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COMMITTEE ON JUDICIARY
March 11, 2005
LB 670, 393, 316, 385, 567, 123

The Committee on Judiciary met at 1:30 p.m. on Friday, March 11, 2005, in Room 1113 of the State Capitol, Lincoln, Nebraska, for the purpose of conducting a public hearing on LB 670, LB 393, LB 316, LB 385, LB 567, and LB 123. Senators present: Patrick Bourne, Chairperson; Dwite Pedersen, Vice Chairperson; Ray Aguilar; Jeanne Combs; Mike Flood; Mike Foley; and Mike Friend. Senators absent: Ernie Chambers.

SENATOR BOURNE: The other members will come as the afternoon progresses I hope. Welcome to the Judiciary Committee. This is the 21st day of committee hearings. We're hearing six bills today. My name is Pat Bourne. I'm from Omaha. To my left is the committee clerk, Laurie Vollertsen. To my right is the committee's legal counsel, Jeff Beaty. And the other members I will introduce the other members of the committee as they arrive. Please keep in mind that senators have duties and hearings in other committees (laugh) so don't take it personally if they either don't show up or leave during your testimony. If you plan to testify on a bill, we're going to ask that you sign in in advance at the on-deck area there. Please print your information so that it's easily readable and can be entered into the permanent record. Following the introduction of each bill I'll ask how many testifiers we have. We'll first have the introducer of the bill, then we'll take proponent testimony, opponent testimony, and then we'll have any neutral testimony. When you come forward to testify, please clearly state and spell your name for the record. All of our hearings are transcribed and your spelling of your name would help the transcribers immensely. Due to the large number of bills we hear here in the committee we do utilize a timing light system. Senators introducing bills get five minutes to open, three minutes to close if they choose to do so. All other testifiers get three minutes to testify exclusive of any questions the committee might have for you. The blue light will go on at three minutes. The amber light at one, and then when the red light comes on we ask that you conclude your testimony. The rules of the Legislature state that cell phones are not allowed so if you have a cell phone please disable the ringer so as not to disturb those testifying. Reading someone else's testimony is not allowed. We will allow you to submit that testimony to us

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and we will enter it into the record but we won't allow you to read that testimony. We've been joined by Senator Foley from Lincoln and Senator Dwite Pedersen from Elkhorn soon to be Omaha, and Senator Mike Friend from Omaha as well. With that, Senator Landis to open on LB 670.

LB 670

SENATOR LANDIS: Thank you, Senator Bourne, members of the Judiciary Committee, David Landis, principal introducer of LB 670, L-a-n-d-i-s, representing "The Garden District" today as I always do.

SENATOR Dw. PEDERSEN: How does your garden grow?

SENATOR LANDIS: Well, it depends on what you do with this bill, Dwite (laughter). I think it has the chance to grow very well and I tell you why. We have in this state a Nebraska Computer Crimes Act. We did it several years ago. I was a cosponsor, although John Lindsay was the principal introducer of the bill. In the intervening time, things that I think we would all regard are misuses of computers, have sprung up because it is an ever-changing field and this bill makes some appropriate adjustments to that. Understand that the basic law for antispam work is done federally but there is the wrap around policy of the Nebraska Computer Crimes Act. One of the things that happens in LB 670 is the updating of several critical definitions, one of which is computer network. This is a better and updated definition of a computer network and with the amendment that I've offered you, it also includes wireless access points as part of a computer network. That's sprung up since the Nebraska Computer Crimes Act was initially passed. The computer software definition is updated and is more appropriate as a description of what now passes for software than what was on the books when this bill was originally passed. Spyware is new. Spyware is something that some external user sneaks into your computer to watch what you do and send them back data about you that you did not agree to. When the Nebraska Computer Crimes Law was written we didn't even know this existed. It didn't exist but it sprung up and right now it's not against Nebraska law. It's a bad idea which is why the destructive product which had meant viruses in the old days is now amended to include downloads and installs

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other...this is a piece of software that downloads and installs other computer programs not authorized by the computer owner or retrieves personal data including but not limited to Social Security numbers, birthdates, credit card numbers, or passwords for unauthorized use. That's one of the things that spyware can do. This is critical to identity theft. If you can get somebody's credit card numbers, Social Security numbers, names, dates, and places and that occurs by the spyware phenomenon. There's also an updated definition for electronic mail service provider. An offense is added here and the offense is in Section 3. A person commits offense under the Nebraska Computer Crimes Act by use of a computer or computer network with the intent to falsify or forge electronic mail transmission information or other routing information in any manner in connection with the transmission of unsolicited bulk electronic mail through or into the computer network of an electronic mail service provider or its subscribers. And generally speaking, most spam does not get discovered, it's hard to find but when you do and when you've got one, you need to have the tools available to stop it. This bill helps in that respect. This is a bill modeled on what was recently done in Virginia. It is also an update of the work that Nebraska has already done and I would ask the committee to report the bill out. I think it's the kind of bill that once you see it and, in fact, approve of it I think you have to agree with me that computer crimes are dangerous and growing, that we want updated tools. I think it's something you can find a home someplace between now and the end of the session given the notable work this committee does with the merger of various ideas in updating our criminal code. This is an area that you have to keep on top of. Computer crimes changes almost quarterly which is why attention to this deserves the committee's attention even on the last day of committee hearings.

SENATOR BOURNE: We've got another week to go (laugh).

SENATOR LANDIS: Oh, do you? Oh, my God.

SENATOR BOURNE: And you still have another minute to go.

SENATOR LANDIS: No, I don't.

SENATOR BOURNE: All right.

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SENATOR LANDIS: In that case, I revert it back to the Chair.

SENATOR BOURNE: (laugh) We've been joined by Senator Flood from Norfolk, Senator Aguilar from Grand Island, and Senator Combs from Milligan. Senator Foley.

SENATOR FOLEY: Remember, I'm not a lawyer when you hear the question.

SENATOR LANDIS: Gotcha, sure.

SENATOR FOLEY: Does this bill allow us to reach beyond our borders to someone who's sending in this stuff to our state? Because as a (inaudible) that's where it's coming from, let's be honest about it. There might be just a little bit here but.

SENATOR LANDIS: Here's what I'm going to tell you. And I'm going to hope it's right but then afterwards I'll check. And Jeff can cross-check my work. A person who sends this into the state of Nebraska is violating Nebraska law. We have to be able to establish the law was broken in Nebraska but living in another state does not permit you to break Nebraska law. It is usually a matter of resources, Senator Foley, not jurisdiction.

SENATOR FOLEY: Okay.

SENATOR LANDIS: From my perspective, I think that the transgression has occurred here because, in a sense, it's an invasion of privacy for your computer in Nebraska to import something into it here. I think there's a nexus. The problem then is to go in and finding them and bringing them into the jurisdiction for that. But from my perspective, my first answer is the fault lies here which means it's a matter of resources and going to get somebody who broke a law in Nebraska.

SENATOR FOLEY: It's my understanding that a lot of the spam that we get is actually coming from another country perhaps since it has to do with the federal legislation. It didn't stop the spam. It just kind of pushed it out the door.

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SENATOR LANDIS: And even if only one of us, I mean if we only got five spams a day and if you're in the Legislature you're getting a lot more than five. Your staff is getting a lot more than five. But if we simply did five spams a day in the Legislature we would have 127,000 spams over the course of this session. Nutty, nutty, nut case and we get over 1,500 spams per day in the Legislature. And my guess the number is twice, three, four times that amount.

SENATOR FOLEY: I like what you're doing. I'll probably vote for the bill to tell you but in the final analysis I think the answer is not more laws. Maybe this will help a little bit.

SENATOR LANDIS: A little bit.

SENATOR FOLEY: I think ultimately there's going to have to be some technological miracle that's going to occur here that somebody's going to figure out how to stop this stuff. And I don't know how that will ever happen but anyway.

SENATOR LANDIS: That's my hope. I can't wait for that day to come.

SENATOR FOLEY: Me too.

SENATOR Dw. PEDERSEN: Senator Combs.

SENATOR COMBS: Yes. I apologize I didn't make it here for all of your opening. Did you mention the cost to people in terms of band-width utilization for all these e-mails that ties up their band-width and costs money?

SENATOR LANDIS: No, but the cost of spam is immense.

SENATOR COMBS: It's tremendous. Thank you.

SENATOR Dw. PEDERSEN: Any other questions? Thank you, Senator Landis. Will you be closing?

SENATOR LANDIS: No, I won't.

SENATOR Dw. PEDERSEN: Back to the garden.

SENATOR LANDIS: Back to the garden.

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LB 670, 393

SENATOR Dw. PEDERSEN: Thank you. There's not very many people in attendance here today so I'm not going to ask for a raise of the hands. Why don't we just start out with those who are in support of LB 670? Please come forward. Richard.

RICHARD HEDRICK: Yeah, I don't know if I'm...

