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A REVIEW OF THE TOOLS TO FIGHT TERRORISM ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON TERRORISM, TECHNOLOGY AND HOMELAND SECURITY

OF THE

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MONDAY, SEPTEMBER 13, 2004

UNITED STATES SENATE,
SUBCOMMITTEE ON TERRORISM, TECHNOLOGY AND HOMELAND SECURITY, COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 9:34 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Jon Kyl, Chairman of the Subcommittee, presiding.

Present: Senators Kyl, Sessions, Feinstein, and Cornyn [ex officio.]

OPENING STATEMENT OF HON. JON KYL, A U.S. SENATOR FROM THE STATE OF ARIZONA

Chairman KYL. This hearing will come to order of the Committee on the Judiciary's Subcommittee on Terrorism, Technology and Homeland Security.

Good morning, everyone, and welcome to today's hearing. It is going to focus on Senate bill 2679, the Tools to Fight Terrorism Act, which is a bill that I recently introduced with several other members of this Committee and of the Senate leadership.

Since the terrorist attacks of September 11, Congressional committees and executive agencies have conducted extensive reviews of our Nation's anti-terrorism safety net. We have had numerous hearings in the House and Senate Judiciary Committees, the Joint Intelligence Committee inquiry, the 9/11 Commission hearings and report, and the Justice Department has conducted extensive evaluations of its own anti-terrorism capabilities.

These hearings have uncovered numerous flaws and gaps in our anti-terrorism system. We have found, for example, that in many cases anti-terror investigators still have less authority to access information than do investigators of other crimes that, while serious, pale in comparison to the threat posted by international terrorism. We also have seen that some of the Federal Code's criminal offenses and penalties are far too light or too narrow in their scope, in light of the contemporary terrorist threat.

Yes, despite all of these hearings and inquiries, Congress has enacted no major anti-terrorism legislation since the passage of the USA PATRIOT Act almost 3 years ago. To give just a brief description of the nature of the TFTA—again, the Tools for Fighting Terrorism Act—and the legislative process behind it, here are just a few examples of some of the most important provisions.

Section 102 is identical to a bill introduced in 2002 by Senator Schumer and me which allows FBI agents to seek warrants for the surveillance of suspected lone wolf terrorists, such as alleged 20th hijacker Zacarias Moussaoui. We have acted on that bill in the Senate and it is pending in the House.

Sections 112 and 113, which are the same as a bill introduced by Senator Chambliss, will improve information-sharing among Federal agencies and with State and local authorities, avoiding the types of barriers between criminal and intelligence investigators that impeded pre-September 11 searches in the United States for hijackers Khalid Al-Midhar and Nawaf Alhazmi.

Section 106 is identical to a bill introduced by Senator Hatch which punishes hoaxes about terrorist crimes or a death of a U.S. soldier, imposing penalties commensurate with the disruptions and trauma inflicted by such hoaxes.

Title II is identical to a bill introduced by Senator Cornyn, who is with us here this morning. It imposes stiff 30-year mandatory minimum penalties for possession of shoulder-fired anti-aircraft missiles, atomic and radiological bombs, and variola virus, which is smallpox—penalties which are sufficient to deter middlemen who might help terrorists acquire these weapons.

Title IV is identical to a bill introduced by Senators Biden and Feinstein which creates a set of criminal offenses tailored to the challenges of guaranteeing the security of our Nation's seaports.

TFTA is divided into five titles which consist of all or part of 11 bills that I said are currently pending either in the House or in the Senate. Every provision has previously either been introduced and is pending as a bill in Congress or addresses a matter that has been explored in a Congressional Committee hearing.

Collectively, the provisions of TFTA have been the subject of nine separate hearings before House and Senate committees, and have the subject of four separate Committee reports. If you add up, by the way, all of the time that the various bills included in TFTA have been awaiting enactment since first introduced, as of today the components of the bill have been pending for 14 years, 7 months and 9 days. But who is counting?

In any event, with today's hearing, I hope to give this legislation a final opportunity for review so we can get it to the Senate floor and get it adopted before Congress recesses for the year.

I am pleased to introduce the witnesses and, with Senator Feinstein's concurrence, would invite Mr. Turley to join this panel. The protocol is we have our Government witnesses on the first panel and other witnesses second. With only three witnesses today, all being erudite in the law, I am going to ask that they all three join us, and then we can get our questions answered at one time.

Dan Bryant will be our first witness. He is the Assistant Attorney General for the Office of Legal Policy in the Department of Justice. He began his legal career at Justice in 1987. In 1995, he became counsel to the House of Representatives' Judiciary Subcommittee on Crime, and promoted to majority chief counsel of that Subcommittee in 1999. He was appointed Assistant Attorney General for the Justice Department's Office of Legislative Affairs in 2001 and has served in his current position since 2003.

Barry Sabin is the Chief of the Counterterrorism Section of the Justice Department's Criminal Division. Mr. Sabin previously served nearly a dozen years in the U.S. Attorney's office in Miami, Florida, where he held the positions of Chief of the Criminal Division, Chief of the Major Prosecutions and Violent Crime Section, and Deputy Chief of the Economic Crime Section. His most recent position in that office was First Assistant U.S. Attorney and he held that position since 2002.

I would like to note that Mr. Sabin's office recently received some very praise in the report of the September 11th Commission, and I want to quote it because I think it sets the stage nicely for what we want to do here today. So this is a quotation from the September 11th Commission report.

"The Department of Justice also has dramatically increased its focused efforts to investigate and disrupt terrorist financing in the United States. The Terrorism and Violent Crime Section formed a unit to implement an aggressive program of prosecuting terrorist financing cases. The Terrorist Financing Unit coordinates and pursues terrorist financing criminal investigations around the country and provides support and guidance to U.S. Attorneys' office in terrorist financing issues. In stark contrast to the dysfunctional relationship between the FBI and DOJ that plagued them before 9/11, the two entities now seem to be working cooperatively. The leadership of the FBI's Terrorism Finance Operation Section praises the CTS Terrorist Financing Unit"—which is Mr. Sabin's unit—"for its unwavering support."

Finally, I am pleased to also introduce Professor Jonathan Turley, the Shapiro Professor of Public Interest Law at George Washington University Law School. Professor Turley is a nationally-recognized expert on constitutional law and national security policy. In addition to a large number of academic works in these areas, Professor Turley has served as counsel in a variety of high-profile national security cases in both criminal and civil courts, including espionage cases in both Federal and military courts.

Professor Turley is a frequent witness on constitutional and national security issues in Congress and has served as a consultant for such issues for State legislatures. His academic writings and public appearances have made him, according to a recent study, one of the top 100 most cited public intellectuals in the Nation and one of the top two most cited law professors—a distinction.

As I told Professor Turley this morning, we are really interested in him grading our bill here, not giving any kind of a whitewash, but to tell us if there are parts of it he thinks could stand improvement because, as I said, we do want to move this bill to the Senate floor as quickly as we can and get it adopted before we leave here.

As always, I am joined by the ranking Democrat member of the Subcommittee, Senator Feinstein, from California, who has been an ardent supporter of anti-terrorism legislation. She and I had introduced legislation before September 11 that we pushed hard, and it wasn't until after September 11 that our colleagues began to notice what we had been trying to do on this Subcommittee.

I couldn't have a better partner on this Subcommittee in trying to improve the way that this country deals with the whole spec-

trum of terrorism issues than Senator Feinstein and I am happy to turn the time over to her now.

[The prepared statement of Senator Kyl appears as a submission for the record.]

STATEMENT OF HON. DIANNE FEINSTEIN, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator FEINSTEIN. Thank you very much, Mr. Chairman, and thank you, too, for those comments. I think you know how much I have enjoyed working with you.

I want to take this opportunity to welcome our witnesses. I certainly look forward to your remarks.

I would like to use my time very briefly to discuss two points and kind of put Mr. Bryant a little bit on the hot seat in my comments, if I might. I have two concerns. The first is that the Department of Justice may not effectively be using the tools it already has. I have noticed the tendency of the Department to rather trumpet arrests and indictments in terrorism cases, but those announcements don't seem to be matched by prosecutions. Let me give you a few examples—in Detroit, with the Detroit cell, defendants Koubriti and Elmardoudi, who had been convicted on terrorism and fraud charges, and Ahmed Hannan, who had been convicted of fraud. A fourth defendant, Farouk Ali-Haimoud, was acquitted. A jury verdict was overturned, with a finding of prosecutorial misconduct and failure to provide required discovery to the defendants.

In Portland, Oregon, Brandon Mayfield—the FBI mistakenly said his fingerprints matched one found on a plastic bag connected to the Madrid, Spain, bombing. Two leaders of a mosque in Albany, New York, were released on bail after a Federal judge concluded the men were not as dangerous as prosecutors alleged.

A Saudi student in Boise, Idaho, was acquitted in June on charges of giving terrorist material support by creating an Internet network. There was no clear-cut evidence that said he was a terrorist.

Mr. Moussaoui has continued to tie up the court system in knots. Mr. Padilla, was arrested in Chicago, then transferred to southern New York and finally to a military court, arrested with great fanfare, but it is no longer clear whether any real plot did exist. So I think it is important that we not always look to increasing the legislative authorities provided, but also that we use what we have both properly and appropriately.

My second concern is one of oversight. Since September 11, I think the Congress has acted expeditiously. Senator Kyl outlined some of the issues that this Subcommittee has handled—bioterrorism, the Visa Reform and Border Security Act, and, of course, the PATRIOT Act. The PATRIOT Act perhaps is the greatest aid to prosecution that has come up, and I have been trying to follow it and have had great trouble in doing it, and I want to express that for the first time publicly.

We know that 16 provisions of the PATRIOT Act sunset in 2005. They are the controversial provisions. Those provisions require participation by the executive branch—the Attorney General, the Director of Central Intelligence. I have repeatedly requested that the Department of Justice undertake a task that they should have

begun without prompting, and that is carrying out an objective, comprehensive review of the effect and efficacy of the 16 provisions set to expire next year.

I received a report earlier this year, but it was not at all responsive to what I had asked. It was more or less a compendium of success stories. Let me give you one example.

One of the most controversial tools is Section 215, and last year the Attorney General announced that he had not been used. In April, my staff received a briefing on that provision and was promised by representatives from Mr. Moschella's office that an update of the status would be provided. On Friday, June 18, the Washington Post reported that the FBI had, in fact, sought to use that very controversial provision.

On my behalf, my staff asked for a classified account of the issues raised in that story. No response was forthcoming, and two weeks ago we were notified that no response would be provided, except that contained within the general quarterly report.

I voted for the bill. That approach is simply not acceptable. It doesn't serve the needs of our counterterrorism efforts and I think it fosters a climate of cynicism and suspicion. The Attorney General has appropriately been given new and more powerful authorities to respond to the threats facing us. These authorities are best used within the context of appropriate oversight. I have found that very difficult to achieve. If someone who has supported the Act finds that difficult to achieve, what are those that didn't support or really want to see those provisions expire or not be renewed going to think?

So as time goes on, I have growing concerns because I have tried to get answers, I have tried to get the kinds of evaluations of those sections that we need to do our oversight duties, and they have not up to this point been forthcoming.

Fortunately, we do have time, because I wouldn't estimate that any hearings here are going to begin before next year. But I just want to serve notice that I am really very serious about taking a good, hard look at those 16 sections. Once again, I would like to say that I am not receiving the material that we need to provide our legally mandated oversight authority.

Thanks very much, Mr. Chairman.

Chairman KYL. Thank you, Senator Feinstein.

[The prepared statement of Senator Feinstein appears as a submission for the record.]

Senator Cornyn, would you like to make any statement?

STATEMENT OF HON. JOHN CORNYN, A U.S. SENATOR FROM THE STATE OF TEXAS

Senator CORNYN. Just briefly, Mr. Chairman, thank you for convening this hearing, and it is good to be here with you and Senator Feinstein. Even though I am not on the Subcommittee, I am very much interested in this legislation and in the subject matter.

As a cosponsor of this bill, the Tools to Fight Terrorism Act of 2004, of course, I am very interested in what each of the witnesses has to say about this proposal. But I would note that I believe I saw this morning, or maybe it was yesterday, that while basically crime levels are at a 30-year low in this country, and much of this

legislation is directed at punishing terrorist activities and possession of WMD and other dangerous potential weapons, we are not obviously when we are talking about terrorism just concerned about punishing crime or punishing it after the fact. We are interested in prevention and preemption.

That is, of course, what bringing down the wall was all about in the PATRIOT Act, sharing that information. Perhaps the best evidence that the PATRIOT Act has been successful, as well as the other efforts that have been undertaken during the last 3 years, is that we have so far been able to disrupt or prevent any other terrorist acts on our own soil.

Two areas that I am particularly interested in have to do with the increased penalties for possession and use of MANPADS—that is surface-to-air shoulder-fired missiles—which are a potential threat to civil aviation. Obviously, the consequences of the use and trafficking of those is obvious.

In the same vein, this bill provides increased penalties for possession of various weapons of mass destruction, including chemical and biological weapons, things like the smallpox virus which could be devastating, if used, and dirty bombs, radiological materials and nuclear materials.

So I appreciate your convening this hearing today and letting me sit in with you and Senator Feinstein, and look forward to the testimony.

Chairman KYL. Thank you, Senator Cornyn.

Perhaps, Dan Bryant, when we are done talking about the Tools to Fight Terrorism Act, you might, if you are inclined and you can at this point, address some of the concerns that Senator Feinstein raised in her opening statement.

Why don't we begin with Hon. Dan Bryant and Barry Sabin, and then Professor Turley. Ordinarily, we have a five-minute clock up here. I am not going to use that today. I will assume that you can keep your remarks roughly within that point of time. Thank you.

STATEMENT OF DANIEL J. BRYANT, ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL POLICY, DEPARTMENT OF JUSTICE, WASHINGTON, D.C., AND BARRY SABIN, CHIEF, COUNTERTERRORISM SECTION, CRIMINAL DIVISION, DEPARTMENT OF JUSTICE, WASHINGTON, D.C.

Mr. BRYANT. Good morning, Mr. Chairman, Ranking Member Feinstein and Senator Cornyn. I thank you for the opportunity to appear before you this morning to discuss S. 2679, the Tools to Fight Terrorism Act of 2004. Mr. Chairman, I will take your lead and I will refer to it as the TFTA.

Congress and the administration already have done much to improve the Government's ability to fight the war on terrorism. The most notable of these efforts was the enactment of the PATRIOT Act, which has proven invaluable in our counterterrorism efforts. There is, however, more to be done.

The TFTA proposes numerous improvements to current law. It contains significant, effective, constitutionally-sound tools that would help us prevent, disrupt and prosecute terrorism. For purposes of today's hearing, my colleague, Barry Sabin, and I will com-

ment on a handful of the key provisions in the bill, and I would like to focus now on two of those.

The TFTA contains a number of provisions that fill gaps in existing law. Some of the most important of these are in Title II which addresses the private use and possession of four weapons that could be catastrophic in the hands of terrorists—Man-Portable Air Defense Systems, or MANPADS; atomic weapons; radiological dispersal devices, sometimes referred to as dirty bombs; and, finally, the variola virus which causes smallpox.

MANPADS are portable, lightweight, surface-to-air missile systems designed to take down an aircraft. Typically, they are able to be carried and fired by a single individual. They are small, and thus relatively easy to conceal and smuggle. A single attack could kill hundreds of persons in the air and many more on the ground. A MANPADS attack could also cripple commercial air travel. As such, MANPADS present a serious threat to civil aviation.

The threats posed by other prohibited items—atomic weapons, radiological dispersal devices and smallpox—are obvious. Atomic weapons and dirty bombs could be used by terrorists to inflict enormous loss of life and damage to property and the environment. The variola virus is classified by the Centers for Disease Control as one of the biological agents posing the greatest potential threat to public health.

There are no legitimate private uses for any of these weapons. They have the capability to cause widespread harm to the American people and to disrupt on a large scale the United States economy. Current penalties for the unlawful possession of these weapons, however, do not adequately reflect the serious threat to public safety and national security posed by their enormous destructive power. A maximum penalty of only 10 years in prison applies to the unlawful possession of MANPADS and atomic weapons.

Although the use, threatened use or attempted use of radiological dispersal devices are covered by the weapons of mass destruction statute, there is no statute that criminalizes the mere possession of such devices. Similarly, although there are penalties for prohibited transactions involving nuclear materials, all of them require proof of certain intent. There is no statute criminalizing mere possession.

The knowing, unregistered possession of the variola virus has a maximum penalty of only 5 years in prison and up to a $250,000 fine. Although the possession of the virus for use as a weapon is punishable under the biological weapons statute for any term of years up to life, the U.S. Sentencing Guidelines provide for a sentence of only 6.5 to 8 years for an offender who has no prior criminal record.

To provide a much greater deterrent for the possession or use of these weapons, the TFTA would establish a zero-tolerance policy toward the unlawful importation, possession or transfer of these weapons by imposing very tough criminal penalties. Under the bill, possession of any of these weapons would result in mandatory imprisonment for 30 years to life. Use, attempts or conspiracy to use, or possession and threats to use these weapons would result in mandatory life in prison. Capital punishment could be imposed if the possession or use of such a weapon resulted in death.

These penalties are justified by the catastrophic destruction that could be caused by the use of these weapons. Although harsh penalties may not deter suicidal terrorists determined to attack the United States, they may well deter those middlemen and facilitators, as the Chairman has referred to, who are essential to the transfer of such weapons. They also would assist prosecutors and investigators in obtaining cooperation from those individuals and moving swiftly up the chain to identify the most dangerous terrorists.

Section 102 of the TFTA would fill another gap in existing law by amending the Foreign Intelligence Surveillance Act to permit surveillance of so-called lone wolf terrorists. FISA currently does not cover unaffiliated individuals or individuals whose affiliation with a foreign terrorist group is not known who engage in or are preparing to engage in international terrorism.

Imagine a situation in which a single person comes to the United States to make preparations for or even initiate a terrorist attack. While in the United States, he engages in suspicious activity, such as purchasing large quantities of dangerous chemicals, signing up for commercial airplane flight school with no prior flight experience and no interest in becoming a commercial pilot, or scouting the security perimeter of several nuclear power plants.

If FBI authorities became aware of such behavior, they may wish to conduct an international terrorism investigation by obtaining a FISA order permitting electronic surveillance of the suspect. Under current law, FISA would prevent the FBI from obtaining the order unless they could show that the individual was affiliated with an international terrorist organization.

But the reality today is that a terrorist who seeks to attack the United States may be a lone wolf who is not connected to a foreign terrorist group or someone whose connection to a foreign terrorist group is unknown or unknowable. The quarter-century-old FISA law prevents law enforcement and intelligence authorities from exerting maximum effort to intercept and obstruct such terrorists.

The TFTA would fix this anomaly. Section 102 would update FISA by permitting the FBI to apply to the FISA court for a surveillance or search order if they have probable cause to suspect that a foreign national in the United States is engaged or may be preparing to engage in international terrorist activity, even if they cannot immediately link that person to a particular foreign state or terrorist group.

Chairman Kyl and Senator Schumer introduced legislation to fix this problem almost 2 years ago and the Senate passed it overwhelmingly in May of 2003 by, I think, a 90–8 vote. Given all we have learned about the terrorist threats we face, it is critical to enact this common-sense reform.

Mr. Chairman, thank you again for the chance to be with you and I look forward to responding, and I would be pleased to address now or after statements made by my other colleagues to Senator Feinstein's concerns.

Chairman KYL. Let's move through the comments about this bill and then we can come back to that, if that is all right. Thank you very much.

Barry Sabin.

Mr. SABIN. Good morning, Chairman Kyl, Ranking Member Feinstein, Senator Cornyn. Thank you for the opportunity to testify at this important hearing.

I wholeheartedly agree with my colleague, Mr. Bryant, that the Tools to Fight Terrorism Act of 2004, if passed, would fill a number of holes in our homeland security blanket. For my opening remarks, I will focus my testimony in the area of material support for terrorism and terrorist financing because I believe they are so critical to our daily counterterrorism efforts.

As the Department's leadership has indicated, a critical element in our battle against terrorism is to prevent the flow of money and other material resources to terrorists and terrorist organizations. From the perspective of a career Federal prosecutor, I fully endorse this approach.

But as the anniversary on Saturday reminded us all, we must continue to be vigilant. In recent months, we have seen the seizures of large quantities of chemicals used to make bombs near London's Heathrow Airport, the bombings in Madrid, a car bombing in Riyadh that killed 5 and wounded 147 others, the raising of the threat level pursuant to credible threats on some of our financial institutions, and just last week, and for the third year in a row preceding the anniversary of 9/11, Osama bin Laden's second in command Imam Al Zawahiri was seen in a video trying to rally al Qaeda supporters. These developments separately and collectively indicate that the United States and its allies remain a target of deadly worldwide attacks by al Qaeda and others whose view of the world involves the indiscriminate killing of innocent people.

