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H.R. 2703, THE PRIVATE SECURITY OFFICER EMPLOYMENT ACT OF 2007

HEARING

BEFORE THE

SUBCOMMITTEE ON HEALTH, EMPLOYMENT, LABOR AND PENSIONS

COMMITTEE ON EDUCATION AND LABOR

U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

SECOND SESSION

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H.R. 2703, THE PRIVATE SECURITY OFFICER EMPLOYMENT ACT OF 2007

Tuesday, February 26, 2008
U.S. House of Representatives
Subcommittee on Health, Employment, Labor and Pensions
Committee on Education and Labor
Washington, DC

The subcommittee met, pursuant to call, at 10:32 a.m., in room 2175, Rayburn House Office Building, Hon. Robert Andrews [chairman of the subcommittee] presiding.

Present: Representatives Andrews, Wu, Hare, Kline, McKeon, Davis of Tennessee, and Foxx.

Staff present: Aaron Albright, Press Secretary; Tylease Alli, Hearing Clerk; Carlos Fenwick, Policy Advisor, Subcommittee on Health, Employment, Labor and Pensions; Brian Kennedy, General Counsel; Sara Lonardo, Junior Legislative Associate, Labor; Robert Borden, Minority General Counsel; Cameron Coursen, Minority Assistant Communications Director; Ed Gilroy, Minority Director of Workforce Policy; Rob Gregg, Minority Legislative Assistant; Richard Hoar, Minority Professional Staff Member; Alexa Marrero, Minority Communications Director; Jim Paretti, Minority Workforce Policy Counsel; and Linda Stevens, Minority Chief Clerk/Assistant to the General Counsel.

Chairman ANDREWS [presiding]. Committee will come to order. Good morning.

Colleagues and ladies and gentlemen, welcome to the subcommittee hearing this morning. We are dealing with an interesting issue and we have two panels of witnesses that we will proceed to expeditiously.

As we meet this morning, a nuclear power plant or a hazardous waste site or an oil refinery or a chemical plant is most probably being guarded by a person who is an employee of a private company. And the men and women who serve in that capacity broadly, almost uniformly, I would say, do a very, very good job. They are competent, they are qualified, they are honest, they are hardworking. They are doing a very good job defending our country.

But we don't know if all of them fit that description because there are holes in the system that does background checks on people that have such a critical responsibility.

The Department of Homeland Security has identified that 85 percent of the critical infrastructure of our country is owned by pri-

vate sector firms who almost always use private sector security firms to provide their security.

So how would we know if the person gathering—if the person who was guarding that hazardous waste site, or that person who is guarding that oil refiner is competent or not? How would we know whether he or she is perhaps even a terrorist? How would we know?

Well, the answer is we might know, but we might not. If this facility is located in a state that has elected under a 2004 law to get access to FBI database background checks, and if the employer in that state has elected to gain access to the information, and if that employer has chosen to use that information to bar or otherwise limit employment for a person that doesn't pass the background check—if all three of those qualifications are met, then we can be sure, if the information is accurate, we can be sure that the person working, guarding that hazardous waste plant or chemical plant, is not a terrorist and ought to be there.

There are too many ifs in that equation, as far as I am concerned. I think that in order to protect the public, we need to know certainly that the people to whom we are entrusting this important responsibility are qualified, competent and safe, as the huge majority of those in that field are already doing.

So how do you reach the point where we have that 100 degree certainty, or as close as we can get to 100 percent? There are many issues that are raised by the legislation in front of us. The purpose of this hearing is to begin the process of evaluating those issues and improving the legislation that is in front of us.

Here are some questions that come to mind:

Is it necessary to have a requirement that states either have background check standards that meet a federal standard or give way to a federal background check process? Is it necessary or not? We all have one witness, a very qualified witness, who will testify that we should wait for states to catch up. I think we all have other witnesses who will testify to the contrary.

Next question: How can we be sure that the information that is being conveyed is accurate? That is a very important question. We certainly do not want a situation where someone is denied a job, or a promotion, or some other employment opportunity because they are inaccurately identified as someone who is a problem.

Another important question about privacy. Once an employer has access to information about someone's background, how can we be sure the employer will only use that information in a legitimate and appropriate way and not in a way that will unfairly or unduly harm that employee? A very important question.

Then, finally, there is a question of whether or not employers who have access to the background check information should be compelled to use it, or simply given the discretion as to whether or not to use it. And there are two views on that subject as well.

I am pretty confident that there is universal agreement on the proposition that we want the best system in place we can to ensure that private employees who are responsible for guarding the critical infrastructure of this country are worthy of that responsibility. I don't think there would be much disagreement about that at all, if any disagreement.

I am sure there will be disagreement on the panels today about the best way to accomplish that objective. I have a set of ideas, but they are a set of ideas that are subject to criticism and evaluation to make the underlying bill better.

Again, the goal here is that we reach a point where we can say with a high degree of confidence to our constituents that the person who is guarding that radioactive waste dump, who is an employee of a private security firm, is safe and qualified and going to do his or her job, so that someone is not going to steal the contents of that waste dump and make a dirty bomb that would put the community at risk.

This is a very important issue. It is one that the Congress has acted on in 2004, but I think we need to reconsider and review in this context, and I am very pleased that we have some very distinguished ladies and gentlemen who are going to help us sift through this issue here today.

At this point, I will turn to my good friend, the ranking member from Minnesota, for his opening comments, and we all then proceed to our first panel, which is Mr. Campbell.

Mr. Kline?

Prepared Statement of Hon. Robert E. Andrews, Chairman, Subcommittee on Health, Employment, Labor and Pensions

Good morning and welcome to today's HELP Subcommittee hearing on HR 2703, the Private Security Officer Employment Authorization Act (PSOEAA) of 2007.

In 2004, President Bush signed into law the Private Security Officer Employment Authorization Act (PSOEAA). PSOEAA authorizes the security industry to request access to criminal history information for consenting prospective employees from the state. Like the banking, nursing and child care industries, it is essential for private security officer employers to have access to this information in order to ensure that applicants being considered for employment are qualified for the position.

Four years later, many states have yet to prioritize implementation of a timely process for private security employers to obtain background information. These implementation issues combined with the failure of several states to even establish a background check process has left us vulnerable.

To address this flaw in the protection of our homeland, I have introduced HR 2703, "The Private Security Officers Act of 2007." HR 2703 ensures that private security employers protecting our critical infrastructure conduct criminal background checks on all potential employees.

Specifically, HR 2703: (1) prohibits private security employers from hiring guards without obtaining certain state criminal history information; (2) requires a process to allow private security guard employees or applicants to challenge the accuracy or completeness of their criminal history records; (3) specifies the crimes for which states must provide conviction information to such employers; (4) imposes confidentiality and recordkeeping requirements on such employers; and (5) protects such employers from liability for good faith employment determinations based upon available criminal history information.

Since 85 percent of our critical infrastructure such as power plants, oil and gas refineries, chemical plants, communication networks, schools, and hospitals are monitored and protected by the private security industry, I believe it is imperative that these employers have access to an applicant's criminal background information with the proper safeguards in place to protect their information. I thank all the witnesses for coming before the committee today and look forward to hearing their testimony.

Mr. KLINE. Thank you, Mr. Chairman. Thanks for holding the hearing.

We do indeed have two panels of terrific witnesses, and I am looking forward to getting into the discussion. I have a prepared statement, which I would like to submit for the record.

Chairman ANDREWS. Without objection.

[The statement of Mr. Kline follows:]

Prepared Statement of Hon. John Kline, Senior Republican Member, Subcommittee on Health, Employment, Labor, and Pensions

Good morning, and welcome to our witnesses.

In 2004, the Republican-led Congress adopted, with overwhelming bipartisan support, the "Private Security Officer Employment Authorization Act of 2004." Contained within intelligence reform and anti-terrorism legislation, this law recognized a simple but important fact: namely, companies that employ individuals to provide security services should have access to information about any criminal record of these individuals.

In a post-9/11 world, where the threat of terrorism can never fully be out of sight, it seems obvious that employers want and need to know whether the employees they are hiring to secure their safety and property have a criminal history. Unfortunately, because of the state-based nature of so many of our criminal records, complete information may too often be lacking. An employer checking an employee's criminal history may be limited to what relevant state agencies can provide and the employee himself tells—or fails to tell—the employer.

It was for that reason that Congress in 2004 adopted the Private Security Officer Employment Authorization Act, to provide access to federal criminal history information maintained by the FBI at the Department of Justice. Under the 2004 law, Congress affirmatively allowed employers to submit identifying information through state-based agencies for the purpose of conducting background checks against federal criminal records.

Three years later, we will hear today whether and how the Private Security Officer Employment Authorization Act has lived up to its promise. In particular, I welcome the testimony of our witnesses as to how the bill's original intent—that federal criminal background checks be conducted through a state-based system—has succeeded or failed.

Testimony today will focus on H.R. 2703, legislation introduced by Chairman Andrews, which would amend key provisions of the 2004 law. I will say that I have a number of questions about the bill's intent and effect, and I welcome our witnesses' commentary on these points.

I look forward to a healthy discussion of these issues, and welcome today's hearing as the forum to determine whether further legislative action is necessary, and if so, the scope of such action. I welcome each of our distinguished witnesses, and yield back my time.

Mr. KLINE. And just make a couple of very, very quick comments, because, Mr. Chairman, you gave a very thorough, broad, deep, wide and all those sorts of things overview, and it would be very hard for me to disagree with any of that.

We are really exploring to see if that 2004 law, the Private Security Officer Employment Authorization Act of 2004, is doing its job. And if not, what to do to make it better. Chairman Andrews has a bill, H.R. 2703, according to my notes, which we are clearly going to be talking about today to see if there are shortcomings in the 2004 law, if 2703 meets those shortcomings, fills those gaps and does it in a way that is acceptable to us.

There are certainly points to be argued on each side. This is one of those times, Mr. Chairman, which I am coming into this with a completely open mind. We want to dig to the bottom of this and find, as you said, Mr. Chairman, what is the best way to ensure that the private security guards, who we entrust for so much of our infrastructure's security and personal security in many cases in this country, to make sure that they have the proper backgrounds, that they are the right people for the job.

So I am looking forward to the hearing. I would like to get started.

With that, I yield back.

Chairman ANDREWS. Mr. Kline, thank you very much.

The first question that we are going to address is whether it is plausible to set up such a system. It is a huge undertaking. Is it plausible to set up a system where private security companies across the country can have access to the best and most accurate data that are maintained through the FBI? And the witness is going to talk to that and other issues, Mr. Frank Campbell.

Mr. Campbell is senior counsel in the Office of Legal Policy at the U.S. Department of Justice. He was the author of the Attorney General's Report on Criminal History Background Checks, issued in June 2006. Mr. Campbell was central to the development of the fingerprint fast-capture device for criminal history checks. He also serves as the principal Department of Justice liaison for the National Crime Prevention and Privacy Compact Council, which establishes rules relating to the intrastate exchange of FBI criminal history for non-criminal justice purposes.

Mr. Campbell graduated from Lafayette College, has overcome that liability, I say as a Bucknell graduate. And he has received his law degree from the George Washington University Law School.

Mr. Campbell, welcome to the committee. We thank you for your testimony.

STATEMENT OF FRANK CAMPBELL, SENIOR COUNSEL, OFFICE OF LEGAL AFFAIRS, U.S. DEPARTMENT OF JUSTICE

Mr. CAMPBELL. Chairman Andrews, Ranking Member Kline and members of the subcommittee, thank you for the opportunity to address you on the implementation of the Private Security Officer Employment Authorization Act.

The act was passed as a means of prompting states without private security officer licensing systems to set up programs that would allow private security companies to attain FBI criminal history background checks to screen prospective and current private security officers.

Under current law, access to FBI-maintained criminal history information is governed by a patchwork of state and federal statutes. The main vehicle for providing such access has been state statutes approved by the attorney general under Public Law 92544 that allow criminal background checks using FBI information in certain licensing and employment decisions.

These checks are processed through state identification bureaus and in order to provide more complete information, include a check of state records. The results of these checks are supplied to public agencies that provide their own suitability criteria or those established under state law.

Currently there are approximately 1,200 Public Law 92544 state statutes. Other access has been authorized by federal statutes allowing particular industries to go directly to the FBI for a criminal history check without going through a state identification bureau, including, for example, discretionary access granted to the banking, securities and nuclear energy industries.

According to the FBI, 41 states plus the District of Columbia and Puerto Rico have passed 92544 statutes in connection with licensing and employment of individuals as private security guards.

Some of the statutes only cover background checks for armed security guards. Many of the statutes permit but do not mandate such checks.

The Private Security Officer Employment Authorization Act authorized private security companies to submit fingerprints of employees or applicants to a state identification bureau, have an FBI check done, and have the results returned to a state agency that would apply either existing state standards for employment of private security guards, or when no state standards exist provide notice to the employer whether the individual has a criminal history record for an offense specified in the act.

Under the act, private security companies are permitted, but not required, to request these checks. The act does not compel an adverse or a favorable employment determination based on the results of the check. The act specifies that states may opt out of the background check system authorized by enacting a law or issuing an order by the governor providing that the state is declining to participate.

To date, only one state, Wyoming, has notified the FBI that it has opted out of the act's background check system. While the act provides that states are considered to be participating in the system if they have not opted out, the law provides no enforcement mechanism to compel participation by states that have neither opted out, nor taken steps to make these checks available to the private security industry.

The Department expects in the near future to send an additional communication to the states, reminding them of the act's expectation that they participate in the background check system if they have not opted out, as specified in the law.

We understand that Chairman Andrews has introduced a bill, H.R. 2703, to amend the Private Security Officer Employment Authorization Act. The Department does not have at this point a position developed on that bill, so I am unable to comment on the bill's provisions today.

I can note, however, that in response to a provision in the Intelligence Reform and Terrorism Prevention Act of 2004, the Department sent to Congress in June 2006 the Attorney General's Report on Criminal History Background Checks. The report made recommendations on how the law governing access to FBI criminal history can be changed to provide broader and more uniform access to such information for use by private, unregulated employers.

The report recognized that the current approach of enacting separate authorizing statutes has resulted in inconsistent access across states and industries. The report also acknowledged that the competing interests involved in criminal history checks, including the interest in facilitating the reentry and continued employment of ex-offenders.

