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COMPUTERIZED CRIMINAL HISTORY RECORDS

HEARING

BEFORE THE

SUBCOMMITTEE ON

PATENTS, COPYRIGHTS AND TRADEMARKS

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

NINETY-EIGHTH CONGRESS

FIRST SESSION

ON

SYSTEM FOR INTERSTATE EXCHANGE OF CRIMINAL HISTORY RECORDS

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COMPUTERIZED CRIMINAL HISTORY RECORDS

THURSDAY, MAY 12, 1983

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
SUBCOMMITTEE ON PATENTS, COPYRIGHTS AND TRADEMARKS,
Washington, D.C.

The subcommittee met, pursuant to notice, at 2:28 p.m., in room 226, Dirksen Senate Office Building, Senator Charles McC. Mathias, Jr. (chairman of the subcommittee) presiding.

Staff present: Steve Metalitz, staff director; Lynn Brashears, Maura Whelan, and Margel Lindzey, legislative aides; and Pam Batstone, chief clerk.

OPENING STATEMENT OF SENATOR CHARLES McC. MATHIAS, JR.

Senator MATHIAS. The committee will come to order.

The Chair would like the record to show that, for the first time in history, we are beginning a few minutes ahead of time.

We are marking today the opening of what may be a new chapter in a book that is already too long for some readers. This is the first hearing in the jurisdiction of this subcommittee over privacy issues, and so we are going to revisit a topic which in years past has consumed a great deal of energy in both Houses of the Congress.

Today we are going to examine the national system for interstate exchange of criminal history records, a system in which the advances of information technology have played a role and which promises great benefits to the administration of justice. But I think at the same time it poses some serious pctential threats to the privacy interests of Americans.

It has become a cliche that to make good decisions you have to have good facts, good information. The criminal justice systems of the Federal Government and of the States are in the business of making decisions. Every day the people who make these systems work—the police, the prosecutors, the defense attorneys, the judges, the jurors, the probation and parole officers, the correction officials—have to make decisions of the utmost importance to their fellow citizens. They have to decide who is going to be questioned about a crime. They are going to have to decide whose house will be searched, or who is going to be arrested. They have to decide who is going to be prosecuted, on what charges will the prosecution be based, and how to defend against those charges. They have to decide who is going to be summoned to testify, who is going to be cautioned to be silent. They have to decide who is going to be incarcerated, for how long they are going to be locked up, under what

conditions they will be locked up, and whose liberty will be restricted in other ways.

And, of course, in a few cases they have to decide who is going to live and who is going to die. So to make these decisions, and to make them wisely, people need as much relevant information as they can get, and one kind of information that has proved useful is criminal history.

Does a suspect have a prior record, has a witness been convicted of a crime of moral turpitude, has the defendant been arrested while on bail, is the prisoner awaiting sentence an habitual offender?

As the criminal justice systems strain under the weight of more and more investigations, and more and more prosecutions, the need for more timely access to accurate criminal history information increases. For example, in many States across the country the traditional discretion of judges in imposing sentences has been restricted by legislation. Many of these statutes mandate prior criminal records as the most important determinant of the sentence to be imposed. These controls, of course, simply do not work in the absence of complete, timely and accurate criminal history information.

So the development of an effective national criminal history records system ought to lead to better decisionmaking in the criminal justice system. Interstate exchange of criminal history information is important in this era in which the citizenry, the criminal and the law abiding equally, has become highly mobile. Dramatic breakthroughs in computer and communication technology will soon make this essential information instantly accessible to decisionmakers on all levels.

I suppose the reason we are here is because there is a dark side to these bright prospects, and part of it can be summed up in another cliche: garbage in, garbage out. Inaccurate, incomplete, outdated criminal history information is not going to help police or prosecutors or the others in making good decisions. Instead, it may lead them to bad decisions.

When an arrest record is not promptly supplemented with accurate disposition data, a defendant may wrongfully be kept incarcerated before a trial. When the conviction which appears on the computerized rap sheet is ambiguously phrased, an inappropriate sentence may be imposed. And, of course, unlike errors that can crop up in other computerized information systems, the bugs in a criminal history records system can tarnish a citizen's reputation, and limit his employment, or cost him his liberty.

There was a dramatic example of this in the case of Wilbert Lee Evans, who was sentenced to death in Virginia, in the year 1981. The jury specifically relied on evidence of Evans' criminal record in North Carolina in imposing the capital punishment. Last month, the Commonwealth of Virginia, in all its might, majesty, dominion, and power, asked the judge to vacate the death sentence because it was admitted that the records of the defendant's prior convictions were seriously misleading, and otherwise defective. In fact, of the seven previous conviction records introduced into evidence at Evans' trial, only two were properly admissible. So to Evans, the

cost of these computer bugs was 2 years of his life spent on death row.

