

**MINUTES OF THE  
SENATE COMMITTEE ON JUDICIARY  
Seventy-fourth Session  
March 6, 2007**

The Senate Committee on Judiciary was called to order by Chair Mark E. Amodei at 9:09 a.m. on Tuesday, March 6, 2007, in Room 2149 of the Legislative Building, Carson City, Nevada. The meeting was videoconferenced to the Grant Sawyer State Office Building, Room 4412E, 555 East Washington Avenue, Las Vegas, Nevada. [Exhibit A](#) is the Agenda. [Exhibit B](#) is the Attendance Roster. All exhibits are available and on file in the Research Library of the Legislative Counsel Bureau.

**COMMITTEE MEMBERS PRESENT:**

Senator Mark E. Amodei, Chair  
Senator Maurice E. Washington, Vice Chair  
Senator Mike McGinness  
Senator Dennis Nolan  
Senator Valerie Wiener  
Senator Terry Care  
Senator Steven A. Horsford

**GUEST LEGISLATORS PRESENT:**

Senator Warren B. Hardy II, Clark County Senatorial District No. 12

**STAFF MEMBERS PRESENT:**

Linda J. Eissmann, Committee Policy Analyst  
Brad Wilkinson, Chief Deputy Legislative Counsel  
Lora Nay, Committee Secretary

**OTHERS PRESENT:**

Dan Brubaker, U.S. Postal Inspector, U.S. Postal Inspection Service  
Troy Dillard, Administrator, Compliance Enforcement Division, Department of Motor Vehicles  
Lee B. Rowland, American Civil Liberties Union of Nevada  
John L. Wagner, The Burke Consortium  
Janine Hansen, Nevada Eagle Forum  
Lynn Chapman, Nevada Families  
Jason M. Frierson, Clark County  
Cotter C. Conway, Washoe County Public Defender  
Gina Spaulding, Executive Director, State Board of Architecture, Interior Design and Residential Design

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Ira J. Waldman, Advisor, National Conference of Commissioners on Uniform  
State Laws  
William R. Uffelman, Nevada Bankers Association

CHAIR AMODEI:

We will start with Senate Bill (S.B.) 155.

**SENATE BILL 155**: Makes various changes to provisions pertaining to the  
prosecution of identity theft. (BDR 14-1008)

SENATOR WARREN B. HARDY II (Clark County Senatorial District No. 12):

With me today is Daniel Brubaker who is a team leader with the United States  
Postal Inspection Service, Los Angeles Division. Mr. Brubaker contacted me  
over the interim. The Postal Inspection Service needs additional police powers to  
effectively do their job in the area of identity theft. We also realized Nevada's  
laws could be improved.

DAN BRUBAKER (U.S. Postal Inspector, U.S. Postal Inspection Service):

My office is in Las Vegas. The packet I have provided ([Exhibit C](#), original is on  
file in the Research Library) contains my written testimony entitled "Overview."

The Las Vegas Valley has the highest incidents of volume-mail theft in the  
country. Volume-mail theft is when five or more postal customers have mail  
stolen. Those thieves involved in mail theft are nearly always involved in identity  
theft, usually to obtain money for a drug habit.

United States Postal Inspectors do not have state peace officer status. When  
local law enforcement agrees to assist with state-level mail theft cases,  
two agencies are performing the same function. By granting limited peace  
officer powers to Postal Inspectors, agencies would be able to use these  
resources for other local issues.

To make an arrest, we request a state warrant. When we get the warrant and  
find our suspect, we cannot arrest him, so we ask a local police officer to  
transport our suspect to jail. If the suspect is in Henderson, we notify  
Henderson law enforcement to pick up the individual, but they cannot transport  
him to Las Vegas. We then have to ask Las Vegas Metropolitan Police  
Department to meet the Henderson officers at the jurisdiction line for a prisoner

transfer. Three agencies are impacted to arrest one suspect. With this bill, we would be able to arrest our suspect and transport him to jail.

The U.S. Postal Inspection Services is designed to handle these types of investigations. When I say “designed,” our agency is set up to handle the large amount of victims and witnesses. We have a world-renowned laboratory with handwriting experts who can take a handwriting exemplar and compare it to items used in identity theft—like counterfeit checks or credit card applications—and make a forensic match. We have an entire polygraph division and national resources to assist at no cost to Nevada taxpayers.

