOR EFFICIENCY AND ACCURACY

THURSDAY, APRIL 26, 2007

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CRIME, TERRORISM,
AND HOMELAND SECURITY
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 10:02 a.m., in Room 2237, Rayburn House Office Building, the Honorable Robert C. "Bobby" Scott (Chairman of the Subcommittee) presiding.

Present: Representatives Scott, Delahunt, Johnson, Weiner, Jackson Lee, Baldwin, Forbes, Gohmert, Coble, Chabot, and Lungren.

Staff present: Bobby Vassar, Chief Counsel; Ameer Gopalani, Majority Counsel; Gregory Barnes, Majority Counsel; Caroline Lynch, Minority Counsel; and Veronica L. Eligan, Majority Professional Staff Assistant.

Mr. SCOTT. The Subcommittee will come to order.

I am pleased to welcome you today to this hearing before the Subcommittee on Crime, Terrorism, and Homeland Security on "Employer Access to Criminal Background Checks: The Need for Efficiency and Accuracy."

This hearing will explore the balance between the growing desire of private industry to directly access criminal history and background check information and the need to ensure the reliability, accuracy and relevance of such background checks.

There are about 1,200 State statutes nationwide permitting different groups and businesses to access the FBI data through State governments.

These statutes generally require background checks in certain areas that the State has sought to regulate, such as persons involved in civil service, day care, school and nursing home workers, taxi drivers, private security guards and members of regulated professions.

Some States allow employers access to the information while others are more protective of individual privacy. The result is a mismatch of statutes with inconsistent laws, with very little to show in the way of standard, rationale or scheme.

Moreover, there are complaints that State processes are inefficient and require an inordinately long waiting period for informa-

tion that may be critical to safety, liability as well as filling staff positions critical to effective operation of a business or an organization.

And about 10 States have no process for records checks for some industries and organizations, even where checks are required by law or otherwise deemed necessary.

In recent years, Congress has passed laws allowing some employers, such as nursing homes and banking institutions, to directly initiate background checks with the FBI, bypassing State operations.

Other employers try to access the information through other means, such as going through private security firms.

With an ever-greater demand for this information, it is important that there be a fair and consistent standard to balance employer needs with the important goal of ensuring that qualified employees are not barred from employment.

In 2004, the Subcommittee considered and Congress passed the Intelligence Reform and Terrorism Prevention Act of 2004, which included a provision to allow private security officer firms to submit FBI background check requests through the States.

The law also included a provision requiring the Attorney General to make recommendations to Congress for establishing a standardized and more efficient process for background check requests generally, and giving the Attorney General's authority to add more categories of organizations who are allowed to receive background check information.

The Attorney General issued a report on these matters in June 2006 wherein he recommended that we move toward granting virtually all private employers and third-party screening firms, which employers often use to investigate job applicant's personal and financial histories, access to the FBI database to obtain criminal history information.

Considering that some States may not prioritize the process of seeking an FBI record check or may not have a background check process at all, we need to develop ways for authorized employers to be able to have background checks completed.

However, I am concerned about authorizing all employers access to criminal history information at the Federal level, given that not all States authorize such general access to State or FBI record information and, frankly, for good reason.

In addition to the Attorney General's report suggesting that all employers eventually be authorized to receive criminal history information, the FBI has issued a proposed regulation to start including non-serious offenses such as juvenile and misdemeanor arrests and convictions, on criminal history reports.

While specific juvenile and misdemeanor information may be appropriate in certain cases, it should not be made available generally.

One reason for my concern on the indiscriminate broadening of the type of information and the persons who can get it is because of the disproportionately negative impact that such information may have on the employment prospects for minorities.

Studies have shown that racial minorities are more likely than similarly situated Whites to be arrested, prosecuted, convicted and sentenced to prison, and for longer terms.

Therefore, they are more likely to have arrest records and conviction records than similarly situated Whites. Indeed, African-Americans comprised 39 percent of those who have served prison time. Hispanics comprised 18 percent.

Thus, employer policies that reject job applicants and employees with criminal records, while neutral on their face, have a racially disparate impact, unless there is a policy which establishes a clear nexus between the employer's desire to have criminal record information and the needs of the job, employers run a risk of violating Title VII of the Civil Rights Act of 1964.

Another concern about broadening access and the information made available is the fact that the FBI database is fraught with inaccuracies. According to the Attorney General's report, the FBI is "still missing final disposition information for approximately 50 percent of its records."

This means that many records fail to include information on dismissal of charges and expungements. With such inaccuracies, raw criminal record history information viewed by untrained eyes could do more harm than good and would unfairly deprive an employee or applicant of a good work opportunity and the employer of a good worker as well.

Because of my concerns with the FBI's proposed regulation to include non-serious offense information which would have an extremely prejudicial impact on the employment prospects of people with minor criminal histories, many of whom were never even convicted of a crime, I want to join the gentlelady from California, Ms. Waters, in a letter to the attorney—I join the gentlelady from California, Ms. Waters in a letter to the Attorney General requesting that he delay the issuance of the proposed regulations.

This will give us time to hear from our witnesses regarding the issue and to structure legislation aimed at allowing authorized employers sufficient access to appropriate criminal history and background information while not unduly prejudicing employment applicants.

So I look forward to the witnesses' testimony today on how to improve the accuracy and efficiency in accessing criminal records information by authorized entities without unduly prejudicing and penalizing job applicants, including ex-offenders.

It is my privilege now to recognize my colleague from Virginia, the Ranking Member of the Subcommittee, Mr. Forbes, for his opening statement.

Mr. FORBES. Thank you, Mr. Chairman, for holding this important hearing on employer access to the FBI criminal history background check database.

This is, as you have mentioned, a complex issue that requires balancing two competing concerns, an employer's need to receive accurate criminal history records of potential employees, and a prospective employee's right to privacy.

Currently, the FBI maintains criminal history records on more than 48 million individuals. The FBI collects these records from

Federal and State law enforcement and does not verify the accuracy of the reports.

Each State submits these records, including arrest, charging, disposition and sentencing information, to the FBI database.

Traditionally, access to criminal history records has been limited to criminal justice agencies. In response to business demand for more thorough screening of prospective employers, access to FBI criminal history records was expanded to include non-criminal history checks.

Federal statutes currently authorize background checks by the Federal Government for specific industries to promote public safety and national security.

Additionally, Federal law grants States access to FBI criminal history records for background check purposes.

Requests for non-criminal history background checks are growing rapidly. In fiscal year 2005, the FBI processed 9.8 million non-criminal background checks, compared with only 6.8 million checks in fiscal year 2001.

According to statistics prepared for today's hearing by SEARCH, in States like Florida and California, non-criminal background checks have exceeded criminal background checks.

The types of background checks vary depending on the needs of each State. Each State's request for an FBI-maintained criminal history record must be submitted through its criminal history record repository.

This allows the State repository to compare its records with FBI-maintained records to ensure completeness and accuracy before determining whether an applicant is disqualified from employment.

On average, 70 percent to 80 percent of State records contained the final disposition while only 50 percent of the arrest records in the FBI database contained the final disposition.

Most of the private sector does not have access to FBI-maintained records. Private employers collect background information from sources other than the FBI and often use a private firm to screen a prospective employee.

In recent years, there has been a growing interest from the private sector for access to FBI-maintained records because they are housed in a central database and a fingerprint base.

Expanding private-sector access to these record raises several concerns. For instance, should the private sector have direct access to FBI-maintained records, or should requests be processed through existing State repositories?

How should the information be disseminated to the private sector, particularly since half of the FBI records do not contain dispositions?

Should every part of a criminal history record be disseminated or only disqualifying information? Who determines what constitutes disqualifying information?

I am looking forward to hearing the testimony from each of you today.

And if I could just take a few more seconds, I want to just point out the logistics that we have in these hearings, by necessity. As you can see, we have six witnesses. We have a limited amount of

time. Even the Chairman is very gracious in allowing us sufficient time to ask questions.

But I want to encourage you, if you have additional evidence that we don't get to, that we don't ask, get it to us so that we can submit it in the records.

And even for people sitting out there listening, if you have additional information you think is important on this subject, the Chairman is very lenient in allowing us to put information in that we think is factually relevant.

And we encourage you to get that to us so that we can get a full record to make the right decisions.

Mr. Chairman, I yield back.

Mr. SCOTT. Mr. Forbes, we are going to scrutinize everything——

[Laughter.]

We have a distinguished panel of witnesses here today to help us consider the important issues that are currently before us.

Our first witness will be Mr. Frank Campbell, Deputy Assistant Attorney General in the Office of Legal Policy at the United States Department of Justice. He has served as both a senior counsel and Deputy Assistant Attorney General in the Office of Legal Policy since 1998. He was responsible for developing the June 2006 Attorney General's report on criminal history background checks.

Before joining the Office of Legal Policy, he served for 4 years in the FBI general counsel's office, and practiced law for 14 years in Washington, D.C., emphasizing white collar criminal defense and civil litigation. He is a graduate of Lafayette College and has a law degree from George Washington University Law School.

Our next witness will be Maurice Emsellem, policy director at the National Employment Law Project, a non-profit research and advocacy organization that works in partnership with local communities to deliver on our Nation's promise of economic opportunity. He is a nationally recognized expert in economic security programs, including the unemployment insurance system and employment rights of people with criminal records.

He has published in academic journals, including the Stanford Law & Policy Review and the University of Michigan Journal of Law Reform, and has testified before Congress and State legislatures. He has a B.A. from the University of Michigan and a J.D. from the Northeastern University School of Law.

Next will be Sharon Dietrich, managing attorney at Community Legal Services in Philadelphi (CLS). She has been an attorney with the employment law unit of the Community Legal Services since 1987. She became CLS's managing attorney for public benefits and employment in 1997. She has represented many individual ex-offenders who have been denied employment because of their criminal record. On May 1, 2001 she received an award from the Pennsylvania Prison Society in recognition of her work on behalf of people with criminal records.

Next will be Ronald Hawley, executive director of SEARCH, a consortium of governor-appointed justice practitioners representing the 50 States and territories. Before joining SEARCH, Mr. Hawley served most recently as the governor-appointed CIO of the State of North Carolina, where he managed operations in the Office of Information Technology Services, including the development of state-

wide policies and procedures and the enterprise architecture implemented by the State.

Mr. Hawley began his career with the State Bureau of Investigation of the North Carolina Department of Justice, where he rose to the position of assistant director of the division of criminal information. He has a graduate degree from the University of Maine, an undergraduate degree from Campbell College in North Carolina, where he graduated with honors.

Next is Floyd Clarke, vice president of corporate compliance at Mac Andrews & Forbes Holding Incorporated and a member of the board of managers of Allied Barton Security Services. Previously, he spent 30 years working for the FBI, ending in January 1994 as acting director of the bureau. He is a graduate of George Washington University.

And our final witness will be Robert Davis, international vice president and national legislative director of the Transportation Communications International Union. Prior to his current position, he served as general chairman of the TCU Systems Board of Adjustment number 155 in Chicago from 1991 to 1999. He also served as general secretary treasurer of the Systems Board of Adjustment number 155 from 1983 to 1991.

Now, each of the witnesses' written statements will be made part of the record in its entirety.

I would ask each witness to summarize his or her testimony in 5 minutes or less. And to help stay within the time, we have a little timing device which will start off green, will go to yellow when about 1 minute is left, and then go to red, when we would ask you to wrap up.

So, Mr. Campbell, will you begin?

TESTIMONY OF FRANK A.S. CAMPBELL, DEPUTY ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL POLICY, UNITED STATES DEPARTMENT OF JUSTICE, WASHINGTON, DC

Mr. CAMPBELL. Chairman Scott, Ranking Member Forbes and Members of the Subcommittee, my name is Frank Campbell, and I serve in the Office of Legal Policy of the United States Department of Justice. Thank you for the invitation to address you on issues relating to criminal history background checks.

As you know, in June 2006, the Department of Justice sent to Congress the Attorney General's report on criminal history background checks. The report responded to a provision in the Intelligence Reform and Terrorism Prevention Act of 2004.

The reporting requirement was based on congressional interest in developing a more uniform and rational system for assessing and using FBI criminal history records for employment suitability and risk assessment purposes.

There appeared to be frustration with the existing approach of enacting separate State or Federal statutes authorizing access to FBI data for only particular employers or industries.

The resulting patchwork of statutes allows access inconsistently across States and industries. For example, while the banking and nursing home industries have access authority, the chemical industry does not.

And while private security companies can get FBI background checks in some States, in other States they cannot.

Employers with no access authority are left with what they frequently consider less-than-adequate information for efficient and accurate criminal history checks.

We therefore agree that Congress should revisit the authorities under which checks can be made of FBI criminal history information for non-criminal justice purposes.

In preparing the report's recommendations, we sought, through a Federal Register notice, broad input from a variety of stakeholders with an interest in this issue.

The information and points of view expressed in the many comments we received made us realize that improving criminal history background checks involved several different and sometimes competing interests.

Broadly stated, they include the interest of employers in assessing the risk of hiring an individual with a criminal history, finding efficient ways to do accurate background checks, protecting the privacy rights of individuals subject to a check, ensuring that State and Federal equal employment opportunity laws are followed by employers so that they do not unfairly exclude otherwise qualified applicants with criminal records from employment opportunities, and the broad social interest in facilitating the reentry and continued employment of ex-offenders.

Employers want to make informed hiring decisions. Many employers therefore ask applicants if they have a criminal history. When they ask the questions, employers often seek information on whether the response is truthful and complete.

Employers without access to FBI records seek criminal history through name base checks of other public and commercial information sources. However, they frequently find those sources to be inefficient, incomplete or inaccurate.

FBI criminal records would add significant value to such checks by providing a nationwide database of records based on positive identification of fingerprints.

FBI fingerprint checks can help promote privacy by making it less likely that another person's record would be wrongly associated with an applicant. They can also enhance security by making it less likely that a relevant criminal record will be missed.

The report therefore recommends that when employers can lawfully ask whether an applicant has a criminal history, FBI records should be one of the sources available when they do a criminal background check.

Such access, however, should be subject to a number of rules and conditions. The rules should include privacy protections for individuals to help ensure that the information is accurate, secure and used only for authorized purposes.

The rules should require record screening in accordance with Federal and State laws that limit access to criminal records for employment purposes.

In addition, the rules should require an employer's acknowledgment of legal obligations under Federal and State equal employment opportunity laws.

To avoid government agencies making suitability decisions for private employers, the report recommends authorizing dissemination of the records to the employer or to a consumer reporting agency acting on the employer's behalf.

The report also suggests that Congress consider providing employers guidance on suitability criteria to be used in criminal record screening.

To take advantage of their more complete records, the access should be through States that agree to participate and that meet minimum standards for processing these checks.

The Attorney General would establish a means of doing the checks in States that do not opt into the program.

The report emphasized that the Attorney General must be able to prioritize private-sector checks to enable the scaling of the system to meet the demand in a way that does not interfere with the use of the system for criminal justice and national security purposes.

Finally, recognizing the importance of record completeness for this use as well as the many other important uses made of this information, the report also calls for a renewed Federal effort to improve the accuracy, completeness and integration of the National Criminal History Records system.

The report notes that in recent years the National Criminal History Improvement Program has been funded at smaller and smaller fractions of the amount requested in the president's budget.

To achieve uniformity and improvements, Federal funds should be targeted at reaching national standards relating to prompt disposition reporting and record completeness, including information about declinations to prosecute and expungement and sealing orders.

Private-sector criminal history checks will continue regardless of whether FBI information is made available for that purpose.

The report concludes, however, that by establishing rules of access that account for the competing interests involved, allowing dissemination of FBI information to private employers can not only provide more accurate and reliable information for use in suitability screening, it can also enhance individual protections for privacy and fair use of criminal records in employment decisions generally.

Thank you for the opportunity to appear at today's hearing. We look forward to assisting you on any legislation the Subcommittee may wish to develop on this subject. And I would be happy to answer your questions.

[The prepared statement of Mr. Campbell follows:]

PREPARED STATEMENT OF FRANK A.S. CAMPBELL

Statement for the Record

Frank A. S. Campbell
Senior Counsel, Office of Legal Policy
United States Department of Justice

Before the

United States House of Representatives
Committee on the Judiciary
Subcommittee on Crime, Terrorism, and Homeland Security

Hearing on Employer Access to Criminal Background Checks:
The Need for Efficiency and Accuracy

April 26, 2007

Chairman Scott, Ranking Member Forbes, and Members of the Subcommittee. My name is Frank Campbell and I serve as Senior Counsel in the Office of Legal Policy in the United States Department of Justice. I appreciate the opportunity to address you on the issues relating to criminal history background checks. As you know, in June 2006, the Department of Justice sent to Congress *The Attorney General's Report on Criminal History Background Checks*. The report responded to a provision in the *Intelligence Reform and Terrorism Prevention Act of 2004*. We understood the reporting requirement to be based on congressional interest in developing a more uniform and rational system for accessing and using FBI criminal history records for employment suitability and risk assessment purposes. There appeared to be frustration, both within Congress and among private users of criminal history information, with the existing approach of enacting separate state or federal statutes authorizing access to FBI data for only particular employers or industries. The resulting inconsistent access authority often affects critical infrastructure industries – for example, while the banking and nursing home industries have access authority, the chemical industry does not. This approach frequently leaves those without access authority with what they consider less than adequate information for efficient and accurate criminal history checks.

In preparing the report's recommendations, the Department was required to consult with the state criminal record repositories, the National Crime Prevention and Privacy Compact Council, and representatives from the private sector and labor organizations. In addition to these entities, we sought broad input from a variety of stakeholders with an interest in this issue, and received a great deal of information and diverse points of view that were extremely useful in preparing the report.

The Attorney General's Report recognized that improving criminal history background checks involves several different, and sometimes competing, interests. They include:

- employers' interest in being aware of the criminal history of a job applicant in order to assess whether they can bear the risk of hiring the individual;

- the need to find efficient ways to deliver to users reliable and accurate criminal history information;
- protecting the privacy rights of individuals subject to a criminal background check;
- ensuring that users of the information follow state and federal equal employment opportunity laws and do not to unfairly exclude persons with criminal records from employment opportunities when they are otherwise qualified for a position; and
- the broad social interest in facilitating the reentry and continued employment of ex-offenders.

The Report attempted to account for this range of interests in recommending ways to provide broader private sector access to FBI criminal history information. We agree that there is a need to revisit the authorities under which checks of this information can be made for non-criminal justice purposes. Many employers can and do seek criminal history information from other public and commercial sources, but frequently find those sources to be inefficient, incomplete, or inaccurate. FBI criminal records would add significant value to such checks by providing a nationwide database of records based on the positive identification of fingerprints. The framework for broader access authority suggested in the report seeks to avoid the need to enact separate statutes that create inconsistent levels and rules for access to these records. The basic question we considered is: How can this be done in a way that allows the responsible use of this information to protect public safety while at the same time protecting privacy and minimizing the negative impact criminal screening may have on reasonable efforts to help ex-offenders reenter and stay employed in the work force?

We answered that question by recommending that access be authorized for all employers, but that the access be subject to a number of rules and conditions. We emphasized that private sector access to FBI criminal records must be prioritized by the Attorney General to enable the scaling of the system to meet the demand in a way that does not interfere with the use of the system for criminal justice and national security purposes. To avoid government agencies having to make suitability decisions for private employment, the report recommends authorizing dissemination of the records to the employer or a consumer reporting agency acting on the employer's behalf. The access would be under rules protecting the privacy interests of individuals in ensuring that the information is accurate, secure, and used only for authorized purposes. The rules also would require record screening to account for federal and state laws that limit access to criminal records for private employment purposes. In addition, the rules would require an employer's acknowledgment of legal obligations under federal and state equal employment opportunity laws. Consideration also should be given to providing employers guidance on suitability criteria to be used in criminal records screening. When possible, the access should be through states that agree to participate and that meet minimum standards for processing these checks, including a response time of no more

than three business days. The Attorney General would establish a means of doing the checks in states that do not opt into the program.

The report's recommendations are forward-looking. Given the competing law enforcement and national security demands on the FBI's system and resources, all-employer access under the proposed rules would likely take many years to implement. However, the report recommends that the Attorney General should be authorized to provide access to priority employers as FBI system capacity and other necessary resources allow.

Noting the importance of record completeness for this use as well as the myriad of other uses made of the FBI criminal history record system, the report also calls for a "renewed federal effort to improve the accuracy, completeness, and integration of the national criminal history records system." The report notes that in recent years the National Criminal History Improvement Program (NCHIP) has been funded at smaller and smaller fractions of the amount requested in the President's Budget. At the same time, the purposes for which the money is to be used have increased, such as participation by the states in the National Sex Offender Registry and the creation of files on sharing information, including civil protection orders on domestic violence. The report also recommends that "federal funds should be targeted at reaching national standards established by the Attorney General relating to prompt disposition reporting and record completeness, including declinations to prosecute and expungement and sealing orders, so that there is uniformity in improvements by repositories nationwide."

Several key points underlie the Report's recommendations:

- Conducting criminal history background checks is a reasonable step that employers and volunteer organizations take to protect their customers, their employees, their assets, and the public. Employers want to make informed hiring decisions. While not all criminal records are relevant to a person's qualifications for a job, some records clearly are relevant to a placement decision, and there is no way of knowing whether a relevant record exists unless an employer screens applicants for criminal history.

- As a result, private employers can and do ask applicants about their criminal history. In some states, how that question is asked is subject to restrictions, but in all states some form of criminal background screening is permitted for employment purposes. When they ask the criminal background question, employers seek out information on whether an applicant's response is truthful and complete.

- Employers who do not have access to FBI criminal history information go to other sources of this public record information, including courthouse searches, available state criminal record repository information, and commercial data providers and background screening companies. According to a recent SEARCH survey cited in the report, 25 of 34 states responding to the survey now make both

name-only and fingerprint searches of their state criminal history record information available to any member of the public.

- Private sector criminal history checks will continue regardless of whether FBI information is made available for that purpose. Making FBI criminal history information available for private sector background screening will not necessarily lead to more criminal history checks than already occur. FBI fingerprint checks are more expensive and less convenient than name checks. The private sector is in the best position to identify the unregulated jobs that require this level of criminal history screening.

- FBI criminal history information, while not complete, is one of the best sources available – it covers all 50 states and, even when missing final disposition information, it can provide leads to complete and up-to-date information. FBI statistics show an annual hit rate for its civil fingerprint submissions of 11.62 percent.

- To enhance data quality, state repositories should be checked whenever possible, so that the states' more complete disposition records can be part of the response to authorized users. According to the Bureau of Justice Statistics, approximately 70 to 80 percent of state-held arrest records have final dispositions, as compared to the approximately 45 to 50 percent of FBI-maintained arrest records with final dispositions.

- Use of FBI criminal history information can enhance privacy through positive identification. Fingerprint checks reduce the risk of the false positives and false negatives produced by name checks. With FBI fingerprint checks, it is less likely that another person's record would be wrongly associated with an applicant. It is also less likely that an applicant's criminal record will be missed.

- The current access scheme has created a patchwork of statutes, including over 1,200 state statutes under Public Law 92-544. This patchwork allows access to FBI criminal history information inconsistently across states, inconsistently across industries, and even inconsistently within industries.

- Since all employers are able to access criminal history information through other sources, such as the courts, state repositories, and commercial vendors, it would be reasonable to provide all employers access to FBI records for criminal background checks without the need for separate statutory enactments, <u>if</u> two important conditions are met: <u>first</u>, that private employers satisfy requirements for privacy protection and fair use of the information, and <u>second</u>, that the FBI have the necessary resources and infrastructure to service the increased demand for civil fingerprint checks without compromising, delaying, or otherwise impeding important criminal justice and national security uses of the information system.

- If expanded access is allowed, the FBI and state repositories should be authorized to disseminate the records directly to employers. The general limitation on disseminating FBI criminal history information only to governmental agencies that do the suitability determinations has meant that many types of authorized checks do not get done. State repositories and government agencies do not have the resources, nor, in most cases, do they see it as part of their mission, to perform suitability reviews for private employment or volunteer placement.

- The role of the state and federal record repositories should be limited to that of record providers, leaving the suitability determinations to the users or their agents. The access process must avoid federal and state agencies acting as clearinghouses that make employment or volunteer suitability determinations for unregulated private employers or entities. Repositories should be allowed to continue to focus on their mission, with the support of user fees, of maintaining and updating criminal justice information and efficiently delivering that information to authorized users.

- Under certain conditions, the existing private sector infrastructure for background screening, including consumer reporting agencies subject to the Fair Credit Reporting Act (FCRA), should be allowed to access these records on behalf of enrolled employers. Consumer reporting agencies also could assist in finding final dispositions of arrest records since the FCRA requires them to ensure that the information they report is complete and up to date. Consumer reporting agencies allowed such access, however, should meet minimum standards for data security and training in applicable consumer reporting laws.

- Detailed privacy and fair information practice requirements should be imposed as part of expanded access authority, including protections similar to those in the FCRA. These requirements include user enrollment, use limitations, Privacy Act compliant consent and notice, rights of review and challenge, a newly streamlined and automated appeal process, limits on redissemination, information security procedures, compliance audits, and statutory rules on the use, retention, and destruction of fingerprint submissions. The Report also recommends giving an individual the option to review his or her record before applying for a job and before it is provided to a private employer. The latter recommendation is something that goes beyond current FCRA requirements and helps to address the fact that many FBI-maintained arrest records are missing final dispositions.

- Most FBI civil fingerprint submissions typically are collected by law enforcement agencies, such as police departments and jail facilities. These locations are not the appropriate venues for fingerprint submissions for private sector criminal history screening. Fingerprints for these checks should be collected through an unobtrusive electronic means, such as flat prints, in non-law enforcement settings.

- When providing FBI criminal history information to private employers, we should not undermine the reentry policies that state and federal consumer reporting laws

seek to promote by limiting the dissemination of certain kinds of criminal record information by consumer reporting agencies. Expanded private sector access to FBI criminal history information should therefore include record screening in accordance with consumer reporting laws. This screening should be done to respect the limits those laws place on the dissemination of certain criminal histories for use in employment decisions. Congress and the state legislatures may change those restrictions from time to time, depending on the balance they wish to strike between promoting privacy and reentry and allowing the free flow of public record information to users making risk assessments to promote public safety. Our recommendations in this area include suggestions to consider changes in the FCRA to provide some greater uniformity and predictability in access to criminal history information among the states.

- Finally, suitability criteria can play an important role in the screening process by helping guide a determination by an employer of the relevance of criminal history to the duties or responsibilities of a position. For that reason, the report recommends that Congress consider whether guidance should be provided to employers on appropriate time limits that should be observed when specifying disqualifying offenses and on allowing an individual an opportunity to seek a waiver from the disqualification. Federal and state equal employment opportunity laws and regulations bear on the use of criminal records in deciding an individual's job suitability. Therefore, as required by the FCRA, private employers allowed expanded access to FBI criminal history information should certify that information under this expanded access authority will not be used in violation of those laws.

The Report concludes that if the information is handled properly, allowing dissemination of FBI criminal history records to private employers can not only provide more accurate and reliable information for use in suitability screening, but also enhance individual protections for privacy and fair use of the information. I hope today's hearing helps to shed further light on a fairly complex set of issues.

Thank you for the opportunity to appear before this Subcommittee today. I would be happy to answer your questions.

Mr. SCOTT. Thank you, Mr. Campbell.

And before Mr. Emsellem starts, I want to recognize the gentleman from Texas, Mr. Gohmert, the gentleman from North Carolina, Mr. Coble, and the gentleman from California, Mr. Lungren, who are with us, and they have statements. We will accept them for the record when they desire.

Mr. Emsellem?

TESTIMONY OF MAURICE EMSELLEM, NATIONAL EMPLOYMENT LAW PROJECT, OAKLAND, CA

Mr. EMSELLEM. Chairman Scott, Members of the Committee, thank you for this opportunity to testify on the issue of criminal background checks for employment, which affects about one in five adults in the United States who have a record that will show up on a routine background check.

I will focus today on two issues that we believe are critical to workers, employers and the integrity of criminal background checks authorized by Federal law.

First, there is a serious need for standards in Federal laws to better protect those workers who have old or irrelevant criminal records that routinely deny them all sorts of jobs.

The many Federal laws now on the books have often evolved in isolation, producing some laws with helpful standards and many without any.

Today we will highlight the best of the Federal standards that now exist and talk about how to adopt them more broadly.

Second, I will focus on the major problems with the FBI's rap sheets, now used to screen more than 5 million workers a year for employment and licensing purposes.

These concerns take on special significance, given the Attorney General's proposal to vastly expand access to the FBI's criminal records to private employers and to private screening firms.

We believe the system of FBI background checks produced for employment purposes specifically is now broken. Now is the time to fix the rap sheets, in our view, before expanding them.

With regard to the question of standards, you will hear later about how the railroad workers and others have been treated arbitrarily as a result of background checks produced by private screening firms.

Unfortunately, the situation is not much better in the case of those criminal background checks authorized by many Federal laws.

Take the case of the Department of Homeland Security, which screens workers in Federal buildings to identify potential national security risks.

In a recent publicized case from Pittsburgh, DHS decided that two women employed for decades in the Federal building's cafeteria were, "unsuitable for employment," one based on a 10-year-old shoplifting offense and the other for no offense at all, it turned out.

As a result, the two women were literally escorted from the building and docked their pay. Their congressman, Mike Doyle, personally intervened to have the workers reinstated after they and his staff were denied information by DHS on their standards in the appeal process.

How does this kind of arbitrary and unfair treatment happen? The problem is that the Federal laws that require background checks or authorize access to the FBI's criminal records fail to set any meaningful limits or guidelines on the background check process.

These include many of the laws most recently passed by Congress, including the laws regulating private security officers, school employees and nursing home workers.

For example, under each of these recent laws, employers are authorized to receive information on any felony conviction in the FBI system, no matter the age or seriousness of the offense, in addition to most misdemeanors.

However, we know from major studies that 40 percent of employers won't hire someone once they know that that person has a record.

The studies also say that anyone who hasn't committed a crime in 5 years, in more than 5 years, is statistically no more likely to commit another offense compared to someone who has never had any involvement in the criminal justice system.

So once the cat is out of the bag as allowed under current law, there is a good chance the person will never be hired for the job, even if they have a solid work history and they have turned their lives around.

What is the alternative, then? We believe all Federal laws should follow the lead of the terrorism screening laws that now apply to the Nation's port workers and truck drivers who haul hazardous material. Almost 3 million workers right now who are screened by TSA.

These laws and the TSA regulations impose a 7-year age limit on all disqualifying felony convictions, and they limit the disqualifications to selected felonies, not including drug possession, welfare fraud, bad check writing, for example.

Equally important, these transportation laws also include a "waiver procedure" that allows most workers, except those convicted of especially serious security crimes, to prove to TSA that they have been rehabilitated and that they are not a security risk, even if they have a disqualifying felony record.

We believe this framework can be successfully incorporated into most Federal background check laws.

Second, what is wrong with providing FBI rap sheets to more employers and to private screening firms as proposed by the A.G.? For starters, when you have a chance, take a look at the rap sheets that we have included.

The first rap sheet that we have included in the appendix to our testimony.

You will notice right away that unless you are an experienced law enforcement official, they are often difficult to interpret because they include most every entry reported by the States, including every arrest and conviction, usually without any editing to help evaluate the actual number of convictions or the seriousness of the offense.

So the first concern is that the FBI rap sheets were never designed to be read by non-law enforcement professionals, which means there is a huge potential for error and abuse by employers.

In addition, according to the A.G.'s report, 50 percent of the records in the system are incomplete, mostly because the States failed to report the outcome of many arrests to the FBI, despite Federal regulations that give them 120 days to do so.

So the FBI rap sheets routinely report arrests even if there has been no conviction, which ends up costing many workers their jobs or a chance at employment.

Where there is a will, there is a way, however, to deal with this problem. With gun checks, the FBI has a policy of tracking down missing dispositions. According to the A.G.'s report, they track down 65 percent of missing dispositions on arrest within 3 days.

While it is not cheap to take the time necessary to clean up the record before it is released to employers, until the States are better at reporting the information right away, we believe that is what is now required of employment checks as well.

Finally, to make matters worse, the FBI recently proposed a regulation to start reporting non-serious offenses on the FBI's rap sheets produced for employment purposes.

That means that any offense that involved fingerprinting, now including many juvenile arrests in some States and minor crimes like vagrancy and public drunkenness, will also appear on the FBI's rap sheets for employment purposes.

We have many serious concerns with this policy, but suffice it to say there is no compelling justification, and none was offered in the regulations, to make this information available to employers, given the overwhelming prejudicial impact on workers.

As Congresswoman Waters and Chairman Scott stated in their letter to the Attorney General, this policy should not be adopted until its impact has been reviewed more closely by Congress.

The FBI's proposed regulation is an important reminder that the Federal system of criminal background checks that has evolved has been driven by the needs of the criminal justice system, not by what is necessary and reasonable to screen workers for employment.

Mr. SCOTT. Could you try to wrap up a little bit?

Mr. EMSELLEM. We hope this hearing is the first step to help create a more fair system that better balances these concerns. Thank you.

[The prepared statement of Mr. Emsellem follows:]

PREPARED STATEMENT OF MAURICE EMSELLEM

Testimony of Maurice Emsellem Before the U.S. Congress,
House of Representatives, Judiciary Committee,
Subcommittee on Crime, Terrorism and Homeland Security
April 26, 2007

Chairman Scott and members of the Committee, thank you for this opportunity to testify on the subject of the growing reliance on criminal background checks on the job, which affects about one in five adults in the United States who have a criminal record that will show up on a routine criminal background check.

My name is Maurice Emsellem, and I am the Policy Director for the National Employment Law Project (NELP), a non-profit research and advocacy organization that specializes in the employment rights of people with criminal records. NELP's Second Chance Labor Project promotes a more fair and effective system of employment screening for criminal records. The Project seeks to protect public safety and security while supporting the rehabilitative value of work and the basic employment rights of all workers, including those with a criminal record.

At this critical juncture in the evolution of criminal background checks for employment, it is especially important that Congress properly evaluate the impact and effectiveness of current federal policy. Before considering proposals by the Attorney General to further expand criminal background checks and access to the FBI's criminal records by more employers and the growing industry of private screening firms, it is also necessary to scrutinize the problem of incomplete FBI records and other areas of concern that seriously prejudice large numbers of workers, especially people of color.

The good news is that there are also new model policies in federal, state and local laws that can significantly reduce unnecessary barriers to employment of people with criminal records. If incorporated more broadly into federal law and policy, as described below, these innovative reforms can go a long way to create a more fair and effective process of criminal background checks that serves the interests of workers, employers and the community.

I. The Scope & Impact of Criminal Background Checks for Employment

Before evaluating the federal criminal background check laws and policies, it helps to appreciate the vast expansion of criminal background checks of today's workers driven by concerns for national security and public safety and the extent to which this new reality impacts everyday workers and their families.

In 2006, the FBI performed more fingerprint-based background checks for civil purposes that for criminal investigations. In the past ten years, the number of civil requests for criminal records has more than doubled, exceeding 12.5 million in 2006. In 2004, nearly 5 million of the FBI's criminal record requests were conducted specifically for employment and licensing purposes.[1]

[1] Steve Fisher, FBI, Criminal Justice Information Services Division, Office of Multimedia, Response to Information Request from Maurice Emsellem, National Employment Law Project (dated July 22, 2005).

State criminal background checks for employment and licensing purposes have also expanded as a result of the many new laws mandating screening of workers employed in a broad range of occupations and industries. For example, in California alone, about 1.5 million background checks are conducted by the state's criminal record repository pursuant to state laws, which accounts for roughly one in ten adult Californians employed in hundreds of industries. In addition, background checks conducted by private screening firms have increased at a record rate, with 80% of large employers in the U.S. now screening their workers for criminal records (an increase of 29% since 1996).[2]

What then do we know about those workers and communities who are most likely to show a criminal record as a result of the vast prevalence of background checks for employment?

- An estimated one in five adults in the United States have a criminal record on file with the states.[3] Thus, there are literally millions of U.S. workers with a criminal record that will show up on a routine criminal background check, including large numbers of people with arrests that never led to convictions.

- A record 700,000 people are now released from prison each year, looking to find work in their communities and a new way of life. Three out of four individuals being released from prison have served time for non-violent offenses, including property crimes (40%) and drug offenses (37%). Nearly half of all non-violent offenders (48%) are African-American and another 25% are Latino.[4]

- Drug "trafficking" is the single largest category of all of the various state felony convictions, representing over 20% of all cases, followed by drug possession, which accounts for another 12.1% of all state felonies.[5]

- Large numbers of arrests and convictions are for especially minor crimes, like drunkenness and disorderly conduct (which account for almost 10% of all arrests in the United States, or over 1.2 million cases).[6] According to a Minneapolis study, African Americans are 15 times more likely than Whites to be arrested for low-level

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[2] Press Release, "SHRM Finds Employers are Increasingly Conducting Background Checks to Ensure Workplace Safety" (Society for Human Resources Management, January 20, 2004).

[3] According to the latest official state survey, there are 64.3 million people with criminal records on file with the states, including serious misdemeanors and felony arrests. Bureau of Justice Statistics, *Survey of State Criminal History Systems*, 2001 (August 2003), at Table 2. Because of over counting due to individuals who may have records in multiple states and other factors, to arrive at a conservative national estimate we reduce this figure by 30% (45 million). Thus, as a percentage of the U.S. population over the age of 18 (209 million according to the 2000 Census), an estimated 21.5% of the U.S. population has a criminal record on file with the states.

[4] Bureau of Justice Statistics, *Prevalence of Imprisonment in the U.S., 1974-2001* (August 2005), at page 1.

[5] Bureau of Justice Statistics, *Felony Sentences in State Courts, 2002* (December 2004), Table 1.