Inaccurate information is not the only sand that gets into the gears. Irrelevant information can be just as harmful, but the bounds of relevance may be rather broad when criminal history information is needed for a criminal justice purpose.

But when the decision involves employment, or licensure in a field unrelated to the justice system, the question of access becomes much more difficult, much more thorny. Licensing boards and potential employers, of course, would like to know about every contact an applicant has had with the criminal justice system. But you have to balance that desire against the applicant's privacy rights.

And since it is estimated that about 30 percent of the total work force, some 36 million Americans, have had some acquaintance with the criminal justice system, some kind of a record, the issue of noncriminal justice access has to be resolved if the national criminal history information system is to function effectively.

So today we will hear testimony on the quality, that is, the accuracy and completeness of the records which may now be exchanged through interstate computer links. We will also look at the question of who should have access, and the measures taken to secure them against improper access.

We will examine whether the standards currently applicable to record content and quality and security ought to be toughened, and what role the Federal Government is now playing with regard to these concerns, and whether that role needs to be changed.

[The prepared statement of Senator Mathias follows:]

PREPARED STATEMENT OF SENATOR CHARLES MCC. MATHIAS, JR.

Today's hearing marks the opening of a new chapter in what has already proved to be a rather long book. As we convene the first hearing in the jurisdiction of this subcommittee over privacy issues, we revisit a topic which has, in years past, consumed a great deal of energy in both Houses of Congress. Today we will examine the national system for interstate exchange of criminal history records. This system, which the advances of information technology have made possible, promises great benefits to the administration of justice. But at the same time, it poses serious potential threats to the privacy interests of Americans.

It is a cliche that good decisionmaking requires good information. The criminal justice systems of the Federal Government, and of the States, are in the business of making decisions. Every day the people who make these systems work—police, prosecutors, defense attorneys, judges, jurors, probation and parole officers, correctional officials—must make decisions of the utmost importance to their fellow citizens. They must decide who will be questioned about a crime, whose home will be searched, who will be arrested. They must decide who will be prosecuted, on what charges, and how those charges will be defended against. They must decide who will be summoned to testify, who will be cautioned to silence. They must decide who will be incarcerated, and for how long, and under what conditions, and whose liberty will be restricted in other ways. Sometimes, they must even decide who will live and who will die.

To make these decisions wisely, these people need as much relevant information as they can get. One kind of information that is most useful is criminal history. Does the suspect have a prior record? Has the witness been convicted of a crime of moral turpitude? Has the defendant been arrested while out on bail? Is the prisoner awaiting sentence an habitual offender?

As our criminal justice systems strain under the weight of more and more investigations and prosecutions, the need for timely access to accurate history information increases. For example, in many States across the country, the traditional discretion of judges in imposing sentences has been restricted by legislation. Many of these statutes mandate prior criminal record as the most important determinant of the

sentence to be imposed. These controls can't possibly work without complete, timely and accurate criminal history information.

The development of an effective national criminal history records system should lead to better decisionmaking in our criminal justice systems. Interstate exchange of criminal history information is particularly important in this era in which the citizenry, criminal and law-abiding alike, has become highly mobile. Dramatic breakthroughs in computer and communication technology will soon make this essential information instantly accessible to decisionmakers on all levels.

But there is a dark side to these bright prospects. Part of it can be summed up in another contemporary cliche: garbabe in, garbage out. Inaccurate, incomplete, and outdated criminal history information will not help police, prosecutors and the others to make good decisions; instead, it will help them to make bad ones. When an arrest record is not promptly supplemented with accurate disposition data, a defendant may wrongfully be kept incarcerated before trial. When the conviction which appears on the computerized rap sheet is ambiguously stated, an inappropriate sentence may be imposed. Unlike errors that may crop up in some other computerized information systems, the "bugs" in a criminal history records system may tarnish a citizen's reputation, limit his employment potential or even cost him his liberty.

A dramatic example of the dangers of inaccurate criminal history information received wide publicity recently. Wilbert Lee Evans was sentenced to death in Virginia in 1981. The jury specifically relied on evidence of Evans' past criminal record in North Carolina in imposing capital punishment. Last month, the State of Virginia asked the judge to vacate the death sentence. The State admitted that the records of the defendant's prior convictions were "seriously misleading and/or otherwise defective." In fact, of the seven previous conviction records introduced into evidence at Evan's trial, only two were properly admissible. The cost of the bugs in this system: 2 years on death row.