While terrorists continue to plot, we continue to work harder to thwart them. By working together, the various components of the U.S. Government, in concert with our international allies, continue to aggressively pursue terrorists. The Congress and the American people expect nothing less.

Our concerted efforts and reliance on the rule of law and adherence to constitutionally-protected civil liberties have led to the disruption or demise of terrorist cells in locations across the country. We continue to dismantle the terrorists' financial networks, including those that prey on charities, through, in part, an application of standard white-collar investigative techniques.

To be sure, criminal prosecution remains a vital component of the war on terrorism, and we at Justice have used our law enforcement powers, when appropriate, to prevent terrorist acts. Much of our success is due to the wide array of legislative tools provided by the Congress, particularly the material support statutes.

The watershed legislative development of terrorist financing enforcement occurred in 1996, when Congress passed the Anti-Terrorism and Effective Death Penalty Act. This statute created the Section 2339B offense and the concept of foreign terrorist organizations, or FTOs. The crime of providing material support to terrorists and terrorist organizations, including Title 18 United States Code Section 2339A and B, criminalized conduct several steps removed from actual terrorist attacks.

These crimes permit us to redress the problem of the terrorist financier, someone whose role in violent plots is not obviously lethal, but involves the act of logistical and financial facilitation.

These offenses, along with the criminal penalty provisions of the International Emergency Economic Powers Act, or IEEPA, which we frequently use in material support prosecutions, contain the offenses of attempt and conspiracy, which adds to our ability to take down terrorist plots at a very early stage of planning.

The material support statutes and the improvements provided for by the USA PATRIOT Act, including increased penalties, have allowed the U.S. Government to successfully prosecute numerous terrorists and their cohorts. Prosecutions generate more leads and intelligence. Aggressive law enforcement begets more enforcement and further disruption of terrorist support mechanisms.

For example, we can credit the material support statutes as the basis for a grand jury in Dallas indicting the Holy Land Foundation and its officers for conspiring to provide material support to Hamas over the last decade, and as a key basis for a grand jury in Chicago indicting three Hamas operatives this past month; with enabling the pending trial of accused U.S.-based terrorist financier Sami Al-Arian, who allegedly used his University of South Florida office and several non-profit entities he established to support the Palestinian Islamic jihad; with providing for the guilty plea and cooperation of al Qaeda associate and military procurer Mohammed Junaid Babar in New York City; with the plea and cooperation of James Ujaama, who participated in setting up a violent training camp in rural Oregon; with the pending extradition requests of Abu Hamza El-Masri and Babar Ahmed, who have been charged with terrorist support offenses in New York and Connecticut, respectively, and are currently in British custody; and the successful prosecutions of individuals in Lackawanna and Portland and right here in Northern Virginia of several persons training in the United States to engage in violent jihad activities abroad.

But the TFTA improves this critical tool by clarifying several aspects of the material support statutes. As this Committee well knows, there have been a few court decisions finding key terms in the definitions of material support or resources to be unconstitutionally vague. TFTA amends the definition of "personnel," "training" and "expert advice or assistance," the terms deemed vague by these courts, in a way that addresses the concerns about vagueness, and at the same time maintains the statute's effectiveness. There is a fuller discussion of this in our written statement, but let me just cite one quick improvement.

Section 114 would clarify the meaning of the term "personnel" to address a decision by the United States Court of Appeals for the Ninth Circuit finding the term unconstitutionally vague. The court opined that the ambit of the term was vague because "personnel" could be construed to include unequivocally pure speech and advocacy protected by the First Amendment.

Section 114 of TFTA would address the court's concern by providing that a person may be prosecuted under Section 2339B for providing personnel to a designated foreign terrorist organization only if that person provided one, including oneself, or more individuals to work under the organization's direction or control, or to organize, manage, supervise or otherwise direct the operation of that organization.

It is critical that the United States stem the flow of recruits to terrorist training camps. A danger is posed to the vital foreign policy interests and national security of the United States whenever a person knowingly receives military-type training from a designated terrorist organization or persons acting on its behalf.

But the current prohibition on providing material support to foreign terrorist organizations under Section 2339B does not explicitly prohibit receiving training from, as opposed to providing training to a foreign terrorist organization, such as by attending an al Qaeda training camp in Afghanistan.

In many cases, it is clear that persons who attend training camps violate the existing material support statutes by providing training to other trainees serving under the direction of the organization and performing guard duty or other tasks, providing money to the organization for the training, or for uniforms and provisions and the like.

Proof of these specific activities, however, may be difficult to obtain, especially when the training occurred in a remote location. Section 115 of TFTA is designed to fill this gap. Section 115 of TFTA would create a new criminal provision, 18 U.S.C. Section 2339E, which would make it an offense to receive military-type training from a designated foreign terrorist organization, subject to a penalty of fines or imprisonment for 10 years, or both.

That concludes my prepared remarks, Mr. Chairman. I again thank this Committee for its continued leadership and support. Together, we will continue to make great strides in the long-term efforts to defeat those who seek to terrorize America. I am happy to respond to any questions you may have, as well as address Senator Feinstein's earlier remarks.

[The prepared statement of Messrs. Bryant and Sabin appears as a submission for the record.]

Chairman KYL. Thank you very much. Again, I appreciate your willingness to share the podium with a non-government witness here, but he is such a frequent commentator on proposals to change our laws and on provisions of law dealing with terrorism that his views are certainly sought by many, and certainly by this Subcommittee.

I would just note that I am just struck by the context of this. As we have a problem, and September 11th was the crystallization of that problem, and we begin to use the tools that we have, we naturally find out which ones work well, which ones don't work so well, and where there are real holes or gaps.

This Act is deliberately designed simply to fill some of the holes that have been identified by various intelligence and law enforcement people who have had to be on the front line working on this. It is striking—and I want to get into this a little bit later—how working with the law enables you to find out those things that need to be modified in the law and getting advice from the court about those areas in which we as Congress have not been as careful as we should have been perhaps in making sure that the balance between the protection of civil liberties and aggressiveness at going after terrorists is achieved.

Professor Turley, thank you very much for being here.

STATEMENT OF JONATHAN TURLEY, SHAPIRO PROFESSOR OF PUBLIC INTEREST LAW, GEORGE WASHINGTON UNIVERSITY LAW SCHOOL, WASHINGTON, D.C.

Mr. TURLEY. Thank you, Chairman Kyl, Senator Feinstein, Senator Cornyn. Thank you very much for the honor of appearing before you today, and to join the panel with the Government witnesses. Dan Bryant and Barry Sabin and I were acknowledging the fact that we have more often been on different sides of this debate over the last 2 years, and for some the appearance of this panel will look like the Visigoths and the Romans sitting down together. But I think that it does show that the things that divide us are far less than those which we have in common in terms of the fight against terror.

As you know, it is physically impossible for a law professor to speak on any subject in less than 50-minute increments, and so I have submitted a written statement which is too long for any real purpose, but it is available to the Committee.

I was asked to look at this bill, which is composed obviously of many different provisions, which is something of a daunting task, and to look at it in terms of its constitutional status and also its implications in terms of civil liberties in this fight against terror.

I appreciate the Chairman and the members of the Committee inviting me and indicating that they are interested in the views from both sides and not just similar views on these subjects. I am happy to say that I view this as an important advance. I think that civil liberties advocates and national security advocates can find common ground here. It is not that I don't have concerns in this bill, and I am going to mention a few, but the vast majority of this bill serves a real purpose. There are some great advances here.

I think that there is a mistake that many people have when they look at this country from abroad and they assume that when we face these types of dangers, we don't have the ability to react, and react forcefully, but also to react within the first principles that define us as a Nation. This is a good example of one of those bills that respects civil liberties and I think advances national security.

Obviously, bad times take the measure of any people and their government. This bill, particularly Title I, obviously raises issues in terms of civil liberties because it readjusts the relationship between the Government and citizens in the investigation and prosecution of terror cases.

For the most part, what is in Title I is, in my view, not problematic and is beneficial. Six of those sections I have put at the end of my testimony because they have raised constitutional concerns with various groups. I don't actually share some of those concerns, but I think that they are good-faith concerns and I think that the Subcommittee should look very seriously at those concerns. Some of them I do feel warrant assessment and possible changes in the language. But let me quickly go through the titles and then I will address those six sections.

Section 104 in terms of lifetime post-release supervision is a good example of, I think, one of the advantages in this Act. It, to me, makes abundant sense to have eligibility for lifetime post-release supervision in these cases. It is hard to argue against that, and the same can be said of imposing criminal penalties for those that give

false and misleading statements in terms of terrorist crimes or about the death or injury of a U.S. soldier. This is Section 106 which deals with hoaxes.

I previously have advocated the criminalization of these types of hoaxes. While I believe that as a federalism principle, this should primarily remain with the States, there is obviously a Federal interest here. I, as I have written before, find precious little distinction between a hoaxster and a terrorist, since both of them are trying to shut down buildings or communities. They are both achieving the same level of terror.

For a terrorist, the actual body count is sometimes irrelevant, as opposed to the dysfunctional effect of the threat, and hoaxsters achieve the identical result. What is particularly curious is that with some of these hoaxes—and they have come from bizarre corners, from journalists to prosecutors, to normal citizens. The problem is that they often involve millions and millions of dollars of costs that are not recouped.

The effect of this type of law will be to call this conduct what it is—criminal. We will return to this theme a couple of times here that this bill does achieve a very important thing in some cases in establishing that conduct is criminal. That is one of the functions of criminal law, is to correctly identify conduct that as a society we believe is beyond the pale and must be considered criminal.

We also have, for example, other sections which I doubt seriously anyone could argue with, including Section 111, which denies Federal benefits to convicted terrorists. I doubt you will find much disagreement there.

I also agree with the Government witnesses that Section 115 achieves an important purpose in making it a crime to receive military-type training from a foreign terrorist organization. We have seen in cases in recent years, particularly cases like Jose Padilla, that these training camps are used to recruit and indoctrinate individuals. The problem from what I can see is that prosecutors are often left with a very sudden cliff. They either have to charge a direct terrorism crime, which is sometimes difficult to fit, or they have to use a more ambiguous theory. It makes for a difficult prosecution.

What this would do is correctly identify the specific crime of receiving this type of military training from a terrorist organization. And, frankly, it would go directly at one of the great recruiting techniques used on people like Padilla and John Walker Lindh. It also will be of advantage to prosecutors, since they will have a tailored crime to present in front of a jury instead of requiring the jury to adopt a more general or fluid theory.

I am not going to go through each of these sections. I will note, however, that sections like Title IV, which is the Seaports Act, is enormously important. That is an example of an entire area in which we have had significant gaps in terms of the criminalization of misconduct. Congress has repeatedly identified seaports as one of our great vulnerabilities, and these criminal provisions, I think, will present a significant deterrent particularly for people like transporters who are bringing terrorist material or terrorists into the country. I believe that this will have a significant effect on deterrence and will benefit us all.

Turning to those six sections that have drawn the most significant criticism, the first would be Section 102, the lone wolf provision involving FISA. This is the only section that I have significant personal difficulties with, but I need to preface my remarks with a personal caveat. I have been an opponent of the FISA law for many years. I tend to adopt a fairly textualist view of the U.S. Constitution. I believe that the FISA court does not comply with the Fourth Amendment. So my objections to this provision really go more generally to the entire FISA process.

Having said that, I want to be honest that I doubt that the Supreme Court would share my view. The Supreme Court has not fully tested FISA, but I believe that they would uphold FISA, and I also believe they would uphold this provision. So if the question of the Subcommittee is whether this provision will pass constitutional muster, I expect it would, and my objections go more generally to FISA, as I have explained in my written testimony.

Section 103 deals with bail for terrorists. This is a presumption against bail for accused terrorists, and this has drawn some criticism from various quarters. I have no question in my mind that this would pass constitutional review, and I also don't object to it. It seems to me a reasonable request from the Department of Justice to have such a presumption that is indeed rebuttable. We already have this type of provision in 18 U.S.C. 3142E, and it seems to me rather obvious that accused terrorists should be treated in the same fashion.

In Section 104, we have the JETS provision. This is the Judicially Enforceable Terrorism Subpoenas provision. On this issue, once again there have been concerns, and I share those concerns, in terms of the ability of the FBI to issue its own subpoenas.

It is ironic that the civil liberties community and the Department of Justice agree on one thing. The Department of Justice wants this provision because of the ease with which they can issue subpoenas, and that is exactly why civil libertarians are uncomfortable with it. They are concerned that this is making it too easy and that there is some benefit of having an AUSA there to serve as some type of intermediary.

My view on this, quite frankly, is that this change is not going to result in a significant difference. I have never personally heard of an AUSA turning down one of these things. It tends to be a very perfunctory process. But what I would encourage the Subcommittee to do is that if they decide to move the JETS provision to the floor that they commit themselves to close oversight supervision on this point.

This is one area where the closest possible oversight is needed. The Subcommittee must have some type of guarantee that it will receive information on an annual basis as to the number and scope of these subpoenas. To not have that guarantee, I think, frankly, would be dangerous.

Section 108 involves confidential CIPA provisions, and once again I have to confess a personal bias. As the Chairman has noted, I litigate national security cases and I tend to be on the other side of CIPA proceedings. This provision would allow the Government to submit in camera ex parte requests for CIPA protection.

Quite frankly, this is a request that is almost uniformly accepted by courts. There are a few courts where courts have rejected these requests and said you put the request on the public record. But quite frankly, I don't see many cases where the Department of Justice has been put into a compromised position that is indicated in this amendment. But it will probably not materially change most cases or the rights of defendants. Very little is actually disclosed in these public requests, and so the difference is likely to be marginal.

109 is the FISA information issue regarding immigration proceedings. This provision has been called by the American Immigration Lawyers Association as constitutionally dubious. The AILA believes that allowing FISA information to be used, but not allow notice of the use would raise constitutional problems.

As much as I respect that organization and the work that it does, I do not see the constitutional problem. The fact is that you can use secret evidence in immigration proceedings, and the mere fact that you will not get specific notice that it is FISA-derived, in my view, is a practical and not a constitutional problem for the defense.

Finally, in Section 114, we have the material support provision. This provision, as was noted, corrects gaps in the original language identified by the Ninth Circuit Court of Appeals. In that sense, it moves this statute out of one constitutional area of concern; that is, void for vagueness. I would think that that would be embraced by civil liberties advocates.

However, I want to note that there remain First Amendment and due process concerns with regard to material support prosecutions. I happen to share those concerns, but the material support issue is a difficult one for civil libertarians because we are frankly divided. There are some who believe that any prosecution for material support raises facial constitutional problems, that it gets into speech and association.

I share those concerns, but I also believe that the Government does have a legitimate interest in prosecuting people giving material support to terrorist organizations. We have throughout our history prosecuted aiders and abettors, and to me there is precious little difference in the type of misconduct identified in this provision.

Having said that, I have enormous concerns over the prosecutions under this provision and I have significant concerns over the administrative aspects of designating terrorist organizations. I would encourage the Subcommittee to look at that.

However, I believe that this is an advance. It makes this statute better and brings it closer to conformity with the Constitution. Quite frankly, I believe this entire law would be upheld under even First Amendment and due process challenges as it stands. It doesn't mean it can't be improved, but I believe that most courts would accept this language as fully complying with the Constitution.

Let me end by saying that I believe that this law really represents the best of us in the sense that it involves a number of changes that were made in conformity to objections made earlier in 2003. There have been sections that have been removed, and I believe that this has been improved dramatically. I do think that civil

libertarians should reflect that and show that we support a fight against terrorism and that we recognize the changes that have been made.

In the same way, I hope that the Department of Justice recognizes that Congress has once again shown in this bill that it is willing to deal with matters in the Federal courts to make them an acceptable forum for the prosecution of terrorism cases and enemy combatant cases.

One of my criticisms of the current Attorney General is that he has often expressed a certain distrust of the judicial system and its ability to handle terrorism cases. I don't agree with that. I don't understand why the Attorney General has worked to circumvent the courts in some respects.

But I believe this bill shows that Congress and many civil liberties advocates are willing to make adjustments to compromise and to accommodate, and I hope that that will carry over to the Department of Justice because I think that ultimately we have a certain crisis of faith when you start to circumvent the Federal judiciary.

This constitutional system has existed through every possible stress challenge. We have faced challenges that would have left most systems in a fine pumice and we have survived. That is what the Framers built. They built a constitutional system to survive, not to inspire, to survive, and we have survived.

For those that say that the Federal courts cannot be used to try these cases, it borders on constitutional defamation. We deserve better, and this Act will strengthen the ability of the Government to use the Federal courts and I hope that it will renew their commitment to use them consistently in these cases.

That ends my statement. Thank you, sir.

[The prepared statement of Mr. Turley appears as a submission for the record.]

Chairman KYL. Thank you very much, Professor Turley. I would note that a lot of the ideas here that are embodied in this legislation have come from the Justice Department.

Mr. TURLEY. Yes.

Chairman KYL. So it presumably does indicate a desire on their part to continue to use the system and to improve it so that they can be successful. Obviously, if you have the Ninth Circuit initially at least ruling that the material support statute doesn't work, that doesn't help the Justice Department. So they have helped us come up with some ways that they think that it would. I very much appreciate your candidate assessment of this.

What I would like to do, I think, is to begin with at least three of the areas in which you indicated that the sections probably would be upheld as constitutional, but either bear close watching or you really question the need for in the sense of what improvement would they really make, would it really change anything; specifically, the CIPA protection, the material support statute. Do we really—well, excuse me. I guess that isn't the point that you made there, but that we have to provide significant oversight there, as well as in the administrative subpoena section.

Let me just ask our other two witnesses to address the question of why some of these provisions would be needed, specifically the

ones that you referred to—administrative subpoena, CIPA protection, material support, and then I will make the case for the lone wolf.

Dan Bryant.

Mr. BRYANT. Mr. Chairman, with respect to administrative subpoenas, and then I will turn to my colleague, Mr. Sabin, and have him respond to a couple of the other provisions, as you know, current law currently provides dozens of agencies with 335 distinct authorities to use administrative subpoenas in a wide variety of investigations.

The question that you all are facing, that Congress is taking up, is whether or not in terrorism investigations—and the text of this bill would only provide for administrative subpoenas in terrorism investigations—whether or not that same widely employed investigative authority should be available in terrorism investigations. We think the answer is absolutely yes, given the imperative of preventing terrorist incidents.

The key to prevention is often speed. Administrative subpoenas, as Professor Turley has noted, do provide an opportunity to move more swiftly to obtain key information from a third party in connection with a terrorism investigation. Professor Turley indicated that AUSAs routinely will sign a grand jury subpoena, but what of the circumstance when no AUSA can be found? What of the circumstance when a grand jury isn't sitting, and under Federal law the return date to comply with a grand jury subpoena requires that the grand jury be sitting?

What if it is a Friday evening and these resources aren't available over the weekend? The administrative subpoena provides another way for our terrorism investigators to not be slowed down by those occurrences and to move with great speed to obtain relevant information from third parties. So we think that administrative subpoenas, which are used routinely in all of these other areas of Federal investigations, certainly are appropriate to be used in terrorism investigations.

Chairman KYL. On that point, do you think that whether it be classified or not in all cases that the Department would be willing to share information with the Congress on a routine or timely basis as to the situations in which that subpoena authority is used if, in fact, it is granted so that we could on a real-time basis perform our oversight function as Professor Turley has suggested we should?

Mr. BRYANT. Yes, I think that would be important and entirely appropriate.

Chairman KYL. Thank you.

Mr. SABIN. With respect to two of Professor Turley's points, one on the Classified Information Procedures Act, Section 108, that is a very limited change. All the legislation provides is rather than a prosecutor standing up in open court dealing with critical national security evidence or information and making the request which currently exists under Section 4 of the Classified Information Procedures Act, it permits that to proceed ex parte and in camera with the judge, which is already embedded in the present law. But rather than making it discretionary, it makes it mandatory.

So the same procedures and substantive rights that a defendant would have would not be undermined, would not be changed. The

same constitutional protections are assured. It just provides the court to review that national security information without exercising discretion and forcing the prosecutor to stand up in open court and trigger that mechanism.

With respect to the material support statutes, as I mentioned in my opening remarks, that has been the backbone and the life blood of our Article III judicial prosecutions in the post-9/11 realm. I would refer this Committee to the decision last week of the United States Court of Appeals for the Fourth Circuit where, en banc, they determined that Section 2339B survived constitutional scrutiny emanating out of a terrorist case from Charlotte, North Carolina, involving a Hezbollah racketeering enterprise.

The court addressed the constitutionality on vagueness and overbreadth grounds, and found that it was appropriate.

