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TESTIMONY BEFORE THE PRIVACY PROTECTION STUDY COMMISSION

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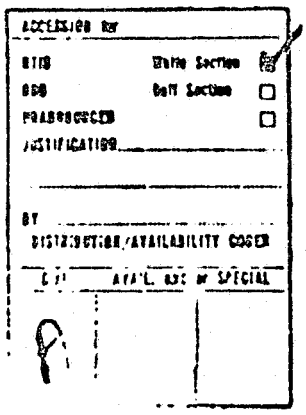
ABSTRACT

Discusses in general the nature, extent and problems of the private security industry. Given the nature and extent of current regulation of the industry, a series of statutory and policy guidelines are offered to improve the industry's effectiveness and to reduce the seriousness and prevalence of its problems without threatening its financial viability. Particular attention is paid to two privacy-related issues: the regulation of access by private investigators to police records and the regulation of third-party questioning by private security firms in investigations for employers, insurance companies and credit bureaus.



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INTRODUCTION

About six years ago I headed what was probably the first broad study of private security in the United States. The study, conducted at the Rand Corporation, was sponsored by a grant from the LEAA. My remarks today are drawn primarily from what we learned in that study. We updated certain of the material from that study in preparation of a book *The Private Police: Security and Danger* to be published next month. However, some of what I will say probably needs updating, particularly in two areas: (1) the ways in which states and localities have altered how they regulate private security; (2) and the case law bearing on private security issues. Nevertheless, based on articles in the professional trade journals and in the public media, I believe that the basic issues have not changed and I also believe that not much more has been learned about them by others since our study was completed.

A fundamental premise of the study was that private security services fill a perceived need and provide clear social benefits to their consumers and, to some extent, to the general public. Few would argue that, all other things equal, if private security services were drastically reduced or eliminated, reported crime, fear of crime, and prices of merchandise and services would rise. The research focused on examining alternative *incremental or evolutionary* policy and statutory guidelines that might improve the industry's effectiveness and reduce the seriousness and prevalence of its problems, without threatening its financial viability. That is we did *not* attempt to build a theoretical economic and legal framework for analyzing the benefits and costs of *radical* alternatives to current public and private security and investigation arrangements.

Let me first briefly summarize the nature, extent and problems of the private security industry; then I will summarize the recommendations we made in our study reports. Finally, I will address two major issues of interest to this commission today in somewhat more detail.

A PROFILE OF THE INDUSTRY AND ITS EMPLOYEES

Private security forces in the United States are vast and growing. In 1972, over 1.1 million people in the United States were crime-related security workers, and 429,000 of them were privately employed. Another 113,000 were government-employed guards. Thus, only about half of the crime-related security personnel in the country work for a public law enforcement agency. About half of all security personnel have full police powers and half do not. In 1972, a total of over $12 billion was spent on all public and private crime-related security forces. It is estimated that nearly $4 billion was spent in 1972 for crime-related private security forces alone. In the private sector, the majority of the security workers are employed "in-house," directly by the organization they are serving. However, a rapidly growing minority are employees of organizations that sell security services on contract. The vast majority of both contract and in-house private security personnel are employed as guards or watchmen, rather than in police or investigative occupations.

While the number of public policemen and detectives grew over 50 percent in the decade between 1960 and 1970, the number of people whose primary occupation is that of private policemen and detectives remained relatively constant at about 20,000. In 1970, only about 6 percent of the people whose

primary occupation was that of police or detective were privately employed, and about one-third of those were in the private contract security industry. In 1972 about 25,000 people were private police or detectives; 17000 were employed in-house and 8000 were employed by contract organizations. This does not include investigators employed directly by employment, insurance and credit firms. Projections for the contract organizations indicate an increase to 12,000 by 1985, or about 4% of the contract industry's total.

In 1969, within the contract security industry offering guard, investigative and armored-car services, the seven largest firms (Pinkerton's, Burns, Wackenhut, Globe, Baker, Brink's and Loomis) together accounted for upward of 70% of all employment in the industry, even though there are thousands of firms providing such services.