Providing inaccurate information is not the only way to throw sand in the gears of decisionmaking. Irrelevant information can be just as harmful. The bounds of relevance may be rather broad when criminal history information is needed for a criminal justice purpose; but when the decision involves employment or licensure in a field unrelated to the justice system, the question of access becomes much thornier. Certainly licensing boards and potential employers would like to know about every contact an applicant has had with the criminal justice system; but this desire must be balanced against the applicant's privacy rights. Since it's estimated that some 30 percent of the total labor force—about 36 million Americans in all—have some sort of criminal record, the issue of noncriminal justice access must be resolved if the national criminal history information system is to function effectively.

Today we will hear testimony on the quality—that is, the accuracy and completeness—of the records which may now be exchanged through interstate computer links. We will also look at the question of who would have access to these records, and at the measures taken to secure them against improper access. We will examine whether the standards currently applicable to record content, quality, and security ought to be toughened. And we will consider what role the Federal Government is now playing with regard to these concerns, and ask whether, and how, that role needs to change.

We will hear these questions addressed from a variety of perspectives; by representatives of the Federal Bureau of Investigation, by State law enforcement officers, and by scholarly experts in the field of information law and policy. We will begin with a presentation from the Office of Technology Assessment, based on an in-depth study of the issues raised by the development and operation of a national criminal history records system.

These are not new issues. But they are more pressing now than they have been at any time since Congress first examined them, almost two decades ago. My own interest is also of long standing. In 1970, my second year of service in the United States Senate, I proposed that the Law Enforcement Assistance Administration recommend legislation to "promote the integrity and accuracy" of federally funded criminal justice information systems, and to protect the constitutional rights of persons affected. That proposal was enacted into law. Over the next several years, numerous bills, both small and sweeping, were thrown into the hopper; their merits and shortcomings were hotly debated; extensive hearings were held in both Houses. These legislative efforts bore little fruit.

For the last several years, the agencies and the States have had to tackle by themselves the challenges posed by new information technologies, and by new demands on criminal justice systems, with scarcely a hint of guidance from the national legislature. In the words of one of the leading experts in the field, Congress "seemed to have run out of gas."

I hope that our hearing today will at least help to turn the key in the ignition. While the Congress has been coasting, other hands have been on the wheel, and have negotiated some hairpin turns. Our goal today is to get a better idea of the road we've traveled in recent years, and of the crossroads ahead of us. As with many other issues within the subcommittee's jurisdiction, the questions we take up today are made more complex by the lightning pace of technological advances. Our responsibility is to understand that technology, and to guide it in the path which will best serve the interests of all our citizens.

Senator MATHIAS. Without further ado, we will call upon our first panel, the Office of Technology Assessment, Mr. John Andelin, Assistant Director, Science, Information, and Natural Resources Division; and Mr. Fred B. Wood, project director.

Gentlemen?

STATEMENTS OF JOHN ANDELIN, ASSISTANT DIRECTOR FOR SCIENCE, INFORMATION, AND NATURAL RESOURCES, AND FRED B. WOOD, PROJECT DIRECTOR, OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS

Mr. ANDELIN. Thank you, Mr. Chairman. We are pleased to appear before you this afternoon on behalf of OTA.

With me this afternoon are several staff from our program on communication and information technologies, including Dr. Fred Wood, on my right, who served as the project director for our study on alternatives for a national computerized criminal history system. Following my opening remarks, Dr. Wood will present the key findings and conclusions of the OTA study.

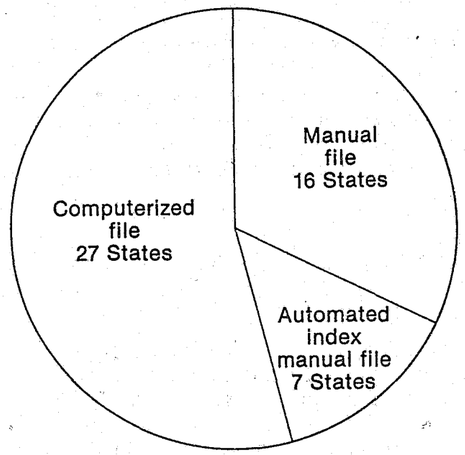
As you know, OTA's mandate is to assess both the beneficial and adverse consequences of technological change, and to identify and analyze relevant policy options for consideration by the Congress. Computer and communication technology is perhaps the most pervasive and dynamic technology in America today. As a result, several committees of Congress, including the Senate Committee on the Judiciary, asked OTA to assess the impacts of this technology on privacy, security, constitutional rights, and other areas of concern. In response to these requests, OTA has completed in-depth studies of electronic mail, educational technology, and—the subject of this hearing—computerized criminal history systems.

