MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON JUDICIARY

Seventy-Fifth Session
May 1, 2009

The Committee on Judiciary was called to order by Chairman Bernie Anderson at 8:19 a.m. on Friday, May 1, 2009, in Room 3138 of the Legislative Building, 401 South Carson Street, Carson City, Nevada. The meeting was videoconferenced to Room 5100 of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. Copies of the minutes, including the Agenda (Exhibit A), the Attendance Roster (Exhibit B), and other substantive exhibits, are available and on file in the Research Library of the Legislative Counsel Bureau and on the Nevada Legislature's website at www.leg.state.nv.us/75th2009/committees/. In addition, copies of the audio record may be purchased through the Legislative Counsel Bureau's Publications Office (email: publications@lcb.state.nv.us; telephone: 775-684-6835).

COMMITTEE MEMBERS PRESENT:

Assemblyman Bernie Anderson, Chairman
Assemblyman Tick Segerblom, Vice Chair
Assemblyman John C. Carpenter
Assemblyman Ty Cobb
Assemblywoman Marilyn Dondero Loop
Assemblyman Don Gustavson
Assemblyman John Hambrick
Assemblyman William C. Horne
Assemblyman Ruben J. Kihuen
Assemblyman Mark A. Manendo
Assemblyman Richard McArthur
Assemblyman Harry Mortenson
Assemblyman James Ohrenschall
Assemblywoman Bonnie Parnell

COMMITTEE MEMBERS ABSENT:

None

GUEST LEGISLATORS PRESENT:

Senator Michael (Mike) A. Schneider, Clark County Senatorial District No. 11

STAFF MEMBERS PRESENT:

Jennifer M. Chisel, Committee Policy Analyst
Nicolas Anthony, Committee Counsel
Katherine Malzahn-Bass, Committee Manager
Sean McDonald, Committee Secretary
Steven Sisneros, Committee Assistant

OTHERS PRESENT:

Michael Bouse, Director, Building and Fire Safety, City of Henderson, Nevada
Robert Robey, Private Citizen, Las Vegas, Nevada
Jonathan Friedrich, Private Citizen, Las Vegas, Nevada
Kyle Davis, Policy Director, Nevada Conservation League, Las Vegas, Nevada
Keith Munro, First Assistant Attorney General, Office of the Attorney General
James Earl, Executive Director, Technological Crime Advisory Board, Office of the Attorney General
Jack Williams, Corporate Development Officer, eCommLink, Inc., Las Vegas, Nevada
Robert Sebby, Lieutenant, Las Vegas Metropolitan Police Department, Las Vegas, Nevada
Orrin Johnson, Washoe County Public Defender's Office, Reno, Nevada
Rebecca Gasca, Public Advocate, American Civil Liberties Union of Nevada, Reno, Nevada
Janine Hansen, President, Nevada Eagle Forum, Elko, Nevada

Chairman Anderson:
I open the hearing on Senate Bill 68 (1st Reprint).

Senate Bill 68 (1st Reprint): Establishes responsibility for the maintenance of certain security walls within certain common-interest communities. (BDR 10-281)

Senator Michael (Mike) A. Schneider, Clark County Senatorial District No. 11:
This bill has to do with perimeter walls in homeowners' associations. It was an issue that was brought to my attention probably about a year ago. I worked with the City of Henderson, and I would like them to present this bill.

Michael Bouse, Director of Building and Fire Safety, City of Henderson, Nevada:
Simply stated, S.B. 68 (R1) specifies that the security wall around a common-interest community is the responsibility of the homeowners' association for all new common-interest communities created after October 1, 2009. Part of my responsibilities in Henderson include enforcing property maintenance standards, including the maintenance of perimeter walls around subdivisions. In many of our subdivisions, those walls have begun to fall into substantial disrepair. Some of them are leaning and listing to the point that I have had to declare them to be dangerous and hazardous; we have had to block off portions of sidewalk to protect the public from these unsafe walls.

When I have set about to enforce our property and maintenance code in these common-interest communities, the first thing I have experienced is resistance from the homeowners who hold that those walls are not their responsibility. Those are the responsibility of the homeowners' association (HOA). When I then contact the HOAs, the HOAs say that their covenants, conditions, and restrictions (CC&Rs) are silent on that point. It is the responsibility of the homeowner. So I end up going back and forth between the parties trying to get some amicable agreement among them about who is responsible for the wall. It has created a considerable time delay for my department in trying to secure compliance. It is also costly for us to continue to go back and forth.

This bill would clearly establish in statute that the perimeter walls are the responsibility of the HOA for new common-interest communities created after October of this year, and that will facilitate quicker and more efficient compliance with substandard walls in the future.

Assemblyman Horne:
I think it is a no-brainer that it is the responsibility of the homeowners' association, because a homeowner cannot repair just one section of the wall when he lives in the center. What I do not understand is why we would only do it for future homeowners' associations and not the ones that currently exist in disrepair? That is why you are here: you have a problem today. We do not see the problem looking forward; we see a problem today. This bill does not fix the problem today.

Michael Bouse:
I agree. When we sat down to offer up the bill and talked to the interested parties, we were advised that the bill would have a greater chance of passing without opposition if it applied to future homeowners' associations. We clarified that intent through an amendment when the bill was heard by Senate Judiciary. I agree with your points, Assemblyman. The problem is there today as well.

Chairman Anderson:
How are we fixing the issue if the bill is only prospective? Because we are in relatively difficult economic times, there is not likely to be a great expansion of new building in any of our communities for a while. In Henderson, it seems to me that some of these walls may have been built by the state as sound walls: as part of new developments, it was required to put up a wall along a major roadway. I presume that is often the case in southern Nevada. Is that not the case?

Michael Bouse:
I believe it is the case, although that is a little outside of my area of expertise. The bill, as crafted, only deals with what is defined as security walls that go around residential subdivisions. We have not experienced any difficulty in terms of deterioration of sound walls. I do not know whether those walls are built on private property or public property. Our bill would address those walls that are built on private property.

Chairman Anderson:
So here we have a wall that is falling down on the public who might be utilizing the sidewalk, and yet we cannot reach back in time to get compliance to repair the safety hazard? We cannot say that the municipal code requires you to make sure that the trees do not tear up the sidewalk and the branches have to be kept at a height so as to not interfere with people walking on the sidewalk? Those have been standard issues forever. Now all of a sudden it is an issue to reach back in time? That is what I am trying to understand, how we are going to deal with this.

Michael Bouse:
For the problems we are having with the failing of existing walls, the walls around the common-interest communities adjacent to sidewalks, we are dealing with the individual property owners. Our current code provides that the individual property owners are responsible. So I end up working with from 15 to over 30 property owners in trying to secure compliance. Some people are responsive, some people are unresponsive; some people want to replace the masonry walls, other people do not want to replace them. So that is

problematic in terms of the existing walls. We are hearing from the HOAs and homeowners that the CC&Rs do not clearly define who is responsible for the maintenance of those walls. We are trying to get ahead of the curve with this legislation, get something done statutorily, so it is clear that from October forward it is the HOA's responsibility.

Chairman Anderson:
For new development, but not for existing developments?

Michael Bouse:
Yes, sir.

Senator Schneider:
In some of the older homeowners' associations in Henderson, the water from landscaping is undercutting those walls, and that is what is making them fall down. The water is obviously coming from the private property. Some of those walls have actually gone through construction-defect litigation, the homeowners' associations were awarded settlements, and they have...

Chairman Anderson:
Used the money for other things.

Senator Schneider:
...used the money for other things. And they have not repaired the wall. Now they are saying, even after they went through and were awarded a settlement from construction-defect litigation, the walls are not their responsibility. We think, "What do you mean? You just went into litigation and said that those are our walls." They are trying to avoid responsibility, and the city really wants to do something going forward so it does not get stuck again. If you want the bill to apply retroactively, I would sure take that back to Senate Judiciary.

Chairman Anderson:
So a homeowners' association generally has a color-painting code that defines acceptable color choices?

Senator Schneider:
It is a color palette, yes. So you cannot have a chartreuse house, it has to be within desert beige, for instance.

Chairman Anderson:
So if it is my wall, I can paint it whatever color I like because it does not belong to the homeowners' association?

Senator Schneider:
You have hit the problem on the head. If you painted a wall chartreuse on the backside of your wall, I am sure the homeowners' association would step in and say you cannot do that, but at the same time they will tell the City of Henderson that they are not responsible for those walls.

Assemblyman Manendo:
I think most HOAs have a reserve fund and are required to have some type of reserve. I have a hypothetical, and I do not know how this bill applies to it. As an example, if a portion of a wall is not in an HOA but is considered common area, how would this bill apply to something like that? We have a situation where a wall is coming down and no one is claiming responsibility for it. Would it still be the responsibility of the local jurisdiction? Would it be the homeowners' responsibility? But when you go to a homeowner, he will say that it is not his wall on his property, it is in a common area. But there is no homeowners' association.

Michael Bouse:
In that instance, we would look at the assessor's records to find out who owns the land. Somebody owns it. We have to determine who that is, and that would be the person responsible for the wall, if it is in fact on the common-interest side of that common-interest element.