I was reading a newspaper article yesterday entitled, “White supremacists gaining clout beyond Southern California” ([Exhibit D](#)). It is about a group of white supremacists in Orange County and southern California aligned with the Aryan Brotherhood. The third paragraph says, “Police point to a recent ‘hit list’ targeting five officers and a gang prosecutor as a sign of how brazen Public Enemy has become.” Public Enemy No. 1 is the name of the gang.

The gist of the article says Public Enemy No. 1 is moving out of southern California into Arizona, Nevada and Idaho. This is the kind of thing we have to deal with in the near future. It is best to address this now and take a proactive approach. If we have stronger identity theft laws, we hope to keep those people out of Nevada because they believe our laws are less strict.

The third column of [Exhibit D](#), second paragraph, says:

Public Enemy is now heavily involved in identity theft. Booth said it has gone from swiping personal information from mailboxes and trash bins to stealing entire credit profiles with the help of girlfriends and wives who take jobs at banks, mortgage companies and motor vehicle departments.

I was recruited from Savannah, Georgia, by the United States Postal Inspection Service (USPIS). I spent five years in Greensboro, North Carolina, where crimes were different from those in the Southwest. After North Carolina, I spent two years in Phoenix. Last April, I took over the USPIS team in Las Vegas.

The mail theft and identity theft problem in Nevada is unbelievable. I have included additional statistics to show where we are. To put this problem into

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perspective, there were five volume-mail attacks for the entire State of Louisiana over the two prior fiscal years, which would be 2004 and 2005. In Las Vegas, we average around a 150 per month.

SENATOR CARE:

Can you describe who a postal inspector is to the Committee?

MR. BRUBAKER:

The USPI is a federal law enforcement agency. We carry weapons, execute search warrants and investigate crimes involving U.S. mail. I work external crimes which includes mail theft and identity theft. I have also worked on bomb investigations, drug investigations and anything that goes through the mail like child exploitation and child pornography. The USPI has an entire division working internal crimes such as postal employees who steal mail and things out of the mail stream and fraudulent workers' compensation claims. You probably have not heard about a postal inspector because we have always prided ourselves on flying under the radar. We are called the silent service, but we have a good reputation in the law enforcement community.

SENATOR CARE:

Your testimony says in fiscal year 2006, postal inspectors in Las Vegas made 69 arrests for mail theft which directly or indirectly relate to identity theft. Of those 69 arrests, 21 were federally charged and 48 charged in state court. That sounds as though you had probable cause for 69 arrests, but when you got it all sorted out, 21 were charged federally. Is that when you had to call the Henderson authorities?

MR. BRUBAKER:

Of the 69 arrests, 21 met the federal threshold. We were unable to prosecute due to the U.S. Attorney guidelines. The U.S. Attorney's Office is not set up to handle the magnitude we have. They had to initiate thresholds for \$100,000 in loss. Last year, we could only find 21 that met the threshold, the other 48 needed to go through state court.

SENATOR CARE:

What do you do? Do you hold the suspect until you can switch courts?

MR. BRUBAKER:

No, we cannot do that.

SENATOR CARE:

What happened to the 48 cases between the time you realized they would not become federal cases and you got them charged in state court?

MR. BRUBAKER:

When we catch them in the act, we interview them and then we have to let them go if they do not meet the federal threshold. We call the U.S. Attorney's Office and ask if they will accept federal prosecution for this case. If they decline, we take them to state court. Since we do not have police powers, we have to release the individual back into the street where they may reoffend, steal more mail and commit more identity thefts. This is common knowledge in the criminal community; they never carry more than five or six pieces of mail because they know when we catch them, we cannot put them in jail that day. When we request a warrant two months down the road, we have to find these people. They disappear, and as long as they do not get pulled over for speeding, they remain out on the street with an active warrant.

SENATOR CARE:

The bill in section 1, subsection 2 reads, "When a person arrested has committed a felony or gross misdemeanor ... ." Is that what you want or would you be satisfied with the powers of arrest where it dealt with identity theft?

MR. BRUBAKER:

Ideally, I would like to execute arrests and search warrants pertaining to offenses involving the U.S. mail including mail theft and identity theft.

CHAIR AMODEI:

How do USPIS inspectors operate in other states?

MR. BRUBAKER:

When I was in North Carolina, I did not have state peace officer status. We did not have the amount of mail theft experienced in Nevada. Arizona allows us peace officer status, and we were successful locating and prosecuting offenders.

CHAIR AMODEI:

Tell me about your training. I am asking in the context of the magic word in Nevada, "POST certified," Peace Officers' Standards and Training. Section 1 of the bill says, "A postal inspector of the United States Postal Inspection

Service.” How does your training equate with a Nevada POST-certified law enforcement officer?