Private security guards are drawn from a different labor pool than public policemen. They are older, less educated, lower paid and more transient. Private policemen and investigators are somewhere in between the two. In 1970, their median age was 42, 83% were male, 90% were white, 86% were full-time and median annual earnings were about $8100.

Private investigators, especially those who hold a state licence, are often experienced in general police or investigative work. Many have served in the local public police, in military security, or in federal law enforcement. As far back as 1960, for example, the American Society for Industrial Security estimated that of all in-house or contract security executives who were members of ASIS, 10% were ex-FBI agents and 25% had been trained by the FBI or some other federal law enforcement agency. Many

private investigators, undercover agents and retail-store detectives, on the other hand are often younger and less experienced in security work. For example some firms prefer to hire completely inexperienced personnel for such security work and then train them. They feel that regular law enforcement training and experience is inappropriate, because presonnel with prior training in public law enforcement are enforcement-oriented rather than prevention-oriented. Further, they lack familiarity with private investigative techniques such as those designed to minimize shrinkage and pilferage of stock in the retail trade.

On the other hand, some contract security firms and others employing in-house investigators prefer more experienced personnel with regular law enforcement backgrounds. For example, as of 1971, one large contract security firm hired only investigators with prior federal law enforcement experience and would not hire former private investigators. Typically their investigators had 10 years of prior government investigatory experience.

While the mass-media image of a "private eye" is romantic and exciting, the reality is quite different. The private investigator usually is an information-gatherer, and often the information gathered has little to do with either prevention of crime or apprehension of criminals. However, some of the private investigator's activities are crime-related. In terms of relative frequency, the primary activities of investigators are pre-employment background checks on personnel, background checks of insurance and credit applicants, plainclothes undercover work to detect employee dishonesty and pilferage or customer shoplifting in retail stores, and investigation of insurance or workmen's compensation claims. Marital-related investigations are rapidly declining in volume as divorce laws

are liberalized. When investigators are hired to assist lawyers in developing evidence for a court case, it is often a civil, rather than criminal, matter. When a criminal matter, the attorney and investigator often are hired to defend the accused.

Although good data are not available, most in-house and contract private detectives receive little preemployment or refresher training. This is similar to the general lack of adequate training for guards.

The range of previous experience of new private investigators runs from none, in many cases, to several decades of experience with high-quality, government investigative forces. However, since the legal powers and authority of public and private police are quite different, even seasoned public investigators may need refresher training in the limitations under which they must operate as private citizens. Inexperienced new employees are expecially in need of training about their legal powers and lawful investigative and interrogation procedures, since the line between legal and illegal is sometimes quite subtle. In addition, new private investigators with previous public police experience may sometimes need training in matters such as pilferage control, and so on, with which they are unfamiliar.

CURRENT REGULATION OF BUSINESSES AND PERSONNEL

The business and personnel categories that are regulated vary widely among states. Twelve states did not regulate at all in 1971; some states, such as Alaska, licensed only contract investigative agencies; other states, such as Wisconsin, licensed contract investigative, guard, and patrol businesses, and licensed or registered all employees of contract investigative, guard, and patrol agencies but did not regulate polygraph examiners and in-house security forces. In contrast, Florida had a very stringent licensing

requirement for individual polygraph examiners but did not register employees of contract investigative, guard, or patrol agencies. One of the weak points in many state laws is the complete exclusion of major categories of security business and personnel from regulation, such as insurance and credit company investigators. A total of 34 states regulated private investigative businesses; 26 regulated guard or patrol businesses; 17 licensed or registered private contract investigative employees; and 12 licensed or registered private contract guards or patrol employees. No state had mandatory regulation of in-house guards or investigators.

Security businesses that are less numerous than guard and investigative agencies tend to be less regulated, even though they perform significant security functions and are susceptible to many of the same problems as are the guard and investigative segments. To our knowledge only 4 states explicitly regulated the central-station-alarm companies, 6 states explicitly regulated armor-transport companies, 11 states licensed polygraph examiners, 4 states licensed repossessors, and only 1 state licensed insurance investigators. The "special police" are regulated by several states.