The computer and communication revolution is here to stay in the area of criminal history records. Since 1970, when the Congress first took legislative action on this subject, 27 States and the Federal Bureau of Investigation (FBI) established computerized criminal history files. These 27 States account for about 85 percent of criminal record activity, as shown in chart No. 1. Over 20 million Federal and State criminal history records are now computerized, as indicated in chart No. 2. There are now two nationwide networks for the electronic exchange of criminal history information—the National Law Enforcement Telecommunications System (NLETS) and the National Crime Information Center (NCIC) Communication System.

[Charts 1 and 2 follow:]

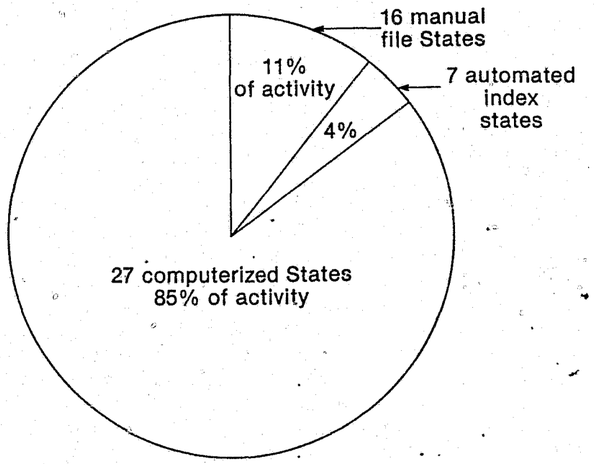
Chart 1.

State Criminal History Files, 1982



SOURCE: Office of Technology Assessment.

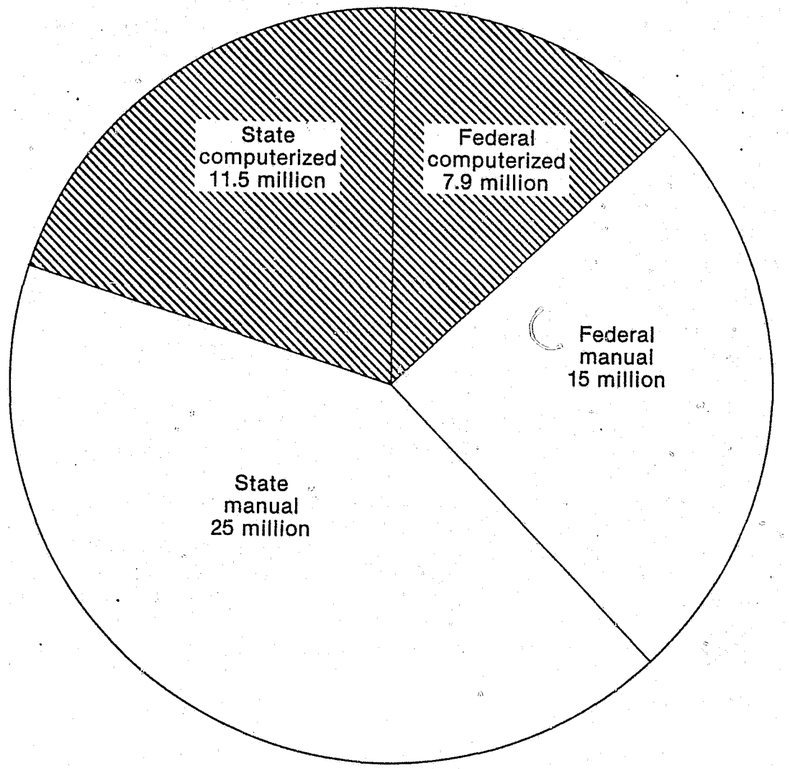
State Criminal History Record Activity, 1981



SOURCE: Office of Technology Assessment, FBI, based on percentage of 1981 criminal fingerprint card submissions to FBI.

Chart 2.

Federal and State Criminal History Records, 1981



SOURCE: Office of Technology Assessment, FBI.

Mr. ANDELIN. Despite this already extensive use of computer technology, on a national level, the sum is less than the parts. We as a nation do not yet have a system that can consistently exchange complete and timely criminal history information. Why is this? It is not the technology, which permits a variety of technical alternatives.

The crux of the matter is that any effective national computerized system impacts issues that have been debated, sometimes heatedly, for 13 or more years. These issues involve Federal versus State responsibility for record collection, maintenance, update, and dissemination; the need to protect the public safety versus the need to protect the constitutional rights of those accused but not convicted and to encourage rehabilitation of ex-offenders; the need to involve all sectors of the criminal justice community in assuming responsibility for record quality; the requirement to protect the privacy and security of criminal history records; and the need to insure that any national system is used solely for lawful and authorized purposes.