What Section 114 would provide is specific terms—"personnel," "training," "expert advice or assistance." With respect to the first constitutional scrutiny that would involve vagueness, we believe that those terms are precise and defined already within the current ambit of the law—precise meaning for personnel, an employment or employment-like relationship; on training, instruction or teaching in part a specific skill, as opposed to general knowledge of a subject matter. And on expert advice or assistance, Federal Rule of Evidence 702 acts as a spring board for providing that kind of specific scientific, technical or other specialized knowledge.

So we believe that while already the language is precisely defined, this would merely act as sort of a belt-and-suspenders so that we can ensure that the critical statute that has been the backbone of our efforts—so that there is no ambiguity in its effectiveness and use. We believe that the material support statutes are constitutionally sound presently. This would just further address any civil libertarian concerns or any remaining concerns that exist out there.

Chairman KYL. Professor Turley, particularly on that last point, because of the circumstances under which it would be necessary for prosecutors to look to the material support statute, lacking anything more concrete with regard to an individual that they want to charge, can you be any more explicit with regard to due process or First Amendment concerns which you expressed in a general way? And I realize we are talking about hypotheticals, but law professors are good at those, as I recall.

Mr. TURLEY. I would be happy to, Mr. Chairman. There have been a number of objections made to the material support prosecutions. Some of those can be divided into the designation of organizations by the U.S. Government. There has been a great deal of objection on the administrative level that organizations are not given a full opportunity to oppose the designation. That came up in the Holy Land Foundation case.

I am not questioning the outcome of that case or whether they should have been designated, but I do think that that case raised some very significant due process questions, including the evidence that was introduced against the organization which proved to be somewhat dubious ultimately.

Now, that doesn't mean that it would change the outcome. It probably wouldn't have changed the outcome, but I believe that the

attorneys for the Holy Land Foundation did raise some significant due process questions about that organization's ability to contest some of these issues.

The First Amendment issues go to a broader question. When you prosecute someone for material support, you are prosecuting them even though they have taken no active, violent measure. And you get into the type of *Brandenburg* issue of what is really required. When is something speech and when is something a crime? Inevitably, when you prosecute material support, you will raise speech and association questions.

I happen to disagree with some of my close friends, in that I think the Government has a legitimate reason to do so; that we have to find a way to do this and to protect those interests. We have to have the ability of citizens to support unpopular groups and to have a chilling effect, not an uncertainty in some of these cases as to whether they could get into trouble in engaging in political speech.

I think the current law allows for too low of a threshold on material support; that you could take a look, frankly, at what triggers material support and what has to be shown to deal with those questions, to give further protection for First Amendment interests. I would be more than willing to submit to the Subcommittee suggestions along that line.

But I do want to emphasize with regard to what Mr. Sabin said I agree with his testimony that some of these cases have performed a vital function. I think this is a crime for our times and we cannot continue to fight against terrorism unless we direct our attention to those people among us who are funding those who are trying to kill us, and we have to find some way to do that. I think the material support provision is a bit too general and should be more specific as to First Amendment activities, and I think that this Committee could do that.

Chairman KYL. As I understand it, your support for the clarification so that we eliminate the void for vagueness problem is consistent with Mr. Bryant's testimony.

Mr. TURLEY. Absolutely, and I want to also build on what you said, Mr. Chairman. I think it is commendable what the Department of Justice has submitted and contributed to this legislation. I think that it is commendable that they are responding to the Ninth Circuit decision and filling this gap.

Chairman KYL. Thank you.

Senator Feinstein.

Senator FEINSTEIN. I have real concerns giving the FBI the administrative subpoena. We purposefully left it out of the PATRIOT Act. We did 156 sections, of which 16 sunset.

Dr. Turley, my experience is that carrying out the oversight role over this Justice Department is very difficult. To that end, I would like to ask that my letters of March 23, April 28 and June 14 asking for information just to be able to carry out the oversight role be entered into the record, if I may.

Chairman KYL. Without objection.

Maybe this is a good time to respond to the concerns of the opening statement. I would ask if the witnesses have the letters or are aware of them so they might be able to respond.

Senator FEINSTEIN. Let me just finish on the administrative subpoena, if I might.

Chairman KYL. Sure.

Senator FEINSTEIN. I have received no information that Assistant U.S. Attorneys are not available 24 hours a day to sign off on a subpoena, and I would like to ask if there is that information that I receive it or if you could answer that question that you do so now.

Mr. BRYANT. Senator, I would be pleased to make sure that we have a fulsome response after this hearing. As an initial response, I am aware of circumstances where administrative subpoenas have been utilized in circumstances where it is unclear whether or not a grand jury subpoena would have been as readily available because of either the unavailability of an AUSA at that moment or the lack of a sitting grand jury. I would be pleased to have the discussion of that fact in more full provided to you.

Senator FEINSTEIN. I would really like to know whether that is fact or fiction because generally the subpoena is issued by the prosecutor. So I would like to know if this really is a case where there is a necessity.

Mr. BRYANT. Right.

Senator FEINSTEIN. I am very disappointed. I mean, I don't understand how we can carry out our oversight responsibility. The Ranking Member of this Committee is told that they will not share on a classified basis information with us as to problems. That is a real problem, and yet they turn around and ask to add new sections, all of which do have some implications.

Now, let me ask this question. Section 2, 50 U.S.C. 851, says, "Except as provided in Section 3 of this Act, every person who has knowledge of, or who has received instruction or assignment in the espionage, counter-espionage or sabotage service or tactics of a government of a foreign country or of a foreign political party, shall register with the Attorney General by filing with the Attorney General a registration statement, in duplicate, under oath, prepared and filed in such manner and form and containing such statements, information or documents pertinent to the purposes and objectives of this Act, as the Attorney General, having due regard for the national security and the public interest, by regulations prescribes."

Has this section been utilized?

Mr. SABIN. What was the statutory cite again, Senator?

Senator FEINSTEIN. 50 U.S.C. 851, Section 2.

Mr. SABIN. If memory serves, that is relating not to counterterrorism efforts, but counter-espionage efforts, and that is a different component of the Justice Department. I can make inquiries of the Counter-Espionage Section.

Senator FEINSTEIN. The question was has it been used?

Mr. SABIN. I know Section 851 has been used, but I am not aware of 851 as I sit here today, that registration requirement being triggered. But rather than speak incorrectly, let me try and get some more information and we can get back to the Committee in that regard.

Senator FEINSTEIN. I would appreciate that.

Now, if you would like to respond to my—first of all, Dr. Turley, thank you very much for your letter. Unfortunately, I just got it

this morning and I would really like to study it a little bit more. But I think your views are balanced and I wanted to say I very much appreciate them.

The bottom line for me, and I suspect for this side, is before we add to the 156 provisions we have passed, I think we need to do our due diligence on those provisions and see that they are being properly carried out. That is where I have got the problem.

So if you would like to take this opportunity, either Mr. Bryant or Mr. Sabin, to respond, I would appreciate it.

Mr. BRYANT. Yes, Senator. I think we will both try to respond. I appreciated Professor Turley's observation that bad times take the measure of a people and it is imperative that we respect our first principles. One of those first principles is that everything that we do by way of providing new tools strengthens ordered liberty; that is, that we not promote order at the expense of liberty, but rather that we promote the genius of our tradition, and that is ordered liberty.

Oversight is an important element of that tradition. That is one of those first principles and we need to make sure that we are being responsive and useful in terms of our responsibility as it relates to your oversight. We do think that we need to do both; that is, we need to both be responsive to Congress as it performs its necessary oversight function and we need to be evaluating additional needs as we assess gaps in current law. So we think we need to be proceeding simultaneously with both of those important imperatives.

In terms of some of the specifics, Senator, that you raise, it is clearly the case that the Moussaoui and Padilla cases—and I think Mr. Sabin will respond perhaps in more detail—do implicate new challenges. It is a new challenge that we face. Questions of which resources to use in a criminal justice arena or in the military arena have presented themselves in ways that haven't occurred in the past, and we are proceeding ahead as we sort through those unprecedented questions.

With respect to the Section 215 inquiry, as you know, Senator, we are required under the terms of the PATRIOT Act to provide to the intelligence committees of the Congress twice-yearly reports regarding the use of Section 215, which is a section authorizing FISA orders to be used to obtain tangible things—records, for example—from third parties.

It is the FISA analog, as you know, to a grand jury subpoena. It is used only in connection with terrorism and spy cases. We are required to report to the Congress twice yearly on usage of that authority provided in PATRIOT. It is my understanding that in addition to the twice-annual reports that we have already been providing to Congress, the next report due to Congress is being finalized and will be on its way. That would, of course, be available to the Senator and all Senators for review through the auspices of the Intelligence Committee.

Senator FEINSTEIN. Let me just stop you there. 215 is one of the 16 sections that sunset. What I asked for is an analysis, or the beginning of an analysis of all of the 16 sections. How can we vote to either let them sunset or to continue them if we don't know how they have been used and really have an opportunity to go into that

use? That is oversight, and I have got to say this is what your Department appears to resist.

Now, I have never before been told I could not have a classified briefing on something that is written in the Washington Post. I have never been told I could not have a classified briefing. I serve on Intelligence, I am Ranking Member of this Subcommittee, and yet I was told I won't be given that information.

So how could I vote to extend sections that are highly controversial and which I have defended up to this point if I can't adequately carry out my constitutional responsibility? The bottom line is I won't if I can't.

Mr. BRYANT. We owe you that information, Senator.

Senator FEINSTEIN. Yes, you do.

Mr. SABIN. With respect to some of the specific matters you referred to, Senator, post-9/11 the mission has been to prevent terrorist activities before they occur. As part and parcel of that, and consistent with Professor Turley's remarks that we seek to address that in Article III constitutional Federal district courts, we have sought to combine the fact that we are sharing that information, pursuant to PATRIOT Act Section 218 which would sunset and 504, to enable the prosecutor and the agent, to enable the criminal law enforcement person and the intelligence investigator to sit down, share that information, figure out which is the best tool in the tool box to use in order to address that particular threat.

That means that prosecutors and agents are getting involved earlier on in the continuum of that terrorist incident or terrorist threat so as not to react, but to prevent, so that cases are taken down earlier and you will have the less playing out of the investigating realm before take-down as opposed to after you seek to do the disruption.

We are also addressing the facilitators and the entire spectrum of activity and not just the bomb-thrower or the operator, but the financial facilitator. So your reference to Sami Al-Hussein out in Idaho—I believe the system worked in that regard. An individual was charged with specific offenses, including material support offenses. It was a difficult case, but the Government brought its evidence, put its evidence before the court, which was tested, and the jury acquitted on certain counts and hung on other counts.

That individual agreed to be deported from the United States after the matter resulted in the hanging on certain counts and the acquittal on others. But to address the activity that Mr. Al-Hussein was alleged to have committed was acting as a platform or a communications provider for violent jihad activities around the world, and the Government produced the evidence.

We disagreed with the court's jury instruction that was provided to the jury, which we believe was problematic in how the jury reached its determination on the material support charges. But that is what you have to do when you bring cases to court and try to have it played out in a full due process arena. We respect that process and do not feel that that was in any way a setback. Indeed, we are going to continue to bring those kinds of cases thoughtfully, judiciously and aggressively to address that kind of use of the modern technology in the 21st century that is being used by those who would seek to facilitate and act as a platform over the Internet.

Your reference to the Albany matter—while it is pending, the judge determined that the two defendants should be released on bond. That is an example of undercover activities by the Federal Bureau of Investigation. We applaud the use of those undercover activities in order to try and ferret out criminal activity consistent with the actions and conduct of individuals violating material support statutes.

We have undercover recordings that we submit will be delivered in discovery and provided at a jury trial to establish the defendants' guilt, we believe, beyond a reasonable doubt. Indeed, the specific provision in TFTA, the presumptive pre-trial detention, would have triggered the application under TFTA Section 103, the rebuttable presumption, in the Albany matter.

The reference to a couple of the other cases are subject to ongoing Justice Department review, but let me make a point about the matter out of the West Coast that you referred to which addresses the material witness warrants. We believe that the use of Title 18 United States Code Section 3144 has been an extremely effective mechanism in the post-9/11 world for law enforcement to obtain information from those that we have not charged with a criminal offense.

So we go to an Article III judge, provide probable cause that an individual is a material witness in a proceeding that is subject to judicial review and effective assistance of counsel, and then pursuant to a grand jury proceeding. So we believe that that system can work, and that is an effective mechanism that the Government has used and will continue to use, we respectfully submit, in order to make sure that we are ensuring respect for the material witness' constitutional rights, but also eliciting information that may enable the Government to pursue others or to have that individual released.

Senator FEINSTEIN. I appreciate your spirited defense. I am back on the reports to Congress that are due, and some are due to Intelligence. My staff has just checked with Intelligence staff and they can find none of the reports that were due to go to Intelligence.

I am still trying to understand checks and on this what means what, but I would be happy to share it with you. I think it indicates that the reports to Congress, as required, have not been forthcoming, and certainly have not been forthcoming on a timely basis.

Thanks, Mr. Chairman.

Chairman KYL. Thank you, Senator Feinstein. We will pursue that with the Justice Department and make sure for the record that we have the information that is required.

Senator Sessions has joined us, too. But, Senator Sessions, even though Senator Cornyn is not a member of the Subcommittee, he has got some pieces of this bill and let me call on him first and then call on you, if that would be all right.

Senator SESSIONS. That is wonderful.

Chairman KYL. All right.

Senator Cornyn.

Senator CORNYN. Thank you, Mr. Chairman. I appreciate particularly Professor Turley's comments about the goal of trying to balance civil liberty concerns with the necessary tools that need to

be provided for law enforcement and intelligence-gathering abilities to provide for our National security. Certainly, this is a debate that is as old as our country and even older.

I think all of on the Committee, and indeed all of us in Congress feel like it is our responsibility to see that that balance is struck as well as we are able to do so. But ultimately we can't know all the given sets of circumstances and facts that may be presented in any given case, and in this instance context is important.

That is why I believe it is important that there ought to be recourse to judicial review, no matter what the circumstance, whether it relates to the so-called sneak-and-peek provisions of the PATRIOT Act which cannot be invoked without the oversight of a judge. I feel the same way about the judicially enforceable terrorism subpoenas, and let me just explain.

My experience with investigations has been that frequently third parties who receive a request from an investigator are uncertain about what their liability may be, let's say, or whether their compliance with a lawful request—let's say an informal request—might perhaps invoke some third party rights that are involved in the request.

So a couple of things happen. Either they will say, well, I will be glad to give you the documents that you are requesting, or they say I need a subpoena for my file just to show that they are responding—not volunteering, but responding to a lawful request.

Indeed, under the administrative subpoena provisions here, ultimately if the repository or the custodian of the documents that are subpoenaed says I am not going to give these up without a court order, there is an opportunity to go to a court to get that approval.

I would just like to ask first Mr. Bryant and then Professor Turley to comment on that. If I have got that wrong, tell me, but if you think I have got it roughly right, I would like to know that as well.

Mr. Bryant.

Mr. BRYANT. Yes, Senator, that is correct. In the case of the judicially enforceable administrative subpoenas for terrorism investigations provided in the bill, recipients can refuse to comply. The FBI can't then enforce that on its own. It would have to go to court to seek to enforce that subpoena. A recipient could petition the court to modify the terms of the request or to quash the subpoena entirely.

It is the case that there is also a provision indicating that compliance with the subpoena request by a third party does not create civil liability on the part of the compliant party. So we think these are important protections that are explicitly part of the provision.

Senator CORNYN. Professor Turley, I note from one report I saw that Congress has already granted administrative subpoena authority in lot of other contexts. That number is kind of staggering—335, according to one report, including postal inspectors, Small Business Administration inspectors. And they are used widely by Federal investigators in health care fraud investigations and in connection with child exploitation investigations.

So is there something specific about this context or the general issue of administrative subpoenas that causes you concerns?

Mr. TURLEY. Well, first of all, I think that is a valid point that you can make too much of the issue. I think there are legitimate concerns here and I will address those in a second, but it is also, I think, confusing when we refer to grand jury subpoenas. It makes it sound like a grand jury issued them, when, in reality, it is simply being signed by an AUSA.

So the removal of the AUSA is not going to be a significant change in terms of civil liberties protections on a practical or a legal basis, and I think that you have to start with the analysis and accept that proposition from my standpoint.

Also, parts of this provision, I think, do make abundant sense, although some of my friends strongly disagree with me. One, for example, is that it prevents people from revealing a national security subpoena. It requires them to only disclose it to their attorney. They can then go to a court to seek the court's intervention if they disagree with the subpoena.

I think that the Department of Justice has a perfectly valid reason for imposing that limitation. The fact is that Federal investigators face this problem all the time outside the terrorist area of issuing a subpoena and then triggering knowledge by potential targets. In the terrorism area, I can think of no greater danger than that type of release of information.

So putting those aside, the issue involving administrative subpoenas can be distinguished in one respect. Those often deal with civil matters; they deal with administrative matters where the potential for the defendant is not as significant as in a terrorist case. So you can make a distinction between the two.

Once again, this is not, in my view, a significant threat to civil liberties, and I think there is a good reason that the Department of Justice is asking for this. To be quite frank, civil libertarians feel wounded in the last few years, and to support some of these provisions is really an exercise of hope over experience for some civil libertarians.

So there is a certain degree of resistance to anything that would make it easier or faster to issue these types of requests, and that is the reason I think Congressional oversight is so essential if you go forward with it.

Senator CORNYN. Well, I appreciate your response because I think it is a very balanced point of view. Unfortunately, in this area some view it as a zero-sum game. Either law enforcement gets what it wants and needs, and if it does, then all of our civil liberties are in jeopardy. I mean, it just seems to be based on TV advertising. Mail solicitations that I receive at my home asking me for money because the U.S. Attorney or the Justice Department or the U.S. Government or the Congress is taking away your civil liberties by provisions like this or like the sneak-and-peek provision which do provide for judicial oversight seem to be so hysterical and off base. But I appreciate your response.

Two other quick questions. One has to do with port security, and again I appreciate, Professor, your comments that you think this is an important and significant reform because of the potential vulnerability of our ports.

Let me first ask, Mr. Bryant, the port of Houston, in Texas—we have talked to them about this provision and they had some con-

cerns, for example, in Section 402, the entry by false pretenses; 409, manifest requirements; 410, stowaways; and 411, bribery. They wondered whether these provisions create or add to the liability of a public port authority. do you have an opinion on that, sir?

Mr. BRYANT. If I might, Senator, in the division of labor Mr. Sabin and I arranged, I think he is in a better position to respond.

Senator CORNYN. Excellent.

Mr. Sabin.

Mr. SABIN. I can't speak to whether it increases the liability in a civil context of a particular port officer or the employees in that regard. We can get you specific information in that regard.

I mean, certainly Title IV addresses, we believe, very necessary legislation gaps that exist relating to transporting terrorists and transporting weapons of mass destruction on vessels, the destruction of certain vessels at maritime facilities, conveying false information to particular individuals.

It does address in one of the provisions the link between corruption or bribery and port security, so that law enforcement can address a potential vulnerability where there is a gap between the border where someone can bribe a particular individual and therefore more easily facilitate terrorist entry into the country. But as to your specific question, I can get further information as to the potential civil liability for an employee at the port.

Senator CORNYN. I would like to know what the Department's official position is on that because if it is unclear, we may need to look at that because I don't want any port, whether it is the port of Houston or others, by invoking the provisions of this statute to incur any additional liability and to create liability that is not already present for civil purposes, obviously.

Mr. SABIN. One thing that we can do is, post-9/11, we have set up a mechanism known as the anti-terrorism advisory councils, which bring together the prosecutorial entities, as well as individuals at the seaports—first responders and the like—to gather and share information. So as part of that system, we can go back to our offices, reach out to the anti-terrorism advisory council coordinator in Houston or other specific port districts and have them, since they now have the networks and shared information that is occurring post-9/11, obtain that information and get you an expeditious response in that regard.

Senator CORNYN. Well, so I don't wear out my welcome too much, since I am not a member of the Subcommittee, let me just ask one more question and this has to do with MANPADS. I think, Mr. Bryant or Mr. Sabin, whoever has this issue in your division of labor, I appreciate the support of the Department for this provision to increase the penalties, and indeed to create penalties for possession of MANPADS.

All you need to do is to drive out close to Reagan National Airport where they have the soccer fields and the bike trails where the planes take off for that concern to be brought home. I am aware of the fact that, of course, during the Soviet invasion of Afghanistan, there were an awful lot of Stinger missiles and other MANPADS provided to the Mujahadeen to knock down Soviet helicopters. Unfortunately, there are a lot of them still circulating in places like the Middle East and places like Central America, where

I recently traveled and was told that there was a buy-back program designed to get these out of circulation.