To account for these interests, the report states that if broader access were to be allowed, it 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 only used 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 addi-

tion, the rules also should require an employer's acknowledgment of legal obligations under federal and state equal employment opportunity laws.

To avoid government agencies acting as suitability clearinghouses for private employers, the report recommends authorizing the determination of 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 and offering opportunities to individuals to seek a waiter from a disqualification.

To take advantage of the 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.

Finally, the report emphasized that the attorney general must be able to prioritize private sector access 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.

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

[The statement of Mr. Campbell follows:]

Prepared Statement of Frank A.S. Campbell, Senior Counsel, Office of Legal Policy, U.S. Department of Justice

Chairman Andrews, Ranking Member Kline, 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 the implementation of the Private Security Officer Employment Authorization Act (PSOEAA). The law was enacted as section 6402 of the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA) and provided authority for states to perform fingerprint-based checks of state and national criminal history records to screen prospective and current private security officers.

Existing Authorities for Access to FBI Criminal History Background Checks

Under current law, access to Federal Bureau of Investigation (FBI) maintained criminal history information is governed by a patchwork of state and federal statutes. The main vehicle for gaining access for non-criminal justice purposes has been state statutes that take advantage of the provisions of Public Law (Pub. L.) 92-544 (enacted in 1972), which allow sharing of FBI-maintained criminal history records in certain licensing and employment decisions, subject to the approval of the Attorney General. These checks are processed through state identification bureaus and, in order to provide more complete information, include a check of state records. These statutes generally require background checks in certain areas that the state has sought to regulate, such as persons employed as civil servants, day care, school, or nursing home workers, taxi drivers, private security guards, or members of regulated professions. The results of these checks are supplied to public agencies that apply their own suitability criteria or those established under state law. There currently are approximately 1,200 state statutes that are approved by the Attorney General under Pub. L. 92-544. The National Child Protection Act/Volunteers for Children Act (NCPA/VCA) allows state governmental agencies, without requiring a state statute, to conduct background checks and suitability reviews of employees or volunteers of entities providing services to children, elderly, and disabled persons. In addition, as noted below, the PSOEAA allows states to do FBI background checks on private security officers without passing a state statute under Pub. L. 92-544.

Other access has been authorized by federal statutes allowing particular industries or organizations to go directly to the FBI for an employment, licensing, or volunteer check, without first going through a state repository and also checking state

records. These laws, some of which were passed after the terrorist attacks on September 11, 2001, seek to promote public safety and national security by either authorizing access to a check by certain industries or affirmatively regulating an industry or activity by requiring background checks and risk assessments by government agencies. They include authority for discretionary access by the banking, nursing home, securities, and nuclear energy industries, as well as required security screenings by federal agencies of airport workers, HAZMAT truck drivers and other transportation workers, persons seeking access to nuclear facilities and port facilities, and aliens visiting the United States.

Pub. L. 92-544 State Statues Relating to the Private Security Industry

According to the FBI, currently 41 states, plus the District of Columbia and Puerto Rico, have passed 92-544 statutes authorizing FBI criminal history checks in connection with licensing or employment of individuals as private security guards, watchman, or private investigators or detectives or for permits to carry or possess a firearm in connection with such activities. Some of the statutes only cover background checks or licensing for armed security guards. Many of the statutes permit, but do not mandate, such checks.

The Provisions of the PSOEAA

The PSOEAA was passed as a means of encouraging and prompting states without private security officer licensing systems to set up a program that would allow private security companies to obtain FBI background checks on prospective and current private security officers. The PSOEAA allowed authorized employers of private security officers to submit fingerprints to a state identification bureau for a state and national criminal history check. State identification bureaus serve as the criminal justice information record repositories in each state. Upon receiving a background check request under the PSOEAA, a state identification bureau is authorized to submit the fingerprints to the Attorney General for a check of the FBI's national criminal history record information databases, with the results of the FBI check to be returned to the state identification bureau.

Upon receipt of the results of the FBI check, a state that has not opted out of the background check system authorized by the Act is required to provide a qualified employer notice as to (1) whether the applicant fails existing state standards (such as licensing requirements) relating to criminal history background for qualification to be a private security officer, or (2) if the state has no such standards, whether the applicant has been (a) convicted of a felony, (b) convicted within the last 10 years of an offense involving dishonesty or false statement or an offense involving the use or attempted use of physical force against another person, or (c) charged with a felony with no resolution within the preceding 365 days.

The checks under the Act are permissive, not mandatory, for private security companies. An employer may forego requesting a check or may provide interim employment while a check is pending. The Act does not compel an adverse or favorable employment determination based upon the results of the check. The Act specifies that states may decline to participate in the background check system authorized by enacting a law or issuing an order by the Governor (consistent with state law) providing that the state is declining to participate. States that have not opted-out under this subsection are considered to be participating in the background check system established under the Act.

To date, only one state, Wyoming, has notified the FBI that it has opted out of the PSOEAA background check system. While the PSOEAA provides that states are considered to be participating in the Act's background check system if they have not opted out through state legislation or an executive order, the Act provides no enforcement mechanism to compel participation by states that have neither opted out nor taken steps to make these checks available to the private security industry. Nor did the law provide carrot-and-stick incentives for state participation, such as federal funding or federal grant penalties. The Department, however, expects in the near future to send an additional communication to the states on their obligations to participate in the background check system established under the PSOEAA if they have not opted-out under the Act. We will also make the states aware of the option under the Compact Council's outsourcing rule[1] to use contractors or chan-

[1] The National Crime Prevention and Privacy Compact Council, whose members are appointed by the Attorney General from state and federal agencies, promulgates rules and procedures governing the exchange and use of criminal history records in the FBI-maintained Interstate Identification Index for non-criminal justice purposes. The Department's regulations under the PSOEAA encouraged States to consider using channeling agents to transmit fingerprints to the FBI and the results of the criminal history checks to the States. Channeling agents are generally private entities that contract with authorized recipients of criminal history information

neling agents to implement the suitability review requirements under the Act. The PSOEAA, however, does not provide the Department with authority beyond such exhortation to obtain the cooperation of the states in performing these background checks.

The Attorney General's Report on 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 IRPA, section 6403, which was a companion to the PSOEAA. 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. 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. 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.

The Report attempted to account for the range of interests involved in criminal history background check 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 made 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.

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to perform routine non-criminal justice administrative functions relating to the processing of criminal history information. The Compact Council issued an outsourcing rule and standard in December 2005 governing the non-criminal justice use of FBI criminal history information. The outsourcing standard specifies that among the functions that can be outsourced to a contractor or channeler are making fitness determinations or recommendations, obtaining missing dispositions, and disseminating the information as authorized by federal law or a Pub. L. 92-544 state statute. See The National Crime Prevention and Privacy Compact Council, Notice, Security and Management Control Outsourcing Standard, 70 Fed. Reg. 74373, 74375 (Dec. 15, 2005).

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.

Several key points underlie the Report's recommendations:

• 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.

• It would be reasonable to provide a means for access to FBI records for criminal background checks for private security officers when such checks are not available through a state, if two conditions are met: first, that private employers satisfy requirements for privacy protection and fair use of the information, and second, 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 (such as those under the PSOEAA) 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 unregulated private employment.

• 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.

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

Chairman ANDREWS. Mr. Campbell, thank you very much for your longstanding work on this issue and for your testimony today.

I notice on Page 5 of your written testimony, which without objection will be made a part of the record——

Mr. CAMPBELL. Thank you.

Chairman ANDREWS [continuing]. You reference the 2006 report that you played such an important role in, and say, "The current access scheme has created a patchwork of statutes, including over 1,200 state statutes under P.L. 92544. This patchwork allows access to FBI criminal history information inconsistently across states, across industries, even inconsistently within 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."

Could you expand on that point? Does that mean that throughout the country the chemical industry is not included in this? Or is it just in certain places? What does that mean?

Mr. CAMPBELL. There may be certain states that have passed 92544 laws that allow criminal history checks for chemical companies in their states, but today there is no federal law that provides authority for the chemical industry to get FBI background checks.

I know that the Department of Homeland Security recently issued guidelines to the chemical industry on security and they do require criminal background checks for certain types of access to those facilities. And in those regulations, they indicate that they can use commercial sources or whatever other sources are available.

Chairman ANDREWS. How would you characterize the report's recommendation, the 2006 report's recommendation, with respect

to whether or not all people working as security guards in critical infrastructure industries have background checks? What does the report say about that?

Mr. CAMPBELL. Well, the report didn't address specifically the private security guard industry. But when we issued our regulations under this law, we did acknowledge that the private security industry is growing rapidly and performing an increasingly vital role in protecting the public from violent crime and terrorism, and we stated that the key to preserving the trust placed by the public in private security guards performing their protective duties are background checks that include a criminal history check of FBI information.

Chairman ANDREWS. Now, the other point is I think I heard you say that the recommendations of the report say that in states that opt out of access to the background check, federal background check system, that the attorney general should establish a means through which this information is available to employers. Is that what you said?

Mr. CAMPBELL. That is part of our recommendation. And I think what we were acknowledging there is the reality that it is going to be very difficult to expect all 50 states to provide uniform access to these kinds of checks. And if we are interested in providing access to employers, there needs to be some kind of federal mechanism to allow that access so that it is more uniform and there is more rationality in the——

Chairman ANDREWS. And did I hear you say that that mechanism of access for states that opt out should be some third-party purveyor of the information?

Mr. CAMPBELL. One of the key recommendations that we make is that rather than having state and federal agencies act as suitability clearinghouses for private, unregulated employers, that we find a way that we can disseminate the information to the users. And that is the private employers.

Right now, 92544 requires that they only go to a state agency. The fact that a state agency has to look at the record and examine it and make a decision whether it falls within certain categories and then give a red light or a green light to the user has meant that many of these authorities have not been implemented. So that is the reason for our recommendation that we find a way to——

Chairman ANDREWS. I also note that one of the recommendations that you make is that it is important that there be privacy criteria, that employers and third parties handling this information adequately safeguard the records of employees. Could you just briefly expand on what you think those privacy considerations should look like?

Mr. CAMPBELL. Yes. We have detailed privacy recommendations, which include that users enrolling in the system give them the authority to do it, that they agree to limitation of the use of that information for only that purpose, that there be privacy act comply and consent notice, that there be rights of review and challenge of the information, that a newly streamlined automated appeal process be developed for individuals who want to challenge that information, that there be limits on redissemination of the information,

that there be information security procedures and compliance audits. It is a very detailed recommendation.

Chairman ANDREWS. What kind of enforcement mechanism do you think should exist to enforce those requirements? And then my time is up.

Mr. CAMPBELL. Well, we do recommend that there be a criminal penalty for misuse of the information or for using the information for other than the purposes authorized. And of course, if users are enrolled in the system, we can withdraw their right if they abuse it to have access to this information.

Chairman ANDREWS. Thank you very much, Mr. Campbell.

Mr. Kline?

Mr. KLINE. Thank you, Mr. Chairman.

Thank you, Mr. Campbell.

Under the current law, which you went through very carefully, 92544 and the 2004 act, not under the proposals of the chairman's bill or your report, but under current law as we sit here today, who is able to get access to the federal criminal history record and under what circumstances, as we are today? Who has access to that?

Mr. CAMPBELL. Well, if a state has passed a state statute that will authorize particular employers to get access or if there is a licensing scheme, those employers have the right to access.

There are certain federal statutes. For example, the banking industry can come directly to the FBI and get an FBI rap sheet, and they do that through a channeling agent that is the American Bankers Association. The ABA collects the fingerprints, submits them to the FBI, and then they channel the records back to the banking institution.

Mr. KLINE. So the banker, or the bank, goes to the ABA, goes to get the information, comes back down the same channel?

Mr. CAMPBELL. That is right. And similar authority is allowed for the nursing home industry. They have to go through state identification bureaus, but there is a law that allows the dissemination of the criminal history information directly to a nursing home facility. So there is another precedent for providing the records back to the actual user as opposed to having a governmental agency screen or review the records for suitability.

Mr. KLINE. Or even a nongovernmental agency in the case of the ABA, for example.

Mr. CAMPBELL. That is right. And the ABA, they don't look at the records. They just pass the records back down to the bank.

Mr. KLINE. Ah. Okay.

We are going to explore so many aspects of this, but clearly one of the things that has come out, we talked about Wyoming, came up earlier, but just in your opinion, as an informed observer, why are so many states apparently failing to meet the obligations of the 2004 law?

Mr. CAMPBELL. We don't have specific information on why states aren't necessarily implementing the Private Security Officer Employment Authorization Act. We did, however, get general information on the attitude of the states with respect to doing background checks when we were doing the report. We got input from state re-

positories and others involved in background checks at the state level.

And most of them indicate that the biggest hurdle to getting checks done is the fact that the limitation on dissemination of the record to the user, and that when you require that, that means that the state has to designate an agency and the resources along with it to receive the criminal history information, examine it and make suitability determinations, and that is one of the reasons we recommended in our report that we find a way to authorize the dissemination and the information down to the user.

The states also indicated that they support dissemination to the user, because they believe the individual company is in the best position to make a decision about the relevance of a particular record to the position in question.

Mr. KLINE. So in your opinion, then, it is fundamentally not some sort of philosophical issue, it is a question of resources, manpower and money. The states would rather not be in that business. Is that right?

Mr. CAMPBELL. That was certainly one of the factors that was indicated to us when we were preparing this report.

Mr. KLINE. And so the other way to do that would be to have the individual employer, small business, medium business, something, somebody who is employing these private security guards, to go directly to the FBI, to the federal agency, to get the information. Presumably, that would mean personnel and resources on the part of the FBI to answer these questions. Is that right?

Mr. CAMPBELL. It would, and one of the things that we would want to do in looking at any proposed amendment is to consider the resource impact of any proposed changes.

We made recommendations that some authority ought to be provided for allowing an authorized recipient to go to the FBI if a state doesn't make the records available.

But as far as particular proposals, we have to take a look and provide specific feedback on particular language.

Mr. KLINE. Okay.

Thank you, Mr. Chairman. I yield back.

Chairman ANDREWS. Thank you, Mr. Kline.

Mr. Hare, do you have any questions?

Mr. HARE. No, I don't, Mr. Chairman. I just want to thank you for having the hearing. It is a wonderful piece of legislation. I look forward to working with you on it.

Chairman ANDREWS. Thank you very much.

Mr. Campbell, we really appreciate your testimony. If we can prevail upon you, I am sure we all be calling upon you again as we go through the process of refining this idea. Your work has really been exemplary and your wealth of information is very much needed by us, so thank you.