Assemblyman Manendo:
I think that is the point. It is a common-interest area, but there is no homeowners' association. I wonder if that situation ever came up in Henderson?

Michael Bouse:
It has not yet occurred, but you have given us something to think about.

Chairman Anderson:
Mr. Manendo's point is well taken. I am thinking particularly of some sections in Reno that were built before the turn of the century [1900], they have large columns that are made of stone and are pretty well set, and they designate the neighborhood that you are moving into. In fact, quite frequently in communities there are pieces of brickwork and other landmarks that have to be maintained. If a group is maintaining it, it could be a little more difficult.

Assemblyman Manendo:
I think what you are saying is you would go look at the records and say that wall, if it was in an HOA, would be the HOA's responsibility already.

Michael Bouse:
Correct.

Assemblyman Manendo:
So then what is this bill doing? It sounds like you are saying that you want to make sure the HOAs are responsible, but what I am hearing from you that it is already the HOA's responsibility.

Michael Bouse:
In the case you are talking about, where the walls adjoin a common element, the HOA probably owns that parcel and that wall. This bill talks about the wall that goes around the perimeter of a subdivision and abuts private property, and therein lies the problem. We have not experienced a case where a HOA has refused to maintain a wall that was on land for which they were responsible. The problem is trying to get the HOA to maintain the wall that goes around the perimeter of a subdivision, which is typically at the rear of people's yards.

Assemblyman Hambrick:
I was made aware of another potential problem where there may be a wall that is entirely between two private parcels. Is there any way that the bill could address that? How do we make sure the owners know it is their problem and not the HOA's? There are some instances where units' owners share a wall that also looks to the public side.

Michael Bouse:
I want to make sure I understand your question. I think you are describing a situation where a wall is built on a common property line and there is private property on either side of the wall. In those cases we notify both property owners that it is a shared responsibility for them to maintain the wall. The bill addresses security walls that go around the entire perimeter of the subdivision as opposed to the walls that go along the property line between private properties.

Chairman Anderson:
Common walls fall into a different category, and when you get up to their backyards, they are usually covered by a different set of covenants. It is usually taken care of. I do not think the intent of the bill is to address an argument about who the fence belongs to. It seems to be an age-old one. I do not think we are going to solve that problem with this particular bill. The issue you are trying to address here is where public safety is at risk, where there is a public safety question, not whether it is your dog sneaking into my yard.

Michael Bouse:
That is correct.

Chairman Anderson:
Senator, did I understand you to say that you felt that it would or would not endanger the bill to make it retroactive?

Senator Schneider:
I said I would be perfectly willing to take an amendment back to Senate Judiciary. I feel comfortable that they would accept that amendment.

Chairman Anderson:
Mr. Anthony, a suggestion?

Nicolas Anthony, Committee Counsel:
I believe the bill as introduced applied retroactively. Certainly, if it is the Committee's intent to amend the bill, we can model some language and remove the effective date provision. I believe we would be deleting subsection 2 of section 1.

Robert Robey, Private Citizen, Las Vegas, Nevada:
I support the bill. It brings out an interesting point: the walls are not in the reserves. We have a lot of bills in front of Assembly Judiciary and Senate Judiciary talking about reserve specialists and what should be in the reserves. I am concerned because, had these walls been in the reserves, there would be no problem.

Chairman Anderson:
Mr. Robey points out that the question of reserves might be enhanced by making it a retroactive piece of legislation.

Jonathan Friedrich, Private Citizen, Las Vegas, Nevada:
It would seem that if a wall is about ready to collapse and would be falling into a public area, the local jurisdiction or municipality would have the right to protect the public by removing the wall and eliminating the hazard, and it would be up to the homeowner or homeowners' association to restore it. I would think the people who are backing up to a public thoroughfare would be motivated to restore the wall.

Chairman Anderson:
Often the tearing down and removal of the material is half the cost of construction. At public expense, we will be doing the work of the common-interest community. They are not contributing to the larger community by choosing to be in this special district. Is that not the purpose of joining a common-interest community, so you can maintain control over what is going on in that community in terms of colors, height of walls, where you can park, where you can play, where you can do whatever?

Jonathan Friedrich:
I know from my experience in the community I live in, it very specifically states in the CC&Rs that each homeowner is responsible for the maintenance of his walls. There is something called the maintenance code, which is part of the International Building Code. I do not know what communities in the state may have adopted that code, but in that maintenance code there is a requirement that the owner of the property shall maintain the improvements thereon. That is something that could be investigated.

Chairman Anderson:
So if the city tore it down, they would have to bill the individual homeowner for the destruction of the wall?

Jonathan Friedrich:
I would believe so, but it would have to be verified if the City of Henderson, or whichever municipality, has adopted the maintenance code and what the code requires. I am not that familiar with that section of the code.

Chairman Anderson:
I will close the hearing on S.B. 68 (R1).

Let us turn our attention to Senate Bill 216 (1st Reprint).

Senate Bill 216 (1st Reprint): Revises provisions regarding the addition of shutters in common-interest communities. (BDR 10-1078)

Senator Michael (Mike) A. Schneider, Clark County Senatorial District No. 11:
I could have put this bill in my committee, the Senate Energy, Infrastructure, and Transportation Committee, because it really is an energy bill. Since it hits so hard on common-interest communities, we had it drafted so it would come to this Committee.

This bill says that in homeowners' associations, specifically condos and townhomes, the association may not unreasonably restrict rolling shutters. Rolling shutters are put up for security and energy conservation. In my district, we have many condo associations and a lot of seniors live in them. They really want those shutters for both security and energy efficiency. The push back we have had from the associations is that it is common property, a common element. The shutters would be attached to the common element because, in condos, you only own the paint on the inside of your wall and the airspace. You do not even own the sheetrock on your wall. Even the interior of the wall is a common element. Of course the exterior is all maintained by the association: the paint, cracked stucco, the roof tiles, or whatever, are all maintained by the association. So therein lies the problem: they say it is a common element and you cannot attach anything to a common element. This bill says that we understand it is a common element, but we are going to attach some personal property to it. We tried to craft this so that you could only attach the shutters to windows and doors on your unit. You are responsible for maintaining those shutters, and we do not think it is a "takings" of any sort. It did pass out of the Senate 16 to 5.

The rolling shutters really do well as insulation. They are about 3/8 of an inch thick, and they have some insulation in the middle, but when they come down over the windows there is a big air space and they protect the window from the sun and help insulate it. It can knock down a power bill by over 50 percent. For security, obviously, they are really secure. You would need a crowbar to get them off. In south Florida, the Miami area and on down, rolling shutters are mandated by the entities down there for hurricanes, because those condo buildings get destroyed by hurricanes. You see people boarding them up with plywood down there. They have overcome that common-area element objection there.

Chairman Anderson:
As I am sure you are well aware, *Mason's Manual* section 760 requires that the vote of one house is not under consideration or influential in the other house and has no bearing upon the question.

Senator Schneider:
I understand that. I was just pointing out that it did not go through unanimously and we had vigorous debate in the other house.

Chairman Anderson:
I can recall, during political campaigns it used to be very common practice for sunshades on cars to be campaign signs for candidates. People seemed very eager to pick up the sunshades, and the candidates seemed very eager to

provide them. I know many homeowners' associations are always concerned about the uniformity of color and texture and the quality of the way the buildings look from the outside. We have heard discussions on multiple nuances of this issue in terms of the color of solar reflectors, tile roofs, even the color of grass. Why would we not then be concerned about the aesthetics of these shutters? Many associations have mandated a particular appearance. Should this not be regulated by the association rather than by state law?

Senator Schneider:
We are moving forward with our new energy policy in this state, and we are going towards green energy. From the discussions we have had in my committee we concluded that the cheapest watt produced is the one you never use. That is why we are moving towards this policy. We are saying that this is an extremely important policy for reducing our dependence on foreign oil and for cleaning the air, because we reduce the amount of electricity that is produced. In this bill we are saying that the homeowner can have those shutters, they cannot be unreasonably restricted, but they still would have to match the color palate of the association. If the trim is a brown, beige, or whatever it is, they would still have to match. The association still has some control over the appearance of the shutters, but it cannot restrict them.

Assemblyman Mortenson:
I think this is a very good bill. You are absolutely right about the incredible difference shutters make on heat pouring into a structure, at least in the summer time. I have two eastern-facing glass sliding doors in my home. We put a Rolladen shutter on one of them —I should say rolling shutter. Standing in front of those two doors halfway through the morning, heat blazes through the one without the shutter and the one with the shutter, you feel nothing. We have just put a down payment on another shutter; they are amazingly efficient.

Assemblyman Carpenter:
Is this the same situation we had with the last bill: it is effective going forward after July? I see the July date in here.

Senator Schneider:
Yes, it becomes effective July 1, 2009.

Assemblyman Carpenter:
So it is going forward?

Senator Schneider:
Yes. We do have disputes in Las Vegas with shutters where people have put them on.