By 1975, the number of states licensing investigative agencies had risen from 34 to 35, and the number requiring a license for guard companies had increased from 26 to 31. And several states had significantly improved certain aspects of their regulation; among them, California, Florida, Illinois, Pennsylvania, and Texas. In September 1975, for example, Illinois brought in-house guards under limited regulation. In addition, in 1975 a total of 18 states were considering revision of their private security licensing and regulation statutes.

Many categories of private investigators and guards are explicitly excluded from licensing requirements. Even though they perform some of the same types of investigative activities as contract investigators, both insurance and credit investigators were explicitly exempted from licensing in 22 states in 1971. Most of the remaining states that licensed contract investigators implicitly excluded most insurance and credit investigators (who work for a single employer) by licensing only contract investigators and excluding in-house investigators working "for a single employer" rather than "for hire". Since both contract and in-house personnel may have to deal with the public and their investigative reports equally affect the members of the public being investigated, it appears that current state regulation is not directed at specific types of security activities or personnel whose actions affect the public but rather at some of the businesses that sell security services.

REGULATION OF ACCESS TO POLICE RECORDS

The records of public law enforcement agencies, including records of arrests and convictions, generally are accessible to some private security personnel, even in jurisdictions in which policy or statutes prohibit such access. And private security executives freely admit this, as we were told in interviews with them. Such records are most commonly obtained in connection with preemployment, insurance, and credit investigations.

State regulation of public access to such records usually is either nonexistent or not adequately enforced. First, while state "freedom of information" acts have been interpreted not to require general public access to arrest records, they do permit the disclosure of such records to certain persons upon the discretion of the local administering agency. Second, state expungement

statutes are inadequate to prevent the pre-expungement dissemination of criminal records outside of state and local law enforcement agencies. Third, internal regulations of local law enforcement agencies that prohibit the disclosure of criminal records are often not adequately enforced. Finally, even though prohibitions upon the dissemination of criminal records may be enforced, an individual's records may nevertheless be obtained upon his written waiver in many jurisdictions. Such waivers are procured routinely by employers and others.

Judicial decisions reflect a trend toward prohibiting the dissemination of records of public law enforcement agencies to other public agencies and to private individuals and corporations. These decisions have generally been based on statutory grounds, though the courts have been influenced in their interpretation by consideration of the constitutional rights of due process and privacy. Tort theories of recovery based on defamation of right of privacy either are not well developed or are restricted in their application.

The Federal Fair Credit Reporting Act imposes standards of accuracy upon private firms that regularly investigate and prepare preemployment, credit, and insurance reports. As of 1971, our analysis concluded that The Act was not likely to limit access to or reporting of criminal records, except insofar as it prohibited the reporting (except for specified purposes) of information more than seven years old.

REGULATION OF GATHERING INFORMATION ON PRIVATE CITIZENS FROM THIRD PARTIES

Third-party questioning by private security firms is most widely used in investigations for insurance companies, credit bureaus, and employers. Little hard information is publically available concerning the techniques of third-party questioning, except that the results may be inaccurate because of time

pressures and quotas that apparently may be imposed by some firms.

Because of time and cost factors in the industry, there is built-in limitation on the quality of third-person reports. In 1970, the typical employment report cost about $25. The investigators who prepare the reports are relatively low-paid employees. Retail Credit Corporation (now Equifax, Incorporated), investigators averaged 11-1/2 reports per day. In addition to the time pressure, there is some indication that some agencies may have imposed formal or informal quotas for derogatory information. Witnesses who were former employees of Retail Credit Corporation stated at Senate Committee hearings held in 1969 by Senator Proxmire that they had had a quota for numbers of reports prepared daily and for the proportion of reports containing derogatory information. (The president of Retail Credit, however, testified that such quotas did not exist in his corporation.) Inaccuracies have a vast potential for harm to the reputation and pocketbook of the person under investigation.