[6] U.S. Department of Justice, Federal Bureau of Investigation, *Crime in the United States, 2004* (2005), at Table 4.1.2004.

offenses, but less that 20% of African American arrests for these offenses result in convictions.[7]

Finally, what does the research say about how employers evaluate criminal records? According to a major survey, 40% of employers will not even consider a job applicant for employment once they are aware that the individual has a criminal record.[8] African-Americans are far more likely than Whites to be denied an interview as documented in "testing" studies that specifically control for the individual's criminal record. Indeed, White applicants were three times more likely to get a call back than similarly credentialed African-Americans.[9]

In contrast to this evidence that employers make broad negative conclusions about workers with a criminal record, the research also shows that those people who have not had any involvement with the criminal justice system over a limited period of time are no more likely than anyone else to commit another crime. Specifically, a recent study found that those with a prior record who have not been arrested or convicted of a crime over a period of five years are statistically no more likely that someone with no prior record to commit a crime.[10] Not surprisingly, those who have been employed even for a year or less are also far less likely to commit another crime. According to a study in Illinois which followed 1,600 individuals recently released from state prison, only 8% of those who were employed for a year committed another crime, compared to the state's 54% average recidivism rate.[11]

II. Reforming Federal Laws that Deny Employment to People with Criminal Records

A. The Landscape of Federal Laws Requiring FBI Background Checks

Federal laws require or authorize FBI criminal background checks covering millions of workers, both in the public and private sectors. In addition to screening for criminal records, these federal laws often prohibit individuals with certain criminal records from being employed in various occupations.

The federal laws also authorize the states to conduct FBI background checks based on their state occupational and licensing laws. Thus, when a state passes a law setting screening standards for particular occupations, like school employees, private security officers, or nursing home workers, they can also authorize an FBI background check reviewed by the state licensing agency. In many cases, the states have not authorized FBI checks for certain occupations. The states have often questioned the significant fees

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[7] Council on Crime and Justice, *Low Level Offenses in Minneapolis: An Analysis of Arrests and Their Outcomes* (November 2004), at page 4.
[8] Harry Holzer, Stephen Raphael, Michael Stoll, "Employer Demand for Ex-Offenders: Recent Evidence from Los Angeles," (March 2003), at pages 6-7.
[9] Devah Pager, "The Mark of a Criminal Record," 108 Am.J.Soc. 937 (2003).
[10] Kurlychek, et al. "Scarlet Letters & Recidivism: Does An Old Criminal Record Predict Future Criminal Behavior?" (2006).
[11] American Correctional Association, 135th Congress of Correction, Presentation by Dr. Art Lurigio (Loyola University) Safer Foundation Recidivism Study (August 8, 2005).

involved in running FBI checks (which can run $40 to $75, including the fingerprint processing fees) on top of other licensing fees already imposed on the workers or the employer.

After the September 11th attacks, Congress also enacted criminal record prohibitions that apply to workers employed in nearly the entire transportation industry (including aviation workers, port workers and truck drivers who haul hazardous material). These laws, which are specifically intended to identify terrorism security risks, have adopted standards regulating the severity of disqualifying offenses (limited to selected felonies in most cases) and the age of the offense (limited to 7 years in the case of the laws regulating 700,000 port workers and 2.7 million hazmat drivers). These criminal background requirements, which are implemented by the Transportation Security Administration (TSA), apply equally to current workers and new applicants for transportation jobs and licenses.

Also significant, the TSA regulations have made an effort to remove disqualifying felonies that are especially broad to prevent unfair treatment and more effectively screen for true security risks. Thus, the regulations no longer include felony offenses for drug possession, welfare fraud and bad check writing as disqualifying.[12] Especially important, the laws regulating port workers and hazmat drivers also include a "waiver" procedure allowing those who have a disqualifying offense to petition to remove the disqualification based on evidence of rehabilitation and their employment record.[13] Finally, the laws and regulations also impose several "permanent disqualifications" not subject to waivers and time limits, like espionage and other crimes that raise special terrorism-related concerns.

In the past decade, Congress has also enacted laws making the FBI's criminal records available in the case of background checks regulating private security officers,[14] nursing home and home health care workers,[15] workers who "have the responsibility for the safety and security of children, the elderly or individuals with disabilities,"[16] and school employees.[17] Often, these laws make the FBI's criminal records directly available to employers or certain intermediary organizations, usually when the state laws regulating these occupations to do not authorize the use of FBI records. As in the case of the new private security officer law, the employer is authorized to request the FBI record, which is then processed by the state.

In contrast to the post-9/11 transportation laws, which screen for terrorism security risks, the laws that authorize individual employers and intermediary organizations to request the FBI's records include few, if any, minimum screening standards. For example, except for the 10-year limit on some misdemeanors in the new private security law, none of these laws

[12] 72 Fed. Reg. 3600 (January 25, 2007).
[13] USA Patriot Act of 2001, 49 U.S.C. Section 5103a (2.7 million hazmat drivers); Aviation and Transportation Security Act of 2001, 40 U.S.C. Section 44936 (unescorted access to airport security areas); Martime Transportation Security Act of 2002, 46 U.S.C. Section 70105 (secured areas of ports).
[14] Private Security Officer Employment Authorization Act of 2004, P.L. 108-458, Title VI, Subtitle E, Section 6402; 71 Federal Register 1690, dated January 11, 2006 (interim final regulations)
[15] P.L. 105-277, Div. A., Title I, Section 101(b).
[16] 42 U.S.C. Section 5119(a)(1).
[17] H.R. 4472, Adam Walsh Child Protection & Safety Act (signed July 27, 2006).

limit the age or seriousness of the offense that can be considered by the employer or the intermediary organization. Nothing in federal law specifically requires that the employer only consider offenses that are "job related," which is the standard set forth in Equal Employment Opportunity Commission (EEOC) guidances interpreting Title VII of the Civil Rights Act of 1964.[18] Meanwhile, these federal laws regulate occupations that employ especially large numbers of minority workers.[19]

Also, in contrast to the transportation security laws, the other federal laws do not require a "waiver" procedure, which specifically allows all individuals to make the case that they have been rehabilitated and that they are not a threat to safety or security on the job. The absence of meaningful appeal and waiver procedures not only deprives qualified workers of their livelihood, even after years of service to the same employer, it also undermines the goal of encouraging rehabilitation. As described more below, federal policies that reward and promote rehabilitation, including waiver procedures, are paramount to the goals of the reentry movement to reduce recidivism by removing unnecessary barriers to employment of people with criminal records.

To help appreciate the critical need for federal standards, consider the following example of the kind of arbitrary treatment that workers often suffer as a result of federal background checks. Last year, two women who were each employed for decades in the cafeteria of the federal building in Pittsburgh, were deemed "unsuitable" for employment by the Department of Homeland Security (DHS). One had a 1997 shoplifting conviction that was supposed to be expunged, and the other was never arrested but DHS found a record because it ran the wrong Social Security number.[20] The women were literally escorted from the building and told they could no longer work there, immediately resulting in a loss in pay.

Congressman Mike Doyle's office intervened with DHS to help them appeal the determination get them back their jobs. After the women attempted unsuccessfully to reach the number provided by DHS to appeal the case and the DHS refused to provide the Congressman's staff with information on the appeal process, the Congressman himself intervened which led to the workers being reinstated. As result of this experience, the Congressman called for a Congressional review of DHS background check process.[21]

B. Priorities for Reform of Federal Screening Laws

Recognizing the significant impact that federal and state occupational laws play in promoting the successful reentry of people with criminal records into society, experts in the

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[18] U.S. Equal Employment Opportunity Commission, *Policy Statement on the Consideration of Arrest Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, as amended*, EEOC Compliance Manual (Sept. 7, 1990).

[19] PowerPoint, National Employment Law Project Presentation Before the Congressional Black Caucus Foundation. 35th Annual Legislation Conference (September 24, 2005).

[20] "Homeland Security Clears Cafeteria Workers After a Puzzling 2-Week Hiatus Two Women Allowed Back on the Job Tuesday," *Pittsburgh Post-Gazette* (July 18, 2006).

[21] Press Release, "Congressman Doyle Calls for Review of Homeland Security Screening Process," (August 3, 2006).

field have uniformly called for a systematic review of state federal employment and licensing laws to limit unnecessary barriers to employment.

Thus, the Re-Entry Policy Council, a bi-partisan panel of leading state officials and practitioners, recommended that policy makers "conduct a review of laws that affect employment of people based on criminal history, and eliminate those provisions that are not directly linked to improving public safety."[22] Similarly, the American Bar Association, adopting the recommendations of the Justice Kennedy Commission, urged the federal government to "limit situations in which a convicted person may be disqualified from otherwise available benefits, including employment, to the greatest extent consistent with public safety."[23]

Thus, Congress should be especially cautious before authorizing any new FBI background checks until standards are developed based on the best of the federal laws and the model policies developed by the states and cities that have been leaders on this issue. Consistent with the recommendations of the ABA and Reentry Policy Council, we urge the Committee to adopt the following standards before further expanding criminal background checks.

- Inventory Federal Laws & Policy: Last year, Governor Jeb Bush of Florida issued Executive Order 06-89 requiring an "inventory" of all state laws and state agency practices that limit employment of people with criminal records, the collection of data to determine the impact on employment opportunities, and state agency recommendations for reform including "eliminated or modified ex-offender employment disqualifications."[24] This is a critical first step that the federal government should take to evaluate the impact of federal laws on employment of people with criminal records and develop proper standards that ensure a more fair and effective screening process while protecting public safety.

- Adopt Minimum Federal Standards: As required by the federal transportation security laws regulating port workers and hazmat drivers screened by TSA (H.R. 1401 passed by the House of Representatives also applies to private screening firms that conduct background checks of railroad workers), disqualifying offenses should be time limited, and all lifetime disqualifications should be eliminated except in special circumstances. Equally important, all federal laws should include waiver provisions. Thus, all workers with disqualifying offenses should be provided an opportunity to establish that they have been rehabilitated and do not pose a safety or security threat.

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[22] Reentry Policy Council, *Charting the Safe and Successful Return of Prisoners to the Community* (2004), at page 299.

[23] American Bar Association, Justice Kennedy Commission, *Reports with Recommendations to the ABA House of Delegates* (August 2004), Recommendation at page 2 (adopted by the House of Delegates on August 4, 2004).

[24] PowerPoint Presentation by Vicki Lukis Lopez, Chair, Governor's Ex-Offender Task Force, "Creating Employment Opportunities for Ex-Offenders: Realizing the Goal of the Second Chance" (September 27, 2006).

- Require Disqualifying Crimes to "Directly Relate" to the Job. Consistent with the directives of the EEOC and the employment and licensing laws of half the states, a more fair and effective federal policy requires that disqualifying crimes for employment and licensing "directly relate" to the responsibilities of the job.[25] Of special concern, drug offenses should be closely scrutinized given their disproportionate impact of communities of color. In addition, broad categories of disqualifying offenses found in federal laws, such as "dishonesty, fraud and misrepresentation" should be disfavored. For example, TSA excluded drug possession from its list of disqualifying felonies regulating security threat assessments of transportation workers, along with welfare fraud and bad check writing which previously were considered disqualifying "dishonesty" offenses.[26]

- Limit the Background Check Until the Final Stages of the Hiring Process: To ensure that applicants are evaluated on the merits of their qualifications and not unfairly discriminated against based on an irrelevant criminal record, the federal government should follow the lead of several major cities (Boston, Chicago, Minneapolis, St. Paul, San Diego, San Francisco) in limiting consideration of criminal records until the final stages of the hiring process.[27] Thus, except in safety sensitive positions, such as law enforcement and national security, job applications for federal employment should not be asked about their criminal record as part of the initial application.

III. Improve the Integrity of the FBI's Rap Sheets Produced for Employment Screening Purposes

While never originally designed to screen workers for employment, the FBI's rap sheets are now the major gateway for employment for millions of workers employed in a range of industries and occupations. Based on the FBI's rap sheets, large numbers of individuals are denied employment or licensing, often in cases where they have a long record of employment and their criminal record is not directly related to the job. Despite the growing role that FBI rap sheets play in denying employment to people with criminal records, there has been very limited scrutiny of this critical function performed by the FBI.

Moreover, in the recent report to Congress (*The Attorney General's Report on Criminal History Background Checks*, June 2006), the U.S. Attorney General called for broad new authority to make the FBI's rap sheets available at the DOJ's discretion to all private employers not now authorized by federal law to directly access the FBI's rap sheets.[28]

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[25] Margaret Colgate Love, *Relief from the Collateral Consequences of a Criminal Conviction: A State-by-State Resource Guide* (July 205), at page 9.
[26] 72 Fed. Reg. at 3600 (January 25, 2007).
[27] Editorial, "Cities that Lead the Way," *New York Times* (March 31, 2006); Editorial, "Twin Cities Adopt Smart Job Stances: Effort is to Help Stop Revolving Prison Door," *Star Tribune* (January 2, 2007).
[28] Specifically, the Attorney General recommended that "State criminal history repositories and the FBI should be authorized to disseminate FBI-maintained criminal history records directly to authorized employers or entities and to consumer reporting agencies acting on their behalf, subject to screening and training requirements and other conditions for access and use of the information established by law and regulation." Id. at page 61.

Indeed, the AG's proposal goes further and recommends that the private screening firms that conduct criminal background checks, including Choicepoint and others, be authorized to access the FBI's records on behalf of a private employer. Thus, this hearing is a critical first step to evaluate the integrity and accuracy of the FBI's criminal records for employment screening purposes in the context of proposals to expand access to the FBI's records.

A. The Basics of FBI Rap Sheets Produced for Employment Screening Purposes

First, it is important to appreciate that the FBI rap sheet produced for employment screening purposes is not unlike the rap sheet produced for criminal investigations. Even for experienced criminal justice officials, the FBI's rap sheets are often difficult to interpret because they are an unedited version of nearly all the criminal record information provided by the states, including all arrests and convictions no matter the age of the offense.

The rap sheet does not distinguish between felonies, misdemeanors and lesser categories of offenses, like "violations," which are particularly significant in evaluating an individual's record for employment screening purposes. Instead, the FBI's rap sheet indicates the specific offense as expressed in the state's penal code (e.g., "criminal mischief – 2nd") without characterizing the severity of the crime. As a result, expanding access to FBI records, especially if accessed by individual employers with no criminal justice experience, creates the potential for significant employer error in assuming that many offenses on an individual's record rise to the level of a serious felony or other more grave offenses.

B. Incomplete FBI Rap Sheets Undermine the Integrity of the Background Check Process

Probably the most prejudicial flaw of the FBI rap sheets produce for employment purposes is the extent to which the state information reported is out-of-date or incomplete, thus also undermining the integrity of the criminal background check process.

According to the report by the U.S. Attorney General, the FBI's rap sheets are "still missing final disposition information for approximately 50% of its records."[29] Mostly, that includes arrest information which makes its way on the rap sheet after the individual has been fingerprinted, but the arrest information is never updated electronically by the state. In more than half the states, 40% of the arrests in the past five years have no final disposition recorded, which means that the FBI's records are similarly incomplete.[30]

This serious reporting gap exists despite federal regulations intended to ensure that the records produced by the FBI are accurate and up-to-date. Specifically, the regulations state that "[d]ispositions should be submitted by criminal justice agencies within 120 days after the disposition has occurred."[31] More generally, the FBI's regulations also require that the

[29] *The Attorney General's Report on Criminal Background Checks*, at page 3.
[30] Bureau of Justice Statistics, Survey of State Criminal History Information Systems, 2002 (August 2003), at page 2.
[31] 28 C.F.R. Section 20.37.

"information on individuals is kept complete, accurate and current so that all such records shall contain to the maximum extent feasible disposition of all arrests data included therein."

Thus, workers who have never been convicted or a crime or have charges on their rap sheet that have been dismissed are seriously prejudiced by arrest information that still makes its way onto the FBI rap sheet. This undermines the laws of a number of states that prohibit employers from taking into consideration an individual's arrest record absent a conviction. When the information is reported to employers, it also conflicts with the policy of the EEOC. Citing the discriminatory impact of arrest information on African-Americans and Latinos, the EEOC stated "[s]ince using arrests as a disqualifying criteria can only be justified where it appears that the applicant actually engaged in the conduct for which he/she was arrested and that conduct is job related, the Commission further concludes that an employer will seldom be able to justify making broad general inquiries about and employee's or applicant's arrest."[32]

In significant contrast to the FBI rap sheets produced for employment purposes, the FBI rap sheets produced for federal gun checks are far less incomplete. In the case of gun checks, 65% of the missing dispositions from the state are tracked down by the FBI within three days.[33] If more targeted federal resources are devoted to rap sheets produced for employment purposes, there is no apparent reason why similar results could not produced. In California, the law prevents the state criminal records repository from releasing state rap sheets for employment and licensing purposes unless it has been verified within the past 30 days that the case is still actively in the courts or in the local District Attorney's office. More resources should also be devoted to funding the states to improve their criminal record keeping systems.

C. FBI's Proposed Regulation to Report "Nonserious" Offenses

Seriously compounding the problem of old arrests reported on FBI rap sheets, the FBI has proposed new regulations overturning more than 30 years of policy by allowing "nonserious" offenses to also be reported on the FBI's rap sheets for employment purposes (71 Fed. Reg. 52302, dated September 5, 2006).

Nonserious offenses include juvenile arrests and convictions and any adult arrests or convictions, including anything from vagrancy, to drunkenness to many traffic violations. All that is required is for the state to require the individual to be fingerprinted, which is happening far more often, even in the case of juvenile arrests. The current regulation (28 C.F.R. Section 20.32(b)), which the FBI has now proposed removing, was the product of a 1976 lawsuit, ruling that the FBI failed to adequately remove non-serious offenses from the rap sheets produced for non-criminal justice purposes.[34]

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[32] U.S. Equal Employment Opportunity Commission, *Policy Statement on the Consideration of Arrest Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, as amended*, EEOC Compliance Manual (Sept. 7, 1990).
[33] *The Attorney General's Report on Criminal Background Checks*, at page 108.
[34] *Tarlton v. Saxbe*, 407 F.Supp. 1083 (D.D.C. 1976).

The only justification and evidence provided in support of the FBI's decision to reverse 30 years of policy was the following statement: "the FBI believes that this rule provides substantial, but difficult to quantify, benefits by enhancing the reliability of background checks for non-criminal justice employment purposes. . . . "[35] While the current regulations limit FBI's rap sheets for non-criminal justice purposes to "serious and/or significant adult juvenile offenses," the state records now submitted to the FBI routinely include non-serious offenses. Once the fingerprint record is submitted to the FBI by the states, the FBI does not systematically delete these records when the rap sheets are produced for non-criminal justice purposes.

We believe the FBI's proposed regulation, which has not yet been finalized, is seriously misguided. Of special concern, large numbers of workers will, for the first time, show an FBI rap sheet based on solely on a non-serious offense, which is unwarranted given the limited safety and security threat posed by these offenses. Although current figures were conspicuously not included in the proposed regulation, when the FBI implemented its policy excluding nonserious offenses in the 1970s, it resulted in a 33% decrease in the total number of fingerprint cards retained by the FBI. In 2004, drunkenness and disorderly conduct alone accounted for almost 10% of arrests in the U.S., and these offenses will now be reported for employment purposes on the FBI rap sheet.

In addition, the FBI's proposal represents a radical departure from the state policies protecting the privacy of juvenile records for non-criminal justice purposes and promoting rehabilitation. In 2005, there were more than 1.5 million arrests of people less than 18 years old, often for property crimes. Most studies indicate that only one-third of youthful offenders ever commit a second offense.[36]

To keep these sensitive juvenile records confidential and promote rehabilitation, almost all states authorize certain juvenile records to be expunged and sealed. However, the records can still be listed in the state record systems (and then reported to the FBI) unless and until the young person successfully petitions the courts to have them removed by the state.[37] Most states never seriously contemplated that an individual's minor juvenile offense, including mere arrests, would make its way onto the FBI's rap sheets and create a devastating stigma that will follow the individual for life, from job to job and from state to state.

The FBI's policy will also seriously undermine the civil rights of people of color, who are more likely to be arrested for many nonserious crimes. For example, while African-Americans represent about 13% of the population, they account for about one-third of all those arrested for disorderly conduct, vagrancy and juvenile offenses.[38] A leading study in

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[35] 71 Fed.Reg. at 52304.

[36] Bureau of Justice Statistics, *Privacy and Juvenile Justice Records: A Mid-Decade Status Report* (May 1997), at page 4.

[37] Indeed, even in federal court proceedings involving juveniles, where the juvenile is required to be fingerprinted, the federal law the proceedings cannot be share for any employment purpose "except for a position immediately and directly affecting the national security." (18 U.S.C. Section 5038(a)(5)).

[38] U.S. Department of Justice, *Federal Bureau of Investigation, Crime in the United States, 2005*, at Table 43A. For example, in 2005, African-Americans accounted for 27.8% of all arrests in the United States.

Minneapolis also documented that African-Americans are 15 times more likely than Whites to be arrested for low-level offense, but less than 20% of the African-American arrests resulted in convictions.[39]

In a letter dated March 23, 2007, Chairman Scott and Congresswoman Maxine Waters sent a letter to the Attorney General urging the FBI "to delay implementation of the regulation to allow Congress to conduct oversight." A recent *New York Times* editorial recommended that Congress act to preclude the FBI from finalizing its regulations for fear that that they would "transform single indiscretions into lifetime stigmas." ("Closing the Revolving Door," dated January 25, 2007). Given the conspicuous absence of compelling evidence supporting their reliability or probative value of non-serious offenses, we urge the Committee to pursue the issue with the FBI, while also evaluating whether the FBI is actively enforcing the current regulations.

D. Priorities for Reform of FBI Rap Sheets Produced for Employment Purposes

Before further expanding access to the FBI rap sheets to any new industries or employers, the first priority of Congress should be to ensure that the five million records produced now for employment purposes are accurate, complete, and accountable both to the workers and their employers. Given the new realities of criminal background checks for employment, the FBI should adopt a new system of reporting that is properly tailored to the needs of employers and workers, similar to the rights that now govern disclosure of credit reports, including criminal background check reports produced by private screening firms.

We recommend the following priorities for reform of the FBI rap sheet produced for employment screening purposes:

- Preclude Non-Serious Offenses from the FBI Rap Sheets: For the reasons described above,[40] the FBI should not compound the many concerns that now plague the FBI rap sheets by reversing its regulation precluding reporting of non-serious offenses. Thus, the proposed regulation should be abandoned by the FBI for the purposes of employment and licensing screening. In addition, Congress should request a review to evaluate compliance with the existing regulation to ensure that non-serious offenses are not making their way onto rap sheets that are now reported by the FBI.

- Enforce & Improve Existing Regulations Requiring Updated Rap Sheets: In addition, Congress should request a review of policies and procedures to improve compliance with the FBI regulations that call for timely and complete reporting of all dispositions within 120 days. As provided for FBI rap sheets produced for

However, for several non-serious offenses, their rates of arrest were much higher, including disorderly conduct (33.6%), vagrancy (38.4%) and curfew and loitering violations (35.5%).

[39] Council on Crime and Justice, *Low Level Offenses in Minneapolis: An Analysis of Arrests and Their Outcomes* (November 2004).

[40] For a more detailed treatment of this issue, see the public comments to the regulations submitted on November 6, 2006, by NELP and a number of unions, civil rights and privacy rights organizations available on-line at http://www.nelp.org/docUploads/FBI%2DNSOComments%2Epdf.

gun permits, the majority of missing dispositions for FBI rap sheets produced for employment purposes should be investigated and corrected by the FBI within three days. As required by California law, in no case should the FBI be permitted to report an arrest that has not been verified as active within the past 30 days.

- Provide Workers A Copy of the FBI Rap Sheet Before an Adverse Action: In addition to the procedures described above, which place the burden on the FBI and the states to generate complete and accurate records produced for employment screening purposes, the FBI should provide the worker with a copy of the record before an employer, an intermediary or a government agency makes an adverse determination based on the record. This proposal corresponds to the protections of the Fair Credit Reporting Act which apply to private screening firms that conduct criminal background checks for employers.[41] This consumer protection standard will go a long way to help correct incomplete and inaccurate information on the FBI's rap sheets, while also reducing the prejudicial delays that occur in seeking to correct the record and make the case to the employer or the government agencies that the adverse determination should be reversed.

* * *

Thank you again for the opportunity to testify on this critical issue of concern to millions of hard-working families and their communities. We look forward to working with the Subcommittee to help develop more fair and effective federal criminal background check policies that promote and protect public safety.

[41] 15 U.S.C. Section 1681b(b)(3)(A).

Appendix
Sample FBI Rap Sheets

[redacted]

001

U.S. Department of Homeland Security
Arlington, VA 22202

Transportation
Security
Administration

[redacted]

Re: Initial Determination of Security Threat Assessment, [redacted], CDL #
[redacted]

Dear Mr. [redacted]

The Transportation Security Administration (TSA) conducts security threat assessments on persons who hold commercial driver's licenses (CDL) with hazardous materials endorsements (HME). The regulations regarding these security threat assessments may be found at Title 49, Code of Federal Regulations (C.F.R.), Part 1572, a copy of which may be located on TSA's website, www.tsa.gov.

TSA will not authorize a state to issue or renew an HME if TSA determines that an individual does not meet the security threat assessment standards described in 49 C.F.R. Section 1572.5. This letter serves as TSA's initial determination that you pose or are suspected of posing a security threat and may not be eligible to obtain or renew your HME on your CDL.

BASIS FOR INITIAL DETERMINATION OF THREAT ASSESSMENT

After a review of certain records, TSA has determined or suspects that you pose a security threat because:

Your criminal history record shows that you were convicted of a disqualifying criminal offense, Perjury, in [redacted], on or about January 8, 2004, and sentenced to 180 days incarceration. In addition, your criminal history record shows that you were arrested, indicted, or otherwise have an open disposition for a potentially disqualifying criminal offense, Perjury, [redacted], on or about July 2, 2003. Under Section 1572.103, you are disqualified from holding an HME if either the date of your HME application is less than seven years from the date of your conviction or if you were sentenced to a period of incarceration, the date of your application is less than five years since you were released from jail, prison, or other correctional institution.

Please provide TSA with written proof **within 45 days after the date of service of this letter** that the aforementioned legal matters did not result in a disqualifying criminal conviction and/or incarceration. If TSA does not receive proof in that time and you take no further action, TSA's security threat assessment will automatically become final 45 days after the date of service of this letter and you will not be permitted to renew or obtain an HME on your CDL.

Please note, convictions for certain offenses will permanently preclude you from holding an HME, while convictions for other offenses will only preclude you from holding an HME for a period of time. Please refer to TSA's website for a complete list of disqualifying criminal offenses which constitute a permanent ban and those offenses which are a temporary ban from holding an HME.

Prior to TSA directing the state whether to issue or renew your HME, you may seek releasable materials upon which this initial determination of security threat assessment is based, submit an appeal, and/or request a waiver. For information on how to do any of the foregoing, please refer to the insert provided with this letter.

INSTRUCTIONS TO SEND CORRESPONDENCE TO TSA

All correspondence to TSA should have the TSA HAZMAT Request Cover Sheet attached to the front of your correspondence. This cover sheet can be found at the end of this letter and includes your full name, mailing address, and CDL number. Please change any information on this cover sheet that is incorrect. You should check one of the request boxes on this cover sheet and attach it to the front of your correspondence.

Correspondence must be mailed to:

Transportation Security Administration
TSA HAZMAT Processing Center
P.O. Box 8117
Fredericksburg, VA 22404-8117

You are not required to obtain an attorney to seek releasable documents, dispute this initial determination, and/or seek a waiver and/or time extension, but may do so at your own expense.

Sincerely,

Frank E. Skroski

Frank Skroski
Program Manager, Adjudication Center

Enclosure

- FBI IDENTIFICATION RECORD -

WHEN EXPLANATION OF A CHARGE OR DISPOSITION IS NEEDED, COMMUNICATE DIRECTLY WITH THE AGENCY THAT FURNISHED THE DATA TO THE FBI.

NAME	FBI NO.	DATE REQUESTED
[redacted]	[redacted]	2006/03/28

SEX	RACE	BIRTH DATE	HEIGHT	WEIGHT	EYES	HAIR	BIRTH PLACE
M	W	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]

FINGERPRINT CLASS	PATTERN CLASS	CITIZENSHIP
[redacted]	[redacted]	UNITED STATES

END OF PART 1 - PART 2 TO FOLLOW

UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION
CRIMINAL JUSTICE INFORMATION SERVICES DIVISION
CLARKSBURG, WV 26306

USHAZ0002 ICN [redacted]
PART 2

- FBI IDENTIFICATION RECORD - FBI NO-[redacted]

1-ARRESTED OR RECEIVED 1991/12/15 SID- [redacted]
AGENCY-POLICE DEPARTMENT MILLBRAE ([redacted])
AGENCY CASE-[redacted]
CHARGE 1-PETTY THEFT

COURT-CAMC SO SAN FRAN SO SAN FRANCISCO ([redacted])
CHARGE-148 PC-OBSTRUCTS RESISTS PUBLIC OFFICER
SENTENCE-
DISMISSED
CHARGE-484 490 5 PC-THEFT PETTY THEFT MERCHANDISE
SENTENCE-
CONVICTED-PROBATION -018MONTHS
PROBATION - FINE -
IMP SEN SS

2-ARRESTED OR RECEIVED 2003/07/02 SID- [redacted]
AGENCY-SHERIFF'S OFFICE REDWOOD CITY ([redacted])
AGENCY CASE-[redacted]
CHARGE 1-001 COUNTS OF CONSPIRACY,COMMIT CRIME
CHARGE 2-001 COUNTS OF PERJURY

3-ARRESTED OR RECEIVED 2004/01/08 SID- [redacted]
AGENCY-SHERIFF'S OFFICE REDWOOD CITY ([redacted])
AGENCY CASE-[redacted]
CHARGE 1-001 COUNTS OF PERJURY

COURT-
CHARGE-001 COUNTS OF PERJURY
SENTENCE-
180 DAYS JAIL

RECORD UPDATED 2006/03/28

ALL ARREST ENTRIES CONTAINED IN THIS FBI RECORD ARE BASED ON FINGERPRINT COMPARISONS AND PERTAIN TO THE SAME INDIVIDUAL.

THE USE OF THIS RECORD IS REGULATED BY LAW. IT IS PROVIDED FOR OFFICIAL USE ONLY AND MAY BE USED ONLY FOR THE PURPOSE REQUESTED.

Revised record

UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION
CRIMINAL JUSTICE INFORMATION SERVICES DIVISION
CLARKSBURG, WV 26306

UNAUTHORIZED

[illegible]000000Z ICN [redacted]

BECAUSE ADDITIONS OR DELETIONS MAY BE MADE AT ANY TIME, A NEW COPY SHOULD BE REQUESTED WHEN NEEDED FOR SUBSEQUENT USE.

- FBI IDENTIFICATION RECORD -

WHEN EXPLANATION OF A CHARGE OR DISPOSITION IS NEEDED, COMMUNICATE DIRECTLY WITH THE AGENCY THAT FURNISHED THE DATA TO THE FBI.

NAME	FBI NO.	DATE REQUESTED
[redacted]	[redacted]	[redacted]

SEX	RACE	BIRTH DATE	HEIGHT	WEIGHT	EYES	HAIR
F	B	[redacted]	503	145	BRO	BRO

BIRTH PLACE
MICHIGAN

FINGERPRINT CLASS	PATTERN CLASS	CITIZENSHIP
PI PM 14 17 18	WU WU RS RS RS WU WU LS WU LS	UNITED STATES
PM PO 15 CI 17	WU WU LS WU	

1-ARRESTED OR RECEIVED 1988/04/09 SID- [redacted]
AGENCY-SHERIFF'S OFFICE PONTIAC (MI[redacted])
AGENCY CASE-[redacted]
CHARGE 1-AGGREVATED ASLT

COURT-
CHARGE-AGGRAVATED ASSAULT-MISDEMEANOR
SENTENCE-
9-17-97 PLED GUILTY SENT PROB 12M, F/C/R $375

2-ARRESTED OR RECEIVED 2004/04/28 SID- [redacted]
AGENCY-SHERIFF'S OFFICE GRAND RAPIDS ([redacted])
AGENCY CASE-[redacted] NAME USED-[redacted]
CHARGE 1-DISORDERLY CONDUCT

COURT-
CHARGE-DISTURBING THE PEACE - MISDEMEANOR
SENTENCE-
4-28-04 PLED GUILTY SENT F/C $180 CONF 2 DAYS

PHOTO_INFORMATION
2-ONE PHOTOS AVAILABLE

END OF PART 1 - PART 2 TO FOLLOW

Mr. SCOTT. Thank you.

We have been joined by the gentleman from Ohio, Mr. Chabot.

Ms. Dietrich?

TESTIMONY OF SHARON M. DIETRICH, MANAGING ATTORNEY, EMPLOYMENT AND PUBLIC BENEFITS, COMMUNITY LEGAL SERVICES (CLS), PHILADELPHIA, PA

Ms. DIETRICH. Thank you, Chairman Scott. Thank you, Members of the Committee, for hearing from me today. As was said before, my name is Sharon Dietrich. I am the managing attorney for employment and public benefits at Community Legal Services in Philadelphia.

I have had the honor of representing poor people in employment law matters for 20 years there, and I see my potential contribution today as talking about how background checking is affecting people with criminal records on the ground.

When I started at CLS as a young employment lawyer 20 years ago, this simply was not an issue that I ever saw in my case load. I still remember the first time somebody came in and said I can't get a job because of my criminal record, because it was such a unique request for service from us.

And flash forward from that time years ago to now. People having employment problems because of their criminal record is the single most common reason people come to CLS for help.

We now are serving hundreds of people every year, or attempting to serve hundreds of people every year, who cannot get a job, cannot keep a job, are facing background check reports that are inaccurate.

It is simply a burgeoning demand as a result of the greater availability of background check information.

Now, as Chairman Scott said, Title VII does, in fact, apply to people with criminal records, and it has been construed to mean that if an employer has a policy to check records, it should try to narrowly tailor it to exclude the risks that they are to exclude.

But I am sorry that I am here to say that, in fact, we see that for many people, any record, no matter how old, no matter how minor, is just a barrier to employment.

I can't tell you how many people I have represented who have not even a misdemeanor, who have what are called summary offenses in Pennsylvania—shoplifting when they were 18 years old 20 years ago who now cannot get jobs.

I can tell you that many of our clients have convictions that are decades old and have had exemplary histories since they had their interaction with the criminal justice system—can't find a job.

I remember one of my clients told me that it is more difficult for him to get a job now than it was when he came out of prison in 1980, because of the background checking and employers' zero-tolerance for people with criminal records.

Sure, there are some employers that are trying to make a nuanced determination and write nuanced policies so that they are excluding people who provide a threat.

But in my experience, there are many more employers who simply wait for the background check to come back, and if it says anything other than no record, that person is rejected.

In addition, I need to talk about the background screening industry, because that is another growth industry that we have witnessed in my practice over the years, over, I would say, the last 10 years.

Again, this used to be something that was non-existent. But now there are literally hundreds of background screening companies, and many of our clients come in after they have been fired from their jobs or rejected from their jobs with reports that were prepared by background screeners.

And the same as with the suitability requirement, there is a Federal law that ostensibly applies here. The Fair Credit Reporting Act (FCRA) applies to the background screening industry.

But there is very little enforcement of that law. And we regularly see product from the background screeners that is incorrect or otherwise prejudicial.

I can't tell you how often we have seen people who come in with criminal records from background screening agencies that are actually reporting somebody else's criminal record, often somebody with a similar name, maybe even their father, who is senior, and they are a junior.

But I am about to file a FCRA case on behalf of a woman who has a fairly common name, and there was another person with a similar date of birth, and the background checking company did a criminal record check in the Philadelphia court system and decided they were the same person. My client was fired from her job.

This is not rare. This is something that is happening fairly regularly. And again, Federal laws exist. But I will say I do not think that the Equal Employment Opportunity Commission (EEOC) has ever made a priority of enforcing the standards around Title VII.

The Federal Trade Commission is not making a priority of regulating the background check industry.

And I urge you that so long as we are having these problems with the existing information that is available that Congress and the Federal Government not make FBI records available.

As was pointed out earlier, they are even more unreliable, more inaccurate. It will only make the situation for my clients who are just really trying to support their families and themselves even more difficult. Thank you.

[The prepared statement of Ms. Dietrich follows:]

PREPARED STATEMENT OF SHARON M. DIETRICH

Testimony of Sharon M. Dietrich
Before the U.S. Congress, House of Representatives, Judiciary Committee, Subcommittee on Crime, Terrorism and Homeland Security
April 26, 2007

Chairman Scott and members of the Committee, thank you for this opportunity to testify on the subject of the growth of criminal background checks in employment. This subject is perhaps the least acknowledged significant employment problem hindering millions of Americans from supporting their families and themselves.

My name is Sharon Dietrich. I am the Managing Attorney for Employment and Public Benefits for Community Legal Services, Inc. (CLS), in Philadelphia, PA. CLS is the larger of the two legal services programs serving low income people with civil legal problems in Philadelphia; we are not funded by the Legal Services Corporation. CLS is among the few legal services programs in the country that have long-standing employment law practices, with ours dating to the early 1970s. We see about 1,000 new clients seeking employment law representation every year.

I have been practicing employment law at CLS for almost 20 years. When I began my career, criminal background checking simply was not an issue for CLS's clients. That began to change about a decade ago, when clients began presenting us with cases in which their criminal records acted as a barrier to employment. The number of persons with criminal record issues seeking employment representation by CLS has grown steadily ever since, increasing from 36 in 1999 to 293 in 2006. Meanwhile, the number of legal and policy issues associated with criminal records on which we have worked has exploded. Attachments A and B illustrate the types of individual representation and systemic advocacy in which CLS engages on behalf of people with criminal records facing employment barriers.

Today, I will speak about two significant problems faced in the employment context by people with criminal records: (1) employers failing to consider whether criminal records are job-related or render the workers unsuitable for employment; and (2) inaccurate and unfairly handled criminal records, especially when prepared by commercial background screeners. These problems implicate two federal laws of general applicability. Because employer policies rejecting persons with criminal records have a racially disparate impact, Title VII of the Civil Rights Act of 1964 requires that employers have a business necessity in order to justify such policies. Moreover, commercial background screeners are subject to the standards of the Fair Credit Reporting Act. Nevertheless, the application of these laws to criminal background screening is little known and less enforced.

I. Federal Law Must Require Employers to Eliminate Overbroad Bans on Employment of People with Criminal Records and to Instead Consider the Job-Relatedness of a Conviction

From representing hundreds of people with criminal records over the last decade, I can tell you that no criminal record is so minimal or so old that it will not present employment barriers for the person who has it. Many employers have hiring policies that absolutely bar the employment of people with criminal records. If the background check report does not say "no record," the person does not get the job. They do not apply any "suitability criteria" to evaluate whether a criminal record really indicates whether a job applicant is likely to be a potential threat or liability in the workplace.