These have proven to be difficult issues over the years, yet the OTA study has concluded that resolution of these issues is possible. However, we also found that resolution of these issues will probably require congressional action, and most properly so, since so many vital interests are at stake.

Again, on behalf of OTA, thank you for the opportunity to appear. Dr. Wood will now highlight the major areas that, in OTA's judgment, warrant the careful consideration of your subcommittee.

Senator MATHIAS. Thank you very much, Mr. Andelin.

Mr. WOOD. Thank you, Mr. Chairman.

With your permission, I will enter my written statement into the record, along with a copy of the summary of the OTA report.

Senator MATHIAS. The full statement will be included in the record.

[The following was received for the record:]

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STATEMENT OF FRED B. WOOD, PROJECT DIRECTOR

OFFICE OF TECHNOLOGY ASSESSMENT

UNITED STATES CONGRESS

Mr. Chairman and Members:

Thank you very much for the opportunity to appear before your subcommittee this afternoon. I had the privilege of serving as project director for OTA's study on the prospects for a national computerized criminal history (CCH) system and implications for the privacy and security of criminal history records.

Introduction

Mr. Chairman, the timing of this hearing is most appropriate. We as a Nation are approaching a critical juncture in the development of our national criminal history system. In the coming months, key decisions will be made that can shape the future of this system for years to come.

The Congress of the United States has a long-standing, established interest in the privacy and security of criminal history records and the issues associated with development of a national CCH system. As early as 1970, Mr. Chairman, the Congress enacted your amendment to the Omnibus Crime Control and Safe Streets Act that required the Administration to submit legislation on this subject. For the next 4 years, several bills were debated in both the Senate and the House. While none of these bills was passed, the Congress did enact an Omnibus Crime Control amendment in 1973. This amendment emphasized the need for complete and current records and the protection of privacy and security, and led to promulgation by the U. S. Department of Justice (DOJ) of regulations that became final in 1976.

Since that time, one or both branches of Congress have been involved almost every year in a long string of related issues, for example over the role of the Federal Bureau of Investigation (FBI) and the States in a national system. But no further substantive legislation has been enacted. Indeed, with the exception of FBI charter legislation and certain DOJ appropriation authorization bills, it has been 8 years since Congress last considered

legislation on criminal history record systems. I commend the Subcommittee for initiating a much needed review and oversight of this subject, including whether, at long last, a legislative resolution of outstanding issues can be achieved.

Mr. Chairman, as you know, OTA has conducted a comprehensive study entitled An Assessment of Alternatives for a National Computerized Criminal History System. I would like to bring the results of the study into focus for the Subcommittee. With the Chairman's permission, I will enter my full statement and a summary of the OTA report into the record and highlight the major points.

Current National System

First of all, OTA concluded that the United States already has a national criminal history record system. Criminal history records have been in use in various forms for over 150 years. Today, the FBI and 49 of the 50 states have their own centralized record repositories, frequently known as identification bureaus or crime information centers. The FBI and 27 States have CCH files, and another 7 States have an automated name index to their manual files.

OTA has estimated that about 60 million criminal history records are maintained in Federal and State repositories, with roughly one-third of the records computerized and two-thirds manual. About 40 percent of the 60 million total records are maintained by the FBI, and the other 60 percent by the States. We estimated that the number of annual Federal and State criminal history record disseminations is roughly 20 million, split about evenly between FBI and State disseminations. These records are disseminated largely via the U. S. Mail, the National Law Enforcement Telecommunications System (NLETS), and the National Crime Information Center (NCIC) communication lines.

Thus, the issue is not whether to have a national system. We already have one. The issue is whether the current system is working well enough.

OTA concluded that the current system, while showing significant improvement over the last decade, is still not fully meeting legitimate criminal justice needs, nor is it fully protecting privacy and individual rights.

Unmet criminal justice needs reflect the reality that the current system is incapable of consistently providing complete and accurate information on a timely basis. This is particularly true, for example, in pretrial release and bail decisions, which usually must be made within 36 to 72 hours. Even where more decision time is available, the administrative effort and delays of compiling complete and accurate records can at present be excessive.

An OTA review of dozens of research studies conducted over the last 20 years documented that criminal history information is used in the following criminal justice areas:

- o criminal investigations
- o career crime programs
- o arrest decisions where probable cause is ambiguous
- o post-arrest charging decisions
- o arraignment: setting pretrial release conditions and bail requirements
- o trial: plea bargaining, establishing (or challenging) credibility of witnesses and defendants
- o presentence investigation reports
- o sentencing (especially for repeat offenders)
- o correctional assignments
- o parole decisions.