And I was only kidding about Lafayette College.

Mr. CAMPBELL. Bucknell is a great school.

Chairman ANDREWS. What did you say about Bucknell?

Mr. CAMPBELL. Bucknell is a great school.

Chairman ANDREWS. You are welcome back any time, then. Some day, when you are attorney general, you can come back. That is great. Thank you, sir.

Mr. CAMPBELL. Thank you, Mr. Chairman.

Chairman ANDREWS. We all ask the second panel to come forward, and I will start to introduce the members of the second panel as they take their seats.

Joe Ricci is executive director of the National Association of Security Companies, the nation's largest private security trade association. He is also the founder and owner of Ricci Communications, which implements and manages communications efforts for corporations.

Mr. Ricci has worked with many international security companies, including ASIS International, ICX Technologies and Securitas Security Services.

Welcome, Mr. Ricci.

Mr. Weldon Kennedy is vice chairman of Guardsmark LLC, a private security company, a position he has held since 1997. After serving as a naval intelligence officer, Mr. Kennedy joined the FBI in 1963 and stayed with the bureau for 33 years. He rose through the ranks, eventually serving as its deputy director, the FBI's second highest position and its highest nonpolitical appointment.

Welcome, Mr. Kennedy, we are glad that you are here.

Mark de Bernardo enjoyed his time with us so much 2 weeks ago, he came back today.

Mark is a partner with the law firm of Jackson Lewis, a labor and employment law firm. In the past, Mr. de Bernardo has served as special counsel for domestic policy and director of labor law for the U.S. Chamber of Commerce.

He received his B.A. from Marquette University in 1976 and his J.D. from the Georgetown University Law Center in 1979.

Welcome back. Glad to have you with us.

Donna Uzzell is the chair of the National Crime Prevention and Privacy Compact Council. Ms. Uzzell is also director of criminal justice information systems for the Florida Department of Law Enforcement, a position she has held since 1996. She was instrumental in the creation and maintenance of Florida's sexual offender and sexual predator registration and notification program.

Ms. Uzzell was an officer with the Tallahassee Police Department from 1981 until 1993. She earned her B.S. from the Florida State University School of Criminology.

Welcome. We are glad to have you with us.

And finally, we are honored to have Floyd Clarke with us today. Mr. Clarke is former director of the Federal Bureau of Investigation and testifying on behalf of Allied Security Holdings, the parent company of Allied Barton Security Services, where he holds a position on its board of managers.

Mr. Clarke joined the FBI as a special agent in 1964, working in Birmingham, Boston, Philadelphia and Kansas City. He progressed to be the supervisor, assistant special agent in charge, special agent in charge, assistant director, executive assistant director and deputy director before finally being named acting director in 1993.

He obtained both his B.A. and J.D. from the George Washington University.

Director Clarke, nice to have you with us this morning as well.

So we are going to begin with Mr. Ricci. We note that there is a box in front of you. It has lights on it. You have 5 minutes to summarize your excellent written testimony, which is going to be made a part of the record permanently for the committee.

When the yellow light goes on, it means you have 1 minute left. When the red light goes on, it means the 5 minutes are up and we would ask you to expeditiously summarize and complete your testimony.

Mr. Ricci, welcome to the committee.

STATEMENT OF JOSEPH RICCI, EXECUTIVE DIRECTOR, NATIONAL ASSOCIATION OF SECURITY COMPANIES

Mr. RICCI. Chairman Andrews, Ranking Member Kline and members of the committee, my name is Joseph Ricci and I am the executive director of the National Association of Security Companies, or NASCO.

NASCO is the nation's only organization dedicated to representing private contract security companies and NASCO members employ nearly 500,000 highly-trained security guards serving throughout the government and commercial sectors.

NASCO is committed to initiating and supporting efforts at the federal, state and local levels to raise standards for the licensing of private contract security firms and the registration, screening and training of security guards.

In 2004, Congress passed the Private Security Officer Employment Authorization Act, which authorized contract security companies to obtain FBI criminal history records checks for screening private security guards in every state. While several states conducted these checks based on state statutes, most did not.

Unfortunately, now 3 years after the passage of the law, the situation remains relatively unchanged. Given public policy and the compelling reasons for the existing law, we believe efforts to increase the facilitation of FBI records checks cannot be ignored.

NASCO welcomes the congressional attention to this problem and we are particularly grateful to Chairman Andrews for his continuing interest in improving the background screening of security. NASCO supports any attempts to improve the facilitation of FBI CHRI checks, including legislation, education and dialogue.

NASCO and its members look forward to working with Representative Andrews and other concerned legislators to improve access to the FBI checks, including amending the PSOEAA to access checks through a third-party DOJ authorized entity or channeler to process the FBI checks in states without established processes.

Employers of private security guards could use these channelers to access and screen employees based on existing state screening standards or suitability determinations; in the absence of state standards, using federal standards established by the PSOEAA.

When the PSOEAA was considered by the House of Representatives in 2004, it was reported that approximately half the states were not conducting FBI criminal records checks for private security. While only 40 states license private security firms and guards, only 31 of these states require or facilitate FBI records checks. And in seven of these states, the FBI check is only done for armed guard applicants.

More recent estimates have put the state numbers that offer FBI checks at 16 states. Regardless of the exact number of states conducting FBI checks on security guards, it is clear that despite the authority and a law directing states to facilitate these checks, the majority of the states do not conduct FBI federal criminal history checks.

In trying to find a solution, it is important not to lose sight of the urgent national security and public safety concerns associated with conducting criminal history checks and NASCO is hopeful a solution can be fashioned as soon as possible.

Today, nearly 2 million people are employed with the private security industry domestically, protecting businesses, public offices, schools, hospitals, business districts, residential communities, nursing homes, day care centers and shopping centers. And as Representative Andrews said earlier, they protect 85 percent of the critical infrastructure, including public utilities, pipelines, ports, reservoirs, bridges, tunnels and many others.

If this is a policy argument, empirical evidence further highlights the importance of FBI checks, including results from several states, including California, that when they implemented their FBI checks in 2003 it resulting in nearly 15 percent of guard applicants being denied licenses based on criminal convictions for sex-related offenses, burglary, robbery and battery outside of the state. Similar results in other states substantiate these figures.

The use of channelers to facilitate criminal background checks is a well-developed concept and was recommended in the 2006 DOJ Report on Background Checks. It specifically addressed the issue of employers getting FBI checks from non-state parties.

NASCO has specifically discussed the problems of obtaining FBI CHRI checks and the use of channelers with DOJ officials and believes this approach would increase the facilitation of these checks.

NASCO has reviewed H.R. 2703 and looks forward to the opportunity to discuss the legislation in detail with the drafters and the committee staff. As noted, NASCO supports the primary element of H.R. 2703, which authorizes the use of non-state channelers or any designated by DOJ to conduct FBI checks on security guard employers when a state is not performing these checks.

I want to thank the committee for holding today's hearing and paying attention to the problem associated with a lack of FBI CHRI checks for private security guards pertaining to the existing law. We believe these checks, combined with NASCO's continued efforts to raise standards at the federal, state and local level for private security are vital to our national homeland security and the issue of public safety and protection.

We look forward to working with you to find a solution to the problem.

Thank you.

[The statement of Mr. Ricci follows:]

Prepared Statement of Joseph Ricci, CAE, Executive Director, National Association of Security Companies (NASCO)

Chairman Andrews, Ranking Member Kline, and members of the Committee, my name is Joseph Ricci, and I am the Executive Director of the National Association of Security Companies (NASCO). NASCO is the nation's only organization dedicated to representing private contract security companies, and NASCO member companies

employ nearly 500,000 highly trained security guards serving throughout the government and commercial sector. NASCO is committed to initiating and supporting efforts at the federal, state and local levels to raise standards for the licensing of private contract security firms and the registration, screening and training of security guards.

In 2004, Congress passed the Private Security Officer Employment Authorization Act (PSOEAA) which authorized contract security companies to obtain FBI Criminal History Records Checks (CHRI) through the states for screening private security guards in every state.[1] While some states were already conducting these checks pursuant to state statues, most were not. Unfortunately, now three years after the passage of the PSOEAA and two years after the implementing regulations were published by the Department of Justice (DOJ), the situation remains relatively unchanged. NASCO knows of no states facilitating contract security company access to FBI CHRI checks for the screening of private security guards pursuant to the PSOEAA. Given public policy and the compelling reasons for passing the PSOEAA, conducting criminal records checks for security guards can no longer continued to be ignored.[2]

NASCO welcomes the congressional attention to this problem, and we are particularly grateful to Chairman Andrews for his continuing interest in improving the background screening of security guards and H.R. 2703 is one attempt to solve this problem. NASCO supports all efforts that improve the facilitation of FBI CHRI checks including legislation, education and dialogue. NASCO and its members look forward to working with Rep. Andrews and other concerned legislators pursue activities to improve the facilitation of these checks including amending the PSOEAA to access checks through a third-party DOJ authorized entity ("channeler") to process FBI CDHRI checks in states without established processes pursuant to the PSOEAA. Employers of private security guards will be able to utilize a "channeler" to access and screen employees based on existing state screening ("fitness determination") standards or in absence of such standards pursuant to the federal standards in the PSOEAA.[3]

The regulation and licensing of private security guards has traditionally been the domain of the states, and as mentioned, for many years states—pursuant to state statutes passed after a 1972 federal law authorizing state use of FBI CHRI for employment regulation—have been conducting FBI checks on security guards as part of that state's security guard licensing process.[4] However, when the PSOEAA was being considered by the House of Representative in 2004, it was reported that approximately half the states were not conducting FBI criminal record checks for private security guards. While 40 States were licensing private security officers, only 31 of those states permitted or required an applicant to undergo a FBI fingerprint check for prior criminal history, and in seven of those states, an FBI check was done only when a person was applying for an armed guard position.[5] More recent estimates have put the number of states that offer FBI checks for security guards at 16.[6]

Regardless of the exact number of states that are currently conducting FBI checks on security guards, it is abundantly clear that at this moment—despite the pre-PSOEAA authority states possessed to conduct FBI checks on security guards, and despite the enactment of PSOEAA directing states to facilitate these checks—the majority of states do NOT conduct these checks.

As mentioned, NASCO supports amending the PSOEAA so that employers of security guard could alternatively use a "channeler" to obtain FBI criminal history checks in states not doing check. Furthermore, NASCO believes such legislation is strongly justified by Congress' passage of the PSEOAA, public policy, and current federal and state background check practices and realities.

The PSOEAA and Public Policy

First, and foremost, when Congress passed the PSOEAA in 2004, the purpose of the law was clear—to provide the authority for security guard employers in states not doing FBI checks to get these checks per request. At the time, directing employers to go through state identification bureaus made sense since many of the states not conducting FBI checks were regulating security guards and states were already familiar with and conducting FBI checks on other classes of employees. However, for a variety of reasons, it is now very apparent that processing the FBI checks through the state identification bureau is not sufficient or workable.

In trying to find a solution to the current FBI check "processing" problem, it is very important not to lose sight of the urgent national security and public safety concerns that lead to the passage of the PSOEAA and NASCO is hopeful a solution can be fashioned as soon as possible.

Today, nearly two million people are employed in private security domestically compared to less than 700,000 law enforcement personnel. Security officers are on duty protecting businesses, public offices, schools, hospitals, nursing homes, day care centers, shopping centers and housing communities. In addition, private security officers are stationed at many of the nation's critical infrastructure sites and facilities including nuclear plants, public utilities, oil pipelines, ports, bridges, tunnels and many other places.

Recent estimates indicate that 85% of the nation's infrastructure is owned and operated by private industry and private security officers protect the vast majority of these assets. Similarly, the overwhelming majority of "first responders", who are first on the scene in the case of an attack or other emergency situation in our manufacturing plants, office buildings, banks, public utilities, shopping malls, are, more often than not, private security officers.

In addition to the policy arguments much empirical evidence was also provided to Congress on why FBI screening was needed for security guards during the consideration of the PSOEAA. Here are three examples provided at the 2004 House hearing on the PSOEAA.

(1) In California, in 2003 there were over 69,000 "Guard Card" applicants. Of those applicants, almost 18,000 had an FBI "rap" sheet indicating some sort of a prior criminal history. Thanks largely to a new law that went into effect in California in 2003, over 9,000 or 51% of those applicants with a rap sheet were denied a guard card. The three most common reasons for denial were for sex related offenses, burglary/robbery and battery convictions. Other data also showed that registered sex offenders frequently attempted to obtain a guard card in California.[7]

(2) In Illinois, a 2004 review showed that the FBI criminal history records check eliminated four times as many applicants as the Illinois State Police check for crimes committed within the State. Put another way, Illinois State Police clear 87% of all applicants while the FBI check clears only 64%—a 23% difference.[8]

(3) Rep. Shelia Jackson-Lee asked one of the witnesses, Westchester DA Jeanine Pirro, "Has there been difficulty in hiring private security officers and finding that they have criminal backgrounds?" Ms. Pirro replied, "It is difficult to identify those individuals who have a criminal history from another State in New York. That is the problem and just recently in Westchester there were several security guards that my office indicted for sexual assault of students who had criminal histories in other States that we had no way of knowing and that the schools had no way of knowing."[9]

Given the importance of private security to protecting our nation's critical infrastructure, as well as people and property, and given the implicit trust that people have, and should have, in private security guards, it made complete sense when Congress passed the PSOEAA in order to better ensure that persons who are convicted of serious crimes are identified and prevented from employment in these positions of trust. It also makes sense now that Congress pursues opportunities to facilitate these FBI CHRI checks as authorized in PSOEAA.

Background Check Developments and Realities

While the Department of Justice and the FBI can best describe the processes necessary to set up a system for facilitating FBI CHRI checks through an authorized entity or channeler, the use of a private entity or a "channeler" to facilitate criminal background checks is a well developed concept. In 2006, pursuant to a request from Congress, DOJ produced a comprehensive "Report on Background Checks" that specifically addressed the issue of employers getting FBI checks from non-state parties, and the use of private third party channelers was recommended.[10]

NASCO has specifically discussed the PSOEAA checks problems with DOJ officials and we have not received any indication that, if authorized by Congress, the use of private parties or channelers to conduct PSOEAA FBI checks on security guards would not work. Furthermore, the DOJ Report states that "there already exist standards to govern management of records" by channelers.[11]

Of course, such a screening entity or "channeler" would be fully governed by applicable laws and regulations regarding the handling of FBI records. In fact, the use of private channelers to obtain FBI CHRI is already authorized and regulated by DOJ.