MR. BRUBAKER:

We definitely meet or exceed Nevada’s POST certification standards. We attend a four-month academy in Washington, D.C. From there, we have on-the-job training for six months and go through different disciplines. We carry firearms, learn about the law and have continuing certifications in firearms, officer survival and defensive tactics.

CHAIR AMODEI:

What kind of situation arises when the person arrested has committed a felony or gross misdemeanor not in your presence?

MR. BRUBAKER:

We may get a call at two in the morning after a patrolman pulls a car over and finds a garbage bag full of mail. We are going to investigate this. My agency goes through the mail, determines witnesses and victims and then notifies them. A felony was committed, not necessarily in our presence, but we would want to act on it.

CHAIR AMODEI:

Section 1, subsection 3 says, “has reasonable cause for believing the person arrested to have committed it.” I wonder what the difference is between those two. If you get called and there is a sack of mail, that is reasonable cause because you are not supposed to possess 80 pieces of mail—none of it yours. I want to have a comparison with Arizona’s statutes before our next work session. If there are other states with something similar, I want them included. Your objective sounds good, but I want details of what other people are doing and how this compares with the parameters in which Nevada peace officers operate. Is there such a thing as reciprocity with federally trained officers?

MR. BRUBAKER:

There is precedence. The Drug Enforcement Administration (DEA), United States Secret Service, Federal Bureau of Investigation (FBI) and Bureau of Indian Affairs (BIA) have limited state powers.

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SENATOR MCGINNESS:

You said the postal inspectors in Las Vegas made 69 arrests in 2006. How would this bill expand your abilities or give more people authority? Is the problem bigger than the 69 arrests you made?

MR. BRUBAKER:

We would be able to accomplish our job in a more efficient manner. We would not be chasing our tail to figure out a way to get somebody transported across town to jail. We would be able to identify the suspects, pick them up and take them to jail.

SENATOR MCGINNESS:

Who made these 69 arrests? Were they postal inspectors like you?

MR. BRUBAKER:

Yes, sir. I have eight people on my team in Las Vegas. Five are directly assigned to mail theft and identity theft. I have a general analyst who analyzes trends and helps us digest information into a product so we can execute search warrants and related actions. I have another inspector who works on nothing but security, designing a better mousetrap so postal boxes are not easy to break into. Overall, six of the eight inspectors are working with mail theft and identity theft.

CHAIR AMODEI:

You indicated, according to the U.S. Attorney's prosecution guidelines, that unless somebody has committed a six-figure potential crime, they are not federally prosecuted.

MR. BRUBAKER:

We try to prosecute on a case-by-case basis. I take a case to the deputy chief who will make a determination. If the case meets interstate transportation guidelines or other criteria, it may be accepted.

CHAIR AMODEI:

What about somebody whose theft is in the \$75,000 range?

MR. BRUBAKER:

We would prosecute a \$75,000 loss through state court.

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SENATOR HORSFORD:

Where did the standard for five or more persons and \$3,000 or more in loss or injury come from?

MR. BRUBAKER:

I did not write the identity theft portion of this bill.

BRAD WILKINSON (Chief Deputy Legislative Counsel):  
It came from Arizona law.

SENATOR HORSFORD:

I am concerned. What happens if there are only three people or the loss is only \$2,000? Who is responsible to convict those individuals? Identity theft happens at all levels, and we need to be protecting people at all of those levels.

MR. WILKINSON:

This bill provides an enhanced penalty in section 2. Fewer than five persons or less than \$3,000 would be a Category C felony, but if there are five or more persons or \$3,000 or more involved, then the offense is bumped up to a Category B felony.

SENATOR HORSFORD:

Who would prosecute under the Category B felony level?

MR. WILKINSON:

This is state statute so it would be a district attorney.

SENATOR HORSFORD:

Could we follow this up with our Congressional Delegation? It alarms me that the threshold is \$100,000 for a federal offense, and they are not looking to prosecute below that amount. Is there some way we can bring this to the attention of the Congressional Delegation?

CHAIR AMODEI:

Ms. Eissmann will draft a letter for the Committee to endorse to our federal Delegation expressing concern based on testimony on this bill. We could follow up individually.



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SENATOR WIENER:

Also, include information about how Nevada ranks, our growth and the level of problem we have which will reinforce the message from the Committee.

MR. BRUBAKER:

It is not unusual for the U.S. Attorney's Office to have a prosecutive threshold. When I was in Charlotte, the threshold was \$120,000.