Chairman Anderson:
So even if you are in an existing homeowners' association, after July 1 you would be able to utilize this law to get rolling shutters? It is not just for new development?

Senator Schneider:
Yes. Let me give you an example. Mr. Mortenson used the example of his house; how it cut his electric bill down quite a bit. I have a constituent who lives in Summerlin North. She is a hearing specialist for the Clark County School District. She is severely hearing impaired and has all of her equipment in her house. I went to meet with her because she was denied shutters on her upstairs windows, where she keeps her TV and her phone system so she can communicate outside. It gets hot upstairs so she wanted the rolling shutters up there. She was denied by the association, but she also had shutters on the back of her house that could not be seen from the street, and she had shutters for security reasons on her bedroom window and her sliding door downstairs. Because she is deaf and her master bedroom is downstairs, she was scared to go to sleep at night because somebody could break into her house and she could not hear them. So she had rolling shutters put on, they have been there for years, and the association did not know it because they could not see into her backyard. Now she wants to put them on the upstairs windows for energy purposes, and they denied it.

We had quite a fight with Summerlin North and had to go through a lot—the fight was so vigorous. When you have someone like this who is hearing impaired, a disability, the association had to hire an interpreter to come to each meeting, and that interpreter would interpret for her. They fought it, but they finally gave in.

Assemblyman Carpenter:
In Elko, we put on shutters in the summer, and we also have to put them on for the winter weather, so it really helps us.

Assemblyman Manendo:
It seems that this would be similar to what we have in law concerning solar screens. I am not sure if that is in Chapter 116 of *Nevada Revised Statutes* (NRS). You are the expert so you would know. Associations cannot deny solar screens, but they can give you examples of what you can use: you can get a dark brown or light brown one. So it seems like the shutters would fall into that

same category, there would be some restrictions as far as not being able to get a purple one, but you can match the outside color of your home or condo?

Senator Schneider:
That is correct. There are different companies that sell shutters. I know that Lowe's sells them. Mr. Mortenson mentioned a brand name, Rolladen, and those shutters are kind of like Jacuzzi or Xerox: they just happen to be the biggest and most well known, but there are other companies that sell shutters. An association could say, "Here is the type of shutters you can use and here is the color palate you can use," and then they would approve them based on that.

Assemblyman Manendo:
I know that where I live—and I am on a golf course—some of the folks put up shutters because the balls kept breaking the windows. After three or four times, they ended up putting up the shutters, and that was their main intent. And then they realized that their electricity bill went down as well. Their mindset was that the balls keep coming through the window and made a mess, and it costs $500 per window. That was their intent. I see more benefit than just the security and energy issues as well.

Jonathan Friedrich, Private Citizen, Las Vegas, Nevada:
I have no opposition to putting shutters on freestanding homes. My only concern is with the aesthetics that would be affected on townhomes. If it is a two story building, and Mrs. Smith on the first floor wants them but Mrs. Jones on the second floor does not want them, what does the complex wind up looking like if this bill is passed, people have the shutters helter-skelter, and it almost looks like a checkerboard? That is my concern as far as aesthetics. My other item is with regard to the conservation of energy. There is the possibility of using film on the inside of windows just as they use on car windows. That could also cut down on the transmission of heat.

Chairman Anderson:
The association "may not unreasonably restrict"—you do not think that language would give them the ability to take care of that particular issue? That is pretty broad language.

Jonathan Friedrich:
That would leave a lot of room for disputes...

Chairman Anderson:
Well, of course it would.

Jonathan Friedrich:
...because it becomes subjective.

Assemblyman Horne:
During the testimony, I heard energy savings to upwards of 50 percent, I heard about potential benefits in security, and your opposition is how it looks and a possible screen like you put on cars. The only type of screening I know that would prevent someone from breaking a window is that bulletproof screening used on security vehicles, and I do not know if that is cost effective as opposed to these shutters. Do you know the cost of that type of screening as opposed to shutters?

Jonathan Friedrich:
No, but in testimony during the Senate hearings it came up that, if it was for security, the shutters could be installed on the inside of the window. If an association did allow a homeowner to put the shutters on the exterior, who would then become responsible for any water infiltration of the structure? If the exterior of a building were to be painted, would the shutters have to be removed and reinstalled? If the current owner moved and the new owner came in and decided to remove the shutters, who is responsible for restoring the holes in the wall? It just opens up a lot of different issues.

Assemblyman Horne:
I think the bill says that with respect to the shutters, and by implication any subsequent removal of the shutters, the subsequent owner would be responsible. Or even if the existing owner decides that he does not want the shutters anymore, he would be responsible for that. I think the reasoning behind your opposition falls short of the overall benefits of having these shutters.

Kyle Davis, Policy Director, Nevada Conservation League, Las Vegas, Nevada:
We are in support of this bill. Yesterday afternoon I had the opportunity to be a part of a discussion that Senator Schneider led about transportation in our state. It brought up a couple of themes that I think are relevant here as well. For a long time in our state, and really throughout our country, we have done things based on what were the easiest, what looked the best, or what felt the best, and we really did not think too much about the consequences. Unfortunately for us, those days are over. We cannot afford to think only about aesthetics; we have to think about what impact an action has on our natural resources and our quality of life. There was an article yesterday about how the Las Vegas area has some of the worst air quality in the entire nation. This is definitely something we need to be addressing, and that does not even get to the issue of

the impacts of climate change on our water supplies and wildfires throughout our state.

Energy is an issue that we need to be dealing with, and this is a tool we can use to start to have some impact on our air quality, in a positive direction, and putting less carbon into the air. I think the Senator pointed out the fact that the watt you do not produce is the cheapest and most efficient thing to do, and these shutters have the ability to reduce that load.

The bill before you is not a new concept. This is something that Assemblyman Horne spent a lot of time working on last session together with a couple of members who are no longer a part of the Legislature. They worked very hard on negotiating this. I think this is a reasonable compromise because, if these rules are in place right now in homeowners' associations, it allows for the association to keep them in place, but it makes sure a rogue homeowners association board in the future would not be able to put on a restriction here to keep people from being able to make their homes more energy efficient.

We are in support of the bill. We think it is a good step forward in terms of energy efficiency.

Chairman Anderson:
I will close the hearing on S.B. 216 (R1).

> ASSEMBLYMAN MANENDO MOVED TO DO PASS SENATE BILL 216 (1st Reprint).
>
> ASSEMBLYMAN SEGERBLOM SECONDED THE MOTION.
>
> THE MOTION PASSED. (ASSEMBLYMEN COBB, GUSTAVSON, AND HAMBRICK VOTED NO. ASSEMBLYMAN OHRENSCHALL WAS ABSENT FOR THE VOTE.)

[The Committee stood in recess at 9:21 a.m. and was called back to order at 9:35 a.m.]

I will open the hearing on Senate Bill 82 (1st Reprint).

Senate Bill 82 (1st Reprint): Makes various changes relating to technological crime and the seizure of certain funds associated with prepaid or stored value cards. (BDR 14-266)

Keith Munro, First Assistant Attorney General, Office of the Attorney General: Senate Bill 82 (1st Reprint) is comprised of two distinct parts. I will talk about the first part, which relates to sections 2 and 14, and we will leave technical questions to James Earl, Executive Director of Nevada's Technological Crime Advisory Board. Part two will be left to Mr. Earl as well.

If you turn to the last section of the bill entitled, "Text of Repealed Section," you will note an existing Nevada law, *Nevada Revised Statutes* (NRS) 193.340. If you look to subsection 2 of that statute, it states, "In investigating criminal activity that involves or may involve the use of a computer"— it then lists several law enforcement agencies—these agencies "may, if there is reasonable cause to believe that an individual subscriber or customer of a provider of Internet service has committed an offense through the use of the services of the provider of Internet service, issue a subpoena to carry out the procedure set forth in 18 U.S.C. § 2703 to compel the provider of Internet service to provide information." This is a tough law. It is right there in black and white: "reasonable belief," "issue a subpoena," "provide information." And if you do not, the failure to comply with the subpoena could result in a show-cause hearing before a Nevada judge. If you do not have a good reason for complying, you face possible criminal or civil contempt from a Nevada judge.

The Nevada Legislature adopted this law in 2001. Senate Bill No. 551 of the 71st Session passed unanimously in both houses. Chairman Anderson, Assemblyman Carpenter, Assemblyman Manendo, Assemblyman Mortenson, Assemblywoman Parnell, you all voted for it; Assemblyman Ohrenschall, your mom voted for it. Two years later, the Nevada Legislature amended this law in Senate Bill No. 300 of the 72nd Session. It passed unanimously again in both houses. This has been the policy for eight years for the State of Nevada. It was set in place at the onset of the Internet age. The intent was to provide law enforcement with the tools necessary to protect Nevadans from things like identity theft, cyberstalking, child luring, and child pornography. Those types of crime still exist today.