In the DOJ Background Report, it is recommended that "existing private sector infrastructure for background screening" (such as a "consumer reporting agency") be used to obtain FBI checks in state not conducting such checks. As mentioned in Footnote 1, if a state is not regulating an industry, there are a variety of reasons complicating any efforts to facilitate these checks and prompting states to not want to conduct FBI checks, screening or fitness determinations for employee in that industry. When a state is not willing to do FBI checks on certain employees, DOJ rec-

ommends that the FBI be able to send the CHRI; (1) directly to an authorized employer (direct access is currently not legal for security guard employers under the PSOEAA or other statutes and is a much bigger issue) or, (2) to a third party who could do the required state or federal screening for the employer.

As mentioned, there are already standards in place that would safeguard the FBI CHRI when received by a channeler, and the authorization for third parties to conduct FBI screening when a state is not doing it as DOJ recommends, is precisely what security guard employers need from Congress in legislation to address the current problem with implementation of the PSOEAA.

This solution is especially needed to facilitate checks in those ten states where there are no regulations governing security guards. The DOJ Report explains why FBI records should go to non-state parties;

"* * * (t)he FBI should be authorized to disseminate FBI-maintained criminal history records directly to employers or entities authorized to request a criminal history background check, or 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 Attorney General regulations behalf, subject to screening and training requirements and other conditions for access and use of the information established by law and Attorney General regulations. EXPLANATION: A major limitation in the background check scheme under Public Law 92-544 is the requirement that the records be disseminated only to a governmental agency that applies suitability criteria and provides the results of its fitness determination—qualified or not qualified—to the employer or entity involved. This makes sense when the state is affirmatively regulating employment in a particular area and a government agency is designated as responsible for reviewing the records and making suitability determinations according to specified criteria. This model does not necessarily make sense in industries where employment is not being regulated by the government. Requiring suitability screening by a government agency when there is no regulation generally has meant that the screening does not get done. This has been the true in the case of the NCPA/VCA. Notwithstanding the authority provided under those statutes, most states have not created means for the screening of employees or volunteers for entities providing services to children, the elderly, and disabled persons.[12]

DOJ has made it clear, and state agencies have confirmed, that unless a state is already conducting fitness determinations or suitability screening for employers as part of a licensing or regulatory regime for a particular class of employees, it is not likely that states will affirmatively undertake setting up a process to conduct further checks or screening—despite federal legislation such as the PSOEAA authorizing and encouraging such checks. For states to start doing new FBI checks, it will involve the need for additional state resource and administrative support, and such a system cannot be set up simply because there is also authority to collect user fees. In fact, in those states where there is no regulation of security guards, it has been suggested that state legislation would be necessary to set up an FBI check system pursuant to the PSOEAA, thus putting security guard employers in the same difficult situation they were in before the passage of the PSOEAA.

NASCO will continue to work state agencies and organizations, state representatives and support all efforts to improve the facilitation of FBI CHRI checks pursuant to the implementation of the PSOEAA. However, given the inaction of the past several years, the observations of DOJ on such situations and state level budget and administrative hurdles, NASCO clearly believes congressional authorization to use third parties to obtain FBI checks is a solution definitely worth pursuing.

Regardless of the process to conduct these checks, NASCO recognizes and supports the authority of states to regulate the security guard industry. If Congress allows third parties to conduct FBI checks for employees in states where such checks are not available, NASCO fully supports the DOJ Report's recommendation "that the law of the state of employment should be applied in the screening" when an FBI check is done for an employee in a that state.[13] NASCO is very concerned about any implication, which could be received negatively by the states, that legislation to facilitate FBI checks for security officers in every state will permit federal screening standards to supersede existing state standards.

Comments on H.R. 2703

NASCO has reviewed H.R. 2703 and looks forward to the opportunity to discuss the legislation in detail with the drafters and Committee staff. As noted, NASCO supports the primary element of H.R. 2703 which authorizes the use of a non-state "entity designated by DOJ" to conduct PSOEAA checks for security guard employers when a state is not doing such checks. NASCO believes this notion should be the foundation of any legislative effort to address to the current situation.

There are some elements of H.R. 2703 which raise issues that require more clarification and discussion including the structure and processes for the DOJ authorized entity, the list of disqualifying offenses, mandatory checks and temporary hires, as well as clarification regarding application of standards for fitness determinations and safeguards to prevent superseding of state authority to regulate private security.

Conclusion

Thank you for holding today's hearing and bringing attention to the problem associated with the lack of FBI CHRI checks for private security guards pursuant to the implementation of PSOEAA. We believe these checks, combined with NASCO's continued efforts to raise standards at the federal, state and local level for the licensing of private security companies and the registration, screening and training of private security guards, is vital to our national security and an issue of public safety and protection. We look forward to working with you to find a solution to this problem.

ENDNOTES

[1] Pub. L. No. 108-458 § 6402 (2004), 28 USC § 534

[2] The term "check" and "screen" are used interchangeably. Both denote a party—such as a state agency or a DOJ designated entity—obtaining a person's complete FBI CHRI or "rap sheet" and then screening or checking the rap sheet for arrests and/or convictions that may or not under applicable law disqualify the person from employment or a license or may or may not have to be reported to an employer. This screening/checking process is also referred to as a "fitness determination". It is also important to note, that under pre-existing federal law that authorized states to access FBI CHRI for certain types of employees including security officers, and also under the PSOEAA, a security officer employer is never allowed to be given the FBI "rap sheet." Thus any state currently doing FBI checks on security guards obtains the rap sheet and then uses it as a part of a fitness determination (e.g. licensing application decision). Any new state doing an FBI check pursuant to the PSOEAA would also have to get the FBI rap sheet and then review it against any employment or licensing standards the state may have, or if the state did not have such standards, then against the reportable offense standard in the PSOEAA. The administrative burden and cost of making fitness determinations is cited in several sources as major reasons why states are not and will not do security officer FBI background checks.

[3] NASCO "Background Screening Resolution" October 17, 2007 APPENDIX 1

[4] PL 92-544

[5] Prepared Statement of Mr. Don Walker, Chairman, Securitas Services USA, "Legislative Hearing on S.1743 the "Private Security Officer Employment Authorization Act of 2003," Before the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security, 108th Cong., Serial No. 108-89 (March 30, 2004). *http://judiciary.house.gov/HearingTestimony.aspx?ID=59*

[6] January 30, 2008 Letter to Attorney General Michael Mukasey from Senators Joseph Lieberman, Carl Levin, Lamar Alexander, and Representative Steve Cohen.

[7] See Footnote 2, Statement of Don Walker, Chairman Securitas Services USA.

[8] Ibid.

[9] Legislative Hearing on S.1743 the "Private Security Officer Employment Authorization Act of 2003," Before the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security, 108th Cong., Serial No. 108-89 (March 30, 2004). Transcript at Page 68. *http://commdocs.house.gov/committees/judiciary/hju92829.000/hju92829—0f.htm*

[10] U.S. Department of Justice Office of the Attorney General "THE ATTORNEY GENERAL'S REPORT ON CRIMINAL HISTORY BACKGROUND CHECKS" June 2006.

[11] Ibid at 102

[12] Ibid at 90.

[13] Ibid at 120.

Chairman ANDREWS. Mr. Ricci, thank you for your testimony. We appreciate your constructive approach to this, and we know that is something shared by each of the witnesses.

Mr. Kennedy, welcome to the committee.

STATEMENT OF WELDON KENNEDY, VICE CHAIRMAN, GUARDSMARK, LLC

Mr. KENNEDY. Thank you, Mr. Chairman, Ranking Member Kline and members of the subcommittee. Thank you for this opportunity to present the views of Guardsmark concerning H.R. 2703.

I am Weldon Kennedy, as previously introduced, the vice chairman of Guardsmark, and I was previously the director of the FBI. An experience in these capacities, I hope, to be useful to this committee.

Guardsmark appreciates the chairman's interest in the common goal that we all share, increasing the access of the private security industry to a nationwide criminal history record information. This interest will undoubtedly promote U.S. homeland security and we thank you for your willingness to help in this regard.

Guardsmark has concerns about H.R. 2703 that led us to recommend that it not be enacted. We certainly share your objective of obtaining proper access for our industry to nationwide criminal history record information.

Guardsmark has two principle concerns with 2703. First, it federalizes a regulatory system that is currently based in over 40 states. And, No. 2, it pulls the FBI into the employment process much further than I believe that the bureau or the Department of Justice would be comfortable.

On this first point, we observe that the private security industry is regulated in over 40 jurisdictions in the United States. Regulation of who may enter a profession is a classic state function and the PSOEAA made no fundamental changes to this regime in 2004.

H.R. 2703, however, would shift the system to one of much greater federal intervention, which could prompt the states to reduce their scrutiny of companies and individuals working in our industry. We think that this unintended result would be adverse to the industry and inconsistent with improving homeland security.

Our second main point is that the FBI would not likely be comfortable in taking an enhanced role in the regulation of the security industry. While sharing criminal history record information is certainly acceptable to the FBI, H.R. 2703 goes well beyond the sharing function, imposing expanded regulatory responsibility upon the FBI and imposing expanded regulatory responsibility on the FBI is unlikely to lead to positive results for the industry.

Some in our industry may expect that the FBI alone can solve our criminal history record access problems, but I believe those expectations are unrealistic and that disappointment is inevitable. The states simply have to be a part of the solution because it is information on state criminal convictions to which we need access.

We also have a number of additional drafting concerns with H.R. 2703 that I will simply identify now and ask that the subcommittee review our written statement for all the details.

In summary, the bill will unwisely create a new federal precondition to employment of a private security officer. It establishes a federal employment eligibility standard that could conflict with certain state standards. Three, it allows for a federally designated entity to assess the standards that have traditionally been reserved to the states. Four, it requires the states to respond in 3 days, which could provoke some of them to opt out of the bill altogether. And, five, it significantly expands the list of disqualifying offenses in a manner that could encourage opposition from the employee rights perspective, a criticism that the 2004 law worked hard to avoid.

Mr. Chairman, we are happy to work with you in a constructive manner to improve our industry's access to CHRI. Let me repeat that we appreciate your interest and your objectives. We reluctantly oppose the legislation you have introduced, but we desire to

work constructively and closely with you and this committee to devise suitable alternative approaches.

Thank you again for this opportunity to testify.

[The statement of Mr. Kennedy follows:]

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TESTIMONY OF WELDON L. KENNEDY
Vice Chairman, Guardsmark, LLC

before the
HEALTH, EMPLOYMENT, LABOR AND PENSIONS SUBCOMMITTEE
OF THE HOUSE COMMITTEE ON EDUCATION & LABOR

February 26, 2008

Hearing on *"H.R. 2703, Private Security Officer Employment Authorization Act of 2007*

Chairman Andrews, Ranking Member Kline, and Members of the Subcommittee, thank you for this invitation to present the views of Guardsmark LLC on the H.R. 2703, the Private Security Officer Employment Authorization Act of 2007. My name is Weldon Kennedy, Vice Chairman of Guardsmark LLC, and a former Deputy Director of the FBI. My experience gives me a unique perspective on the issues being considered today, and I trust the subcommittee will find it helpful.

Guardsmark LLC provides security services to companies in the manufacturing, financial, health care, transportation, petrochemical, automotive, information technology, government services, public utility and many other industries. Guardsmark's services include: uniformed security officers, private investigation, pre-employment screening, executive protection, and business continuity planning and preparedness. Guardsmark, which is headquartered in New York, New York, provides services in over 400 cities throughout the United States, Puerto Rico, Canada and the United Kingdom. Guardsmark, which is a privately owned U.S. company, is one of the largest security companies in the world. Guardsmark is committed to providing unmatched security services to its clients.

For over 25 years, Guardsmark has led the fight to raise professional standards in the security services industry. Guardsmark's historic efforts in this regard were instrumental in obtaining passage of the *Private Security Officer Employment Authorization Act of 2004,* Section 6402 of Public Law 108-458 (the "PSOEAA"). The PSOEAA was the result of bipartisan cooperation to enhance security services in the wake of 9/11. The PSOEAA received unanimous passage by the U.S. Senate, after having first been unanimously approved by the Senate Judiciary Committee, 19-0.

We greatly appreciate the subcommittee's interest in the topic of improving the process by which private security officers are employed and private security company may have access to criminal history record information (CHRI). Improved company access to this information will promote national security and homeland security, and we genuinely thank you, Mr. Chairman, for your desire to assist on these critical issues.

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I am here today to offer constructive criticism of H.R. 2703. I would like to emphasize first that we share a common objective – improving qualified employer access to CHRI. There is no debate that the current regime is not functioning as intended, notwithstanding enactment of the "PSOEAA". The concerns I address today apply not to the objective of H.R. 2703, but rather to the manner by which its objective is pursued. Unfortunately, H.R. 2703 contains significant problems. Far from *curing* problems with the PSOEAA, its enactment would simply *create* greater confusion, uncertainty and difficulty for private security companies.

Principal Concerns

Based upon my prior experience as Deputy Director of the F.B.I., I believe that the provisions of H.R. 2703 are certain to raise concerns on the part of the U.S. Department of Justice, which makes enactment of the bill unlikely. During my service as Deputy Director of the F.B.I., I had direct authority over the administration of the F.B.I's criminal justice information system. While this is an excellent repository and retrieval system, it is not designed to be the primary screening mechanism for all criminal history background checks in the United States. CJIS works with the respective states to effectuate their own efforts in enhanced criminal history retrieval and reporting. For the Department of Justice to undertake the new and expanded type of responsibility as contemplated by H.R. 2703 would be beyond its mission and intrude on an area of traditional state regulation. Imposing such an expanded responsibility upon DOJ would likely be received with resistance.

Guardsmark is also concerned that H.R. 2703 would "federalize" a system that is currently centered at the State level -- with minimal federal participation. The private security industry is regulated at the State level in 40 states. Indeed, the regulation of almost all professions is a traditional state – not federal – function. Our industry has a minimal interaction with the federal CJIS database, which the PSOEAA sought to enhance through greater reliance on the federal CHRI database when employment candidates have resided in more than one state. Critically, the PSOEAA avoided displacing the state-level regulatory function. H.R. 2703, however, would reverse this situation by placing a federal restriction on employment of private security officers, and by interposing the U.S. Justice Department directly into the hiring process. Guardsmark believes that, no matter how well intended this approach, the result will be confusion at the state level, and a degradation of the review that state regulators currently provide to new private security officers. The end result could be a reduction in the overall quality of new private security officers, which is in no one's interest. Again, we know such a result is not intentional, but we feel compelled to point it out in order to avoid it.