No federal law specifically creates any limits to employers' decisions predicated on criminal records, and only four states comprehensively regulate the consideration of criminal records in public and private employment and occupational licensing.[1] As a result, the most important law restricting employer consideration of criminal records is Title VII of the Civil Rights Act of 1964,[2] the federal law prohibiting race discrimination in employment, even though criminal records are not its focus.

Title VII is applicable because racial minorities are much more likely than whites to have criminal records. Taken together, African-Americans (39%) and Hispanics (18%) comprised a majority of those who have ever served prison time.[3] Almost 17% of adult black males had ever served prison time, a rate twice that of Hispanic males (7.7%) and six times that of white males (2.6%).[4] Thus, employer policies that reject job applicants and employees with criminal records, while neutral on their face, have a racially disparate impact.

For decades, neutral policies that have a racially disparate impact have violated Title VII.[5] After disparate impact has been proved, Title VII requires the employer to demonstrate that the

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[1] Margaret Colgate Love, Relief from the Collateral Consequences of a Criminal Conviction: A State-by-State Resource Guide (William S. Hein & Co., Inc. 2006) [hereinafter Relief from Collateral Consequences], at 64. The four states are Hawaii, New York, Pennsylvania and Wisconsin.

[2] 42 U.S.C. §2000e *et seq.* Title VII is enforced by the U.S. Equal Employment Opportunity Commission (the EEOC).

[3] Thomas P. Bonczar, Prevalence of Imprisonment in the U.S. Population, 1974-2001 (U.S. Dept. of Justice, Bureau of Justice Statistics Aug. 2003), at 5.

[4] Id.

[5] The disparate impact doctrine was adopted by the U.S. Supreme Court in Griggs v. Duke Power Co., 401 U.S. 424 (1971).

policy is "consistent with business necessity."[6] A plaintiff can still prevail even if business necessity is demonstrated, if there is an alternative practice which the employer has not adopted.[7]

Almost as long as there has been disparate impact case law under Title VII, there have been decisions rejecting employer policies absolutely barring the employment of people with criminal records.[8] Until recently, the most notable decision concerning convictions was Green v. Missouri Pacific Railroad Co., 523 F.2d 1290 (8th Cir. 1975), on appeal after remand, 549 F.2d 1158 (8th Cir. 1977). The injunction in Green prohibited the automatic denial of employment based on a criminal conviction, but permitting the employer to consider convictions "so long as defendant takes into account the nature and gravity of the offense or offenses, the time that has passed since the conviction and/or completion of sentence, and the nature of the job for which the applicant has applied," Green, 549 F.2d at 1160.

In 1985, the EEOC, then chaired by Clarence Thomas, promulgated a policy codifying the three factors set forth in the Green injunction as the business necessity standard for the consideration of convictions. EEOC Compl. Man. § 604 App [hereinafter EEOC Policy Guidance on Convictions]. The three business necessity factors are:

(1) the nature and gravity of the offenses;

(2) the time that has passed since the conviction and/or the completion of the sentence; and

(3) the nature of the job.

The EEOC Policy Guidance on Convictions characterizes the first and third factors as bearing upon the job-relatedness of the conviction, and the second factor as covering the time frame involved. It also elaborated that the first factor "encompasses consideration of the circumstances of the offense(s) for which an individual was convicted as well as the number of offenses."

The most recent EEOC policy guidance on a related subject is "Policy Guidance on the Consideration of Arrest Records in Employment Decisions under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e et seq. (1982)" (Sept. 7, 1990) [hereinafter the EEOC

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[6] 42 U.S.C. §2000e-2(k)(1)(A)(i).

[7] 42 U.S.C. §2000e-2(k)(1)(A)(ii).

[8] E.g. Green v. Missouri Pacific Railroad Co., 523 F.2d 1290 (8th Cir. 1975), on appeal after remand, 549 F.2d 1158 (8th Cir. 1977); Carter v. Gallagher, 452 F.2d 315, 326 (8th Cir.), cert. denied, 406 U.S. 950 (1972); Field v. Orkin, No. 00-5913, 2001 WL 34368768 (E.D. Pa. Oct. 30, 2001); Washam v. J.C. Penney Co., Inc., 519 F. Supp. 554, 561 (D. Del. 1981); Dozier v. Chupka, 395 F. Supp. 836, 842-43 (S. D. Ohio 1975).

Policy Guidance on Arrests], also contained in Section 604 of the EEOC Compliance Manual, Vol. II. The EEOC Policy Guidance on Arrests reaffirmed the three-pronged business necessity test of the EEOC Policy Guidance on Convictions. It also states that with respect to consideration of arrests, "a blanket exclusion of people with arrest records will almost never withstand scrutiny."

From the promulgation of EEOC's policies on criminal records until recently, there was little case law on this subject, notwithstanding the enormous expansion of criminal background checking by employers during that period. Nor has the EEOC taken leadership in prioritizing criminal record cases or in public education on the issue. In my experience, there is little employer knowledge of the EEOC's policies on criminal records. While the number of people with criminal records being rejected from jobs has increased exponentially, application and enforcement of Title VII standards in this context has been almost non-existent.

On March 19, 2007, the Court of Appeals for the Third Circuit rendered the first appellate decision on the application on Title VII to people with criminal records since Green. In El v. Southeastern Pennsylvania Transportation Authority, 479 F.3d 232 (3d. Cir. 2007), the court found that the plaintiff, who had a 47 year old murder conviction, had not as a factual matter rebutted the transportation authority's criminal record hiring policy for its paratransit subcontractors. Aside from its holding concerning the application of SEPTA's policy to Mr. El and the factual record in the case, the decision was very instructive for the crafting of criminal records policies that will pass muster under Title VII.

The Third Circuit thoroughly analyzed the history of Title VII's business necessity defense in disparate impact cases and determined that the standard that it had previously articulated – "that discriminatory hiring policies accurately but not perfectly distinguish between applicants' ability to perform successfully the job in question" – could be adapted to the context of criminal conviction policies.[9] ***The court concluded that Title VII requires that criminal record policies "accurately distinguish between applicants that pose an unacceptable level of risk and those that do not.***"[10] In footnotes describing the application of its test, the court distinguished between applicants who pose "minimal level of risk" and those who do not,[11] making clear that an employer cannot reject persons with criminal records on the grounds that the level of risk cannot be brought down to zero.

The El court did not adopt the EEOC Policy Guidance on Convictions as the standard, indicating that it was not entitled to great deference. The court suggested that while the policy

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[9] Id. at 244.

[10] Id. at 245.

[11] Id. at 245 n. 13 & 14.

guidance codified the Green decision, it lacked the thorough and persuasive analysis that entitled it to deference.[12]

Finally, the El court gave some idea of the nature of the analysis that it expects employers to engage in when constructing criminal record policies. SEPTA's policy created seven-year exclusions rather than lifetime bars for many offenses, yet the court articulated concerns about how it was drafted. For instance, it indicated that it would have expected SEPTA to explain how it decided which offenses were in which category, why the seven-year time period had been chosen, and why a crime like simple assault was in the lifetime ban category.[13] Notably, the court had previously indicated that business necessity case law requires "some level of empirical proof that challenged hiring criteria accurately predicted job performance."[14]

The El decision, then, presents several lessons. (1) Employers may refuse to hire some persons with criminal records, despite the racially disparate impact. (2) However, to avoid violating Title VII, they must carefully craft their criminal record exclusionary policies, based on empirical evidence as to whether a person with a criminal record presents more than a minimal risk. In my experience, relatively few employers are crafting criminal record policies with anything approaching this degree of care. To the contrary, absolute bars are more the norm.

This history of the application of Title VII to criminal records raises several implications for the role of the federal government in limiting employers' decisions involving criminal records.

- **EEOC should make enforcement and public education of the Title VII legal standards applicable to criminal records a high priority.** Given the huge number of Americans affected by employers' criminal record policies, this issue should be at the forefront of EEOC's agenda. It fits easily into EEOC's newly announced "E-RACE" initiative, which it describes as "an outreach, education and enforcement campaign to advance the statutory right to a workplace free of race and color discrimination."[15]

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[12] Id. at 244.

[13] Id. at 248.

[14] Id. at 240.

[15] EEOC, "EEOC Takes New Approach to Fighting Racism and Colorism in the 21st Century Workplace" (press release Feb. 28, 2007). According to the press release and its website, the E-RACE initiative will identify issues, criteria and barriers that contribute to race and color discrimination, explore strategies to improve the administrative processing and the litigation of race and color discrimination claims, and enhance public awareness of race and color discrimination in employment. On its webpage explaining the need for the initiative, EEOC cites to disparities caused by employer policies looking at arrest and conviction records. http://www.eeoc.gov/initiatives/e-race/why_e-race.html

- **EEOC should update its policy guidances related to criminal records.** The EEOC should take the EI court's criticism of its policy guidances to heart and improve upon them. These guidances were written before criminal background checks became ubiquitous; indeed, they were written before the Civil Rights Act of 1991 revised the Title VII standards for disparate impact cases. They should take into account recent research on the likelihood of reoffending[16] and describe the necessary tailoring of employer policies discussed by the Third Circuit.

- **Congress should enact a law that deals directly with employer consideration of criminal records.** While Title VII currently plays an important role as the only federal law applicable in this context, it is not well-suited to the task. Title VII disparate impact lawsuits are extremely complicated and costly to bring, particularly to adduce statistical proof of disparate impact. Moreover, not all people with criminal records are covered by Title VII. The problem of employer consideration of criminal records is nuanced and widespread enough to merit its own statute, rather than relying on the application of a law of general applicability to race discrimination issues.

- **Congress should direct the U.S. Department of Justice to undertake empirical research helping employers assess risk.** Alternatively, Congress should allocate funding for such research.

- **Congress should not make more criminal record information available to employers without better application and enforcement of suitability criteria.** So long as employers are not being made accountable to have criminal record screening policies that are tailored to the risk for which they are screening, Congress should not permit yet more potentially harmful information to be made publicly available. So, for instance, the Attorney General's recent recommendation for the expansion of the availability of FBI information should be rejected.[17]

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[16] For instance, a recent study found that after six or seven years without reoffending, a person with a criminal record presents little more risk than a non-offender. Megan Kurlychek et al., "Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?" Criminology and Public Policy, Vol. 5, 1101-22 (July 18, 2006). The authors "believe that [their] research supports explicit time limits in any statutory restrictions on employment."

[17] The Attorney General's Report on Criminal History Background Checks (June 2006) (available at http://www.usdoj.gov/olp/ag_bgchecks_report.pdf), at 59. This recommendation was made despite the fact that FBI records are notoriously unreliable. For instance, a recent report found that of 174 million arrests on file with the FBI, only 45% have dispositions. Craig Winston, "The National Crime Information Center: A Review and Evaluation" at 6 (Aug. 3, 2005).

II. Federal Law Must Require that Criminal Background Reports Be Fair and Accurate

Employers conducting criminal background checks can get them from a variety of sources. Sometimes, employers obtain "rap sheets" directly from public sources, such as the courts or their state's central repository.[18] However, many employers purchase criminal background reports from commercial background screeners, which in turn obtain the information from public sources and prepare reports.

The burgeoning growth of the commercial background screening industry is well documented. A recent report by the National Task Force on the Commercial Sale of Criminal Justice Record Information was the first comprehensive examination of the role of commercial vendors.[19] Although the task force was unable to quantify the number of vendors or the checks they produced, it estimated that there are hundreds, maybe even thousands, of regional and local companies, in addition to several large industry players.[20] Among the latter, the report noted that ChoicePoint conducted around 3.3 million background checks in 2002, most of which included a criminal record check.[21] USIS Transportation Services reported having 30,000 clients and processing more than 14 million reports per year.[22]

The industry's members are "consumer reporting agencies" governed by the Fair Credit Reporting Act (FCRA).[23] Like Title VII, FCRA is a statute of general applicability, and it is more commonly associated with the credit reporting industry than with criminal background checks.

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[18] Indeed, laws that mandate background checks in certain industries frequently require that records be obtained from the central repository, which is often the State Police.

[19] SEARCH, the National Consortium for Justice Information and Statistics, Report of the National Task Force on the Commercial Sale of Criminal Justice Record Information (2005) [hereinafter National Task Force Report on Commercial Sale of Criminal Record Information], at vi.

[20] Id. at 7.

[21] Id.

[22] Id. at 8.

[23] 15 U.S.C. §§ 1681-1681u. See Dalton v. Capital Associated Industries, 257 F.3d 409, 415 (4th Cir. 2001); Poore v. Sterling Testing Systems, Inc., 410 F.Supp.2d 557, 569 (E.D. Ky. 2006); Obabueki v. ChoicePoint, Inc., 145 F.Supp.2d 371, 394-96 (S.D.N.Y. 2001), aff'd, 319 F.3d 87 (2d Cir. 2003). FCRA is enforced by the U.S. Federal Trade Commission (the FTC).

Nevertheless, numerous FCRA rights are implicated when a criminal background report is prepared by a commercial background screener.[24]

Among the duties on commercial background screeners compiling criminal background reports for employers are the following.

- Commercial background screeners may not report arrests or other adverse information (other than convictions of crimes) which are more than seven years old, provided that the report does not concern employment of an individual who has an annual salary that is $75,000 or more.[25] 15 U.S.C. §§ 1681c(a)(5), 1681c(b)(3).

- Commercial background screeners must use "reasonable procedures" to insure "maximum possible accuracy" of the information in the report. 15 U.S.C. §1681c(b). *Note, however, that commercial background screeners are not strictly liable for mistakes in their reports.*

- A commercial background screener reporting public record information for employment purposes which "is likely to have an adverse effect on the consumer's ability to obtain employment" must either notify the person that the public record information is being reported and provide the name and address of the person who is requesting the information or the commercial background screener must maintain strict procedures to insure that the information it reports is complete and up to date. 15 U.S.C. §1681k.

Among the duties that FCRA imposes when an employer uses a criminal background report provided by a commercial background screener for purposes of a hiring decision are the following.

- The employer must provide a clear written notice to the job applicant that it may obtain a consumer report. 15 U.S.C. § 1681b(b)(2). It also must obtain written authorization from the job applicant to get the report. 15 U.S.C. § 1681b(b)(3). Therefore, in situations where a commercial background screener is involved, persons with criminal records ought to be made aware that their criminal record will be scrutinized, which often is not the case when criminal records are obtained directly by the employer from public sources.

- If the employer intends to take adverse action based on the criminal background report, a copy of the report and an FTC Summary of Rights must be provided to the job applicant

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[24] FCRA does not, however, apply to information obtained from public sources of criminal record information, such as the courts or central repositories. National Task Force Report on Commercial Sale of Criminal Record Information, supra note 19, at 58.

[25] For many years, the seven year limit also applied to reporting of convictions. However, this seven year limit was eliminated by Congress in the Consumer Reporting Employment Clarification Act of 1998, P.L. 105-347, Sect. 5.

before the action is taken. 15 U.S.C. § 1681b(b)(3). The obvious reason for this requirement is to permit a job applicant to address the report before an employment decision is made.

- Afterwards, the employer, as a user of a consumer report, must notify the job applicant that an adverse decision was made as a result of the report and must provide, among other things, the name, address and telephone number of the commercial background screener and the right to dispute the accuracy or completeness of the report. 15 U.S.C. § 1681m(a).

Given the volume of people with criminal records whom we represent, CLS regularly sees cases in which the criminal record leading to a client being rejected was generated by a commercial background screener. Despite these companies being covered by FCRA, we have noted many inaccuracies with the reports and other non-compliance with FCRA's requirements by the commercial background screeners and the employers.

1. **Inaccurate reports:** Sometimes, data simply is reported incorrectly, such as when the grade of the offense (felony, misdemeanor, etc.) is wrong.

2. **"Mismatching" of records**: We have seen numerous cases where a criminal record is reported by the commercial background screener that belongs to a different person, of a same or similar name (also sometimes called a "false positive"). This danger is especially present for people with common names and for Hispanic names. Often, the commercial background screener has ignored data indicating that the record did not belong to the subject of the background check, such as a date of birth, middle initial, or suffix (such as "Sr." or "Jr.").

   CLS is preparing FCRA litigation against a commercial background screener which wrongly reported a conviction to our client. Although the person who was convicted had a name match with our client, their dates of birth did not match. Moreover, the screener had also obtained a clear report on our client from the Pennsylvania State Police (the PSP) as well as having looked at court records. The PSP report was more reliable, because its database is searchable by social security number as well as date of birth. Nevertheless, the conviction was reported to my client, who was fired as a result of it.

   In another "mismatching" case, the commercial background screener searched the database of the Administrative Office of Pennsylvania Courts for a client with a common name. It reported 18 different criminal cases against my client – none of which was his. The screener failed to examine the year of birth connected with each case; almost none of the defendants were even born in the same decade as our client! This case illustrates why searches by name only should never be permitted.

3. **"Over-reporting" information:** Sometimes if an employer is not sure about a match, it will report a case in a manner such as the following: "There is a conviction with Mr. X's name on it. This may or may not be your Mr. X." Unfortunately, employers usually assume that

the commercial background screener has done the work for them and rejects the person rather than inquiring further.

4. **Not understanding criminal identity theft:** Criminal identity theft occurs where someone who was arrested used the victim's name and personal identifiers as an alias, resulting in the perpetrator's record being reported as the victim's record. Criminal identity theft is a surprisingly common problem, with the primary criminal justice report examining this phenomenon estimating that 400,000 Americans were victimized in a year's period.[26] However, we have had cases of criminal identity theft where the commercial background screeners refused to correct their reports upon proof being provided.

5. **Not presenting the criminal record information in a way that an employer can understand it:** For instance, the information may be laid out so that several charges connected with one arrest look like they involve multiple incidents.

6. **Maintaining their own databases and not eliminating expunged cases:** Several of the larger commercial background screeners sometimes create their own "shadow databases" from information that they have obtained from public sources. However, when a case has been expunged in the public record, it sometimes remains in the company's database.[27]

7. **Reporting arrests that do not lead to convictions:** As noted above, FCRA allows commercial background screeners to report arrests that have occurred in the last seven years, and the screeners usually supply this information. However, as is true in some other states, Pennsylvania law does not permit arrests to be taken into account when employment decisions are made.[28] Moreover, as noted above, EEOC's Policy Guidance on Arrests also indicates that arrests usually should not be the basis of employment decisions, go so far as to state that "a blanket exclusion of people with arrest records will almost never withstand scrutiny." Thus, commercial background screeners' common practice of reporting arrests serves little purpose beyond inviting employers to make illegal employment decisions.

8. **Lack of employer compliance with their FCRA responsibilities:** If, for instance, employers complied with their obligation to provide job applicants with a copy of their report prior to an adverse employment decision, many of the errors and mis-matches might be worked out. Moreover, even people whose records are reported correctly could have an

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[26] Report of the BJS/SEARCH National Focus Group on Identity Theft Victimization and Criminal Record Repository Operations (Dec. 2005), at 2.

[27] Adam Liptack, Criminal Records Erased by Courts Live to Tell Tales, New York Times, Oct. 17, 2006.

[28] Cisco v. United Parcel Services, Inc., 476 A.2d 1340, 1343 (Pa. Super. 1984).

opportunity to put their best foot forward, to explain why they present minimal risk despite their records. However, in our experience, employers seldom comply with this obligation.

Given these problems with commercial background screeners, the federal government should move to ensure that minimum standards of accuracy and fairness are being enforced in the industry.

- **The FTC should begin an initiative to monitor and regulate the commercial background screening industry and its customers.** To date, the burgeoning industry has faced little to no regulation. On the private enforcement side, fewer than a dozen reported FCRA cases have been brought against commercial background screeners and employers using their products. Given the inaccuracies and other FCRA violations that my organization has seen and the high stakes faced by workers losing their livelihoods as a result of these actions, I urge that FCRA enforcement regarding the commercial background screening industry be made a priority.

- **Congress should enact a law that deals directly with the accuracy and fairness of criminal records.** As in the analogous context of Title VII, it would be better if criminal records were regulated by a statute geared to the issues that they present, rather than being regulated as a FCRA afterthought. A better federal law would:

  * Cover all criminal record reports obtained by employers, whether directly from public sources or from commercial background screeners;[29]

  * Create screening standards for the industry;

  * Establish a higher standard of accuracy than FCRA currently provides;

  * Mandate that for criminal record information to be provided to an employer, at least two of four criteria must match exactly (name, date of birth, social security number or fingerprints);

  * Prohibit the reporting of arrests;

  * Restore the seven year time limit on the reporting of convictions;[30]

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[29] Recognizing a need for uniformity no matter the source of a report, the National Task Force on the Commercial Sale of Criminal Justice Record Information recommended that FCRA apply to all records used by employers and others. National Task Force Report on Commercial Sale of Criminal Record Information, supra note 19, at 72.

[30] See note 25.

* Eliminate FCRA's preemption of stricter state statutes and/or state common law claims.

Alternatively, FCRA could be amended to correct these flaws in existing law as applied to commercial background screeners.

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On behalf of the hundreds of people with criminal records that my organization represents every year, I thank you for the opportunity to testify today.

ATTACHMENT A

Community Legal Services' Representation of Ex-Offenders in Employment Cases

Note that CLS represents only low income Philadelphia residents. Also, our ability to provide representation depends on the merits of a case and the availability of staff.

Cases in which CLS may be able to represent:

- *An ex-offender is denied a job or fired because of his/her criminal record even though the record is not related to the job and/or is old.* CLS might be able to write a demand letter to the employer, file an EEOC (discrimination) charge, or in extraordinary cases, file a lawsuit.

- *An ex-offender cannot work in a nursing home, home health care agency, mental health or mental retardation facility, or other facilities covered by the Older Adults Protective Services Act (OAPSA).* In some cases, employers might "over-apply" the law, turning down people with certain convictions who could be employed despite the law. In other cases, there might be an exception to the law, such as when a facility is sold and the person with the record already works there. In such cases, CLS can try to convince the employer that it can and should hire or keep employing the person. But in many cases, the person will not be allowed to work under OAPSA. CLS is working to curtail the law, and we will talk to workers who are affected so we can tell them if and when our efforts are successful and advise them about their options in the meantime.

- *An ex-offender is denied entrance to a job training program for a profession for which his/her record does not prohibit the person from working.* CLS can try to convince the training program that the person should be admitted.

- *An ex-offender's occupational license is threatened because of his/her criminal record.* We might be able to represent the person in a licensing hearing.

- *An ex-offender who is providing child care for a parent is denied a Welfare Department subsidy.* DPW may not have proper grounds for denying the subsidy. We can look into it.

- *A person who was adjudicated delinquent as a juvenile is having problems with that record.* CLS can determine whether the employment problem is in violation of the law and can advise whether the record might be able to be expunged.

- *An ex-offender completed Accelerated Rehabilitative Disposition (ARD) in one of the counties, but his/her record has not been expunged.* We can try to help get the expungement if there is no legal assistance for that problem available in the county. In Philadelphia, the Defender Association handles these expungements. We provide assistance in these cases only if employment is affected by the criminal record.

- *An ex-offender is willing to do the work to try to get a pardon but wants legal advice.* Except for cases involving ARD, almost all convictions can only be erased by a Governor's pardon. The person applying for a pardon must be prepared to do the legwork, such as collecting documents and information and writing answers to the pardon application. But if he/she is committed to the process, CLS may be able to provide advice and, in rare cases, representation at a pardon board hearing. We provide assistance in these cases only if employment is affected by the criminal record.

- *A person needs expungement of arrests for which he/she was not convicted.* CLS handles such cases in rare circumstances. The Defender Association of Philadelphia provides representation in cases where they represented the person in the criminal case; in other cases, the person can seek assistance from Pre-Trial Services. We would only consider providing assistance if neither of these organizations can help and if employment is affected by the criminal record.

- *A person who is not an ex-offender has a criminal record that is wrong.* An example would be a case in which the person is a victim of identity theft. CLS can try to help correct the record. We provide assistance in these cases only if employment is affected by the criminal record.

Cases in which CLS usually cannot help or will offer only brief advice:

- *CLS cannot help ex-offenders find jobs.* We are not an employment agency or job coaches. We do have a resource manual of programs that might be able to help.

- *CLS will not provide representation in criminal proceedings.* Again, these services are provided by the Defender Association.

People seeking representation by CLS's Employment Unit should begin by coming to our Intake Unit, Monday through Friday, 9:00 a.m. to noon, at 1424 Chestnut Street, Philadelphia. The intake paralegal will screen for eligibility, take information, and collect documents. The new file will then be assigned to the Employment Unit.

For more information about ex-offenders' legal rights, see CLS's website at
http://www.clsphila.org/Ex-Offenders_Information.htm

Prepared, 2/21/03

ATTACHMENT B

Community Legal Services' Legal and Policy Advocacy Assisting Ex-Offenders

Community Legal Services of Philadelphia has developed expertise in the civil (i.e., non-criminal) legal problems faced by ex-offenders. Although CLS does not have an "ex-offender unit," per se, several of our legal units do provide assistance to ex-offenders with civil legal problems caused by their criminal records. Those units include:

- Employment;
- Public benefits;
- Family advocacy (representing parents involved with the Philadelphia Department of Human Services);
- Public housing and Section 8.

Highlights of CLS's systemic advocacy efforts for ex-offenders include the following:

- We have co-counseled litigation under the state constitution challenging the Pennsylvania Older Adults Protective Services Act (OAPSA), which created a lifetime bar preventing most ex-offenders from working in nursing homes, home health care agencies and other long-term care facilities. On December 11, 2001, the Pennsylvania Commonwealth Court ruled in our favor by a five to two vote. Nixon v. Commonwealth of Pennsylvania, 789 A.2d 376 (Pa. Commw. 2001). The State appealed, and on December 30, 2003, the Pennsylvania Supreme Court also ruled in our favor by a six to one vote.

- As a Senior Soros Justice Fellow, CLS Supervising Attorney Amy Hirsch prepared the most in-depth study of the effect of the TANF and food stamps felony drug ban. Amy E. Hirsch, 'Some Days Are Harder Than Hard': Welfare Reform and Women with Drug Convictions in Pennsylvania (Center on Law and Social Policy, December, 1999). Ms. Hirsch has led efforts to educate the Pennsylvania legislature about the harmful effects of the felony drug ban. On December 23, 2003, the Governor signed Act 44 of 2003, which eliminated the ban on cash assistance and food stamps in Pennsylvania.

- In April 2002, CLS joined the Philadelphia Consensus Group on Ex-Offender Reentry and Reintegration, facilitated by Search for Common Ground. This group includes representatives of the prisons, the district attorney, the defender association, the courts, the probation and parole department, service providers, and other stakeholders. The Group analyzed the barriers to prisoner reintegration in Philadelphia and made recommendations for their removal. Its report is available from our website.

- Our Family Advocacy Unit has begun efforts to improve the ability of incarcerated parents to participate in child welfare system proceedings, increase visitation, and improve services, with the goal of strengthening families and avoiding the termination of their parental rights. We are advocating for changes in the Department of Human Services, the Philadelphia Prison System, and the Family Court to improve their systems to better serve incarcerated parents and their children.

- The culmination of our work to date for ex-offenders was the release in May 2002 of Every Door Closed: Barriers Facing Parents With Criminal Records, a joint publication of the Center for Law and Social Policy and CLS, funded by the Charles Stewart Mott Foundation. The report documents the legal challenges that parents released from incarceration will face in successfully caring for their children, finding work, acquiring safe housing, going to school, and accessing public benefits. An "Every Door Closed Action Agenda" series of one- page fact sheets based on recommendations from the report was released in 2003 and has been widely distributed to policymakers across the country. The full report, executive summary, and fact sheets are available on CLASP's website, and can be accessed from a link on CLS's website.

CLS also provides frequent community education sessions for social service staff and participants in welfare-to-work programs, drug and alcohol treatment programs, AIDS education programs, ex-offender groups, the Philadelphia jails, and other settings in which we reach significant numbers of people with criminal records and their advocates.

To learn more about CLS's work for ex-offenders, and to view our reports and community education, see our website at: http://www.clsphila.org/Ex-Offenders_Information.htm.

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Prepared by Community Legal Services, Inc. (9/7/03, updated 10/25/04)

Mr. SCOTT. Thank you.
Mr. Hawley?

TESTIMONY OF RONALD P. HAWLEY, EXECUTIVE DIRECTOR, SEARCH, THE NATIONAL CONSORTIUM FOR JUSTICE INFORMATION AND STATISTICS, SACRAMENTO, CA

Mr. HAWLEY. Mr. Chairman and Members of the Subcommittee, I am Ron Hawley, executive director of SEARCH. It is a great honor to have the opportunity to testify before you today.

As you know, we have submitted testimony for the record, and I would like to take a few minutes to highlight key points of that testimony.

SEARCH is a State criminal justice support organization comprised of governor's appointees from each State. Dues are paid by each State to support the work of search.

And it is important to note that in most cases our members administer the criminal history records within their State.

SEARCH is dedicated to improving the criminal justice system and the quality of justice through better information management, effective application of information and identification technology, and responsible law and policy.

Although search has not taken a position on the many recommendations in the report, we believe that the report is exceptionally comprehensive, identifies the appropriate issues and asks the right questions.

The 50 gubernatorial appointees who govern SEARCH are committed to the State-based approach to national background checking that is sensitive to privacy considerations.

As Members of Congress continue to review the report, we expect to work with you, keeping these values in mind.

Our work in the field dates back to our beginning in 1969 when we first explored sharing criminal history data from State to State.

Throughout, we have steadfastly sought to properly balance an individual's right to privacy with society's need for criminal history information.

In fact, it is fair to say that our report, known as technical report number 13, included recommendations that helped to craft regulations adopted in March 1976 as 28 CFR Part 20.

Most recently, we hosted, along with the Bureau of Justice Statistics, an all-day conference around the Attorney General's report that gave varied interest groups the opportunity to further what we believe is an essential national discussion.

We believe resolution of these complex issues requires congressional action, and we commend the Chair and the Committee for beginning the process.

Much progress has been made through the congressional support of the Interstate Identification Index, or III, administered by the FBI in partnership with the States; creation of the National Crime Prevention and Privacy Compact that established the Compact Council; and funding initiatives such as the National Criminal History Improvement Program.

Nevertheless, more work needs to be done, and your continued support is needed. I would like to make the following points in the time remaining.

All the research—and indeed, the Attorney General's report—indicates that the most complete record resides within the State repositories. This is, in part, the reasoning behind the III approach. Therefore, we believe it is essential that any future system continue to access State's records.

We believe that utilizing the existing infrastructure is critical to the long-term success of any system moving forward. III and the Compact Council provide the foundation.

However, III is also the infrastructure relied upon by the State and the Federal criminal justice system to provide daily support for public safety and homeland security work.

Based on these first two points, we believe that the revenue currently generated through State fees for these checks must continue to be available to the States so that they can continue their part of the partnership that supports this system.

We also support, as an option, allowing the record to be returned to a non-governmental entity. In a recent survey of the State repositories, SEARCH found that the current restrictions were a significant obstacle to increasing access to national searches.

However, this increased access must be coupled with proper training and safeguards to ensure persons reading the record are qualified to correctly interpret the information.

Work has begun to standardize these record reports, and it would go a long way toward solving this problem if that could be completed.

We urge congressional funding to greatly expand the adoption of this standard report.

Finally, we believe that any national system authorized by Congress should rely on the fingerprint-based databases maintained by the FBI and the State repositories.

Criminal history background checks have become almost a rite of passage in our society for homeland security, for public safety, for risk management.

But how do we determine who should be checked? How do we assure that the checks are accurate? How do we assure that the checks meet high standards for privacy? And how do we assure the offenders get the real second chance to reenter society?

These are hard questions, and hard work lies ahead. We at SEARCH look forward to working with Congress, the Justice Department and all stakeholders on the critically important issue.

On behalf of SEARCH and its governor's appointees, I thank you for this opportunity, and I would be glad to respond to questions.

[The prepared statement of Mr. Hawley follows:]

PREPARED STATEMENT OF RONALD P. HAWLEY

INTRODUCTION

On behalf of SEARCH, the National Consortium for Justice Information and Statistics ("SEARCH"). I want to thank you Mr. Chairman and members of the subcommittee for this opportunity to testify regarding The Attorney General's Report on Criminal History Background Checks.

SEARCH is a nonprofit membership organization created by and for the States and is dedicated to improving the criminal justice system and the quality of justice through better information management, effective application of information and identification technology, and responsible law and policy. SEARCH is governed by a Membership Group comprised of one gubernatorial appointee from each of the 50 States, the District of Columbia, Puerto Rico and the Virgin Islands. Each state

pays dues in support of the work of SEARCH. Members are primarily State-level justice officials responsible for operational decisions and policymaking concerning the management of criminal justice information, particularly criminal history information.

Since our founding in 1969, when the federal Law Enforcement Assistance Administration created Project SEARCH to explore the feasibility, practicality and cost-effectiveness of developing a computerized criminal history records system and of electronically exchanging these records across state lines we have steadfastly sought to balance the individual's right to privacy with society's need for criminal history information. In 1970, SEARCH first published findings and recommendations regarding the security, privacy and confidentiality of information contained in computerized criminal history files. Subsequent revisions led to a comprehensive rethinking of criminal justice information policy in the form of a publication known as Technical Report No. 13. By any measure, the standards in Technical Report No. 13 had an important impact upon law and policy with respect to criminal justice information. The standards served in large measure as a basis for the Law Enforcement Assistance Administration's development of comprehensive regulations for criminal history record information adopted in March 1976 as 28 C.F.R. Part 20.

The SEARCH Membership Group has not taken a position on the Attorney General's Report. However, we find it to be an exceptionally comprehensive discussion of meaningful issues and it asks the right questions. Most of these issues and questions are not new to the SEARCH Membership. Our testimony today focuses on several concepts and strategies which would contribute significantly to an improved national system for conducting national criminal history record checks for national security, employment, and licensing, as well as the screening of prospective volunteers who have access to the young infirm or elderly.

SEARCH has a long history of involvement with criminal record background checks, not only how these checks are administered by our members but also contributing to the formulation of national and state policies that guide the scope and use of criminal record background screening. I will mention but a few recent relevant activities. In 2005, SEARCH published the Report of the National Task Force on the Commercial Sale of Criminal Justice Record Information. We believe this report is the first-ever comprehensive look at the role that commercial background screening companies play in the collection, maintenance, sale and dissemination of criminal history record information for employment screening and other important risk management purposes. In 2006, we concluded the work of the National Task Force on the Criminal Backgrounding of America. The Task Force Report, as well as other SEARCH activities, helped to inform the Attorney General's Report on Criminal History Background Checks and are referenced in the Attorney General's Report. This past February SEARCH hosted an all day conference entitled Expanding Access to Criminal History Information and Improving Criminal Record Backgrounding which brought together and gave varied interest groups the opportunity to further what we believe is an essential national discussion. Because this discussion can only move toward final resolution through congressional action, I commend the Chair and this committee for holding these hearings.

THE NEED FOR CONTINUING CONGRESSIONAL LEADERSHIP AND SUPPORT

The Attorney General's Report and much of my testimony today will refer to the national system, administered by the FBI, for exchanging criminal history record information known as the Interstate Identification Index, or III. Similarly, both the Attorney General's Report and my testimony will refer to the National Crime Prevention and Privacy Compact and "Compact Council" established under the Crime Identification Technology Act of 1998 (PL 105–251).

It should be noted that although today we are talking about the Interstate Identification Index in the context of noncriminal justice purpose background checks, it is this same system, the III, upon which detectives depend when conducting criminal investigations, prosecutors rely when making charging decisions, judges rely when passing sentences, corrections officials depend on when classifying inmates and it is the III that supports an array of other criminal justice system tasks. It is the same system that is used in part to screen prospective hazardous materials drivers and a host of other homeland security related applications. In short, anything that impacts the Interstate Identification Index, either positively or negatively, may effect the functioning of our state and federal criminal justice systems as well as the national system for conducting criminal record background checks for homeland security, employment, licensing and other authorized purposes.

Ideally, any undertaking to improve the national criminal history record check system should build upon the existing infrastructure governed by the National

Crime Prevention and Privacy Compact. The Compact governs the use of the Interstate Identification Index (III) System for conducting national criminal history record searches for noncriminal justice purposes, such as background screening for employment, licensing and volunteering. The States and the Federal Government have invested a great deal of expense and effort over a period of more than 25 years to implement the III system, which provided access to more than 60 million criminal history records as of March 2007.

Much of the growth of the III system can be credited to the Congress's creation and continuing support of the National Criminal History Improvement Program (NCHIP), an umbrella program that implements provisions of the Crime Identification Technology Act of 1998, the Brady Handgun Violence Prevention Act, the National Child Protection Act of 1993 and several others. Since the inception of NCHIP in 1995, the number of automated criminal history records held by state criminal record repositories and available for sharing between the States and the FBI under III increased by an estimated 98 percent. As of March 2007, 95 percent of the criminal history record information in the FBI administered database was contributed by State and local law enforcement, courts and other local justice entities, typically through a State-level criminal record repository.

We believe that the framework for discussion of how best to conduct criminal history background checks would not today be taking place but for the Congress's initiation and continuing support of various grant programs and especially NCHIP which has nurtured the extraordinary success of the cooperative partnership between the States and the Criminal Justice Information Services Division of the FBI that is III, the Interstate Identification Index.

With the ongoing need to replace technology, enhance technology and process an ever growing statutorily mandated criminal background check workload, homeland security related workload, as well as efficiently addressing continued growth of criminal justice applications, we believe that NCHIP and related grant programs must be sustained and expanded.

BACKGROUND CHECKS TODAY—STATE REPOSITORIES, FINGERPRINTS AND THE FBI

As the Attorney General discusses in his report access to criminal history records is far from universal and constrained by such issues as who has statutory authorization, inconsistent costs, privacy concerns, and whether the search of a criminal records database is based on matching biometric identifiers (e.g., fingerprints) or merely names. Beyond, or perhaps supplemental to accessing official records is the data available for purchase from commercial information providers. It is useful to recognize that at both the state and national levels criminal record background screening relies on databases that were originally established to serve the needs of the criminal justice community. As previously noted, those needs remain in place although at the federal level and in many states it is now common to find that the volume of inquiries for background checks surpasses the criminal justice related volume.