There is little state regulation of the information-gathering activities of private investigators. While several states, including New York and Massachusetts, have recently enacted statutes that regulate the reporting of credit and employment investigations, these statutes provide only for limited recovery for the failure to correct inaccuracies in a report after it has been prepared. Nor do the statutes permit an individual, in advance of investigation, to forego the benefits sought and hence stop the investigation.

Common-law tort doctrines of defamation and invasion of privacy place few restrictions upon third-party questioning. Credit and similar reports are protected to the extent that, to be actionable, any inaccuracies they contain must be the product of actual ill will or malice on the part of the investigator, and the report must be without a legitimate business purpose. The tort of invasion of privacy requires "publication," i.e., dissemination of private facts beyond a limited group of people, and hence is inapplicable

to most if not all private investigations. The tort of intentional infliction of emotional distress requires a deliberate or malicious campaign of harassment or intimidation. The courts have not been sympathetic to any extension of the common-law doctrines to cover third-party questioning by public law enforcement officers or private investigators, even when such questioning has been conducted under false pretenses.

The Federal Fair Credit Reporting Act regulates "investigative consumer reports" by requiring the correction of inaccuracies contained in such reports. The act provides sanctions for willful and negligent noncompliance but does not require that prior notice of an investigation be given to the subject thereof.

INDUSTRY PROBLEMS

On the basis of evidence from several sources, including surveys of private security employees and of state and local regulatory agencies, interviews with security executives, security agencies' complaints and insurance-claim statistics, court cases, and media accounts, it is abundantly clear that a variety of potential and actual problems do exist with private security forces. But the evidence is insufficient to judge the precise extent of these problems. There are problems of abuse of authority, such as assault or unnecessary use of force (with and without a gun), false imprisonment and false arrest, improper search and interrogation, impersonation of a public police officer, trespass, illegal bugging and wiretapping, breaking and entering, gaining entry by deception, false reporting, and improper surveillance. There are problems of dishonest or poor business practices, such as inaccurate reporting, franchising licenses, operating without a license, failure to

perform services paid for, misrepresenting price or service to be performed, and negligence in performing security duties.

Current regulation and legal remedies need improvement. Licensing and regulation of private security businesses and employees, is, at best, minimal and inconsistent, and, at worst, completely absent. Sanctions are rarely invoked. Moreover, current tort, criminal, and constitutional law has not been adequate -- substantively or procedurally -- to control certain problem areas involving private security activities, such as searches, arrests, use of firearms, and investigations. Finally, current law has not always provided adequate remedy for persons injured by actions of private security personnel.

Problems particularly relevant to practices of private investigators include inaccurate or false reporting; trespassing on private property to spy on or photograph the person being investigated; searching premises illegally when the person being investigated is absent; and posing as someone other than a private investigator when obtaining information from neighbors.

OVERVIEW OF SUGGESTED POLICY AND STATUTORY GUIDELINES

Now I believe it would be useful to summarize our view of preferred policy and statutory guidelines that have the potential of improving the effectiveness and reducing the social costs of private security. These guidelines are aimed at (1) broadening, strengthening, and applying uniformly restrictions such as the licensing and regulation of private security businesses and personnel and the laws regulating private security functions or activities; (2) improving the state of knowledge and making available the information that legislators and regulatory agencies need to carry out their functions; and (3) providing incentives, in addition to negative sanctions, for improving private security.

In developing these guidelines, we have proceeded from two major premises:

- If government regulation is necessary, it is desirable that it be applied as uniformly as possible.
- Any measures aimed at upgrading the quality of private security or at alleviating certain problems, should impose the minimum possible interference or impairment of an individual's ability to conduct business or to work in private security.