Additional Concerns:

Among the additional specific objections that Guardsmark has to H.R. 2703 are the following:

1. The bill creates a new federal prohibition on the employment of a private security officer until all criminal background check results are received, even if the company has

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solid evidence that a particular candidate is fully qualified based on its comprehensive pre-employment screening, such as that currently performed by Guardsmark. This new opportunity for delay in hiring even qualified candidates would diminish, rather than enhance, the security services that are being demanded by U.S. companies.

2. The bill makes it unlawful to employ someone as a security officer who does not meet the bill's standards, which are poorly defined and may conflict with state laws. Many states have more stringent standards than those set forth in the bill. Due to the bill's ambiguous language, it is unclear whether it would federally pre-empt tougher state standards.

3. A federal entity (whether the United States Attorney General, or an entity created or designated by the Attorney General) is interposed to administer standards in what has historically been a state-regulated industry. This is certain to meet strong objections in Congress on both constitutional (10th Amendment) grounds and under the doctrine of federalism. The purpose of the PSOEAA was to expedite obtaining federal criminal history background information. Trying to establish a federal security services "czar" is both unnecessary and unlikely to succeed.

4. The bill mandates a three-day response time, thereby encouraging (if not forcing) states to "opt out" under the PSOEAA. Imposing an unrealistically short deadline for processing criminal background information requests provides states with an incentive to "opt out" under the PSOEAA rather than cooperating with private security companies. This bill therefore could unintentionally impede, rather than facilitate, obtaining the federal criminal history records.

5. The bill expands the list of disqualifying offenses, together with a "catch all" category, making the employment screening process far more complex and cumbersome. It also requires employers to compare and reconcile the proposed federal standards with possibly conflicting state standards. This is a recipe for confusion – and ultimately lower compliance.

6. By expanding the list of offenses and prohibiting employment until the background has been completed, the bill invites opposition on civil rights, civil liberties, privacy and employment-related grounds from a variety of groups representing these interests. Up until this point, the PSOEAA and its sponsors have worked hard to avoid this controversy. Exposing the private-security CHRI regime to this criticism could be damaging to overall support for the current process, which itself would be harmful to homeland security.

For these reasons, I believe that the deficiencies of H.R. 2703 are significant enough to justify withholding further action on this legislation. There are alternative methods to legislative remedies that we are pursuing, and I would be happy to discuss these cooperative administrative efforts with the Committee during the question and answer period.

Again, we appreciate this committee's interest, and we appreciate the opportunity to testify.

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Chairman ANDREWS. Mr. Kennedy, thank you for the spirit of your testimony and very worthy suggestions. We really do appreciate your constructive approach to this.

Mr. KENNEDY. Thank you.

Chairman ANDREWS. Mr. de Bernardo, welcome back.

STATEMENT OF MARK DE BERNARDO, JACKSON LEWIS LLP

Mr. DE BERNARDO. Thank you, Mr. Chairman.

Thank you, Mr. Kline, members of the subcommittee.

I appreciate this opportunity to testify in support of criminal background checks and in support of H.R. 2703.

The Council for Employment Law Equity, which I represent, and Jackson Lewis, which is a 450-lawyer, 34-city employment law firm representing management, we support employers' interests, the users of criminal background checks. And let me say, I think the role of criminal background checks in employment is strong, appropriate and necessary, and it is particularly necessary in such industries and in such employment categories as the use of security guards in private sector employment.

We feel that employment use of criminal background checks is not only pro-employer, it is pro-employee and, ultimately, it is in the interest of the ex-offenders themselves. They have a better chance of being reintegrated into society and into employment by those employers who actually use criminal background checks. In fact, studies that are cited in my testimony uniformly say that those employers who use criminal background checks are more likely to hire ex-offenders than those employers who do not. In fact, three and a half times more likely.

So that societal interest of having those people coming out of prison, getting them reintegrated in society, is actually served in this regard.

But more information is better than less information, and I think the spirit and thrust of H.R. 2703 is that we would have more consistent information, we would have more information that is available to employers on a regular basis. Right now it really is a patchwork at the state level. There are great inconsistencies. You know the old saying, "garbage in, garbage out."

You know, as employers we want to know whether or not the job applicants that are coming before us are qualified, and we particularly want to know this for those positions where there are high-risk populations, where there are people that are particularly vulnerable, whether they be customers, workforce or certain job positions that are discussed in my testimony, job positions in hospitals, day care centers, elder care. Certainly any jobs involving youth, school districts, youth camps, counseling programs, certainly any jobs involving national security or the defense industry.

You know, if we are going to have defense contractors that are employing employees on military bases, we want to have every opportunity to know as much as we possibly can about those job applicants and do the screening. And the jobs go on and on. If you have access to financial securities or large amounts of cash, certainly those situations. Pharmaceutical companies, drug stores, anywhere where there would be access to drugs on the open market are going to be valuable.

So what we want is more information, more consistent information, more readily available information. What we have now is information that comes from the states, which talks about conviction in that state.

But, you know, so often those being released from prison are crossing state lines. Los Angeles County, 47,000 people released from prison are going to be in Los Angeles County last year. One-third of the 23 percent of those people being pulled from prison in California will be in Los Angeles County itself. Well, California has 11 percent of the nation's population. They have 23 percent of the

nation's former prison inmate population, again concentrated in Southern California.

So there are people crossing state lines with the inconsistency of what is going on at the state levels with the exclusion of those people who are serving out federal offenses. Sure, I am in favor of a system by which we can identify and have better information, more consistent information, more accurate information, and I applaud you, Chairman Andrews, for approaching this in one segment with H.R. 2703.

[The statement of Mr. de Bernardo may be accessed at the following Internet address:]

http://edlabor.house.gov/testimony/2008-02-26-MarkdeBernardo.pdf

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Chairman ANDREWS. Mr. de Bernardo, thank you very much for your contribution today.

Ms. Uzzell, welcome.

STATEMENT OF DONNA UZZELL, CHAIRWOMAN, NATIONAL CRIME PREVENTION AND PRIVACY COMPACT COUNCIL

Ms. UZZELL. Thank you.

Good morning. I am Donna Uzzell and I work for the Florida Department of Law Enforcement. I am currently, as the chairman mentioned, the chairman of the National Crime Prevention and Privacy Compact Council.

The council is a federal rule-making body that works in partnership with states, end-users and policy-makers like yourselves to inform or to regulate and facilitate the sharing of criminal history record information to non-criminal justice users to enhance public safety and still address privacy rights. To date, 27 states have ratified the compact and 11 have signed our MOU.

I am delighted to be here today. I represent my fellow states. I do need to say that my comments reflect the practices in my state and the individual opinions of several of our members and not our official position as a council, since this is a federal rule-making body.

This council fully agrees that persons who are placed in any position of trust should be appropriately screened. Clearly, individuals such as private security guards are vital to the nation's domestic security. In Florida, I am proud to say that these checks have been done by our Division of Licensing for over 20 years. We average 30,000 checks a year. But as we heard, not all states do participate.

In my handout I have expressed the concerns with the existing law and would be glad to expand on that during any Q&A. In regards to solutions, though, I would like to reference not only my testimony provided earlier on the AG Report on Criminal History Background Checks, but I would like to share with you firsthand experience from a proven model that is also referenced in the AG report.

Several years ago in Florida volunteer agencies were considering implementing the National Volunteers for Children Act to protect children, the disabled and the elderly. There are a number of volunteer organizations, such as Boys & Girls Clubs and churches,

that fall within this category, as well as large employers in our state, such as Universal Studios and Disneyworld.

The dilemma was that no one agency could take on the workload of screening and no one criteria was appropriate. The solution, through an amendment to the act, was to allow the qualified entity, with the presence of a waiver, to receive the criminal history information and to make their own suitability determinations.

This allowed us to implement this law in our state and the entities are subject to state audits to address privacy and security concerns. It has been working in our state since 1999 and we have conducted over 140,000 criminal history checks since, using this model.

Another model that is applicable, as Frank Campbell mentioned, was Public Law 105277, which was passed in 1998, allowing nursing home facilities to receive national criminal history information from the state in the event that a state statute was not in place. Three states take advantage of this law and in 2007 alone over 27,000 checks were done under that act.

One more model that was recently enacted by Congress via Section 153 of the Adam Walsh Act is the ability for private schools to now receive the results of criminal history information to make suitability determinations for persons they employ. Similar to the private security guard industry, private schools across the country were receiving varied assistance in obtaining checks of their employees. When Congress passed the act in July of 2006, it enabled private schools to directly receive national criminal history information if the provision is requested by the governor and the checks are fingerprint based.

In that same act, Congress made this provision available to private companies that contract with child welfare agencies for licensing of foster and adoptive parents. These models could be applied to the private security guard industry and would allow the states that wish to regulate the industry to continue doing so, but not hold hostage the companies in states where regulations do not exist.

Several states that I have spoken to indicated they would be able to begin processing these checks if the information was passed down to the employing company. And I might add that the Florida Association of Security Companies emailed me and said they supported this approach.

Privacy issues? Well, let me just say this: at least 25 states already make criminal history information in their state available on the Internet. Private data companies compile this information and sell it around the country. Information provided by the FBI is at least fingerprint based and eliminates some of the harm done from someone mistakenly identified by name. And caveats could be put in place, like were mentioned in the AG report, to protect privacy.

Rap sheets can be read. It is a myth that they can't. With minimum training, we have evidence of that across the country.

If it is true that security guards do protect 85 percent of the nation's critical infrastructure, and I am glad to hear that—that is a number I have heard and I am glad to hear you say that, Mr. Chairman—and we trust them with tremendous responsibility, then why wouldn't we trust them to receive criminal history infor-

mation to ensure that the right person is placed within these sensitive positions and allow public safety to take precedent?

So, consistent with past congressional precedents, if legislation is enacted I would strongly consider allowing private security guards to receive the information. Despite what you may have been told, there are companies that would like to police themselves and are willing to step up to the plate and take on the responsibilities.

And just one more thing, Mr. Chairman. I have heard anywhere from 16 to 32 to 40, just in preparing for this I pulled 17 states and 14 of the 17 actually do these checks. So what I will do as Compact Council chairman is I will be glad to work with the security guard industry, but I will do a poll and survey, and I would be glad to share the information not only of what states conduct the checks, but states that have any limitations, so I can share those with you as well.

[The statement of Ms. Uzzell follows:]

Prepared Statement of Donna M. Uzzell, Director, Criminal Justice Information Services, Florida Department of Law Enforcement; Chairman, National Compact on Crime Prevention and Privacy Council

Good Morning, I am Donna Uzzell and I am the Director of Criminal Justice Information Services for the Florida Department of Law Enforcement. I am here representing the National Crime Prevention and Privacy Compact Council and I currently hold the position as Chairman. On October 9, 1998, President Clinton signed into law the National Crime Prevention and Privacy Compact (Compact) Act, establishing an infrastructure by which states can exchange criminal records for noncriminal justice purposes according to the laws of the requesting state, and provide reciprocity among the states to share records. The Compact became effective April 28, 1999, after Montana and Georgia became the first two states to ratify it, respectively. To date, 27 states have ratified the Compact and 11 states have signed the Council's Memorandum of Understanding (MOU) in voluntary recognition of the Council's authority to adhere to the rules and procedures of the Compact. The remaining states are represented by the FBI who has a designated member to the Council. Therefore, between the states who have ratified the Compact and established MOUs, 38 states are now under the purview of the Compact.

Goal and Mission of Compact Council

The Goal of the Compact Council is to make available the most complete and up-to date records possible for noncriminal justice purposes. Our mission, is to work in partnership with criminal history record custodians, end users, and policy makers to regulate and facilitate the sharing of complete, accurate, and timely criminal history record information to noncriminal justice users in order to enhance public safety, welfare and security of society while recognizing the importance of individual privacy rights.

Because our members are federally appointed by the United States Attorney General and federal agencies are represented on the Council, the council does not lobby or take a position on any specific legislation. However, I am delighted to be here today, representing my fellow member states and extremely pleased that the committee recognized the role of the Council and our subject matter expertise on issues such as the one before you today. My comments are reflective of the practices in my state and the individual opinions of several of our members and are not an official position of the Council.

Implementation of the Private Security Officer Employment Authorization Act (PSOEAA)

Let me begin by emphasizing that the Council members fully recognize the importance of ensuring that persons who are placed in any position of trust (whether it be persons with direct contact with children, the disabled and the elderly, or persons who work in nuclear regulatory plants, or in airports or drive hazmat materials) are appropriately screened and that a criminal history background check be performed on the individual before he or she is placed in that position. The information that has been relayed to the Council is that 85% of the nation's critical infrastructure, including power plants, water treatment facilities, and telecommunications facilities

are protected by the private security industry. Clearly, these individuals are critical to the nation's domestic security initiatives and serve in trusted positions.

In Florida, private security guards, both armed and unarmed, receive a state and national criminal history check and the industry is regulated and licensed by our Department of Agriculture and Consumer Services, Division of Licensing. These checks have been done for over 20 years and we average around 30,000 applications a year.

I continue to hear a range of numbers as to how many states are actually performing criminal record checks on private security guards. I have heard numbers ranging from 16 to 25 to 32 states. Since the Private Security Officer Employment Authorization Act was passed, I am aware that several states have indicated they have enacted or broadened their own state statutes. Last week at a Council committee meeting, when I had learned that I would be testifying today, I conducted a quick poll of a few of my counterparts and found that the states of California, Texas, New Jersey, New York, Tennessee, Arkansas, Virginia, New Hampshire, Texas, Louisiana and Vermont also conduct state and national checks on private security guards armed and unarmed. In fact, according to the FBI there are 41 states, the District of Columbia and Puerto Rico that have requested and received authorization under Public Law 92-544 to perform national criminal history checks on private security guards. Some, like Georgia, the regulatory agency has authorization to do both armed and unarmed but regulates only armed security guards, some like Kansas and Oklahoma are permissive in their checks and are not mandatory.