More than 1200 state laws, often referred to as Public Law 92–544 statutes have been approved by the Attorney General as sufficient to provide access to the national criminal records database as part of a background screening process. Typically, a request for a national search for a noncriminal justice purpose authorized by a State statute is submitted to the State's criminal history record repository and begins with a fingerprint-based search of the repository's criminal history record database. Commonly, an FBI search follows if the State repository fails to identify the applicant as having a State record. In other instances, the applicant fingerprints are submitted to the FBI independent of whether an identification and record have surfaced at the State level. In these instances, both the State level and national level information is forwarded to the adjudicating entity. Either of these approaches provides a more comprehensive search than a search conducted by the FBI alone, since State databases are more complete than the centralized database of State offenders maintained by the FBI. The Attorney General's report recognizes the importance of the state held records and urges that under any scenario those records be accessed. We recommend that any improvement to conducting criminal history background checks retain a check of the state held records. In addition to providing the most reliable search, the fees charged by State repositories for such searches provide funds that the States rely upon to support their criminal history record systems, which are the foundation not only for employment and licensing decisions but also for an array of critical criminal justice decisions such as charging, bond setting, sentencing and others.

We would be opposed to the development of any system that fails to take advantage of state-maintained records. These records have been shown to be more com-

plete than those maintained by the FBI. State-maintained databases contain arrests that may not be included in the FBI's files, and are more apt to include dispositions of arrest charges. This is the primary reason why the FBI and State officials agreed 25 years ago to begin the phased implementation of the III system, which is designed ultimately to make State repository records available for all national search purposes instead of FBI records.

FBI-held offender records continue to be the primary database used for national noncriminal justice search purposes. Many of the records provided as a result of such searches lack disposition information. In some instances, such as requests through the National Instant Criminal Record Background Check System (NICS), the burden of providing this missing disposition information falls primarily upon the State repositories, which do not receive compensation for this activity other than from their own legislatures.

To the extent that the national system that may be authorized by the Congress permits additional noncriminal justice entities to bypass the State repositories and apply directly to the FBI or to some other national-level organization, the problem of missing dispositions will worsen and the burden on State repositories will increase. Any resulting loss of funds that repositories receive for conducting noncriminal justice background checks would seriously impede their ability to collect, search and forward criminal records to the FBI, resulting in the steady erosion of the quality of criminal records maintained by the FBI. Meanwhile, the FBI's workload would increase significantly. Sizing for the FBI's Integrated Automated Fingerprint Identification System was based, in part, on the well-recognized fact that two-thirds of arrested individuals have previous criminal histories; identification of these individuals at the State level would spare the FBI from having to conduct a repetitive search.

For these reasons, we urge the Committee to recommend that appropriate federal funding be provided to compensate State repositories if they are expected to contribute services to a national check system that deprives the States of existing fees.

A 2005 SEARCH survey of the state criminal record repositories indicated that the greatest obstacle to increased State participation in programs to provide national searches for noncriminal justice purposes is the fact that current Federal law does not permit the repositories to make criminal history records, or parts of them, available to private noncriminal justice entities, such as volunteer agencies covered by the National Child Protection Act or non-governmental entities authorized under State statutes enacted pursuant to Public Law 92–544. Instead, the States must designate State agencies to make fitness determinations and forward them to the applicant noncriminal justice agencies.

We urge the Committee to recommend that the States and the FBI be authorized, as an option, to make criminal history records disseminated by the FBI or accessed by a State from the FBI available to nongovernmental agencies, such as private employers and agencies that deal with children, the elderly and disabled persons. We believe these agencies are able to make their own fitness determinations concerning their applicants as an alternative to State agencies that may not be familiar with all of the circumstances concerning applicants' duties and the environments in which they will be employed or may volunteer. This recommendation is not intended to abrogate governmental determinations relating to regulatory responsibilities associated with licensing or certification for various positions.

We recognize that some private noncriminal justice agencies may need training or instructions to help them interpret and understand criminal history records. We recommend that such agencies be required to enter into user agreements that contain such requirements as training, security and perhaps making the criminal history records reviewed during applicant processing available to the applicants themselves to help ensure that they are accurate and complete. Applicants should be given the opportunity to correct erroneous information and to appeal adverse decisions. We believe that this approach recognizes and is consistent with privacy protections and consumer rights. Such agreements should also require compliance audits and provide penalties for noncompliance.

Criminal history records vary in presentation format, content and intelligibility from state-to-state and between states and the FBI. "Rap Sheet" literacy can at times be a challenge for even those who routinely review criminal record information. To address this problem SEARCH, NLETS—the International Justice and Public Safety Sharing Network (an organization founded by the States), the Criminal Justice Information Services (CJIS) Division of the FBI, and the CJIS Division's Advisory Policy Board have banded together in a Joint Task Force which has formalized the specifications for a standardized criminal history record. The FBI, Kentucky, Wisconsin and Maine have implemented the specification and other states are moving in this direction. Given the wide ranging benefits that would be derived

from national implementation, such as ease of understanding the criminal history record and the ability to create summary and chronologically merged information, we urge the committee to support funding to expand adoption of the standardized "Rap Sheet" through funding for programming and training.

BACKGROUND CHECKS TODAY—NAME BASED CHECKS

The Attorney General's Report discusses the expansion of access to criminal history record information. As previously noted, official State and FBI files can only be accessed when authorizing statutory authority is in place. These statutes typically require the submission of fingerprints and fees which vary widely from state-to-state. Policy makers, based on an April 2006 SEARCH survey, in at least 25 states make name-only searches of criminal history information available to the public through a website maintained by the criminal records repository in 15 states or the state court system in 10 states. In addition some of these states accept mailed-in, telephone and in-person requests. In states that offer this service it is common to find that the volume of name-based inquiries is ten-fold or greater than the number of noncriminal justice purpose fingerprint transactions.

The National Task Force on the Commercial Sale of Criminal Justice Record Information found it difficult to quantify the number of criminal record related transactions processed industry-wide. "In addition to a few large companies there are hundreds, perhaps even thousands, of local and regional companies." Further, there are wide differences in the number and scope of records maintained or accessed by companies.

We believe that the criminal history record databases maintained by the FBI and the State repositories should continue to be the basis for national criminal history searches for noncriminal justice purposes. While some employers or volunteer organizations may wish to conduct name-based criminal record searches from the States or commercial databases compiled by private vendors, we believe that the databases that from the basis of a national system should be based on positive identification—fingerprint-based identification.

In his testimony to Congress in May 2000, former Assistant FBI Director David Loesch shared the results of an analysis conducted by the Bureau of the 6.9 million records submitted for employment and licensing purposes in Fiscal Year 1997. According to Loesch, 8.7 percent or just over 600,000 of the prints produced "hits." Loesch further noted that 11.7 percent of the "hits" or 70,200 civil fingerprint cards reflected different names than those listed in the applicants' criminal history records. These individuals would have been missed entirely by name-only background checks. This and other studies have repeatedly substantiated that background checks based on names rather than positive identification consistently miss a substantial number of criminal records while erroneously associating applicants with criminal record information that does not relate to them.

Criminal information databases maintained by private vendors are also not as complete as the official records maintained by State and Federal criminal record managers. Official records are populated with information from all segments of the criminal justice process, from arrest, trial, adjudication and correctional activity. Information in private databases is often collected from only one or two of the justice process components, such as courts or corrections. Further, access to records that are sealed or expunged from official databases is often provided in commercial databases, interfering with public policy efforts to give former offenders an opportunity to rebuild their lives. However, it is worthwhile to note that these databases would be the preferred choice in some circumstances and may also contain information not available in the governmentally administered records sets. For example, an employer may be very interested in vehicle related offenses committed by applicants for driving positions yet this kind of information is rarely included on the "Rap Sheet."

A full discussion of the privacy protections built into the Fair Credit Reporting Act is not within the scope of this hearing. However, while the FCRA provides comprehensive protections that are imposed on commercial providers, it should be noted that governmentally provided information varies significantly on the restrictions that are applied. For example, in the case of the courts, they are often more open than that available from the private sector—even when both sets of information are name based.

CONCLUSION

In our post 9/11 world we concur with the Attorney General's Report that there is a need to improve access for the private sector to criminal record information. Better access however does not necessarily mean universal unfettered access to all

information for all employers and all positions. We know a great deal about recidivism rates but far less about evaluating the predictive value of a specific conviction over time when it comes to assessing public safety risk, integrity, or performance in a particular job. And after all isn't that the purposes of the criminal record background check?

The Attorney General's Report recognizes that there must be a balance between appropriate access and privacy rights if we are to have an effective policy. The Report breaks some new ground in this area. While the SEARCH Membership has not taken a position on the privacy related recommendations in the Report the Committee should be aware that every state has a process which affords an opportunity to review a record and correct inaccuracies on that record.

We are confident that the concepts, processes and procedures described above would contribute significantly to a noncriminal justice background check system that provides the public with maximum safety benefits while ensuring the viability of all justice entities that contribute criminal record data. Once again, we appreciate the opportunity to provide these comments, and we urge you to contact us if we can provide additional information concerning this vitally important matter.

Mr. SCOTT. Thank you, Mr. Hawley.

Mr. Clarke?

TESTIMONY OF FLOYD I. CLARKE, VICE PRESIDENT FOR CORPORATE COMPLIANCE, MAC ANDREWS & FORBES HOLDINGS, INC., PHILADELPHIA, PA

Mr. CLARKE. Chairman Scott, Ranking Member Forbes and Members of the Subcommittee, thank you for the opportunity to testify today about the experiences of Allied Barton Security Services in attempting to use the criminal history database of the FBI to help screen applicants, as well as our views on the Attorney General's June 2006 report on criminal history background checks.

I am a member of the board of managers for Allied Barton, and previously I spent 30 years working at the FBI, retiring in January 1994 after having served as the acting director of the bureau.

Thus, I approach this issue with the benefit of the perspective of both the FBI and the private sector.

Allied Barton is the largest American-owned security officer services company, with more than 48,000 security officers and over 100 offices located across the United States, including Virginia, from which we help protect the facilities, employees and customers of approximately 3,300 clients.

Private security officers provide a primary line of defense for much of our country, securing countless lives, tens of thousands of important and valuable sites from coast to coast.

For the safety of the people at these locations and the facilities involved, the companies employing these officers want to do all that we reasonably can to ensure that the officers that we hire are trustworthy and not likely to commit violence or, at worst, aid or support terrorists.

At a minimum, this requires that our companies have a reliable and timely way of learning about any serious criminal history of our applicants and employees.

The Attorney General's report concludes that comprehensive and reliable criminal history background checks cannot be accomplished without timely access to the records of the Criminal Justice Information Services Division of the FBI.

And we agree, but let me explain why this is so important. Without access to the Federal records, the only records available to an employer are those in the States and their political subdivisions,

where the records are typically kept at the courthouses in each of the countries.

Since there is no practical way to check all 3,000 clerks of courts around the country for every employee, employers usually will request a record check in the counties in which the applicant says they have recently lived or worked.

This leaves the employer blind to any criminal history records in States for which the applicant failed to disclose contacts.

How can we rely upon a system to weed out untrustworthy and dangerous applicants when the process necessarily depends upon the honesty and forthright nature of every applicant?

Mr. Chairman, I want to stress that Congress and, in particular, this Committee is to be commended for having endeavored to address this problem by enacting the Private Security Officers Employment Authorization Act in 2004 which allows Allied Barton and other firms to submit requests through the States to screen employees against the FBI's criminal history records.

Unfortunately, for a variety of reasons, States have generally not exercised this authority, and employers still cannot regularly screen prospective employees against the national database.

We work closely with the State regulators and, for the most part, they fully and competently fulfill their State role. However, the States with which we work have not prioritized the next step in seeking an FBI records check, despite the 2004 statute permitting them to do so.

In addition, several States have no background check process at all. Thus, without direct access to the FBI database, it is extremely difficult to verify applicant's backgrounds in these States.

It is equally important that record checks be completed in a timely manner. Significant delays in getting responses are unfair to employers and applicants and present potential security risks.

Hiring needs are typically time-sensitive. When records are slow in coming in, the employer is compelled to either pass over the applicant or to place him or her on the job pending the results of a State background check, leaving potentially unreliable and dangerous persons as protectors of loved ones, valuable sites and sometimes they are there for weeks.

To address these problems, the Attorney General's report recommends that private sector employers be able to screen job applicants against the FBI's criminal history records, with the State serving as the primary access point for criminal background checks only if they can meet standards set by the Attorney General.

The report recommends that in order to participate, States must meet standards specified by the Attorney General within the parameters set by statute for the scope of access and the methods and time frames for providing access and responses for these checks.

Specifically, a State or the FBI should be required to respond to an approved submitting agency within three business days of the submission of the fingerprints.

Thus, the Attorney General recommends that access to FBI-maintained records should be available to employers when States do not opt to participate.

Based upon our experience, we strongly support this recommendation and urge Congress to strengthen current law by providing statutory authority for such access.

In conclusion, I want to point out that our experience indicates that protections afforded to employees of the kind that Congress wisely included in the Private Security Officers Employment Authorization Act have worked well to protect the important privacy rights, ensure fairness of the process, and to support essential policies to promote appropriate reentry of ex-offenders.

These protections are consistent with the recommendations in the Attorney General's report.

I want to thank you again for the opportunity to address the Subcommittee today. The Attorney General's report rightly recognized a serious homeland security issue and has provided very helpful recommendations to remedy that problem.

I am confident that implementing these recommendations will make our Nation safer. Thank you.

[The prepared statement of Mr. Clarke follows:]

PREPARED STATEMENT OF FLOYD I. CLARKE

I. INTRODUCTION

Chairman Scott, Ranking Member Forbes, and Members of the Subcommittee, thank you for the opportunity to testify today about the experience of AlliedBarton Security Services in attempting to use the criminal history database of the Federal Bureau of Investigation (FBI) to help screen applicants, as well as our views on the Attorney General's June 2006 Report on Criminal History Background Checks ("AG's Report").[1]

I am the Vice President for Corporate Compliance of MacAndrews & Forbes Holdings, Inc. and a Member of the Board of Managers for AlliedBarton Security Services. Previously, I spent 30 years working at the Federal Bureau of Investigation, ending in January 1994 as Acting Director of the Bureau. Thus, I approach this issue with the benefit of the perspective of both the FBI and the private sector.

AlliedBarton Security Services, headquartered in King of Prussia, Pennsylvania, is the largest American-owned security officer services company. Established in 1957, AlliedBarton is a trusted leader with proven expertise in providing highly trained security officers to a number of markets, including manufacturing and industrial, financial institutions, colleges and universities, commercial real estate, government services, healthcare, residential communities, and shopping malls and other retail facilities. AlliedBarton has more than 48,000 security officers and over 100 offices located across the United States from which we help protect the facilities, employees, and customers of our approximately 3,300 clients.

Congress, and in particular this committee, should be commended for having recognized, in 2004, the imperative for having "professional, reliable, and responsible security officers for the protection of people, facilities, and institutions" and that these private security officers "should be thoroughly screened and trained."[2] As part of the Intelligence Reform and Terrorism Prevention Act of 2004, Congress enacted the Private Security Officer Employment Authorization Act to allow Allied Barton and other private security officer firms to submit requests through the states to screen employees[3] against the FBI's criminal history records. Unfortunately, for a variety of reasons, states have generally not exercised this authority and private security officer employers still cannot regularly screen prospective employees against the national database.

Mr. Chairman, I know from my experience at the FBI how important it is to obtain timely criminal history record checks. In my years with AlliedBarton, I have seen how important it is in the private security officer context as well. My testimony today briefly discusses why this access is so important and how it has worked—and not worked—for AlliedBarton over the last two years.

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[1] United States Department of Justice, *The Attorney General's Report on Criminal History Background Checks* (June 2006).

[2] P.L. 108–458, section 6402.

[3] References to "employees" in this statement should be understood to also include applicants.

II. RELIABLE PRIVATE SECURITY OFFICERS ARE CRUCIAL TO OUR NATION'S SECURITY

Private security officers provide a primary line of defense for much of our country, securing countless lives and tens of thousands of important and valuable sites from coast to coast. The Intelligence Reform and Terrorism Prevention Act of 2004 (Pub. L. No. 108–458) found that "the threat of additional terrorist attacks requires cooperation between public and private sectors and demands professional, reliable, and responsible security officers for the protection of people, facilities, and institutions." Noting that the private sector controls 85% of the critical infrastructure in the nation, the 9/11 Commission concluded that, "unless a terrorist's target is a military or other secure government facility, the 'first' first responders will almost certainly be civilians."[4]

Those civilians are likely to include private security guards, counted on as the prime protectors of homes (apartment buildings, dormitories, and private communities), offices, financial institutions, factories, public sector facilities, hospitals and other critical elements of the infrastructure of our nation. For the safety of the people at these locations and the facilities involved, the companies employing these private security officers want to do all that we reasonably can to ensure that the officers we hire are trustworthy and not likely to commit violence or, at worst, aid or support terrorists. At a minimum, this requires that our companies have a reliable and timely way of learning about any serious criminal history of our applicants and employees.

Reliable Criminal History Checks Require Access to FBI-Maintained Records

The Attorney General's Report concluded that a comprehensive and reliable criminal history background check cannot be accomplished without timely access to the records of the Criminal Justice Information Services Division of the Federal Bureau of Investigation. We agree. Let me explain why this is so important.

Without access to federal records, the only records available to an employer are those in the states and their political subdivisions, where the records are typically kept at the courthouse in each county. Since there is no practical way to check all 3,000 clerks of court around the country for every employee, employers usually will request a record check in the counties in which the applicant says they have recently lived or worked. This leaves the employer blind to any criminal history records in states for which the applicant failed to disclose contacts. How can employers rely on a system to weed out untrustworthy or dangerous applicants when that process necessarily depends on the honesty and forthright nature of every applicant?

There are commercial databases that aggregate criminal history information from multiple states but, as the AG Report found, these are not truly national in scope because not all states, courts, or agencies make their records available to such compilers. Moreover, these databases are only updated occasionally and, thus, may lack current data. These commercial databases, therefore, are not adequate substitutes for screening against the FBI-maintained database.

Congress acted in 2004 to provide private security officer employers with access to that federal database. Unfortunately, in doing so, Congress required that the employers always go through the state identification bureaus in order to get that access. In other words, we must submit the employee information to the state bureau, which then decides whether to forward the request to the federal level.

We work closely with state regulators of private security officers and, for the most part, they fully and competently fulfill their state role. However, the states with which we work have not prioritized the next step of seeking an FBI records check, despite the 2004 statute permitting them to do so. In addition, several states have no background check process at all. Thus, without direct access to the FBI-maintained database, AlliedBarton and other security officer employers have no way to verify applicants' backgrounds in these states.

It is equally important that record checks be completed in a timely manner. Significant delays in getting responses to criminal history record requests are unfair to employers and applicants, and present potential security risks. Hiring needs are typically time-sensitive, which means either passing over the applicant because the records are not in, or, where permitted, placing a private security officer applicant "on the job" pending the results of a state background check—leaving potentially unreliable and dangerous persons as the protectors of loved ones and valuable sites for weeks.

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[4] The National Commission on Terrorist Attacks on the United States ("9/11 Commission"), *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks on the United States,* 397–98 (July 2004).

The Attorney General's Report found that the processing time for states, from the date of the fingerprint capture to the date of submission to the FBI ranged up to 42 days.[5] This is consistent with AlliedBarton's experience over the last 2 years under the current statute.

III. RECOMMENDATIONS: PROTECTING OUR NATION

To address these problems, the AG's Report recommends that private sector employers be able to screen job applicants against the FBI's criminal history records, with the states serving as employers' primary access point for criminal background checks only if they can meet standards set by the Attorney General. The Report recommends, "In order to participate, states must meet standards specified by the Attorney General, within parameters set by statute, for the scope of access and the methods and time frames for providing access and responses for these checks."[6] Specifically, the Attorney General concluded, "A participating state or the FBI should be required to respond to an enrolled employer, entity, or consumer reporting agency within three business days of the submission of the fingerprints."[7]

Importantly, this means that an employer in a state that cannot, or chooses not to, provide timely background check results that incorporate both state and FBI data should be able to make direct requests to the FBI, through an entity designated by the Attorney General, for criminal history records. The Attorney General's Report stated it this way: "Access to FBI-maintained criminal history records should be available to employers when states do not opt to participate, either because they lack the authority, the resources, or infrastructure (such as system capacity) to process such checks, or because the access they can offer is limited in scope or does not meet the national standards set for this system."[8]

Based on our experience, we strongly support this recommendation and urge Congress to strengthen current law by providing statutory authority for such access.

There are sound reasons for employers seeking comprehensive criminal histories to also check state repositories. The Attorney General's Report noted that the "rationale for requiring the submission of fingerprints through a state record repository is based on the fact that the FBI-maintained records are not as complete as the records maintained at the state level."[9] The FBI's records also have more limited information regarding disposition of arrests, with only 50 percent of its arrest records containing final dispositions, compared to the states that range from 70 to 80 percent.[10] Thus, even if employers are permitted to submit requests without first going through the state, they are likely to use the federal response as an indicator of which states contain records regarding the employee, and then they will check the records in those states. This process, however, will avoid the delays involved in having to go through the states just to get the FBI response.

Guaranteeing Employee Protections

AlliedBarton's experience indicates that the protections afforded to employees that Congress wisely included in the Private Security Officer Employment Authorization Act have worked well to protect important privacy rights, ensure the fairness of the process, and support essential policies to promote appropriate re-entry of ex-offenders. These protections are consistent with the recommendations in the Attorney General's Report and include:

- Written, informed consent of the employee
- The opportunity for the employee to review the information received
- Specific qualifying crimes, where states do not have their own standards
- Criminal penalties for misuse of the criminal history information

IV. CONCLUSION

In conclusion, I want to thank you again for the opportunity to address the Subcommittee today. The Attorney General's Report rightly recognized a serious homeland security issue, and has provided very helpful recommendations to remedy that problem. I'm confident that implementing these recommendations as applied to the private security industry—specifically by insuring employers' timely access to FBI criminal records while preserving employee rights—will make our nation safer.

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[5] *Id* at 22.
[6] *Id* at 87.
[7] *Id* at 94.
[8] *Id* at 88.
[9] *Id* at 27.
[10] *Id*.

Mr. SCOTT. Thank you.
Mr. Davis?

TESTIMONY OF ROBERT F. DAVIS, INTERNATIONAL VICE PRESIDENT AND NATIONAL LEGISLATIVE DIRECTOR, TRANSPORTATION COMMUNICATIONS INTERNATIONAL UNION, ROCKVILLE, MD

Mr. DAVIS. Chairman Scott, Ranking Member Forbes and Members of the Committee, thank you for the opportunity to speak to you today on the subject of criminal background checks for employees of railroad contractors.

My name is Robert Davis, and I am an international vice president and the national legislative director of the Transportation Communications Union, commonly known as TCU.

TCU is a labor organization representing employees, most of whom are employed in the railroad and related industries, including employees of contractors providing service to the railroads.

Let me emphasize at the start that there is nothing more important to our union than the safety and security of our members. We acknowledge that some control over access to railroad property is an important component of assuring their safety.

Consistent with legitimate security concerns, we must also protect employees subject to background checks from arbitrary loss of employment by providing them with fundamental procedural protections. This is one of the most important aspects in assuring accuracy in criminal background checks.

During 2006, each of the four major Class I railroads, including the Burlington Northern Santa Fe (NSF) implemented a program requiring its contractors to use the services of e-RAILSAFE to conduct background checks, including the criminal background, of their employees.

The railroads advised their contractors that this program was adopted to meet "government security recommendations, directives and regulations." There are, however, no such government requirements.

While this background check program raises serious questions of equity, our current labor laws do not afford a meaningful avenue for redress. As an example, Transportation Communications International Union (TCU) has, for many years, represented employees of Pacific Rail Services employed in Seattle, Washington. PacRail provides the labor to load and unload freight at an intermodal yard owned by the BNSF.

This yard is adjacent to a port facility where freight is routinely transferred between BNSF and ocean-going vessels. In the fall of 2006, BNSF advised PacRail that its employees would be required to participate in the e-RAILSAFE background check program.

PacRail employees were required to sign a waiver authorizing e-RAILSAFE to obtain consumer reports, including any reports providing information on the employees' "character and general reputation."

No explanation was offered to the employees or TCU as to which criminal offenses would disqualify them from entering BNSF property. No explanation was offered as to what mitigating factors, if any, would be considered.

While there is an appeal process, that process is totally controlled by BNSF, with no redress before a true neutral. BNSF has refused to respond to requests from TCU and PacRail for information about this program.

As a result of this background check program in Seattle, two employees lost several weeks of employment, and one has permanently lost employment.

While these employees had criminal records, PacRail was well aware of this fact from the time they were hired. Each of these employees had worked for PacRail for several years without incident, and absent BNSF's demands, PacRail would have taken no disciplinary action against them.

To summarize, employees who honestly reveal their criminal records at the time of hiring, after years of an unblemished work records, have been barred from entering their work site because of their criminal records, which were previously known by their employer.

While these actions were supposedly taken in the name of security, no explanation was offered as to how these employees are security risks.

The so-called appeal process controlled by the BNSF has refused to give information to the contractor or the affected employees.

While BNSF designed and imposed the background check program, it was not obligated to bargain or arbitrate with TCU about this program, since TCU's collective bargaining relationship for the involved employees is with PacRail, not BNSF.

TCU has filed a grievance over the implementation of this program with PacRail. PacRail has defended its actions by maintaining that it had no choice but to put this program into effect at the insistence of BNSF.

BNSF, not PacRail, barred these employees. This matter is currently pending arbitration. We will soon learn the outcome.

But even assuming that the arbitrator finds PacRail violated its collective bargaining agreement, he will be unable to provide the employee who has been permanently barred from his workplace with the traditional remedy of reinstatement.

Traditional collective bargaining and arbitration have proven totally ineffective. Since the tools the law currently provides employees and their unions are not up to this task, we have turned to Congress to deal with this issue.

The port security Transportation Workers Identification Credential (TWIC) program mandates a robust appeal and waiver process with the right to redress before an administrative law judge.

We want to add our voices to those supporting H.R. 1401, the "Rail and Public Transportation Security Act of 2007."

This bill provides for a waiver process much like the TWIC program so that affected employees can demonstrate, through rehabilitation or other factors, that he is not a security risk. It provides a meaningful appeal process and, most importantly, a meaningful redress process.

Significantly, these procedures bind the rail carriers and their contractors and therefore provide the basis for relief.

Again, thank you for this opportunity to testify, and I will be happy to answer any questions the Committee has.

[The prepared statement of Mr. Davis follows:]

PREPARED STATEMENT OF ROBERT F. DAVIS

Chairman Scott, Ranking Member Forbes and members of the Committee, thank you for the opportunity to speak before you this day on the subject of efficiency and accuracy in criminal background checks for employees of railroad contractors. My name is Robert Davis, and I am an International Vice President and National Legislative Director of the Transportation•Communications International Union, an affiliate of the International Association of Machinists, referred to as TCU.

TCU is a labor organization representing approximately 45,000 active employees, most of whom are employed in the railroad and related industries. TCU represents employees employed in the clerical, carman and supervisor crafts and classes employed by each of the nation's Class I railroads, Amtrak, and various commuter authorities. In addition, TCU represents the employees of some of the contractors providing service to the Class I railroads.

Let me emphasize at the start that there is nothing more important to our union than the safety and security of our members. We accept that some control over access to railroad property is an important component of assuring their safety. Consistent with legitimate security concerns, we can, and we should, also protect employees subject to background checks from arbitrary loss of employment, providing them with fundamental procedural protections. This is one of the most important aspects in assuring accuracy in criminal background checks.

During 2006 each of the four major Class I carriers—Union Pacific Railroad (UP), Burlington Northern Santa Fe Railroad (BNSF), CSXT and Norfolk Southern Railroad (NS)—implemented a program requiring its contractors to use the services of e-RAILSAFE to conduct background checks, including the criminal background, of their employees.[1] Each of these carriers advised their contractors that this program was adopted to meet "government security recommendations, directives, and regulations." As acknowledged by the President of the Association of American Railroads, and a representative of the Department of Homeland Security, in their testimony before the Subcommittee on Transportation Security and Infrastructure on February 16, 2007, this claim was erroneous.[2] There are no requirements for employee criminal background checks for railroad contractors. As I will demonstrate, where such background checks are required, unlike the railroads' program, federal law affords important protections to affected employees.

The implementation of this background check program raises serious questions of equity. Even where there is a collective bargaining relationship with a contractor, our current labor laws do not afford a meaningful avenue for redress. In order to make this point, I will now describe in some detail how this program impacted the employees of Pacific Rail Services, referred to as PacRail, who are represented by TCU.

TCU has for many years represented PacRail's employees employed in Seattle, Washington. PacRail provides the labor to load and unload freight at a rail yard owned by the BNSF. This yard is adjacent to a port facility where freight is routinely transferred between BNSF and ocean-going vessels. PacRail's employees work in close proximity to longshoremen responsible for the loading and unloading of cargo. The BNSF facility in Seattle is commonly referred to as an intermodal yard. The facility provides a critical link between rail, ship and truck modes of transportation.

In the fall of 2006 BNSF advised PacRail that its employees would be required to participate in the e-RAILSAFE background screening program. As a result PacRail's employees were required to sign a waiver authorizing e-RAILSAFE to obtain consumer reports including any reports providing information on the employees' "character and general reputation." No explanation was initially offered to PacRail's employees or their union as to the need for such a broad waiver, though, in response to subsequent inquiries, TCU was advised by PacRail that the broad waiver was needed to assure the accuracy of the criminal background check. No further explanation was given. No explanation was offered to employees or TCU as to which criminal offenses would disqualify them from entering BNSF property. No expla-

[1] As a result of this program, several employees of a UP contractor were denied access to their work site in the Chicago area because they had failed this background check. The affected employees are represented by the Teamsters, and a representative of that organization also testified at hearings held February 16, 2007, by the Transportation Security and Infrastructure Subcommittee.

[2] We thank Chairman Conyers for his interest in this issue and his attendance at that hearing.

nation was offered as to what mitigating factors, if any, were to be considered. While there is an appeal process, that process is totally controlled by BNSF, with no redress in front of a true neutral.

As a result of this background check, two employees lost several weeks of employment, and one has permanently lost employment. While these employees had criminal records, PacRail was well aware of this fact from the time they were hired. Each of these employees had worked for PacRail for several years without incident, and absent BNSF's demands, PacRail would have taken no disciplinary action against them.

BNSF imposed the requirement that PacRail employees undergo criminal background checks, designed the process for the background check, dictated the scope of the employee waiver, selected the company that conducted the background check, and designed the appeal process, which it controlled. Though BNSF maintains that it is responsible only for barring affected contractor employees from their property, and not for their termination of employment, the effect of the system is to deny PacRail employees an opportunity to work. Though BNSF designed, imposed and controlled the background check procedures, it was not obligated to bargain or arbitrate with TCU about that program, since TCU's collective bargaining relationship for the involved employees is with PacRail, not BNSF.

Under the National Labor Relations Act, PacRail is obligated to bargain over this program with TCU, but since it was not the moving party, there was no basis to engage in meaningful bargaining with the party responsible for their program. TCU filed unfair labor practice charges against PacRail for failing to bargain over this background check program, but investigation of these charges has been deferred pending arbitration. Further, PacRail was so uninvolved with the program that it was unable to respond to TCU's information requests, nor was it able to get BNSF to do so. BNSF also declined to respond to TCU's direct requests to it for information about this program.

To summarize, employees who honestly revealed their criminal records at the time of hiring, after years of an unblemished work record, have been barred from entering their work site because of their criminal records about which their employer was well aware. While these actions were supposedly taken in the name of security, no explanation was offered as to how these employees are security risks. While there is an appeal process, it is controlled by the railroad, and BNSF has refused to provide its contractor, the affected employees, or their union the most basic information about this process. It is hard to believe this situation is happening in America. And to make it even worse, this entire mess has been justified by the railroads as stemming from their compliance with non-existent requirements from the Department of Homeland Security.

TCU has filed a grievance over the implementation of this program with PacRail. PacRail has defended its actions by maintaining that it had no choice but to put this program into effect at the insistence of BNSF and that BNSF, not it, barred employees from going to work. This matter is pending arbitration, and we will soon learn whether the arbitrator accepts this defense. But even assuming the arbitrator finds that PacRail violated its collective bargaining agreement with TCU, he will be unable to provide the employee who has been permanently barred from his work place with the traditional remedy of reinstatement. Since BNSF is not party to the collective bargaining agreement, it will not be bound by the arbitrator's decision, and the arbitrator has no means to require BNSF to permit the employee onto its property.

Traditional collective bargaining, negotiations, information requests, grievances, and arbitration have proven totally ineffective to deal with this issue. Since the tools the law currently provides employees and their unions are not up to the task, we have turned to Congress to deal with this issue. We believe at a minimum that simple fairness and traditional concepts of fundamental due process require that (1) a time period be established for considering felony convictions; (2) a background check procedure be transparent—the list of disqualifying felonies be clearly articulated for all interested parties; (3) there be a nexus between the involved felonies and homeland security—rail contractor employees should be subjected to no greater scrutiny than Congress has imposed on port employees; (4) mitigating factors such as the facts surrounding the conviction and rehabilitation should be considered; and (5) there be a meaningful appeal process where a disqualifying decision could relatively promptly be reviewed by a true neutral.

The Transportation Worker Identification Credential (TWIC) program called for in the Port Security Act of 2006 already provides these protections to longshoremen and truck drivers carrying hazardous materials. PacRail employees work closely with both. The TWIC program was passed with bipartisan support in Congress and signed into law by President Bush.

The TWIC program calls for a robust appeal and waiver process with the right to redress before an Administrative Law Judge. The TWIC program lists specific crimes by statute for which an employee could be disqualified and provides that such crimes must have direct nexus to "terrorist and security risk." The railroads' original appeal process, as well as recently revised procedure, contains none of the protections of the TWIC program.

Fortunately Congress is in the process of addressing this problem. We want to add our voices to those supporting the Perlmutter Amendment to the Public Transportation Act, Section 120 of H.R. 1401. We thank Congresswoman Jackson Lee for being a co-sponsor of that amendment. That amendment provides for a waiver process in which the affected employees can demonstrate that through rehabilitation or other factors he is not a security risk, a meaningful appeal process, and, most importantly, a meaningful redress process. Significantly, these procedures bind the rail carriers and their contractors and, therefore, provide the basis for relief. We believe that fundamental fairness warrants support of this bill, which we understand has been passed by the House. A companion bill has been passed by the Senate, and the two bills are heading to conference committee. We are hopeful that the conference committee report will retain the protections described above and that a bill will soon be on its way to President Bush.

Thank you again for this opportunity to testify.

Mr. SCOTT. Thank you, Mr. Davis.

We have been joined by the gentleman from Georgia, Mr. Johnson.

We will now ask questions. We will be subject to the 5-minute rule. And I will recognize myself first for questions.

First, Mr. Davis, are workers still being denied employment because of the background checks?

Mr. DAVIS. Yes, sir, they are. The two that I indicated that were suspended for quite some time—they, in fact, are back. The other individual is still barred from the property, as the B.N. says. And there is also a similar situation in Chicago——

Mr. SCOTT. Well, is it clear that the Federal Government is not requiring that result?

Mr. DAVIS. Yes, it is clear that they are not requiring that result.

Mr. SCOTT. Okay.

Mr. DAVIS. That was so stipulated, as a matter of fact, in a hearing before the Homeland Security Committee by the president of the AAR, Mr. Hamburger.

Mr. SCOTT. Okay.

Does anybody think that it is appropriate to release to employers records of arrests as part of the record?

No one feels that way? Okay.

Ms. Dietrich, should the employer have the right to use its own judgment to decide what record would disqualify somebody from a job?

Ms. DIETRICH. I suppose it depends how they exercise that judgment. I certainly would agree——

Mr. SCOTT. Well, not whether they are exercising good judgment or bad judgment, but should that be the right of the employer?

Ms. DIETRICH. It depends what industry we are talking about. I understand that there are some industries in which Congress and the State legislatures will mandate certain background criteria, and I—where there are particularly vulnerable populations at risk. And that is sort of taken away from them there.

In other cases, I think there should be at least a recognition that across-the-board bars of people with records should not be permitted to happen.

Mr. SCOTT. You are not talking about it is bad judgment. You said it should be illegal?

Ms. DIETRICH. Yes.

Mr. SCOTT. If an employer has a choice of someone with a record and someone without a record, should they not be able to discriminate in favor of the one without a record?

Ms. DIETRICH. Not under Title VII, sir. There is a requirement that they use a business necessity in order to simply disqualify people whose records don't allow them to satisfy their hiring needs.

Mr. SCOTT. Is that under Title VII?

Ms. DIETRICH. Yes.

Mr. SCOTT. That would require a disproportionate—disparate impact.

Ms. DIETRICH. That is correct. Now, some States also have laws that prohibit people from being rejected unless there is a relationship between the job and the record.

So for instance, in Pennsylvania, we have such a law, but still there is obviously a lot of wiggle room that the employers have under that law because, as I described, many Pennsylvanians are losing jobs for records that are not related to the job they applied for.

Mr. SCOTT. Now, you mentioned the background screening—that we have laws involving background screening, like you have fair credit reporting laws. Are there any sanctions if the records are being released with significant inaccurate information?

Ms. DIETRICH. Under the Fair Credit Reporting Act, there is a requirement that background checkers use maximum reasonable efforts to get the information correct. But the sanctions there, of course, are either that the FTC has to enforce that, or that there be a private lawsuit.

And so far, there are only a dozen, fewer than a dozen, cases that have been brought against the background screening industry for violations of that law.

Mr. SCOTT. Is there any statute of limitations, Ms. Dietrich, about how long something ought to stay on your record?

Ms. DIETRICH. I would argue that it is——

Mr. SCOTT. With credit, you can't include stuff that is very old, is that right?

Ms. DIETRICH. That is correct. For arrest information, FCRA—Fair Credit Reporting Act—limits it to 7 years. However, in 1998 Congress eliminated the 7-year restriction for convictions.

It used to be there was a 7-year limitation that background checkers could report convictions, but Congress eliminated that and made it an open-ended amount of time.

Mr. SCOTT. Now, where is the prohibition against—if you get a record, it would not include any arrests more than 7 years old?

Ms. DIETRICH. Yes, that is part of the more general obsolete information provisions of the Fair Credit Reporting Act.

Mr. SCOTT. What about record checks? Is that under the Fair Credit Reporting Act?