In addition, OTA validated the findings of previous studies that a

significant percentage of serious offenders (roughly 30 percent) have arrest records in more than one State. And about 75 percent of the so-called multi-state offenders have arrests in at least one non-contiguous State. These findings confirm the need for the interstate exchange of criminal history information.

Criminal history records are also used for a variety of purposes other than criminal justice--primarily for employment and licensing decisions and security checks. OTA found substantial non-criminal justice use--about one half of all FBI Identification Division use in fiscal year 1981 and about one-sixth of State criminal record repository use in 1982 on a national average (45 out of 50 States responding).

While non-criminal justice needs are less time-sensitive than criminal justice needs, both are sensitive to record quality. OTA found significant record quality problems at both the Federal and State levels, and, while record quality has improved since 1970, record quality levels are far short of the standards established under Federal regulations. I will return to record quality in a moment.

Alternatives for a National CCH System

For the last decade or more, several alternatives for using computer and communication technology to develop a national CCH system have been heavily debated. The alternatives considered include:

- national full record repository
- single-state/multi-state concept
- national index concept
- national ask-the-network concept
- regional systems.

The leading candidate at the present time is the Interstate

Identification Index (known as the Triple-I or III for short). From an operational standpoint, the III is intended to: -

- determine whether a specific individual has a prior criminal record elsewhere;
- obtain key criminal history information, if a prior record exists;
- utilize positive (fingerprint derived) identification;
- facilitate record exchange among State and Federal files; and
- phase out FBI "rap sheets" and criminal history records except for Federal offenders, with State offender records to be maintained only by States.

Based on the results of the OTA study, the benefits and problems associated with the III are likely to be the following.

The III has the potential to speed up record exchange and reduce record duplication when fully implemented. However, the III will not necessarily improve record quality. The III will increase State control over record dissemination, but may complicate efforts to protect privacy and security of criminal history records (due to wide variation in State record quality and in State laws on dissemination). In addition, the III will result in nonuniform record content (e.g., due to variations in State statutes on sealing and purging and on record content) unless nationwide standards are established.

Full implementation of III depends on the cooperation and capability of State criminal history record repositories and identification bureaus, as well as the FBI, and will necessitate various improvements in State capabilities. Further, the III will accentuate the need for broader participation of affected parties in policy oversight, and will require cooperation of law enforcement, judicial, and correctional sectors at Federal, State, and local levels in providing complete, timely, and accurate information.

Basis for Congressional Action

Given these potential benefits and problems with the III, OTA concluded that Congressional action is needed. The basis for such action and for Federal jurisdiction in general, regardless of the specifics, is six-fold.

First, the III or any other viable national CCH system must be truly national in scope. The system by definition will most likely involve, at a minimum, Federal criminal justice agencies, Federal non-criminal justice agencies authorized by Federal statute or executive order, State/local criminal justice agencies, and State/local non-criminal justice agencies authorized by State statute and approved by the U. S. Attorney General.

Second, the III or any other viable system is, by definition, interstate in nature. This is exemplified by interstate criminal mobility (30% of serious offenders with multi-State records) and the need for interstate communication (in making III inquiries and responses). As such, the III is subject to the interstate commerce clause of the U. S. Constitution.

Third, the III or other system will require future Federal funding. This will include, at a minimum, a portion of the annual FBI appropriation for FBI fingerprint identification ($69 million in FY 84), a one-time FBI appropriation for the Automated Identification System known as AIDS ($40 million in FY 84), and a portion of the annual FBI appropriation for NCIC ($10 million for FY 84). In addition, Federal funding would include a portion of any funds that may be authorized and appropriated under the Justice Assistance Act of 1983 (S. 53, H. R. 1338), if enacted, for development of justice information systems.

Fourth, the III will affect implementation of Federal criminal record statutes and Executive Orders such as P. L. 89-554 (criminal justice), P. L. 92-544 (State/local non-criminal justice), P. L. 94-29 (securities industry), P. L. 96-132 (message switching), E. O. 10450 (civilian applicants or employees), E. O. 12065 (military applicants or employees), and E. O. 10865 (military contractor employees).

Fifth, III will affect implementation of Federal privacy and security statutes and regulations including P. L. 93-83 and 28 CFR 20. Past applicability of Federal regulations was based on the fact that all States

received Law Enforcement Assistance Administration (LEAA) funding which directly or indirectly supported criminal justice information systems. Future applicability could be based on the fact that all States participating in III will be partially subsidized through Federal support of Ident, AIDS, and NCIC.