So I guess I have to explain why would we be here recommending the repeal of a provision, approved unanimously by the Legislature, that was intended to protect our citizens. You will notice reference to federal law in NRS 193.340 requiring compliance with the procedure set forth by the federal government. That has been the policy set by the Legislature for eight years. Why must Nevada follow the procedures established by the federal government on this issue? The Internet is worldwide. Federal law controls on issues like this. It is the federal preemption doctrine. The Nevada Legislature was mandated to require law enforcement to comply with these federal procedures. Federal law has now changed.

The Office of the Attorney General is legal steward for the state. When federal laws change, we have an obligation to let you, the state policy makers, know that and bring an option for remaining legal. Here is the option: your staff copied the requirements of the new federal law and placed them in section 2 of the bill. Section 2 replaces section 14. There are two concerns, however. The new federal law is complicated. We had a lot of time over in the Senate to explain it. The Senators had a lot of time to digest the information. Section 2 is more restrictive, we believe, for law enforcement. We believe section 2 provides greater protection for our citizens. Here is why. Look at subsection 1 of section 2. Law enforcement must obtain a search warrant for electronic communications held in storage for less than 180 days. The standard for having a search warrant issued is a finding of probable cause by a judge. Probable cause denotes that it is likely that the information is there. I think that is a higher standard than the reasonable cause standard set forth in NRS 193.340, which denotes a possibility that the information is there. Moreover, a search warrant requires judicial review; an administrative subpoena does not. The existing law has no judicial involvement.

Look at subsection 2 of section 2. For anything held for longer than 180 days, you either have to get a warrant, serve a subpoena, or get a court order. Those are greater protections for our citizens. Probable is stronger than reasonable. A search warrant up front issued by a judge provides greater protections than a subpoena issued pursuant to a lower standard with no judicial involvement. It is right there in black and white. By passing section 2, we believe the Legislature would keep pace with the policy that it established eight years ago and would provide greater protections for our citizens.

There is another problem, though. When the federal law changed, it changed within a comprehensive and lengthy act known as the Patriot Act (Public Law 107-56; 115 Stat. 272). Those two words, Patriot Act, give some people pause. I understand that. Some want you to fall prey to those words, Patriot Act. This is the Patriot Act [holds up binder]. It is lengthy and comprehensive. This is our bill [holds up copy of bill]. They are not the same thing. Our intent is to bring Nevada into compliance with federal law. We think the protections for our citizens are greater in section 2 and provide more restrictions for law enforcement.

We are willing to work through any issues so that our state complies with federal law and our citizens have their rights protected. But I have an idea what the Economic Forum will say today. I am not sure you will have the time to work through section 2 with us if you have concerns. I also do not want section 2 to distract attention from the remainder of the bill. The remaining portions of the bill are the primary focus of S.B. 82 (R1). The remaining

provisions of the bill are important to our friends with the Las Vegas Metropolitan Police Department. They are with us today. Therefore, if there are concerns, we are willing to take out sections 2 and 14 so that you can concentrate on the remaining portions of S.B. 82 (R1). We know section 2 is complicated. We know we are short on time. We want people to have a comfort level with what is passed. If there are concerns, we would respectfully request that your Committee members work with Committee staff during the Interim so that section 2 can be thoroughly vetted by this Committee during the Interim to ensure a comfort level for the next legislative session. If there are concerns about section 2, out of respect for the efforts of the Senate on this legislation, which passed it 20 to 1, I would respectfully request that section 2 be introduced as a committee introduction so that this Committee can continue its work to ensure that the policies of this state remain current and, therefore, effective for the benefit of our citizens. With that, I will turn it over to Mr. Earl to discuss sections 3 through 13.

James Earl, Executive Director, Technological Crime Advisory Board, Office of the Attorney General:

Among the members of the Advisory Board, a joint legislative-executive agency, are Sheriffs Gillespie and Haley. One of the seven statutory duties of that Board is to "evaluate and recommend changes to the existing civil and criminal laws relating to technological crimes in response to current and projected changes in technology and law enforcement techniques." [NRS 205A.060(5)]

With that in mind, I am here today on behalf of the chair of the Board, the Attorney General. Sections 3 through 13 of S.B. 82 (R1) exist because of Lieutenant Bob Sebby, the head of the Las Vegas Metropolitan Police Department's (Metro) economic crimes unit, and his people. Lieutenant Sebby will speak in just a moment from Las Vegas to describe how he figured out that criminals were using plastic instead of cash in criminal transactions and also what his challenges are today. Lieutenant Sebby was assisted by Jack Williams, an acknowledged expert in the prepaid card industry, who fortunately now works in Las Vegas. Mr. Williams is also standing by to explain how quickly criminals can move lots and lots of money from anywhere in the world in support of criminal activities in Nevada. These men briefed the Board on the criminal challenges and their technical and financial underpinnings. They provided critical input and understanding to a task force of prosecutors and law enforcement officers.

The second part of S.B. 82 (R1), that is sections 3 through 13, is the product of those efforts. The bill text in those sections is based on the Nevada statute governing the issuance of search warrants. It allows law enforcement, acting with probable cause, to freeze funds associated with a prepaid card for a period of up to ten business days. That allows enough time to apply for a search warrant. If the search warrant is granted, the funds can be seized electronically. That seizure would remain in place until disposed of by a court order to either release the funds or to forfeit the funds after trial and conviction.

The only significant point of contention that has been broached so far has to do with the provision allowing law enforcement to seize funds in overseas accounts without a warrant, if there was additional probable cause to believe that the financial institution would not comply with a freeze instruction.

Several months after the bill draft request (BDR) was submitted, the U.S. Court of Appeals for the Second Circuit clearly decided that there was no warrant requirement on overseas searches. Now, very often appellate court language can be confusing, and indeed some would say that law students spend three years trying to learn how to interpret court decisions. In this case, the language is very, very clear. The court said:

> The following reasons weigh against imposing a warrant requirement on overseas searches.
>
> First, there is nothing in our history or our precedents suggesting that U.S. officers must first obtain a warrant before conducting an overseas search....
>
> Second, nothing in the history of the foreign relations of the United States would require that U.S. officials obtain warrants from foreign magistrates before conducting searches overseas or, indeed, to suppose that all other states have search and investigation rules akin to our own....
>
> Third, if U.S. judicial officers were to issue search warrants intended to have extraterritorial effect, such warrants would have dubious legal significance, if any, in a foreign nation....
>
> Fourth and finally, it is by no means clear that U.S. judicial officers could be authorized to issue warrants for overseas searches....
>
> For these reasons, we hold that the Fourth Amendment's Warrant Clause has no extraterritorial application and that foreign searches

> of U.S. citizens conducted by U.S. agents are subject only to the Fourth Amendment's requirement of reasonableness.

[*In re Terrorist Bombings of U.S. Embassies in East Africa (Fourth Amendment Challenges)*, 552 F.3d 177 (2nd Cir. 2008)]

Mr. Munro indicated earlier that reasonableness is a far lower standard than the probable cause standard contained in the second part of S.B. 82 (R1). Accordingly, we believe that the provisions of S.B. 82 (R1) go beyond the legal requirements.

I would like to demonstrate a couple important facts of life which are necessary for you to understand and underlie what you are about to hear from Lieutenant Sebby and Mr. Williams. This particular piece of plastic [indicates] looks like an American Express card. This particular piece of plastic [indicates] looks like a hotel room key. This particular piece of plastic [indicates] looks like a blank with nothing on either side. Now the rhetorical question is which of these pieces of plastic can be used to access funds, controlled by a drug cartel, in an offshore account electronically located in a financial institution in Kabul, Afganistan, Panama City, Panama, or Jakarta, Indonesia? The answer to that question is that we do not know, and law enforcement cannot tell, by looking at the surface of those cards. Even if law enforcement was able to read the information located on the magnetic stripe on the back, they would learn only a bank and routing number. They would not know who was the putative controller of the funds, nor would they know the amount of funds held electronically in an account associated with either a bank or a nonbank institution. In order to get that information, law enforcement needs to work cooperatively through someone else, using a specialized financial network that allows transference of that type of information to and from a law enforcement query and the bank or nonbank that ultimately controls the funds, wherever it is in the world.

Assemblyman Horne:
You were speaking on the Fourth Amendment and basically that there are no restrictions on searches in foreign countries. 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, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Nothing in that restricts it to the jurisdictional boundaries of the United States. I do not understand why, or what case law says about why, this only applies within the jurisdictional boundaries of the United States.

James Earl:
The court case from which I quoted is from the United States Court of Appeals for the Second Circuit. This was a fairly complicated factual case and broke down actually into two different court decisions. It is a recent case. It was decided dealing with facts related to bombings of U.S. embassies in East Africa. It was decided on November 24, 2008. It is as recent a case as exists on this issue. As I indicated when I read the paragraph headings, it was very clear what the court said. It had reviewed all of the applicable precedents, and you heard the language from which I quoted saying that none were applicable. The court then looked at a variety of other issues and concluded, very clearly, that even when a U.S. citizen was involved, there was no Fourth Amendment requirement to deal with overseas searches, and the standard for such a search, when ordered by a U.S. official, was one of reasonableness, not probable cause, and not probable cause with a warrant.