Ms. DIETRICH. Yes. Yes, if they are being done by background check companies. If a public source of information is used by an employer—let's say somebody goes to the Pennsylvania State Police or to the Philadelphia courts—the Fair Credit Reporting Act does

not apply there. But it does apply to the background check companies.

Mr. SCOTT. So if someone went and got direct access to the FBI report, it would include all arrests and all convictions as far back as you can go.

Ms. DIETRICH. As far as I know, unless different standards were laid out by Congress.

Mr. SCOTT. Mr. Campbell, is there any—is that right?

Mr. CAMPBELL. Well, our recommendations don't recommend that the raw rap sheet be provided to the employer if this kind of expanded access is allowed.

We do a number of—we make a number of recommendations in that regard. First, we say that there be an effort to find missing dispositions, and that the repositories be given up to 3 business days to find those dispositions if there are arrests that don't have them.

We also suggest that we screen the records in accordance with State and Federal consumer reporting laws and any other State laws that might restrict the use of criminal history information by employers, so we respect the policies underlying those laws.

We also indicate that the records should be designated as a felony, a misdemeanor, or some lesser offense, something which doesn't happen in the raw rap sheets now.

We also recommend that rap sheets be standardized so that they are more easily comprehensible by non-criminal justice users.

We also recommend that in order to get access to these kind of records, employers be certified in reading and interpreting criminal records before they can even get access, that they have some kind of training in reading and interpreting records, and that a Web site and toll-free assistance number be provided so that employers can get assistance if they need it in interpreting the records.

So I think there is a series of—to the extent that we expand this to the private sector, we have recommended that not just the raw FBI rap sheet, which is used by criminal justice agencies, be disseminated, but rather a series of steps be done to screen them and make them more usable.

Mr. SCOTT. Thank you.

Mr. Forbes?

Mr. FORBES. Thank you, Mr. Chairman.

And thank all of you again for being here and for your expertise.

Ms. Dietrich and Mr. Clarke, I would like to ask your impressions on something that is just a dilemma to me. I don't know the answer to this.

But over and over again, on some of the hearings that we have come before us, we pound on employers because we say that they are hiring people here illegally and they are not checking those people to see whether or not they should be in the country and whether they have their documentation.

And the reason we hear is because we need so many positions filled for jobs. And I know that is what employers are telling me over and over again, "We have all these jobs that we need."

Then we have a hearing like this that we come in and say, "All these employers are fighting to keep people and not hire people be-

cause they are finding anything they can on their records to keep from hiring them."

And I know that is true. I am not disagreeing with that. But the question I have is what is the motivation for these employers. Do we also need to look at some of our tort liability laws?

Because I know, Mr. Clarke, in your situation, you are saying we need people—we are dealing in the security industry, and we want people that we can market and people feel safe.

And, Ms. Dietrich, I am hearing over and over again from employers, "The reason we do this is because if we slip up one time, we are going to just get nailed, and it is not whether we lose the suit or not, it is the cost of litigation over and over again because somebody is going to say we didn't check out everything we should."

What is your response, both of you, to the tort situation that our employers are in?

Ms. DIETRICH. I couldn't agree more. I think it is necessary to take a look at the extent to which employers are put sometimes in a Catch-22.

I, frankly, think that often that is sort of oversold as a reason for doing this, because there are, I think—and part of it is tort liability. That is a concern. Part of it is that everybody is doing it, and somehow you are not conducting your human resources correctly if you are not doing it.

But tort liability, if those laws were addressed, would certainly help people with records get jobs.

Mr. FORBES. Mr. Clarke?

Mr. CLARKE. I don't think that tort liability motivates us.

Mr. FORBES. No, but other employers.

Mr. CLARKE. I don't know how to answer that specifically, but ours is mainly to be sure that we know that we are not putting people into a job that they are supposed to be providing security when, in fact, they represent a high security risk.

We just need to be sure—and especially when you consider that 85 percent of this country's critical infrastructure is owned by the private sector, and our society is depending upon the private sector to provide adequate security for those industries.

Mr. FORBES. Mr. Campbell, if we adopt the recommendations of the A.G.'s 2006 report, and we basically are kind of opening some floodgates for requests to the FBI, would this inhibit in any way the FBI's primary mission of servicing the criminal justice community?

Mr. CAMPBELL. Well, one of the main conditions that we think needs to be included is the authority of the Attorney General to scale the system and only grant access to priority employers as the system can handle the demand, without interfering with the law enforcement and national security uses of the system.

So there is excess capacity to a certain extent now. We also know that there are many national security type uses that will be coming down the road that will increase demand on the system.

So obviously, this can only be expanded as the system allows for its use beyond those primary uses of the system.

Mr. FORBES. The A.G.'s report recommends authorizing dissemination of the records to the employer or consumer reporting agency

acting on the employer's behalf, but it is limited by several suggested rules, including ensuring accurate reports.

Would the FBI be responsible for ensuring that accuracy? And wouldn't that really require the FBI to obtain literally thousands of unreported dispositions? And basically, can the FBI comply with all these requirements?

Mr. CAMPBELL. Well, I think the idea behind the report is that we recognize the problems posed by missing dispositions when the records go out to private employers and suggest that the FBI and the repositories do seek to complete those dispositions.

It will cost more money. Obviously, that effort will take additional resources and will have to be added to any fee that is charged to the user in getting the information.

The other thing we recommend in that regard—and this goes beyond the FCRA—is that the individual be provided an opportunity to see their record before they apply for the position so they can correct it before they apply; also, that they see it before it goes to the employer so if they see an inaccuracy there, they have a chance to correct it before the cat is out of the bag, so to speak, and they can correct the record, as well as before adverse action.

So we recommend a number of things that would help to protect an individual seeking dispositions and giving them the opportunity to review and challenge through an automated and streamlined appeal process.

Mr. FORBES. And thank you all. We appreciate your work in this area. We know it is a very important area.

And I yield back, Mr. Chairman.

Mr. SCOTT. The gentleman from Georgia?

Mr. JOHNSON. Thank you.

Mr. Davis, you alluded to a situation involving the railroad workers in Chicago. Would you update us on that situation?

Mr. DAVIS. Well, I just have passing knowledge of it, but I will tell you what I do know about it. First of all, the same as the situation in Seattle.

These employees worked for a contractor, not directly for the railroad, and they were dismissed under the same type of circumstance that I described in Seattle, that the e-RAILSAFE criminal background check revealed something or other that the railroad in Chicago that employs the contractor didn't like and so they "barred them from the property."

I am not sure at this point where that matter stands as far as either legally or through an arbitration procedure or anything, because it involves a different union from mine.

Mr. JOHNSON. All right. How many railroad workers, if you know, throughout the country have been harmed by criminal background record checks?

Mr. DAVIS. Well, I can only speak to the ones that I know directly about—would be, as of this time, keeping in mind that this program only went into effect last year, the three that were in Seattle—and I am not exactly sure of the number in Chicago. I have seen numbers around 30 or a little more there.

And there were a couple of other individuals that I am aware of, again in Chicago, a different contractor, a different company, early

on, I would say maybe April of last year, but—those are the only ones I have direct knowledge of.

Obviously, we would only know about it if, in fact, one, the employees were represented by us or perhaps by some other union. If they worked for a contractor that is non-union then, you know, I wouldn't know about those.

Mr. JOHNSON. All right. Thank you.

Mr. Campbell, in the Attorney General's report to Congress, you wrote about the problem that FBI rap sheets are often incomplete.

Can you explain how the FBI addresses this incompleteness problem in order to ensure that information is complete for purposes of conducting Federal gun checks?

Mr. CAMPBELL. Well, the Brady Act provides 3 business days in which the National Instant Criminal Background Check System can respond to a gun dealer on whether a prospective buyer is prohibited from possessing or receiving a firearm.

And using those 3 business days, the NICS and the point of contact States that conduct background checks before purchases of guns in those States seek missing dispositions and other information that might reflect on the person's ability to purchase a firearm.

So for example, if there is an arrest for a felony but there is no disposition, NICS personnel make efforts to obtain that disposition within 3 business days.

If at the end of 3 business days the disposition is not found, the dealer is advised that the sale may proceed—or actually, they say the sale is delayed, but they can—under the Brady law they can transfer the firearm after 3 business days.

NICS continues the search for the missing disposition for 20 days after the initial call.

Mr. JOHNSON. I see. And then if something is found within that 20 days, then—what happens?

Mr. CAMPBELL. They would contact the gun dealer to advise them, for example, if they find that the person was convicted of the felony and is, in fact, disqualified, they advise the gun dealer that they are changing the response to denied.

And if the gun has been transferred, they refer that case to the ATF for retrieval of the firearm.

Mr. JOHNSON. I see. And approximately how many times per year does that happen?

Mr. CAMPBELL. I would have to get back to you to give you exact numbers.

Mr. JOHNSON. Well, approximately.

Mr. CAMPBELL. There are many thousands of cases where missing dispositions are not obtained within the 3 business days every year. I believe that is the case.

Mr. JOHNSON. Well, from the standpoint of the weapon has then been transferred during that 20-day period, and the agency has to then get back with the dealer to let them know that the certification, if you will, has been rescinded, approximately how many times does that happen per year?

Mr. CAMPBELL. I think there are several reports that the FBI has put out that cite those numbers. I think they are in the range of

3,000 to 5,000 per year. I would have to look to give you exact numbers.

But I think that is the number of cases where they find a disposition that shows the person was prohibited and they find out from the gun dealer that the gun was transferred, and then they refer the case to ATF.

Mr. JOHNSON. And then do you have any idea as to how many—on how many occasions does the ATF actually retrieve weapons from persons whom the authorization has been revoked?

Mr. CAMPBELL. I don't have those numbers with me, but I am sure the ATF can help us get those numbers to you, Congressman.

Mr. JOHNSON. All right. Thank you.

I will yield back.

Mr. SCOTT. Thank you.

And in order of appearance, the gentleman from North Carolina, Mr. Coble?

Mr. COBLE. Thank you, Mr. Chairman.

Ms. Dietrich, employers who seek broad criminal history reports and do not have access to the FBI database—how do they get the reports?

Ms. DIETRICH. They can get them from a number of different sources. They can try to get them themselves from, say, State police, central repositories. They can send a runner over to the courthouse to look at the court records. Or they can buy something from a commercial vendor.

Commercial vendors have different access, depending on what their situation is, so they may have their own databases that they have created from purchasing information from those other sources. They may send runners to the courthouses.

They probably are searching in places where the person has lived in order to see whether they have a record there.

Mr. COBLE. And generally, is this reliable?

Ms. DIETRICH. Well, there are even problems with public records, to be quite honest.

Mr. COBLE. Yes.

Ms. DIETRICH. A lot of my work has to do with fixing public records that are incorrect as well.

But often, in the translation, when you have somebody else running out to get the record for you, that is another level of evaluation of the information where they may or may not get it right.

So in fact, in my practice, inaccurate records have become one of the growing issues that I have had to work on.

Mr. COBLE. Thank you.

Mr. Hawley, if you will, elaborate a little more in detail about the Compact Council and the role of other organizations that are important contributors to the criminal history record information policy.

Mr. HAWLEY. All right. The Compact Council, as I indicated in my remarks, was established to govern over the use of these records, State records and the FBI records, for a non-criminal justice purpose.

It established a council that has 15 members. Of those members, 11 are State repository folks who are responsible for administering these records back in the States.

One of the things that they have done is to recognize the importance of getting these records in a timely fashion. Their own record is suggesting that these records must be returned consistent with the turnaround time that is used for the NICS system.

In addition to that, other entities that are involved include organizations like Global, which is an advisory group.

And the reason that is important—there has been a lot of talk today about reading the rap sheet or understanding the criminal history record.

And as I mentioned in my remarks, an awful lot of work has been done in that area to standardize on that. That would go a long way to enabling us to train and educate people to interpret those records.

Global is an organization that works on that standardization. The FBI CJIS division has been involved for many years in standardizing that rap sheet along with the States.

And all of those efforts are essential to us moving this forward in a positive way.

Mr. COBLE. I thank you, sir.

Mr. Davis, in the PacRail example that you gave, do you know how BNSF obtained the criminal history records, since I am told that there are no requirements for criminal history background checks regarding railroad contractors?

Mr. DAVIS. No, sir. Directly, I can't tell you that. All I can tell you is that together with the other major railroads in this country, BNSF retained—some people have said created—this e-RAILSAFE company.

They obtained the records. How they did it or where they got them, they won't tell us. They don't answer our questions—they meaning the BNSF.

Mr. COBLE. But am I accurate when I say that there are no requirements——

Mr. DAVIS. No, there are no requirements for the kind of work that these individuals do. There are requirements relative to hazmat and certain situations involving customs and things like that, but not in this particular area of work that we are talking about.

Mr. COBLE. I thank you.

Thank you all for being with us.

Mr. Chairman, I thank you and I yield back.

Mr. SCOTT. Thank you, Mr. Coble.

Ms. Jackson Lee?

Ms. JACKSON LEE. Thank you very much, Mr. Chairman. Thank you for this hearing.

And I thank the witnesses and apologize that we are holding, interestingly enough, another hearing on immigration, and some of the issues really overlap.

Let me just, as a brief backdrop, indicate that I think we are all committed to this important question of security, but, more importantly, to have accurate information and to protect the workplaces.

I am reminded of the week that we have experienced. This was not a worker, but this was a student—and had an unfortunate episode in their background. It was not a criminal history, but it cer-

tainly had to do with a mental instability. And the question is notice to people that they were associated with.

Recently in Houston, at NASA, someone created havoc on the basis of a mental condition, not criminal. But we certainly would have wanted to have the information to be able, possibly, to protect the environment.

I want to thank Mr. Johnson for asking the question. And in his absence, before I ask Mr. Campbell and Mr. Emsellem questions, Mr. Johnson posed a question to you, Mr. Davis. It so happens that I have direct and, I think, accurate information about that.

Our Committee, under the leadership of Chairman Thompson and myself as the Homeland Security, Transportation Security Subcommittee chair, felt it was an important enough issue to hold a hearing and to correct it in a rail security bill.

And we worked with Mr. Lungren, who is on this Committee, to respond to the utilization of information on the pretense that it had been required by the Department of Homeland Security, that there was a homeland security risk.

And we corrected it to clarify that that was not the case. But we also corrected it to provide a procedure in that bill for individuals who might be charged with being ineffective because of either a criminal background or to suggest that it had a security impact.

In this day, we are going to be using a lot of those issues to, I think, deny hard-working individuals the opportunity to work. And I am concerned.

I think Mr. Clarke was very honest by saying that the private sector controls 85 percent of the critical infrastructure, another part of my Committee work in another hat. And I think that is an important review.

But I want to—Mr. Campbell, I know that you have gone over this, so just for my sake, if you would—your office has acknowledged that the existing system is riddled with quality issues from substandard fingerprinting imaging to incomplete records.

That is a big challenge to then release everyone's records with complete lack of sensitivity. And so I raise that question to you.

And, Mr. Emsellem, if you would follow by reiterating or trying to get us to understand the impact of an arbitrary system, an unfair system, an arbitrary treatment of employees, that there are no meaningful limits, no guidelines.

What impact does that have to the, if you will, sense of commerce moving back and forth but also the ability to be employed and also the ability of an employer to be fair?

Mr. Campbell, what do we do with a system that seems to be fractured?

Mr. CAMPBELL. Thank you, Congresswoman. The recommendations we make make it clear that we are not recommending that if the private sector be provided access to this information that we provide the raw FBI rap sheet.

We recommend that before any kind of response is provided that the record repositories make an effort for 3 business days to seek missing dispositions on arrests.

So as you noted and as the report noted, approximately 50 percent of the arrest records that the FBI has are missing dispositions.

We would recommend that we would screen those records, and we would attempt to obtain those dispositions before those records are released.

In addition, we recommend that if a record is to be released, we give the individual—that is incomplete in some respect, even if it is not necessarily obviously incomplete on its face, we give the individual the opportunity to see that record before it goes to the employer, so if they know something about the record that is incomplete or inaccurate, they have a chance to correct it before it goes to the employer.

This goes beyond the protections that are currently provided under the Fair Credit Reporting Act. For example, that could relate not only to a missing arrest disposition, it could also relate to a conviction that has been expunged.

And if there is no evidence that the conviction has been expunged, or if there are laws that say expunged convictions cannot be produced to employers, if the individual sees the record, they can take some kind of steps through an appeal process to correct the record.

Ms. JACKSON LEE. Thank you.

Mr. Emsellem, you could finish the answer. Thank you.

Mr. EMSELLEM. Yes. I mean, I would say our concern, which we tried to make clear in our testimony, is that this is a system that a lot of workers have to deal with now. There are 5 million background checks—5 million rap sheets produced for employment purposes right now, and there is a big problem right now.

We really appreciate and have great regard for the report and its recommendations to improve the standards, to create accuracy of records, but we are not aware of very much that is going on right now to take the problem and fix it.

And as it applies to employment—FBI checks done for employment purposes—so just to, you know, give you an example, if it helps, in our testimony toward the back we represented a worker who went through the TSA process that was described earlier, very routine, where there is an incomplete record.

As a result of the incomplete record which is on the rap sheet here, the person was denied a good job with a major carrier as a truck driver. This person was released and had one major felony on his record, but he was released from prison several years ago.

He got a good job. This denial threatened the existence of his job and puts everybody back to the wrong place as a result. We were able to help them because there exists this waiver process and appeal process to clean up that record and get it right.

We are trying to say that is what needs to be done now. I really appreciate all the recommendations about future things that need to be done. We are trying to say there is a big problem now that needs to be fixed.

Ms. JACKSON LEE. Thank you.

Thank you, Mr. Chairman.

Mr. SCOTT. The gentleman from Texas, Mr. Gohmert?

Mr. GOHMERT. Okay. Thank you, Mr. Chairman. I won't use all my time, but I appreciate the hearing. I think this is an important issue.

I have had increasing concerns of the Orwellian nature, it seems like, of our government, the information they have obtained, the recent revelation about the abuse of the NSL records and information that it was obtained—also concerned about what some of you all have touched on.

The safeguards that we need to——

Mr. SCOTT. Would the gentleman suspend for just a moment?

Mr. GOHMERT. Yes.

Mr. SCOTT. I advise the gentlelady from Texas that we are having a markup as soon as one more Member would walk in. And if you could remain, we would appreciate it.

Thank you.

Mr. GOHMERT. Okay.

And we do need a better ability to clean up the records, to make sure they are accurate. But I was shocked by one of the responses.

If I understood correctly, when the Chairman asked do any of you—as I understood the question, do any of you feel that employers should have access to arrest records, and I didn't see anybody indicate to the affirmative.

Nobody here believes that if we had accurate records, ability to clean them up easily enough when there is an error, that an employer—as Mr. Clarke indicated, 85 percent of our critical infrastructure is in the hands of private sector.

And you are hiring a security guard that is going to protect enriched uranium that the whole world would pay millions of dollars to get, and you don't want to even know if they were arrested?

Let me also advise you, we had a hearing down in New Orleans in the last few weeks, and we learned there that, you know, whereas New York has six murders per 100,000 people, before Hurricane Katrina New Orleans had 50 murders per 100,000 people.

And since this D.A. went into office, only one in 10 are arrested for those murders, and if you are arrested, only 12 percent are ever convicted.

You also could have an example, say, hypothetically—I realize this is far-fetched. Say you had some guy in a university who goes around and kills over 30 students in cold blood and doesn't kill himself but is arrested and is acquitted at trial for insanity.

Now, you are hiring security guards to protect enriched uranium or to protect school children. None of you would want to know if a potential guard had been arrested?

And I realize, Mr. Clarke, you said you are not motivated by tort liability. Are you a privately—you work for a privately held company or a publicly traded?

Mr. CLARKE. It is privately held.

Mr. GOHMERT. Okay, because publicly traded, if you make that statement, you are in trouble, because the stockholders have a right to have you concerned about tort liability. All right.

Now I am going to go back to the question. Anybody want to answer? You are not concerned about arrest records, wouldn't want to know?

Mr. CLARKE. The reason I didn't respond to that—because it is not an easy question to answer "yes" or "no" to. Absolutely, I, as a security service provider, would definitely want to know that.

But in terms of looking at how you would structure a process that is fair, there could be guidelines set up that the employer themselves never see the rap sheet, that the standards are set up so that when it is processed through the entity that has been described, we will get either a red light or a green light in terms of whether we could hire them or not.

The other part of that question also deals with, you know, if a person is arrested and acquitted, I am not sure that that kind of information should be floating out there in the hands of all employers.

Mr. GOHMERT. If he is acquitted by reason of insanity so there is—because some States have that provision. If you are acquitted by reason of insanity, you are acquitted. You wouldn't want to know that?

Mr. CLARKE. I definitely would want to know that. And you have an individual who is arrested multiple times for sex offenses and acquitted, or for one reason or another the prosecution ends up finding them innocent, and you are trying to hire somebody to provide security at a grade school facility, would I want to know that he has been arrested? Absolutely, I would want to know that.

I think that is part of how we describe how this process, in fairness, is vetted so that it is applied equally, uniformly and consistently. But I think that is all part of this—that we need to get to as to how it is processed. And if it is——

Mr. GOHMERT. Okay. My time has expired.

But let me just hear from one other person.

Mr. CAMPBELL. I will say, Congressman, that my understanding is that many of the—or at least some of the State laws that authorize access to FBI fingerprint checks have criteria, suitability criteria, that include arrest records as being relevant to the question of suitability.

And one of the examples I frequently heard is that when there is a requirement for background checks on school bus drivers, if there are a series of drunk driving arrests, that can disqualify the individual for employment.

And I also know, for example, in the area of gun background checks, one of the disqualifiers under the gun control act is an unlawful user or possessor of illegal drugs. And the ATF regulations define——

Mr. GOHMERT. And a lot of States have a disqualifier as being domestic violence as well, but anyway.

Mr. CAMPBELL. But there are circumstances where arrests are clearly thought to be relevant. And I believe the EEOC's guidelines——

Mr. GOHMERT. Well, I certainly think so, but I was surprised that nobody from the panel indicated so.

Thank you, Mr. Chairman.

Mr. SCOTT. The gentleman from California?

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

There are so many questions to ask. I mean, we stand here and we talk about the records system as if it is a perfect system.

When I took over the California Department of Justice in 1991, we had the most advanced fingerprint automated system in the world, largest, and the FBI was still doing manual checks.

But at the same time we were doing that, our disposition records—we were hundreds of thousands behind in disposition records. We were doing it manually. It took me 3 years to work through that.

We have got a pretty good system now, but I am not sure how accurate it is across the country. So that is one of the first questions we have got, is how accurate is the system.

The second one is what is public knowledge now. In other words, how public are arrest records? Can someone tell me, generally speaking? I am not talking about going to somebody, but if you go down to the—can you go down to the courthouse and get them? Can you go to the police department and get them?

Mr. HAWLEY. Yes, sir. That is exactly the case. And what the record is showing is that clearly the employers are getting access to this data in some form or fashion.

Mr. LUNGREN. You see, that is a fundamental question. If we have already made a decision, public policy decision, that this is public information, it is not the question of whether or not it is public, it is the question of whether it is accessible, not because of the law but because of the technology that has been applied.

And so I think that is one of the fundamental questions we have to look at here.

The third thing is I have always looked at it from the other side of it. When I was Attorney General, I was responsible for doing the background checks for teachers, for law enforcement and so forth.

And we had to make that a priority versus everything else because of all the requests we were getting.

And so we talk here as if it is just an instant thing that we are going to be able to do it, and I am not sure the FBI or the Justice Department is going to have the manpower, the money and so forth to do what we are setting out to do.

And I think that is a concern, where we will be letting people have a false sense of confidence that that is available.

The fourth thing is what kind of levels of access do we have. Security officers—I think that is fairly simple. We want you to have pretty good background checks. People who are teaching in school—we want to make sure you have pretty good background checks.

We do background checks now for people who are going to be teachers—or, excuse me, going to be——

Mr. SCOTT. Will the gentleman suspend?

Mr. LUNGREN. Yes.

Mr. SCOTT. We need to recess the Committee hearing. We have two bills we want to mark up very quickly, as we have nine people here.

[Whereupon, at 11:34 a.m., the Subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

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April 25, 2007

Chairman Bobby Scott
House Judiciary Committee
Subcommittee on Crime, Terrorism and
Homeland Security
B-370B Rayburn House Office Building
Washington, DC 20515

Dear Chairman Scott,

I write to commend the committee for holding a hearing on the issue of private sector access to FBI criminal history records and ask that you include the attached written testimony, submitted on behalf of Business Roundtable's Security Task Force, as part of the record for this hearing.

Roundtable CEOs represent 160 of America's leading corporations with a combined workforce of more than 10 million employees and $4 trillion in annual revenues. We know that the private sector has an important role to play in homeland security and disaster response, as more than 85 percent of the nation's critical infrastructure is owned and operated by the private sector. We are committed to do our part to keep America secure and to be part of the national response to a catastrophe, whether it is caused by a terrorist, natural disaster, or industrial accident.

As you know, mitigating the insider threat, particularly the insider terrorist threat, by improving employee screening has been a priority of Business Roundtable's Security Task Force, which was established after the attacks of 9/11 and chaired by Frederick W. Smith, Chairman, President and CEO of FedEx Corporation. We have been pleased to work with the committee on this issue.

If you have any questions please contact Tom Lehner, Director-Public Policy with Business Roundtable at (202) 872-1260.

Sincerely,

John J. Castellani

Business Roundtable
Security Task Force

A Collaborative Strategy for using National Criminal History Record Checks to Reduce the Insider Threat

Testimony Submitted to the
Subcommittee on Crime, Terrorism, and Homeland Security
Committee on the Judiciary
United States House of Representatives

April 26, 2007

A Collaborative Strategy for Using National Criminal History Record Checks to Reduce the Insider Threat

Written Testimony of the Business Roundtable Security Task Force

Submitted to the
Subcommittee on Crime, Terrorism, and Homeland Security
Committee on the Judiciary
United States House of Representatives

April 26, 2007

Introduction

The Business Roundtable appreciates the opportunity to submit testimony on the importance of allowing private sector employers to conduct more effective and accurate background screening through appropriate access to FBI-maintained criminal history records. The Committee is to be commended for its interest in this important issue and for following up on the *Attorney General's Report on Criminal History Background Checks*, released in June 2006. That Report carefully examined issues raised by allowing private sector employers to request FBI criminal history record checks. In preparing the Report, the Department of Justice sought comment from all interested parties. The Roundtable submitted comments, as did many others.

After this thorough review, the Attorney General's Report concluded that "[w]hen a private employer or entity can inquire about the existence of a criminal record of an applicant or employee, we believe that it is reasonable to provide the employer a means to check maintained criminal history records to determine whether the response to the question is truthful and complete." (Report at p.76) Thus, the Report recommends that, "Subject to conditions specified in federal law and Attorney General regulations, authority to request FBI-maintained criminal history records should be broadened ...to cover: (A)

priority employers, and subsequently, if capacity allows, all employers for use in decision regarding an individual's employment suitability." (Report at p.59)

The Roundtable believes this authority is particularly important in the context of protecting homeland security. It is estimated that more that 85 percent of the nation's critical infrastructure - the power grid, financial services, information services, railroads, airlines and others - is owned or operated by the private sector. The business community, therefore, has important roles and responsibilities in safeguarding this essential infrastructure. The 160 CEO members of the Business Roundtable – with more than 10 million employees and $4.5 trillion in combined annual revenues – recognize and accept this responsibility, and have moved forward to strengthen security at individual companies and to help collectively in our nation's preparedness, disaster response, and recovery programs.

After the attacks of September 11, 2001, the Roundtable established a Security Task Force that has spearheaded successful initiatives to enhance preparedness. These include creation of CEO COM LINK℠, a secure telephone communications system to connect businesses and government for the exchange of timely information in the event of a terrorist threat, crisis or major natural disaster; development of a comprehensive risk assessment guide to assist CEOs and other corporate managers in strengthening homeland security by improving the private sector's preparedness for infrastructure disruptions, natural disasters and terrorist attacks; and authoring a widely disseminated *Crisis Communications Toolkit* that offers best practices for communicating with employers, customers and neighbors during a crisis; and developing a white paper entitled *Terrorism: Real threats. Real costs. Joint solutions*, which concludes that the best security solutions will come from government policies that encourage greater business participation and are based on collaborative efforts that favor flexible and focused private-sector initiatives.

Over the last few years, the Business Roundtable Security Task Force focused on three key initiatives: hardening the Internet by securing cyberspace against attack and taking steps to ensure that essential online business functions are safeguarded so as to ensure safe, secure and survivable communications; enhancing supply chain resiliency and port security by working with government and business to bring a greater focus on improving security at points of entry for goods and materials and on developing sound security investment policies to maximize finite financial resources; and addressing the insider threat through improved applicant screening. This latter initiative is the focus of this testimony.

Enhanced Screening of Job Applicants is Critical and Consistent with the National Strategy for Securing Critical Infrastructures

The Business Roundtable believes that there are homeland security, national security and economic security needs for employers to be able to screen prospective employees against a national set of records in order to reduce the insider threat to critical industries and infrastructures. In addition, providing employers with the means to more accurately screen applicants will reduce the likelihood of individuals facing adverse employment decisions based on mistaken information.

The President's *National Strategy for Physical Protection of Critical Infrastructure and Key Assets* clearly articulates the homeland security imperative for providing employers with a way to use government criminal history databases for screening of those applying for sensitive positions. That strategy notes:

> *"Those who have access to and operate our critical infrastructures and key assets are crucial to our national protective scheme. ... Time-efficient, thorough, and periodic background screening of candidate employees, visitors, permanent and temporary staff, and contractors for sensitive positions is an important tool for protecting against the 'insider threat.' Unfortunately, in-depth personnel screening and background checks are often beyond the capabilities of private sector and non-federal government entities. Private employers also lack access to personnel reliability data—often in the possession of the federal government—that could help determine whether employees, contractors, and visitors should be employed at or allowed access to sensitive facilities."*

This need for private sector access to national criminal history records was echoed in the *Attorney General's Report on Criminal History Background Checks* in June, 2006, which concluded that authority to request FBI-maintained criminal history records should be broadened to cover private sector employers, giving first priority to critical infrastructure industries, regulated industries and professions, the placement of persons in positions of trust working with vulnerable populations, and other checks that the Attorney General determines will promote public safety or national security.

Working with government to reduce the insider threat through more effective and efficient screening of potential hires in sensitive industries and facilities against the national criminal history database is a top priority of the Business Roundtable. Key industries already employ extensive background screening for sensitive positions. However, there are inevitable gaps in what employers can

accomplish without access to a national database. To meet the homeland security imperative to protect against the insider threat in the private sector, business and government must work collaboratively to fill those gaps in a comprehensive way, rather than the sector-specific, patchwork approach that has been adopted to date.

The Roundtable is mindful that policies and procedures for providing broader screening against the national database must be efficient, fair, and respectful of privacy concerns. It will be important to avoid overburdening the already stretched resources of local law enforcement, which is often called upon now to act as intermediary for non-criminal justice records checks. In addition, as with the current processes in place for background screening pursuant to laws like the Right to Financial Privacy Act, criminal records should only be used in hiring decisions where appropriate for the job, and adequate procedures must be in place for applicants or employees who may be treated unfairly or whose records may be inaccurate. Moreover, safeguarding personal information about employees or applicants is a fundamental requirement of corporate security.

While this testimony focuses on protecting critical infrastructure from an insider threat, there are obviously other private sector employers with a legitimate need to carefully screen job applicants for homeland and national security purposes or other reasons. For example, Congress has already determined that child care facilities or other places where volunteers or employees work closely with children should be able to get information from the national database. And most recently, Congress extended access to the database to cover private security officer companies. As the Attorney General's Report notes, broader access, beyond critical infrastructure sectors, may be necessary and appropriate.

The National Security Imperative to Protect Critical Infrastructure

The need to protect critical infrastructures owned or operated by the private sector is beyond dispute. The Department of Homeland Security has identified a number of critical industries with "infrastructures so vital that their incapacitation or destruction would have a debilitating impact on defense or economic security." Some of the most critical are:

- Civilian nuclear power
- Chemicals and hazardous materials (including oil and natural gas)
- Electricity service
- Food and agriculture
- Water
- Financial Services

- Emergency Services
- Government Operations
- Transportation

Congress also recognizes these sectors as relevant to the national defense. For example, Congress has amended the Defense Production Act of 1950 to explicitly include the critical infrastructures (protection and restoration) as part of the law's parameters. In addition, the Homeland Security Act of 2002 includes provisions to protect from disclosure information submitted by the private sector to the Department of Homeland Security about vulnerabilities and threats to critical infrastructure, much the same way national security information is protected. Most recently, the Intelligence Reform and Terrorism Prevention Act of 2004 included a requirement for the Department of Homeland Security to report to Congress on its assessment of critical infrastructure protection needs and the readiness of the Government to respond to threats against the nation's infrastructure.

Listed below are just a few examples of damage caused by disruptions to elements of the nation's critical infrastructure. While only one of these examples was caused by a malevolent insider, it does not require a great deal of imagination to move from these real life examples to envision the damage and economic impact if, for example, terrorists gained access to sensitive jobs in critical infrastructure sectors.

- On August 14, 2003, North America experienced the largest blackout in history. It affected eight states in the Midwest and Northeast, and parts of Canada. At its peak over 50 million people were without power and over 100 power plants were immobilized and shut down. The blackout has been estimated to have cost businesses over $6 billion in direct costs and possibly much more in losses in goodwill and brand equity. [i]

- In September of 2002, a dispute between the longshoremen and port operators and shipping lines closed ports from San Diego to Seattle for eleven days. With some economists estimating damage to the economy of $1 billion a day, the lockout caused factories to close, perishable cargo to rot, and retailers to face inventory shortages. [ii]

- In 2000, in Maroochy Shire, Australia, a discontented former employee was able to remotely access the controls of a sewage plant and discharge approximately 264,000 gallons of untreated sewage into the local environment. [iii]

A Shared Security Responsibility Between the Public and Private Sectors

In his cover letter to the *National Strategy for Physical Protection of Critical Infrastructure and Key Assets*, the President closed by remarking,

> *As we work to implement this Strategy, it is important to remember that protection of our critical infrastructures and key assets is a shared responsibility. Accordingly, the success of our protective efforts will require close cooperation between government and the private sector at all levels. Each of us has an extremely important role to play in protecting the infrastructures and assets that are the basis for our daily lives and that represent important components of our national power and prestige.*

Private Sector Responsibility

As noted above, approximately 85% of the nation's critical infrastructure is in the private sector. Thus, the private sector is best positioned, and has the responsibility, to undertake many of the necessary steps to ensure the security of that infrastructure. This applies to applicant screening as well as to other security measures. As the Attorney General Report found, "the private sector is in the best position to identify the unregulated jobs that require this level of criminal history screening and merit the associated cost and inconvenience." (Report at p. 78)

Many employers in sensitive industries already conduct extensive screenings, but there are gaps that can only effectively be filled with criminal history information from the federal government. For example, criminal checks on potential hires currently can only be run against local, rather than national databases and are generally conducted only in locales that the applicant indicates as prior residences. Thus, the thoroughness of this check is dependent upon the accuracy and thoroughness of the application submitted by the prospective employee. Moreover, criminal activity that may have occurred outside the residential area will not be discovered. Access to a national database will fill this critical gap.

Screening applicants against a comprehensive, national criminal history database will not necessarily identify suspected terrorists. However, experts have found that terrorists often finance themselves through criminal activity. Moreover, applicants who lie about their criminal history have a vulnerability that could be exploited by terrorists or other malevolent actors.

A fingerprint check can also assist critical industries to verify the identity of prospective hires in sensitive positions. Key to an effective personnel screening program is the ability to ensure that the applicant is not misrepresenting his or her identity. While programs like those prescribed in the REAL ID Act will go a long way toward addressing this problem, they will take some time to implement. Unfortunately, we cannot assume that time is on our side.

U.S. Government Responsibility

Addressing the insider threat is ultimately part of a general risk management strategy. As with any risk management plan, this requires mapping threat information against vulnerabilities. As noted above, industry is best positioned to identify vulnerabilities, including with regard to applicant screening. However, the federal government is the repository of the only truly national criminal history database, which is key to identifying potential threats. Only the federal government can work with all 50 states to ensure that all local criminal records can be appropriately accessed at a national level in a way that is efficient, accurate, and safeguards legitimate privacy interests.

As the Attorney General's Report pointed out, currently, "[n]o single source exits that provides complete and up-to-date information about a person's criminal history. The FBI-maintained criminal history database, however, is certainly one of the better sources because it is based on positive identification and can provide, at a minimum, nationwide leads to more complete information." (Report at p. 6)

Need for Strategy to Strengthen Public-Private Partnership

The Roundtable believes that private industry and the federal government should work collaboratively to develop mechanisms for providing employers with appropriate information from the national database based on a partnership with government. The private sector should assist the federal government to ensure appropriate safeguards for an applicant's privacy and afford applicants adequate due process. Existing procedures and requirements for safeguarding applicant rights in the context of criminal history checks, such as those in the Fair Credit and Reporting Act, can inform policies for these national record checks.

This work would build on existing policies that already permit such screening. For example, in recognition of the homeland security value of screening employees against the national database, Congress has already enacted laws requiring such screening for some highly sensitive jobs, including airline employees and hazardous cargo truck drivers. For example, the Transportation Worker Identification Credential (TWIC) program creates a nationwide credential system, including national criminal history checks for

key employees, designed to enhance security at U.S. transportation facilities, including seaports, airports, railway, pipeline, trucking and mass transit facilities. Rather than these patchwork, industry-specific, mandatory laws, however, the CEOs of Business Roundtable believe that a voluntary, across-the-board initiative is a more effective approach. As noted earlier, the private sector is in the best position to identify sensitive jobs for which this level of screening is needed.

An example of this kind of voluntary screening is the Volunteers for Children Act, enacted in 1998, allows entities that involve contact with children to choose to request fingerprint-based national criminal history record checks of employees and volunteers. This has led to the development of innovative collaborative mechanisms between the private sector, state law enforcement agencies, and the federal government to enhance screening and, hence, the safety of children. These could serve as useful models.

Conclusion

The Roundtable understands that the private sector must share the heavy lifting as our nation prepares for the possibility of future domestic attacks by terrorists, and companies have taken action to improve security for our employees, their communities, and our companies. Working in partnership with the government to mitigate the insider threat by improving the voluntary screening process for sensitive jobs in industry has been a priority of the Roundtable's Security Task Force.