Sixth, the III will affect protection of constitutional rights. The courts have found a relationship between record quality and 4th (privacy), 5th (due process), 6th (counsel), 8th (bail), and 14th amendment (equal protection) rights; and between non-criminal justice dissemination and 1st (association), 4th (privacy), 5th (due process), and 14th amendment (equal protection) rights, and also civil rights under the Civil Rights Act of 1964.

Within this context, I will now briefly discuss specific action alternatives in several of the major issue areas of concern to the Subcommittee.

Record Quality

Mr. Chairman, the quality of criminal history records, that is, their completeness and accuracy, has been of concern to the Congress for at least 13 years. Record quality is critical to both the efficiency of criminal justice decisions and the protection of individual privacy, due process, and equal protection of the laws. The results of the OTA study show that, while improvement has been made, there are still significant record quality problems in urgent need of attention. The major problem is incomplete disposition reporting.

OTA found that, as of 1982, only 13 of 47 States are in substantial compliance with the Title 28 requirements for 90-day disposition reporting. Thirteen States indicated to OTA that less than 50 percent of dispositions are reported. The nationwide average is 65 percent. This means that over one-third of the dispositions that have occurred are not being reported to the State repositories. It is not surprising, then, that OTA found that about 30 percent of FBI criminal history records disseminated in 1979 were missing dispositions, since the FBI at present must depend on information submitted by State and local agencies.

A second part of the problem is that neither the FBI nor the majority of

States conduct record quality audits, defined as comparing the content of the Federal or State record with the information in local police, prosecutor, or court records for a specific case. The FBI and 35 of 46 States, as of 1982, do conduct quality checks on information once received. But only 13 States have ever conducted a record quality audit.

The OTA study results suggest that the Subcommittee should seriously consider statutory disposition reporting and record quality control requirements for the III. For example, this could take the form of mandatory 30- or 60-day disposition reporting and annual record quality audits.

Non-criminal Justice Access

Another priority issue area is access to criminal history records for purposes other than criminal justice. The OTA study documented that such requests constitute a significant percentage of total requests made to State and Federal repositories, close to 20 percent on a Statewide average, with 7 States (out of 45) indicating over 40 percent non-criminal justice requests. There are at least three concerns. First, non-criminal justice requests can overburden record repositories to the point where efficiency is compromised. Second, there is great disparity among and between State and Federal laws and regulations as to who should have non-criminal justice access, to which information, and for what purposes. These differences make it difficult to ensure equal protection under the law in the absence of national standards. And third, given that an estimated 36 million Americans have criminal history records, the impact of record dissemination on individual privacy and employment prospects could be substantial.

At present, non-criminal justice use of the III is prohibited. However, the III will soon have to be opened up for such use. Otherwise, the FBI would be required to maintain a separate record file, and this would defeat one of the main objectives of the III.

Thus, non-criminal justice access is a second area that strongly warrants Subcommittee attention. The OTA study identified several alternatives, such as limiting non-criminal justice dissemination to disposition records only, or, at a minimum, requiring a check on arrest information prior to

dissemination to ensure that the arrest is still active and that a disposition has not occurred. Another alternative is to prohibit non-criminal justice dissemination of arrest information over 6 months (instead of 1 year) old unless the arrest is still active. A recent National Institute of Justice-sponsored study in 14 jurisdictions found that the average time from arrest to final disposition was 6.2 months, and thus 6 months may be more appropriate than the one year standard used in current Federal regulations. In addition, OTA concluded that Congress needs to resolve the current conflicts between State and Federal laws on non-criminal justice dissemination.

Policy Control

Policy control is a third priority issue area. Because about 95 percent of records exchanged by the III are likely to be State records, the States have generally sought a major role in policy control. And, since most State criminal history record repositories are maintained by law enforcement agencies, law enforcement also has sought a major role.

However, the collection of complete, timely, and accurate information depends on cooperation of judicial, prosecutorial, and correctional sectors as well as law enforcement. These sectors seek a larger role. And finally, because the use of criminal history records is so pervasive (by an estimated 64,000 criminal justice agencies and several tens of thousands of non-criminal justice agencies), other affected interests (e.g., defense attorneys, criminal justice planners, civil liberties and minority groups) have sought a role.

At present, policy control is vested in the U. S. Attorney General, who has delegated this reponsibility to the FBI Director. The FBI Director is advised by the NCIC Advisory Policy Board (APB). The APB currently includes 20 elected members (as of September 1982 all are law enforcement; 9 from State police, 7 from State identification bureaus, 4 from city or county police departments) and 6 appointed members (2 each from the judicial, prosecutorial, and correctional sectors). There is also a pending proposal to add 4 appointed members (International Association of Chiefs of Police, National Sheriffs Association, National District Attorneys' Association, and American Correctional Association).