CHAIR AMODEI:

I understand. But it is also a fact in which we need to deal.

TROY DILLARD (Administrator, Compliance Enforcement Division, Department of Motor Vehicles):

We support S.B. 155, particularly regarding enhanced penalty levels. As Mr. Brubaker indicated earlier, one criminal enterprise is to find individuals in jobs that may not pay well and obtain information through them. This bill increases those penalties to a Category B felony if the offense is over \$3,000 in damages or five identities.

Regarding the forthcoming Real ID card, criminal enterprises will seek methods to obtain a compliant Real ID card through staff at the Department of Motor Vehicles (DMV). This bill goes a long way to deter those who think that a \$3,000 to \$5,000 street price for a Real ID compliant card would be a good idea with a potential of 20 years and a \$100,000 fine hanging over their heads.

SENATOR NOLAN:

Is there public notification or posting? I agree with you, but there has to be public education any would-be wrongdoers would understand what they are up against if they break this law.

MR. DILLARD:

I can assure you that will happen if the Legislature passes this bill. Within the DMV, we will make it clear to staff what the potential penalty is if they choose to engage in that type of misconduct.

LEE B. ROWLAND (American Civil Liberties Union of Nevada):

I am the staff attorney at the American Civil Liberties Union of Nevada (ACLU). I am here to oppose the section of the bill that increases the powers of the federal postal inspection officers to arrest without a warrant. The erosion of due

process for something inherently a white collar crime—where there is no possibility, or little possibility, of violence while one is waiting for a warrant—is inappropriate. Getting a warrant is not difficult on either the federal or state level. Officers have the ability to phone in for a warrant and wait while they obtain one to ensure no further crimes take place.

We have no objection to giving postal inspection officers the powers of arrest or the power to access the state warrant system. As the postal inspector pointed out, some of those seem like needless inefficiencies in the system. However, giving federal officials carte blanche to arrest anyone under section 2 who has committed any felony or gross misdemeanor with no requirement to probable cause, reasonable suspicion or anything else would clearly violate the Fourth Amendment of the *Constitution of the United States of America*.

This inclusion in section 2 also occurs in *Nevada Revised Statute* (NRS) 171, and the same powers are granted to other federal officials such as DEA and BIA agents. This is a good opportunity to revisit NRS 171 and excise this language. We are concerned the power this language grants postal inspection officers is so vast it literally gives them power to arrest anyone for any crime and dump them into the state's jail system with no requirement of probable cause or reasonable suspicion. That is clearly a red flag for us. We believe that fundamentally undermines the civil liberties of due process and the Fourth Amendment, and we oppose the bill as written.

CHAIR AMODEI:

Though you have other concerns, is your focus on section 1, subsection 2 of S.B. 155?

Ms. ROWLAND:

Yes, we oppose expanding the lack of due process to a white collar crime. Warrantless searches and arrests should occur only when there is a possibility of violence or specific harm to the public good. We oppose writing into law that arrests can be made without a warrant. The language in subsection 2 is troublesome, and that same language occurs throughout NRS 171. If an officer made an arrest under subsection 2 that did not otherwise qualify under subsections 1, 3 or 4, you have a serious Fourth Amendment problem. It is not appropriate to write unnecessary sections into the law that carry constitutional problems.

SENATOR CARE:

Case annotations under NRS 171 and NRS 171.1245 confer these same powers upon the FBI. I found a case annotation that went to abuse of process. Can you relate to this Committee any experience where courts have weighed the issue of lack of probable cause without a warrant involving the FBI, DEA and others?

MS. ROWLAND:

No, I did not do independent research under NRS 171. General Fourth Amendment jurisprudence says if you are making a warrantless arrest, there must be clear, concise and provable objective facts leading to reasonable cause that a crime is being committed or there is danger to the public good. Law enforcement officers cannot run around arresting people without limitations. The ACLU can provide documents about jurisprudence on the limitations of warrantless arrests.

JOHN L. WAGNER (The Burke Consortium):

We are opposed to S.B. 155. We do not condone identity theft and would like to put a stop to it. It is already a crime to break into mailboxes. If someone is caught, a citizen's arrest could be implemented. I question why five or more; why not three or more or two or more? Why only \$3,000 or more? A federal officer should have some arrest powers as part of the federal laws. I have a snide remark I will read to you, "Why do we want people who cannot deliver the mail reliably to make arrests?"