SENATOR Dw. PEDERSEN: Are you for LB 670?

RICHARD HEDRICK: We got to do something about it (laugh). I don't know if (inaudible)...

SENATOR Dw. PEDERSEN: Well, you're usually neutral, Richard, so (laughter) I'm just caught a little off-base here. Go ahead, Mr. Hedrick.

RICHARD HEDRICK: Well, I don't know what's going on. I am Hedrick if you haven't learned already. I had something like 3,000 e-mails and then last two days ago I looked at it and I had 9,000. And Yahoo, for some reason, they had a limit on it. And now they don't have a limit on it (laugh). I can't keep up with deleting the mail. One problem is you don't want to answer any question. They have so many good ideas there. We'll give you (inaudible) computer for trying it out and you're stupid enough to fall for their line to get your name. And you don't get anything (laughter) so I guess that's one problem. If you open up your mailbox and find some junk mail they don't know about it. But they know about it when you get an e-mail.

SENATOR Dw. PEDERSEN: Thank you, Mr. Hedrick. Any questions from the committee? Seeing none, thank you. Anybody else here in support of LB 670? Any opposition to LB 670? Any neutral? Seeing none, that will close the hearing on LB 670 and we'll open the hearing on LB 393. Senator Smith here to introduce. Welcome, Senator Smith.

LB 393

SENATOR SMITH: Thank you, Mr. Chairman, members of the Judiciary Committee. For the record my name is Adrian

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LB 393

Smith, A-d-r-i-a-n S-m-i-t-h. LB 393 would prohibit centers of bulk e-mail from using false or deceptive information in these messages. Either the victims or the Attorney General may seek civil remedies against the violators. The remedies include injunctions, recovery of actual damages, and civil penalties of \$500 per e-mail message in lieu of actual damages. The prohibited acts include using the name of a third party in the return address field without permission of the third party, misrepresenting any information in identifying the point of origin of the transmission path of the e-mail, using a deceptive subject line, demonstrating a pattern of sending unsolicited false deceptive or fraudulent advertisements when the recipient has requested to decline such e-mail. Damages include actual damages including lost profits. In lieu of actual damages one may elect to recover \$500 for each e-mail, twice the amount the federal law allows for recovery. In addition to monetary damages the recipient is entitled to attorneys' fees. Interactive computer service may also recover actual damages, attorneys' fees and costs. Exemptions: A person who provides users with access to a computer network and as part of the service transmits e-mails on behalf of those users unless they transmit e-mail that they knew or should have known was in violation. E-mail access from an electronic bulletin board or e-mail in exchange for free use of an e-mail account. Other states have done this. I cite a particular case in Texas where they find an especially egregious enterprising individual (laugh). I commend his enterprising efforts but they exploited a lot of people and when we look at the amount of damages, you know, I want to be flexible. I don't want to encourage unnecessary litigation. I also believe that it should be something that is more than just the cost of doing business in exploiting those folks who might fall victim or fall prey to a particular individual seeking to do damage. I would take any questions.

SENATOR Dw. PEDERSEN: Thank you, Senator Smith.

SENATOR SMITH: Well, I don't know about any questions but questions that I might be able to answer (laugh).

SENATOR Dw. PEDERSEN: We have a question. Senator Flood.

SENATOR FLOOD: Thank you, Vice Chairman Pedersen. Senator Smith, thank you for your testimony. I agree with what

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you're trying to do. To make this work within the context of our civil liability statutes, I'm a little worried that the \$500 represents more of a punitive fine than possibly a civil remedy, you know. I don't know that the state can agree upon liquidated damages for a civil cause of action. Liquidated damages by the Supreme Court have not been looked upon very favorably in recent months. Would you rather keep this on the civil side or do you have any objection to exploring this in the criminal code?

SENATOR SMITH: I would certainly be open to exploring it in the criminal code. I think that gets to the exploitation of individuals more so than the civil side.

SENATOR FLOOD: There would be a fine of \$500.

SENATOR SMITH: Right, but I also...I believe that because there are a lot of damages out there that the civil side should be allowed to a certain degree anyway so that folks could recover their losses.

SENATOR FLOOD: And I agree with that. My concern would be how do you prove up damages from a deceptive e-mail unless you participated? If you participate in a scam or deception, we've got the Consumer Protection Act and deceptive advertising and not that I've ever engaged in that but I do know it's found in Section 9-701 of the statutes. And I believe that deception is one of the...and Jeff, committee counsel, probably is familiar with that. We could amend that section unless this already does. I guess I didn't...you wouldn't have any problem with that.

SENATOR SMITH: I'm flexible. I want to be sure we come up with something that's enforceable and workable in a practical situation.

SENATOR FLOOD: Okay, I appreciate the bill. Thank you.

SENATOR SMITH: Thank you.

SENATOR Dw. PEDERSEN: Any other questions from the committee? Seeing none, thank you, Senator Smith. Will you be closing?

SENATOR SMITH: Thank you. I'll probably waive closing.

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SENATOR Dw. PEDERSEN: Okay. Thank you. Those in support of LB 393? Please take the stand.

LYNN FRITZ: Good afternoon, Senators. My name is Lynn Fritz. That's spelled F-r-i-t-z. I'm an assistant attorney general with the Nebraska Attorney General's Office. I'm chief of the Public Protection Bureau of which the Consumer Protection Division is part. I'm appearing this afternoon to testify in favor of LB 393. LB 393 is part of a legislative solution to the problem of unsolicited commercial electronic or e-mail messages commonly referred to as spam as Senator Smith has already described. There are over 35 states that have passed some type of antispam legislation. In 2003, Congress enacted legislation aimed at reducing spam. This federal legislation specifically permits states to enact legislative measures which prohibit falsity or deception in any portion of a commercial electronic mail message. LB 393 which focuses on false and deceptive bulk electronic mail is the type of legislative measure permitted by Congress. LB 393 would prohibit senders of bulk electronic mail from using materially false or deceptive information in bulk mail messages. Several specific acts would be permitted under the bill as Senator Smith has already enumerated so I won't take your time in enumerating those again. The important thing about LB 393 is that it provides a broader scope of remedies to those who have been the victim of deceptive fraudulent bulk mail than the remedies that are available under the federal Spam Act. Under the federal Spam Act enforcement authority totally rests with governmental entities whereas under LB 393 a private cause of action by an individual citizen would be authorized so that they could protect their own interests. LB 393 would authorize any person who is injured as a result of a violation of the act to bring an action to recover damages. The damages would include all actual damages such as lost profits, for example. The recipient would be entitled to recover costs and attorneys' fees. Alternatively, instead of actual damages the recipient of the e-mail may be able to recover from the person violating the act the sum of \$500 for each bulk mail message transmitted to the recipient in violation of the act. The \$500 damages in lieu of actual damages would be greater than the damages provided by the federal Spam Act which is \$250. Additionally, LB 393 specifically protects any existing

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civil causes of action so that those could be brought by the recipients in addition to the cause of action authorized by the bill. LB 393 would also authorize the Nebraska Attorney General to seek injunctive relief and civil penalties for violation of the act. Under the federal Spam Act the state attorney generals have the authority to bring enforcement actions on behalf of their citizens and to obtain actual damages and a \$250 penalty but only if the federal enforcement agencies have not brought an action first. This would eliminate that requirement and would allow the state Attorney General to bring the action on behalf of citizens who are damaged by the spam. If there are any questions, I'll be glad to answer them.

SENATOR Dw. PEDERSEN: Thank you.

LYNN FRITZ: If I can.

SENATOR Dw. PEDERSEN: Senator Flood.

SENATOR FLOOD: Thank you, Vice Chairman Pedersen. Thank you very much for your testimony. You're probably a lot more familiar with the statutes relating to consumer protection than I am. What would be your reaction to making this more of a criminal penalty and amending the Consumer Protection Act in Nebraska in Chapter 9?

LYNN FRITZ: I would see that this bill could become, could go hand in hand with the Consumer Protection Act because it is aimed at deceptive practices just as is the Consumer Protection Act. I think the difference between this bill and a criminal action is its emphasis on the private cause of action for the individual recipient and that would distinguish it from a criminal action which would be brought by the state by the prosecuting attorney. So I think it, you know, I think it would supplement a criminal act but the focus of this particular bill is the right of the citizen to bring a civil right of action for damages.

SENATOR FLOOD: I appreciate that. Do you find in your work for the Attorney General's Office that civil remedies are better than criminal remedies and is that kind of a commentary on our restitution procedures in criminal court or?

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LB 393

LYNN FRITZ: Well, I don't think they're better. I think they go hand in hand. I think they serve separate purposes and I think it's important that you have both. The criminal obviously is more punitive. The civil can be, you know, like you said, more restitution, more aimed at the individual protecting their own rights and...but I definitely think there's room for both particularly when you're dealing with such a large problem as spam.