The OTA study concluded that a broadened and strengthened policy advisory mechanism is needed. Even with the proposed additions, the NCIC Advisory Policy Board would not include sufficient representation from the judicial and other non-law enforcement sectors of the criminal justice community, and has no representation from the non-criminal justice sector.

The OTA study identified several options for Congressional consideration, ranging from broadening the existing APB or vesting III policy oversight in the Bureau of Justice Statistics Advisory Board, to establishing a consortium of States or an independent policy control board.

Other Issue Areas

Mr. Chairman, several other issue areas discussed in the OTA report warrant Subcommittee attention, but I will only briefly discuss them here:

Record Content: The size and content of the index will affect III utility to criminal justice decisionmakers, manageability and cost to recordkeepers, and impact on privacy and individual rights. Opinions and laws vary widely on appropriate record content. What types of arrests should be included in the III? Under what circumstances should juvenile offenders be included? When should III entries be purged (e.g., after a set period of time for arrests not leading to conviction)?

Audit: User audit mechanisms are intended to help assure Congress and the public that III (or any other national CCH system) is operating within the boundaries of law and regulation, identify any system problems and possible solutions, and monitor system performance and progress toward meeting statutory and/or regulatory purposes. What types of user audits should be conducted of Federal and State repositories? This is a question of who is using the system and the records and for what purposes, as contrasted with audits of record quality previously discussed. Should the General Accounting Office or some other entity be given statutory audit authority?

Message Switching: Unless all criminal history records were stored in

one place, a national CCH system requires some electronic means to transfer records (and inquiries for records) among the various Federal and State repositories and agencies. The transfer or switching of messages from one State to another through the NCIC computer has been a point of concern. The controversy has centered on balancing technical requirements for an efficient and effective system versus concerns over preemption of States' rights and the potential for monitoring and surveillance. Should the FBI be provided authority to message switch record inquiries but not the records themselves, as proposed under the III?

Funding: Throughout the 1970's, it was Federal Government policy to support the development of State CCH systems and the implementation of Federal regulations. Given this prior investment, the total cost requirements are now much less than they would otherwise be. However, current fiscal constraints generally make it difficult for States to fund necessary additional improvements, and are likely to delay participation of some States in III. Should the Federal Government provide funding to States for development of key capabilities necessary for III participation?

Intelligence Use: Systems like III or NCIC have potential application for intelligence or surveillance purposes. The general concern focuses on use of NCIC for collecting and disseminating information on persons not formally charged with a crime or not having a criminal record, and for tracking or surveillance of individuals based on subjective criteria. On the other hand, various proposals for intelligence or surveillance use of NCIC, while controversial, are believed by some to have significant merit. Should the Congress establish a statutory charter for NCIC or otherwise develop statutory limitations on or controls over intelligence/surveillance use of NCIC or III?

Closing Comment: Need for Legislation

Mr. Chairman, the Congress has an excellent opportunity to resolve the more than decade long debate over a national computerized criminal history

system. Over the next 6 to 9 months, decisions will need to be made on the III, and possibly on many of the other issues central to the debate. If one thing is clear as a result of the OTA study, that is that many of the concerned parties look to the Federal Government and to the Congress for setting the overall direction and framework for a national system, even though the States and other parties desire a major role in the development, operation, and control of the system.

At present, Federal criminal history files and the interstate exchange of criminal history records operate under the general authority of 28 USC 534, 42 USC 3789g(a), and 28 CFR 20, and are subject to a large number of State and Federal statutes and Federal executive orders regarding criminal record content and dissemination. NCIC also has a detailed set of operating procedures. However, there is no specific statute covering the III.

Various advocates believe that legislation is needed to provide a clear mandate for III or any other national CCH system, establish a strong national commitment in terms of political and financial support, specify policy control and management responsibilities, and set appropriate standards for record quality, content, and use. Alternatives to legislation include user agreements among the 50 States and the FBI, an interstate compact, a uniform State criminal history privacy act adopted by the States, and/or development of regulations by the Bureau of Justice Statistics or some other DOJ agency.

The OTA study concluded that legislation appears to be the most appropriate vehicle for guiding the full implementation of a national CCH system such as the III in a way that will enhance the efficiency and effectiveness of the criminal justice process, protect privacy and constitutional rights, and properly balance the roles and responsibilities of the Federal and State Governments.

I thank you for the opportunity to appear today and would be happy to answer any questions that you may have, either this afternoon or for the record.

END