Do you have any figures or do you have any information that you can share with the Subcommittee on the availability of these via arms merchants and how realistic the threat of access to MANPADS by someone who wishes to do us harm—how readily they can be obtained?

Mr. BRYANT. We would have to get back to you, Senator, with specifics. As a general matter, though, it can be noted that the bad news is MANPADS are available in the global marketplace. The good news is many of them, including some of those that you have referred to from past conflict in parts of the world, are very old, raising questions of reliability.

I do know that there is a briefing available by individuals within our intelligence community and they can speak with great specificity to the question of how many and what type are currently available.

Senator CORNYN. Thank you very much. Whether they are old or not, I am reminded of the saying that we keep repeating around here that the bad guys only have to be lucky once and we have to be lucky all the time.

Thank you, Mr. Chairman.

Chairman KYL. Thank you, Senator Cornyn. You are welcome anytime.

Senator Sessions.

Senator SESSIONS. Mr. Chairman, thank you for your leadership on this issue. No one in the Senate has been more aggressive and alert to the important issues than you, and Senator Feinstein also has been supportive and shown leadership on these questions.

I would like to go back to the administrative subpoena, the FBI subpoena. This is something that is a mountain out of a mole hill if there ever was one.

Is it not true, Mr. Sabin, that the DEA on a regular basis can issue administrative subpoenas for bank records, telephone records and motel records, and does that everyday in drug cases?

Mr. SABIN. It is my understanding that, yes, the Drug Enforcement Administration, as well as a host of other Federal agencies, use the administrative subpoena authority on health care fraud prosecutions and others.

Senator SESSIONS. Mr. Chairman, what used to happen in the days of "Dragnet" and Jack Webb is the police officers would call the motel or the telephone company and say I need the records on John Doe, and they would give them to them. And then somewhere lawyers got involved and said, well, maybe motel records are confidential to the customer and maybe we can't give them. And the banks said these are our customers; we don't want to help the DEA or the FBI prosecute our customers, so we are not giving the records anymore.

So you have to get a subpoena, and the way that works is that to get a subpoena for drug cases, the DEA issues a subpoena. In addition to that, Small Business Administration investigators can issue them. The Internal Revenue Service can issue them on tax charges. We can't issue these subpoenas on terrorists who want to kill us, but we can issue administrative subpoenas to get records

to prosecute a citizen on a tax charge, and the Nuclear Regulatory Commission, the Department of Labor, the Bureau of Immigration and Customs and Enforcement.

So first of all, this is not a big deal, to my mind. There is a bureaucratic matter that Mr. Sabin and Mr. Bryant probably understand, and that is the Assistant United States Attorneys like to be in charge of everything. So they like to have a grand jury subpoena and they don't care if an FBI agent needs it on Friday afternoon and Monday is a holiday and the FBI has to wait until Tuesday to find an AUSA to get the thing approved. Or maybe the AUSA is out and nobody else will approve it and he has to wait two weeks and the whole investigation is delayed. I have always been sympathetic, frankly, with the FBI's concern. The DEA can get these records; everybody else can get them. They are just about the only agency that can't.

Is that a fair summary of the history of some of this stuff, Mr. Sabin? You are a prosecutor. Have you tried cases?

Mr. SABIN. I have, sir; I have tried many. Prosecutors are diligent, but there are circumstances on weekends or where they can be delays. I don't want to say that it occurs frequently, but it is a necessary means for an agent to have in the most expeditious fashion the ability in a terrorist investigation not to be delayed. So if we can get those records, we can exploit the information and we can act to prevent a terrorist attack. So anything that we can do to get that information quicker and shared more expeditiously we support.

Mr. BRYANT. Senator, can I just add it is important to note, I think, that current law already provides for the same kind of non-disclosure that is contemplated in this provision in other types of investigations. Health care fraud, child crimes, investigations involving educational records—in all of these areas, current law provides for the opportunity for a non-disclosure requirement to be attached.

Senator SESSIONS. Now, that is interesting. So you have got a non-disclosure provision in education investigations, which don't threaten the lives of thousands of American citizens, and potentially millions. So we have that kind of freedom in those cases, but we don't in terrorism cases.

I think our friends in the civil rights and civil liberties community are really overboard on this and just haven't thought this through and haven't understood the history and the ways policies occur, Mr. Chairman. I think they just react immediately to anything that looks like an expansion of investigative powers, when really this is just bringing terrorism cases up to some of the abilities we have now in other cases.

Let's talk about this non-disclosure. This is really, really, really important. If you are doing a high-level terrorist investigation and you have identified an organization that there is reasonable cause to believe may be involved in serious attacks against the people of the United States, subjecting thousands of people's lives to danger, maybe you need a bank record to see where money has been moved to corroborate these charges, Mr. Sabin, and you subpoena that bank record.

What could it do to the investigation if the bank's lawyer says, well, it is our policy to advise our customer whenever their records have been subpoenaed? How could that impact the investigation?

Mr. SABIN. Time is of the essence. You want to make sure that you can get that information as quickly as possible. So if you are going to be subjected to negotiation and legal back-and-forth between counsel for the financial institution or a court proceeding or any kind of other endeavor that would subject that information to not being provided as timely and as quickly as possible, you can play out the parade of horribles.

Senator SESSIONS. I guess I was moving on to the next subject, which is the immediate non-disclosure limitation. A lot of banks take it as policy. I have investigated frauds involving banks, or needing records from them. A lot of banks take it as a policy that they should notify their customer as soon as that customer's records have been subpoenaed.

Now, if you are trying to conduct a surreptitious investigation of a group of terrorists, you don't want them to know you are on to them and that you are investigating them. Can't this blow up the whole investigation if they called up the terrorists to tell them their bank records have been subpoenaed by the FBI?

Mr. SABIN. Certainly, it can impact not only that individual, but that individual's actions and relationship to other individuals in the organization. So monies can be moved, evidence can be destroyed, people can flee legitimate targets. So you will lose the ability to control the investigation. You lose the power to be able to strategize and use all the tools that Congress has provided us, whether that is the continuing electronic interceptions or other authorities in connection with that financial subpoena. So non-disclosure is very critical.

Senator SESSIONS. This only applies to the FBI in terrorist cases. It doesn't apply to the IRS or drugs or fraud or corruption or bribery, only in terrorist investigations. That would be a small number overall of the investigative work of the FBI, would it not?

Mr. SABIN. Correct, Senator.

Senator SESSIONS. Well, I understand the Supreme Court by a 9–0 ruling approved administrative subpoenas and approved the non-disclosure rule. I think Justice Thurgood Marshall wrote that opinion. So this is not a deal that threatens our liberties. That is all I am saying.

I am delighted that our civil liberties groups are watching everything we do, and I think it is fine that they challenge and raise issues when we may be threatening American liberties. But if we had to have one example in America, one kind of case in which you would have administrative subpoenas and non-disclosure by the recipient, wouldn't it be terrorism, if that was the only case we allowed it to happen? But now we are doing it in all these other cases of lower importance and denying it in terrorism cases, and I think that is really bizarre.

Mr. Bryant, did you want to comment?

Mr. BRYANT. Senator, your analysis might lead one to conclude that the non-disclosure requirement should attack automatically in all terrorism investigations. The text of this bill is more judicious, if you will, even than that, in that it provides for non-disclosure in

terrorism investigations only when the Attorney General certifies that disclosure could endanger the national security of the United States.

Senator SESSIONS. Well, that is a very significant point, I think, to make and I am glad you clarified that. I do note that FBI Director Mueller has said this authority would be, quote, "tremendously helpful," close quote, to terrorism investigations, and I really believe it would. Based on my experience, you don't want the bad guys to know you are on to them. You don't want them to know that you are getting records.

A lot of times, steps are not taken in an investigation that investigators would like to take simply because they know it will tip off the criminals to what is going on. In a terrorism investigation, that could cost lives. I think you are right.

Mr. Turley, you have thought about this a lot. Are we way off base on this?

Mr. TURLEY. No, you are not, Senator. The fact is I think that the non-disclosure provision is important. It is a valid request by the Department of Justice. I think that this section is written, as was noted, in a highly judicious manner. I think it is something that does not raise civil liberties concerns, but it does raise national security issues that are valid.

In terms of the use of these subpoenas, I also agree that we shouldn't make this bigger than it is. The civil liberties community—I can't speak for them, but as one person who has advocated civil liberties views in the past, I can say that there is obviously a great sensitivity when we are in a fight like this against terror. There is a great concern.

The fact is that some of our greatest wounds historically have been self-inflicted. We have done a great amount of harm to ourselves in the past when we have faced great threats. But it is also important, as you have noted, for the civil liberties community to recognize when there are valid requests and needs by the executive branch.

As I mentioned in my opening statement, I think that if the Subcommittee goes forward with the JETS provision, it is simply important for the Subcommittee to clearly lay out an oversight function and a reporting schedule so that you can keep track of the scope and number of the subpoenas.

Senator SESSIONS. Well, briefly, Mr. Sabin or Mr. Bryant, could the Department of Justice require that the FBI give notice to the U.S. Attorneys and Assistant U.S. Attorneys for these subpoenas? You don't need the statutory authority for that. I mean, the little bureaucratic deal is that the Department of Justice attorneys like to know everything. I have been there, been one of them. So it is a power deal, and it always has been, between the FBI—the FBI says the DEA can do this, why can't we?

Mr. BRYANT. It could both be required as a matter of DOJ practice, and even if there were no such requirement imposed internally within the Department, FBI investigators utilizing administrative subpoenas would have reason to nevertheless work closely with AUSAs in connection with those investigations underway.

Senator SESSIONS. I agree with that.

Chairman KYL. Senator Sessions, let me just interrupt you for one second. If we were to impose a reporting requirement of the circumstances in which it was used, obviously they would have to report it to somebody and the Department of Justice is the obvious entity to provide the report. So it could happen as a matter of course.

Senator SESSIONS. Right. But, fundamentally, the principle is this: If you go into a motel and you sign a motel document saying you are there and put your tag number on it, there is no expectation of privacy in that. If you make a telephone call and you contact someone on the phone, you have an expectation of privacy in the contents of the conversation. But to make a telephone call, everyone knows the computer systems account for the numbers that you utilize and there is no expectation of privacy of the telephone numbers you call in that, and historically phone companies have given them over without subpoenas.

I mean, this is the fundamental constitutional principle involved here: Is there an expectation of privacy in your bank records or telephone records? Since a bank is not like a priest-penitent relationship, the banker does not have the ability to refuse to answer questions about a person's bank account. They don't volunteer, but if they are asked, they have to testify to what the person told them about did they lie about the loan, what did they tell them, what addresses did they give them and all these things. So there is not an expectation of privacy in the paperwork in the bank because everybody in the bank has access to it. That is why bank records can be subpoenaed in the fashion that they have been without the high degree of proof required for a wiretap of a person's private conversations.

I think, Mr. Chairman, you are on the right track with this. I really believe that this particular thing is important for our investigators. Other agencies have these powers and have had them for years, and we really need the FBI to have them in terrorism cases.

One more thing. Thank you for adding into your legislation the legislation I offered earlier to close a number of the gaps in the enforcement of attacks on trains. We had a lot better laws on airplanes and some real gaps in mass transportation by train, and thank you for making that legislation a part of it. I think it is a good step forward.

Chairman KYL. Thank you, Senator Sessions. Let me just reiterate before I make a couple of closing comments for any of you to respond to if you like that the purpose of putting this bill together was to take things that were relatively non-controversial that we could pass quickly. In the event that we could not bring the reauthorization of the PATRIOT Act back up, which the Department would like to see done, are there other things that have been recommended over time or that members have introduced as bills?

And in my opening statement, I made the point that all of the legislation in this bill has either been introduced or been the subject of hearings. It has gotten quite a bit of vetting, but we wanted to have it all put together in one place, one time, for this hearing.

Senator SESSIONS. We had a full hearing on the train legislation that I offered.

Chairman KYL. Right, and each of the components has had some attention paid to it. So the idea here was to do something that was not particularly controversial. The administrative subpoena section is the only one that has really, I think, received criticism, and I hope that after today's hearing and the other information that has been produced on that, our colleagues would see that that is not an extension of law, but simply conforming to existing law with respect to a lot of other different types of investigations our Government performs.

The two areas that we really haven't focused on here—one is not very controversial, but I just want to make the point because it is so doggone important. The 9/11 Commission and everybody else has talked about the failure of the FBI and the CIA to talk to each other, and INS and FBI and one group of FBI within the FBI, and so on.

To some extent, the PATRIOT Act and other changes have made that possible, but there are a couple of provisions of this bill that also improve on that capability of sharing information, both with regard to Federal agencies and with regard to State and local governments. I just wanted, even though they are not controversial, to just illustrate why it is so important.

One of the cases I mentioned was Khalid Al-Midhar, who was one of the eventual hijackers who flew the plane into the Pentagon. We had obtained some information about him. The CIA primarily had done some surveillance in Malaysia and provided some information to the FBI. The agent in charge grasped the significance of a visa application that Al-Midhar had applied for and was able to talk to and confirm with INS that he had actually entered the United States both in January of 2000 and again on July 4, 2001.

At that point, the FBI decided that since Al-Midhar was in the United States, if he was, that he had better be found. That is the point at which the wall became a problem because when the CIA, FBI and INS people, all of whom had shared information—when that information was put together with the FBI request to headquarters from the New York field office that a criminal investigation be opened which could allow greater access to resources dedicated to search for this guy, the FBI attorneys took the position that criminal investigators cannot—and that word was emphasized in the original writing—cannot be involved, and that criminal information discovered in the intelligence case would be passed over the wall according to proper procedures in due time.

But the agent in the New York office responded by e-mail and here is what he said, quote, "Whatever has happened to this, someday someone will die. And wall or not, the public will not understand why we were not more effective in throwing every resource we had at certain problems," end of quote.

The 9/11 Commission then made the point that if he had been found and if he had been held on immigration violations or as a material witness, for example, investigation or interrogation into their activities might have yielded evidence of other connections. In any event, we will never know for sure, but at least it could have been one of the elements that might have been able to stop 9/11 from happening.

Well, these two sections of this legislation, first of all, provide a uniform standard under which the FBI would disseminate information. Interestingly enough, one of the existing statutes anonymously placed restrictions on information-sharing with other agencies that are greater than the restrictions applied to non-Federal agencies. This statute tries to make all of that uniform, make it easier and conform basically all of the different provisions of law to each other so that there is one standard both within the agencies and across agencies, and then secondly to allow that information to be shared with State and local government officials as well.

So, again, nobody has particularly talked about this. Everybody is for it, but I just want to make the point that these are important changes in the law and one of the reasons why we need to get this done.

I just want to close with this, and particularly, Professor Turley, if you want to respond to it. This is the so-called Moussaoui fix. This was my bill and I have been so frustrated that we haven't been able to get it passed because this is the case where Agent Rowley in Minneapolis says this guy is planning something and you have got to get after him, and asked FBI headquarters.

You know, FBI headquarters has been criticized, I think, in this case unfairly because the law is pretty clear. When you think somebody is engaged in terrorism activities or planning terrorism activities, you either have to show that they are an agent of a foreign power or affiliated with an international terrorist organization. Those are the two ways that you can get jurisdiction to issue the subpoena, in this case for the guy's computers. This is Zacarias Moussaoui.

Frankly, the evidence didn't exist that tied him either to a foreign government or an international terrorist organization. There was some information about Chechens, but it was too loose for the FBI to go with. So I think probably rightly, they said we can't let you look in his computer.

What the so-called Moussaoui fix does is to say that if you have this information about someone and it is not a United States citizen, but you have reason to believe that he is involved in terrorism activities or planning to commit a terrorist act, then you would be able to secure a subpoena under FISA.

That subpoena may give you information that shows that he actually is affiliated with a terrorist organization—he was just acting on his own up to now—or that he is not affiliated with a terrorist organization, but he is acting on his own and he intends to do bad things. Or it may exonerate him. But in any event, it does fill that particular gap. As I say, we passed it through the Senate handily and it is still hung up in the House.

Professor Turley, you didn't comment on the information-sharing. I gather there is no particular controversy there, but is there anything else that you think we ought to be doing in this Moussaoui fix that we haven't done to make it better?

Mr. TURLEY. Well, thank you, Mr. Chairman. I would be more than willing to look further at the Moussaoui issue. Of course, as I mentioned in my written testimony, I think the fact that this Committee is moving again to reduce those barriers between agen-

cies is an important thing. It is probably the greatest lesson we learned in 9/11, is the vulnerability associated with those barriers.

In terms of FISA, as I mentioned in my opening statement, this is part of a larger context and we could have good-faith disagreements on it. I tend to be something of a textualist on the Fourth Amendment. Also, I do think it would be surprising to the people that wrote FISA that there are more FISA surveillance orders than conventional interceptions today under Title III.

That is something that I think was not anticipated, and what we have seen with FISA is a gradual change. And I am not trying to put an evil motive on this. I mean, the fact is the Department of Justice is facing some serious threats. Prosecutors by their nature try to be opportunistic in trying to use every tool that they have.

But we have seen FISA begin with the view that it was going to be the exception rather than the rule. It was focused on foreign powers as the critical definition and it was focused on foreign intelligence-gathering as the important definition. We have seen the last 3 years the move toward the use in conventional criminal investigation of FISA, and now we see a move away from the foreign powers.

So for the civil liberties community, I think there is a very significant concern that FISA is becoming a circumvention of the Fourth Amendment for all practical purposes. But as I mentioned in my opening statement, all of that is based on a threshold view from some of us that this entire process is constitutionally suspect.

But I also want to be frank. Although it will shock the Chairman, the Supreme Court has disagreed in the past and probably would not share my view, and I think that FISA would probably be upheld, if it was a full review, on all of its provisions, including this one if it is added. So this is not going to make the law unconstitutional. The issue of whether it is constitutional or not goes to a far more basic question and it depends upon your approach in interpreting the Constitution, how textualist you are, how much flexibility you think there is in the language.

Chairman KYL. I really appreciate it, and I share Senator Feinstein's view that you have presented very balanced testimony, very credible, because of that. Your advice, therefore, we all consider very valuable.

Unless Senator Sessions has anything further or unless either of you would like to comment further, I just want to make the point that, as legislators, we do our best to take information and act on it. I remember when Agent Rowley came and testified, and it was almost as if who could possibly disagree with this proposition that that warrant should have been issued.

When you checked it out and you realized probably that would have gone beyond what the law really permitted, if everybody felt this was important to do, then we needed to make the fix. But it is important that we get wise counsel from everybody who has an interest in this to ensure that we don't go too far in responding to the public outcry and the law enforcement outcry and that we don't cross over the line and abuse somebody's rights. I appreciate your assessment that in this case, in this very limited situation, we probably wouldn't be doing that, whatever your views of the underlying FISA.

By the way, this also illustrates something else. We have a lot of laws that are now used for purposes that they might not have been originally intended for, but they do work in certain situations.

Professor Turley, you are absolutely right. When FISA was originally written, it did not have terrorism in mind. It was dealing with spies who were working against our country. But it also works in the terrorism context, and with a few little tweaks it can be made to work better. Since that is one of the major threats against us right now, I think it is up to us to at least try to make it work to the best advantage of protecting our people, again, consistent with constitutional principles.

So if there are no other comments, let me note that Senator Hatch's statement is going to be placed in the record. Anybody else can put statements in the record or submit questions until 5:00 p.m., Monday, September 20. And, of course, we would hope to get a response from any of you to those questions. And based upon what has been said here today, if you have anything you would like to supplement, you are certainly welcome to do that.

Again, I want to thank all three of you. Your testimony has been very, very helpful, and I think perhaps historic in enabling us to move forward and doing our best to add some additional tools to fight terrorism, close some loopholes and ensure that we have done everything that we possibly can up to this point in time to not only provide our military with everything it needs, but the other half of the folks that are fighting this war on terror in the intelligence community, the law enforcement agencies, Department of Justice, and so on; that we give them the tools to fight the mission that we expect them to fight as well. So, hopefully, we can move this legislation forward and get it done before we finish up our session here.

Senator Sessions, thank you very much.

If there is nothing further, then this Subcommittee hearing will be adjourned.

[Whereupon, at 11:38 a.m., the Subcommittee was adjourned.]

[Questions and answers and submissions for the record follow.]

QUESTIONS AND ANSWERS

U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General Washington, D.C. 20530

January 24, 2005

The Honorable Jon Kyl
Chairman
Subcommittee on Terrorism, Technology
and Homeland Security
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

Enclosed please find responses to questions posed to the Department's witnesses following their appearances before the Subcommittee on September 13, 2004. The subject of the Subcommittee's hearing was "A Review of the Tools to Fight Terrorism Act."