SENATOR FLOOD: And my last question, I guess. I'm just interested to know the Attorney General's Office in Nebraska. When you get involved in a consumer protection violation, do you find yourself filing more civil suits or criminal suits? And this is just for my own information. What do you find yourself doing more often?

LYNN FRITZ: We take a look at the facts and decide how we think we can prove it best, how we think the actions can be stopped. There are times when what we need is injunctive relief. We need to go in and make sure that business is put out of business so that more consumers don't get hurt and then the civil would be the way that we'd go. There are other times when maybe the business is already, you know, out of business and it's...

SENATOR FLOOD: The damage has been done.

LYNN FRITZ: Yeah, the damage has been done but it's a real onerous situation and we want to penalize the person or the business that's done it so then we might bring a criminal. But we really analyze it under both theories.

SENATOR FLOOD: Thank you very much. I appreciate your testimony.

LYNN FRITZ: You're welcome.

SENATOR Dw. PEDERSEN: Any other questions from the committee? Seeing none, thank you, Ms. Fritz.

LYNN FRITZ: Thank you.

SENATOR Dw. PEDERSEN: Any more testifiers in support? Any opposition to LB 393? Any neutral? Senator Smith has waived closing. That will close the hearing on LB 393. We

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LB 316

will now open the hearing on LB 316. Senator Howard here to introduce. Can I please poll...the committee clerk has reminded me for the rest of the capitol on the closed circuit TV and so they know when to come for the next bill, I do need to poll the people in attendance. How many people we have here in support of LB 316? Opposition? Neutral. I see one neutral and three for. Thank you. Whenever you're ready, Senator Howard.

LB 316

SENATOR HOWARD: Thank you, sir. Good afternoon, Chairman and members of the Judiciary Committee. I am Senator Gwen Howard of Omaha and I'm glad to be here today to introduce LB 316, the Consumer Protection Against Spyware Act. First, however, I need to make a confession. I really don't understand spyware (laughter). I'll let you know that up-front...

SENATOR Dw. PEDERSEN: Join the crowd (laughter).

SENATOR FRIEND: Yeah, you can sit with us right here then.

SENATOR HOWARD: Thank you. My knowledge of computers is limited. I can turn it on, I can e-mail, and I can operate some very basic functions. Like many Americans, I'm certain some members of this committee, possibly, I am at the mercy of other people when it comes to computer technology. But as a result of my status as a computer novice, I'm a perfect example of why LB 316 is important. Computer programs, commonly known as spyware or adware, are placed on computers through the Internet without the knowledge of the computer owner. Those of us who know little about the Internet or computers really are powerless to stop it. In fact, a survey done by the National Cyber Security Alliance found that 91 percent of the consumers surveyed had some form of spyware or adware on their computers and most didn't even know it. Now some of those who engage in the practice of placing spyware on a computer do so to actually help the computer user navigate the Internet. Some businesses engage in the practice to advertise but some have more sinister motives. They place these programs on a computer in an attempt to obtain personal information such as bank account numbers or websites used by the computer owner. In either

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case, whether the motives are good or bad, spyware reduces the effectiveness of a computer and threatens business productivity. A build-up of spyware on a computer consumes disk space and resources and it dramatically slows the computer's performance and inhibits its usefulness. While no one knows for sure the actual cost of spyware, several technology websites we viewed estimated that in lost productivity and technical support the cost is \$173 per incident and in a thousand person organization with a spyware infection of 10 percent per month the annual cost would be more than \$200,000 a year. Since computers and the Internet are the economic medium of our age, this has tremendous impact not only on individuals like me but on our entire economy. And rather than explain this bill in more detail, I'm turning over the effort to my legislative aide who can shed some light on the subject. Thank you.

SENATOR Dw. PEDERSEN: Thank you, Senator Howard. Is there any questions from the committee? They all caught right onto it, Senator Howard.

SENATOR HOWARD: Thank you. Oh, oh (laugh) I'll do my best. Okay, thank you. I do know some websites but not many.

SENATOR Dw. PEDERSEN: Seeing none, thank you, Senator Howard.

SENATOR HOWARD: Thank you, sir.

SENATOR Dw. PEDERSEN: We should please have our first testifier in support.

RICHARD HOPPE: I'm Richard Hoppe. I'm Senator Howard's legislative aide, H-o-p-p-e, in case you were confused, Laurie. Senator Howard is a novice and I guess you'd put my computer skills more in the intermediate category. Fortunately, for you all there's some experts that are going to follow me. Senator Howard has asked me just to kind of briefly explain what the bill actually does so that you have some basis of reference. The bill proposes that the following actions taken by a person, placing a software program on another's machine without the user knowledge be made illegal. For instance, changing the Internet's access site or messing with the internet access that the person has. For instance, when most of you go to your computer

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today I assume with the Legislature what pops up is our legislative website, the Unicam website so you can do your business there. Some spyware programs erase that and direct you to other websites for the purpose of trying to get you to buy something or whatever. I know in my own circumstance on my home computer before I got a really good tech guy, it kept taking me to a gambling site which was sort of ironic in that I'd never even set foot in a casino in my 36 years of life. But, nonetheless, that does get the power of these things. They can afford to do this because they have such mass volume and be able to get to so many other computers. Second, the part that you may be most familiar with would illegalize the collection through deception of personal identifiable information such as websites visited, home addresses, bank accounts, payment histories, et cetera. That's kind of the identity theft or trying to get into someone's bank account, use a credit card to pay for something that doesn't belong to you. Third, the continuous reinstallation of computer software the computer user has removed. So you get those pop-ups or some information on your computer that's been placed there by someone else, you go through the steps that your manual or your tech guy tells you to get rid of it and it keeps reappearing because of a program, a spyware program, that's put on there that keeps allowing the program to continue to pop up. Fourth, the intentional misrepresentation that a program will be removed when it will not be or that a software program is necessary for computer security. And those are my real favorites. You get a pop-up that says if you don't do something right now the end of the world will occur, you'll have a data collapse, something of that nature. Fifth, the disabling of antivirus or antispyware programs that the user has placed on the computer to block spyware. There are a various number of programs on the market that allow you to block this type of stuff but there are spyware programs that disable that. Real quickly here, the other part of this bill is the enforcement. Right now because there was no clear way to determine how to best enforce it as I think the conversation you had with Senator Smith kind of underscored, we appoint a task force to examine these issues and think about how they're being pursued in the other 19 states that are currently right now considering this type of legislation. Most of them use either civil remedies or they task the Attorney General for enforcement and, truthfully, several of them just didn't mention enforcement at all. And

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we really believe there needs to be a greater meeting of the minds before something like this is actually put forward. Some folks from UNO are going to come next and tell us all our shortcomings here because apparently we did as best we could a job to draft this but the experts are a better place to do so and so I'll turn it over to them.

SENATOR Dw. PEDERSEN: Thank you, Mr. Hoppe. Is there any questions from the committee? Seeing none, thank you. Next testifier in support?

TREVOR TAYLOR: My name is Trevor Taylor. I'm a computer professional and also a student at UNO.

SENATOR Dw. PEDERSEN: Could you please spell your last name for the record?

TREVOR TAYLOR: Sure. T-a-y-l-o-r. I've been a computer professional for six years. I'm currently a computer science student at UNO. I have had much run-in with spyware. I worked at Info USA for a period of a year and a half. During my time at Info USA it was not unusual for me to spend nine to ten hours a week simply going out to users' computers and then uninstalling spyware, doing all the work to get it cleaned up. And if you missed one little piece because of, as he mentioned, it reinstalling itself you are back out there again. It's a big cost to businesses as well as to consumers. Spyware like this is typically cheap software that is not developed well and will cause your computer to perform very badly once it's installed. I've seen many instances of this happening. It's something that definitely needs to be addressed.

SENATOR Dw. PEDERSEN: Thank you, Mr. Taylor. Is there any questions from the committee? Senator Friend.

SENATOR FRIEND: Thank you, Senator Pedersen. Mr. Taylor, I don't know that I lied. I do understand a little bit about what we're dealing with, not as much as you I don't think, but I work at a large company in downtown Omaha and I'm not trying to, I guess, reiterate what Senator Foley brought up a point earlier on, I don't know if you were here. We just heard three bills...I'm not sure, I know the bank can combat this with a lot of different infrastructure that they have. We have problems with individuals being able to combat this

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but I also know through some of my colleagues at the bank in the technology division, that this is a big business to combat spyware. We're trying to create legislation to stop it but there are private...there are companies out there that are going to hit it. It's like creating a cure for a terrible disease. And when they do, I don't think they want government in their way. I mean, how would you respond to that? I mean, because it's common. I mean, they know this is out there and it's a big business to try to stop it so...

TREVOR TAYLOR: There is, again, like spam or viruses, it is a big business to stop it. That does not mean that it doesn't happen and there are new ways to develop to get around whatever technologies that are currently in place.