Because it appears that a current accurate accounting state by state does not exist, I am going to do a formal survey with the Compact Council and hope to enlist the support of the National Consortium for Justice Information and Statistics (SEARCH) and the National Association of Security Companies (NASCO) to fully understand how many states are actually performing these checks, the limitations within the state and any point of contact. I would be more than happy to share with the committee the results of that survey when completed. However, I think most will agree that one thing we do know is that there are approx. approximately 8 to 10 states that do not have any legal authority whatsoever to conduct national checks on security guards. Idaho is one of those states. Idaho does not have a state statute authorizing these checks. Last week, in a discussion with a representative from this state, I did learn that there has not been a demand by the industry within that state to enact legislation or implement the PSOEAA. The state representative in Idaho, welcomes the opportunity to work with members of the industry although admits that implementation presents a set of challenges.

Current Problems with PSOEAA Implementation

While implementing the PSOEAA checks without a 92-544 statute may appear to be a simple solution, such a task has certain obstacles that would need to be overcome. First of all, the state would need to not only submit the fingerprints and receive the criminal history results but would also be required to perform the suitability determinations based on the federal criteria. The volume of those checks could be significant. Although a fee could be assessed for this purpose, the state would need to have state authority via legislation or executive order to assess the fee, receive the money, hire the necessary resources to perform the task of adjudicating the results, handle appeals and process approvals and denials. Even if the state chose to outsource some of these functions, the state cannot outsource something it is currently not authorized to do, so the infrastructure would still need to be in place for the state to take on the responsibility for these checks.

If the state does not have the ability to participate based on the concerns previously mentioned, the state may "opt out" to enable a "participating state" to do these checks for them. While this may also sound reasonable in theory, once again, it is a complex undertaking. A state that is performing the checks usually has a licensing or regulatory function with specified criteria used within that state for screening. Even though a fee for services is authorized, it would be very difficult for the state to justify requesting additional resources to accommodate other states, and to ask them to screen to the federal standard for these checks and their own standards for checks within their state.

I can speak personally for the state of Florida in saying that we are continually being asked to scale down our budget and limit the hiring of additional resources. Even if we could collect a fee for that service, expanding our government to provide services outside our state would be questioned. We continue to be told to stick to our core missions and I am sure since you also represent the states that this is something you can certainly understand.

How do we make this work?

So you ask yourself, well what would work. The USAG was tasked in Section 6403 of Intelligence Reform Bill and Terrorism Prevention Act to conduct a study on the issue of background checks. The Compact Council was specifically mentioned in the law as a reference group for the topic. The Council posted notes to the Federal Register as comments and worked closely with USDOJ's Office of Legal Policy in the development of the final report. It is important to note that the report to Congress is very much aligned with the recommendations of compact council members. It is also very much aligned with the comments from SEARCH. The part of the report that may be specifically relevant to Congress is in Section V Recommendations for Standardizing Non-Criminal Justice Access Authority.

Suggested Models for Consideration

Let me share with you firsthand experience from a proven model that is referenced in the AG report in Section III, Examples of Programs Implementing Criminal History Check Authorities. In Florida, several years ago there was a similar situation concerning the ability to perform state and national checks on persons employed or volunteering around children, the elderly and the disabled. There are a number of agencies that fall under this category in Florida to not only include volunteer organizations such as Boys and Girls Club, churches, and universities, but large employers in our state such as Universal Studios, and Disney World. The dilemma was that no "one" agency in the state could take on the workload of screening for these entities and there was not "one set of criteria" that would be appropriate for all. The United Way was concerned about the impact on volunteerism and that persons with criminal offenses that would still make them suitable for some jobs could be ultimately screened out. For instance, an agency may want to allow someone with multiple driving violations including Driving While Intoxicated to volunteer in a facility with the elderly as long as they are not driving the patients but may not want someone with a history of fraud, with an elderly person who could be vulnerable to fraudulent scams. The solution, through an amendment to the Volunteers for Children's Act was to allow the qualified entity, with the presence of a waiver, to receive the criminal history information and make their own suitability determinations. The entities are subject to state audits to ensure that they are maintaining all security requirements in the maintenance and dissemination of the information. This program has been in place since 1999, and in 2006/2007 Florida conducted 144,693 criminal history checks using this model.

Another model that is applicable to this situation is the Public Law 105-277 which was passed in 1998 allowing Nursing home facilities to receive national criminal history information from the state in the event that a state statute was not in place to provide for these checks. Three states take advantage of this law and in 2007 alone over 27,000 checks were done under this statute.

One more model that was recently enacted by Congress via the Adam Walsh Act is the ability for private schools to receive the results of criminal history information to make suitability determinations for persons they employ. Similar to the Private Security Guard Industry, private schools across the country were receiving varied assistance in obtaining criminal history checks for their employees. Some state laws only authorized criminal history checks for public schools and some included private schools but required them to fall under the state board of education for regulation. In states, where the state did not want to regulate private schools or where the private schools wanted separation from the state board there was little to no avenue for them to receive the information and do the right thing. When Congress passed the Adam Walsh Act in July 2006, you enabled private schools to directly receive national criminal history information if the provision was requested by the Chief Executive Officer of the state and the checks were fingerprint based. In the same act, Congress made this provision available to contracted entities of Child Welfare Agencies for the licensing of Foster and Adoptive parents.

In each of the models, a group was defined as having a specialized need for persons in trusted positions to be background checked, there was no consistency nationwide, and the decision as to whether to conduct the checks was based on the states ability to provide resources to adjudicate the results and apply criteria for suitability. These models could be applied to the Private Security Guard Industry and would allow the states that wish to regulate the industry to continue doing so, but not hold hostage the companies in states where regulations do not exist. In Georgia, the state has indicated that it will continue to license armed guards and that if the records could be pushed back to the employing agency they would be willing to proceed with all security guards. Other states have indicated the same. In Florida, even though security guards are licensed by the state, many of the guard companies would like to receive the results of screening to determine if they would want to apply their own standards for persons they hire to ensure that they are appro-

priately placing persons in positions. Today, they must do a private company search of these records or a state only search of these records in order to accommodate that need.

Privacy Concerns

The privacy issues surrounding this information should not deter you from taking this type of action for the following reasons:

• In at least 25 states, the states information is already available on the internet by a name based check.

• Private data companies compile criminal record information from courts, corrections and other databases from around the country and sell to their customers.

• At least, the information provided by the FBI is fingerprint based and limits the harm done from someone being mistakenly identified by name.

• Caveats, like those mentioned in the AG report could be put in place to protect privacy.

• Rap sheets CAN be read and we have examples at the state level of numerous organizations that are screening criminal history records today with minimum training, to say otherwise is a myth.

If it is true that security guards do protect 85% of the nation's critical infrastructure, and we trust them with that tremendous responsibility then why wouldn't we trust them to receive the criminal history information to ensure that the right person is placed within these sensitive positions and allow public safety to take precedence.

Recommendations

This recommendation is consistent with past congressional actions as previously mentioned and could be enhanced by placing minimum criteria in place that the agencies would need to adhere to.

I urge you to do the following:

Prior to passing legislation, ensure that you have received accurate information and in those states that are already regulating the industry and conducting these searches allow them to continue as appears to be recommended in this legislation.

If legislation is enacted, strongly consider allowing the private security guard industry to receive the results of the criminal history information. If these individuals are truly guarding areas that are critical to our nation's domestic security, then do not tie their hands to enable them to employ the right person in these sensitive jobs. Despite what you may have been told, there are security guard companies that would like to police themselves and are willing to step up to the plate to take on this responsibility.

In doing so you will:

• enable persons who currently cannot be checked to receive the screening, and

• enable more states to participate.

The USAG report recommendation on access to criminal history records indicates that when a state agrees to participate in processing these checks and passing them down to the employer the state should be able to do so with certain protections in place. If the state opts out, then the employing entity should be able to go directly to the FBI. Critical Infrastructure is listed as one of the first priorities in determining who should be able to avail themselves of this service. Consider implementing the recommendations of the USAG report.

Chairman ANDREWS. We would be eager to receive that information. Thank you.

Ms. UZZELL. Thank you for letting me be here today. I appreciate it.

Chairman ANDREWS. Our privilege.

Mr. Clarke, welcome to the committee. Glad to have you with us.

STATEMENT OF FLOYD CLARKE, MEMBER, BOARD OF MANAGERS, ALLIED SECURITY HOLDINGS

Mr. CLARKE. Thank you, Chairman Andrews and Ranking Member Kline and the rest of the committee.

It is a pleasure and I appreciate the opportunity to appear before you today to offer some comments about H.R. 2703.

As you mentioned, I am a member of the board of managers of Allied Security Holdings, the parent company of Allied Barton Security. And previously I spent 30 years in the FBI, leaving in January 1994 as the acting director. So I approach this issue with the benefit of the perspective from both the FBI and private sector.

Allied Barton is the largest American-owned security services company. We have more than 52,000 security officers in over 100 offices and we service approximately 3,500 clients across the United States.

Let me begin, Mr. Chairman, by commending you for your commitment to this issue over the years. As Congress recognized in the legislation that you were instrumental in helping to pass in 2004, there is a homeland security imperative for having professional, reliable and responsible security officers for the protection of people, facilities, institutions, and ensuring that these officers are thoroughly screened and trained.

In an effort to achieve this objective, Congress enacted the Private Security Officers Employment Act to allow private security officer companies 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 the authority that they have been given and employers still cannot regularly screen perspective employees against the national database.

And I want to again commend you, Mr. Chairman, for recognizing the need to strengthen this earlier legislation.

Private security officers, as you mentioned, provide a primary line of defense for much of our country, securing countless lives, tens of thousands of important facilities from coast to coast. The threat of additional terrorists acts requires the cooperation between the public and the private sectors.

The private sector, as you mentioned, controls 85 percent of the critical infrastructure in this nation, and unless a terrorist target is a military or other secure government facility, the first first responders most likely will be civilians. Those civilians will include private security guards. We want to do all that we reasonably can to ensure that the officers that we hire are trustworthy and not likely to commit criminal acts or aide or support terrorists.

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

Congress directed the attorney general to examine the issue related to non-law enforcement access to federal criminal history records and the AG concluded that reliable criminal history background check cannot be accomplished without timely access to the records of the FBI.

Without access to the federal records, the only records available to an employee are those in the states, where the records are typically kept in 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 will usually only request a check in the counties in which the applicant says that they have recently lived or worked. This leaves the employer blind to any criminal history in states for which the applicant failed to disclose contacts.

Congress acted in 2004 to provide employers 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.

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 requests for criminal history records to the FBI either directly or through an entity designated by the attorney general.

We strongly support this recommendation and applaud you, Mr. Chairman, for incorporating this provision in H.R. 2703.

I understand that there may be concerns that this legislation bypasses states. As I read it, however, it clearly requires employers to go through the states in every instance where the states are willing and able to respond. The only instance in which employers can make a request other than through the state is where the state has chosen not to establish a mechanism for getting prompt federal records checks accomplished.

We fully support efforts to get more states to adopt such mechanisms. However, that will take time, time during which we will continue to have a dangerous gap in the screening.

H.R. 2703 does not preclude continuing efforts to work with the states and ensures that as those states come into compliance with the AG's standards, employers will be required to go through them for their record checks.

Our experience indicates that the protections afforded to employees under Congress, which Congress included in 2004, are appropriate and that the legislation that is being suggested and offered here builds upon those and even strengthens those.

I would be more than happy to answer any questions that you might have.

[The statement of Mr. Clarke follows:]

Prepared Statement of Floyd I. Clarke, Member of the Board of Managers, Allied Security Holdings

Chairman Andrews, Ranking Member McKeon, and Members of the Subcommittee, thank you for the opportunity to testify today about HR 2703, the Private Security Officers Employment Authorization Act of 2007 and 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 for these positions of trust,

I am the Vice President for Corporate Compliance of MacAndrews & Forbes Holdings, Inc. and a Member of the Board of Managers for Allied Security Holdings LLC, the parent company of 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 52,000 security officers and over 100 offices located across the United States from which we help protect the facilities, employees, and customers of our approximately 3,500 clients.

Mr. Chairman, let me begin by commending you for your commitment to this issue over the years. As Congress recognized in legislation that you were instrumental in helping to pass in 2004, there is a homeland security imperative for having "professional, reliable, and responsible security officers for the protection of people, facilities, and institutions" and ensuring that these private security officers are "thoroughly screened and trained." [1]

In an effort to achieve this objective, as part of the Intelligence Reform and Terrorism Prevention Act of 2004, Congress enacted the Private Security Officer Employment Authorization Act (PSOEAA) to allow Allied-Barton and other private security officer firms to submit requests through the states to screen employees[2] 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. I want to again commend you, Mr. Chairman, for recognizing the need to strengthen that earlier legislation.

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, how it has worked—and not worked—for AlliedBarton over the last two years, and why the changes made by HR 2703 are important for both applicants and employers.

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 facilities 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." [3]

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

When Congress enacted the PSOEAA, it also directed the Attorney General to examine the issues related to non-law enforcement access to federal criminal history records and report back. The Attorney General's Report[4] 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 another way to access 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.

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.

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 requests to the FBI, either directly or 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 applaud the Chairman for incorporating it in HR 2703. Ensuring timely and accurate record checks is in the best interest of both employers and employees.

The best way to ensure accuracy is to combine federal and state records, which the proposed legislation authorizes. 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] HR 2703 provides a process for ensuring that screening is not based on incomplete records by requiring that when records are incomplete, the government shall provide notice of any state(s) in which such records may be completed or verified.

Thus, even if employers are permitted to submit requests without first going through the state, they will 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.

Mr. Chairman, I understand there may be concerns that this legislation by-passes the states. As I read it, however, it clearly requires employers to go through the states in every instance where the states are willing and able to respond. The only

instance in which employers can make a request other than through the state is where the state has chosen not to establish a mechanism for getting prompt federal records checks accomplished. AlliedBarton fully supports efforts to get more states to adopt such mechanisms. However, that will take time; time during which we will continue to have a dangerous gap in screening. HR 2703 does not preclude continuing efforts to work with the states and ensures that, as those states come into compliance with AG standards, employers will be required to go through them for the record checks.

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

In addition, Allied supports the additional safeguards in HR 2703 to protect applicant rights and improve accuracy of NCIC records. HR 2703 adds a new section requiring the Attorney General to ensure that there is a process whereby an employee subject to a request for a National Crime Information Center criminal history records check will have the opportunity to provide to the head of the National Crime Information Center of the Federal Bureau of Investigation information concerning the accuracy or completeness of such results.