Assemblyman Horne:
Are you aware of any opinions from the other circuit courts contrary to this one?

James Earl:
I am aware of no contrary opinion.

Assemblyman Cobb:
For purely domestic seizures dealing with domestic financial institutions, there is still no warrant requirement?

James Earl:
Throughout all of the rest of the bill, and dealing with any activities that involve institutions within the United States, whether banks or nonbanks, the standard for a freeze is probable cause. Law enforcement then has ten days to apply for a search warrant. If that search warrant is not granted, the freeze is automatically lifted. If the search warrant is granted, then, and only then, can funds be seized by law enforcement and held pending the outcome of a judicial proceeding to determine the disposition of the funds.

Assemblyman Cobb:
For this freeze, the reason it is warrantless is that an exigency exists?

James Earl:
Yes, that is correct. It is an exigent circumstance, and I expect that Mr. Sebby and Mr. Williams will explain more about that. This is not unusual in the world of prepaid cards. One of my colleagues was driving back from Elko within the last six months and stopped at a series of gas stations to get gas. When she got back to Reno two days later, she tried to use her debit card for a modest purchase. She knew she had funds in the account associated with the debit card, but her transaction was denied. The reason for that was that the gas stations, using the contract provisions that they have, froze $50 each time she tried to make a gasoline purchase. Most of us do not realize that this happens, but it does. Those funds had not been released in sufficient time, not by any government, but by the commercial gas station operators, so funds were blocked when she tried to use her debit card days later in Reno.

Even though most of us do not realize it, when we have a debit card, the terms of our debit card agreement allow a financial institution and a retail merchant to freeze some amount of money associated with our purchases for some period of time. I have read some agreements where that period is up to 30 days.

Assemblyman Cobb:
I understand contractual agreements. I am talking about Fourth Amendment violations, which obviously do not apply to private parties. I think you have answered my question.

Assemblyman Carpenter:
It is not the individual gas stations that are doing it but outfits like Texaco and all the rest of them. They are the ones freezing the funds, not the individual stations. Some hotels do it, too.

Chairman Anderson:
I think Mr. Earl was stating that this is done as part of the billing practices of the billing departments. Hotels and rental car companies do this as well. If you have a narrow credit balance, you better be careful.

James Earl:
Correct. The point I was making is that, given this commercial practice, the duration of the freeze for law enforcement acting with probable cause, ten days, is certainly not unreasonable.

Chairman Anderson:
Because of the time it takes to get the subpoena?

James Earl:
Yes, sir. Because of the time it takes to apply for and get a search warrant. And this is particularly true in light of what I believe you are going to hear from both Lieutenant Sebby and Mr. Williams about the speed at which criminals transfer money associated with prepaid cards.

Jack Williams, Corporate Development Officer, eCommLink, Inc., Las Vegas, Nevada:
eCommLink is a core processor for open-loop MasterCard and Visa-branded prepaid debit cards. We also support mobile cell phone payment programs worldwide. I have been part of the prepaid card industry since 1995. In fact, I am credited with the creation and implementation of the first gift card in this country. As a core processor, eCommLink provides the full array of services required to support various prepaid card programs and is considered to be among the top processors in the United States. As a leading subject matter expert regarding prepaid cards and prepaid cards tied to mobile phones, I am frequently asked to speak at industry events. As a result of these presentations, I have been asked to provide insight and information to various industries. In this role, I have provided insight to the Las Vegas Metropolitan Police Department, the Technological Crime Advisory Board, and the Department of the Treasury on the technology and uses of prepaid cards and mobile cell phones.

I can assure you that knowledgeable criminals using a cell phone can move very large amounts of money around the globe in a matter of seconds using accounts tied to prepaid cards. For example, I am aware of a case that involved a company that was using prepaid card accounts and cell phones to facilitate the laundering of millions of dollars. I am ready to answer your technical or operational questions.

Robert Sebby, Lieutenant, Las Vegas Metropolitan Police Department, Las Vegas, Nevada:
[Read from prepared testimony (Exhibit C).]

Chairman Anderson:
I am concerned about how this takes place. I could put a magnetic stripe on the back of just about any kind of piece of plastic, and I can use that as camouflage for carrying around one of these cards. Is that correct?

Jack Williams:
Yes, you can encode the information, the "mag data," on anything, a room key, and so forth.

Chairman Anderson:
So I could theoretically take a room key from a hotel, erase the data, and then put on any sort of information I wanted to, and as long as it matched with the encryption code, I would be able to retrieve sizeable amounts of money. But someplace in the world that money has to exist, correct?

Jack Williams:
That is correct.

Chairman Anderson:
So I no longer need a suitcase to carry $2 million. I can just walk in with this piece of plastic and do my deal.

Jack Williams:
That is correct, or you could put it on a cell phone and make it even easier.

Chairman Anderson:
How are we going to make sure that the average citizen is protected from invasion of privacy with respect to law enforcement knowing his bank balance? I think that is private information between an individual and the bank, although the bank is probably already sharing that information with the federal government for other kinds of reasons. I do not feel it is any of law enforcement's business to know how much money is in my bank account. Do I not have that right as an ordinary citizen?

Robert Sebby:
Yes, you do. This bill requires that we have probable cause to even look at that. So I cannot get that information unless I have probable cause. The criminals we are dealing with have not just 1 card with them but 10, 20, or 30 cards, and they are doing criminal activity. That is what has brought them to our attention. We have probable cause in the first place to arrest them.

Chairman Anderson:
I am reaching into my pocket. I have a Sears card, a Borders card, an AT&T card—two of those, actually—a card from one of my banks, one for my wife's account, and four more cards that I use on a regular basis. I also have one from my dentist. How many cards do I get to carry before you consider that to be probable cause?

Robert Sebby:
You can carry as many cards as you want. One factor is all of those cards bear your name. We are seeing criminal activity with prepaid gift cards. The criminals are stealing your credit cards, whether it is by a skimming device or physical theft of the cards, and they are taking that data and moving it onto fake credit cards or prepaid or shared value cards, because that is where they are getting the money. They want cash, not property. Stealing property is harder to get away with and requires one more step. They cannot stay anonymous. That is how we are finding credit card thieves and organized groups who are dealing strictly in the trafficking of that magnetic stripe data, which you can also purchase online for $25 for a $10,000 card and move that magnetic stripe data onto a prepaid value card or a credit card. That is what develops our probable cause.

Chairman Anderson:
I do not think my Starbucks card has my name on it, and I know my Borders card does not. Not all of them have a picture and name, so I am concerned about what constitutes probable cause. How are law enforcement officers going to determine the difference between me and John Carpenter, which one of us is the good guy and which one is the bad guy, if there is a difference? Are there other kinds of criminal activity that it has to be based upon?

Robert Sebby:
Criminal activity is what we deal with.

Chairman Anderson:
So it is not just the presence of a card that does not have your name on it?

Robert Sebby:
Absolutely not. There has to be criminal activity involved. That is what would bring you to my attention. Your walking down a street or using a credit card would not. But, if your bank called and said there is fraudulent activity on this card and we are reporting it to law enforcement, we have to get involved.

Chairman Anderson:
So the bank would notify you that there was potential criminal activity?

Robert Sebby:
Either the bank or the individual victim would bring it to our attention. A lot of people who are victims of identity theft are told by their bank to come make a police report.

Assemblyman Horne:
Could you give me some real world explanation of how you would find probable cause—I am looking at section 7 of the bill—that a financial institution will not honor a freeze? Is it just by requesting them to and they do not?

Robert Sebby:
We served a search warrant on an out-of-state bank to freeze a bank account. A local branch was located in Nevada. They refused to give us a check for the money, even though we had a signed search warrant. In between the time that it got to their lawyers and back down, that institution had released the funds back to the criminal. It happens in-state as well as out-of-state because all of these bank mergers. Most of their corporate lawyers are not in Nevada. They may have a bank charter here, but if it is a national bank with a national charter, in their minds they do not have to follow our rules. I have to go through the Attorney General's office to go after their securities and exchange license if they do not honor our search warrants. It does happen, and a lot of out-of-country banks will not honor anything from us.

Assemblyman Horne:
It sounds to me as if you have already reached your probable cause today.

Robert Sebby:
The problem is the speed with which a criminal can transfer money from that account with a stored value card before I can get a seizure warrant.

Assemblyman Horne:
I understand that argument. What I am getting at is this section says you are going to be able to seize funds if you have probable cause to believe they will not honor the freeze. Your testimony today implies that you already believe from your experience that these financial institutions will not honor them. It sounds to me as if you have already reached your probable cause today for a case that may not occur until tomorrow. Tomorrow's situation could happen—let us say that this bill became law today—and by your testimony you could seize those funds immediately because you say that their practice has been not to honor your search warrants.

Robert Sebby:
No, sir. That was only one financial institution, and you asked me for a specific case. For anything within the United States, the only thing that law enforcement can do is freeze the funds. I will never seize anything without a judge's order, because that is what the judge is there for: to validate that there is probable cause to seize those funds until the outcome of the case.