We applaud Congress for recognizing the need for a review of current laws and policies on non-criminal justice access to the national database and appreciate the opportunity to provide this testimony on the importance of broadening access for private sector employers as the Committee considers legislation in response to the Report of the Attorney General.

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[i] "The 2003 Blackout: Economy Won't Likely Be Derailed --- Cost Could Hit $6 Billion As Major Sectors Are Hurt; A Few Reaped Benefits," by Jon E. Hilsenrath, *The Wall Street Journal*, A6, August 18, 2003. "Record blackout over for most; Officials still in dark over failure of grid," by Jerry Seper, *The Washington Times*, A01, August 16, 2003.

[ii] "Both Sides See Gains in Deal To End Port Labor Dispute," by Steven Greenhouse, *The New York Times*, Page 14, Column 5, November 25, 2002.

[iii] "Critical Infrastructure: Control Systems and the Terrorist Threat," by Dana Shea, *CRS Report for Congress*, received through CRS web, updated July 14, 2003, citing National Infrastructure Protection Center, *Highlights*, 2-03, June 15, 2002.

April 26, 2007

SURVEY OF STATE REPOSITORY CRIMINAL & NON-CRIMINAL JUSTICE PURPOSE CRIMINAL HISTORY BACKGROUND CHECKS

A survey of states was conducted by SEARCH in preparation for the upcoming House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security, to be held on April 26, 2007. States were asked for statistics on the number of fingerprint supported criminal history background checks performed, both for criminal and non-criminal/civil purposes. A total of 43 states and Puerto Rico responded. A summary of the results is presented below.

State	State Repository Fingerprint-Supported Criminal History Record Checks			
	Criminal Justice Purposes	Non-Criminal Justice Purposes	Combined Total	Comments
Alabama	121,000	42,000	163,000	2006 totals
Alaska	26,828	25,912	52,740	2006 totals
Arizona	46,549	264,046	310,595	2006 totals
Arkansas	88,510	52,601	141,111	2006 totals
California	1,571,932	1,679,415	3,251,347	FY 2005-2006 totals
Colorado	262,122	111,315	373,437	2006 totals
Connecticut	95,440	79,896	175,336	2006 totals
Delaware	37,924	31,512	69,436	2006 totals
District of Columbia				
Florida	1,028,991	1,153,450	2,182,441	2006 totals
Georgia	517,170	184,234	701,404	2006 totals
Guam				
Hawaii	31,210	22,191	53,401	2006 totals
Idaho	74,314	61,229	135,543	2006 totals

State	State Repository Fingerprint-Supported Criminal History Record Checks			
	Criminal Justice Purposes	Non-Criminal Justice Purposes	Combined Total	Comments
Illinois	714,234	232,890	947,124	2006 totals
Indiana	6,659	26,861	33,520	2006 totals
Iowa	6,072	14,119	20,191	2006 totals
Kansas	4,570	27,135	31,705	2006 totals
Kentucky	194,000	25,263	219,263	2006 totals
Louisiana				
Maine				
Maryland	193,157	193,932	387,089	2006 totals
Massachusetts	178,000	68,000	246,000	2006 totals
Michigan	460,000	230,000	690,000	2006 totals
Minnesota	161,601	27,385	188,986	2006 totals
Mississippi	54,730	105,100	159,830	**10/1/05 through 9/30/06 totals**
Missouri	215,147	111,792	326,939	2006 totals
Montana	21,507	17,802	39,309	2006 totals
Nebraska	646,166	21,665	667,831	2006 totals
Nevada	74,269	163,681	237,950	2006 totals
New Hampshire		161,712		2006 total, additional data not available at this time
New Jersey	223,860	347,706	571,566	2006 totals
New Mexico				
New York	557,113	446,000	1,003,113	2006 totals
North Carolina	192,808	129,537	322,345	2006 totals
North Dakota	15,612	2,485	18,097	2006 totals

State	State Repository Fingerprint-Supported Criminal History Record Checks			
	Criminal Justice Purposes	Non-Criminal Justice Purposes	Combined Total	Comments
Oklahoma	102,405	31,173	133,578	2006 totals
Pennsylvania				
(Puerto Rico)	23,100	14,000	37,100	2006 totals
Rhode Island	41,493	11,489	52,982	2006 totals
South Carolina	211,541	35,463	247,004	2006 totals
South Dakota	26,000	14,000	40,000	2006 totals
Tennessee	26,613	7,532	34,145	2006 totals
Texas	46,205	257,323	303,528	2006 totals
Utah				
Vermont	19,998	11,212	31,210	**2005 totals**
Virginia	273,429	156,501	429,930	2006 totals
Washington	276,149	111,004	387,153	2006 totals
West Virginia	50,000	50,000	100,000	2006 totals
Wisconsin	168,699	27,985	196,684	2006 totals
Wyoming	14,358	12,605	26,963	2006 totals

For Immediate Release ***Contact: Matt Dinkel at 202-225-2135***

Congressman Doyle Calls for Review of Homeland Security Screening Process

Washington, D.C. - August 3, 2006 - U.S. Representative Mike Doyle (PA-14) called today for Congressional review of the process that the U.S. Department of Homeland Security uses to screen people who work in federal buildings.

"It seems to me that Homeland Security should use more common sense and treat Americans with more consideration," Congressman Doyle said today in releasing these letters. **"Instead, it appears that DHS has taken the dictum 'shoot first and ask questions later' a little too much to heart."**

Two of Congressman Doyle's constituents, Judith Miller and Mary Broughton, after having both worked for decades in the William S. Moorhead Federal Building cafeteria, were deemed "unsuitable for employment in a federal building" by the Department of Homeland Security several weeks ago. Congressman Doyle and his staff worked successfully with these women to file an appeal with the Department of Homeland Security and have their "unsuitable" determinations promptly overturned.

"After seeing what Judy Miller and Mary Broughton went through, I want to make sure that the DHS security screening process works better in the future," Congressman Doyle observed. **"That's why I've written to the Chairman and Ranking Member of the House Committee with jurisdiction over the Department of Homeland Security and asked that they review the way these background checks are conducted."**

"These ladies clearly posed no threat to security at the federal building, and a single phone could have cleared up the questions arising from their background checks," Congressman Doyle said. **"But what happened? They were told they couldn't work there anymore and escorted out of the building. In the blink of an eye, they lost their livelihoods - and only after my office intervened did they get their jobs back."**

"These ladies lost two weeks' pay before they were reinstated," Congressman Doyle observed. **"Needless to say, Homeland Security didn't compensate them for their economic loss or the embarrassment and frustration they suffered as a result of this incident. I want to make sure that the Department of Homeland Security treats decent, hardworking Americans more fairly in the future."**

The full text of these letters follows:

I wanted to make you aware of the recent experiences that two of my constituents have had with the Department of Homeland Security – and ask you to make sure that decent, hardworking Americans are being fairly treated by DHS when it conducts security background checks on them.

Judith Miller and Mary Broughton have each worked in the cafeteria of the William S. Moorhead federal building in downtown Pittsburgh for decades. They are excellent employees and are clearly no threat to national security. Nevertheless, on July 5, they were informed that the Federal Protective Service had deemed them "unsuitable" to work in a federal building. They were escorted from the building and told they could no longer work in the cafeteria. They were given a letter informing them that they could appeal the decision and that if they wanted to do so, they could call a phone number at the FPS.

Over the next several days, these women called that number several times and left messages, but no one returned their calls. We subsequently learned that the person at that phone number was on vacation. These women, like many other Americans who might find themselves in similar situations, live paycheck to paycheck, and having to wait several days to begin the appeals process caused them serious financial loss.

After several days, when they didn't receive any response from DHS, they contacted my office and asked for help in filing their appeals. My staff contacted the DHS congressional liaison office for Immigration and Customs Enforcement, and received a very brusque response. The Congressional liaison staffer handling the case seemed offended that a Member of Congress would have the effrontery to act as an ombudsman for one of his constituents. He refused to provide my staff with any information about the appeals process, and only told my staff repeatedly that the women would have to file an appeal. Not satisfied with this response, and with no one yet answering the phone at the number the women had been given, I personally called the DHS Congressional liaison for ICE. I received a much more positive and helpful response from DHS than my staff did. DHS staff offered to look into the case and monitor the progress of the appeals process. From this point on, my staff's treatment by DHS personnel improved markedly, and the women's appeal was processed and satisfactorily resolved within a week.

My constituents have had their "unsuitable" determination overturned, and they have returned to work. Their employer has decided to pay them their back wages. They are being made whole – not counting, of course, the distress that this episode caused them over the last two and half weeks. The attached articles provide additional information about this case.

I am deeply concerned, however, that many other decent, hard-working Americans may find themselves in a similar situation, not think to ask for Congressional assistance, and end up losing their jobs. I was dismayed by my constituents' treatment in this affair -- especially since a single phone call to each woman could have cleared up the concerns that FPS had about their backgrounds. This experience has left me with the strong impression that FPS should revise its procedures for conducting background checks on people who work on federal property. I would greatly appreciate it if the Homeland Security Committee would review this process, determine whether problems like those experienced by my constituents are widespread, and take appropriate measures to make this process less of an ordeal for the millions of Americans who may go through it in the future.

While these background checks and the appeals process may seem routine and unexceptional to the people at FPS who conduct them, they often appear quite mysterious and intimidating to people who don't spend their lives dealing with secretive bureaucracies. Moreover, the consequences of an adverse determination can be devastating.

I don't think that a Member of Congress should have to intervene in order for DHS to treat American citizens fairly. At the very least, I would think that DHS would give Americans the courtesy of a phone call before it denies them their livelihoods. In addition, since many of these people can ill afford to miss even one week's pay, it seems to me that FPS appeal information lines should always be staffed during the regular work week. FPS might also consider providing all of the information and forms necessary to file an appeal with each letter identifying someone as unsuitable for employment on federal property. In addition, given that the financial impact that even a week out of work would have on many workers, Congress might want to look at how long it is taking FPS to process such appeals. Finally, it appears that FPS might want to encourage its employees to treat other Americans with a little courtesy and respect. A thoughtful review of this process would probably suggest other reforms that are called for as well.

In closing, I want to reiterate my strong concern that the FPS background check system as it is currently operating may be causing an unacceptable level of "collateral damage." On behalf of my constituents and an unknown number of Americans who have seen their lives disrupted and damaged by an arbitrary and unresponsive government agency, I urge you to carefully review this matter. Thank you for your consideration of this request.

###

Congress of the United States

Washington, DC 20515

March 23, 2007

VIA FACSIMILE: 202-307-6777
The Honorable Alberto Gonzalez
Attorney General
U.S. Department of Justice
Robert F. Kennedy Building
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-2000

Dear Mr. Gonzalez:

As members of the Committee on the Judiciary in the House of Representatives, responsible for oversight of the Federal Bureau of Investigations (FBI), we express our concern with a proposed regulation that would authorize the FBI to include "non-serious" offenses, including juvenile arrests, as part of the Criminal History Record Information (CHRI) or "rap sheets" it provides for employment screening purposes.

Because of the extremely prejudicial impact that this proposed policy would have on the employment prospects of people with especially minor criminal histories, many of whom were never convicted of a crime, we request that you delay issuance of this proposed regulation in order to allow Congressional oversight on this issue.

On November 6, 2006, the FBI closed the public comment period on this proposed regulation that would authorize the agency to report "non-serious offenses" (NSOs) on the FBI's rap sheets for employment screening purposes (71 Federal Register 52302, dated September 5, 2006). Currently, the FBI can only report serious misdemeanors, felony arrests, and convictions. As defined by the FBI regulations, NSOs include all juvenile arrests and convictions reported by the states to the FBI and any non-serious adult arrests and convictions. The latter could include anything from vagrancy,

loitering, and false fire alarm to non-specific charges of drunkenness and even traffic violations.

In 2002, the FBI generated more rap sheets for non-criminal justice purposes than for criminal investigations, including over five million rap sheets provided to employers and state occupational licensing agencies. While most FBI rap sheets are provided to state and federal agencies, including the Transportation Security Administration, more federal laws now authorize certain private employers to access the FBI's records. Because FBI rap sheets influence a multitude of employment decisions, congressional oversight is necessary to examine the serious concerns related to their reliability and the extent to which employment decisions would be negatively impacted by the proposed regulation to report minor criminal offenses.

According to a recent report by the U.S. Attorney General, the FBI's rap sheets are "still missing final disposition information for approximately 50 percent of its records." (U.S. Department of Justice, *The Attorney General's Report on Criminal Background Checks,* June 2006, at page 3). This means that the records collected routinely fail to include information necessary to thoroughly and objectively evaluate the rap sheet, such as the results of arrests, dismissal of charges, and expungements. The FBI's proposal to add large numbers of arrests for non-serious offenses, including vagrancy and disorderly conduct (offenses which account for approximately 10% of all arrests in the U.S.), would further compromise the integrity and reliability of the FBI rap sheets.

In addition, we are concerned that the FBI's proposal represents a significant departure from federal and state policies that protect the privacy of juvenile records for non-criminal justice purposes. While there were more than 1.5 million annual arrests of people less than 18 years of age, often for property crimes, studies show that only one-third of youthful offenders ever commit a second offense. However, if these types of incidents are reported on FBI rap sheets, these arrests for often one-time youthful indiscretions will remain on individuals' records indefinitely, causing serious hardship in many cases.

Finally, we are concerned that there will be many more FBI rap sheets based solely on non-serious offenses. When the FBI implemented its policy of excluding non-serious offenses in the 1970s, it resulted in a 33% decrease in the total number of fingerprint cards retained by the FBI. Unless the proportion has changed dramatically since then, a large number of people will now show a criminal record with the FBI if the proposed regulation is finalized. Studies show that employers are far less likely to hire an individual with a criminal record, often without regard to the seriousness of the offense. Thus, many more workers may be wrongly denied employment based solely on a non-serious offense if Congress is not given an opportunity to examine this issue.

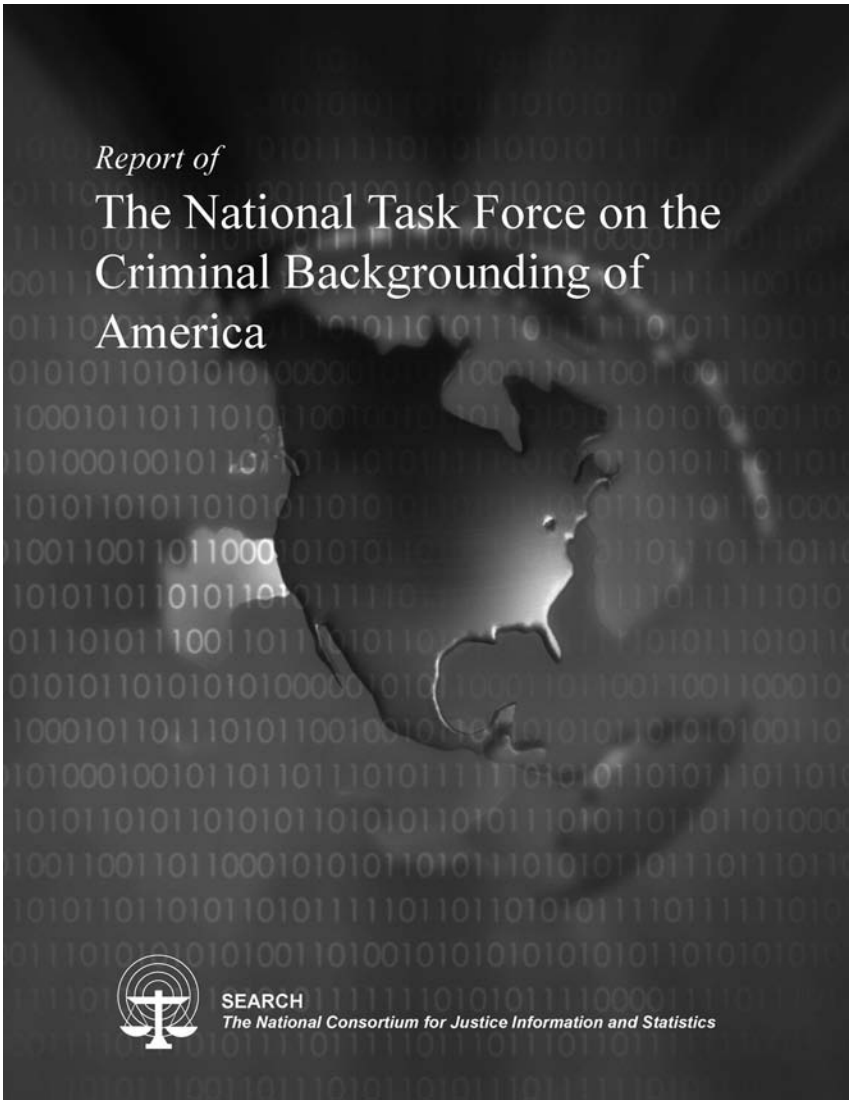
A recent *New York Times* editorial ("Closing the Revolving Door," dated January 25, 2007) recommended that Congress act to preclude the FBI from finalizing its regulations for fear that they would "transform single indiscretions into lifetime stigmas." We agree that the Bureau's proposed regulations have the potential to create serious impediments to employment opportunities for viable, qualified candidates. Therefore, we request that you delay implementation of the regulations to allow Congress to conduct oversight.

Very truly yours,

Maxine Waters
Member of Congress

Robert "Bobby" Scott
Chairman
Subcommittee on Crime, Terrorism, and Homeland Security

cc: The Honorable Robert S. Mueller, III


Report of
The National Task Force on the Criminal Backgrounding of America
SEARCH
The National Consortium for Justice Information and Statistics

This report was prepared by SEARCH, The National Consortium for Justice Information and Statistics, Francis X. Aumand III, Chairman, and Ronald P. Hawley, Executive Director.

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Report of the National Task Force on the Criminal Backgrounding of America

Introduction

The criminal record background check has become a ubiquitous part of American culture. As some observers have noted,[1] "Today, background checking—for employment purposes, for eligibility to serve as a volunteer, for tenant screening, and for so many other purposes—has become a necessary, even if not always a welcome, rite of passage for almost every adult American."

A Society for Human Resource Management survey of employers, the results of which were published in January 2004, found that more than 80 percent conduct criminal background checks of prospective employees. Fifty-one percent of employers conducted such checks in 1996.[2]

The terrorist attacks of September 11, 2001, resulted in millions more criminal record checks being conducted routinely. Just weeks after the attacks, Federal Aviation Administration administrator Jane Garvey ordered criminal checks of up to 1 million workers with access to secure areas in the nation's airports. The Patriot Act,[3] enacted by Congress in October 2001, directed the criminal backgrounding of hazardous materials transporters. The process was expected to result in approximately 3.5 million checks each year. Similar checks were contemplated for those working in U.S. ports and in the country's chemical industry.

Child protection legislation such as the Protect Act[4] on the national level and Florida's Jessica Lunsford Act[5] on the state level broadened ever further the scope of both statutorily authorized and required screening. Estimates as to the number of youth-serving volunteers who could potentially be backgrounded as a result of the Protect Act range in the tens of millions. Florida schools are struggling with the impact of the Lunsford Act, which requires the backgrounding of virtually anyone who enters school grounds when children are present, including meter readers, package delivery service representatives, drivers who deliver groceries to school cafeterias, and individuals who fill vending machines.

Some law enforcement criminal records repositories now conduct almost as many criminal record checks for civil or noncriminal justice purposes as for criminal purposes. The FBI, for example, processed 9,777,762 fingerprint submissions for civil checks in Fiscal Year 2005 compared to 10,323,126 fingerprint submissions for criminal checks during that same period.[6] It would be difficult to accurately tally the tens of millions of noncriminal justice criminal record checks, both name- and fingerprint-based, conducted throughout the country each year by government-administered repositories and by private commercial background check service providers.

[1] *Report of the National Task Force on the Commercial Sale of Criminal Justice Record Information* (SEARCH: Sacramento, CA, December 2005), available at **http://www.search.org/files/pdf/RNTFCSCJRI.pdf**.

[2] *Wired News*, "When Old Convictions Won't Die," May 10, 2004, **http://www.wired.com/news/business/0,1367,63364,00.html?tw=wn_story_related**.

[3] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Public Law 107-56.

[4] The Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act of 2003, Public Law 108-21.

[5] Florida Statutes 1012.465.

[6] Information provided Jan. 10, 2006, by Barbara S. Wiles, Management Analyst, Criminal Justice Information Services Division, FBI.

America's growing dependence on criminal record background checks to strengthen public safety by reducing opportunities for certain criminal offenders to repeat their past histories requires new and additional resources to help law- and policymakers craft backgrounding laws, policies, and procedures to effectively govern this expansion.

To assist on the national level, Congress included a directive in the Intelligence Reform and Terrorism Prevention Act of 2004[7] for the U.S. Attorney General to prepare a report making "recommendations … for improving, standardizing, and consolidating the existing statutory authorization, programs, and procedures for the conduct of criminal history record checks for noncriminal justice purposes." The Attorney General was directed to look at a number of factors associated with noncriminal justice background checks, including the role of private information providers, security concerns, fee structures, dissemination policies and restrictions, information technology infrastructure issues, and other factors.

To provide further guidance and assistance, SEARCH, The National Consortium for Justice Information and Statistics (SEARCH), and the Bureau of Justice Statistics (BJS), U.S. Department of Justice, launched a comprehensive and analytic look at noncriminal justice background checks, seeking clarity on many of the pervasive questions associated with the process.[8]

How can the checks be conducted most effectively? What criminal record information is most relevant to a suitability determination? How do we balance public safety concerns against the rights of individuals? Can states find ways to accommodate the increasingly burdensome noncriminal justice background check cost and still respond effectively to demands?

National Task Force Created to Guide Effort

To guide this effort, SEARCH and BJS convened nationally recognized experts in August 2004 to be the National Task Force on the Criminal Backgrounding of America.[9] The Task Force was comprised of representatives from federal agencies, including the Federal Bureau of Investigation (FBI), the Department of Justice (DOJ), the Department of Defense (DOD), and the Office of Personnel Management (OPM); volunteer organizations which screen volunteers' backgrounds; state criminal history record repositories and identification bureaus; private companies that assemble criminal justice information and sell it for background checks; employers; state legislatures; criminal record background check clearinghouses; and scholars and academic experts.

The Task Force met four times between August 2004 and August 2005. Its findings and recommendations herein do not necessarily represent the views of all or any one member or the organizations with which they are affiliated.

Scope of this Report

This report is intended to provide law- and policymakers with recommendations and discussion on criminal backgrounding for noncriminal justice purposes, and it describes the Task Force's vision for such backgrounding based on values identified

[7] Public Law 108-458.

[8] SEARCH is a nonprofit consortium of the states dedicated to improving the quality of justice and public safety through the use, management, and exchange of information; application of new technologies; and responsible law and policy, while safeguarding security and privacy (**http://www.search.org/**). The Bureau of Justice Statistics, a component of the Office of Justice Programs in the U.S. Department of Justice, collects, analyzes, publishes, and disseminates information on crime, criminal offenders, crime victims, and the operation of justice systems to all levels of government, providing critical data to federal, state, and local policymakers (**http://www.ojp.usdoj.gov/bjs/**).

[9] Hereafter, the Task Force. A list of Task Force members appears on page 22.

during its meetings. Recommendations, which begin on page 8, are organized into the following subsections: Appropriate Levels of Access; Privacy and Social Safeguards; Complete and Accurate Records; and Miscellaneous. It is hoped that this report will be a positive and important contribution to the continuing debate surrounding criminal backgrounding for noncriminal justice purposes.

Definition of Terms

The Task Force identified the following key terms that describe the background check layers available today. These terms and definitions were crafted in a building-block manner that emphasizes record source, which is a critical aspect of backgrounding discussions and concepts. Consequently, many of these definitions are based on record source. They rely on the concept that government records are generally considered "official" records, and that private-sector records are not "official" records unless designated as such by government. The following terms were defined for use in this report:

Backgrounding – The overall collection, maintenance, retrieval, and use of data about a person's background, from any source.

Criminal Backgrounding – The overall collection, maintenance, retrieval, and use of data about a person's criminal record, through official government records, as set forth in the next two definitions.

Criminal History Record Check – A check that returns records from official criminal history repositories.[10] Criminal history repositories store "criminal history record information,"[11] which federal law defines as "information collected by criminal justice agencies on individuals consisting of identifiable descriptions and notations of arrests, detentions, indictments, information, or other formal criminal charges, and any disposition arising therefrom, including acquittal, sentencing, correctional supervision, and release."[12] Two types of criminal history record checks exist: fingerprint-based and name-based. These two types will be referred to throughout this report to clarify issues associated with each. (While not part of this definition, some repositories return information from sex offender registries and wants-and-warrants files with criminal history record checks.)

Criminal Case Record Check – A check that returns results from official criminal case records maintained by state or federal criminal justice agencies, other than records returned by criminal history record checks, as defined above. Examples include information from wants and warrants files, sex offender registries, courts, law enforcement, corrections, and other sources of records on individuals and offenses kept in criminal justice agency case management systems. Some of these records are original source records for criminal history repositories. Criminal case record checks are generally not fingerprint-based.

Investigatory Record Check – A check that returns results from investigatory records maintained by government or quasi-government entities, other than records returned by criminal history record checks and criminal case record checks as defined above. Examples are gang registries, intelligence or investigative files, and Interpol and other international records. Investigatory record checks are not usually fingerprint-based.

Civil Record Check – A check that returns results from official government-

[10] For the purpose of this report, "criminal history repository" means state repositories and the FBI-administered Interstate Identification Index (III), which includes the National Fingerprint File (NFF).

[11] Hereafter, CHRI.

[12] 28 C.F.R. § 20.3(d).

maintained civil records. Examples include records of birth and death, marriage, land, public education, military service, and civil court records and judgments. Civil record checks are not fingerprint-based.

Commercial Check – A check that returns results from non-governmental private providers, which collect, compile and store data from many different sources, including civil and criminal government databases and other private databases. Examples include personal identifiers such as Social Security Numbers, past addresses, records from criminal history databases, civil courts, credit and consumer agencies, assessors' offices, county clerks, the military, and educational institutions. Commercial checks often draw upon a multitude of different source databases and combine the results into a consolidated profile. They are almost always name-based.

Current Landscape

The backgrounding landscape is very complex. The landscape is comprised of two distinct components: 1) laws and policies governing access to, and the use of, background information; and 2) the collection and management of data that provide background information. Complexities multiply when the components are combined. Further, as we face increased demand for backgrounding, and criminal backgrounding in particular, important national public policy issues surface regarding privacy, authorized use of official records, and others.

In its broadest sense, backgrounding is "the overall collection, maintenance, retrieval and use of data about a person's background, from any source."[13] A full background check can include many types and sources of personal information, such as:

- Information to verify the identity of the applicant or record subject, including birth certificates and other vital records
- Criminal history and criminal case record information
- Employment history
- Credit history and score
- Education history
- Residence and rental history
- Civil court actions
- License issuance
- Department of Motor Vehicle records
- Military and Department of Defense histories
- No-fly, selectee, and other terrorist watch lists
- Character references
- Federal agency records
- Drug and alcohol test results
- Immigration records
- Office of Foreign Assets Control data
- "Deadbeat dad" registries
- Various insurance databases, including the Comprehensive Loss Underwriting Exchange (CLUE)
- Non-adjudicated shoplifting reports from retail sources
- Foreign association databases
- Various abuse registries
- Voting records
- Travel information databases
- Others.

Although the Task Force recognized and discussed backgrounding in its broadest sense, it focused the bulk of its discussions and recommendations on criminal record backgrounding. The Task Force viewed

[13] See "Definition of Terms" section on page 3 of this report.

criminal record backgrounding as at the heart of the most significant backgrounding issues, and an area for which it could offer the most significant recommendations and insight. Therefore, criminal record backgrounding is the primary focus of this report's discussions and recommendations.

Demand for Criminal Record Backgrounding and Resulting Tensions

According to a February 2005 survey of human resource professionals by the Society for Human Resource Management, criminal background checks were the second-most frequently conducted employee background checks by employers after U.S. employment eligibility checks.[14] A number of reasons, not necessarily mutually exclusive of each other, motivate employers, volunteer organizations, and others to conduct criminal record background checks. They include:

- Public safety
- Compliance with legal requirements
- Limitation of liability
- Conditions of doing business
- Protection of vulnerable populations
- Customer assurance
- Avoidance of loss of business
- Fear of business loss, or public or media backlash over an incident caused by an individual with a past record
- To regain public or customer trust.

New and advancing technologies also play a role in the demand for criminal background checks, as they ease the collection, maintenance, and dissemination of background information.

With the high demand for criminal backgrounding, tensions surface between differing views on the value and appropriate use of criminal background information. Some conclude that widespread access to criminal background information is predominantly beneficial to society for public safety and other reasons, and should be prevalent. Others conclude that widespread access to criminal background information may be predominantly detrimental to society and invites negative unintended consequences, especially if privacy rights are not carefully protected. Still others fall at various points on the spectrum between these two opposing views, recognizing a need to balance these interests.

The Task Force recognized that tensions exist between access and privacy. These tensions were discussed at length and were of great concern. The Task Force strived to strike an appropriate balance between these two perspectives and issued its recommendations with this goal in mind.

Law and Policy

Layers of law and policy governing criminal record backgrounding activities exist at the state and federal levels. For example, 28 U.S.C. § 534, an important provision at the federal level, states, "The Attorney General shall (1) acquire, collect, classify, and preserve identification, criminal identification, crime, and other records; and (2) exchange these records with, and for the official use of, authorized officials of the Federal Government, the States, cities, and penal and other institutions."[15]

The Code of Federal Regulations (C.F.R.) further governs the use of records collected under the authority of 28 U.S.C. 534, which shall be referenced in this report as "FBI-

[14] Bureau of National Affairs, "SHRM Survey Finds Employers Spending more Time on Worker Background Checks," *Privacy Law Watch*, Feb. 25, 2005.

[15] 28 U.S.C. § 534. See also *U.S. v. Rosen*, 343 F.Supp. 804, 806 (D.C.N.Y 1972) (noting that the word "shall" in 28 U.S.C. § 534 "is not merely an authorization but an imperative direction.").

maintained CHRI" (criminal history record information).[16] Specifically, 28 C.F.R. 20.33 limits the use of such records to "criminal justice agencies for criminal justice purposes,[17] which purposes include the screening of employees or applicants for employment hired by criminal justice agencies." This provision has lead to the common use of two phrases for the purpose of distinguishing the use of CHRI: "use for criminal justice purposes" and "use for non-criminal justice purposes."[18] Such phrases shall be used throughout this report.

Given the generally restrictive use of FBI-maintained CHRI, specific legislation is required to authorize its use for noncriminal justice purposes, such as employment and licensing background checks. Further, the authorization must specifically authorize access to FBI-maintained CHRI or FBI systems, rather than a mere obligation, prohibition, or administrative responsibility to perform certain employment or licensing screening.[19]

Public Law 92-544 was enacted by Congress in 1972 to permit states to enact legislation that designates specific licensing or employment purposes for which state and local government agencies may submit fingerprints to the FBI and receive FBI-maintained CHRI. It is important to note that FBI-maintained CHRI includes state records to the extent that they are collected by the FBI and indexed through the FBI's Interstate Identification Index (III).[20]

Public Law 92-544 statutes may include disqualifying offenses that prevent an applicant from obtaining a position of employment or a license if the applicant has the stated offense in his or her background. Crimes of violence or of a sexual nature are almost a universal disqualifying offense in Public Law 92-544 statutes. Other disqualifying offenses relate more specifically to the license or position being sought; for example, a conviction for a financially related crime would likely disqualify an individual from a position that involves handling money.

[16] See "Definition of Terms" section on page 3 of this report, especially "Criminal History Record Check," for the definition of CHRI.

[17] "Criminal justice purpose" is further defined to be for an "administration of criminal justice," as outlined in 28 C.F.R. 20.3(b). Qualifying activities include: detection, apprehension, detention, pretrial release, post-trial release, prosecution, adjudication, correctional supervision, rehabilitation, and the criminal identification activities and the collection, storage, and dissemination of criminal history record information.

[18] "Use for non-criminal justice purposes" has also been commonly called referred to as "use for civil purposes." However, this second reference to civil purposes is not as widespread, and its terms do not relate as directly to the underlying legal authority.

[19] CJIS Information Letter, U.S. Department of Justice, April 6, 2001.

[20] The Interstate Identification Index (III), known informally as "Triple I," is an interstate/federal-state computer network for conducting national criminal history record searches. III uses an index-pointer approach to tie together the criminal history record databases of state central repositories and the FBI.

Under this approach, the FBI maintains an automated master name index, which includes the names and identifying information on all individuals whose CHRI is available through the III system. (As of December 1, 2005, the system held more than 56 million records.) If a search of the index indicates that an individual is the subject of a III-indexed record, the index will point the inquiring agency to the FBI and/or to the state or states from which the individual's criminal history records can be obtained. The inquiring agency may then obtain the records directly from the state or FBI criminal record database that holds the records.

III searches for criminal justice purposes, including criminal investigations and prosecutions, are conducted pursuant to federal regulation 28 CFR Part 20, Subpart C. III searches for noncriminal justice purposes must be fingerprint-based and are conducted pursuant to the National Crime Prevention and Privacy Compact, as established by the Crime Identification and Technology Act of 1998, Public Law 105-251.

Twenty-five states have ratified the Privacy Compact: Alaska, Arizona, Arkansas, Colorado, Connecticut, Florida, Georgia, Idaho, Iowa, Kansas, Maine, Maryland, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, North Carolina, Ohio, Oklahoma, Oregon, South Carolina, Tennessee, and Wyoming. Eleven states and territories have signed a Memorandum of Understanding effectively subscribing to the Compact: American Samoa, Guam, Hawaii, Illinois, Kentucky, Mississippi, North Dakota, Nebraska, New Mexico, South Dakota, and Vermont.

The following criteria must be met before access is allowed under a Public Law 92-544 statute: (1) the statute must exist as a result of a legislative enactment; (2) it must require that applicants be fingerprinted; (3) it must, expressly or by implication, authorize the use of FBI records for the screening of applicants; (4) it must identify the specific category(ies) of licensees/employees falling within its purview, thereby avoiding overbreadth; (5) it must not be against public policy; and (6) it must not identify a private entity as the recipient of the results of the record check.[21]

The problem with the overall Public Law 92-544 approach is that the specific state provisions that authorize access to FBI-maintained CHRI create a complex, inconsistent, and noncomprehensive authorization scheme. Similar positions of employment in different states may be treated differently, even though the underlying public safety issues may be the same. States have enacted more than 1,100 statutes under the Public Law 92-544 umbrella.

State statutes separate from Public Law 92-544 statutes allow public access to state-held CHRI. Each state legislature controls access to its own state-maintained CHRI, and each state may take a different approach to making such records publicly available for employment, licensing, and other noncriminal justice purposes. (A listing of many of the State laws governing the security and dissemination of State-maintained criminal history record information can be viewed on the online *Compendium of State Privacy and Security Legislation* at http://www.search.org/programs/policy/compendium/.) State-level criminal history record checks vary considerably, from name-based searches that do not require data subject authorization to fingerprint-based searches that require both statutory and data subject authorization. State-maintained CHRI databases are believed to be more complete than those maintained by the FBI in that they often have more dispositions, misdemeanor information that was not collected by the FBI, and offender information that the state maintained even though it was rejected by the FBI because of poor fingerprint images or other quality control issues.

The Task Force recommendations follow.

[21] CJIS Information Letter, *supra* note 19 at p. 19.

Task Force Recommendations

Appropriate Levels of Access: Recommendations 1.1 to 1.9	
Recommendation 1.1	National investment should be directed toward enabling and maximizing the use of fingerprints for criminal history record checks for noncriminal justice purposes.
Recommendation 1.2	Expand access to fingerprint-based criminal history record checks under Public Law 92-544 for noncriminal justice purposes that involve positions of trust.
Recommendation 1.3	Consider alternate means to support cost of producing checks.
Recommendation 1.4	Consider options to reduce fees paid by requestors and applicants.
Recommendation 1.5	Offer automatic updates of disseminated information.
Recommendation 1.6	Set a response time deadline.
Recommendation 1.7	Establish access controls to prevent unauthorized access.
Recommendation 1.8	Allow private agents and value-added services from the private marketplace.
Recommendation 1.9	Consider electronic consumer interfaces and data exchange services.
Privacy and Social Safeguards: Recommendations 2.1 to 2.4	
Recommendation 2.1	Obtain the subject's consent for criminal history record checks for noncriminal justice purposes.
Recommendation 2.2	Develop appropriate relevancy criteria.
Recommendation 2.3	Provide notice of disqualifying offenses.
Recommendation 2.4	Allow access and correction by data subject.
Complete and Accurate Records: Recommendations 3.1 to 3.3	
Recommendation 3.1	Work toward complete and accurate records.
Recommendation 3.2	Continue funding for the National Criminal History Improvement Program (NCHIP).
Recommendation 3.3	Provide clear and consistent results.
Miscellaneous: Recommendations 4.1 to 4.3	
Recommendation 4.1	Create a federal act to address backgrounding for noncriminal justice (or "civil") purposes.
Recommendation 4.2	Impose civil and criminal penalties.
Recommendation 4.3	Develop a national education campaign.

Appropriate Levels of Access: Recommendations 1.1 to 1.9

RECOMMENDATION 1.1:
National investment should be directed toward enabling and maximizing the use of fingerprints for criminal history record checks for noncriminal justice purposes.

Two primary identifiers are used for criminal history record checks: fingerprints and names, with names often being coupled with other identifiers such as gender, date of birth, and Social Security Number. Criminal history record checks conducted for noncriminal justice purposes under Public Law 92-544 are fingerprint-based. Criminal history record checks performed for noncriminal justice purposes outside the authorization of Public Law 92-544 are predominantly name-based. The majority of state criminal history repositories offer name-based checks for noncriminal justice purposes to the general public.[22] It is easier and cheaper for both consumers and repositories that offer this service to perform name-based checks rather than fingerprint-based checks. Checks of prospective handgun purchasers performed under the Brady Handgun Violence Prevention Act[23] are also name-based, as are most criminal case record checks. However, there is some movement throughout the states to increase fingerprint capture, storage, and search capabilities for criminal history record checks. The use of other biometric data, such as digital photos, is also emerging in some areas. Overwhelmingly, however, civil record and commercial checks are name-based.