The bill also imposes strict record management requirements to protect confidentiality. Under these amendments, employers would be required ensure that the results of the records search are maintained confidentially and are not misused or disseminated to any person not involved in the employment decision. It also requires that the results of the search request are destroyed with one year unless a claim is pending.

Moreover, HR 2703 limits reporting to convictions only. It deletes the current language in the PSOEAA that allows employers to consider arrests for which there has been no resolution for 365 days. In addition, this version provides greater specificity in offenses, ensuring their direct relevance to the position of private security officer, replacing current broad language that includes any "offense involving dishonesty or a false statement."

Conclusion

In conclusion, I want to thank you again for the opportunity to testify today in support of HR 2703. It provides essential improvements to the PSOEAA and I'm confident that these improvements in the screening of private security officers—specifically by insuring employers' timely access to FBI criminal records while preserving employee rights—will make our nation safer.

ENDNOTES

[1] P.L. 108-458, section 6402.
[2] References to "employees" in this statement should be understood to also include applicants.
[3] 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).
[4] United States Department of Justice, The Attorney General's Report on Criminal History Background Checks (June 2006).
[5] Id at 22.
[6] Id at 87.
[7] Id at 94.
[8] Id at 88.
[9] Id at 27.
[10] Id.

Chairman ANDREWS. Well, thank you, Mr. Clarke.

And thank each of the witnesses for very edifying and instructive testimony.

We do have issues and concerns about employee privacy issues, and I would ask unanimous consent at this time to have letters en-

tered into the record from the National Employment Law Project and the Service Employees International Union, so that we may have their views, which will clearly be taken into consideration if this process goes on, without objection.

[The statement of the National Employment Law Project follows:]

National Employment Law Project

Delivering Economic Opportunity

Christine L. Owens,
Executive Director

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BY FAX

February 26, 2008

Honorable Robert E. Andrews, Chair
Health, Employment, Labor & Pensions Subcommittee
Committee on Education & Labor
2439 Rayburn House Office Building
Washington, D.C. 20515-3001

Re: Statement in Opposition to H.R. 2703

Dear Representative Andrews:

We are writing in opposition to H.R. 2703, the Private Security Officer Employment Authorization Act of 2007, which is scheduled for a hearing before the Health, Education, Labor & Pensions Subcommittee on February 27, 2008. For the reasons described below, we believe that the proposed bill would seriously prejudice the rights of law-abiding workers to employment in the private security industry.

The National Employment Law Project (NELP) is a non-profit organization that promotes employment opportunities and labor protections for low-wage workers. Our Second Chance Labor Project helps workers employed in private security and in other major industries subjected to criminal background checks to ensure a more fair and effective system of employment screening for criminal records. The Project seeks to protect public safety and security while promoting the rehabilitative value of work and the basic employment rights of all workers, including those with a criminal record.

We have a number of serious concerns with H.R. 2703. First, by making the FBI's criminal records more readily available to private screening firms and individual employers, H.R 2073 undermines the employment opportunities of large numbers of workers who are unfairly penalized by the poor reliability of the FBI's criminal records. According to the Attorney General, 50% of the FBI's criminal records are incomplete, which is mostly due to the failure of the states to update the criminal records after the individual has been arrested.

In contrast to federal gun checks required under the Brady Law, the FBI has no special procedures to update the criminal history records produced for employment purposes. As a result, workers are routinely denied employment due solely to inaccurate and unreliable FBI rap sheets, which cannot be cured by a procedure that puts the burden on the worker, as required by H.R. 2073, to correct the FBI's records. The first priority of Congress should be to improve the reliability of the FBI rap sheets produced for employment purposes, not to expand their access as proposed by H.R. 2073.

H.R. 2703 also seeks special treatment for the private security industry by authorizing employers and private screening firms to directly the access the FBI's criminal records, thus bypassing the state screening agencies if the state cannot respond to an inquiry within the limited three days required by the bill. However, the private screening firms have an especially poor record enforcing current federal law, including the Fair Credit Reporting Act (FCRA) which is designed to protect workers against errors and abuses associated with criminal background checks for employment. For example, according to a study documenting compliance of the FCRA, only about one half (56%) of screening firms covered by the law provided the information to workers to comply with the law's mandates.[1] Thus, for good reason, 69% of the public "worries" about the participation of commercial firms in providing criminal history information for employment and licensing purposes.[2]

Indeed, the House Homeland Security Committee held a hearing last year (February 16, 2007) documenting abuses by the private screening firm (called E-RailSafe) that was hired by the railroad industry to provide criminal background checks for employment. Of special concern, the hearings documented that African-Americans with an unblemished record of employment were disproportionately singled out for firings by the private screening firm. A complaint against the private screening firm is now pending before the Federal Trade Commission alleging major violations of the FCRA on behalf of 100 railroad workers.[3]

Under current law, state screening agencies with experience evaluating criminal records for employment are relied upon primarily to review the FBI's records, not private screening firms or individual employers. Absent these protections, including more objective screening criteria applied by the states, the potential to disproportionately deny employment to people of color seeking private security jobs is significantly increased. African Americans make up 32% of the private security workforce and Latinos account for another 14%. People of color are also disproportionately represented among those who have served prison time for non-violent crimes.

This concern is compounded by the fact that H.R. 2703 disqualifies even those workers with misdemeanor drug and other non-violent convictions from being employed as private security officers. Thus, H.R. 2703 contrasts significantly with the Maritime Transportation Security Act of 2002 (MTSA), which requires criminal background checks of about 1.5 million port workers to identify terrorism security risks. Under the MTSA, disqualifying convictions are limited to certain felonies dating back seven years. In addition, unlike H.R. 2073, the MTSA requires a "waiver" procedure which allows all workers to demonstrate that they been rehabilitated, even if they have a disqualifying crime.

Finally, we question the need to amend the Private Security Officer Employment Authorization Act of 2004 to create a new regime of criminal background checks of private security officers without first engaging the Attorney General to aggressively implement the current law in coordination with the states. Indeed, the Attorney General has yet to issue final regulations

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[1] Shauna Briggs, Merdith Thanner, Shawn Bushway, Faye Taxman, Mishelle Van Brakle, "Private Providers of Criminal History Records: Do You Get What You Pay For?" (April 2004).

[2] (U.S. Department of Justice, *Privacy, Technology and Criminal Justice Information: Public Attitudes Toward Uses of Criminal History Information,* July 2001.

[3] "FTC Asked to Probe Background Checks on Rail Workers," *Washington Post* (July 12, 2007)

implementing the federal law, which was enacted December 17, 2004. It is thus premature to create new federal law that could seriously undermine the rights of workers to employment in the private security industry.

Accordingly, we oppose H.R. 2703, and we urge action by Congress to address the reliability of the FBI's criminal records produced for employment screening purposes. For more information, feel free to contact Maurice Emsellem, NELP Policy Co-Director at 510-663-5700 or by e-mail at emsellem@nelp.org. Thank you.

Sincerely,

Christine Owens

Christine Owens
Executive Director

[The statement of the Service Employees International Union follows:]

February 25, 2008

Dear Representative:

On behalf of the Service Employees International Union's (SEIU) 1.9 million members, including 30,000 SEIU private security officers, I am writing to express SEIU's opposition to H.R. 2703, which is the subject of the Health, Education, Labor, and Pensions Subcommittee hearing on February 26, 2008.

H.R. 2703 seeks to expedite criminal background checks for security workers by granting access to confidential FBI records to private businesses. This has very dangerous public policy and privacy implications, and would only increase the risk of errors and omissions denying otherwise eligible individuals employment opportunities.

An important problem with the bill is that it creates a dangerous precedent by providing access to FBI records for private, for-profit screening firms working on behalf of security companies. Some of these screening firms have a poor record of compliance with worker protections required by the Fair Credit Reporting Act (FCRA) for employment-related criminal background checks. Furthermore, third-party access to FBI records bypasses direct oversight by states that maintain strong screening standards.

Unfortunately, the questionable quality of the FBI records presents another major difficulty. The U.S. Attorney General has reported to Congress that many of the FBI's records are inaccurate or incomplete, with a widespread failure to provide dispositions of arrests. Until action is taken to improve the quality of these records, workers run a substantial risk of unfair disqualification by employers relying on faulty data.

We also note that the Private Security Officer Employment Authorization Act of 2004 has not yet been fully implemented, with interim regulations still pending. It seems prudent for Congress to consult with the Department of Justice on specific problems with the still-evolving process, before enacting another law that can have severe unintended consequences for workers trying to get a start in this important and growing industry.

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February 25, 2008
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I urge you to oppose passage of H.R. 2703 without substantial revisions to address these serious problems. If you wish to discuss these issues further, please contact Peter Pocock in the SEIU Legislation Department, at 202.730.7750, or peter.pocock@seiu.org.

Sincerely,

Alison Reardon
Director of Legislation

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Chairman ANDREWS. Mr. Clarke, I think that you answered a question I was about to ask, but I want you to reiterate it. Mr. Kennedy speaks of his concerns about the federalization of the process of hiring private security guards, and the rule in our country is that we don't have federal rules—federal rules are the exception, not the rule. And it take exceptional circumstances to have federal regulation in order to solve a perceived problem.

What are the exceptional circumstances here that in your view justifies a greater federal role in this process?

Mr. CLARKE. Well, it is a varied rationale, Mr. Chairman.

First of all, that there is inconsistency within which the states apply these standards. As Mr. Kennedy mentioned, there are 40 states that have some type of process, but that process varies from record checks to nothing more than a licensing process that does not include record checks.

So when we were considering what is at risk and what the American public expects when they go to a shopping mall or they have their students enroll in a university or we have critical petrochemical or pharmaceutical industries where private security people are employed, that there should be some national, some basic threshold that governs whether or not we put people in these positions of trust.

So in the areas where states have regulations, we work with those states and use those as the standards. It is only in the places where states don't do the record checks or don't have standards that we need to have some additional help to govern what those standards should be.

Chairman ANDREWS. Mr. Ricci, is it my understanding that of the nine companies that are a part of the association, you represent that eight of them essentially agree with Mr. Clarke's position? Is that correct?

Mr. RICCI. NASCO did not vote particularly on the H.R. 2703. What we did is, we passed a resolution by majority in the fall that

look at the issues associated with the bill and really supporting the idea of creating a third party entity as approved by DOJ. And I am looking at things such as disqualifying offenses and mandatory turnaround times and really working with your office and with other legislators to handle those issues.

So there were some votes done, but we usually have 17 members and they were not involved in that.

Chairman ANDREWS. I understand.

Mr. Kennedy, I want to ask you a question, and I very much appreciate the constructive spirit of your testimony.

Let us take the scenario of hazardous medical waste, which is generated a lot of different places around the country, hospitals, research labs and whatnot. And almost always the institutions that generate this waste use private security guards to guard their facilities.

The theft of a fairly small amount of hazardous medical waste could make a dirty bomb. It is a very real and present concern.

In a state that has opted not to be part of the federal system and that has opted not to require security companies to do background checks on their security guards, why shouldn't we pass a federal law that requires that hospital or that medical institution to have background checks of the security guards that are guarding that hazardous medical waste? Why shouldn't we do that?

Mr. KENNEDY. Mr. Chairman, that is an extremely complex issue, as I am sure you understand.

Chairman ANDREWS. Yes.

Mr. KENNEDY. There are some states that have been long involved in administration of their own internal processes with regard to licensing, et cetera.

Chairman ANDREWS. Right.

Mr. KENNEDY. It is true, of course, that we have 10 states that do not currently have a licensing procedure for private security individuals.

Our company and many others in our industry—however, not unanimously—conduct extremely thorough background investigations on the individuals being employed. We believe at our company we have the most comprehensive system to do that.

Mr. Clarke mentioned that there are 3,000 counties in the United States and that there is no current system to have a check of all 3,000 counties to determine whether or not a criminal record may exist on an individual throughout the United States.

Your bill would cure that problem, but it would impose federalization of those standards on states, all of the states, all 50.

Chairman ANDREWS. But how about the specific question I asked. Is it your answer that we shouldn't impose the requirement to get that background check done because it is too complicated? Because it can't be done? What is the answer? Is your answer yes or no?

Mr. KENNEDY. My answer is no, we should not, because it imposes on the states' rights.

Chairman ANDREWS. Okay.

Mr. KENNEDY. In England, for example, they have a statute that you are talking about. It is a very——

Chairman ANDREWS. England is not a perfect world in any sense of——

Mr. KENNEDY. No, it isn't. But they have a very——

Chairman ANDREWS. Look, what we could tell you to do here is to balance these concerns. And clearly, as I said a few minutes ago, the general rule in American law is that states decide things under the 10th amendment. The exception is that we do.

I am more inclined to agree with Mr. Clarke, that this is one of those exceptional circumstances because of the relationship between guarding the critical infrastructure. But certainly we do understand that cost, the complexity, the other balancing issues, and we all take them into consideration.

Mr. Kline?

Mr. KLINE. Thank you, Mr. Chairman.

Thank you, gentlemen and lady, for your testimony, it is excellent, as we try to make sure we are approaching what appears to be a shortfall in the 2004 law in a reasonable way.

Mr. de Bernardo, you seem in your testimony, written and oral here, to support mandated background checks for security personnel. Am I right in that reading?

Mr. DE BERNARDO. You are correct, yes.

Mr. KLINE. So let us explore that a little bit here to make sure we don't overreach.

In the examples that the chairman has given today, I don't think there is any question that we want those security guards to have a pretty thorough background check, armed guards at nuclear power plants, perhaps people where there is hazardous waste, whether it is nuclear or medical or something.

But the term "security guard" is pretty broad. There are people involved in security that are in parking lots, maybe they are making sure that thinks aren't pilfered from dressing rooms and so forth. We are talking about a lot of people here.

Is it your testimony and your view that all of those people should have mandated background checks? Every employer who hires anybody who could be involved in that security business would be required to have a background investigation?

Mr. DE BERNARDO. Well, Mr. Kline, we would find that acceptable.

Normally, the CELE, the employer community in general, is not going to be in favor of mandates, as you well know. But, you know, there are some issues that are so important and as a practical matter, two things.