JANINE HANSEN (Nevada Eagle Forum):

I am the state president of Nevada Eagle Forum and it pains me to oppose S.B. 155. We supported identity theft laws and have worked with Senator Wiener on her identity theft bills. We testified for Assemblywoman Barbara E. Buckley. In 2001, we brought forth the first identity theft bill. Assembly Joint Resolution No. 9 of the 71st Session passed unanimously by the Senate and by a large majority of the Assembly.

The problem and issue of identity theft has been created by the federal government. Assembly Joint Resolution No. 9 of the 71st Session addressed that. The federal government refuses to do anything about protecting our Social Security numbers. They have imposed legislation on states requiring Social Security numbers on over 130 licenses easily available to the public. In 2000, the Inspector General of the Social Security Administration talked about the problems they experienced because Social Security Numbers were not

protected. This problem is created by the federal government, and now we have a federal agency telling us how to resolve it.

Another issue created by the federal government is they have not protected our borders. We have hundreds and thousands of people coming across our borders from Central and South America who are involved in criminal gangs and nothing is done.

The federal government has also created a problem because their threshold of \$100,000 is so high they cannot prosecute those who need to be prosecuted. Assembly Joint Resolution No. 9 of the 71st Session says:

The collection of such personal information is increasing, and the opportunity for the Federal Government to abuse that information violates the fundamental right of law-abiding citizens to be free from unreasonable government intrusion, surveillance and monitoring.

A remedy with Congress has been ignored. Nevada's *Constitution* mirrors the federal *Constitution*. The Fourth Amendment says, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause ... " In this piece of legislation, they do not need probable cause. The standard is lowered to reasonable cause. I do not trust the federal government. From my own experience, I have concerns about people being arrested without good cause.

In section 1, subsection 2, there is no definition as to what felony or gross misdemeanor has been committed and in the phrase "although not in his presence," how does he know if they committed the crime? There is no protection for individual people. The well-meaning person from the post office said the reason they wanted this is because they wanted more efficiency. Justice never comes efficiently. The reason we have constitutional restraints is to restrain government from violating our rights. The objective of law enforcement is not necessarily efficiency. That is a frustrating issue for law enforcement, but it is important to protect the rights of the people.

I support increasing penalties; I support other measures in S.B. 155 which improve our identity theft laws. We need to do all we can. But this issue,

created by the federal government, should not be solved by giving postal inspectors power not monitored by the state and where we have no protection of the federal or state constitution.

This issue is important because identity theft is the No. 1 crime, and many of us have suffered. The answer is not to destroy our state and federal constitutional standards by allowing them to arrest people for any felony or gross misdemeanor and then only with reasonable cause. You should send a statement to the federal government asking them to lower the threshold and do something to protect Social Security numbers. You can do something in our own state by taking Social Security numbers off those over-130 licenses and refusing to comply with federal laws which injure our people. You have state sovereignty; although we have become used to kowtowing to the federal government, we do not stand up against it. I encourage you to protect us from identity theft and violations of our constitutional rights by the federal government.

LYNN CHAPMAN (Nevada Families):

Most of my concerns have been addressed already. I am concerned about police powers. I know other bills have come before our state Legislature. It is scary worrying about the post office, parking attendants and animal control having police powers. As far as penalties, the bigger the penalty, the better.

JASON M. FRIERSON (Clark County):

Clark County does not oppose S.B. 155. We do not oppose targeting identity thieves and dealing with that problem. We do not oppose the five-or-more-persons standard as set forth in this bill. We concur with concerns regarding warrantless arrests and lowering the standard for probable cause down to reasonable cause. Another concern is the financial loss or injury in the amount of \$3,000 or more. If someone has the identifying information of five or more persons, more than likely, if there are damages, there are going to be damages exceeding that amount. Also, we already have a theft statute setting the standard at \$2,500 which is a Category B felony.

COTTER C. CONWAY (Washoe County Public Defender):

My opposition to this bill relates solely to the requested presumption in section 2, subsection 5 concerning proof of possession of personal identifying information of five or more persons permits a rebuttable inference. I am aware that presumptions and inferences are permitted under the *Constitution*. I fear

them in cases where this deals with one of the elements of the offense. The prosecution should be obligated to prove all elements beyond a reasonable doubt and not be allowed a presumption. A presumption allows a judge to instruct the jury to presume the fact which lessens the burden the state has of proving a case beyond a reasonable doubt. A prosecutor prosecuting something with five or more persons identifying information should be able to make a clear argument the accused person has intent to violate statutes and is in the process of violating the statute. Taking away their obligation and burden of proof is not appropriate, and we ask those provisions concerning presumption be stricken from this bill.