We hope that this information is helpful to you. Please do not hesitate to call upon us if we may be of additional assistance in connection with this or any other matter.

Sincerely,

William E. Moschella
Assistant Attorney General

Enclosure

cc: The Honorable Dianne Feinstein
Ranking Minority Member

Hearing Before the Senate Judiciary Subcommittee on Terrorism, Technology and Homeland Security: "A Review of the Tools to Fight Terrorism Act"

September 13, 2004

WRITTEN QUESTIONS FROM SENATOR PATRICK LEAHY FOR

DANIEL BRYANT, ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL POLICY

AND

BARRY SABIN, CHIEF, COUNTERTERRORISM SECTION, CRIMINAL DIVISION

1. Many Americans, including members of Congress, have real concerns about providing unfettered powers to the FBI to obtain documentary and testamentary evidence via administrative subpoenas. You argued that such subpoenas are needed because an AUSA might not be available to sign a grand jury subpoena in an emergency situation and/or that there might not be a sitting grand jury at the time the subpoena needs to be issued. For these reasons, you support section 105 of S. 2679, the "Tools to Fight Terrorism Act of 2004."

(A) Would you oppose modifications of section 105 that would require the subpoena's author to certify on the face of the subpoena that there was no sitting grand jury and that an Assistant U.S. Attorney was not readily available before service of the subpoena?

RESPONSE: The Department of Justice is not aware of any other administrative subpoena authority for which Congress has imposed a requirement of the sort proposed by this question. Given the vital importance of ensuring that investigators are given the tools they need to intercept and obstruct terrorist plots, the Department does not believe that it is necessary for Congress to depart from its well-considered judgment in other contexts by imposing such a requirement within section 105.

(B) Would you support oversight requirements on this issue?

RESPONSE: If Congress were to provide the FBI with the authority to issue judicially enforceable anti-terrorism subpoenas, the Department would not oppose a requirement to report to Congress regarding the number of times such authority has been used.

2. At the hearing, Senator Feinstein asked you to provide specific instances in which an AUSA has not been available to an FBI agent to sign off on an emergency grand jury subpoena, resulting in the loss of evidence or some other irrevocable consequence to a pending investigation.

(A) Have you identified any such instances? If so, please provide details.

RESPONSE: While technology has facilitated contacting a prosecutor, Assistant United States Attorneys (AUSAs) are not always available for an immediate response. The AUSAs are primarily responsible for representing the United States in court. Their duties include appearances at trials, motion hearings, sentencing hearings, arraignments, and initial appearances – proceedings for which an AUSA must engage in extensive preparation. In some jurisdictions, an AUSA may have to travel to other cities in order to attend these proceedings. Although AUSAs make every effort to be available to law enforcement, particularly with respect to time-sensitive, important investigations, such as those involving terrorism, their litigation responsibilities do not always permit an immediate response. It is for this reason that the authority to issue administrative subpoenas in cases involving crimes against children – crimes that could require immediate responses – was delegated to the FBI, in addition to the prosecutors. Having said that, however, we are unaware of any specific instances in which an AUSA's inability to sign off on an emergency grand jury subpoena resulted in a loss of evidence or some other irrevocable consequences of a pending investigation. We do believe, however, that a situation could arise in which the FBI may need to obtain emergency documentary or testamentary evidence in a case, and an AUSA may not be immediately available to issue a subpoena.

(B) Are there policies governing the need for each U.S. Attorney's Office to designate a "duty" Assistant U.S. Attorney to be available in each district on a 24-hour availability basis and, if so, is the FBI regularly notified of the contact information for that Assistant U.S. Attorney? If the answer is "no" to either of these questions, please explain.

RESPONSE: There is not a policy requiring each U.S. Attorney's Office (USAO) to designate a duty AUSA to be available in each district on a 24-hour basis. However, this is a common practice in the USAOs and is considered to be a best practice by the Evaluation and Review Staff at the Executive Office for United States Attorneys. For those districts that have this service, the USAO receptionist or voice-mail message provides a telephone number for the duty AUSA so that contact information is available to the FBI or any other agency that may have an urgent need to contact an AUSA.

3. The administrative subpoena section in S. 2679 has often been compared to the subpoena power in health care fraud cases (18 U.S.C. § 3486). But there are many differences between a § 3486 subpoena and the one S. 2679 authorizes, including the fact that the Attorney General has designated § 3486 subpoena power to AUSAs, not to FBI agents, pursuant to § 9-44.201 of the U.S. Attorney's Manual.

(A) Would you support a modification to S. 2679 that would designate [sic] the new administrative subpoena authority to AUSAs?

RESPONSE: The Department would oppose such a modification, because it would remove the principal benefit of the administrative subpoena authority: to provide the FBI a useful

investigative tool in the terrorism context, where the unavailability of an AUSA may hinder the critical goals of prevention and investigative speed.

(B) Please identify any other differences in the two powers and answer whether, as to each difference, you would support any modification of S. 2679 to make it consistent with § 3486 and if not, why not?

RESPONSE: The analogy is a useful one. Because we believe that administrative subpoenas have proven to be valuable investigative tools in other contexts, including health care fraud cases, we strongly feel that such tools should be available for use in our highest priority cases – those involving terrorism. Whatever differences may exist between the authority proposed within section 105 of S. 2679 and that granted in 18 U.S.C. § 3486, the Department believes that each is appropriately fashioned to meet the legitimate needs of law enforcement in their respective contexts, and hence that modification of the former to match the latter is unnecessary.

(C) Health care fraud investigations are different than most criminal investigations, because they often start as civil investigations. Of course, it would be an abuse of the grand jury to use it to issue subpoenas in a civil investigation, which is why Congress created the administrative subpoena authority in § 3486. Is there any similar aspect to terrorism investigations that would justify the administrative subpoena authority proposed in S. 2679?

RESPONSE: The terrorism investigation in which the administrative subpoena authority sought would be used, of course, would not proceed in the civil context. *See* S. 2679, 108th Cong., 2d Sess., § 105(a) ("*In any investigation concerning a Federal crime of terrorism* (as defined under section 2332b(g)(5)), the Attorney General may issue in writing and cause to be served a subpoena requiring the production of any records or other materials that the Attorney General finds relevant to the investigation, or requiring testimony by the custodian of the materials to be produced concerning the production and authenticity of those materials.") (emphasis added). The primary justification for this authority is the preventive focus in terrorism investigations, which demands quick action in the face of possible governmental resource constraints.

4. The Attorney General testified before the Senate Judiciary Committee in June 2004 and told us that he thought there were "335 different areas of the federal government in which enforcement officials have the right to request on an official basis documents from business, business records." He stated further: "Those are called administrative subpoenas. I believe that if those are requestable on the basis of health care fraud and other things that for terrorism cases we would be well-served to have that same kind of authority."

(A) Please provide the citations for the 335 different administrative subpoena powers referenced by the Attorney General.

RESPONSE: The citations for these administrative subpoena authorities are detailed in a report prepared by the Department of Justice's Office of Legal Policy, entitled *Report to Congress on*

the Use of Administrative Subpoena Authorities by Executive Branch Agencies and Entities (May 13, 2002) (available at www.usdoj.gov/olp) ("Report").

(B) Of these 335 administrative subpoena powers, which would allow the government to require nondisclosure of the subpoena to third parties for an infinite period of time upon certification by the Attorney General or his delegee [sic]?

RESPONSE: Several administrative subpoena authorities provide nondisclosure requirements to varying extents. For instance, the Department of Justice may obtain an ex parte order under 18 U.S.C. § 3486(a)(6)(A) preventing the disclosure of the existence of a summons issued in the context of health care fraud and the sexual exploitation or abuse of children. The Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g(b)(1)(J)(i), also specifies that agencies issuing subpoenas to an educational entity may seek an order requiring the entity "to not disclose to any person the existence or contents of the subpoena[]." Finally, the Department notes that 18 U.S.C. § 2709(c), which you introduced as part of the Electronic Communications Privacy Act of 1986, provides that "No wire or electronic communication service provider, or officer, employee, or agent hereof, shall disclose to any person that the Federal Bureau of Investigation has sought or obtained access to information or records under this section." (Noting that "[s]ection 2709 has been available to the FBI since 1986," a federal district court in New York recently held that section 2709(c)'s nondisclosure requirement operated as a prior restraint on speech, in violation of the First Amendment. *See Doe v. Ashcroft*, 2004 WL 2185571, 04 Civ. 2614 (VM), slip op. at 63, 83-116 (S.D.N.Y. Sept. 28, 2004). The government has appealed this decision.)

Other authorities prevent issuing officials from disclosing information produced in response to an administrative subpoena. 49 U.S.C. § 523(c), for example, prohibits an employee of the Department of Transportation's Federal Motor Carrier Safety Administration who conducts an inspection pursuant to 49 U.S.C. § 504 from knowingly disclosing information yielded during that inspection.

(C) Of these 335 administrative subpoena powers, which pertain to criminal cases?

RESPONSE: Several grants of administrative subpoena authority pertain to investigations of possible criminal law violations. For instance, the authority Congress granted in the Health Insurance Portability and Accountability Act of 1996 permits the Attorney General to issue an administrative subpoena for "the production of any records or other things relevant to the investigation" or "testimony by the custodian of the things required to be produced" in any investigation relating to a federal health care offense. 18 U.S.C. §§ 3486(a)(i)(I), 3486(b). Although the information yielded from the exercise of this administrative subpoena authority may potentially be used in a related civil proceeding – which "enables the government to resolve these matters in a coordinated and timely fashion" and "eliminates the need of the government to otherwise serve two sets of subpoenas, one criminal and one civil," Report at 31 – section 3486(a)(i)(I) involves the criminal "investigation and prosecution of federal health care offenses." *Id.* Similarly, 18 U.S.C. § 3061(a)(1) provides that "Postal Inspectors and other agents of the United States Postal Service designated by the Board of Governors to investigate criminal matters related to the Postal Service and the mails may serve warrants and subpoenas

issued under the authority of the United States." Pursuant to 18 U.S.C. 3486(a)(1)(A), administrative subpoena authority is also available in criminal investigations involving the sexual exploitation of children, threats against the President under 18 U.S.C. § 871, and threats against former Presidents under 18 U.S.C. 879. Administrative subpoenas may also be issued in Controlled Substances Act investigations under 21 U.S.C. 876.

Finally, as the Report observes, the administrative subpoena authority "most commonly used" is that "provided to all Inspectors General," which "is mainly used in criminal investigations." Report at 6. Notably, "Inspector General administrative subpoena authority has been upheld by federal courts even in situations where the Inspector General is coordinating with divisions of the Justice Department exercising criminal prosecutorial authority where there are reasonable grounds to believe a violation of federal criminal law has occurred." *Id.* at 28.

5. I agree with Professor Turley's remarks that the material support statute, in theory, is an important tool for prosecutors, but I also believe it needs close examination. We held a hearing on this very topic before the full Judiciary Committee on May 4, 2004. At that time, I asked several follow-up questions regarding the material support statute; nearly 4 months later, I have yet to receive answers.

(A) When can I expect answers to these questions?

RESPONSE: The responses to the questions referenced above are under review within the Department and will be furnished at the earliest possible date.

(B) How do you respond to Prof. Turley's criticism that the material support statute implicates important constitutional concerns, in part, because of the administrative processes (or lack thereof) relating to the designation of Foreign Terrorist Organizations?

RESPONSE: The administrative processes used to designate Foreign Terrorist Organizations under the material support statute do not run afoul of the Due Process Clause of the Constitution's Fifth Amendment. Pursuant to section 219 of the Immigration and Nationality Act (INA), enacted originally as section 302 of the "Antiterrorism and Effective Death Penalty Act of 1996," (Pub. L. 104-132), the Secretary of State designates Foreign Terrorist Organizations. Those designations, however, are not at the Secretary's "unfettered discretion." As the Ninth Circuit stated in *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1137 (9th Cir. 2000), "the Secretary must have reasonable grounds to believe that an organization has engaged in terrorist acts – assassinations, bombings, hostage-taking and the like – before she can place it on the list. *See* 8 U.S.C. § 1182(a)(3). This standard is sufficiently precise to satisfy constitutional concerns." Moreover, the Secretary's designation is subject to judicial review in the United States Court of Appeals for the District of Columbia Circuit. *See* 8 U.S.C. § 1189(b). In addition, section 219 of the INA requires the Secretary to notify Congress seven days in advance of publication in the Federal Register of her intention to designate an organization as a Foreign Terrorist Organization. This latter requirement permits Congress to "weigh in," should it so choose.

We note that section 7119 of the "Intelligence Reform and Terrorism Prevention Act of 2004," which the President signed into law on December 17, 2004, amended section 219 of the INA, regarding the designation of Foreign Terrorist Organizations, in various respects.

6. Mr. Sabin commented on an issue that I have been speaking about for months now and that is the circumstances under which the Department of Justice chooses to deal with alleged terrorists using alternative procedural mechanisms (such as deportation) in lieu of prosecution. Can you articulate the Justice Department's policy in this regard – *i.e.*, when it will deport a suspended terrorist (*e.g.*, Nabil al-Marbh), and when it will prosecute?

RESPONSE: The decision whether to use alternative procedural mechanisms, such as deportation, in lieu of prosecution, is made on a case-by-case basis and must weigh numerous factors. For example, judgments must be made about the strength of the evidence and its likely admissibility at trial, the credibility of witnesses, the availability of corroborating documents, and possible defenses. The ability to protect intelligence sources and methods during any prosecution must be evaluated. The impact of different approaches on the probability of the government obtaining cooperation and useful information from a specific target, or from others, must be considered. Such cooperation may help efforts to detect, prevent and disrupt terrorist activity, or to prosecute other cases. Moreover, in some cases, it may be appropriate to bring a prosecution followed by deportation at the conclusion of any sentence.

These decisions will invariably involve input from a number of agencies, including one or more U.S. Attorney's Offices, the Criminal Division and others at the Department of Justice, the FBI and other members of the Intelligence Community, and the Department of Homeland Security, which is responsible for deportation. Because a variety of professionals will always have to make fact-specific judgments weighing numerous factors, there can be no list of circumstances that will dictate when deportation versus prosecution would be optimal.

The question mentions the deportation of Al Marabh. Al Marabh was prosecuted, convicted, and served a sentence for a criminal immigration offense. The Department's decision not to bring additional criminal charges against him was based on a thorough and careful assessment of the law and the potential evidence and the Principles of Federal Prosecution set forth in the U.S. Attorney's Manual. *See generally* U.S. Attorney's Manual sec. 9.27000, *et seq.* The process involved deliberations within the Department, including the Criminal Division and the United States Attorney's offices, and with other Executive Branch agencies, which resulted in the conclusion that the best option available under the law to protect our national security was to remove Al Marabh from the United States via deportation.

7. After the material support charges were dismissed in the *United States v. Koubriti, et.al.*, the Associated Press reported that the FBI sent an email to the Detroit office stating, "You should be proud of the excellent investigative work conducted by the JTTF (Joint Terrorism Task Force) in Detroit and everyone should recognize that their efforts may have prevented another attack?" If so how? If not, why not?

RESPONSE: Because the Koubriti case remains in active litigation, and because the district judge handling the case has issued a protective order prohibiting officials of the Department (and

others) involved in the case from commenting on it, it would not be appropriate to comment further.

8. Section 113 of S. 2679 discusses circumstances under which grand jury information can be disclosed. While I am a clear supporter of increased information sharing, I am also a strong proponent of grand jury secrecy. After all, Federal Rule of Criminal Procedure 6 was drafted to protect the confidentiality of the grand jury's proceedings and deliberations and to protect the reputation of innocent suspects.

(A) Why should a court not be involved in decisions to share grand jury information outside the criminal arena – even if it is an oversight decision made after the fact?

RESPONSE: Section 113 of S. 2679 is similar to section 6501 of S. 2845, the "Intelligence Reform and Terrorism Prevention Act of 2004," which the President signed into law on December 17, 2004. It expands the circumstances under which Rule 6(e) allows the disclosure of a grand-jury matter. The question posed, however, implies that the amendment would also narrow the court's involvement in the process. That is not the case. Subsection 6501(a)(1)(A) adds the possibility of disclosure to a "foreign government," but Rule 6(e)(3)(B) of the Federal Rules of Criminal Procedure would continue to apply to any such disclosure and would require prompt notice and certification to the court that impaneled the grand jury. Subsection 6501(a)(1)(B)(i) allows disclosure to prevent or respond to certain threats, but Rule 6(e)(3)(D)(ii) would apply to any such disclosure and requires notice to the "court in the district where the grand jury convened." Subsection 6501(a)(1)(C) allows certain disclosures to a foreign court or prosecutor, but Rule 6(e)(3)(E) would apply to any such disclosure and requires court authorization. In each situation, the court supervising the grand jury would continue to have an oversight role, as it does under current law.

(B) What types of provisions or modifications to section 113 would you support that would further the goals of FRCP 6 while allowing for increased information sharing?

RESPONSE: In the light of the response to part A above, we have no modifications to Section 113 to suggest.

9. A critical element to improved security is how information is shared among government and law enforcement agencies. In this regard, the 9-11 Commission reviewed a plan created by a task force of leading professionals in information technology, national security and law assembled by the Markle Foundation. The plan entitled the System-wide Homeland Analysis and Resource Exchange, or SHARE plan, was deemed an "outstanding conceptual framework" for a trusted information network by the 9-11 Commission. The 9-11 Commission also noted, however, that while the SHARE plan has been discussed widely throughout the government, it has not been "converted into action." Does the Department of Justice intend to convert the SHARE plan into action and if so, when, and if not, why not?

RESPONSE: Since September 11, 2001, the Department has been continuously in action to improve information sharing among law enforcement and homeland security agencies at all levels of government. We have done so through a number of efforts, including the Global Justice Information Sharing Initiative, the Law Enforcement Information Sharing Program, and specific projects to interconnect existing information systems operated or sponsored by the Department of Justice and, most recently, with the Department of Homeland Security. As we have taken these actions, we have considered the issues raised by the Markle Foundation and the 9-11 Commission. The Department of Justice – indeed, the entire Administration – is committed to achieving the objective sought by these reports, namely, that U.S. law enforcement and homeland security authorities have knowledge and make use of the broad base of information available in order to fight terrorism and protect the territory, people and interests of the United States. Toward that end, on August 27, 2004, the President issued Executive Order 13356, *Strengthening the Sharing of Terrorism Information to Protect Americans*. Among other actions, the President directed the Department of Justice to work with a number of other agencies to establish an interoperable terrorism information sharing environment to facilitate automated sharing of terrorism information among appropriate agencies, including state and local authorities.

SUBMISSIONS FOR THE RECORD

Department of Justice

STATEMENT

OF

DANIEL J. BRYANT
ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL POLICY

AND

BARRY SABIN
CHIEF, COUNTERTERRORISM SECTION
CRIMINAL DIVISION

BEFORE THE

SUBCOMMITTEE ON TERRORISM, TECHNOLOGY AND HOMELAND SECURITY

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

CONCERNING

S. 2679 – THE "TOOLS TO FIGHT TERRORISM ACT OF 2004"

PRESENTED ON

SEPTEMBER 13, 2004

Hearing before the United States Senate Judiciary Committee, Subcommittee on Terrorism, Technology and Homeland Security: "A Review of the Tools to Fight Terrorism Act"

Joint Testimony of Daniel J. Bryant, Assistant Attorney General, Office of Legal Policy, U.S. Department of Justice, and Barry Sabin, Chief, Counterterrorism Section, Criminal Division, U.S. Department of Justice

September 13, 2004

Chairman Kyl, Ranking Member Feinstein, and Members of the Subcommittee:

Thank you for the opportunity to testify at this important hearing. Since the attacks of September 11, 2001, Congress and the Administration have made great progress in providing law enforcement and intelligence officials with the tools they need to prevent, disrupt, investigate, and prosecute terrorism. The most notable of these achievements was enactment of the USA PATRIOT Act, passed with overwhelming and bipartisan support in the House and Senate.

Yet there is more to be done. The President and the Attorney General have asked all of us at the Department of Justice to think proactively and creatively about how to strengthen our laws to keep the country safe from terrorist attacks, while carefully safeguarding civil liberties. In that spirit, we are pleased to testify on behalf of the Department in support of the Chairman's bill, S. 2679, the Tools to Fight Terrorism Act of 2004 ("TFTA").

The new tools provided by the TFTA will prevent attacks and will make America safer. It contains numerous valuable provisions focusing on anti-terrorism investigative tools, private possession and use of certain dangerous weapons, anti-terrorist protections for railroad carriers and mass transportation systems, seaport security, and terrrorist financing. We would like to focus briefly on six provisions in this statement. They are the provisions prohibiting the possession or use of Man-Portable Air Defense Systems ("MANPADS") and other dangerous weapons; strengthening the material support statutes; giving intelligence officials the ability to investigate "lone wolf" terrorists; authorizing administrative subpoenas in terrorism investigations; providing for the presumptive pre-trial detention of those charged with terrorism offenses; and prohibiting hoaxes related to terrorist offenses or the deaths of military servicemen.