Number one, I think the overwhelming majority of employers are doing criminal background checks for people who are in security positions. And, secondly, if they are not, they should, you know, given the potential liabilities. In our litigious society, one of the things that is discussed in our testimony, is the fact that negligent hiring, negligent retention lawsuits, there has been explosive growth in this regard.

I think that it is unwise for employers to hire people in security positions, or any positions where there are at-risk populations that would be affected by having a criminal in that position.

One of the long sections of our testimony discusses criminal recidivism. There is absolutely no question that someone who has a

criminal conviction in their background, no matter when it was, is more likely to commit a crime again than a normal citizen. Those getting out of prison are 53 times—no matter what their conviction was for—are 53 times more likely to commit a homicide than a normal American citizen.

In fact, the recidivism rate, unfortunately, it is a tragedy in America, is as high as 80 percent. Eighty percent of those people who have had criminal convictions in the past, as many as 80 percent, are likely to be convicted of a crime again.

Mr. KLINE. You are not arguing, though, if I may interrupt, you are not arguing for mandated background checks on every employee? Is that right? Or are you? Somebody who works a cash register——

Mr. DE BERNARDO. No, absolutely not.

Mr. KLINE. There is liability there. You know, greeters.

Mr. DE BERNARDO. I think it should be up to the employer, okay, in the——

Mr. KLINE. That is what I am getting at. If it is going to be up to the employer, who is determining who gets the background investigation? Is this somebody who is responsible for making sure that things aren't taken from dressing rooms or is this somebody who is guarding nuclear waste? Or does it matter? Again, in your view, does it matter?

Mr. DE BERNARDO. I think that is a sort of simplistic approach. You——

Mr. KLINE. I am not a lawyer. I am kind of a simplistic guy, Mr. de Bernardo, so that happens.

Mr. DE BERNARDO. No offense intended.

We are not talking about people that are guarding restrooms. We are talking about people who——

Mr. KLINE. I am trying to get at, should we be careful about how we define security guard in this legislation. You know, it is our job to do a balance here, as the chairman says, and to make sure that we are not overreaching and we are not creating something that is going to turn out to be very, very difficult for employers to enforce. So I am just asking, should we pull in the definition of security guard, or not?

Mr. DE BERNARDO. If there is a sensible definition of security guards that makes sense, then we would favor that, sure.

Mr. KLINE. Thank you.

I yield back.

Chairman ANDREWS. Mr. Hare?

Mr. HARE. Thank you, Mr. Chairman.

Mr. Ricci, in your testimony you were citing findings from a 2004 review of records for applicants that applied for guard positions in my home state of Illinois. The review found that the FBI criminal history checks provided serious criminal information four times more frequently than the state-wide check.

I wonder, what information could be overlooked when private security employers have access to state criminal history records only and what limitations the state checks in providing a complete record of applicants criminal history are involved here?

Mr. RICCI. I think you are referring to, typically, when a state licenses security, much like Illinois does, they check the state

record. So they will check any criminal activity that may be in the state record depositories as well as looking at where an applicant may say they lived within that state.

But the information that is lacking is anything that may have happened in another state. It could be a neighboring state. It could be a state that they used to live in. It could be a state they vacation in, perhaps. Or it could be a federal offense. And none of those would be reported through the state process.

So when you refer to that Illinois study, what it said was when they started to implement these checks, they started to uncover people that had cleared through the state check but were getting results from the federal check, and I think that is really important.

I cited California as well, that since that time those percentages of security officers that have been denied based on criminal activity have gone done, because some of it is deterrent, if they know the federal checks are going to be done in those particular states, as they are also done in the state of New Jersey and the state of Minnesota, in a different form. They all check federal criminal records checks, and so there is a form of deterrence there as well.

Mr. HARE. And just for the panel, and anybody is welcome to respond to this, a lot of you acknowledged that states face considerable challenges in efforts to implement timely processing of criminal background checks, such as lack of financial resources, adequate staff, combined with large volumes of request.

I am wondering, A, has this interfered with the compliance of the Private Security Officer Employment Authorization Act? And/or how can the federal government ease the burden of the states?

Ms. UZZELL. From the states that I have spoken to, as I said in my testimony, the suitability criteria and making that determination and adjudicating the results at the state repository, if you don't mind my expression, is the gorilla in the middle of the room. It is difficult for them to have the resources, not only—they all process the fingerprint cards. That is their job. They will send the information up to the FBI and get the results back. And then the office will get—40 percent of the records in 2009 will be decentralized at the state. They will no longer be kept at the FBI, because that is the rule of the compact.

But I think the other piece to this is that when they get the records back, it is not really the state repository's role to review the records, locate missing dispositions and suitable screen, handle appeals and process that function. So if the records were allowed to be passed back to the entity that was making the decision, closest to the decision-making authority, then I think the states would more likely say, yes, more states that do not regulate, and you pass the records back, we all do these checks.

We all get the records through the state repository first and get a better check, and then we all give the records back to the employment agency so they can screen under the criteria that you, as Congress, determine, with privacy protections in place.

So I do truly believe that if that was put in as part of this legislation, that I think it would be a help to the states to actually do it.

Mr. HARE. Anybody else?

Mr. KENNEDY. Yes, sir.

In the past, when the FBI was trying to modernize the criminal history system and go from the card, the fingerprint, 10-point print card, submitting that hard card to the FBI and switching over to an electronic method, many, many states chose to do that immediately because it was more efficient, they had the resources to do it.

But there were a number of states—in fact, I would want to suggest that it might be the same 10 states we are talking about here, who chose not to do that initially. There were statutes enacted, enabling a federal funding process for states that chose to make such an application in order to build and construct that capability within their state system.

I would suggest something along those lines might be attractive to the states. Again, that suitability issue still is the big gorilla in the room, but at least that would possibly encourage those states who do not do any regulatory processes on security guard personnel, they might be encouraged to do so.

Mr. HARE. Thank you.

Mr. Ricci?

Mr. RICCI. As we mentioned in our testimony, we support the creation of a third-party entity to assist with both the transaction of the electronic fingerprint, but also in the suitability screening. We believe that a third-party agency could help in the screening.

Part of the complication there, as we mentioned, there are 40-plus states that have some type of licensing or registration criteria. Those disqualifying offenses vary by state. So it would be incumbent upon this third-party channeler to be involved in that process of looking through those criteria and assisting with the screening and suitability studies.

Mr. HARE. Thank you very much.

I yield back, Mr. Chairman.

Chairman ANDREWS. I thank the gentleman for yielding.

Mr. Kline, do you have any concluding comments for today?

Mr. KLINE. Thank you, Mr. Chairman.

I just want to say thanks. Excellent two panels, real expertise here. It is always a pleasure when we have a panel of witnesses like this as we are really trying to dig into the bottom and make sure we are producing good law here. So thanks to all of you very much.

And thanks to you, Mr. Chairman.

Chairman ANDREWS. Thank you.

I would like to associate myself with Mr. Kline's remarks. This was an excellent panel, as was Mr. Campbell's testimony in the first panel.

Our objective is to learn more about this issue and write a good law, should one be necessary. And is usually the case, an excellent panel raises more questions than it answers, which is good for us.

We are going to call upon each of the six of you that testified today for further input.

Here is where I would like to see us go, to go back to my hypothetical scenario of the person guarding the hazardous medical waste. I would like to be sure that he or she has passed a background check, that the person is not a felon or a terrorist. I would

like to be 100 percent sure that is the case, to the extent that we can be.

I would also like to be sure that we are sure that that record is about that person, that there wasn't a mistaken record that unfairly deprives someone of a job or of an employment opportunity because the record was wrong. I would also like to be sure that the person holding that background check information is under very strict legal requirements not to share it with someone unlawfully or unfairly. I would like to be sure that employers are given meaningful and practical ways of accessing this information that are not unduly costly. I would like to be sure that states are given similar flexibility and reasonableness as well.

So all of this is easier said than done, but I think that you have given us a roadmap to answer those questions and get this done.

Look, one of the many lessons that I learned from 9/11 is that we have an adaptive enemy who is looking for our vulnerabilities, and you know we focused on our vulnerability after we have been attacked. And we spent a lot of time on the airline industry in this Congress since then, as we well should have.

But I suspect that we are dealing with a terrorist enemy that is spending time in areas that we are not spending time in. And I do think it is incumbent upon all aspects of our national governance to think that through. Not in an environment of paranoia, but in a careful, methodical way that gets several steps ahead of those who would do us harm.

I am glad we live in a country where 85 percent of the critical infrastructure is guarded by private concerns. I don't want to live in a state economy where the government owns and controls everything of any value. I am glad that we live in such a country. But I do acknowledge that in such a system, because we have grown up in peace in this country, the idea that we would have this kind of organized attack on our soil was incomprehensible to us just a few years ago. The fact that we have a patchwork quilt of laws, that we clearly have gaps in our system, I think imposes upon us to take a rational, careful approach to fixing the problem.

Ms. Uzzell, I would compliment your colleagues in particular for the work you are doing in the states on this issue. And by no means do I mean today's hearing to suggest that we think the states have failed. That is not true at all. A more accurate statement is we want every state to hit the level of success that the best states have hit. We want every private security company to hit the level of success that the representatives of the two companies here have hit and I think the association has largely hit.

I just want to make one final comment, that this is obviously not a hearing getting a huge amount of press attention. I am glad. And the reason I say that is that I assure you, if, God forbid, we had a terrorist attack that could trace its roots to stolen medical waste that made a dirty bomb and that the material was stolen because we had coconspirators working on the inside as private security guards, we would fill the room. I never want the room to be filled. I want us to think ahead, to use the most intelligent, legal methods available to us to prevent that from ever happening.

So you have made an excellent contribution to this today, each of the six of you. We appreciate that.

I now want to read my little script here, that says, "As previously ordered, members will have 7 days to submit additional materials for the hearing record." That also includes witnesses, should you choose to do so. And any member who wishes to submit follow-up questions in writing to the witnesses should coordinate with the majority staff within 7 days.

With that said and without objection, the hearing is adjourned.

[Follow-up comments from Mr. Kennedy follow:]

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Weldon L Kennedy
Vice Chairman
Group Executive

March 5, 2008

The Honorable Robert E. Andrews, Chairman
The Honorable John Kline, Ranking Member
Subcommittee on Health, Employment, Labor & Pensions
Committee on Education and Labor
U.S. House of Representatives
Washington, DC 20515

RE: H.R. 2703

Dear Chairman Andrews and Cong. Kline:

I write to follow up on three questions that were asked of me during the hearing on H.R. 2703.

1. Federal Regulation. Chairman Andrews noted that state regulation of commercial activities is the norm, and federal regulation is reserved for exceptional circumstances. I was then asked whether the exceptional circumstances exist when it comes to ensuring that private security guards protecting critical infrastructure or hazardous material do not have criminal records.

I would like to supplement my answer at the hearing. In summary, the exceptional circumstances may exist to ***consider*** whether federal regulation is wise. But upon further consideration, federal regulation of an area relating directly to ***state*** criminal laws will not improve our ability to obtain the goal we all seek , and therefore is not appropriate in these circumstances.

I agree that our system of federalism defers to state regulation of the professional services. The Private Security Officer Employment Authorization Act of 2004 (PSOEAA) certainly respects that principle. While the U.S. Congress may assert federal control over areas of traditional state regulation as long as it respects the 10th Amendment, not every federal intervention makes good policy sense. I respectfully suggest that it would be unwise to establish a significant federal role in the process of becoming a private security officer, for the following reasons:

- The records that we seek relate to convictions under the laws of the 50 States, so the deference required to state law is even greater in this situation;

- Because the data is initially collected and transmitted to the FBI by the States, the federal regulator is dependent on the cooperation of the States in order to make the Criminal History Record Information system function;
- There is no clear likelihood that the policy result we desire – better access to nationwide CHRI – can be realized by imposing control over this process by a federal entity (the FBI) that has no experience or resources necessary to regulate a profession.
- The DOJ itself has testified that, if any legislative change were to occur, serious consideration should be given to authorizing direct employer access to the CHRI, ***but through the State entities handling such information***.

2. Employer Mandates. Chairman Andrews also asked generally whether the exceptional circumstances described above also justify a federal mandate that employers complete a background check on a private security guard before hiring that person. I believe the answer to this question is "no."

Having access to nationwide CHRI is important, but it is not critical in every instance of hiring. For example, Guardsmark performs a comprehensive background check on all of our employment candidates. Let's take the not uncommon situation where our company has an applicant in the State of X, and our private background check shows that the applicant has resided in that state for all of his life. The state criminal history records check indicates no record. While in cases like this it is always helpful to confirm that no other criminal records exist, it would still be entirely proper to hire the individual prior to the results of a federal check.

In this same common scenario, a federal prohibition on hiring would delay the employment and placement on post of the clearly qualified security guard in question. If our industry lacks the ability to properly staff every position as promptly as possible, then the security of the facility being guarded will be diminished. Furthermore, if the federal government is unable to respond promptly to requests for CHRI, for the reasons we describe in our answer to the prior question, then further delay in placing a qualified guard on post would occur. These are all very plausible results that could arise from the new federal mandate proposed by H.R. 2703, even though this is not the intention of the legislation.

3. Non-Legislative Alternatives. Ranking Member Kline asked me what non-legislative options exist to improve our industry's access to CHRI, and I would like to supplement my answer.

The PSOEAA contained two methods for a state to inform employers about the suitability of employment of a private security guard: (1) a determination by the State of eligibility pursuant to state standards, or (2) in a State without standards for qualification to be a private security officer, notice from the State to the employer as to the fact of

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whether an employee has been convicted of a felony or has been charged with a felony that has not been resolved in the prior 365 days.

Our recent communications with many States indicate that most desire to participate in the PSOEAA regime, but many are unable to assess applicants who have criminal convictions arising under another state's law. In this situation, we believe the PSOEAA permits such States to provide employers with the simpler "notice as to the fact of whether" a felony conviction or recent arrest exists with respect to a prospective employee. Such a regime would provide private security companies with sufficient information to make an employment decision, while addressing some of the problems raised by the States that were echoed in the testimony of Ms. Uzell, from the Compact Council. We will be discussing this option further with the Senate sponsors of the PSOEAA, with the Justice Department, and with the Compact Council, and we look forward to reporting back to you regarding this approach to implementing the PSOEAA more completely.

Sincerely,

Weldon Kennedy /by g.l.

Weldon Kennedy
Vice Chairman
Guardsmark LLC

[Whereupon, at 11:48 a.m., the subcommittee was adjourned.]

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