SENATOR FRIEND: Well, these guys are not afraid of what we do, though, right? I mean...

TREVOR TAYLOR: To a certain extent that is true.

SENATOR FRIEND: Let me just sum it up. Do you think, and I don't know how a lot of these guys think. I mean, I know there is a lot of fraudulent behavior out there and I think that we have legislation in place that, you know, could hold them accountable. But it's a big business to try to defraud places like First National, Wells Fargo, and, you know, US Bank. So I guess I would say, I would ask you, are we spinning our wheels? I like all these bills, I would tell you that right now. But are we spinning our wheels here? Do you actually think these will accomplish something with these characters?

TREVOR TAYLOR: I think they will accomplish something, yes. Whether they'll get rid of it entirely, no, I don't think they'll get rid of it entirely. I don't think you can. It's an ongoing fight. You develop a technology or a legislature to combat it, they'll come up with some different way to do it. I think it...

SENATOR FRIEND: Yeah, that's what I'm afraid of.

TREVOR TAYLOR: ...I think it is a step in the right direction. I don't think it will completely solve it.

SENATOR FRIEND: Thanks, Mr. Taylor.

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TREVOR TAYLOR: Um-hum, thank you.

SENATOR Dw. PEDERSEN: Any other questions from the committee? Seeing none, thank you, Mr. Taylor. The next testifier in support, please come forward.

TIM VIDAS: My name is Tim Vidas, V-i-d-a-s. I'm a senior technology researcher, University of Nebraska at Omaha. I'm also a certified information systems security professional, the highest certifications that you get in the industry right now and my area of expertise at the college is network and computer forensics, reconstructing and correlating events that have occurred in order to determine what has happened (inaudible). One of the biggest things that...I'll address two things as Alex is going to come up here after me and address some other technical inaccuracies. But one of the big things that I'll say right now, I'm for the bill but I have a lot of concerns with the way that some of the things are worded right now. From the definitions area, there is no definition of what actually constitutes spyware. There are a lot of other definitions that kind of lead up to the definition. I think if you're going to try and draft legislation that addresses spyware you should define exactly what it means and there's a definition of a virus that a well-written virus degrades performance and in some way the machine, and a well-written virus actually won't degrade performance of the machine. It will actually be fairly covert it's not an overt act. But I think it's a good start for the legislation and I think this legislation is something that's needed. Towards the end, there are some allotments for people that this law does not apply to. And it's pretty obvious that the intent of this paragraph is to allow law enforcement and authorized individuals like vendors of software, for example, Microsoft Update, to allow updates to your software package. But just to give you a couple of scenarios where this would apply where you probably don't want it to, it mentions stealing of information. Stealing of information is an interesting notion in the digital world because you never actually lose anything. If something is stolen in the physical world, you notice it's gone, right? You can catch it on camera and things like that but in a digital world you still have it. So it's a breach of confidentiality. Somebody else also has your information and you have the exact same identical

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information still. This actually does not apply to software providers, people that actually create spyware are actually providing you software, right? So you don't want to exempt...I think that's a general exemption. And it also exempts tech support where if you bring a computer in to get some type of support where they could actually install methods of spyware and you probably don't want to have that as part of the bill. And it also exempts something that I would call benevolent worm. Viruses have two pieces to them. They have the piece that kind of propagates and they travel around on. And you also have a thing that we call payload which is what it actually does. Everybody kind of infers that the payload be something malicious, (inaudible) an attack or do something else. But, in fact, you could write a virus that goes out and fixes machines, right? It patches them and under this, that would not be covered. And it looks like I'm out of time.

SENATOR Dw. PEDERSEN: Thank you. Excuse me, but I didn't get your last name.

TIM VIDAS: Vidas, V-i-d-a-s.

SENATOR Dw. PEDERSEN: Thank you. Mr. Vidas, is there any questions for Mr. Vidas from the committee? I have one. Can you give me a real simple definition of spyware?

TIM VIDAS: Ooh, simple definition of spyware (laughter). It's easy to point out the...

SENATOR Dw. PEDERSEN: Obviously, I'm not...

TIM VIDAS: ...accuracies. It's hard to fix them, right? Spyware can be defined in many ways. Generally, I suppose, it's some form of tracking or leakage of identifiable information from an unknowing user.

SENATOR Dw. PEDERSEN: I have a computer. I have two of them. The one I like the best doesn't have e-mail on it (laughter). It's not hooked up to e-mail so it's a typewriter but I appreciate that. I appreciate having people like you that know it like I've got to wait till my kids come home on the weekend to take care of my stuff but...

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TIM VIDAS: Well, I can formally invite all of you that would like to have further education to come down and we will talk. (inaudible).

SENATOR Dw. PEDERSEN: Thank you. Any other questions from the committee? Seeing none, thank you, Mr. Vidas. Next testifier in support?

ALEX NICOLL: My name is Alex Nicoll. Last name is spelled N-i-c-o-l-l. And I am the associate director for technology of the Nebraska University Consortium on Information Assurance. We do a lot in the realm of computer security and, of course, one of the things we deal with on a regular basis are things like spyware, spam, and many of the other topics you're going to hear about today. One of the things I'd like to ask the people to keep in mind, first off, I am entirely for legislation that will criminalize the misuse of other people's computing resources. However, I realize that there are some people who say you can't stop things through legislation and that is absolutely correct. There are some actions you cannot stop through legislation. They have to be stopped through technology. But just as though we can't stop carjacking through legislation, we can't stop murder through legislation, we should not just say we give up. We can't stop it through writing a law. We should continue forward and make sure that if the perpetrators are caught, they are adequately punished for doing what they're doing. They are causing people grief; they're causing people real financial loss, and they are causing people an indeterminate amount of frustration and, of course, abuse to their technical support, generally 13-year-olds that they find on the street. So, with that in mind, I'd like to ask or offer a guideline or two about how these things need to be done in the future or at least my opinion thereof. A lot of bills like this tend to be very technology dependent. They very specifically speak towards the technology use that are today's technologies. They do not even consider the way things might be a year from now or two years from now. We talk about the Internet as a specific protocol but it's not. It is a conglomeration of many, many protocols carried by many, many different providers. We talk about our computers in terms of hard drives and monitors and keyboards and keystroke loggers. That's the way things are today. This can all be generalized as storage and input and display and be very generalized towards the technologies we're going to

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have tomorrow. And I think, to be perfectly honest with you, a lot of what is the bill right now is very generalized in the wrong places and very specific in the wrong places and will probably need to be reversed a little bit. For instance, as Tim has already pointed out, the loopholes don't necessarily catch the people you want it to catch. But when we're talking about different types of technologies it's only spyware right now if it's removed from a hard drive to say nothing of floppy drives or USB (phonetic) memory devices or your digital camera or your digital phone or your personal digital assistant and so on and so forth. So we need to make sure that when we start considering bills like this and, again, I say these are very good ideas if for no other reason they will adequately penalize people who are going these sorts of things. The penalties need to be severe enough that we can enforce them through state borders. As was already pointed out, these people are not within the state of Nebraska as a general rule. And we need to make sure that this law will carry forward ten years from now if we can, simply so we don't have to go through this again and rewrite it. Thank you.

SENATOR Dw. PEDERSEN: Thank you, Mr. Nicoll. Is there any questions from the committee? Senator Combs.

SENATOR COMBS: I was just wondering, do you know what an ID10T error is? (Laughter) I make those all the time.

ALEX NICOLL: Oh, yes. I forget who I am all the time (laughter).

SENATOR COMBS: Thank you.

SENATOR Dw. PEDERSEN: Senator Friend.

SENATOR FRIEND: Thank you, Senator Pedersen. Is Mr. Nevel, right?

ALEX NICOLL: Nicoll.

SENATOR FRIEND: Nicoll, I'm sorry. You know, do you know Mr. Taylor and Mr. Vidas before today?

ALEX NICOLL: Yes.

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SENATOR FRIEND: Senator Flood and I were talking. You three get together, invent some cutting edge spyware blocking software, we'll buy stock in it and we'll give Senator Howard a finders fee (laughter). That was a joke. Actually, it's not a joke.

ALEX NICOLL: Personally, I'd like to but...

SENATOR FRIEND: If you do that (laughter).

SENATOR Dw. PEDERSEN: Thank you, Senator Friend. Senator Flood.

SENATOR FLOOD: Thank you for your testimony, and thank you, Senator Pedersen. I was wondering, when I bought my Dell computer I subscribed to that McAfee security software that's supposed to mask my IP address when I go places so they can't tell who I am and it's supposed to stop people from putting all that spyware on my computer. And I'm not up enough on these issues to know if it's really doing what I say it's doing. So my question is, these consumer products that are on the market like I got through my Dell computer, is that doing anything to protect my computer from being a victim of this spy software?