SENATOR HARDY:

I want to thank the Committee for taking time to review this issue. I am sorry the opposition came. I did not have an opportunity to discuss S.B. 155 with them. The bill has been out all session and nobody approached me with concerns. I regret we wasted the Committee's time. We probably could have resolved these issues before we brought the bill forward. I must object to characterization of our postal inspectors as mail carriers who cannot get it right. I find that offensive. These are men and women who every day put their lives on the line just like other law enforcement personnel. I will work with those who oppose the bill to come up with some resolution.

CHAIR AMODEI:

Mr. Wilkinson, we want you to look at other states that have done this. We want to see what we have done with similar federal agencies. The lady from the ACLU brings up a point with respect to section 1, subsection 2 that we should look at in terms of a potential tune-up. We need a letter to the U.S. Attorney. Mr. Brubaker, if you want, get together with the issue Mr. Frierson talked about regarding consistency between the two statutes for thresholds, which is something we ought to meld before we have an opportunity to vote up or down.

SENATOR CARE:

It appears as though the Legislature crafted the language "reasonable cause" as opposed to "probable cause" in 1985. I find it interesting that after 22 years, there are no case annotations on the distinction between those terms anywhere in NRS. I do not know if there is no difference or if nobody pursued the issue.

MR. WILKINSON:

The standard set forth in section 1, subsections 1 through 5 is identical word for word to our existing statutes for all peace officers and federal officers in Nevada. The bill is not lowering the standard or setting a different standard. "Reasonable cause" has the same meaning as "probable cause." We are not talking about reasonable suspicion, which is a lower standard.

CHAIR AMODEI:

If we need to tune-up that issue while we are here, even in a global sense, it is fine. I am having a hard time understanding how section 1, subsection 2 would apply and figuring out when an arrested person has committed a felony, although not in their presence. If it is not being used, maybe we ought to get rid of it, not only here but everywhere since Mr. Brubaker was looking for parity with how other Nevada law enforcement officials work.

We will close the hearing on S.B. 155 and open the hearing on Assembly Bill (A.B.) 26.

**ASSEMBLY BILL 26**: Revises certain provisions governing the filing of certain organizing documents for corporations and other business entities. (BDR 7-549)

Gina Spaulding (Executive Director, State Board of Architecture, Interior Design and Residential Design):

I am here in support of A.B. 26 and submit my written testimony ([Exhibit E](#)).

During the Assembly Committee on Judiciary hearing, there was a question regarding whether this bill would affect exempted interior design companies or interior decorating companies or persons. It does not affect the exempted interior design companies or individuals. It only affects anyone wanting to use or provide the services of an architect, registered interior designer or residential designer.

SENATOR WASHINGTON MOVED TO DO PASS A.B. 26.

SENATOR MCGINNESS SECONDED THE MOTION.

THE MOTION CARRIED. (SENATORS CARE AND WIENER ABSTAINED FROM THE VOTE. SENATOR NOLAN WAS ABSENT FOR THE VOTE.)

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CHAIR AMODEI:

We will now open the hearing on S.B. 168.

**SENATE BILL 168**: Enacts the Uniform Assignment of Rents Act. (BDR 9-972)

SENATOR TERRY CARE (Clark County Senatorial District No. 7):

Senate Bill 168 is the Uniform Assignment of Rents Act. It is one of our newer acts and was a two-year work in progress. I sat on the National Conference of Commissioners on Uniform State Laws (NCCUSL) drafting committee as did Ira J. Waldman who is the American Bar Association Advisor to the Drafting Committee.

Nevada has the lien theory of mortgages. That means when you buy a house, you take title. The lender does not have title but takes a security interest in the house. If you default, the lender has certain remedies. Sometimes a landlord defaults on rental property that could be commercial, industrial or residential. When that happens, what recourse does the lender have? People within the premises have an obligation to pay rent under whatever lease they happen to be in and depending on the kind of property. Usually, there is a separate agreement on the assignment of rents. This bill is intended to clarify issues that can arise with those circumstances; what is the tenant to do, how are the proceeds applied and what kind of notice must be given the tenant? The Assignment of Rents Act establishes a security interest of the creditor in the rents and that security is interest distinct from the premises.