MANPADS and Other Dangerous Weapons

Title II of the TFTA would prohibit the possession and use of some of most dangerous weapons that might become available to terrorists – MANPADS, atomic weapons, radiological dispersal devices (sometimes referred to as "RDDs" or "dirty bombs"), and the variola virus (smallpox). The provision would also deter the use of these weapons by imposing strict, mandatory penalties for mere possession. Although some of these weapons could kill thousands or even millions of innocent Americans, the current maximum penalty for possessing them

ranges from no penalty at all to ten years' imprisonment, depending on the weapon. Given the terrorist threats we face, this is simply unacceptable.

MANPADS are portable, lightweight, surface-to-air missile systems designed to take down aircraft. Typically they can be carried and fired by a single individual. They are small and thus relatively easy to conceal and smuggle. A single MANPADS attack on a commercial airliner could kill hundreds of people in the air and many more on the ground. A MANPADS attack could also cripple commercial air travel. As such, MANPADS present perhaps the greatest threat today to civil aviation. Atomic weapons or radiological dispersal devices could be used by terrorists to inflict enormous loss of life and damage to property and the environment. Finally, the variola virus is the causative agent of smallpox, an extremely serious, contagious, and often fatal disease. Variola virus is classified by the Centers for Disease Control as one of the biological agents that poses the greatest potential threat to public health. Because it is so dangerous, variola virus would be attractive to terrorists for use as a biological weapon.

Simply put, there are no legitimate private uses for these weapons. When in the wrong hands, they could cause catastrophic harm to the American people and jeopardize the United States and world economies.

Current penalties for the unlawful possession of these weapons do not adequately reflect the serious threat to human life, public safety and national security posed by their enormous destructive power. A maximum penalty of only 10 years in prison applies to the unlawful possession of MANPADS, which are subject to registration requirements as destructive devices under the National Firearms Act (26 U.S.C. § 5871); the maximum fine for this felony is $250,000 (18 U.S.C. § 3571(b)).

The same penalties apply under the Atomic Energy Act to the unlawful possession of an atomic weapon – a maximum of 10 years in prison (42 U.S.C. § 2272) and, under the general federal fines provision, up to a $250,000 fine. Although use, threatened use, or attempted use of radiological dispersal devices are subject to the weapons of mass destruction statute (18 U.S.C. § 2332a), there is no statute that criminalizes the mere possession of such devices, without criminal intent. Although there are penalties for prohibited transactions involving nuclear materials, all of them require proof of criminal intent (18 U.S.C. § 831).

The offense of knowing, unregistered possession of variola virus, which is subject to registration requirements as a select agent under the Public Heath Service Act, has a maximum penalty of five years in prison and up to a $250,000 fine (18 U.S.C. § 175b(c)). The knowing possession of variola virus for use as a weapon is punishable under the biological weapons statute for any term of years up to life, 18 U.S.C. § 175(a); the U.S. Sentencing Guidelines, however, provide for a sentence of only six and a half to eight years for a person committing this offense who has no prior criminal record. If the possession of the biological agent is neither shown to be for use as a weapon, nor for bona fide research (or other peaceful purposes), there is a maximum penalty of up to 10 years in prison (18 U.S.C. § 175(b)).

To provide a much greater deterrent to the possession of these weapons and to prevent an attack using these extraordinarily lethal weapons, the bill would establish a "zero tolerance" policy towards the unlawful importation, possession, or transfer of these weapons. It does so by making mere possession of those weapons, without any showing of intent, a federal crime carrying stiff mandatory penalties. This would promote the cause of prevention in at least three ways: increased deterrence (especially as to arms smugglers and others who support terrorists); increased cooperation from those who are apprehended; and increased incapacitation of terrorists who are caught in possession of these weapons before they actually attack.

Although harsh penalties may not deter suicidal terrorists determined to attack the United States, they may well deter those middlemen and facilitators who are often essential to the transfer of such weapons. Many of these middlemen already do a cost/benefit analysis, and significantly higher, mandatory penalties could dramatically alter their calculations. When lesser participants are caught importing or holding these illegal weapons, the existence of such penalties would also assist prosecutors and investigators in obtaining cooperation and moving swiftly to identify the most dangerous terrorists. Long, mandatory sentences, including life without parole, provide a fast and powerful incentive to cooperate, as has proven to be the case in cracking the code of silence for organized crime. In the case of these dangerous weapons, the speed with which persons choose to cooperate could well save lives.

The bill imposes stringent, mandatory minimum criminal penalties similar to those provided in other federal statutes such as the drug kingpin law. Specifically, for each of the weapons covered by the bill, unlawful possession would result in mandatory imprisonment for 30 years to life; use, attempts or conspiracy to use, or possession and threats to use these weapons would result in mandatory life in prison; and the death penalty would be available if the death of a person results from the unlawful possession or use. These very stiff penalties are justified by the catastrophic destruction that could be caused by use of these weapons.

The Material Support Statutes

The TFTA also improves current law by clarifying several aspects of the material support statutes. This is another key tool in preventing terrorism. As the Department of Justice has previously indicated, "a key element of the Department's strategy for winning the war against terrorism has been to use the material support statutes to prosecute aggressively those individuals who supply terrorists with the support and resources they need to survive. . . . The Department seeks to identify and apprehend terrorists before they can carry out their plans, and the material support statutes are a valuable tool for prosecutors seeking to bring charges against and incapacitate terrorists before they are able to cause death and destruction."[1]

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[1]*See* Statement of Daniel J. Bryant, Assistant Attorney General, Office of Legal Policy, U.S. Department of Justice before the Subcommittee on Terrorism Technology and Homeland Security, May 5, 2004.

These statutes currently prohibit the provision of "material support or resources" for the commission of certain terrorism offenses, *see* 18 U.S.C. § 2339A, as well as the provision of "material support or resources" to designated foreign terrorist organizations. *See* 18 U.S.C. § 2339B. The term "material support or resources" is defined, for purposes of the statutes, as "currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine and religious materials." 18 U.S.C. § 2339A(b).

As this Subcommittee well knows, there have been a few court decisions finding key terms in the definitions of "material support or resources" to be unconstitutionally vague. This legislation is designed to fix those concerns. The TFTA amends the definition of "personnel," "training," and "expert advice or assistance" – the terms deemed vague by these two courts – in a way that addresses the concerns about vagueness and at the same time maintains the statutes' effectiveness.

For instance, section 114 would clarify the meaning of the term "personnel" (*see* section 114(e)) to address a decision by the United States Court of Appeals for the Ninth Circuit finding the term unconstitutionally vague. *See Humanitarian Law Project v. U.S. Dept. of Justice*, 352 F.3d 382, 404-05 (9th Cir. 2003). The court opined that the ambit of the term was vague because "'personnel' could be construed to include unequivocally pure speech and advocacy protected by the First Amendment." *Id.* at 404. (It remains the Department's position, as explained this past May, that the term "personnel," as used in the material support statutes, is not unconstitutionally vague; additionally, on September 8, 2004, the Ninth Circuit granted the Department's petition for rehearing en banc of the entire decision, and in a separate case, the en banc Fourth Circuit Court of Appeals upheld the constitutionality of the material support statute against similar challenges, *see U.S. v. Hammoud*, 2004 WL 2005622, at *3-*7.) Section 114(e) of the TFTA would address the court's concern by providing that a person may be prosecuted under § 2339B for providing "personnel" to a designated foreign terrorist organization only if that person provided one or more individuals to work under the organization's direction or control or to organize, manage, supervise, or otherwise direct the operation of that organization. The provision further clarifies that individuals who act entirely independent of the foreign terrorist organization to advance its goals or objectives shall not be considered to be working under the foreign terrorist organization's direction and control. Thus, under section 114, no person who engages in independent advocacy of a foreign terrorist organization's goals or objectives would be considered to have provided "personnel" to that organization. This amendment would have no effect on current prosecution policy, which does not target conduct protected by the First Amendment, but would help to allay concern that the material support or resources statutes pose a threat to the exercise of First Amendment rights.

Section 114(b) of the TFTA would also add a specific definition of "training" in response to the Ninth Circuit's decision that this term too was unconstitutionally vague. *See Humanitarian Law Project*, 352 F.3d at 404-05. As an example, the court opined that the term

conceivably could include teaching members of foreign terrorist organizations to use international human rights laws to resolve conflicts in a peaceful manner. *Id.* Section 114(b) would alleviate such concerns by limiting the term "training" to "instruction or teaching designed to impart a specific skill, as opposed to general knowledge" and by expressly requiring that the term be construed not to abridge First Amendment protections.

Moreover, section 114(b) would add a specific definition of "expert advice or assistance" in response to a decision by the United States District Court for the Central District of California invalidating section 2339B's prohibition on the provision of "expert advice or assistance" as unconstitutionally vague because it potentially encompasses protected speech. *Humanitarian Law Project v. Ashcroft*, 309 F. Supp. 2d 1185 (C.D. Cal. 2004). Drawing on Federal Rule of Evidence 702's description of what constitutes expert testimony, the TFTA would amend section 2339B to make clear that "expert advice or assistance" to foreign terrorist organizations means advice or assistance based on scientific, technical, or other specialized knowledge. Importantly, the definitional focus on specialized knowledge would not prohibit persons from engaging in constitutionally protected speech, such as advocating in support of terrorist organizations or their causes. By making these and other amendments to current law, section 114 of the TFTA would preserve the material support statutes' usefulness in prosecuting the fight against terrorism, while resolving any ambiguity about their constitutionality.

In addition to issues related to terms used in the definition of "material support or resources," section 114 of the TFTA would also clarify another important aspect of the material support statutes. Recently, in the same decision in which it held the terms "personnel" and "training" to be unconstitutionally vague, the Ninth Circuit also held that an individual, to violate the material support statute, either must have knowledge of an organization's designation as a foreign terrorist organization or have "knowledge of the unlawful activities that caused the organization to be so designated." *Humanitarian Law Project*, 352 F.3d at 400. Unfortunately, one could interpret the latter part of this requirement to mean that a defendant must have knowledge of the facts contained in the generally classified, internal State Department documents, which form the basis for the Secretary of State's decision to designate an organization as a foreign terrorist organization. Additionally, the United States District Court for the Middle District of Florida earlier this year adopted an even stricter scienter standard, concluding that the government must prove under the material support statutes that the defendant knew that his actions would further the illegal activities of a designated foreign terrorist organization. *See United States v. Al-Arian*, 308 F. Supp. 2d 1322 (M.D. Fla. 2004).

The Department believes that the burdensome scienter requirements set forth by these courts are neither compelled by 18 U.S.C. § 2339B nor intended by the Congress, and that they would dramatically reduce the utility of that statute. The Department believes that the statute requires only knowledge by the defendant of either the "foreign terrorist organization" designation, or that the organization engages in terrorist activity, as defined by relevant provisions of federal law. The Department has therefore asked in its petition for rehearing *en banc* that the Ninth Circuit clarify its ruling on this point. Nevertheless, to remove any possible

ambiguity with respect to 18 U.S.C. § 2339B's scienter requirement, section 114 of the TFTA would clarify that the statute requires only knowledge by the defendant of either the underlying "foreign terrorist organization" designation, or of the fact that the organization engages in terrorist activity, as defined by relevant provisions of federal law. Persons who provide material support to an FTO with knowledge of this type cannot legitimately claim to have been acting innocuously.

Section 115 of the TFTA would fill a related gap in the material support statutes. The current prohibition on providing material support to foreign terrorist organizations under section 2339B does not explicitly prohibit receiving training from, as opposed to providing training to, a foreign terrorist organization, such as by attending an Al Qaeda training camp in Afghanistan. In many cases, it is clear that persons who attend training camps violate the existing material support statutes by providing training to other trainees, serving under the direction of the organization in performing guard duty or other tasks, providing money to the organization for the training or for uniforms and provisions, and the like. Proof of these specific activities, however, may be difficult to obtain, especially when the training occurred in a remote location. Section 115 of the TFTA is designed to fill this gap.

It is critical that the United States stem the flow of recruits to terrorist training camps. A danger is posed to the vital foreign policy interests and national security of the United States whenever a person knowingly receives military-type training from a designated terrorist organization or persons acting on its behalf. Such an individual stands ready to further the malicious intent of the terrorist organization through terrorist activity that "threatens the security of United States nationals or the national security of the United States." *See* 8 U.S.C. § 1189(a)(1)(C). Moreover, a trainee's mere participation in a terrorist organization's training camp benefits the organization as a whole. For example, a trainee's participation in group drills at a training camp helps to improve both the skills of his fellow trainees and the efficacy of his instructors' training methods. Additionally, by attending a terrorist training camp, an individual lends critical moral support to other trainees and the organization as a whole, support that is essential to the health and vitality of the organization.

Section 115 of the TFTA would create a new criminal provision, 18 U.S.C. § 2339D,[2] which would make it an offense to receive military-type training from a designated foreign terrorist organization. Subsection 2339D(a) would prohibit the receipt of military-type training from a designated foreign terrorist organization, subject to a penalty of fines under title 18 (up to $250,000 in most instances) or imprisonment for 10 years, or both. (Designated foreign terrorist organizations are those designated by the Secretary of State under section 219 of the Immigration and Nationality Act ("INA").) This provision would apply not only to conduct undertaken within the United States or conduct that occurs in interstate or foreign commerce, but also to conduct engaged in outside the United States by any U.S. national, permanent resident alien, stateless

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[2] Section 115(a) of the TFTA specifies addition of a new section "2339E" after 18 U.S.C. § 2339C; this appears to be a scrivener's error, since there is currently no section 2339D.

person who habitually resides in the United States, or any person who is afterwards found in the United States.

Under the new provision, the government would have to prove that the offender knew the organization from which it had received training had been designated as a foreign terrorist organization or that the organization had engaged in or engages in "terrorist activity" as defined by 8 U.S.C. § 1182(a)(3)(B) or "terrorism" as defined by 22 U.S.C. § 2656f(d)(2).[3] Under this formulation, if a defendant knew that the organization from which the defendant received training was a foreign terrorist organization, it would not be a defense that the defendant did not receive the military-type training in order to facilitate the organization's unlawful activities. Likewise, the government would not be required to prove that the defendant knew that receiving military training from a foreign terrorist organization was prohibited by law, or that the defendant knew of all of the unlawful activities that caused the organization to be designated as a foreign terrorist organization.

Subsections 115(b) through 115(d) of the TFTA would ensure that aliens who receive training in violent activity from or on behalf of terrorist organizations neither enter nor remain present in the United States. As an example, subsection 115(b)(1) would amend the INA (8 U.S.C. § 1182(a)(3)(B)(i)) to render inadmissible any alien who has received military-type training from or on behalf of a terrorist organization as defined by of the INA (8 U.S.C. § 1182 (a)(3)(B)(vi)). Similarly, subsection 115(d) of the TFTA would amend the INA (8 U.S.C. § 1227(a)(4)) to make any alien deportable who receives military-type training. This subsection also would make clear that these amendments would have retroactive application, in keeping with the INA's existing counter-terrorism provisions as well as historic practice in immigration legislation. *See Lehmann v. U.S. ex rel. Carson*, 353 U.S. 685, 690 (1957) ("It seems to us indisputable, therefore, that Congress was legislating retrospectively, *as it may do*, to cover offenses of the kind here involved." (emphasis added; citations omitted)). Given the national security threat posed by aliens who have already obtained such military-type training, the TFTA appropriately would render them inadmissible and deportable.

Lone Wolf Terrorists

The TFTA also improves current law by amending the Foreign Intelligence Surveillance Act of 1978 ("FISA") to cover "lone wolf" terrorists. FISA currently does not cover unaffiliated individuals, or individuals whose affiliation with a foreign terrorist group is not known, who engage in or are preparing to engage in international terrorism. Imagine a situation in which a single person comes to the United States to make preparations for or even initiate a terrorist attack. While in the United States, he engages in suspicious activity, such as purchasing large

[3] This formulation addresses the issue raised by the Ninth Circuit's decision in *Humanitarian Law Project*, 352 F.3d at 402-03, regarding the scienter element in 18 U.S.C. § 2339B.

quantities of dangerous chemicals, signing up for commercial airplane flight school with no prior flight experience and no interest in becoming a commercial pilot, or scouting the security perimeter of several nuclear power plants. If FBI authorities become aware of such behavior, they may wish to conduct an international terrorism investigation by obtaining a FISA order permitting electronic surveillance of the suspect. Under current law, FISA would prevent the FBI from obtaining the order unless they could show that the individual was affiliated with an international terrorist organization. But the reality today is that a terrorist who seeks to attack the United States may be a "lone wolf" who is not connected to a foreign terrorist group, or someone whose connection to a foreign terrorist group is not known. The quarter-century-old FISA prevents law enforcement and intelligence authorities from exerting maximum effort to intercept and obstruct such terrorists.

Section 102 of the TFTA would fix this anomaly. This section would update FISA by permitting the FBI to apply to the FISA court for surveillance or search orders if they can show probable cause to suspect that a foreign national in the United States is engaged or may be preparing to engage in international terrorist activity, even if they cannot immediately link that person to a particular foreign power. As Senator Schumer stated on May 8, 2003, when the Senate debated similar legislation he and Senator Kyl introduced (and which the Senate passed on that date):

> Right now we know there may be terrorists plotting on American soil. We may have all kinds of reasons to believe they are preparing to commit acts of terrorism. But we cannot do the surveillance we need if we cannot tie them to a foreign power or an international terrorist group. It is a catch-22. We need the surveillance to get the information we need to be able to do the surveillance. It makes no sense. The simple fact is, it should not matter whether we can tie someone to a foreign power. Whether our intelligence is just not good enough or whether the terrorist is acting as a lone wolf or it is a new group of 10 people who have not been affiliated with any known terrorist group, should not affect whether we can do surveillance, should not affect whether they are a danger to the United States, should not affect whether they are preparing to do terrorism. Engaging in international terrorism should be enough for our intelligence experts to start surveillance.

Senator Schumer was right then, and his words ring true today. Given all we have learned about the 9/11 attacks and other terrorist threats in recent years, it is critical that we make the common-sense change he and Senator Kyl long ago suggested. By allowing investigation of "lone wolf" terrorists under FISA, section 102 of the TFTA does just that.

Administrative Subpoenas

One of the TFTA sections that would provide law enforcement and intelligence officials with critical tools for investigating and obstructing terrorist activity is section 105, which authorizes the use of administrative subpoenas in terrorism investigations. Currently, law enforcement officers responsible for staying a step ahead of the terrorists may be kept a step behind in their investigations due to their inability to issue administrative subpoenas. Because an administrative subpoena is issued directly by an agency official, it can be issued as quickly as investigative needs demand.

Administrative subpoenas are a well-established investigative tool, available in investigations of a wide variety of federal offenses such as health-care fraud, *see* 18 U.S.C. § 3486(a)(1)(A)(i)(I); sexual abuse of children, *see id.* § 3486(a)(1)(A)(i)(II); and threats against the President and others under Secret Service protection, *see id.* Administrative subpoenas are not, however, currently available to the FBI for use in terrorism investigations. This gap in the law is a particularly serious omission, given both the government's fast-moving, preventative approach to terrorism and the devastating consequences of a terrorist attack. As President Bush stated in his September 10, 2003, address to the FBI Academy at Quantico, Virginia: "[I]ncredibly enough, in terrorism cases, where speed is often of the essence, officials lack the authority to use administrative subpoenas. If we can use these subpoenas to catch crooked doctors, the Congress should allow law enforcement officials to use them in catching terrorists."

Section 105 contains important safeguards as well. For instance, if a recipient refused to comply with an administrative subpoena, the Department of Justice could not enforce it unilaterally, but would have to obtain a court order to do so. The recipient also would be able to ask a judge to quash the subpoena. In sum, section 105 enables a proactive approach to obstructing terrorism by providing law enforcement the tools needed for time-sensitive investigations, while also protecting the rights of subpoena recipients.

Presumptive Pre-Trial Detention of Terrorism Suspects

Another critical tool that the TFTA provides for preventing terrorism – and which the President urged Congress to enact last fall – is the presumptive pre-trial detention of those charged with terrorist offenses. Current law provides that federal defendants who are accused of serious crimes, including many drug offenses and violent crimes, are presumptively denied pretrial release under 18 U.S.C. § 3142(e). But the law does not apply this presumption to those charged with many terrorism offenses. To presumptively detain suspected drug traffickers and violent criminals before trial, but not suspected terrorists, defies common sense. As the President said in his September 2003 speech at the FBI Academy: "Suspected terrorists could be released, free to leave the country, or worse, before the trial. This disparity in the law makes no sense. If dangerous drug dealers can be held without bail in this way, Congress should allow for the same treatment for accused terrorists."