ALEX NICOLL: In general, it depends entirely on the piece of software you're talking about but I will say there is also a fair amount of what we refer to as snake oil out there. It's the kinds of solutions that are touted to always solve every problem you could possibly have but if only you buy our one product which, by the way, doesn't interoperate with anybody else's products so you have to keep buying our services over and over and over again. And to be honest with you, they make a lot of false claims. The one you mentioned about preventing your IP address from being spread across the Internet so people can identify your machine. That is categorically not possible through software intervention. The problem is, your IP address uniquely identifies you on the Internet. That's how information gets back and forth from your machine to another machine. It's sort of the source and destination part of the transmission. So if you want something to come back to you, you have to tell it where it came from and your IP address is how it tells where it came from.

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SENATOR FLOOD: Is it...so you're saying what I bought was junk or was it good? (Laughter)

ALEX NICOLL: (Laugh) I would say it was at least misrepresented if that was one of the claims they were making.

SENATOR FLOOD: Does it stop any spyware?

ALEX NICOLL: Without seeing the actual software, I couldn't testify to that but I would say that in general solutions that start with that kind of will prevent type of language, generally do not. As a matter of fact, they're by and large, a monitoring system for the companies that produced that piece of software to let you know when your antivirus is out of date or when other things are out of date so you can continue to subscribe to their services.

SENATOR FLOOD: It was 69 bucks (laughter).

SENATOR COMBS: You were ripped.

SENATOR FLOOD: Thank you for your testimony.

SENATOR Dw. PEDERSEN: Thank you. Any other questions from the committee? Seeing none, thank you, Mr. Nicoll.

ALEX NICOLL: Thank you.

SENATOR Dw. PEDERSEN: Do we have any other testifiers in support of LB 316? Seeing none, we'll move to opposition. Seeing none, neutral? Seeing none, Senator Howard to close.

SENATOR HOWARD: Yes, sir. Well, I'm very glad I could bring this bill into you this afternoon. I think we've all learned something. I certainly have. And I hope you will consider this and consider advancing it on. Thank you. I'm sorry you wasted your money (laughter).

SENATOR Dw. PEDERSEN: Any questions of Senator Howard? Seeing none, thank you.

SENATOR HOWARD: Thank you.

SENATOR Dw. PEDERSEN: That will close the hearing on

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LB 316. We'll open the hearing now on LB 385. Senator Johnson is here to introduce. Whenever you're ready, Senator Johnson.

LB 385

SENATOR JOHNSON: (Exhibits 3, 4) Senator Pedersen, members of the Judiciary Committee, I'm Senator Joel Johnson representing the 37th district. Last name is spelled J-o-h-n-s-o-n. I'm here today to reintroduce a bill that this committee advanced last year. The thing that I'd like you to look at first is the map in front of the packet that you just received. What this shows is a map of the United States and shows that we have the dubious distinction along with North Dakota as being...how can I put it in nicely, at the bottom of the pile as far as using DNA in our legal system. The only other state that comes close is Hawaii and Hawaii has legislation underway where DNA will be used for all felons. How did I get interested in this? A couple of years ago now, I was actually approached by a pediatrician who had been to a meeting where...a pediatrics meeting. This was brought up regarding sex offenders and the like. Virginia has been at this the longest period of time. One of the studies that Virginia has done not too long ago is that only 15 percent of the matches came from DNA collected with violent or sex offenders. That's the category we're in, 15 percent; 85 percent of the DNA matches were found because nonviolent offenders were entered into the data bank. Go from 15 percent to 85 percent. Fully, one-half of those nonviolent offenders were burglars. Nebraska collects only violent and sex offenders. I think the important thing to remember, as we pointed out in the past, for the first time in history, not only can we prove guilt and prove it conclusively but we can prove innocence. Furthermore, no other investment in the criminal system will do more to protect the innocent, convict the guilty, and reduce human suffering and so it at the least cost. Clearly, in Nebraska we need a system approach. Someone has to be in charge of this system as well. We need an administrator. We've chosen the State Patrol. Who do they help with the administration of collecting and banking of these samples? Well, first off, the judges. When these sentences are made they need to be reminded that this is part of their duty. The clerk of the court can do this through the Internet,

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e-mails, et cetera. Probation, this is one of the places where we really fall down even with today's limited number. All in custody should be sampled regardless of the site of incarceration be it the penitentiary where we actually do a pretty good job or on probation. This bill allows for quality assurance to make sure that we do good DNA studies. Now, the source of funding must be clear. I wish I could come here today and tell you that it is clear. It still is not. You've heard repeatedly that the federal government is applying large amounts of money to do this. They are supplying large amounts of money to states unlike ours that have gone deeply in debt establishing DNA programs. For states like ours that are pay-as-you-go, we basically get nothing. We actually have had some indication now that we will have some money this way.

SENATOR Dw. PEDERSEN: Senator Johnson, do you have much more there?

SENATOR JOHNSON: No, I'm virtually done, sir.

SENATOR Dw. PEDERSEN: Go ahead.

SENATOR JOHNSON: First of all, I want to thank Senator Pedersen for helping with this. Last year this bill was amended by this committee with Senator Pedersen in charge and this now represents the bill that was passed last year. What happened last year for those of you that weren't here, there was a snow storm. Some of our members couldn't be here. I offered this bill to them to attach an amendment. The amendment was with civil DNA. That was added. The Governor did not like that, vetoed that, and so this is without the civil component.

SENATOR Dw. PEDERSEN: Thank you, Senator Johnson. Any questions from the committee? Seeing none, can I sample those in attendance, how many people we have here in support of LB 385? Any opposition? Any neutral? Senator Johnson to close.

SENATOR JOHNSON: All right. Glad I didn't get a (laughter)... Well, we were actually kidding about this a little bit when we were having lunch that it's Friday afternoon and let's get this over with. But it is a serious matter and we should make sure that we do do the right

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thing. On the separate sheet that you received, you will see the numbers involved in the cost as far as this is concerned. The State Patrol, we have been in contact with them. There are monies available that if they stop someone who is transporting cocaine, for instance, they make seizures and there are monies available this way. We are in consultation with them to see if we can get some monies this way. Also, I have had a conversation with the chairman of our Appropriations Committee who has visited with the State Patrol head as well and so I think that we're working to a common agreement. The numbers are not huge. What I would like you to look at is we are including just burglars and robbers and the numbers for that are 63,000. If you include all felons like a lot of states are doing it goes to 332,000. But you get the most bang for your buck by including just those two. Thank you.

SENATOR Dw. PEDERSEN: Thank you, Senator Johnson. Any questions from the committee? Senator Johnson, I have one. Go ahead, Senator Foley.

SENATOR FOLEY: You took out the civil component. That was the problem last year.

SENATOR JOHNSON: Yes, sir.

SENATOR FOLEY: So that's gone.

SENATOR JOHNSON: Yes.

SENATOR FOLEY: So this bill is not a clone of that bill.

SENATOR JOHNSON: No, it's not a clone (laugh) of that. Very good. (laughter) But what is in it is the committee amendments and so on that were added to it this year.

SENATOR Dw. PEDERSEN: Senator Johnson, more of just the affirmation of the fact that when you mention that this DNA has also been used for the innocent. Isn't DNA one of the number one...it is, I think, the one and probably the only one that has released so many people from death chambers. Is that right?

SENATOR JOHNSON: I believe that's right, sir. It is the proof of innocence. To my knowledge, this has never

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occurred in the history of law.

SENATOR Dw. PEDERSEN: I agree with you. It's fascinating stuff.

SENATOR JOHNSON: One other last comment that I might make and I know that Senator Chambers isn't here today. And I think it's worth mentioning because Senator Chambers certainly is a strong proponent, if not guardian of the rights of minorities. I think this is the type of legislation that would appeal to Senator Chambers and I would offer working with him at this point because it is, I think, one of the best guarantees for minority groups that there is.

SENATOR Dw. PEDERSEN: Thank you very much. Are there other questions? Thank you, Senator Johnson.

SENATOR JOHNSON: Thank you, sir.

SENATOR Dw. PEDERSEN: That will close the hearing on LB 385. And we will open the hearing on LB 567 as soon as Senator Beutler arrives. If he doesn't arrive very soon we'll put Senator Friend up there for LB 123. Senator Beutler is on his way. Can I sample those in attendance? Those here in support of LB 567? Opposition? Neutral? Won't take him very long. Senator Beutler is here. Whenever you're ready, Senator Beutler, we are here ready for LB 567. We've already sampled those in attendance. You don't have any for or against or neutral so it's all your floor. So if you'd like to open and close in the same statement, we'll give you five minutes (laughter). (See also Exhibits 5, 6)

SENATOR BEUTLER: Oh, you're as mean as the Chair himself.

SENATOR Dw. PEDERSEN: Go ahead, Senator Beutler.