Senate Bill 168 has a provision for perfection or recordation of the assignment. It has rights of the tenants to notice and addresses the issue of priorities with other creditors who think they have an interest in the rents. The bill has 39 sections. I have given an overview. I will not go through section by section. I mentioned recordation, perfection, enforcement by appointment of a receiver if necessary and enforcement of notification to the assignor. We are using the terms "assignee" and "assignor" when you have an assignment, the enforcement of notification to a tenant. The bill contains a simple notice form on page 9. It is not required, just a suggested form. The effect of the



enforcement, the applications of the proceeds of the rents and a few other provisions I have mentioned, including the priority when you have competing creditors. Mr. Waldman is one of the top experts in this country on this subject. My pleasure would be to have any questions as to the sections in the bill be specifically directed to Mr. Waldman.

IRA J. WALDMAN (Advisor, National Conference of Commissioners on Uniform State Laws):

The members of the NCCUSL Drafting Committee on Assignment of Rents consisted of experts who represented borrowers, the assignors, lenders, the assignees and tenants. It also consisted of people who represented small property owners, small-time tenants and small-time lenders. We had a great mix of thoughts and ideas to deal with this historically vexing issue that has had a lot of wasteful litigation—particularly in the bankruptcy courts—trying to understand what is an assignment of rents, how you would enforce it and how you could perfect it, and what all that means, particularly in the context of a bankruptcy of a property owner.

I have practiced in this area for over 25 years, not just representing 1 side versus the other but also on behalf of lenders, borrowers and tenants. I have seen this issue from all sides. Around the country, the law in this area has been a total mess. Very few states have seen fit to enact legislation that could be followed and understood by the parties involved, by state court judges and by bankruptcy court judges. California was at the forefront and has had legislation in effect since 1996. They provided impetus for NCCUSL to promulgate a uniform act that could be enacted throughout the country. If Nevada enacts the proposed uniform act, you will have better legislation than the legislation in California. It does certain things in terms of congruity between Article 9 and the assignment of rents laws that California does not have. This is important when trying to deal with who is entitled to the actual cash paid by tenants.

WILLIAM R. UFFELMAN (Nevada Bankers Association):

We are in support of S.B. 168. Page 8, lines 17 through 19 have a very fair statement that is important. I would not want to see this language stripped from the bill. The security interest of the mortgage holder would be severely affected. If residential properties were taken out, that would clearly go to the heart of the matter, and we would be opposed to any change.

MR. WALDMAN:

We spent considerable time on the Drafting Committee discussing what to do about residential properties. What you see in the Act is the consensus of the participants. The ultimate decision was to provide for tenants—for whom the residence is their primary residence—the ability to make their own decision as to how to comply with a lender's notice and pay either their landlord or the lender. In either case, that will satisfy their rental obligation and they will not be in default. That is not the rule for commercial tenants. Commercial tenants must pay the lender when they get noticed. Residential tenants can get notices from lenders stating they are activating their assignment of rents and to pay them. Tenants do not know what to do and are at risk because they do not know if they should pay the lender or their landlord. This bill makes it clear they have an option and can pay either the lender or their landlord to satisfy their rental obligation.

CHAIR AMODEI:

We will close the hearing on S.B. 168.

SENATOR WIENER MOVED TO DO PASS S.B. 168.

SENATOR MCGINNESS SECONDED THE MOTION.

THE MOTION CARRIED. (SENATOR NOLAN WAS ABSENT FOR THE VOTE.)

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We will open the hearing on S.B. 177.

**SENATE BILL 177**: Enacts the Uniform Foreign-Country Money Judgments Recognition Act. (BDR 2-963)

SENATOR CARE:

This is the Foreign-Country Money Judgments Recognition Act. It is a mechanism for enforcement in this country of money judgments made in another country. If you get a judgment in Kansas, there are provisions already in statute for enforcing that judgment in Nevada and recognition of that judgment recognition is subject to determination under the Full Faith and Credit Clause of the *U.S. Constitution*.

Since there has been an increase in international trade, there is an increase in litigation between parties in all forms throughout the world. That is what this bill is intended to address. If there is a judgment in France or England and somebody needs to enforce it in this country, this is a way to get that done.

The first step under the bill is recognition of a foreign judgment. It has to meet certain statutory standards, and if it does, it will become recognized and may be enforced just as any judgment from another state. This only applies if the judgment is conclusive, final and enforceable in the foreign country. It excludes judgments that pertain to taxes, fines, criminal proceedings and domestic relations. Other international laws or legislation address domestic relations.

The burden is on the party seeking recognition of the judgment to demonstrate the factors I have just gone through. It contains standards for recognition. A tribunal or a court may not recognize where it can be shown that the tribunal from the foreign jurisdiction is, in fact, impartial and even afforded due process. The courts here may not recognize the judgment if it turns out the court in the foreign jurisdiction did not have personal and subject matter jurisdiction over the parties from the beginning.