This omission has presented authorities real obstacles to prosecuting the war on terrorism, as Michael Battle, U.S. Attorney for the Western District of New York, testified before this subcommittee on June 22. In the recent "Lackawanna Six" terrorism case in his district, prosecutors moved for pre-trial detention of the defendants, most of whom were charged with (and ultimately pled guilty to) providing material support to al Qaeda. It was expected that the defendants would oppose the motion. What followed was not expected, however. Because the law does not allow presumptive pre-trial detention in terrorism cases, prosecutors had to participate and prevail in a nearly three-week hearing on the issue of detention, and were forced to disclose a substantial amount of their evidence against the defendants prematurely, at a time when the investigation was still ongoing. Moreover, the presiding magistrate judge did in fact authorize the release of one defendant, who, it was later learned, had lied to the FBI about the fact that he had met with Usama Bin Laden in Afghanistan.

The Lackawanna Six case illustrates the real-life problems the absence of presumptive pre-trial detention has posed to law enforcement. But this shortcoming in the law has also enabled terrorists to flee from justice altogether. For example, a Hezbollah supporter was charged long ago with providing material support to that terrorist organization. Following his release on bail, he fled the country. Fortunately, after living overseas as a fugitive for six years, he surrendered to the FBI, and is now in U.S. custody.

Section 103 of the TFTA would amend 18 U.S.C. § 3142(e) to presumptively deny pre-trial release to persons charged with an offense involved in or related to domestic or international terrorism, as defined in 18 U.S.C. § 2331, or with a federal crime of terrorism, as defined in 18 U.S.C. § 2332b(g)(5). This proposal would apply merely a rebuttable presumption in favor of detention, one that could be overcome with evidence from the accused in favor of release. The final decision would still be up to a Federal judge. Given that terrorism-related crimes are serious, and that the absence of a presumption has in fact impeded law enforcement, section 103 should become law.

Hoaxes

Section 106 of the TFTA fills a gap in existing law by creating a new federal crime of perpetrating a terrorism-related hoax. Since September 11, hoaxes have seriously disrupted people's lives and needlessly diverted law-enforcement and emergency-services resources. In the wake of the anthrax attacks in the fall of 2001, for example, a number of individuals mailed unidentified white powder, intending for the recipient to believe it was anthrax. Many people were inconvenienced, and emergency responders were forced to waste a great deal of time and effort. Similarly, in a time when those in uniform are making tremendous sacrifices for the country, several people have received hoax phone calls reporting the death of a loved one serving in Iraq or Afghanistan.

Currently, such hoaxes are prosecuted, if at all, under "threat" statutes. In the case of anthrax hoaxes, those statutes would include 18 U.S.C. § 2332a, which criminalizes certain threats to use weapons of mass destruction, and 18 U.S.C. § 876, which criminalizes use of the mail to threaten injury to a person. But these statutes are not sufficient to prosecute all terrorism hoaxes because they do not address conduct that is not a provable threat. For example, calling law enforcement and falsely reporting the receipt of an envelope filled with anthrax would constitute a hoax, but it would not necessarily be a threat. Nor is current law adequate to allow the prosecution of those who make knowingly false reports about terrorism or the death of or harm to someone serving in the armed forces.

Section 106 of the TFTA would send a strong message that the law will aggressively punish hoaxes. Originally introduced in the House and Senate as stand-alone bills, with bipartisan support in each chamber, this provision would penalize the intentional conveyance of false or misleading information, under circumstances where the information may reasonably be believed and where it concerns what would be serious criminal offenses, such as certain terrorist offenses or the use of a biological weapon. It also would appropriately punish those who make false statements about the death, injury, or capture of a member of our military during a war or armed conflict in which the United States is engaged. Furthermore, a convicted defendant would be required to reimburse any party that incurred expenses related to an emergency or investigative response to the false report. Finally, a convicted defendant would be liable in a civil action to any party incurring such expenses. The legal adjustments made by section 106 would go far to deter terrorist hoaxes.

* * * *

The TFTA also contains a number of other important improvements which space does not permit us to analyze in detail. Among the TFTA's other common-sense reforms are provisions permitting imposition of the death penalty against those who, in the course of committing a terrorist offense, engage in conduct that results in the death of another person (section 110); denying certain federal benefits to those charged with terrorism-related offenses (section 111); permitting federal officials to more readily share national security and grand jury information with state and local authorities in terrorism cases (section 113); and prohibiting the provision of material support or resources to a weapons of mass destruction program (section 117). These provisions exemplify the TFTA's much-needed practical approach to strengthening the law.

In conclusion, the Department of Justice believes that Chairman Kyl's Tools to Fight Terrorism Act of 2004 makes well-considered, urgently needed changes to current law, and would greatly aid law enforcement and intelligence officials in their common mission to prevent terrorist attacks and prosecute those who would do us harm. Other executive branch agencies are examining the bill and will work with the Judiciary Committee on any amendments that are appropriate. We thank the Subcommittee again for holding this hearing and for inviting us to testify, and we look forward to answering any questions you might have.

Senate Judiciary Subcommittee on Terrorism, Technology and Homeland Security
Hearing on "A Review of the Tools to Fight Terrorism Act"

Statement of U.S. Senator Russell D. Feingold

September 13, 2004

Mr. Chairman, I was pleased to work with you on the hearing you held on June 22, 2004, on subpoena powers and pre-trial detention of terrorists. I agree with you that how we fight the war on terrorism is absolutely critical. Protecting our citizens from further attacks is vital. We must also strike the appropriate balance between liberty and security. Hearings such as this one allow us to discuss these issues with experts and amongst ourselves. The exchange of a wide variety of views is crucial if we are to make reasoned judgments in the best interest of the American people.

One important recommendation of the 9/11 Commission was that the burden of proof for retaining a particular governmental power should be on the Executive Branch -- to explain that the power actually materially enhances security and that there is adequate supervision of the Executive's use of the power to ensure protection of civil liberties. If a power is granted, there must be adequate oversight. The Commission stated that we must find ways of reconciling security with liberty, "since the success of one helps protect the other."

I must convey my disappointment, therefore, that this hearing is focused once again on proposals to grant new powers to the government. We still have not held a hearing on how the Patriot Act is being used and a real debate on whether some of the most controversial provisions could be improved to better balance the needs of law enforcement with the civil liberties and privacy of the American people. The Department of Justice still has not provided adequate answers to questions from Sen. Feinstein and others on how these powers are being used. If we act on proposals to give the government more power without first conducting meaningful oversight and analysis of powers the Department of Justice already has been given, we will be doing the public a great disservice.

Many of the proposals contained in the Tools to Fight Terrorism Act would significantly expand current law. These new proposals include a new, broad subpoena authority that bypasses the grand jury system in terrorism cases, an expanded presumptive right to pre-trial detention for people charged with any terrorism related crime, a broader definition of material support for terrorism, and an expansion of the Foreign Intelligence Surveillance Act that would limit the discretion of the FISA court. I note also with some concern that this bill does not

seem to take into account the important testimony given by witnesses at the June hearing.

The expansion of federal power in this bill, of course, will not improve existing programs aimed at helping our first responders and local law enforcement. Local first responders and local law enforcement are on the front lines of combating terrorism. The 9/11 attacks demonstrated the need to invest in our first responders and law enforcement and to ensure they have the resources and tools to protect our communities. COPPS funding, Byrne Grants, and Local Law Enforcement Block Grants are just some of the ways that we help our communities in the fight against terrorism.

As we adjust our laws to help the nation better address terrorist threats, we must remember that an essential tenet of any plan to keep Americans safe is a dedication to safeguard the civil rights and liberties that define this great Nation. We must balance the legitimate needs of law enforcement against the freedom of all Americans, the immense majority of whom are innocent of any association with terrorists.

The proposals contained in the Tools to Fight Terrorism Act are certainly worthy of discussion, but they should not be rushed into law. Those provisions of the PATRIOT Act that are subject to the sunset provision do not expire until the end of 2005. It is my view that we should only enact new powers as part of our consideration of the renewal of the PATRIOT Act next year unless there is a clear showing that the new power is needed immediately.

Thank you, Mr. Chairman.

News from . . .
Senator Dianne Feinstein
of California

FOR IMMEDIATE RELEASE:
Monday, September 13, 2004

Contact: Howard Gantman
or Scott Gerber 202/224-9629
http://feinstein.senate.gov/

Statement of Senator Dianne Feinstein
On the Tools to Fight Terrorism Act of 2004

***Washington, DC** – The Judiciary Subcommittee on Terrorism, Technology and Homeland Security today convened a hearing on the 'Tools to Fight Terrorism Act', legislation sponsored by Senator Jon Kyl (R-AZ). Senator Kyl is the Chairman of the subcommittee and Senator Dianne Feinstein (D-Calif.) is the ranking member. The following is the prepared text of Senator Feinstein's statement:*

"Today the Judiciary Subcommittee on Terrorism, Technology and Homeland Security will hear testimony concerning the 'Tools to Fight Terrorism Act of 2004,' a bill introduced by my colleague and friend, Chairman Kyl, which incorporates the efforts of many in the Senate.

For example, Title III of the bill incorporates the 'Anti-Terrorism and Port Security Act of 2003,' legislation I developed with Senator Kyl last year, and, working with Senators Biden and Specter have modified to more directly address criminal justice concerns in the area of port security.

I want to take this opportunity to welcome our witnesses today, Assistant Attorney General Dan Bryant of the Office of Legislative Counsel of the Department of Justice, and Barry Sabin, the Chief of the Department of Justices Counterterrorism Section. In addition, I want welcome Professor Jonathan Turley of the George Washington University School of Law.

I look forward to all of your remarks on this important subject.

Before we begin, I want to briefly discuss two concerns which are highlighted by today's hearing, and hope that you will respond to them in your testimony and in your answers to our questions.

The first concern is that the Department of Justice may not be effectively using the tools it currently has available. Recent public reports of the collapse of high-profile terrorism prosecutions points towards a lack of effective prosecution, rather than a lack of tools. The tendency of the Department to loudly and publicly trumpet arrests and indictments in terrorism cases does not seem to be matched by results in prosecutions.

I believe it is critical that Congress make sure that the law enforcement and intelligence agencies have all of the necessary legal authorities to effectively and successfully investigate and respond to terrorism. But I also think it important that we not always look to increasing the legislative authorities available to law enforcement or intelligence as both the cause and solution to problems in effectively guarding against terrorism. I hope our witness will address that concern.

My second concern is one of oversight. Since September 11th, 2001 Congress has acted quickly and decisively to pass legislation which has added to the authorities available to Executive Branch agencies. Most notably, the USA-Patriot Act contained far reaching reforms and changes. That said, many of those reforms were, and remain, controversial and untested.

Specifically, sixteen provisions of the Patriot Act were of such concern that we incorporated sunset provisions into the text of the act – those sixteen are scheduled to expire at the end of 2005. I believe that is a good schedule, and should give us time to carefully consider each of those provisions. However, such consideration requires participation by the Executive Branch, most notably the Attorney General and the Director of Central Intelligence.

To that end, I have repeatedly requested that the Department of Justice undertake what I consider to be a task they should have begun without prompting – carrying out an objective, comprehensive review of the effect and efficacy of the sixteen provisions set to expire next year. I think it is not only reasonable, but prudent, to make this effort. Who knows what we will find – maybe we need to repeal some of the provisions, maybe we need to strengthen them. But the bottom line is that if we want to be safer from terrorists, we need to honestly and competently appraise, and then reappraise, the tools now available to us.

I have raised this issue numerous times, including directly speaking to the Attorney General. At least one report has been issued, but it falls far short of being a comprehensive analysis of the sunset provisions – in fact, the report, issued this past July, is simply a compendium of success stories related to the USA-Patriot Act generally.

Similarly, one of the most controversial tools available to the Department of Justice is Section 215 of the USA-Patriot Act, the so-called 'library provision.' Last year the Attorney General announced it had not been used. In April, my staff received a briefing on that provision (among others) and was promised by representatives from Mr. Moschella's office that an update of the status of that section would be provided.

Then, on Friday, June 18, 2004, the *Washington Post* reported that the FBI had, in fact, sought to use that very controversial provision.

On my behalf my staff asked for a classified account of the issue raised in that story. No response was forthcoming, and two weeks ago we were notified that no response would be provided except that contained within the general quarterly report.

Such an approach is not acceptable. It does not serve the needs of our counterterrorism efforts, and it fosters a climate of suspicion and cynicism. The Attorney General has, appropriately, been given new, and more powerful, authorities to respond to the threat facing us. But those authorities are best used within the context of careful oversight

I hope our witnesses will address both these concerns, and I look forward to an interesting hearing."

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MAR. 23. 2004 1:47PM FEINSTEIN JUDICIARY NO. 921 P. 1

DIANNE FEINSTEIN
CALIFORNIA

COMMITTEE ON APPROPRIATIONS
COMMITTEE ON ENERGY AND NATURAL RESOURCES
COMMITTEE ON THE JUDICIARY
COMMITTEE ON RULES AND ADMINISTRATION
SELECT COMMITTEE ON INTELLIGENCE

United States Senate
WASHINGTON, DC 20510-0504
http://feinstein.senate.gov

March 23, 2004

The Honorable John Ashcroft
United States Attorney General
Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

The Honorable George Tenet
Director of Central Intelligence
Washington, D.C. 20505

Dear Attorney General Ashcroft and Director Tenet,

The USA-Patriot Act is, in my view, a critical tool in our nation's fight against terrorism. It also represents what I believe to be an essential step in reconfiguring our law enforcement and intelligence authorities and practices to address the new asymmetric threats which face our country in a post-Soviet world. I write to you both in your roles as head of the two parts of our government which are most responsible for this issue: the law enforcement community and the Intelligence Community.

As you know, I have been, and remain, a supporter of the USA-Patriot Act. In fact the bulk of what I believe to be its most critical section, Title IX, which governs intelligence matters, was drafted largely by Senator Bob Graham and myself and included in the final legislation.

Thus I am increasingly concerned with the confrontational tone of discussions about the USA-Patriot Act in general, and the sixteen provisions (out of one hundred and fifty six) which are set to expire in 2005. It is my hope that the Congress can carefully and thoroughly evaluate these provisions in a timely fashion, to ensure that no needed authority is taken from our law enforcement and intelligence agencies. To that end I write seeking your assistance.

I ask that you ensure that a critical and comprehensive review of the implementation, value and importance of each of the sixteen provisions at issue be undertaken by elements of the Department of Justice and the Intelligence Community. Such a review, reduced to a single document, would significantly assist the Congress in carrying out its duty to review these provisions under the USA-Patriot Act.

My hope is that such a document, drawing on the insights of both the law enforcement and intelligence agencies, would be able to set forth, with respect to each provision, an explanation of how it has been used, whether it has proved to be valuable in counter-terrorism efforts, and whether it needs to be retained, improved or eliminated.

I would appreciate if you could respond to me as soon as possible outlining a schedule for the completion of such a review. I look forward to working with you on this matter, and remain,

Yours truly,

Dianne Feinstein
U.S. Senator

DIANNE FEINSTEIN
CALIFORNIA

United States Senate
WASHINGTON, DC 20510-0504

April 28, 2004

The Honorable John Ashcroft
United States Attorney General
Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

The Honorable George Tenet
Director of Central Intelligence
Washington, D.C. 20505

By United States Mail and electronically

Dear Attorney General Ashcroft and Director Tenet,

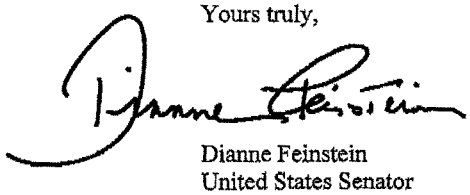
On March 23, 2004, I wrote to you both to ask that you conduct a "comprehensive review of the implementation, value and importance of each of the sixteen provisions" of the USA-Patriot Act subject to "sunset" provisions. I have not received a response to my letter, a copy of which is enclosed.

Recently, President Bush spoke about the USA-Patriot Act, saying "I hope, as a result of this discussion [in Lackawanna, New York], our fellow citizens have a better understanding of the importance of the Patriot Act and why it needs to be renewed and expanded -- the importance of the Patriot Act, when it comes to defending America, our liberties, and at the same time, that it still protects our liberties under the Constitution." Of course the USA-Patriot Act itself does not need to be renewed -- only the sixteen provisions subject to "sunset," but I agree with the President. It is critical that we achieve a "better understanding" of the Act, and its implementation.

That is the reason I asked for your help in fulfilling the Congress's responsibility under the Act by preparing a comprehensive report about the provisions at issue.

I look forward to your responses.

Yours truly,



Dianne Feinstein
United States Senator

enc. as described

DIANNE FEINSTEIN
CALIFORNIA

United States Senate
WASHINGTON, DC 20510-0504
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June 14, 2004

The Honorable John Ashcroft
United States Attorney General
Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Dear Attorney General Ashcroft,

I write in response to our conversation of June 4, 2004, and to my letters to you dated April 28 and March 23, 2004. In those letters I asked that you, along with Director of Central Intelligence George Tenet, conduct a "comprehensive review of the implementation, value and importance of each of the sixteen provisions of the USA-Patriot Act subject to 'sunset' provisions."

Following our conversation, your office provided me an untitled draft report discussing the application and implementation of part of the USA-Patriot Act. I appreciated receiving this draft--the report is helpful, outlining a number of cases in which USA-Patriot Act provisions have been used. Nevertheless, it does not fully address the concerns raised in correspondence, or adequately answer my request.

First, the draft report does not cover all of the sixteen provisions which will expire in December 2005. Second, the draft report does not include a comprehensive and balanced review of the "implementation, value and importance" of those provisions which it does cover. Finally, the draft report does not appear to have been the product of a joint effort by the Department of Justice and the Intelligence Community.

I believe the USA-Patriot Act is an important tool in our defense against terrorism, and that Congress must conduct vigorous oversight and review of implementation of that Act, particularly those provisions so controversial that they were passed subject to sunset provisions. Thus I ask

that you and DCI Tenet work with the Congress to ensure this review. I believe that the type of comprehensive assessment proposed in my earlier correspondence would be of great assistance to the Congress in that effort.

I look forward to your reply.

Yours truly,

Dianne Feinstein
United States Senator

enc. Letter dated April 28, 2004
Letter dated March 23, 2004

Statement of Chairman Orrin G. Hatch
Before the Sub Committee on Terrorism, Technology and Homeland Security of the Senate Judiciary Committee
"A Review of the Tools to Fight Terrorism Act "

September 13, 2004

I want to thank Senators Kyl and Feinstein for holding this important hearing today to review the Tools to Fight Terrorism Act. As I have long said, we need to, and we will continue to, examine the need to add laws to our arsenal of tools designed to protect the American public from acts of terrorism.

Senator Leahy, the Ranking Democrat Member of the Senate Judiciary Committee, and I--as well as other Senators in the subcommittees--have worked together for a long time to examine the adequacy of the current legal tools involved in the war against terror. During the 108th Congress, the Senate Judiciary Committee has been active in its oversight and its evaluation of terrorism issues. To date, the Judiciary Committee, including its subcommittees, has conducted 25 hearings related to terrorism issues. I am confident that we will continue to work together in the future as we continue this series of hearings.

Today's hearing on S. 2679 covers a multitude of national security areas, and we will conduct a serious evaluation of this bill. Some of the areas we will cover today will certainly focus on updating laws designed to protect our country's seaports, guarding our nation's railway systems, and drying up sources used to finance terrorism. We will also tackle other common sense proposals designed to protect our country from terrorism, such as applying the presumption of no bail to those charged with terrorist

offenses--a presumption that is already in place for drug dealers--prohibiting terrorist hoaxes, and using FISA information in immigration proceedings.

S. 2679 also includes several bills that have previously been dropped by Senators Cornyn, Specter and Chambliss. I support these bills and look forward to hearing further testimony on these issues. Senator Cornyn's legislation relating to missile systems designed to destroy aircraft, Senator Specter's legislation to provide the death penalty for terrorists, and Senator Chambliss' legislation permitting the sharing of national security or grand jury information with State and local law enforcement, should become law immediately.

Saturday's remembrance of the September 11th attacks, as well as the recently released 9/11 Commission Report, reminds us all of the tragic events of September 11th and the killing of nearly 3000 Americans. The 9/11 Commission's report examines the failures that led to the attacks and prescribes advice on how to prevent attacks in the future. As part of the ongoing efforts to defend our country, the 9/11 Commission observed that "a full and informed debate on the Patriot Act would be healthy." I appreciate this recommendation and wholeheartedly agree with it. In fact, I have strived to provide this debate throughout the 108th Congress and plan to continue to do so.