Finding sweeping general solutions is not easy. However, we made a number of specific policy and statutory suggestions that may alleviate some of these problems and, at the same time, improve the effectiveness of private security. We suggest, for example, state licensing of owners and executives of *all* types of private contract security businesses and directors of in-house security operations as well. We suggested state

registration of all types of private security employees. (The distinction between licensing and registration is that the former implies that qualifications and standards be met *before* lawfully engaging in an activity whereas the latter implies that such standards can be met after.) Licensing and registration statutes should provide for mandatory job-specific training (including firearms training where necessary), mandatory bonding or insurance requirements, certain job-specific personnel background and experience standards, and clear (and sometimes mandatory) provisions for sanctions such as fines, imprisonment, and suspension or revocation of licenses or registrations for certain violations or activities. To a large extent, the effectiveness of our proposed licensing and regulation scheme will depend on the regulatory agencies' access to information about problems, as well as their resources. Their current knowledge is fragmentary at best; our suggestions include ways of improving such access.

Other suggestions concern tort remedies, the applicability of constitutional standards, and specific statutory provisions. They include ways of controlling access to public police records; provisions giving individuals more control over the extent to which information concerning them is collected; ways of determining whether information obtained by private police in an illegal search of property should be admissible as evidence in either civil or criminal judicial or administrative proceedings; regulations concerning the wearing of uniforms and use of badges (which can lead to impersonation of, and confusion with, public police); criteria for determining the applicability of constitutional standards to activities of private police such as arrest, detention, search, interrogation, and the use of force.

Finally, we suggest that the federal government should consider funding a research center that would continuously evaluate the costs and effectiveness of private security personnel and equipment.

Now, I would like to focus on just two of these areas; namely, access to police records and gathering information from third parties--and explain our recommendations in some detail.

Access to Public Police Records

As I indicated previously, there is a legitimate need for private employers (including private security employers) to check on the background and criminal record of an applicant for or an employee in a sensitive job. Often the job of background screening is given to an in-house or contract private security force. But can these needs be balanced with safeguards and sanctions against the social costs of inaccurate, incomplete, misleading, or false information, and of invasion of privacy? Which types of records should not be disclosed, and which scheme of regulation will control access in a desirable manner? In our opinion, the preferred approach regarding access to criminal records would embody the following:

- Conviction records should be used as grounds for denying registration or licensing (i.e., employment); but only convictions for offenses specified by statute or administrative rule as grounds for denying employment should be reported from public law enforcement files.
- For records of arrests made without probable cause and where the charges are later dropped or where acquittal follows states, by statute, should create a state board with authority to

determine what records can be reported for what jobs and for how long a period after date of arrest. Restrictions on the dissemination of such records should be very stringent.

Under the scheme outlined above, when an individual applies for a job or license classified as sensitive by the state board:

1. He would be shown a list of the kinds of arrests and convictions that would be disclosed if he waived confidentiality in applying for that job; thus, he would see, for example, that an arrest without probable cause or a juvenile arrest for a minor crime would not be reported.
2. He would be asked to sign a waiver of confidentiality.
3. If he signed the waiver and had an unreportable record, the employer would receive a notice from the state bureau to the effect that the applicant has no reportable record. The same notice would be sent out regardless of whether the applicant had no record or had an unreportable record.
4. All requests for reports would have to be processed through the state bureau; local police departments would be forbidden to release any records directly to the private security industry.
5. Private security firms or employers would be allowed access to the system only for record checks on their own prospective employees.

- For such statutes to be effective, they should call for imposition of substantial criminal penalties on public employees who reveal confidential arrest and conviction records, and should provide civil remedies for injunctive relief and damages to the aggrieved individual.

These features would provide adequate safeguards. We do not know the cost of such a system. However, only a fraction of the system's cost would be attributable to the private-security sector, since the list of sensitive jobs would surely embrace many other sectors (for example, the financial). Another unknown is the degree to which criminal and civil sanctions will succeed in closing off access of private security agencies to local police files. Because the ties between the two are often cordial and because many ex-public policemen work in private security, closing access may be difficult. Still other unknowns are the bureaucratic practicality and political acceptability of this proposal.

The rationale supporting these suggestions for controlling access to police records is lengthy; but basically, the intent is to protect applicants from inaccurate or misleading reports and from invasion of privacy, and, by giving prior notice as to which criminal records are reportable, to permit the applicant to forego the potential benefits of the job or license if he does not want his criminal record revealed.