There is discretion for courts in this country. They may deny recognition of a foreign judgment where it can be demonstrated the defendant did not receive notice or the claim is—and these are the operative words—“repugnant to American policy.” Case law says that probably means sense of security as to individual rights. Let me give an example. Libel laws in England are quite different from what they are in the U.S. It is more difficult to win a case for defamation in the United States than it is in England. If there is a valid judgment in England meeting all of the standards, we cannot say the judgment should not be recognized because their libel laws are different. That is not what I am talking about; I am talking about a sense of security to individual rights in another country that basically does not even exist. The judgment may have been fraudulently obtained by the prevailing party in the foreign country. It cannot conflict with another judgment. If the court here is convinced the original action in the foreign country should have been dismissed on an argument of forum non conveniens, then the court here does not have to recognize it. Forum non conveniens, means the witnesses did not have anything to do with where the underlying dispute should have been litigated, witnesses were located elsewhere or the incident occurred elsewhere. Also, if the court here has doubts as to the integrity of the rendering court—there are courts in other countries

that accept bribes—then the court here has discretion of denying recognition of that judgment. The burden is on the defendant to demonstrate any or all of the factors I have just relayed to the Committee.

If you want recognition of a foreign judgment in Nevada, you file that as a separate action or it may be filed in a pending action as a counterclaim, a cross-claim or an affirmative defense. Once the judgment is recognized by the courts, it becomes conclusive and enforceable in this state. There is also a statute of limitation provision saying you cannot have a judgment recognized from a foreign jurisdiction where the judgment was only good for a certain period. If that period has expired in the foreign country, then you cannot have it recognized here. If the rendering jurisdiction is silent on that issue, then you are given 15 years.

There is existing statute called the Enforcement of Foreign Judgments Act. That Act usually applies if you have a judgment from Kansas and you want to get it domesticated because the defendant lives in or owns a house in Clark County and you want to execute on the judgment in Clark County. That statute has been rarely used to enforce a judgment from a foreign country. I have done it with judgments from Canada and Japan. It can be a hassle and does not read as S.B. 177.

Under existing statute, you have to give what is known as an exemplified copy of the judgment. That term is not even defined and is difficult to explain to attorneys in Japan or Canada. Senate Bill 177 is a vehicle for recognizing judgments from outside of the United States. It puts the burden on the person who wants the judgment recognized to demonstrate to the court's satisfaction here that this is the sort of judgment that may be recognized. It puts the burden on the defendant to convince the court here that any one of the factors I related may exist and give the court reason not to recognize the judgment. The bill has taken into account jurisdictions where courts are perhaps not honest, on the take, where there has not been due process and some of the other situations I addressed.

SENATOR NOLAN:

Referring to page 3 in section 7, subsection 3, paragraph (c), you talked about the judgment or the cause of action on which the judgment is based as repugnant to the public policy of this state. That is subject to a judge's

interpretation based upon the defendant's ability to demonstrate that in fact. The judge determines whether the judgment is repugnant.

SENATOR CARE:

That is a discretionary call. The Drafting Committee cites one court case saying that means there is a violation of a sense of security to individual rights. This bill does not include foreign judgments pertaining to domestic matters. The court can conduct an examination of facts.

SENATOR NOLAN:

Is this a better threshold than currently exists on this issue?

SENATOR CARE:

If this bill passes, there are going to be cases where a defendant says a judgment against him is not right. He claims he has been sued for a cause of action that does not exist in this country, under the most bizarre circumstances, based upon local custom 10,000 miles away. The court can look at it and decide if the judgment offends American policy.

SENATOR WIENER:

You mentioned the 15-year statute of limitations. I thought a typical statute of limitation was seven years.

SENATOR CARE:

We may be talking about two different things. A judgment in Nevada is good for six years. Sometime in the remaining six months you can apply to renew the judgment. Senate Bill 177 refers to a judgment which expired in another country that cannot be enforced here. If the law is silent in another country, then it is 15 years here. That was a compromise of the Drafting Committee.

CHAIR AMODEI:

We will close the hearing on S.B. 177.

SENATOR NOLAN MOVED TO DO PASS S.B. 177.

SENATOR WIENER SECONDED THE MOTION.

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THE MOTION CARRIED UNANIMOUSLY.

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This meeting is adjourned at 10:31 a.m.

RESPECTFULLY SUBMITTED:

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Lora Nay,  
Committee Secretary

APPROVED BY:

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Senator Mark E. Amodei, Chair

DATE: \_\_\_\_\_