The Task Force concluded that fingerprint-based criminal history record checks are more accurate than name-based checks. Name-based checks may return results that are "false positive" (incorrectly associates an individual with a criminal record) and "false negative" (fails to associate an individual with his/her criminal record). Names tend to be unreliable identifiers for many reasons: people lie about their names and obtain names from false documents; people change their names; people have the same name; people misspell names; people use different versions of their names—with middle name, without middle name, and with middle initial; people use nicknames and aliases; and names have different formats depending on culture and/or country of origin. Although many databases use names as a primary record identifier, the result can be unlinked or unfound records unless other identifiers are also used to further increase the likelihood of an accurate match.

Although the Task Force agreed that fingerprint-based criminal history record checks are more accurate than name-based checks, criminal history repository records are not always complete for a given request.

Fingerprint-based criminal history record checks often cost more and take longer to provide a response. Ideally, only fingerprint-based checks would be performed. However, name-based checks are often less expensive, are easier for the consumer to conduct, and provide a quicker response. Consequently, name-based checks are often the choice of entities that would otherwise prefer fingerprint-based checks, if available.

The Task Force recommends that national investment be directed toward enabling and maximizing the use of fingerprints for criminal history record checks for noncriminal justice purposes.

[22] *Survey of State Criminal History Information Systems, 2003*, Criminal Justice Information Policy Series, NCJ 210297 (Washington, D.C.: U.S. Department of Justice, Bureau of Justice Statistics, February 2006), available at **http://www.ojp.usdoj.gov/bjs/abstract/sschis03.htm**.

[23] Public Law 103-159.

RECOMMENDATION 1.2:
Expand access to fingerprint-based criminal history record checks under Public Law 92-544 for noncriminal justice purposes that involve positions of trust.

Remove the Public Law 92-544 limitation that requires a public agency to receive record check results, and instead allow authorized private entities to receive results directly. Expand access to fingerprint-based criminal history record checks under Public Law 92-544 for noncriminal justice purposes that involve positions of trust. Specifically, expand such access to "end users who appoint individuals to positions or responsibilities entailing/involving access to vulnerable populations, client residences, businesses' significant organizational assets; sensitive information; or as otherwise deemed necessary by state legislatures or the U.S. Attorney General for public safety or national security."

The Task Force discussed the growing national demand for access to state and federal fingerprint-based criminal history record checks under Public Law 92-544. Although existing state statutes approved by the Attorney General under 92-544 cover a multitude of noncriminal justice purposes, the Task Force recognized that Public Law 92-544 is limiting in that it only permits the FBI to disseminate identification records to state and local governments identified in state statutes approved under the Public Law 92-544 scheme. It forbids dissemination to private entities. State legislatures are unable to authorize criminal history record checks for noncriminal justice purposes pursuant to Public Law 92-544 without a governmental hiring or public regulatory body to receive and screen the results.

The Task Force recommends removal of the Public Law 92-544 limitation that prohibits dissemination of record check results to private entities, and recommends that authorized private entities be allowed to receive record check results directly. This will allow expansion of Public Law 92-544 access for broader purposes. The Task Force emphasized that positions of trust and levels of risk should be the primary qualifiers under approved Public Law 92-544 statutes, not the existence of a governmental regulatory body to accept and screen results.

In addition, the Task Force defined the degree to which Public Law 92-544 should be broadened, recommending that the law be expanded to allow state and federal criminal history record checks to be requested by "end users who appoint individuals to positions or responsibilities entailing/involving access to vulnerable populations, client residences, businesses' significant organizational assets; sensitive information; or as otherwise deemed necessary by state legislatures or the U.S. Attorney General for public safety or national security." Under this scheme, state legislatures would have the opportunity to enact authorizing legislation under the Public Law 92-544 umbrella for private entities within this definition; those entities would, in turn, be able to request fingerprint-based criminal history record checks through state criminal history repositories. State legislatures deciding not to enact such authorizing legislation would, in effect, be "opting out." Entities within the definition affected by state opt-outs would then need authorization by the U.S. Attorney General to request criminal history record checks directly through the FBI.

The Task Force emphasized that such expansion should be achieved in a manner that sends authorized entities to ***state*** criminal history repositories for access, not directly to the FBI, unless states opt out by choosing to not create enabling legislation. Allowing entities within the definition

to bypass state criminal history repositories and to go directly to the FBI would result in a loss of state fees, a potential breakdown of the state criminal history infrastructure, and other unintended consequences due to diversion of revenue.

The Task Force specifically noted that its recommendation is a compromise of various Task Force members' views. It noted that the Task Force was divided on the degree to which authorization under Public Law 92-544 should be expanded; some members wanted expansion to cover all employers and landlords, and others wanted a much more limited expansion. As a compromise, the Task Force adopted the stated recommendation with the intent of authorizing a large pool of positions of trust, but not the entire universe of possible legitimate purposes. The Task Force referred to its final recommendation of expansion under Public Law 92-544 as "not the best possible recommendation, but the best possible recommendation on which the Task Force could reach consensus."

RECOMMENDATION 1.3:
Consider alternate means to support the cost of producing checks.

The concept of adequate and continued funding for criminal history repositories and infrastructure must be a guiding principle for all decisions surrounding the reform of criminal backgrounding. Alternative means to supplement traditional funding for criminal history repositories and infrastructure should be studied. New business processes and technologies should be considered to help streamline criminal history repositories and infrastructure, including capture, processing, and screening, with the goal of reducing costs in the long run.

The Task Force recognized that the cost to criminal history repositories of capturing, processing and screening CHRI for both criminal justice and criminal backgrounding purposes is a critical element in the national discussion of reforms. The cost of technology and staffing to operate and support criminal history repositories is significant. To be effective, criminal history repositories require a sufficient funding commitment to ensure that repository record completeness and accuracy remain the highest priority, that current technology is used, and that requests for criminal history record checks are properly screened and processed in a timely manner.

State criminal history repositories obtain funding and resources in a variety of ways. Some states support criminal history repositories solely through the collection of user fees, which are appropriated back to the repositories. Twenty-two states that responded to a 2004 survey by the National Crime Prevention and Privacy Compact Council[24] reported that all or part of the collected user fees were put in the state's general fund; criminal history repositories then receive general fund appropriations. The problem with varied funding mechanisms is that some criminal history repositories are adequately funded and consequently are more likely to employ advanced technology, while others receive inadequate funding and manually perform certain functions that can be handled more efficiently through automated means. Fingerprint capture by law enforcement and other entities is another critical and related component that also lacks proper funding and technological capabilities in many jurisdictions. These funding factors directly affect CHRI quality and completeness.

In states that redirect fees collected by criminal history repositories back to the repositories, the fees collected for noncriminal justice record checks are often used to offset staff costs and the increasing expen-

[24] See **http://www.search.org/files/pdf/CCouncilUserFeeSurvey_Summarytables_final.pdf** .

ditures on technology maintenance and upgrades. In some states, noncriminal justice fees subsidize and, in some cases, even fully fund the repositories' primary criminal justice functions. Criminal history repositories, and their fingerprint identification systems, were created primarily to provide CHRI to support decision-making at various stages of the criminal justice process, including investigation, bail determinations, sentencing, probation, and parole. In the past 20 years, criminal history repositories have experienced a rapidly escalating national demand for criminal history record checks for noncriminal justice purposes. In states where repositories are funded directly by noncriminal justice check revenue, the secondary noncriminal justice purpose partially subsidizes the primary criminal justice purpose, because criminal justice checks are conducted without fees.

Also, a state criminal history repository only collects fees when a criminal history record check originates with that repository. If a state's criminal history records are obtained through another repository or channel, such as through the FBI, there is no mechanism through which that state can charge for the use, access, or delivery of its records. As noted previously, new cost recovery approaches should be considered, including recovery for results provided regardless of where a record check originates, and regardless of whether the results indicate a returned record or the absence thereof.

After lengthy discussion and review, the Task Force concluded that adequate resources must be provided to criminal history repositories and infrastructure, especially state criminal history repositories, to maintain, at a minimum, the current quality of criminal history record checks. If service demands are increased, adequate resources must be made available so criminal history repositories can respond to increased demands. Absent the availability of adequate resources, the criminal history repository infrastructure will break down with resulting unintended consequences impacting both the criminal justice system and criminal backgrounding.

A similar consequence could occur if existing service demands are legislatively diverted from state criminal history repositories to an alternate, centralized source. Each state repository would play an important role in providing state CHRI to this centralized record source, which would only be as strong as its weakest contributing state repository. Any weak links in this chain would degrade local and national checks for backgrounding, for criminal justice, and for public safety purposes.

The Task Force recommends that the concept of adequate funding for criminal history repositories and infrastructure be a guiding principle in all decisions surrounding the reform of criminal backgrounding. Further, it recommends that alternative means to supplement traditional methods of funding for criminal history repositories and infrastructure, including the development of a national funding model, should be studied. Finally, it recommends that new business processes and technologies be considered to help streamline capture, processing and screening, with the goal of reducing costs.

RECOMMENDATION 1.4:
Consider options to reduce fees paid by requestors and applicants.

Congress and state legislatures should consider the impact of fees on individuals and organizations using fingerprint-based criminal history record checks. Varying fee structures, fee reduction strategies, government subsidies, and other innovative approaches are needed to relieve the financial burden of fingerprint-based

criminal history record checks, especially with respect to circumstances under which multiple or volume checks are performed. Schemes to expand noncriminal justice access to fingerprint-based criminal history record checks should be considered in connection with solutions to address existing fee problems.

The Task Force discussed and expressed great concern about fees charged for fingerprint-based criminal history record checks for noncriminal justice purposes, and the overall indirect impact that fees have on public safety. This concern stems from feedback received from industries and individuals who often view fees as too high, and even unaffordable, to many.

Fees for fingerprint-based criminal history record checks vary from state to state and at the federal level. State fees range from $0 to $75. FBI fees range from $18 to $24. Fees are sometimes reduced or waived for certain classes of consumers, such as volunteers. Fees for name-based criminal history record checks and criminal record checks are usually less than fingerprint-based checks, but all Public Law 92-544 checks are fingerprint-based. Fees for commercial checks also vary, and can be held down by market pressures. Such checks can also be more expensive than state or federal checks based on the nature and extent of the check and the information provided.

The Task Force expressed concern that fees for criminal history record checks can be a financial burden, especially when multiple checks are required. Employees and licensees earning higher incomes are less affected than those seeking positions in the lower economic strata. More checks may be needed for the latter, who may be working multiple jobs or who change jobs often. A delivery person serving multiple hospitals or schools may need a criminal history record check for each entity or in each jurisdiction he or she serves. Volunteers serving more than one organization may also need multiple checks. The cost of such checks could be a disincentive.

Some state and local governments and industries minimize the need for multiple checks through licensing boards and associations. The need for multiple checks is reduced when a licensing board or industry association acts as an intermediary between licensees and the criminal history repository, receiving and screening record check results. The intermediary issues licenses or clearance cards, or otherwise conveys to the public that its licensees or constituents have passed statutory requirements.

The Task Force recognized that various options can address fee problems and the high cost of multiple criminal history record checks. These options require study and evaluation. The fee issue should be resolved before Public Law 92-544 criminal history record checks are broadly expanded.

The Task Force recommends that Congress and state legislatures consider the impact of fees on individuals and organizations authorized for criminal history record checks under Public Law 92-544. Varying fee structures, fee reduction strategies, government subsidies, and other innovative approaches are needed to relieve the financial burden of fingerprint-based criminal history record checks, especially with respect to those who need multiple or a high volume of checks. Schemes to expand private sector access to fingerprint-based criminal history record checks should be considered in connection with solutions to the existing fee issues.

RECOMMENDATION 1.5:
Offer automatic updates of disseminated information.

All criminal history repositories should offer automatic updating of disseminated information as part of their criminal history record check offerings.

The Task Force discussed the need for automatic mechanisms to update disseminated criminal history record check results as changes to a subject's record occur. Employees, licensees, and volunteers often need to be rechecked on a frequent basis. CHRI can change almost immediately after a set of compiled information is released. Specifically, new arrest information may arrive at the repository. Without a mechanism to automatically update results when changes occur (sometimes described as a "rap-back" approach), a criminal history record check would, in theory, have to be run frequently to remain current—an obvious financial and logistical burden on consumers as well as criminal history repositories. Instead, providing automatic update services for previously run checks—e.g., notification of subsequent arrest or conviction—is a more sound and efficient approach. The Task Force recommends that criminal history repositories offer automatic updating of disseminated information as part of their criminal history record check offerings.

RECOMMENDATION 1.6:
Set a response time deadline.

The Attorney General should set a deadline for criminal history repositories to have end-to-end electronic processing for submission of fingerprints to the FBI. All criminal history repositories should work toward receiving electronic fingerprints from all consumers at the point when fingerprint-based criminal history record checks are submitted, and set a deadline for this to occur. State criminal history repositories, together with the FBI, should work toward setting a goal of a maximum amount of time to process the vast majority of fingerprint-based criminal history record checks, from the time a request is submitted to the time results are returned to the consumer.

The Task Force discussed the amount of elapsed time from the initiation of a fingerprint-based criminal history record check to the point when the consumer receives the check results. Consumers receive diminished value if checks are not processed quickly. Applicants do not get hired. Volunteers do not get placed. Many factors can introduce time lags attributable to the consumer, the criminal history repository, or the FBI. The Task Force acknowledged that electronic submission of fingerprints generally results in better response time than manual submission.

The Task Force recommends that the Attorney General set a firm date, at which time all state criminal history repositories must be capable of electronic processing and electronic submission of fingerprints to the FBI to support end-to-end electronic processing. In addition, repositories should work toward receiving electronic fingerprints from all consumers when checks are initiated, and set a deadline for this to occur. Finally, a national goal should be set along the following lines: "The maximum time for a criminal history repository to process the vast majority of fingerprint-based criminal history record checks, from the time a request is properly submitted to the time results are sent back to the consumer, is ____." Although the Task Force was unable to determine the exact number of days, it expressed that delays of more than a week are problematic.

The Task Force also discussed the time that elapses from the point when a consumer decides a fingerprint-based criminal history record check is needed to the time that the

consumer properly initiates the request. However, it was noted that delays occurring prior to the submission of the request are out of the immediate control of criminal history repositories. No recommendations were made with respect to this part of the process.

RECOMMENDATION 1.7:
Establish access controls to prevent unauthorized access.

Proper access controls and security should be established, maintained, and funded to prevent unauthorized access to criminal history repository infrastructure and data.

The Task Force discussed the need for proper security and access controls to ensure that CHRI access is limited to authorized entities, and also to protect against unauthorized access to infrastructure and data. Risks of security breaches increase as laws are modified to expand access to criminal history record checks, and to authorize private entities to receive check results directly. The Task Force recommends that appropriate technical and nontechnical access controls and security, including identification verification at the time the applicant presents himself/herself for fingerprinting, must be implemented and maintained.

RECOMMENDATION 1.8:
Allow private agents and value-added services from the private marketplace.

Private agents should be allowed to offer value-added services to, and to represent consumers in connection with, criminal history record checks, but with appropriate security and controls.

The Task Force discussed the use of private companies as "consumer agents" to provide value-added services to private entities authorized under Public Law 92-544 statutes, and to individuals who are the subject of criminal history record checks. The range of value-added services that private consumer agents can offer is great. Such services may hold the answers to some of the technical and logistical issues that exist around criminal record background checks today. Consequently, the private marketplace should be encouraged to develop value-added services for consumers, and to offer creative solutions to alleviate problems. For example, private agents could serve consumers by capturing electronic fingerprints, ensuring that proper consent is obtained, making requests for criminal history record background checks to repositories, managing accounts for large-volume consumers, and holding record check results in trust for individuals, such as volunteers, who want to provide their results to multiple entities. All of the Task Force recommendations work together to facilitate the use of the private marketplace while retaining certain privacy and social safeguards. The Task Force recommends that private agents be allowed to offer value-added services for criminal history record checks and represent consumers in connection with such checks, but with appropriate security and controls.

RECOMMENDATION 1.9:
Consider electronic consumer interfaces and data exchange services.

Electronic consumer interfaces and data exchanges should be considered by criminal history repositories to facilitate the provision of fingerprint-based criminal history record checks for noncriminal justice purposes, with appropriate security and controls.

The Task Force discussed the need for criminal history repositories to build consumer Internet portals and electronic data interchange services to facilitate the provision of fingerprint-based criminal history

record checks for noncriminal justice purposes. Although this would involve significant technical and security challenges, consumer Internet portals and electronic data interchange services would provide efficiencies for consumers and criminal history repositories. These would require proper security, credentialing and authentication, and trustworthy mechanisms to submit fingerprints and other necessary documentation. Through electronic data interchange services, value-added systems could be built in the private marketplace to serve various industries by offering sophisticated and intelligent solutions to manage large volume accounts with multiple pending requests; by providing automated screening guidance that meets industry relevancy standards; and by processing electronic payment transactions. The Task Force recommends that consumer Internet portals and electronic data interchange services be considered by criminal history repositories to facilitate the provision of fingerprint-based criminal history record checks for noncriminal justice purposes, with appropriate security and controls.

Privacy and Social Safeguards: Recommendations 2.1 to 2.4

RECOMMENDATION 2.1:
Obtain the subject's consent for criminal history record checks for noncriminal justice purposes.

Consent of the subject should be required for any entity to conduct criminal history record checks for noncriminal justice purposes, to the extent it does not conflict with other law. Consent should be obtained in a uniform way, and should define important consent-related issues surrounding criminal history record checks, such as the type of criminal history record check authorized; the scope of consent granted; the duration of the consent; whether the consent covers automatic updates to check results; whether re-disclosure is allowed and, if so, under what circumstances; the extent to which the consent allows storage and re-use of the information obtained to conduct the check (such as fingerprint and Social Security Number); and any other pertinent factors.

The Task Force discussed the issue of consent as it pertains to conducting criminal history record checks for noncriminal justice purposes. It recognized that consent is generally inherent when a subject provides fingerprints for the purpose of a criminal history record check; however, consent may not be present in the context of name-based checks. The Task Force also recognized that state law varies with respect to the degree to which criminal history record checks may be performed within the state, with and without consent.

At the same time, the Task Force recognized that consent is an important concept and in accordance with general privacy principles. The Task Force agreed that a national policy should be developed requiring consent, which is to be applied to the extent that it does not conflict with other state or federal laws. A standard approach for obtaining consent should be defined. The consent should specify the type of criminal history record check authorized; the scope of consent granted; the duration of the consent; whether the consent covers automatic updates to check results; whether re-disclosure is allowed and, if so, under what circumstances; the extent to which the consent allows storage and re-use of the information obtained to conduct the check (such as fingerprints and Social Security Numbers); and any other pertinent factors. If other law exists that conflicts with this consent policy, notice should be provided to the subject of the check, explaining that information may be re-disclosed or otherwise used according to such law.

RECOMMENDATION 2.2:
Develop appropriate relevancy criteria.

Study is needed to develop appropriate relevancy guidelines for end-users, especially as access to criminal history record checks is expanded.

The Task Force discussed the issue of relevancy and the need for guidelines for end-users of backgrounding results to determine whether the existence of various offenses is relevant to the position of employment, licensure, or other service at issue. The Task Force recommends that guidelines be developed to address redemption, forgiveness, and opportunities for individuals after rehabilitation. Whether information from backgrounding results is relevant to a certain position or service is dependent on many factors, such as the type of information (arrest, disposition, or other); the circumstances surrounding an offense; the age of information; the number and severity of offenses; evidence of rehabilitation; and the age of individuals, including the age at which the offense was committed. The core decision in connection with relevancy is one of risk management. Is the arrest or conviction of a type that would create unacceptable risk in the workplace or service environment at issue? Is the arrest or conviction information unrelated to such a degree that one could properly conclude that the subject does not pose a significant risk?

The Task Force agreed that a risk management analysis is the appropriate relevancy approach, as opposed to automatic rejection on the basis of a criminal record. More study is needed to determine which factors should be applied, and how they should be applied to different circumstances, to make appropriate relevancy decisions for various positions of employment, licensure, and other services. Little guidance is currently available to end-users on fair and prudent use of record check results in applicant selection decisions. The Task Force recommends that study is needed to develop relevancy guidelines for end-users.

RECOMMENDATION 2.3:
Provide notice of disqualifying offenses.

Individuals should have access to information that describes disqualifying offenses at the earliest point in time possible, preferably prior to completing an application for employment, licensure, or other service.

The Task Force discussed the need for individuals to receive notification of disqualifying offenses as early as possible when applying for employment, licensure, and other services. It recognized that the earlier applicants receive notice of past events that may disqualify them, the more respectful the process is to applicants, and the more control applicants have over whether to participate in the process and disclose personal information. For example, if certain offenses automatically disqualify a person from obtaining a professional license, notice of such disqualifying offenses should be provided prior to application, examination, or even a pre-requisite course of study. As another example, if an employer has a policy of not hiring an individual with a certain past conviction, applicants should be notified prior to their filling out an application, or even as part of the position posting. Advance notice of disqualifying offenses provides clear benefit to applicants, but does not prevent applicants from moving forward with the application process if they believe a proper case can be made to overcome the disqualification criteria. In addition, advance notice of disqualifying offenses optimizes applicant, end-user, and repository resources. By allowing applicants to self-select out of criminal history record checks, all are spared time and resources that would be otherwise

expended toward an unproductive result. The Task Force recommends that individuals have access to information that describes disqualifying offenses at the earliest point in time possible, preferably prior to completing an application for employment, licensure, or other service.

RECOMMENDATION 2.4:
Allow access and correction by data subject.

Data subjects should have the right to obtain both name-based and fingerprint-based criminal history record check results about themselves, and should have the opportunity to review and correct such records at minimal or no cost. To avoid abuse of this policy, information should be provided to data subjects in a manner that prevents such information from being passed onto employers or others as official record check results. Data subjects should also have access to information about adverse actions against them based on the results of criminal record checks.

The Task Force discussed the importance of data subjects having access to their own criminal history repository records at minimal cost for inspection and correction. It acknowledged that the FBI and state criminal history repositories have procedures for data subjects to request access to, and to correct, their own records. Providing data subjects with access to their own records reduces overall public concerns about the collection and use of information. However, the right to access records for review and correction should not be abused; therefore, the information should not be passed onto others as official record check results in an effort to circumvent fees charged by criminal history repositories.

The Task Force recommends that data subjects have the right to obtain both name-based and fingerprint-based criminal history record check results about themselves, and also have the opportunity to review and correct them at minimal cost. The Task Force also recommends that criminal history repositories implement mechanisms to prevent information provided to data subjects from being passed on to others as official record check results. Finally, the Task Force recommends that data subjects have access to information about adverse actions against them based on the results of criminal record checks.

Complete and Accurate Records: Recommendations 3.1 to 3.3

RECOMMENDATION 3.1:
Work toward complete and accurate records.

Criminal history repositories must continue to work toward complete and accurate records.

The Task Force discussed and stressed the need for complete and accurate records in criminal history repositories. State criminal history repositories do not cover state offenses in a consistent manner. Some repositories maintain information about minor offenses and others do not. The Task Force recommends that criminal history repositories review and compare the types of offense information they accept and retain with approaches from other states, and that they strive for thoroughness and consistency. Similarly, the FBI only recently broadened its acceptance policy to accept minor (i.e., formerly non-criterion) offenses.

Regardless of the scope of offenses covered, criminal history repositories must strive for complete records, especially with respect to arrests, charges, and dispositions for offenses covered. Does the criminal history repository have comprehensive information for all the events in the

criminal justice cycle for the incident? For example, does the repository receive complete and timely information on prosecution (including prosecutor declinations), disposition, sentencing (including alternative sentencing, fines incarceration, work programs, community service), and completion of sentencing terms?

The Task Force acknowledged that gaps exist in criminal history repository records for various reasons; for example, when the police issue a notice to appear instead of formally arresting and fingerprinting an individual. However, if state law requires that information on certain offenses is to be collected, then repositories should work to collect 100 percent of such information. The Task Force recommends that criminal history repositories work to ensure that they have complete records within the scope of covered offenses.

The Task Force acknowledged that various problems exist with respect to criminal history record checks providing results that are incomplete from certain political jurisdictions. Some state criminal history repositories do not have records from all jurisdictions within the state. Likewise, with at least 48 state repositories serving as sole-source conduits for transmission of arrest information to the FBI, if it is not known at the state, it cannot be known at the FBI. The Task Force recommends that all states move toward adoption of the National Crime Prevention and Privacy Compact,[25] which represents a commitment by signatories to participate in the National Fingerprint File (NFF)[26]—the ultimate extension of the decentralized Interstate Identification Index (i.e., the national criminal records exchange system). The Task Force also recommends that the FBI maximize its response to queries that come from state criminal history repositories to help states accomplish a better national search, by forwarding those queries to indexed states. More technically, the Task Force recommends that state queries produce results that include CHRI held by the FBI, the eight NFF[27] states, and the states that have agreed to respond to the QR (Criminal Code Request) purpose Code "I" request.[28]

RECOMMENDATION 3.2:
Continue funding for the National Criminal History Improvement Program (NCHIP).

Continued federal funding is needed to meet NCHIP objectives directed at accurate, timely, and complete criminal history records.

The Task Force discussed the need for continued federal NCHIP funding. The more complete, accurate, and timely the records in state criminal history repositories, the better the quality of results from criminal history record checks. NCHIP provides technical assistance and grant funding to states to improve the quality of their criminal history records. It sets forth various objectives toward accurate, timely, and

[25] Title 42, U.S.C., Chapter 140, Subchapter II, Section 14616.

[26] NFF states assume an obligation to provide interstate record services to all authorized III users for both criminal and noncriminal justice purposes. Thus, there is no need for these states to continue submitting fingerprints and criminal history data to the FBI for arrests of persons whose records are the states' responsibility for III purposes. NFF states submit fingerprint and offender identification information only for the first arrest of an individual for an offense within each state. This enables the FBI to include the record subject in the III index (and set a "pointer" to the submitting state) and to include the subject's fingerprints in NFF. (From *Use and Management of Criminal History Record Information: A Comprehensive Report, 2001 Update*, Criminal Justice Information Policy series, NCJ 187670 (Washington, D.C.: U.S. Department of Justice, Bureau of Justice Statistics, December 2001), available at **http://www.ojp.usdoj.gov/bjs/abstract/umchri01.htm**.)

[27] The eight NFF states are Colorado, Florida, Kansas, Montana, New Jersey, North Carolina, Oklahoma, and Oregon.

[28] A purpose Code "I" request is used for a III transaction that involves noncriminal justice and/or licensing.

complete records. The completion of these objectives, especially those focused on improved records and increased reporting, is an important companion to criminal backgrounding reforms for noncriminal justice purposes. The Task Force recommends that continued federal NCHIP funding be provided for states to help them achieve accurate, timely, and complete records in state criminal history repositories.

RECOMMENDATION 3.3:
Provide clear and consistent results.

Criminal history repositories should provide the results of criminal history record checks in a clear and consistent format that is easy to read and understand. They should also provide publicly accessible resources to help readers interpret results.

The Task Force discussed the need for criminal history record checks to return clear and consistent results. The public often has difficulty reading and understanding the results of criminal history record checks. States have different offenses and present information differently. The Task Force recommends that all criminal history repositories work to present results in a clear and consistent manner, and to make resources available to aid the public in interpreting results. For example, a criminal history repository could adopt the Interstate Criminal History Transmission Specification developed by the Joint Task Force on Rap Sheet Standardization (JTF).[29]

[29] The JTF resulted from the work of a task force put together by the Bureau of Justice Statistics, U.S. Department of Justice, and SEARCH in 1993. The National Task Force on Increasing the Utility of the Criminal History Record in 1995 issued a list of recommendations, one being a call for consistency in the data elements included in exchanged criminal history records, and in the format in which the exchanged information was presented. The JTF was formed following publication of the task force's report to pursue creation of a rap sheet specification that would present responses to criminal record queries in a presentation format and with data elements that requestors could understand. The JTF has issued several iterations of a "standardized rap sheet" since then, the most recent version in February 2005. That version, which is XML compatible, is available at **http://www.search.org/files/pdf/CH_transmission_spec.pdf**.

Repositories can provide paper brochures and/or public portals with offense information and explanations on how to read and interpret check results. The Task Force recommends that criminal history record check results should be provided in a clear and consistent format that is easy to read and understand, and that members of the public should be provided with resources to help them interpret results.

Miscellaneous: Recommendations 4.1 to 4.3

RECOMMENDATION 4.1:
Create a federal act to address backgrounding for noncriminal justice (or "civil") purposes.

Create a new federal act to uniquely address backgrounding for noncriminal justice (or "civil") purposes, and to address privacy and social safeguards and other recommendations under these recommendations. The Task Force discussed the need for a new federal act to address the various recommendations set forth in this report. Confusion exists surrounding laws that govern criminal backgrounding for noncriminal justice purposes and backgrounding in general. To reduce confusion, the public needs one, comprehensive federal act that addresses backgrounding for civil purposes, along with the many considerations described within these recommendations. The Task Force recommends a new federal act to address backgrounding, including criminal backgrounding, for noncriminal justice (or "civil") purposes.

RECOMMENDATION 4.2:
Impose civil and criminal penalties.

Civil and criminal penalties should be imposed for violations of laws that govern backgrounding.

The Task Force discussed the need for continued focus on, and strengthening of,

penalties for violations of laws pertaining to criminal backgrounding and backgrounding in general. With expanded access to state and federal criminal history record checks on the horizon, coupled with the increased risk to data subjects that comes with such expansion, existing civil and criminal penalties should be reviewed, strengthened, and added, as needed, to prevent abuse of access. The Task Force recommends the review, and strengthening if necessary, of existing civil and criminal penalties for violations of law that govern criminal backgrounding. The Task Force also recommends the establishment of such laws and penalties in jurisdictions where they do not already exist.

RECOMMENDATION 4.3:
Develop a national education campaign.

Develop a comprehensive, national campaign to educate the public on the concept, strategies, processes, and goals of criminal record backgrounding.

The Task Force discussed the need for a national educational campaign on backgrounding, especially criminal record backgrounding. Throughout its deliberations, the Task Force recognized the lack of understanding by the general public of terminology, concepts, and laws surrounding criminal backgrounding. In fact, confusing terminology and lack of understanding on the part of the general public was a factor in the formation of the Task Force.

The Task Force recommends that a lexicon for criminal backgrounding be established and published to define a common set of terms, and to promote understanding of those terms. The terms defined in this report should be included. The Task Force also recommends that literature be created and widely distributed to help consumers understand criminal backgrounding today, and backgrounding in general.

National Task Force on the Criminal Backgrounding of America

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UCR

Virginia State Police

CJIS

CCRE

DMV NLETS VCIN Local Law Enforcement NCIC

Criminal Justice Information Services Division Newsletter

Volume 11, Issue 1 **JANUARY 2007**

NEW DIVISION COMMANDER

Thomas W. Turner, forty-year Virginia State Police veteran, has been appointed Division Commander of the Criminal Justice Information Services (CJIS) Division. His appointment to Captain was effective January 10, 2007.

Captain Turner has an extensive tenure in the CJIS Division. For the past 20 years, he has served as the Assistant CJIS Officer in the capacity of Lieutenant. Over the years, Captain Turner has moved through the ranks as a Trooper, Investigator, Sergeant, and First Sergeant.

"Captain Turner has been instrumental in the creation, development, and success of numerous CJIS projects over the years," said Colonel W. Steven Flaherty, Virginia State Police Superintendent. "His progressive ideas and remarkable expertise in this field will continue to be of great benefit to the State Police, the public, and the numerous law-enforcement agencies we interact with every day."

"Virginia has one of the nation's leading Sex Offender Registries because of Captain Turner's commitment and tireless efforts. He has also enabled the State Police to advance technologically, in the areas of record retention and public accessibility," continued Colonel Flaherty.

The CJIS Division provides critical support to law enforcement agencies across the Commonwealth and nation. The Division is responsible for the Virginia Sex Offender and Crimes Against Minors Registry (SOR), the new Sex Offender Investigative Unit, Virginia Criminal Information Network (VCIN), Firearms Transaction Center, Uniform Crime Reporting (UCR), Automated Fingerprint Identification System (AFIS), operational Live Scan sites and units, and criminal and non-criminal Central Criminal Records Exchange (CCRE).

The comprehensive Division also maintains a state mental health file, the Supreme Court/State Police Disposition Interface, and Correctional Status Information (CSI) Interface. In addition, CJIS includes the State Police Photography Laboratory and Microfilm Section. It is also responsible for the maintenance of all related files within the Department.

Captain Turner is the Governor's appointee, and serves as Vice Chairman of the Board of Directors for the National Consortium for Justice Information and Statistics, and Criminal History Record (SEARCH). He is also Chairman of the Board of Directors for AFIS Internet, and Vice Chairman of the FBI/Compact Council's Subcommittee on Policy and Procedures.

A resident of Charles City County, Captain Turner is a graduate of the Southern Police Administrative Institute at the University of Kentucky, the University of Richmond Supervisory Instructor's Course, and John Tyler Community College. He is currently pursuing a degree in criminal justice from Virginia State University.

Promoted into Captain Turner's former position in CJIS was Lieutenant William J. Reed, Jr. Lieutenant Reed has spent the past two years as a First Sergeant in the State Police Gloucester Area Office and, before that, as the Area Commander for the Virginia Beach/Norfolk Area Office. He joined the Department in 1989, after serving two years with the Norfolk Police Department.

NEW DIVISION COMMANDER—
Continued from Page 1

Lieutenant Reed received his Baccalaureate degree in Criminology from St. Leo University. He has completed Northwestern University's School of Police Staff & Command, and is currently completing his Master's degree at Virginia Commonwealth University. Lieutenant Reed retired from the United States Navy Reserve after 22 years of service.

The CJIS Newsletter is published by:
Commonwealth of Virginia
Department of State Police

Criminal Justice Information Services Division
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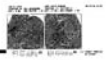
AFIS ACTIVITIES



A F I S

Changes to the Virginia State Police Website

The Virginia State Police (VSP) website has recently undergone improvements, and links have changed. You may access the Live Scan section of the new web by going to: http://www.vsp.virginia.gov and choosing *Law Enforcement Services* from the left, then *Criminal Justice Information Services Division*, and clicking on the *Live Scan* link in the list. The following list contains some of the information found on the website:

- How to buy Live Scan or upgrade your equipment
- Documents, forms and tables for use by Live Scan agencies
- Mugshot Frequently Asked Questions
- IDS Information
- Live Scan location map

Check out the new website, and let us know what you think by sending an e-mail to livescan@vsp.virginia.gov. We want to know what you think about the Live Scan and related content on the web.

*** * * * REMINDERS * * * ***

Don't Get Caught Copying Fingerprints From A Previous Booking

As previously mentioned in July 2006, some sites continue to copy a previous booking on a person and just enter the new arrest data and charges. It is mandatory that you take a new set of fingerprints for an arrestee each calendar day. If you fail to take a new set of fingerprints, the FBI will not accept the transmission and, consequently, the new charges are not of file at the FBI.

Live Scan Notification of Changed Data Fax

When requesting changes on an arrest submitted via live scan, please use the revised

AFIS ACTIVITIES — CONTINUED

Notification of Changed Data form which is attached to this newsletter. The correct FAX numbers are 804-674–2988 and 804-674-2971.

Mugshots

The VSP has received almost 190,000 images in 98,500 individual records; the majority of images coming from Live Scan agencies. Agencies without Live Scan are mailing images with ink cards; these images are being scanned into the Electronic Archive system.

VSP has published a Request for Proposal (RFP) for a Central Criminal Image System (CCIS). CCIS is not intended to replace an agency's local mugshot system, but will allow agency personnel to search for images that match specific criteria, such as age range, hair and eye color, height range, and other personal descriptors and create lineups. The images in the system will be most useful statewide if they meet the VSP requirements for elements such as background color, focus, and lighting. It is up to each agency to ensure the images conform to the standard, listed on the VSP website at http://www.vsp.virginia.gov Click on *Law Enforcement Services* in the list on the main page, then click on *Criminal Justice Information Services Division*, and then click on *Live Scan*. The VSP Person Image Requirements and Standards can be located by clicking the link for *Live Scan Documents, Forms and Tables* from the Live Scan main page.

Palm Print System

VSP has ordered a Palm Print System from NEC Solutions (America), Inc. The equipment needed for this system will start arriving in June, with implementation planned for November, 2007. AFIS remote users will receive training on searching the palm repository for latent palm prints on file from crime scenes. One site in the state is already submitting palm prints with Criminal Arrest Records. These are being captured in the Electronic Fingerprint Archive System and will be imported into the palm repository. VSP is also considering other means for populating the palm repository.

CCRE INFORMATION

Sex Offender Investigative Unit

As a result of changes to Chapter 9, Title 9.1 of the Code of Virginia during the 2006 General Assembly, the Sex Offender Investigative Unit (SOIU) was created. Currently, there are over 15,000 registered sex offenders in the state of Virginia. VSP oversees approximately 5,000 sex offenders, the Department of Corrections oversees approximately 3,000 and the rest are incarcerated.

The SOIU is responsible for physically verifying the work and home address of each registered sex offender under the jurisdiction of VSP, within 30 days of the initial registration or change of address, and semi-annually each year thereafter. The Department of Corrections is responsible for conducting address verifications for those sex offenders who are under the jurisdiction of Probation and Parole. Sex offenders who are currently incarcerated will be tracked upon their release by the correctional facility in which they are housed.

Also, the SOIU handles all criminal investigations for VSP pertaining to sex offender violations and related matters. The Department of Corrections will also forward all criminal matters involving sex offenders under their jurisdiction to the SOIU for initiation of a criminal investigation.

If you have any questions regarding the SOIU, please contact First Sergeant Jeff L. Baker at (804) 674-6759.

VCIN NOTES

DMV NLETS VCIN Local Law Enforcement NCIC

ATTENTION: AGENCY HEADS AND TERMINAL AGENCY COORDINATORS

Please disseminate the information contained in this newsletter to all users of the Virginia Criminal Information Network (VCIN) within your agency.