Keith Munro:
I think you are looking at another layer on top. You have to have probable cause related to criminal activity first. Section 7 is looking at banks outside of the United States. You have to find another layer of probable cause that a freeze would not be honored before you can get into section 7. There are layers involved here. It is not just that I believe there is probable cause that there is money out there. You have to have probable cause related to criminal activity and then probable cause that a freeze would not be protected. I do not think you could base it just upon a belief that someone will not honor a freeze. There must be some probable cause, likelihood, that that institution will not comply.

Assemblyman Horne:
That is what I am getting at. For these outside institutions, how do you establish probable cause that they will not honor the freeze other than asking them and they do not comply?

James Earl:
There could be other information that local law enforcement would have in its hands from a variety of sources. The Technological Crime Advisory Board was set up to bring together commanders for the Federal Bureau of Investigation (FBI), Secret Service, Immigration and Customs Enforcement (ICE), and the two largest law enforcement agencies in Nevada. Those agencies share information all the time. In the particular factual situation which you posit, probable cause may come from information from the Secret Service, the FBI, or ICE indicating whether a practice or pattern of conduct with certain bank or nonbank institutions located outside the United States exists; whether the bank or foreign institution has ever honored any request from law enforcement in the United States at any level; and whether the criminal enterprise, which is involved in the crime that Lieutenant Sebby is investigating, is known to have contacts with those banks in other circumstances in other jurisdictions. So there is a variety of different sources of information that could lead an investigator in the state to conclude that a foreign bank or nonbank would not honor a freeze order.

Assemblyman Horne:
So, hypothetically, if you receive information from the FBI or Secret Service that your international bank has repeatedly refused United States court orders to seize funds that they currently have, that would be enough for probable cause in subsequent cases?

James Earl:
In the circumstances which you posit, the answer is maybe, and perhaps probably. It depends on the particular fact pattern. The situation that you posited was one of a recognized foreign bank. However, stored value cards and gift cards are issued not only by banks but by a variety of nonbank institutions here in the United States. One of the largest issuers of stored value cards in the United States is H&R Block. Overseas, they could be issued by almost anyone depending on the laws of the particular country. Law enforcement might be looking at a nonbank which is located in a two-room concrete bunker, located underneath a particular street intersection in Panama City, Panama. That, along with information obtained from the FBI, ICE, Secret Service, or the Drug Enforcement Agency (DEA), could indicate pretty clearly that this was an institution associated with an affiliated criminal gang, which clearly was not likely to honor any type of freeze coming through the standard financial channels.

Keith Munro:
In a situation like that, where you found probable cause that a freeze would not be recognized and you had a seizure, if you get further into section 7, in subsections 2, 3, and 4, we have created a procedure where you have to give notice that the seizure occurred, procedural due process, an opportunity to be heard, and a court forum where someone could say that his funds were seized improperly from this bank outside of the United States. Those provisions were modeled after the existing state provisions on forfeiture laws.

Assemblyman Horne:
Mr. Munro mentioned the procedure. Part of it says that those funds are to be returned unless they are being held for some other legal reason. When we are talking about forfeiture, sometimes it is not of a criminal nature but of a civil nature. These could be seized for criminal investigation, a court could say that the seizure was improper, but those funds can still be held for a civil forfeiture, correct?

Keith Munro:
Correct. We tried to adopt the procedure which the Legislature has blessed. If you can think of a better procedure for providing due process on this, we are certainly willing to listen. We chose the procedure that has been blessed by this body.

Assemblyman Segerblom:
Are you trying to seize this money because they are the proceeds of a crime? Are you trying to prove the crime happened? Give me an example of why you are doing this.

James Earl:
The basic statutory standard is to seize funds which are the instrumentalities or the fruits of a crime.

Chairman Anderson:
So, in other words, you are telling me that somebody has stolen my identity, he has transferred my money to a stored value card or some other location, and now you are going to seize that location because there is evidence of identity theft?

James Earl:
Those funds are, in the case you describe, the fruits of a criminal enterprise.

Assemblyman Segerblom:
So you physically have the card?

James Earl:
Typically, law enforcement would have the card.

Assemblyman Segerblom:
So you would have the evidence of the crime right there, right?

James Earl:
It depends, obviously, on the circumstances. For example, under the circumstances where there is a drug investigation, the investigation uncovers 25 pounds of drugs, of methamphetamine, in a truck, and beside the drugs is a stack of 25 cards of sundry description, that would likely provide probable cause to seize the cards as part of an ongoing criminal investigation. But looking at the card you do not know what it is or what value is associated with it.

Assemblyman Segerblom:
And you cannot find that out without these powers?

James Earl:
That is correct. That was the essence of Lieutenant Sebby's testimony. When he and his people looked at the 14,000 pieces of plastic that they had accumulated up until about two years ago, they could not tell what those pieces of plastic were and the amounts of money that they were associated with, nor did they have any way to reach through that piece of plastic to either seize or freeze funds.

Assemblyman Segerblom:
I guess my point is to seize the funds is a whole different issue. We are talking about how to figure out if money was transferred for drugs. It seems like you could, if you have the card, trace the history of the card and at some point determine that the card was worth $10,000 which was given in return for the drugs.

James Earl:
We do not know what is on the card, and I leave it to Mr. Williams to answer the more technical question as to whether by simply looking at the information contained on the magnetic stripe that is sufficient by itself to be able to pull up the entire history of transactions on the card. I suspect not. I suspect that would come in a later stage.

Assemblyman Segerblom:
Could someone give me a real world example?

Jack Williams:
The magnetic data involved with these cards only gives me the account number and some security numbers, called card verification values. If it is a personalized card, it would have a name embedded in the data. All I am able to retrieve from the magnetic data on a card is the current balance on the card, and I can also run a transaction that would seize or freeze the funds. The transaction history is not available directly on the magnetic stripe. It would require a subpoena of the processor, similar to what we are, and only through the processor, and going through the financial institution tied to that processor, would you be able to find transaction history or any other data associated with the card.

Assemblyman Segerblom:
With the card, you could trace the transaction and find out whether something of value was given or taken to prove the crime?

Jack Williams:
Yes, sir.

Assemblyman Segerblom:
So what we are talking about is trying to get the money associated with the crime that the police can then use to buy a helicopter or something.

Jack Williams:
The first six numbers of a card number tell me the financial institution that it is tied to. Those six numbers, which is called a bank identification number (BIN), will lead you to who the processor is and who else has been involved in that card's life span. Yes, we are able to get a significant amount of information subsequent to the reading of the magnetic stripe.

Assemblyman Hambrick:
My background was in wiretapping and going after credit information. In the wiretap area, there are certain rules that impose a time frame: when you are listening to a wiretap, at some point you must make a decision before you go forward. In the credit area, when you start reading the information, there is a point you cannot go beyond unless you are sure. Without divulging intelligence, have you established a point where you stop looking, a point where you discard one card as being not relevant to your investigation and move on to the next one? Are there procedures to address some of the privacy questions that the Chairman had earlier?

Keith Munro:
What you are talking about with wiretaps, that is leading up to a potential arrest. Usually, here, there already has been an arrest and this is incidental to a determination of probable cause relating to criminal activity.

Robert Sebby:
Yes, when we identify that criminal activity is occurring, we get whatever cards we find from the suspect, who is usually already in custody or has left behind the instrumentality of the crimes, in this case credit cards, debit cards, or plastic that may have gift or shared value card information on it. Once we get those cards and we run them, if it is a credit or debit card, I can get the information from a bank. But with a stored value card, I do not have an opportunity to run it anywhere to find out, because we have a lot of virtual banks and places that exist only in cyberspace. There is really no person to call until I can verify who he is. We will search for those people. Especially with respect to the money from shared value cards that is obtained through criminal means, when we say freeze and seize, that money does not go to the police department. I am attempting to return money to victims. That is my primary goal. It is not to make money for a police department. Regarding any cards that we find during the course of an investigation, if the card belongs to somebody other than the suspect, we are required to notify the victim because we do not want identity-theft related crimes to continue. It is already taking victims long enough to correct their identity. I am not going to refuse to tell a victim he is a victim.

Assemblyman Hambrick:
I appreciate the example. If, going through the cards, you find that one of the cards is used solely for transactions between the suspect and his legal counsel, at that point I believe you would have to stop going any further. Have you established guidelines to make sure you do not go beyond a certain point? With a cell phone, there may be information on it that is privileged.

Robert Sebby:
That is based upon the probable cause statute. To be honest, if you have a card, even if the suspect is telling me "Only I use this card," I still have an obligation to find out. That is why in courts today the judge can order the defendant to prove where the bail money came from. I do not know where he is getting the money to put on that prepaid card or if he is paying his attorney. Those are things that I have to investigate in order to find out. If it is proven, then, obviously, it is up to a judge to decide whether or not he gives the money back to the attorney. It is not that we are going outside of the scope, but we have to prove where that money came from. I cannot just take people's money because I think they committed a criminal act. I have to have probable cause to show that they were doing this as part of a criminal activity. The typical case with gift cards is you have five suspects standing in line. One goes up to the kiosk and buys five $10,000 gift or stored value cards, goes to the back of the line, puts that credit card in his pocket, and pulls out a new one. The next guy in line does the same thing. The next guy does the same, and so on. They go through until they have maxed out all the cards. That is the type of thing we are seeing in Las Vegas.