LB 567

SENATOR BEUTLER: (Exhibit 7) Thank you, Senator Pedersen. Members of the committee, this bill is to adopt the Sex Offender Monitoring Act and the reason for the bill is simply this. I've become increasingly skeptical over the

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years as to whether certain types of sexual offenders can truly be rehabilitated, at least with our current state of knowledge and consequently, for the protection of the public this bill recommends that certain high risk sexual offenders be intensively monitored for a period of time beyond the time they would normally spend in the criminal justice system. I've given you a little outline of the bill. Since I only have five minutes I'm going to try to highlight the bill itself. It's one where you have to be very careful with procedure because, obviously, constitutional rights are involved. But basically, the act would apply to and apply the additional penalty of intensive supervision to any individual who on or after January 1, 2006, pleads guilty to or is convicted of any of the enumerated offenses that are set out in page 2 of the green copy of the bill. Those offenses are the same offenses that we already have in statute for purposes of the Sex Offender Registration Act. Then, in addition to being convicted of one of those offenses, in order to be under this particular act, this intensive monitoring, you would have to be assigned a high risk of recidivism or have been determined to be a sexually violent predator. Already existing statutes allow for a judge to determine, in some cases, whether a person is a sexually violent predator. I'll talk a little more about the risk of recidivism. That risk analysis is done under this bill by the probation office as part of their review of the individual that's related to sentencing. So that's basically how the front end of the process works. Then from that point on to the point where an offender is released, whether they're released to probation or on parole or whether they jam out, at that point in time, notification that they're coming into society would be given by the appropriate department. The Attorney General would make a decision as to whether a civil commitment proceeding was appropriate. If the Attorney General decided that there would be no civil commitment procedure then the offender would be immediately subject to intensive supervision under the act. And intensive supervision would go on for a period of at least one year but no longer than he or she would be subject to the Sex Offender Registration Act. The supervision would be administered by probation if we're talking about probationary release or parole, if we're talking about parole. The registration act that keys the length of intensive supervision provides that the registration requirement applies for a period of ten years

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so the intensive supervision could apply for a period of ten years. Unless the offense is an aggravated offense or the court has deemed the offender to be a sexually violent predator, in those cases the registration under the registration act can go on for life. And likewise, the monitoring under this act could go on for life. Intensive supervision, there's a definition of it set out here for you. It is a definition that's already in statute. Intensive supervision shall also include in this case active global positioning system, monitoring for a minimum of at least one year. So the basic idea is to put in the hands of probation an additional tool which they can use with a high measure of flexibility and using that tool, hopefully, prevent recidivism for a long time, if not forever. Risk of recidivism, I'm not going to have time to go through, I see, but it's set out...description of it is set out here in the materials that I've given you and it's basically a determination that's made by the probation office at the time that sentencing is done. There are a number of procedures in here to protect the offender. If he's given a high risk of recidivism that can be reviewed not only at the time of sentencing when it's first assigned, but it will be reviewed again at the time they're released. And it will be reviewed subsequently every five years if the intensive supervision goes on for that period of time. I think, Mr. Chairman, that's all I wanted to say in opening and I'd submit myself to the questions of the committee.

SENATOR DW. PEDERSEN: Thank you, Senator Beutler. Those in attendance haven't changed so you do get another three minutes for closing. If you want to add something more to that or do you want me to ask for questions now?

SENATOR BEUTLER: I think I'll leave it open to questions. I sense the committee is probably getting tired of all the bills this week and I don't want to hold you more than what questions you might have.

SENATOR DW. PEDERSEN: Senator Foley has a question.

SENATOR FOLEY: If someone is designated as high risk, if I understand the bill correctly, they would be subject to one additional year of intensive monitoring. Is that what the bill provides?

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SENATOR BEUTLER: No, no. It's a minimum of one year of GPS monitoring, one year of an intensive monitoring that would include GPS. But then the intensity of monitoring would go on for whatever period of time they would be subject to under the law of the registration act. So if they're subject to the registration act for ten years, the intensive monitoring would go on for ten years, maybe with the GPS system for one year and not for nine years or maybe with the GPS system for up to ten years. In the case of people who under the registration act are subject to registrations for their lifetime then intensive monitoring would go on for that same period of time. But probation would have a lot of flexibility in terms of how they structured intensive probation. If you look at that definition of intensive probation and Senator Pedersen is already acquainted with that, it involves a whole number of tools. But the GPS tool is one that I'm recommending to you we get involved with and we learn about because I think that developing technology will become cheaper. It's very accurate in terms of keeping track of where people are. In fact, a prosecutor when we were discussing this bill, related to me the fact that a GPS monitor with a court order had been attached to a prior sexual offender's vehicle unbeknownst to him and that's the way he was caught at the next act. So they're good devices. They're somewhat expensive right now, about \$10 a day, \$3,200 a year. And what you're weighing against that is the likelihood and the common instance today of recidivism and the cost of prison when they go back to prison and the cost to society in terms of having another victim, in terms of not having an otherwise perhaps productive citizen out there working under a monitoring system. So those are kind of the things you're weighing in the balance. Now the bill also provides that the offender pays for the monitoring system to the extent that they're able to do so. Obviously, it has provisions akin to other provisions we have in the criminal justice system that doesn't require people who can't pay for it to pay for it.

SENATOR Dw. PEDERSEN: Any other questions from the committee? Senator Beutler, I'd like to visit with you just a little bit.

SENATOR BEUTLER: Sure.

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SENATOR Dw. PEDERSEN: I've been brought into this arena in the last couple years with some of my correctional work because some of the people that I try to offer some services to as a drug and alcohol counselor after they get out of prison and some of them have been sex offenders. The global tracking, the GPS system wouldn't stop them from reoffending, would it?

SENATOR BEUTLER: Say that again, Senator. Wouldn't...

SENATOR Dw. PEDERSEN: You're talking about GPS, the global tracking system. That would not necessarily stop somebody from reoffending.

SENATOR BEUTLER: No, it wouldn't necessarily stop somebody. It's not the sort of thing that has an electronic device that stings them when they do the wrong thing or anything like that as you well know but it does set out their patterns and lets you know if they're at work or if they're not at work or if there's someplace they're supposed to be or not supposed to be, if they're in the vicinity of children, for example, or near a school, whatever. But you're right, it doesn't prevent it entirely.

SENATOR Dw. PEDERSEN: Are you bothered at all, Senator Beutler, that there is nobody here to testify and I am bothered by it and I'm wondering if you're bothered by it, from law enforcement or those in the recovery process that work in the recovery area with sex offenders and those people who worry about sex offenders and there's no testifiers here for or against?

SENATOR BEUTLER: Well, I can't speak for probation or parole or the people interested in it. I've had meetings with them. I know the prosecutors and the probation people think there needs to be more intensive monitoring of certain types of offenders. The public has a hard time getting to afternoon meetings at any time so that doesn't bother me too much and I haven't rallied the troops for the bill. I've spent a lot of time trying to figure out how to do this right and I think we've got that down anyway.

SENATOR Dw. PEDERSEN: As I see it, we've got a lot more to do. I'm in support a hundred percent of what you're doing because I think this is kind of like the last bill we heard.

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It's also good for those who are trying to live a straight life and trying to go forward. But probation is going to need some more staff, obviously, to...

SENATOR BEUTLER: Yes.

SENATOR Dw. PEDERSEN: ...take this on. But those people, these mental health boards who do these mental health commitments, you know, is causing almost...we're going to end up with some pretty good lawsuits here one of these days too for double sentencing. I mean, they go into prison, they do their time, they come out, and then the mental health board has them picked up and maybe have a civil commitment for them. And one of the things I'm really concerned about that I think...

SENATOR BEUTLER: You think that's not being fairly done, the process is not a fair process?

SENATOR Dw. PEDERSEN: I think it's being fairly done. I think, you know, and it's something that we can probably talk about without all, in this particular arena that we're in right now in a hearing. But some of the concerns I have is we've got a sex offender treatment facility in the Department of Corrections. I have seen that particular treatment facility used sometime when they didn't like somebody to end up saying well, you didn't do a good enough job so we're going to do a civil commitment on you and we're going to write to the county sheriff in Douglas County and saying, we think you're dangerous and he'll pick you up and take you to the board of mental health. I don't want these sex offenders quote, sex offenders out there any more than anybody else. I also don't want a false representation by having to know who they are and have them register to let down my guard and say, those who have not got caught yet are the ones I'm really scared of. But our treatment in this state is almost nil. I mean, we got people who are licensed mental health practitioners who go through school and have no training...some have no training at all in working with sex offenders yet hang out a shingle that they're working with sex offenders. I mean, that's all you have to do in this state. We haven't got any certification process for it. We've got a few people that I have met in the state that I think are qualified to work with sex offenders. I'm really a supporter of electronic monitoring in any area

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including...and I'm just bringing these statements to you so you have a little more knowledge of...