The following agencies were added to VCIN during the third & fourth quarters of 2006:

AGENCY NAME	TERMINAL ADDRESS	ORI
*Botetourt Corr. Unit	BT25	VA012025C
*Caroline Corr. Unit #2	CCU2	VA017015C
Counterintelligence Law Enforc.-Arlington	CILE	VADOD15S0
*DOC Western Reg. Office—Roanoke	DCIR	VA123025C
Fredericksburg Fire Marshal	FKFM	VA1090300
*Norfolk Local Offender Treatment Center	NLOT	VA117041C
*Old Dominion Comm. Corr.—Winchester	ODCC	VA034013C
*Patrick Henry Corr. Unit #28	PC28	VA070015C
*Pulaski Corr. Unit #1	PCC1	VA077015C
*Rustburg Corr. Unit #9	RUS9	VA016025C

*DENOTES LIMITED SERVICE TERMINAL

Purpose Codes for Criminal History Background Checks for Law Enforcement Officer Employment

When an agency is initially checking a pool of candidates for law enforcement officer employment, the purpose field in the criminal history transaction (QH) would be filled with "J" for criminal justice employment. After your candidates have been narrowed down to four or five finalists, then perform another criminal history check (VA.QH.) with the purpose code field filled with "F" in order to obtain a Virginia mental health records check.

Purpose Code "C" in Virginia DMV Transactions

When the Virginia DMV transaction is for an on-going confidential criminal investigation, the purpose code field must be filled with "C". This will prevent DMV from disclosing the inquiry to an individual or their authorized representative. DMV is required to release the history of inquiries of DMV customers under the authority of the Code of Virginia, Section 2.1-382. The Virginia General Assembly enacted House Bill 2422 that went into effect July 1, 1995. This amendment to the code section exempts the release of information regarding inquiries initiated as part of an on-going confidential criminal investigation, where disclosure would jeopardize the investigation.

Any interface agency that programmatically "spins off" DMV queries from the initial VCIN query must ensure that the purpose code field is filled in with "C" purpose code, as appropriate. However, agencies shall not default all DMV queries with the "C" code.

Changing VCIN IP Address: Caution!

Users are cautioned not to make any IP address changes to G-Link terminals or to Computer Interface Servers without first consulting with the Networking Group in our Information Technology & Planning (IT & P) Division or the VCIN Analysts' Office. The phone numbers for the Networking Group in IT & P are 804-674-2651 or 804-674-2272. The phone numbers for the VCIN Analysts' office are 804-674-4667, 804-674-2200, 804-674-2449 or 804-674-2688. Making the appropriate contacts before any IP address changes are made will ensure that service to NCIC/VCIN/NLETS is not interrupted.

Protective Order Registry

The Protective Order Registry files will be audited starting in 2007. For several months, we have begun the process of identifying possible on-going problems involving protective orders. We have seen an enormous amount of protective orders in the system with no serve date, no date of birth, and no social security numbers. These types of errors should be caught during your second party cross checks and/or your internal audits. Please ensure that the information entered in the VCIN/NCIC system is accurate and up-to-date. If you should need a printout of your active protective orders, please contact the VCIN Section-CJIS Division, and one will be made available to you for review.

UCR HIGHLIGHTS....

FBI Quality Assurance Reviews

During the week of November 13, 2006, the Uniform Crime Reporting State Program and eight of the local law enforcement agencies in Virginia were audited by the FBI's Quality Assurance Team. We wish to thank and extend our appreciation for the willingness and cooperation of the following local agencies for participating in this review: Alexandria PD, Chesapeake PD, Henrico County PD, Leesburg PD, Manassas PD, Norfolk PD, Richmond PD, and Virginia Beach PD. We will be providing agencies with certain data quality issues that were brought to our attention during these reviews. One issue has already been posted on the bulletins portion of the IBR website. Agencies have been listing the 99 code (unknown) in the Bias Motivated Crime field and this code happens to mean that there was some evidence that caused the officer to think this might be a hate crime. We are requesting that agencies use the 88 code (none) in this field until they determine, through investigation, that this was, indeed, a hate crime.

IBR Website

Each agency head was sent a letter in November 2006, advising that beginning December 15, 2006, each monthly file submitted to the State Program would require their certification that the information in the file contained true and accurate data. We have provided a check block on the monthly file submission screen to assist you in this process. Those few agencies that are still mailing diskettes, must include a letter from the agency head to the UCR office acknowledging this certification.

Agencies' 2006 nine months' year-to-date reports have been posted on the IBR website. Go to Statistical Reports on the Main Menu, then YTD and the September 2006 option under each of the five reports will contain your 2006 nine months' figures as of December 4, 2006.

2006 January Through September Data

The following figures represent the statewide 2006 preliminary nine months' totals. Offenses of a person (murder, kidnapping, rape, sex offenses and assaults) are victim counts. All other offenses are offense counts.

All Group A offenses increased or stayed approximately the same when compared to the preliminary nine months' figures from the previous year, except the offenses of murder, kidnapping, simple assaults and intimidation, larceny, motor vehicle theft, forgery, and weapon law violations. Offenses that increased with double digit percentages were extortion, burglary, fraud, pornography, and bribery.

2006 Nine Months Arrests

	Adults	Juveniles
Group A Arrests	75,995	13,154
Group B Arrests	123,429	14,681

When comparing the preliminary nine months' 2006 arrest figures to the preliminary nine months' arrests from the previous year, we find that the Group A arrests decreased 1.1%, and the Group B arrests decreased 1.6%.

The total adult arrests (Group A and Group B) decreased 1.8%, while the total juvenile arrests increased 1.7%.

Of the total juvenile Group A arrests, 3,858 were for assaults, 3,278 for larcenies, and 2,033 for drug offenses.

Of the total adult Group A arrests, 25,861 were for assaults, 21,642 for drug offenses, and 11,362 for larcenies.

Appendix E

Notification of Changed Data Fax

Fax to 804-674-2988 or 804-674-2971

ARRESTEE'S SID # _____

DOCUMENT CONTROL # _____

(List a single Document Control Number, Numbers, or range of Numbers)

ARRESTEE'S NAME _____
LAST FIRST MIDDLE SUFFIX

DATA IN ERROR:

DATA AS IT SHOULD APPEAR (CORRECTED):

YOUR SITE'S NAME: _____

YOUR NAME: _____

YOUR PHONE #: ( ) _____

LIVE SCAN CARD HAS BEEN RE-TRANSMITTED WITH CORRECT DATA.
YES*_____ ***Preferred** NO_____

DATE OF ORIGINAL TRANSMISSION: _____

APPROXIMATE TIME OF ORIGINAL TRANSMISSION: _____

Questions for Virginia

# of Records on Criminal History Database: 1,714,080

# of Arrests represented on Criminal History Database: 4,361,016

# of Arrest Fingerprints Processed 2006: 273,794

# of Applicant Fingerprints Processed 2006: 156,501

Fee Structure: State charge is $8 fingerprint processing fee for volunteers (FBI charges an additional $18), State charges $15 for a name based search (no fingerprints), State charges $13 for a fingerprint based search (plus $24 FBI fee)

# of Live Scan Devices used for criminal justice purposes statewide: 318

# of Live Scan Devices used for non criminal justice processing statewide: 120

Does VA provide name based services via the Internet? No, we use a web interface to generate the form, but the forms is printed and mailed to our agency.

If so how many processed during 2006? N/A

Does VA provide name based services via mail, in-person or other form? VIA Mail, and the form may be dropped off at our office. All requests are processed in the order that they are received. There is no expedited process, since many people are operating on short timelines.

If so how many processed during 2006? 277,446

Other statistics and/or narrative describing criminal history operations in VA:
Name based checks as indicated above: 277,446
Fingerprint based checks: 89,763

Additional Information

Virginia is a national leader among the states in the monitoring and tracking of convicted sex offenders – 40 State Troopers and Supervisors are dedicated to this function across the state and are aggressively monitoring 13,000 offenders.

The VA State Police Repository is responsible for various functions which include a concealed weapons permit registry (135,000 entries) and the domestic protection order file.

Authorizing Statutes for Background Checks

Virginia

Central Criminal Records Exchange, Richmond, Virginia (St Bu)

1. Polygraph Examiners (VaCA § 54.1-1804) formerly (VaCA § 54-921)

2. Private Security Services Business (VaCA §§ 9.1-139, 9.1-140, 9.1-145, 9.1-149, and 9.1-150.3)

   A. Armored car personnel
   B. Courier
   C. Armed security officer
   D. Security canine handler
   E. Private investigator
   F. Personal protection specialist
   G. Alarm respondent
   H. Central station dispatcher
   I. Electronic security sales representative
   J. Electronic security technician
   K. Electronic security employee
   L. Electronic security technician's assistant
   M. Private security services training
   N. Unarmed security officers (Becomes law on 01/01/03 - this category only)
   O. Special conservator of the peace

3. Public School Employment (VaCA § 22.1-296.2) and accredited Private or Parochial Schools (VaCA § 22.1-296.3)

4. Virginia Lottery Department employees (VaCA § 8.1-4008)

   A. Board members, officers and employees of any vendor (VaCA § 58.1-4008)
   B. Lottery sales agents (VaCA § 58.1-4009)

5. Virginia Racing Commission (VaCA § 59.1-371)

   A. Every person licensed to hold race meetings
   B. Officer, director, or principal stockholder of a corporation which holds such license and employees
   C. Security personnel
   D. Members and employees of the racing commission
   E. Permit holders, owners, trainers, jockeys, apprentices, stable employees, managers, agents, blacksmiths, veterinarians, and employees
   F. Any person who actively participates in racing activities of any license or permit holder

Virginia (Continued)

6. Employees, volunteers and service providers for juvenile residential facilities regulated or operated by the Virginia Departments of Social Services, Education, Youth and Family Services, or Mental Health, Mental Retardation and Substance Abuse Services (VaCA 63.1-248.7:2) (Effective April 10, 1994)

7. Paramedics or Emergency Medical Technicians (VaCA § 15.2- 1128) formerly (VaCA § 15.1-29.25)

8. Prospective employees of State facilities operated by the Department of Health, Mental Retardation and Substances Abuse Services and prospective employees of this department for positions which receive, monitor, or disburse state funds. (VaCA § 37.1-20.3) (Effective July 1, 1996)(Amended 5/1999)

9. Prospective and contract employees of every community services board, administrative policy board, local government department with a policy-advisory board and behavorial health authority. (VaCA § 37.1-197.2) (Amended 5/1999)

10. Concealed handgun permits (VaCA § 18.2-308)

1. Nonresident applicants for concealed weapon permit
2. Statute delegates to county and city governments the authority to enact an ordinance requiring fingerprinting and a national record check of the applicant permittees. The following county/city governments listed in alphabetical order have enacted such ordinances:

* Alexandria City (Ord. No. 3936; § 13-2-1e)
* Arlington County (§ 17-5.1)
* Augusta County (Code § 11-41)
* Buena Vista City (Ord. No. § 6-30)
* Buckingham County (Ord. No. 43)
* Campbell County (County Code § 16-27)
* Caroline County (Art. II, Ch. 15, § 15.4)
* Chesterfield County (Code § 15-231)
* Clarke County (Code § 106-7)
* Danville City (City Code § 40-8)
* Dinwiddie County (§ 16.5-21)
* Fauquier County (§ 5-20)

* Franklin (City Code § 31-1)
* Fredricksburg (City Code § 13-6.1)
* Hampton City (Ord. No. 1190 § 40-5)
* Harrisonburg City (§ 5-1-10)
* Henrico County (Ord. No. § 15-58)
* Highland County (Ord. No 1040) formerly (Ord. No. 410)
* Isle of Wight County (Ord. No. § 16.2-1)
* James City County (Code 15-35)
* King and Queen County (Ord. No. 81297)
* King William County (§9-80)
* Lancaster County (Ord. No. 92597)
* Louisa County (Ord. No. § 54-13)
* Mecklenburg County (Ord. No. 18-102)
* Newport News (City Code § 43-2 [d])
* Northampton County (Ord. No. 97-04)
* Northumberland County (Ord. No. 70)
* Norton City (Ord. No. 8-19-97)
* Poquoson City (Code § 24-13)
* Petersburg City (Code § 39-5.1)
* Rappahannock County (Code § 109-1) formerly (Code §118-1)
* Richmond City (Code § 20-156)
* Rockingham County (Ord. No. § 2-168)
* Staunton City (§ 18-36)
* Waynesboro City (Ord. No. 1997-28)
* Williamsburg City (Code 9-350)
* Winchester City (Ord. No. 018-97)
* Wythe County (Ord. No. 97-3)
* York County (York County Code, Ch. 1, § 1-17)

11. Employees of every agency licensed by Department of Mental Health in direct consumer care positions (VaCA § 37.1-183.3)(Approved May 1999)

12. Employees of a Gun dealer to transfer firearms (VaCA § 18.2-308.2:(B)) effective. 7/1/00

13. Applicants for permits to manufacture, store, handle, use or sell explosives, and blaster certification (VaCA § 27-97.2)

14. Applicants - Arlington County Fire Department(HB 2171) - Amended VaCa § 27-6.2

15. VA Department of Military Affairs -Applicants - Employment, volunteering or providing services to residential facilitiesfor juveniles (HB 1639) - Amended VaCa § 63.1-248.7:2

16. Arlington Co. - County Applicants (VaCA 15.2-709.1) (Effective 7/1/2002)

17. Bail bondsman certification and licensing
    A. Property bail bondsman (VaCA § 19.2-152.1)
    B. Surety bail bondsman (VaCA § 38.2-1865.7)
    C. Renewal of surety bail bondsman license (VaCA § 38.2-1865.8)

18. Delegates authority to a locality to enact an ordinance meeting Public Law 92-544 criteria to obtain national background checks on individuals offered employment with the locality. (VaCA § **15.2-1505.1)**
    * **Montgomery County (Montgomery Co. Ord. 2004-06)**
    * **King George County (King George Co. Code, Ch. 2, Art. # 6)**

19. Delegates authority to a locality to enact an ordinance meeting Public Law 92-544 criteria to obtain nationalbackground checks on any applicant who is offered or accepts employment with the locality or any prospective licensee for any category of license designated by ordinance. (VaCA § **15.2-1503.1**):
    * Chesterfield County (Chesterfield Co. Code § 2-79)
    * Virginia Beach City (Virginia Beach City Ord. § 2-78)
    * Fluvanna County (Fluvanna Co. Code § 17-3)
    * Leesburg Town (Leesburg Town Ordinance 2003-0-19)
    * King George County (King George Co. Code, Ch. 2, Art. #6)
    * York County (York County Code § 2-4)
    * Manassas City (Manassas City Ordinance 0-2004-20)
    * Accomack County (Accomack Co. Ord. # 9-18-2002 (1), Art. I, § 2-4)
    * Fairfax County (Fairfax Co. Ord., Chapter 3 § 3-1-23)
    * Hanover County (Hanover Co. Ord. No. 03-24)

20. Final candidates with a state agency for a position that has been designated as sensitive. (VaCA § 2.2-1201.1)

21. Applicants for registration, licensure, or certification for professions and occupations regulated by the Department of Professional and Occupational Regulation. (VaCA § 54.1-204)

22. County water treatment facility applicants, employees, or contractors (VaCA § 15.2-634.1)

➔ ➔ <u>Law Enforcement/Criminal Justice Purpose - NO USER FEE</u> ➔ ➔

1. Law Enforcement Positions
    A. Officers and assistants of the Division of Motor Vehicles (VC 46.1-37)

B. State Capitol Police (VC 2.1-93)
C. Agents, inspectors, investigators, etc., of the State
Corporation Commission (VC 56-334)
D. Forest Wardens (VC 10-55)
E. Game Wardens (VC 29-24)
F. Employees of the State Highway Commission (VC 33.1-21)
G. Members, officers, agents and employees of the Alcoholic Beverage Control Board (VC 4-8)
H. State, City, and Town, Fire Marshals and Deputy Fire
Marshals (VC 36-139.2 and 27-34.2)

MAXINE WATERS
MEMBER OF CONGRESS
35TH DISTRICT, CALIFORNIA

CHIEF DEPUTY WHIP

COMMITTEES:
FINANCIAL SERVICES
SUBCOMMITTEE ON HOUSING AND COMMUNITY OPPORTUNITY
CHAIRWOMAN

JUDICIARY
SUBCOMMITTEE ON CRIME, TERRORISM AND HOMELAND SECURITY
SUBCOMMITTEE ON IMMIGRATION, BORDER SECURITY AND CLAIMS

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March 16, 2007

The Honorable Allan Mollohan
Chairman
Subcommittee on
Commerce/Justice/Science
House Committee on Appropriations
2358 Rayburn House Office Building
Washington DC 20515

The Honorable Rodney Frelinghuysen
Ranking Member
Subcommittee on
Commerce/Justice/Science House
Committee on Appropriations
1016 Longworth House Office Building
Washington, DC 20515

Dear Chairman and Ranking Member:

As a member of the Committee on the Judiciary, responsible for oversight of the Federal Bureau of Investigations (FBI), I am extremely concerned with a proposed regulation that would authorize the FBI to include "non-serious" offenses, including juvenile arrests, as part of the Criminal History Record Information (CHRI) or "rap sheets" it provides for employment screening purposes.

Because of the extremely prejudicial impact that this proposed policy would have on the employment prospects of people with especially minor criminal histories, many of whom were never convicted of a crime, I plan to request that the Bureau delay issuance of this proposed regulation in order to allow Congressional oversight on this issue.

On November 6, 2006, the FBI closed the public comment period on this proposed regulation that would authorize the agency to report "non-serious offenses" (NSOs) on the FBI's rap sheets for employment screening purposes (71 Federal Register 52302, dated September 5, 2006). Currently, the FBI can only report serious misdemeanors, felony arrests, and convictions. As defined by the FBI regulations, NSOs include all juvenile arrests and convictions reported by the states to the FBI and any non-serious adult arrests and convictions. The latter could include anything from vagrancy, loitering, and false fire alarm to non-specific charges of drunkenness and even traffic violations.

In 2002, the FBI generated more rap sheets for non-criminal justice purposes than for criminal investigations, including over five million rap sheets provided to employers and state occupational licensing agencies. While most FBI rap sheets are provided to state and federal agencies, including the Transportation Security Administration, more federal laws now authorize certain private employers to

access the FBI's records. Because FBI rap sheets influence a multitude of employment decisions, congressional oversight is necessary to examine the serious concerns related to their reliability and the extent to which employment decisions would be negatively impacted by the proposed regulation to report minor criminal offenses.

According to a recent report by the U.S. Attorney General, the FBI's rap sheets are "still missing final disposition information for approximately 50 percent of its records." (U.S. Department of Justice, *The Attorney General's Report on Criminal Background Checks,* June 2006, at page 3). This means that the records collected routinely fail to include information necessary to thoroughly and objectively evaluate the rap sheet, such as the results of arrests, dismissal of charges, and expungements. The FBI's proposal to add large numbers of arrests for non-serious offenses, including vagrancy and disorderly conduct (offenses which account for approximately 10% of all arrests in the U.S.), would further compromise the integrity and reliability of the FBI rap sheets.

In addition, I am concerned that the FBI's proposal represents a significant departure from federal and state policies that protect the privacy of juvenile records for non-criminal justice purposes. While there were more than 1.5 million annual arrests of people less than 18 years of age, often for property crimes, studies show that only one-third of youthful offenders ever commit a second offense. However, if these types of incidents are reported on FBI rap sheets, these arrests for often one-time youthful indiscretions will remain on individuals' records indefinitely, causing serious hardship in many cases.

Finally, I am concerned that there will be many more FBI rap sheets based solely on non-serious offenses. When the FBI implemented its policy of excluding non-serious offenses in the 1970s, it resulted in a 33% decrease in the total number of fingerprint cards retained by the FBI. Unless the proportion has changed dramatically since then, a large number of people will now show a criminal record with the FBI if the proposed regulation is finalized. Studies show that employers are far less likely to hire an individual with a criminal record, often without regard to the seriousness of the offense. Thus, many more workers may be wrongly denied employment based solely on a non-serious offense if Congress is not given an opportunity to examine this issue.

A recent *New York Times* editorial ("Closing the Revolving Door," dated January 25, 2007) recommended that Congress act to preclude the FBI from finalizing its regulations for fear that they would "transform single indiscretions into lifetime stigmas." The Bureau's proposed regulations have the potential to create serious impediments to employment opportunities for viable, qualified candidates.

For the above reasons, in the Commerce-Justice-Science Appropriations Act for FY 2008, I urge you to include the following language in the text of the bill:

> **None of the funds made available in this Section shall be used to issue the rule referenced in RIN 1110-AA25, published in 71 Federal Register 52302-52305 on September 5, 2006.**

The Honorable Allan Mollohan
The Honorable Rodney Frelinghuysen
Appropriations Subcommittee on Commerce-Justice-Science
March 16, 2007
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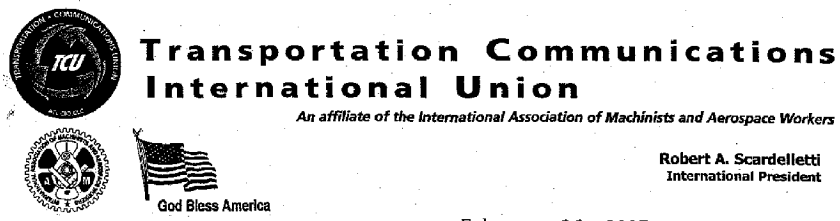
Thank you for your consideration of this request. If you have any further questions about this project, please contact me or Dana Thompson of my staff at 5-2201.

Sincerely,

Maxine Waters
Member of Congress



February 26, 2007

The Honorable John Conyers, Jr.
House of Representatives
Washington, DC 20515

Dear Congressman Conyers:

Thank you for your attendance at the recent hearing of the Subcommittee on Transportation Security and Infrastructure Protection on the issue of background and security clearances for the transportation workforce. During that hearing you asked what unions were doing for members faced with loss of employment as a result of the rail carrier's criminal background checks. As International President of the Transportation•Communications International Union (TCU), I wanted to give you a direct response to your inquiry.

TCU is a railroad labor organization representing employees employed by all Class I railroads in the clerical, carmen and supervisor crafts and classes. It is a member of the Transportation Trades Department of the AFL-CIO whose General Counsel, Larry Willis, testified before the Subcommittee.

The loading and unloading of freight cars is work that has historically been performed by members of our union. However, carriers have gradually contracted out a significant amount of this work involving intermodal traffic. Today some of this intermodal work is performed by carriers' own employees represented by TCU and some is performed by contractors. The contractors' employees may be represented by TCU, the Teamsters, another union, or be unrepresented.

Where TCU represents the contractor's employees, the collective bargaining agreement covering those employees is with the contractor, not the rail carrier. Though TCU may also have a collective bargaining agreement covering the rail carrier's employees, that agreement does not require that the rail carrier arbitrate issues involving the contractor's employees.

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TCU is the collective bargaining representative of the employees of Pacific Rail Services (PacRail), a contractor of BNSF. PacRail provides loading and unloading services at the carrier's intermodal yard in Seattle, Washington. In the fall of 2005 BNSF sent a form letter to its contractors, including PacRail, advising that the contractors' employees would be required to participate in the e-RAILSAFE background screening program. BNSF notified its contractors that this program was adopted to meet "government security recommendations, directives, and regulations." BNSF further advised their contractors compliance with the program would be audited by "BNSF Railway or the U.S. Transportation Security Administration." As made clear in the testimony of the American Association of Railroad's (AAR) President Ed Hamberger, before the Subcommittee, in fact this program is not required by the government, and compliance with it will not be audited by TSA.

According to Mr. Hamberger's testimony, any felony conviction within the previous seven years would result in an employee's disqualification, even though Congress recently in the Port Security bill attempted to carefully limit disqualifying felonies to those with a clear connection to homeland security. Thus, in Seattle where PacRail's employees work closely with and in proximity to longshoremen at the port, a felony conviction that would disqualify a PacRail employee, under the rail carrier's program, would not have the same effect on a longshoreman.

PacRail's employees were required to sign a waiver authorizing the procurement of consumer reports including reports providing information on the employees' "character and general reputation." No explanation was offered to PacRail's employees as to the need for such a broad waiver. No explanation was offered as to which criminal offenses over what time period would disqualify them from entering BNSF property. No explanation was offered as to what mitigating factors, if any, were to be considered. As a result of this background check, two employees lost several weeks of employment, and one has permanently lost employment.

BNSF imposed the requirement that PacRail employees undergo criminal background checks, designed the process for the background check, dictated the scope of the waiver, selected the company that conducted the background check, and designed the appeal process which it controlled. Though BNSF maintains that it is responsible only for barring affected contractor employees from their property, and not for the termination of employment, the effect of the system is to deny PacRail employees an opportunity to work.

Whatever legal liability BNSF may have for the background check procedures it designed, imposed and controlled, it is not obligated to proceed to arbitration with TCU over the effects of this system on PacRail employees, since TCU has no collective bargaining agreement with BNSF covering these employees. Not faced with the prospect of having to justify its actions in arbitration, BNSF has rejected repeated requests by TCU to discuss its background check system as well as TCU's request for information about that system. Indeed, the only meeting with representatives of the rail industry on this subject was held in December 2006 and was set up by the majority staff of the House Committee on Homeland Security.

Notwithstanding the foregoing, TCU has filed grievances with PacRail as well as unfair labor practice charges against it with the National Labor Relations Board. PacRail has defended its actions in imposing the BNSF-designed background check procedures by arguing that it had no choice but to accede to the demands of its client, BNSF. To do otherwise would, according to PacRail, risk loss of the contract. Though TCU attempted to advise affected employees about the background check program, BNSF's unwillingness to provide it with any information seriously hampered its ability to do so.

It remains to be seen whether PacRail's defense will be accepted. What is clear, however, is that it is only through the continuing interest of Congress that BNSF and the three other carriers currently participating in e-RAILSAFE program - UP, CSX and NS - will modify this program to correct its worst abuses. While the industry argues that it has historically conducted background checks of applicants before being hired, its claim that it is merely requiring the contractor's employees to follow similar practices is more than a little disingenuous. There is a big difference between not hiring an applicant because of a criminal background check and disqualifying an employee who has more than adequately performed his job for a number of years as a result of such a check.

It is similarly disingenuous to claim, as did Mr. Hamberger, President and CEO of the AAR, before the Subcommittee, that the necessity for this program is not limited to homeland security concerns but is also based on broader concerns of controlling theft, since this plan had been publicly justified, until Mr. Hamberger's testimony, solely on the basis of homeland security.

While a system of background checks for contractor employees may be necessary in the current environment, that system should reflect a balance between the need to protect security and the need to assure fairness to contractor employees. While reasonable people may differ as to the exact parameters of such a system, we would urge that simple equity require that (1) it be transparent - the list of disqualifying felonies be clearly articulated for all interested parties; (2) there be a nexus between the involved felonies and homeland security - rail contractor employees should be subjected to no greater scrutiny than Congress has imposed on port employees; (3) mitigating factors such as the time period that the employee had been successfully employed and how long ago the felonious conduct took place should be carefully weighed; and (4) there be a meaningful appeal process where a disqualifying decision could relatively promptly be reviewed by a true neutral.

While TCU applauds the industry for making some modifications in its initial program, even with these modifications it still falls far short of the goals set forth above. We believe it is clear that only the continuing interest of Congress will secure a background check process that reflects the need for a balanced approach.

Hopefully, the above background information will demonstrate to you that TCU has done and is doing everything within its power to represent our members caught-up in this situation. However, there are only limited steps we can take to attempt to correct this situation. Rail carriers should be made responsible for their actions forcing their contractors to impose a background check program that they have designed, and Congress should require that such a system meet minimal standards of fairness.

We thank you for your continuing interest in this matter.

Very truly yours,

Robert A. Scardelletti
International President

CC: Chairman Bennie G. Thompson
Chairwoman Sheila Jackson Lee

National Employment Law Project

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January 9, 2006

Mr. Frank A.S. Campbell
Deputy Assistant Attorney General
U.S. Department of Justice, Office of Legal Policy
950 Pennsylvania Avenue, N.W., Rm. 4248
Washington, D.C. 20530

Dear Mr. Campbell:

Thank you again for meeting with our organizations to discuss the major labor and civil rights issues now before the U.S. Attorney General as you prepare the agency's report and recommendations to Congress on federal policy related to criminal background checks and employment. We genuinely appreciated the productive exchange.

The undersigned organizations are writing to supplement the information we provided during the meeting and in our written comments, focusing on the proposal under consideration to expand access to the FBI's criminal records beyond the narrow categories of employers now authorized to receive the information under federal law. For the reasons described below, we urge the Attorney General to recommend that Congress maintain the current restrictions that strictly limit access to the FBI's criminal records as applied to private employers. The Attorney General should instead endorse the independent role of the federal and state agencies that are in the best position to evaluate the FBI's criminal records and vigilantly protect the privacy and civil rights of the one in five adults in the U.S. who now possess a criminal record.

- **Private employers are not qualified or trained to evaluate the detailed and often incomplete information contained in an FBI record, which unfairly penalizes the nation's workers and undermines the credibility of the screening process.**

Under current federal law, employers are only allowed access to an individual's FBI criminal record in especially limited cases for jobs that typically involve special safety and security concerns. However, even in these special situations, workers are routinely denied jobs on the basis of inaccurate and incomplete criminal history information contained in the FBI record. The many errors caused by employers who now access the FBI's criminal records provide sufficient justification not to expand the policy more broadly.

By way of illustration, employment involving access to airports is one of the few areas where the FBI's criminal records are now made directly available to employers, often producing adverse employment decisions based on inaccurate and incomplete information. In a recent case involving a Legal Action Center client, Mr. Smith (actual name withheld) was wrongly denied a position as a baggage handler at John F. Kennedy International Airport by The Port Authority of New York and New Jersey (Exhibit #1 – Mr. Smith's Rejection Letter & Criminal Record). According to the rejection letter issued by the Port Authority's Manager of Airport Security, "the CRHC obtained from the FBI indicates that you were *convicted of a criminal act*" which was not disclosed on Mr. Smith's application. (Emphasis added). However, the FBI record only indicated the arrest (for the sale of marijuana, a

felony), not the disposition of the case. In Mr. Smith's case, the day after his arrest (the only arrest on record), he pled guilty to a "violation" (a non-criminal conviction under New York law) and received a $50 fine. Thus, the Port Authority, a large employer that routinely processes criminal background checks, wrongly interpreted Mr. Smith's incomplete FBI record as evidence of a criminal conviction.

Perhaps more than any other issue, incomplete FBI records produce routine errors by employers which significantly penalize qualified and deserving workers. Indeed, as described in a recent analysis of state criminal repository data conducted for the National Association of Professional Background Screeners, "serious problems remain in the process to link dispositional information to the proper case and charge."1 In contrast to individual employers, independent federal or state authorities with experience conducting fitness determinations are far less likely to make major errors based on the FBI criminal records.2

- **Errors by private employers are compounded by the unedited substance and presentation of the FBI's rap sheets, which are designed for an audience of experienced criminal justice officials not individual employers.**

Even for experienced criminal justice officials, the FBI's rap sheets are often difficult to interpret because they are an unedited version of nearly all the criminal record information provided by the states. As a result, the likelihood of error by individual employers is even more significant given their limited experience deciphering the penal codes, abbreviations and definitions that are required to correctly interpret an FBI rap sheet.

Most importantly, the FBI rap sheet does not distinguish between felonies, misdemeanors and lesser categories of offenses like "violations", which is of special significance in evaluating an individual's record for employment screening purposes. Instead, the FBI's rap sheet indicates the specific offense as expressed in the state's penal code (e.g., "criminal mischief -2d") without characterizing the severity of the crime as either a felony or misdemeanor, or a violent or non-violent offense. As a result, unless the individual employers are intimately familiar with each state's penal code, they will erroneously assume that many offenses on an individual's record rise to the level of a serious felony or other more grave offenses (Exhibit #2 -- Sample FBI Record).3

- **Expanded federal authority to make the FBI's criminal records broadly available would undermine state laws that preclude consideration by private employers of arrest records not leading to convictions and certain sealed and expunged records.**

Because the FBI's criminal records are not edited or otherwise sanitized, state protections expressly intended to limit employer error and abuse will be undermined in the event that the FBI's records are made more broadly available to private employers.

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1 Craig N. Winston, National Crime Information Center: A Review and Evaluation (August 3, 2005), at page 15.

2Private employers in the nursing home industry are also authorized under federal law to directly request an applicant's FBI criminal records (P.L. 105-277, Div. A, Title I, Section 1010(b)). New York recently implemented this federal authority by regulation, while expressly incorporated the state's protections against discrimination on the basis of an individual's criminal record. Despite the state's anti-discrimination protections, the Legal Action Center has verified several reports of nursing home employers who have denied jobs to qualified workers based on incomplete or inaccurate criminal history information provided as part of the FBI rap sheet.

3 In contrast, the rap sheets in some states include a summary table which lists the total arrests, total convictions, and the number of open charges according to the severity of the offense (including felony, violent felony, misdemeanors) (Exhibit #3- Sample New York State Record Cover Sheet).

Currently, there are at least eleven states that prohibit private employers from taking into consideration an individual's arrest records absent a conviction.4 With the goal of promoting rehabilitation of those with a criminal record, a number of other states also expunge or seal certain records that are expressly precluded from consideration by employers.5 However, because the FBI's records are not edited, mere arrests, sealed and expunged records will routinely appear on the FBI rap sheet. Thus, fundamental state protections will be undermined by a federal policy that broadly expands access to the FBI's criminal records by private employers.

- **Expanded federal authority to make the FBI's criminal records broadly available to individual employers would jeopardize the privacy and civil rights of hard-working families.**

We are especially concerned that the expanded authority to make the FBI's criminal records more available to private employers will violate the privacy and civil rights protections that are already seriously compromised by the exponential growth of criminal background checks and the many gaps in information that now plague the state criminal records systems.

Privacy: The FBI requires all those subjected to a criminal records request to first submit to fingerprinting, whether or not they have a criminal record. These FBI criminal records requests for employment purposes, which now exceed five million a year, will significantly increase if private employers are authorized to access the FBI's criminal records. In addition, the fingerprints required by the FBI are increasingly collected and processed by private commercial entities that are far more vulnerable to security breaches. Not surprisingly, when surveyed, the public has also expressed significant reservations with fingerprinting for employment screening purposes.6

Civil Rights: As the Equal Employment Opportunity Commission (EEOC) has concluded, employment decisions based on arrest information discriminate against African-Americans and Hispanics in violation of Title VII of the Civil Rights Act of 1964.7 Despite the EEOC's policy, the FBI's rap sheets list an individual's arrest record from every available state, regardless of the disposition of the case (and without any limitation on the age of the arrest). Thus, once the employer is provided with an individual's FBI record, the "cat is out of the bag" and discriminatory arrest information will be considered by the employer. Even the strongest and most aggressively enforced discrimination laws cannot protect against these abuses once the harm is already done.

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4 The states include: California (Cal. Code Regs. Tit. 2 §7287.4 (d)(1)(A), (B); Cal. Labor §432.7 (f)(1), (2)); Connecticut (Conn. Gen. Stat. §31-51(i)); Hawaii (Haw. Rev. Stat. §378.2 (1)(A)); Illinois (Ill. Comp. Stat. 5/2-103); Massachusetts (Mass. Regs. Code tit. 804, §§3.01and 3.02); Michigan (Mich. Comp. Law §37.2205a(1)); New York (N.Y. Exec. Law §296(16)); Ohio (Ohio Rev. Code Ann. §2953.55(A)); Utah (Utah Admin. R. 606-2-2(U)); and Wisconsin (Wis. Stat. §111.335(1)(a)).

5 According to the Legal Action Center report, *After Prison: Roadblocks to Reentry* (May 2004), 40 states allow some or all arrests that did not lead to conviction to be sealed. In 30 states, the individual can also deny the existence of certain records. (Available on-line at http://www.lac.org/lac/main.php?view=law&subaction=2).

6According to a 2002 public opinion poll sponsored by the Bureau of Justice Statistics, only 37% of the those surveyed responded that it was "very acceptable" to require fingerprinting "when applying for a job, so that the employer could check for a criminal history record." Opinion Research Corporation International, *Public Attitudes Toward Uses of Criminal History Information: Summary of Findings* (Revised May, 25, 2000), at page 63.

7 *See* Equal Employment Opportunity Commission, *Policy Guidance on the Consideration of Arrest Records in Employment Decisions under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.* (1982); EEOC Compliance Manual, Vol. II, Appendices 604-A *Conviction Records* and 604-B *Conviction Records- Statistics*; 26 Fair Empl. Prac. Cas. (BNA) 1799 (Aug. 8, 1980).

In order to uphold the basic civil rights of thousands of minority workers, we urge the Attorney General not to expand the FBI's criminal records to more individual employers. The National Black Caucus of State Legislators (NBCSL) has similarly endorsed the position that access to the FBI's rap sheets should not be expanded beyond current policy. In a resolution ratified in December 2005, NBSCL "RESOLVED, that NBCSL members support the current restrictions that prohibit access to FBI records by private employers in order to limit the significant potential for error and abuse in reviewing criminal records that undermines the employment opportunities of people with criminal records and to maintain existing state privacy and employment safeguards."8

* * *

In conclusion, we urge the Attorney General to recommend that Congress maintain current limits on access to the FBI's criminal records by the nation's employers, consistent with current federal law. Where necessary to protect public safety and security, additional resources should be made available to allow independent federal and state agencies to evaluate criminal records for employment purposes. Compared to individual private employers, these independent agencies are in the best position to evaluate the FBI's criminal records and vigilantly protect privacy and civil rights in this new era of vastly expanded access to sensitive individual records.

Once again, thank you for the opportunity to share our concerns and for your work on this timely report that will help shape federal policy governing the employment opportunities of millions of hard-working families.

Sincerely,

Maurice Emsellem
Policy Director
National Employment Law Project

Roberta Meyers-Peeples
Co-Director
National HIRE Network
Of the Legal Action Center

Larry Willis
General Counsel
AFL-CIO, Transportation Trades Dept.

Theodore M. Shaw
President & Director-Counsel
NAACP Legal Defense & Educational Fund

Allison Reardon
Legislative Director
Service Employees International Union

LaMont Byrd
Director, Safety & Health Dept.
International Brotherhood of Teamsters

cc: Richard A. Hertling
Deputy Assistant Attorney General

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8 National Black Caucus of State Legislators, *Seeing Beyond: Investing in State Leadership: Improving Communities (2005-2006 Ratified Resolutions)*, Resolution No. 06-125. (Available on-line at http://nbcsl.com/RatifiedResolutions06.pdf). In addition, the resolution calls on the "United States Attorney General and Congress to adopt federal standards that eliminate unwarranted barriers in federal law that prohibit employment of people with criminal records and incorporate protections that take into account rehabilitation as well as the age and severity of offenses."

○