Assemblyman Gustavson:
I have several concerns, and I do not know if all of my questions have been answered. I am really concerned about probable cause, what can be used as probable cause, et cetera. I know we have a serious problem with technology today. Every time we improve and invent something new, we wind up having problems with it. I am still very concerned about our constitutional rights, the Fourth Amendment, and other protections. What is going to be used as the basis for probable cause if a person is of a particular race or religion or from another country, where terrorists in our country originated? Are you going to start looking at them because you suspect something? Regardless of who it is or what it is, if they are citizens of the United States—we are hearing different rumors about different groups that might be targeted—I do not want them targeted just because they belong to a particular group. I just want to make sure this bill is not going to allow that.

Assemblyman Segerblom:
Regarding the example you gave where there are five people in line and each one goes through and maxes out the credit card and puts money from the credit card onto one of these stored value cards, how does this bill affect that?

Robert Sebby:
This law would give me the opportunity to recover that money to get it back to the victim or the financial institution that reimbursed that victim.

Chairman Anderson:
Because they had moved the money into another stored value card?

Robert Sebby:
Correct.

Assemblyman Segerblom:
Can a court go through the normal procedures we have today and give you this power to get that money?

Robert Sebby:
I do not have any means to run the cards right now. I do not have a computer system that I can run the card through to get the money back. The technology is that far ahead. A gift card is not a credit card or a debit card. It is an animal unto itself.

Assemblyman Segerblom:
You must have the ability to go to someone who has that technology now and get a court order to allow that to happen.

Robert Sebby:
The other problem is that one example was a physical example. What if you went online to a stored value company, entered your name as Donald Duck, submitted $8 million into that account, and started taking money out on a shared value card, and the money that went into that account was all from wire transfers based upon cash advances from credit cards? Now you do not have anything. But let us say that I track you down and find the probable cause to arrest you, if you get to the jail phone, and I have not frozen those funds, you can make a phone call, enter a password, and take that money out—that you have gotten through illegal means—and move it to another account that I cannot have access to. Therefore, you have just committed another criminal act where, in two seconds, I could have frozen those funds, taken a warrant to a judge to prove there is probable cause for a seizure, and taken the money away from a criminal. In reality, in seconds, criminals can move funds out of

law enforcement's hands. We are trying to protect the community and get the money back to the victims.

Orrin Johnson, Washoe County Public Defender's Office, Reno, Nevada:
Our concern with this bill is primarily with section 2. We are not taking a position on the prepaid card provisions. There has been a lot of testimony, and I do not want to indicate support or opposition to those provisions. Our primary concern is with the grafting of *United States Code*, Title 18, Section 2703 onto the NRS, which we believe has substantial constitutional concerns and is unnecessary in this state, even if it is arguably constitutional.

Chairman Anderson:
Let me give you a short way out by saying that, both by indication of the Attorney General's Office and the feeling of the Chair, if we are going to be moving with the bill at all, it will be without sections 2 and 14.

Orrin Johnson:
I will back off, then.

Chairman Anderson:
You need to raise your concerns so we understand them. If I am to understand the Attorney General's Office correctly, it is their intention that the Committee utilize one of its bill draft requests for the 2011 session to address the issues raised in sections 2 and 14.

Orrin Johnson:
I have some good information that is worth having on the record. I was going to begin by reading the Fourth Amendment, but Mr. Horne already did that. "Papers" is a key word in the Fourth Amendment. Two federal cases have dealt with the new and improved 18 U.S.C. 2703, upon which this bill is based. The first case is *U.S. v. Ferguson*, 508 F. Supp.2d 7 (D.D.C. 2007). The case did not reach the merits because the court found that the exclusionary rule is not applicable to the situation in that case. However, the constitutionality of the law was criticized. The second and more directly relevant case was a Sixth Circuit case called *Warshak v. U.S.*, 490 F.3d 455 (6th Cir. 2007). In that case, a criminal was seeking an injunction prohibiting the federal government's seizure or potential future seizure of his emails and the contents thereof. The injunction was granted by the lower court and upheld by the circuit court. The constitutionality of the law, although it was not decided directly, was substantially challenged.

The bill as it is and the federal law as it is suggest that you need a warrant if you are going to read the contents of an email within six months. But, if my emails—and I do not delete anything on my email, I do not know about anybody else—are over six months old, then they can simply be seized by a government entity. The Sixth Circuit in *Warshak* said that you have a constitutional expectation of privacy in those emails; they should be analogized to an unopened, sealed envelope that is going through the mail.

Certainly there are times when law enforcement would need that information. We just suggest that, like we have been doing for 200 years, they go get a warrant, they show a judge, an independent third party, that there is probable cause, and the judge signs off saying it is okay. That is our primary opposition to it.

We have some real problems in section 2 with the failure to notify someone when the contents of his communications are seized, which prevents him from being able to mount a challenge, or to get an injunction. Those individuals just have to hope that they somehow accidentally find out. Certainly there are circumstances where police officers need to keep the details of an investigation secret from the person who is being investigated, but that is precisely the time when the police need to get a warrant and do it the right way. If the emails truly are over six months old, then law enforcement does not have the immediacy, the time concerns, and the other issues that would justify bypassing the warrant process.

Mr. Munro brought up federal preemption, but nothing in the federal preemption doctrine prevents states from extending greater constitutional protections of privacy to their citizens, either statutorily or through their constitutions, than the federal government allows. This was part of the Patriot Act, and Mr. Munro is right that the act is huge, there is a lot to it, and each one of those parts should be addressed on its merits. But in this particular instance, when we, as a state government, do not have the same national security concerns that the federal government has and there are not the timeliness concerns that some of the other provisions in the Patriot Act address with the six month issue, there is simply no reason—it is unreasonable using the terminology of the Fourth Amendment—to start reading citizens' emails without getting a warrant from a judge.

Assemblyman Horne:
You heard the issue on exigency. How would you suggest that be tackled? It is kind of a different animal now. We are accustomed in our practice to understand that an exigency dealing with a drug bust would be to prevent the destruction of evidence. Or sometimes evidence may be in a vehicle, but law

enforcement is able to impound that vehicle before getting a search warrant without violating someone's constitutional rights. But in these types of matters, there is the issue of being able to electronically transfer funds in moments. How do we counterbalance that exigency issue?

Orrin Johnson:
We are not taking a position on the phone card provisions because the exigent circumstances which would lead the police to need to seize a prepaid card is certainly a reasonable argument. We think that those are arguments that need to be looked at on a factual basis, on a case-by-case basis. I want to avoid doing a legal analysis of the prepaid card provisions. I think there are very good arguments that exigent circumstances doctrines that currently exist would allow for the seizure for a short duration in order to get a warrant to actually seize those funds or search them more directly. But I also think there are circumstances where that would not be appropriate, even where time was short, and would be appropriate, even where the time is longer. I am not really sure whether trying to codify it is the better thing to do. Our primary objections pertain to searching the contents of emails, your web browsing, all of your Internet activity, that sort of thing, which would be allowed under this bill without a warrant past the six month mark. In fact, the interesting thing is, when exigent circumstances are clearly an issue, why would you need a warrant for the newer emails but you would not need a warrant for the older emails?

Rebecca Gasca, Public Advocate, American Civil Liberties Union of Nevada, Reno, Nevada:
The American Civil Liberties Union (ACLU) of Nevada is against this bill. We have multiple concerns with this bill. We want to thank the Attorney General's Office for their intention to have section 2 withdrawn. We have various concerns about that section, several of which Mr. Johnson already discussed. Just because a formal amendment has not been submitted, I would like to quickly put two things on the record that really raised our eyebrows.

On page 5 of the bill, lines 21-26, the definitions refer to federal law, and lines 34 and 35 would allow any school police unit of any school district in the state to use the powers set forth in this bill during their investigation of these cards.

Furthermore, there are multiple issues in sections 3 through 13. We do not believe these sections are actually based on federal law, which was an argument used, and we cannot find any case law stating that the Fourth Amendment requirements do not apply to account balances simply because they are based in another country. The case law from the Second Circuit that was cited earlier dealt with a gentleman who was living in

Nairobi. That decision was based on the search of his house in Nairobi. We think that case is not germane to the issue being presented in this bill. We would highly suggest that members of this Committee read that case, because it is a conflicting opinion. Beyond that, there are many other cases that deal with illegally obtained evidence in criminal cases, and none of them, to our knowledge, have ever made an exception based on the warrant requirement, as you have heard argued today.

In sections 6 and 7, the ACLU has some serious concerns because any police officer, any peace officer, is allowed to freeze those funds. That is not limited, period. That is a broad expansion of powers to give any police officer the right to freeze any of the funds on these cards and subsequently, perhaps based on the actions of a court, be allowed to seize those funds.