Gathering Information on Private Citizens from Third Parties

There are two broad approaches to designing regulations for the gathering of information on private citizens from third parties. The first is simply to prohibit by law the collecting and reporting of certain information. This approach is not preferred because it involves a great many difficult value judgments for which there is little empirical guidance

and because direct prohibitions pose a substantial enforcement problem. The second approach adopts a more *laissez-faire* attitude but provides incentives for private security firms to act in the way society wants them to and facilitates the ability of an individual to control the extent to which information concerning him is collected. This is our preferred approach.

Toward this end, we suggest that the suggestions be enacted in a state statute:

- Before a background investigation is commenced on an individual who has applied for some benefit (e.g., life insurance, credit, or employment), it should be required that the individual be fully informed of the nature of the report and the scope of the investigation. In this way, he will be enabled to make an informed choice on whether to forego the benefit and avoid the investigation. Clearly, such requirements cannot apply to certain types of investigations, such as those involving crimes, marital conflicts, business conflicts, or industrial espionage, because confidentiality is necessary to the success of the investigation. The requirements would apply to credit insurance, and preemployment investigations--those activities which constitute the bulk of private investigative work.
- Whenever an investigative consumer report is reported to the requesting firm, it should be required that the individual being reported on be sent a copy and the name and address of the requestor. Thus, he would be immediately informed of the investigation and could act to refute any information he considered to be misleading or inaccurate. The incremental

monetary costs of this suggestion would not be excessive since all that is involved is duplicating the report and mailing one copy to the individual.

- To facilitate recovery for injuries resulting from inaccuracies in, or false, reporting, investigative agencies should be held strictly liable. Currently, the act requires that willful or negligent violations be proven before recoveries can be effected. Under our suggestion, intent or negligence would be irrelevant; the reporting agency would be held liable if it made an erroneous report and if the mistake caused injury. A possible effect of a strict liability provision might be that reporting agencies and the users of such reports (insurance companies, credit granters, and employers in general) may determine that some types of information are so inherently unreliable and of such marginal value that it is not worth the risk of loss to collect them. The rationale for holding manufacturers strictly liable for defects in their products applies as well to private security agencies and their investigators.
- To prevent invasions of privacy which result when information about an individual is obtained from his friends and acquaintances under false pretenses, investigators making an investigative consumer report should be required to identify themselves, their firm, and the purpose of their inquiry. Or, as an alternative, the investigator should have to produce a letter from the individual being investigated saying that he is aware of the investigation and authorizes it. Again, such requirements would not apply to certain types of investigations where confidentiality is required, such as criminal, marital, or industrial-espionage investigations.

The need to alleviate injury resulting from misleading or incorrect reports is particularly urgent in view of the trend toward computerized storage and retrieval of the files maintained by credit bureaus and other reporting agencies. When subjective data gathered from third-person interviews are forced into the rigid format required for computerized storage and access, the potential for inaccuracy is greatly increased. The potential for harm is also increased as it becomes possible to gain access to central computer files from anywhere in the nation, and as the diffusion of computer terminals to users makes control of unauthorized access more difficult.

THE MODEL PRIVATE SECURITY LICENSING AND REGULATORY STATUTE

The Private Security Advisory Council (PSAC), set up by the U.S. Dept. of Justice's LEAA, recently drafted a model statute in response to concern about the quality of services of private security forces and the present lack of minimum selection and training standards. However, there are major deficiencies in the model statute, including:

- Private investigators and private investigative businesses are not regulated.
- Unarmed nonuniformed private security personnel are not regulated.
- Watchmen are not regulated.
- Proprietary (in-house) security managers are not regulated even though some of their personnel are regulated.
- Training is not required for uniformed unarmed private security personnel, and preemployment screening is less adequate than it is for armed personnel.

- Training required for armed private security personnel is extremely brief compared to what we feel it should be.
- The amount of insurance required is low in relation to liability award levels experienced recently.

However, this model private security licensing and regulatory statute has certain desirable provisions usually not present in existing state law:

- Some mandatory training for armed private security officers.
- Regulation of certain in-house proprietary security personnel as well as contract security personnel.

END