SENATOR BEUTLER: Yeah, and Senator, I share your frustration in terms of...

SENATOR Dw. PEDERSEN: and what I...lately that we need to do something. And some of them, you know, maybe never will need to...and need to be actually locked up because you can't trust them at all. And then others are...there's just all kinds of things. I'd be glad to visit with you outside of this arena in support of this because I didn't really want to get into it but (laugh) but it...

SENATOR BEUTLER: No, I'll make a point of talking to you because I know this is something that fits into a broad spectrum of things that you've done a lot of thinking about and if it doesn't fit quite right I want to know that. But I'm thinking that this is a piece that has to be there at some point and...

SENATOR Dw. PEDERSEN: And I agree because we have more and more. We have them locked up in prison. We have them locked up at the Hastings Regional Center. We have them locked up in the Lincoln Regional Center. We have treatment for only so many but we've got about 80 of them I think right now at the Hastings Regional Center for treatment. Then let alone those that are in the Department of Corrections doing their time and there's some treatment there. And I would like to have more of an assurance as a citizen when these people are coming out they've had some kind of treatment and the monitoring would be a part of that and intensive probation is very good. But we're going to have to have more intensive probation officers, obviously, too...

SENATOR BEUTLER: Yeah, and I didn't mean to indicate and the definition of intensive probation doesn't exclude by any means the kinds of positive programs that you're talking about.

SENATOR Dw. PEDERSEN: Well, I appreciate your work on it.

SENATOR BEUTLER: Monitoring is a very negative aspect of the whole intensive supervision thing, but I don't know how

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you...it's such a useful tool, I don't know you not use it.
You know,...

SENATOR Dw. PEDERSEN: And I didn't take it that way. I mean, I do agree, it's \$125,000 fiscal note on this and it's not very much...

SENATOR BEUTLER: No. That's just the cost really of setting up the initial matrix for the risk of recidivism work that the probation system would do. There would be additional costs down the line but it's hard to ascertain those, not knowing, for example, how much the prisoner himself or herself could pay of the intensive probation...

SENATOR Dw. PEDERSEN: Now also I think we need to look at and want to add onto this, too much longer is, you know, some of these people, you know, we're getting almost to the point where they can't go anywhere either.

SENATOR BEUTLER: Yeah.

SENATOR Dw. PEDERSEN: You know, I can think of a case in Omaha right now where the mental health board says you have to seek out treatment weekly and the person doing treatment was told you can't have anybody in here that's on the sex offender registry (laugh).

SENATOR BEUTLER: You know, Senator, I really think the day is not too far off when we can do away with the registry because it won't be necessary for...well, maybe it is a little further off. But it may not be necessary for people to know where they are if they're correctly monitored and monitored with a high degree of sophistication that seems to be evolving. And the monitoring itself eventually with nano technology can be very hidden kind of monitor but, nonetheless, powerful enough to let probation people know where they are and what they...well, where they are and (laugh) probably someday what they're doing at each moment in time. And not have the scarlet letter kind of attachment that is not particularly positive and constructive.

SENATOR Dw. PEDERSEN: Thank you for your work. Be glad to help you. Any other questions of the committee? Seeing none, thank you, Senator Beutler. That will close the hearing on LB 567 and we'll now open the hearing on LB 123

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and one of our own, Senator Friend, will introduce. Whenever you're ready, Senator Friend. Well, we don't need to sample anymore. We don't have any more bills after this one. Go ahead. Those who are going to testify, please sign in.

LB 123

SENATOR FRIEND: Thank you, Senator Pedersen, members of the Judiciary Committee. My name is Mike Friend, F-r-i-e-n-d, and I represent the 10th Legislative District. It's got a nickname but I will reveal that next week at my final hearing. No, actually I might not. I'm here to introduce and request support for LB 123 and I am introducing the bill at the request of the Nebraska State Patrol. The bill addresses several issues that have arisen regarding the Sex Offender Registration Act. The three areas being addressed are as follows. First, LB 123 requires convicted sex offenders to register even if their conviction is set aside in Nebraska or another state. This ensures that those individuals who have been convicted of an offense requiring them to register as a sex offender would still be required to register regardless of whether or not their conviction was set aside. Secondly, registered sex offenders claiming themselves to be homeless would be required to notify the sheriff of the county in which they reside within five days of becoming homeless and every 30 calendar days thereafter while they remain homeless. Many homeless or transient sex offenders can possibly pose a risk to the public and this provision in this bill allows law enforcement officials to better monitor the particular offender's whereabouts. Lastly, LB 123 allows governmental agencies to access information on all sex offenders for public safety purposes, not merely background checks for employment purposes as currently provided in Section 29-4009. Just wanted to say thanks for the opportunity to present the bill and I would respectfully ask that we advance this as a committee to the floor for consideration. And I would be happy to answer any questions.

SENATOR DW. PEDERSEN: Thank you, Senator Friend. Questions from the committee? Senator Aguilar.

SENATOR AGUILAR: Yeah, Senator Friend, could you give us an

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example of, for instance, why a conviction would be set aside?

SENATOR FRIEND: An example. Well, I could give you the difference between a pardon and a set aside. I mean, if you...a pardon is pretty much wiping the record clean, wiping a person's record clean. A set aside, an example, gosh. I would imagine Senator Pedersen and others in here could probably give you a better example than I could. Maybe some of the folks following me, Dave Sankey, for example, and possibly some others but good question. Thanks.

SENATOR AGUILAR: Thank you.

SENATOR Dw. PEDERSEN: Thank you, Senator Aguilar. Any other questions of the committee? Seeing none. Thank you, Senator Friend. Would the first testifier in support please come forward?

SHANNON BLACK: (Exhibit 8) Members of the Judiciary Committee, my name is Dr. Shannon Black, B-l-a-c-k. I am the clinical director of the Nebraska State Patrol Sex Offender Registry and a licensed clinical psychologist. I am here today to testify in favor of LB 123 regarding revisions to the Sex Offender Registration Act. The Sex Offender Registration Community Notification Division maintains the statewide registry of sex offenders, assesses level of risk and provides community notification based on that level of risk. LB 123 addresses several issues that have arisen since the enactment of the Sex Offender Registration Act. First, issues regarding set asides have been raised in two Lancaster District Court cases. One case involved whether or not a sex offender who had his sex offense conviction set aside was required to register. In Braasch v. Nebraska State Patrol, the court stated, "To hold that a petitioner could have his name removed from the SORA through a procedure other than that authorized specifically by the Legislature through SORA would, in effect, open a back door by which offenders could prematurely be removed from the registry." The court ruled that the level 3 or high risk sex offender must register and that the information regarding the conviction could be utilized in his risk assessment. It was noted by the court that the set aside did not mean the underlying offense was never

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committed. The other Lancaster County District Court's case involved whether information on convictions that were set aside could be used to determine the person's sex offense risk classification. In McCray v. Nebraska State Patrol, the judge noted, "It is not reasonable to permit a person who is required to register under the act, when a contested review of the classification is pending, to then go to the sentencing court and obtain "set asides" of prior convictions and avoid any consequences of such convictions. This would be an absurd result." These decisions are case specific. The Nebraska Supreme Court is scheduled to hear an appeal of this latter case in April. While thus far we have been successful, the potential set-aside loophole needs to be removed to prevent people in these situations from escaping registration responsibilities or artificially reducing the risk assessment classification. Although it is positive that the person satisfactorily completed other court requirements, this does not necessarily equate to low risk and should not eliminate their need to register. There are provisions in the current statute for offenders to have their name expunged from the registry. Second, LB 123 attempts to address sex offenders who are homeless. Obviously, this is an unfortunate situation for the registrant. However, it does not negate the individual's responsibility to keep law enforcement notified of their whereabouts. As currently written, there is no provision to deal with this type of situation. LB 123 would require the registrant to notify the sheriff in the county they are staying that they no longer have a residence or temporary domicile. It would also require them to provide updates to law enforcement about their situation and whereabouts every 30 calendar days during the time they are without a residence or temporary domicile. As an example, in State of Nebraska v. Spradley, the judge found the individual not guilty of sex offender registration violation stating, "Spradley is homeless and had no address. Under our statutory scheme, there is no provision for an offender such as Spradley. He has no address to report and the definition of "temporary domiciled" in Section 29-4004(5)(c) is inapplicable since it requires a stay for at least five days. Although a provision could be made for offenders who are homeless, this is for the Legislature to resolve." This change simply resolves the issue and allows law enforcement to be aware of a person's whereabouts in the community for purposes of public safety. Lastly, LB 123 would allow the

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State Patrol to disclose information regarding sex offenders to governmental agencies for public safety purposes. The current statute allows only release of this information for employment background purposes. The Health and Human Services System will testify more on this subject. As the Legislature noted in the Sex Offender Registration Act, "the Legislature finds that sex offenders present a high risk to commit repeat offenses." The use of loopholes would defeat the intent of the act. Thank you for the opportunity to present this information to you today. I would be happy to answer any questions you may have.