Section 10 would allow the state or law enforcement agencies to contract with private agencies to effectuate provisions of this bill. That, of course, is a serious cause for concern as well because, when law enforcement agencies contract with private organizations to carry out their duties, it is clear that privacy standards need to be put into the law in order to protect the individuals whose confidential or private information is being dealt with. There are no regulations or standards in this bill to protect the privacy rights of individuals.

Clearly, being in law enforcement is a difficult job. The ACLU recognizes that, but when technology changes it is important that the laws do not change in order to undermine the Fourth Amendment. We sincerely believe that this bill, were it to become law, would essentially leave the Fourth Amendment in tatters. This clearly is in contrast with Nevada's libertarian perspective and long tradition of questioning the expansion of law enforcement power.

Mr. Earl mentioned earlier that existing law requires no court involvement. I am not sure if he overlooked the portion of the law which clearly states that, if a company is given a subpoena by a law enforcement agency, it does not have to comply, and the law could not be clearer. This bill seeks to reverse that.

Chairman Anderson:
And you raised those issues on the other side?

Rebecca Gasca:
Yes, sir.

Chairman Anderson:
The reaction from the Senate was?

Rebecca Gasca:
Unfortunately, I did not testify on that side. Ms. Rowland was supposed to be here today, and she does send her apologies that she could not be here.

Chairman Anderson:
But that very issue was raised with the other side?

Rebecca Gasca:
I believe so. It is clear from the current statute that a company may refuse to comply with a subpoena issued by law enforcement. This bill would eviscerate that standard, which we think is very important in upholding the Fourth Amendment.

Assemblyman Cobb:
I somewhat share your concerns with section 10, but I really did not follow your arguments on exigencies in the law in terms of exclusions from the Fourth Amendment. That was a very vague argument that you gave. Are you suggesting that there are no exigent circumstances when a law enforcement officer should be able to seize something upon probable cause or reasonable belief? For instance, as was mentioned by my colleague from the south, the reason why we have them is that the evidence can be destroyed. Especially with things like drug purchases, if you see someone holding what looks like a key of cocaine, because you are a law enforcement officer and you know what it looks like, that is why we allow a seizure, even if there is no ongoing investigation and, of course, no warrant. So are you suggesting that there is something in this bill that goes beyond those exigent circumstances which have been outlined in case law for decades, or are you just opposed to exigent circumstances in general?

Rebecca Gasca:
Those standards brought up are interesting, and clearly case law has existed for years dealing with exigent circumstances. Largely, they deal with evidence that is likely to disappear in short order in cases involving drug use or driving while under the influence, which is why courts have said that law enforcement can take a blood sample. But in cases like that, the courts have found that a person is actually giving his permission to have that blood sample taken just by virtue of enjoying the privilege of driving a car. In this case, we do not think those types of standards apply just because the person is carrying around a Target gift certificate or a prepaid stored value card.

I did note that the gentleman from Las Vegas said that with these types of cards they have the bank and possibly the routing number, and what they are worried about is that evidence disappearing. From what we understand, when you have a bank and routing number, you have probable cause to know that it was involved in a crime, and that should be enough to go to court and get a warrant. We are opposed to seizing and freezing assets without a warrant and without court oversight. Clearly that does not exist in the current law.

Assemblyman Cobb:
My specific question had to do with drug arrests. The reason I want to focus on that as opposed to something like a DUI, where arguments can be made that it is a privilege to be on the roads, is if a trained police officer, using his experience and his knowledge, sees an individual walking down the street with something that looks like an illegal substance, he does not need anything beyond that to seize that substance because of exigent circumstances. In this bill, the way it was described by the police officer from the south, is if you walk into a situation where there is a large amount of drugs and there is a bunch of prepaid cards sitting next to the drugs, that is the probable cause, so you can then freeze the funds and later go to court to seek a warrant to seize the funds. I am asking you, under those circumstances, where there is no privilege argument or anything like that, is the ACLU opposed to using those exigent circumstances to be able to simply freeze those funds?

Rebecca Gasca:
The ACLU would be opposed to freezing funds without court oversight and having that ability given to any peace officer, especially in the cases where it would be given to someone like a school police officer.

Assemblyman Cobb:
Despite exigent circumstances?

Rebecca Gasca:
In general, but I would be happy to get a legal opinion from our lawyers. Clearly I am not one, so I cannot be more specific.

Chairman Anderson:
You feel there is a substantial difference between a school police officer and a metropolitan police officer or a sheriff?

Rebecca Gasca:
I do understand that there are different roles that those officers play, and certainly the duties assigned in one job are very different from another.

The expectations and the populations that those officers deal with are very different as well. Clearly there would be different...

Chairman Anderson:
It would be a yes or a no answer.

Rebecca Gasca:
Yes.

Janine Hansen, President, Nevada Eagle Forum, Elko, Nevada:
I am not an expert on this issue, nor am I an attorney, so my remarks will be rather philosophical in general. However, I do support the concerns of those who have spoken previously, specifically about section 2, and I am glad the Attorney General is essentially withdrawing that for the time being.

First of all, I am very appreciative that Mr. Horne quoted the Fourth Amendment. Of course in the *Nevada Constitution* it is repeated exactly in Article 1, Section 18, except that search and seizure are switched in our *Constitution*. I am particularly concerned about these issues because I think it is very important to maintain and protect our constitutional liberties. That is why I am very pleased to see the very diligent questioning and responses by this Committee on this issue; that shows their deep concern. When I talk to people, they might say to me, "Well, if I am not breaking the law, or if I am not a criminal, why do I care about these things?" And I have to say to them that certainly our Founding Fathers were in a position to understand that. But let me mention the issues that have come up more recently. One is a report by the Missouri police...

Chairman Anderson:
I know you would like to get all of this on the record, but I really need to make sure that we contain ourselves to the bill in front of us. If you would do that, that would value the time of the 14 members here who want to hear what you have to say about the piece of legislation in front of us.

Janine Hansen:
This bill refers to 18 U.S.C. § 2703, which was specifically amended by section 210 of the Patriot Act. This is an issue, and we know that it is only a small portion of it, but I have had serious concerns about the Patriot Act from the beginning. With regard to this bill, those concerns continue. I was part of the statewide organization to oppose the Patriot Act. Those provisions could impact innocent people who have nothing to do with crime when the standards for search and seizure are lessened. That is what I am particularly concerned about. Subsection 4 of the repealed section on the last page of the bill talks

about an individual's right to object to a subpoena and that law enforcement is required to get a warrant in that case. I am particularly concerned that the bill would diminish the individual's rights in the area of search and seizure.

I have been listening to the book on John Adams recently, and one of the things he said was it is much more important that a government protect the innocent rather than punish the guilty. In these circumstances, we always have to keep in mind that the highest responsibility we must have is to protect the innocent.

As we move forward with this, I have serious concerns about just adopting federal law into state law because I have seen recent reports from the federal Department of Homeland Security and the Missouri police that identify people like me; in the case of the Missouri police: people who have voted for certain presidential candidates, and in the case of Homeland Security: people who may be considered terrorists. That would not be the first time I have ended up on those kinds of lists.

Chairman Anderson:
It would appear that, if we were to move forward with this bill, the Attorney General has suggested that sections 2 and 14 be removed, predicated on the belief that those issues will be more fully developed for the next legislative session and the Committee would be requested to ask for a piece of legislation at this time, for consideration at the next legislative session, to address the issues that were raised.

Keith Munro:
As I said, I understand that these sections may give pause because of the federal law involved, and I understand that time is short. We are trying to make sure that this body carries out the policy it enacted, we understand that it may need more study, and we think it would be prudent, out of respect for the Senate, who had time to look at this and passed it 20 to 1, if you need more time and have concerns, that you have a committee introduction as to sections 2 and 14. We believe section 14 provides fewer protections for our citizens than section 2, but we understand that it needs to be thoroughly vetted.

Chairman Anderson:
I will close the hearing on S.B. 82 (R1).

[Discussed measures returning from the Senate with amendment.]

Assemblyman Ohrenschall:
On Senate Bill 216 (1st Reprint), I stepped outside when the vote was called, and I wonder if my affirmative vote could be added to the record.

Chairman Anderson:
Yes. Mr. Secretary, Mr. Ohrenschall was here for the discussion on the bill, but had to step out in order to attend another hearing, and wishes to be recorded as an affirmative vote on S.B. 216 (R1).

[Continued to discuss measures returning from the Senate with amendment and other Committee business.]

We are adjourned [at 11:32 a.m.].

RESPECTFULLY SUBMITTED:

Sean McDonald
Committee Secretary

RESPECTFULLY SUBMITTED:

Julie Kellen
Editing Secretary

APPROVED BY:

Assemblyman Bernie Anderson, Chairman

DATE:

EXHIBITS

Committee Name: Committee on Judiciary

Date: May 1, 2009 **Time of Meeting: 8:19 a.m.**

Bill	Exhibit	Witness / Agency	Description
	A		Agenda
	B		Attendance Roster
S.B. 82 (R1)	C	Robert Sebby	Prepared testimony.