SENATOR Dw. PEDERSEN: Thank you, Dr. Black. Senator Aguilar.

SENATOR AGUILAR: Thank you. Ms. Black, can you answer the question I asked Senator?

SHANNON BLACK: Yeah. In Braasch, for example, he was convicted of third degree sexual assault and had met all the requirements regarding his probation at that time. Then he went back to the court and requested a set-aside of that conviction so, basically, the set-aside as long as he's met the provisions of his probation, would allow him to petition the court for a set-aside. That does not...it nullifies the conviction but it does not take away all the legal consequences of the crime which would be the difference between that and the pardon based on the Supreme Court ruling.

SENATOR AGUILAR: And one last question. Do you have any suggestions on how to deal with the temporary homeless people?

SHANNON BLACK: Again, what we're proposing is at least having a requirement for them to check in with law enforcement every 30 days just to be aware that they're still in the area.

SENATOR AGUILAR: Be kind of tough. Well, I live over there and I live over there.

SHANNON BLACK: And it's more just noting that they're still within that county, that they're still within the area as opposed to that they've moved completely to a different town

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or to a different county.

SENATOR AGUILAR: Thank you.

SHANNON BLACK: Um-hum.

SENATOR Dw. PEDERSEN: Any other questions from the committee? Dr. Black, I have a couple. Your position with the Patrol, do you do any therapy at all?

SHANNON BLACK: No. In terms of the Patrol, it's simply an administrative position in regards to doing a risk assessment and community notification and testifying in proceedings for those people that contest their risk level.

SENATOR Dw. PEDERSEN: But you do give risk assessments yourself to the offenders?

SHANNON BLACK: We do risk assessments of the offenders but it's based on the 14-item instrument that we utilize. There's no interview or clinical evaluation of the offender as part of this risk assessment.

SENATOR Dw. PEDERSEN: And your position is to read that.

SHANNON BLACK: Yes, to review that and to score...there's a couple of items that are related to mental health issues that I do the scoring on.

SENATOR Dw. PEDERSEN: And that recommendation that you do usually goes to a court.

SHANNON BLACK: No. What happens is once we actually complete the risk assessment, the offender or registrant is notified of their risk level and they have the opportunity to contest that if they choose to through the Administrative Procedures Act. If they don't contest that, then we do community notification consistent with whatever their risk level may be.

SENATOR Dw. PEDERSEN: Are you aware...now this is going a little bit away from this bill but are you aware of the treatment facilities and the treatment programs that are in the state of Nebraska?

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SHANNON BLACK: Yes, I am. I used to be coordinator of the inpatient sex offender program at the Lincoln Correctional Center.

SENATOR Dw. PEDERSEN: You are the coordinator?

SHANNON BLACK: I used to be.

SENATOR Dw. PEDERSEN: You used to be the coordinator.

SHANNON BLACK: Yes.

SENATOR Dw. PEDERSEN: Okay. Would you be open to sitting in on some meetings and helping Senator Beutler and myself in some of these areas that we can take a look at some legislation for future use in both treatment and in monitoring of the sex offenders?

SHANNON BLACK: Of course.

SENATOR Dw. PEDERSEN: Thank you. Any other questions for Dr. Black? Thank you, Dr. Black, appreciate your testimony.

SHANNON BLACK: Thank you.

SENATOR Dw. PEDERSEN: Next testifier, please come forward.

TODD RECKLING: (Exhibit 9) Good afternoon, Senator Pedersen and members of the Judiciary Committee. My name is Todd Reckling, R-e-c-k-l-i-n-g and I'm the administrator for the Office of Protection and Safety within the Department of Health and Human Services. And I'm here today to testify in support of LB 123. I'd like to comment on the specific provision of LB 123 which allows any government agency to access all three levels of the sex offenders registry for public safety purposes rather than employment purposes as is currently the case. Currently, the Department of Health and Human Services can only directly access information contained on Level 3 of the registry. This level is accessible by anyone in the community and contains the listing of individuals most likely to reoffend. LB 123 would provide the department with the authorization to also have direct access to levels one and two of the registry. Access to these levels of the registry assists us in conducting background checks on service providers such as

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foster parents, child care providers or personal care aides who serve children or vulnerable adults. I would like the committee to know that as a stop-gap measure, the Department of Health and Human Services has been given access to these two levels in a manner that complies with current state law through a special agreement with the Nebraska State Patrol for checks related to foster parents. This stop-gap measure is labor intensive on the parts of both the State Patrol and the Department of Health and Human Services and involves a number of steps that would be unnecessary if LB 123 becomes law. LB 123 will offer more protection for children and adults served by the Health and Human Services System by providing us with access to all three levels of the registry. I appreciate the opportunity to address the committee today and would be happy to answer any questions.

SENATOR Dw. PEDERSEN: Thank you, Mr. Reckling. Is there any questions from the committee? Seeing none, thank you for your testimony.

MARY POWELL: (Exhibit 10) Good afternoon, members of the Judiciary Committee. My name is Mary Powell and I am a master's prepared nurse, work in a long-term care facility in Omaha, Nebraska. I am here to testify today on behalf of the Nebraska Organization of Nurse Executives. We represent 59 health-care facilities across the state of Nebraska that include acute care, long-term care, assisted living, and a university setting. The Nebraska Organization of Nurse Executives appreciates the support of the committee's commitment to promoting safety within our community. In addition to supporting LB 123, the Nebraska Organization of Nurse Executives requests that the committee consider making an amendment to the bill that would further promote safety by taking into consideration the vulnerable populations cared for by health-care providers within the community. There are currently three levels within the sex offender registry. Level one is a mild rate of recidivism that is available to law enforcement agencies. Level two is a moderate risk of recidivism and that information is available to day cares, youth organizations, and church organizations. Level three is for a high risk which is available to the rest of the community which includes the health-care environment. Members of the organization have great concerns that health-care providers who employ individuals to care for vulnerable adults and children do

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not have access to the same level two information that is accessible to schools, day cares, religious and youth organizations. Health-care providers care for both vulnerable adults and children in a variety of settings from home health to hospice to long-term care to acute care. The way the law is currently written, a health-care provider could unknowingly hire a level two sex offender, send them into the home environment, a long-term care facility, or other health-care setting to care for an elderly, vulnerable adult or helpless child. Caring for the sick regardless of their age often requires the provision of direct hands-on care including bathing the person, assisting them with toileting and caring for them after incidents of incontinence. This, in and of itself, creates an environment where sexual assault could occur. Add to this scenario the potential that the care is provided by a known sex offender with a moderate risk of recidivism to a vulnerable adult or child who may be helpless to protect themselves or to report what happened. The potential for assault is greatly magnified. Members of the organization request that amendment be made. This amendment would allow licensed health-care providers such as hospitals, long-term care facilities, home health providers to access the levels of the sex offender registry, all levels preferably, but at a minimum, level two. I thank you for your consideration of this important matter.

SENATOR DW. PEDERSEN: Thank you, Ms. Powell. Is there any questions from the committee? Senator Aguilar.

SENATOR AGUILAR: As far as your employees are concerned, or respective employees, do you do background checks at all?

MARY POWELL: We do currently do background checks. We check the sex offender registry. We do FBI fingerprinting and criminal background checks.

SENATOR AGUILAR: If you do a criminal background check, wouldn't that pop up?

MARY POWELL: It depends on whether the health-care organization is doing it locally or doing it nationally. If you're just doing a local criminal background check you may only be checking within your state. You may not be checking a neighboring state such as Iowa and you do not have access

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to that information. The vulnerable population that we care for is very susceptible to abuse and add in the potential of sexual assault is just what we're after.

SENATOR AGUILAR: Okay. Thank you.

SENATOR Dw. PEDERSEN: Any other questions for Ms. Powell? Thank you for your testimony. Do we have any other supporters of LB 123? Do we have any opposition to LB 123? Any neutral for LB 123? Senator Friend to close.

SENATOR FRIEND: Thank you, Senator Pedersen. Just briefly, just to address really quickly, Ms. Powell and I and others have had conversations, received correspondence, both e-mail and snail mail or normal mail, however you would like to categorize that. And I just wanted to let the committee know that we're going to further investigate regarding the proposed amendment or the idea behind the amendment and I'm not...there's a little bit of confusion as to whether it's the proper...whether we're dealing with the proper bill for the amendment that has been proposed or the idea that has been proposed. So we're (inaudible) the proper section of the law so I will touch base with Jeff and others on the committee and we'll get to the bottom of that, I guess. That's about all I have.

SENATOR Dw. PEDERSEN: Thank you, Senator Friend. Any questions from the committee? Seeing none, that will close the hearing on LB 123 and that will close our hearings for today.