With the Congress undertaking a bi-partisan review of the 9/11 Commission's report in progress, I was disappointed that the ACLU failed to

heed the Commission's advice to conduct an informed debate of the Patriot Act when it released a television ad claiming that the Patriot Act permits the government
to search houses without providing notice. Unfortunately, no-where in the ad does the ACLU inform viewers that the government is required, in all cases, to give notice of the search in all cases, and that a delay in providing notice can only be done with the approval, and under the supervision of, a Federal Judge. I am saddened to say that I do not believe this type of distortion is the "full and informed" debate the 9/11 Commission had in mind.

In fact, the 9/11 Commission addressed distortion of the Patriot Act in its report. It found "[s]ome executive actions that have been criticized are unrelated to the Patriot Act. The provisions that facilitate the sharing of information among intelligence agencies and between law enforcement and intelligence appear, on balance, to be beneficial." Of course the ACLU and others have the right, and indeed should, participate in the debate surrounding the Patriot Act and other legislative tools, but they should do so honestly in a way that reflects the entire landscape--not misleading half-truths that do not tell the complete story.

As we evaluate the tools to fight terrorism, I believe it is helpful to look to existing legal authorities to determine whether they should be extended into the terrorism arena. A good rule of thumb is that those enforcement tools that are already available in narcotics cases should apply with equal force in the much graver arena of terrorism--where our national security is at stake.

Never again should this country find itself in a position, as we were before September 11th, where our laws are outdated and trail woefully behind commonly used technology.

I look forward to hearing from our witnesses today.

U.S. SENATE COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON TERRORISM, TECHNOLOGY, AND HOMELAND SECURITY

HEARING — "A REVIEW OF THE TOOLS TO FIGHT TERRORISM ACT"

SEPTEMBER 13, 2004

STATEMENT OF CHAIRMAN KYL

Good morning, and welcome to today's hearing of the Senate Judiciary Committee's Subcommittee on Terrorism, Technology, and Homeland Security. This hearing will focus on S. 2679, the Tools to Fight Terrorism Act, a bill that I recently introduced with several other members of this Committee and the Senate leadership.

Since the terrorist attacks of September 11, congressional committees and executive agencies have conducted extensive reviews of our nation's antiterrorism safety net. We've had numerous hearings in the House and Senate Judiciary Committees, a Joint Intelligence Committee Inquiry, the 9/11 Commission hearings and report, and the Justice Department has conducted extensive evaluations of its own antiterrorism capabilities. These hearings have uncovered numerous flaws and gaps in our antiterrorism system. We have found, for example, that in many cases antiterror investigators still have less authority to access information than do investigators of other crimes that, while serious, pale in comparison to the threat posed by international terrorism. We have also seen that some of the federal code's criminal offenses and penalties are far too light, or too narrow in their scope, in light of the contemporary terrorist threat.

Yet, despite all of these hearings and inquiries, Congress has enacted no major antiterror legislation since the passage of the USA Patriot Act almost three years ago.

To give just a brief description of the nature of the TFTA and the legislative process behind it, here are a few examples of some of the most important provisions in this bill:

- § 102 – identical to a bill introduced in 2002 by Senator Schumer and me – allows FBI agents to seek warrants for surveillance of suspected lone-wolf terrorists, such as alleged 20th hijacker Zacarias Moussaoui.

- §§ 112 and 113 – which are the same as a bill introduced by Senator Chambliss – improve information sharing among federal agencies and with state and local authorities, avoiding the types of barriers between criminal and intelligence investigators that impeded pre-September 11 searches in the United States for 9/11 hijackers Khalid al-Midhar and Nawaf al-Hazmi.

- § 106 – identical to a bill introduced by Senator Hatch – punishes hoaxes about terrorist crimes or the death of a U.S. soldier, imposing penalties commensurate with the disruptions and trauma inflicted by such hoaxes.

- Title II – identical to a bill introduced by Senator Cornyn – imposes stiff 30-year mandatory-minimum penalties for possession of shoulder-fired anti-aircraft missiles, atomic and radiologial bombs, and variola virus (smallpox) – penalties sufficient to deter middlemen who might help terrorists acquire these weapons.

- Title IV – identical to a bill introduced by Senators Biden and Feinstein – creates a set of criminal offenses tailored to the unique challenges of guaranteeing the security of our nation's seaports.

TFTA is divided into five titles, which consist of all or part of 11 bills that currently are pending in the House or the Senate. Every provision of TFTA previously either has been introduced and is pending as a bill in Congress, or addresses a matter that has been explored in a congressional committee hearing. Collectively, the provisions of TFTA have been the subject of 9 separate hearings before House and Senate committees and have been the subject of 4 separate committee reports. Collectively, if you add up all of the time that the various bills included in TFTA have been awaiting enactment since they were first introduced in either the House or the Senate, as of today the components of this bill have been pending for 14 years, 7 months, and 9 days.

With today's hearing, I hope give this legislation an additional opportunity for review.

The Witnesses

I am pleased to introduce the witnesses who will testify before us today. Dan Bryant is the Assistant Attorney General for the Office of Legal Policy in the Department of Justice. Mr. Bryant began his legal career at the Justice Department in 1987. In 1995, he became a counsel to the House of Representative's Judiciary Subcommittee on Crime, and was promoted to Majority Chief Counsel of that Subcommittee in 1999. Mr. Bryant was appointed Assistant Attorney General for the Justice Department's Office of Legislative Affairs in 2001, and has served in his current position since 2003.

Barry Sabin is the Chief of the Counterterrorism Section of the Justice Department's Criminal Division. Mr. Sabin previously served nearly a dozen years in the United States Attorney's Office in Miami, Florida, where he held the positions of Chief of the Criminal Division, Chief of the Major Prosecutions and Violent Crimes Section, and Deputy Chief of the Economic Crimes Section. His most recent position in that office was First Assistant United States Attorney. He has held his current position since 2002.

I would like to note that Mr. Sabin's office recently received some high praise in the report of the September 11 Commission. As that report noted:

> The Department of Justice also has dramatically increased its focused efforts to investigate and disrupt terrorist financing in the United States. The Terrorism and Violent Crimes Section * * * formed a unit to implement an aggressive program of prosecuting terrorist-financing cases. * * * * The Terrorist Financing Unit [of the Counterterrorism Section] coordinates and pursues terrorist-financing criminal investigations around the country and provides support and guidance to U.S. Attorney's offices on terrorist-financing issues.
>
> In stark contrast to the dysfunctional relationship between the FBI and DOJ that plagued them before 9/11, the two entities now seem to be working cooperatively. The leadership of [the FBI's Terrorism Financing Operations Section] praises the CTS Terrorist Financing Unit [– Mr. Sabin's unit –] for its unwavering support.

Finally, I am pleased to also introduce Professor Jonathan Turley, the Shapiro Professor of Public Interest Law at George Washington University Law School. Professor Turley is a nationally recognized expert on constitutional and national security law. In addition to a large number of academic works in these areas, Professor Turley has served as counsel in a variety of high-profile national security cases in both criminal and civil courts, including espionage cases in both federal and military courts. Professor Turley is a frequent witness on constitutional and national security issues in Congress and has served as a consultant on such issues for state legislatures. His academic writings and public appearances have made him, according to a recent study, one of the top 100 most cited public intellectuals in the nation and one of the top two most cited law professors.

I thank you all for appearing before us today.

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July 6, 2004

Dismantling the Terror Network: the Need for a Stronger Material Support Statute

Executive Summary

Terrorists cannot operate effectively without a support network that provides funding and logistical support for their efforts. One of the primary ways that our nation's law enforcers fight terrorism is to cut off the networks' sources of support and prosecute those who aid terrorist efforts. Prior to September 11, 2001, law enforcement could rely on a modest "material support" statute that enabled prosecution of those who facilitated terrorism. The USA PATRIOT Act strengthened that law by closing loopholes and ensuring that law enforcement could target more forms of terrorist financing. These changes have enabled law enforcement to break up terrorist cells across the nation, and are indispensable in the war on terror.

Yet recent court decisions have called into question whether the material support statute is sufficiently clear and narrow. The U.S. Court of Appeals for the Ninth Circuit has held that provisions of the statute may violate civil liberties, in particular First Amendment freedoms. The Department of Justice disagrees and is appealing those rulings, but the Senate should not entrust this important tool in the war against terror to appeals to the courts. Instead, the Senate should act to amend the material support statute to remove legal uncertainties and bolster our nation's ability to disrupt terrorist planning.

The Existing Law and How it Aids the War on Terror

Current law grants the Department of Justice special tools to fight terrorism at the planning stages through the material support statutes, in particular 18 U.S.C. §§ 2339A and 2339B. Each statute addresses material support in a slightly different way:

- Section 2339A targets those who provide material support — such as financial backing, lodging, training, expert advice, weapons, etc., but not including medicine or religious materials — while knowing or intending that those resources are to be used in connection with particular terrorist acts.[1] (See footnote for exact text.)

[1] Section 2339A makes it illegal to provide any material support or resources in connection with terrorist acts:

(a) Offense. —Whoever provides material support or resources or conceals or disguises the nature, location, source, or ownership of material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out, a [terrorist act as defined by relevant statute], or in preparation for, or in carrying out, the concealment or an escape from the commission of any such violation, or attempts or conspires to do such an act,

- Section 2339B prohibits "knowingly provid[ing]" material support to organizations designated by the Secretary of State as "terrorist organizations."[2]

The head of the Department of Justice's Criminal Division, Assistant Attorney General Christopher Wray, has testified that these material support statutes illustrate "the breadth of resources that terrorists may need to carry out a successful attack, and the many ways in which their supporters can contribute to the spread of violence. For example, terrorists need not only weapons, but also the training to use them, the money to buy them, and the personnel to wield them."[3] But as Mr. Wray explained, material support need not be so direct: "Terrorists need safe places to stay, expert advice on targets and methods of attack, communications equipment to keep in touch with each other, means of transportation, and identity documents to cross borders."[4]

The Department of Justice relies heavily on the material support statutes to prosecute the war on terror. Consider the following examples:

- In Lackawanna, New York, members of a terrorist cell traveled to Afghanistan after September 11th to attend an Al Qaeda-affiliated training camp. They later pleaded guilty to material support charges, agreed to cooperate with prosecutors, and are now serving prison terms ranging from 8 to 10 years.[5]
- In Portland, Oregon, members of another terrorist cell attempted to travel to Afghanistan after September 11th to fight on behalf of the Taliban. The Department of Justice charged them with conspiracy to provide material support to Al Qaeda and the Taliban, at which point they pleaded guilty to seditious conspiracy and other charges. The court then sentenced them to between 7 and 18 years in prison.[6]
- In northern Virginia this past March, several members of yet another terrorist cell were convicted of material support offenses after training in the United States in order "to fight jihad" in Afghanistan and Kashmir. Moreover, two defendants traveled to Pakistan after

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shall be fined under this title, imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life. ...
(b) Definition. — In this section, the term "material support or resources" means currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials.

[2] Section 2339B addresses those persons who provide material support or resources to designated foreign terrorist organizations. The operative criminal provision, section 2339B(a)(1), provides:

> Whoever, within the United States or subject to the jurisdiction of the United States, knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life.

"Foreign terrorist organizations" are those organizations so designated by the Secretary of State under section 219 of the Immigration and Nationality Act.

[3] Assistant Attorney General Christopher Wray, in a written statement presented to the Senate Judiciary Committee, May 5, 2004, available at http://judiciary.senate.gov/print_testimony.cfm?id=1172&wit_id=3391.

[4] Wray Statement at 2.

[5] Wray Statement at 3.

[6] Wray Statement at 3.

September 11 to train further in a terrorist training camp there. Both defendants have been sentenced to lengthy prison terms.[7]

- In Ohio, an American citizen was helping Al Qaeda by researching the capabilities of ultralight airplanes, extending the airline tickets of several Al Qaeda members, and surveying a potential target. Once caught, he pleaded guilty to material support charges and is serving a 20-year prison sentence.
- In New Jersey, Hemant Lakhani was arrested for "allegedly attempting to sell a shoulder-fired surface-to-air missile to an FBI cooperating witness for the purpose of downing a U.S. civilian airliner. Lakhani, charged with offenses that included attempting to provide material support to terrorists, faces as much as 25 years in prison."[8]
- In San Diego, two men pleaded guilty to providing material support to Al Qaeda. They had "negotiated with undercover agents to buy four Stinger anti-aircraft missiles, which the defendants stated would be sold to associates of the Taliban and Al Qaeda in Afghanistan." Each faces up to 15 years in prison.[9]

The Department of Justice has testified that it has "charged over 50 defendants in 17 different judicial districts" with violations of the material support laws.[10] Gary Bald, Assistant Director of the Counterterrorism Division of the FBI, told the Senate Judiciary Committee, "*It would be difficult to overstate the importance of the material support statutes to our ongoing counterterrorism efforts.*"[11]

The Legal Challenges to the Material Support Statute

The material support statutes were written broadly to address the many ways that persons can aid terrorists. However, it is that same breadth that has caused a few federal courts to find parts of the statutes unconstitutional — in particular, the U.S. Court of Appeals for the Ninth Circuit and federal district courts in Los Angeles and Manhattan. While it is possible that these legal rulings will be overturned on appeal, it is important for the Senate to understand them in order to take the necessary statutory steps to eliminate the constitutional uncertainty.

Some Courts Have Held Parts of the Statutes to be Unconstitutionally Vague

The Ninth Circuit concluded in *Humanitarian Law Project v. Reno*,[12] that the terms "personnel" and "training" as definitions of material support were unconstitutionally vague. The court concluded that a reasonable person examining the statute could conclude that the mere act of advocacy — engaging in pure speech, unaccompanied by any other conduct — could be deemed "material support." The court reasoned, "Someone who advocates the cause of the PKK [the Kurdistan Worker's Party, an officially-designated foreign terrorist organization as defined by the Secretary of State] could be seen as supplying them with personnel" because by doing so, the speaker would be freeing up resources, "since having an independent advocate frees up members to

[7] Wray Statement at 3.
[8] Wray Statement at 3.
[9] Wray Statement at 3.
[10] Wray Statement at 2.
[11] Gary Bald, in a written statement presented to the Senate Judiciary Committee, May 6, 2004, available at http://judiciary.senate.gov/print_testimony.cfm?id=1172&wit_id=3393.
[12] 205 F.3d 1130 (9th Cir. 2000).

engage in terrorist activities instead of advocacy."[13] Advocacy, however, "is pure speech protected by the First Amendment."[14] Likewise with "training," the Ninth Circuit explained that a person who "wishes to instruct members of a designated group on how to petition the United Nations to give aid to their group could plausibly decide that such expression falls within the scope of the term 'training.'"[15]

This holding has been followed and extended in federal courts in California and New York. A judge in Los Angeles held that the term "expert advice or assistance" is unconstitutionally vague because the statute fails to provide sufficient explanation of what kind of "advice" or "assistance" would qualify as material support.[16] And a federal district court in New York held that the term "communications equipment" was also unconstitutionally vague because the prosecutors argued that the mere "use" of communications equipment constituted the provision of material support.[17] The court concluded that defendants were not "put on notice that merely using communications equipment in furtherance of an FTO's [foreign terrorist organization's] goals constituted criminal conduct."[18]

As one law professor testifying in the Senate Judiciary Committee has explained, other courts have disagreed and held that the definitions of such terms as "personnel" and "training" are sufficiently clear to put potential defendants on notice. The professor explained that courts have been "sharply divided on the issue of vagueness" and that the "confusion in this area seems to flow from the concern ... with the intentional broad phrasing of these definitional terms."[19]

Some Courts Have Attempted to Rewrite the "Knowledge" Requirement in § 2339B

In addition to the vagueness concerns, a few courts have expressed constitutional concerns about what a support-providing defendant is required to have known about an organization under § 2339B. That provision makes it a crime to "knowingly provide material support or resources to a foreign terrorist organization." The Ninth Circuit has interpreted this language to require proof that a defendant "not only knew the identity of the organization to which aid was provided, but also that he or she knew the organization had been designated a foreign terrorist organization."[20] Absent that specific knowledge, the court required the prosecutor to prove that the defendant "knew of the unlawful activities that caused it to be so designated."[21] And a federal district court judge in Florida went a step further, holding that the government must prove beyond a reasonable doubt that the defendant knew: "the organization was a FTO or had committed unlawful activities that caused it to

[13] *Id.* at 1137.
[14] *Id.*
[15] *Id.* at 1138.
[16] *Humanitarian Law Project v. Ashcroft*, 309 F.Supp.2d 1185, 1200 (C.D. Cal. 2004).
[17] *United States v. Sattar*, 272 F.Supp.2d 348 (S.D.N.Y. 2003).
[18] *Id.* at 358.
[19] Professor Robert M. Chesney, Wake Forest University School of Law, in a written statement presented to the Senate Judiciary Committee, May 5, 2004, available at http://judiciary.senate/gov/print_testimony.cfm?id=1172@wit_id=3394.
[20] Chesney Statement at 5 (explaining decision in *Humanitarian Law Project v. Dep't of Justice*, 352 F.3d 382 (9th Cir. 2003)).
[21] *Humanitarian Law Project*, 352 F.3d at 400.

be so designated," and that "the defendant knew (had a specific intent) that the support would further the illegal activities of a FTO."[22]

The Department of Justice strongly objects to these judicially-imposed requirements, and has asked the Ninth Circuit to amend its opinion to "make clear that the material support statute ... requires only knowledge by the defendant of either the Foreign Terrorist Organization designation, or that the organization engages in terrorist activity."[23] Prosecutors have not yet formally appealed the Florida decision, but given the court's much more expansive approach, it is unlikely that the Department of Justice will allow the district court to have the last word on that subject.

The Senate Should Act to Strengthen the Material Support Statute

It is widely acknowledged that the material support statutes are central to the war on terror, especially within our nation's borders. Senator Leahy has observed that these laws "have become the weapon of choice for domestic anti-terrorism prosecution efforts."[24] Yet as long as these court decisions stand, the Department of Justice must devote valuable resources litigating the meaning of statutory provisions. The constitutional rights involved are important and deserve serious consideration.

However, the Senate should not leave this debate to the courts. Instead, it should act deliberately to ensure that law enforcers have the tools they need to reach those who seek to aid terrorists. To that end, the Senate should work with the Department of Justice to refine the existing material support statutes. In doing so, the Senate should carefully weigh the concerns voiced by defendants in the above cases and craft rules that ensure that only genuine material support is targeted. The Senate will then be able to ensure that prosecutors have an enforceable law that will stand up in court while protecting defendants engaged in constitutionally-protected activities.

Conclusion

The Senate should not wait to learn if these court decisions are reversed while terrorists continue to plot against our nation. Prosecutors need to know that the laws they rely on are secure and that the indictments they bring will hold up in court. The solution is for the Senate to act proactively and promptly.

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[22] *United States v. al-Arian*, 308 F.Supp.2d 1322, 1338-1339 (M.D. Fla. 2004).

[23] Assistant Attorney General Dan Bryant, in a written statement presented to the Senate Judiciary Committee, May 5, 2004, available at http://judiciary.senate/gov/print_testimony.cfm?id=1172@wit_id=3392.

[24] Senator Patrick Leahy, May 5, 2004, in a written statement made part of the record in the Senate Judiciary Committee, May 5, 2004, available at http://judiciary.senate/gov/print_testimony.cfm?id=1172@wit_id=103.

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September 9, 2004

Updating the Law to Confront New Challenges

Should Postal Inspectors Have More Power Than Federal Terrorism Investigators?

Executive Summary

- Administrative subpoena authority enables federal investigators quickly and efficiently to gather information held by third parties about possible criminal activity without necessarily alerting the criminal suspects.
- Federal terrorism investigators need this administrative subpoena authority to better unravel and stop terrorist plots, yet Congress has failed to update the laws to provide this subpoena authority to them.
- Administrative subpoenas are not new. Congress has granted this subpoena authority to federal officials investigating a wide assortment of federal crimes — including U.S. mail, tax, and labor-law violations, and even financial violations investigated by the Small Business Administration. All told, Congress has granted administrative subpoena authority in 335 different contexts to most government agencies.
- Nor is the authority dormant. For example, the Department of Justice reports that federal investigators in 2001 issued more than 2,100 administrative subpoenas in connection with investigations of health care fraud, and more than 1,800 administrative subpoenas in child-exploitation investigations.
- Administrative subpoena authority — like all subpoena authority — contains critical, built-in protections for civil liberties, and ensures that the executive and judicial branches work together to achieve effective but constitutionally limited law enforcement.
- Federal terrorism investigators should not have weaker investigative tools than Small Business Administration agents or postal inspectors. Congress should provide all of our warfighters the tools they need to protect our nation.
- The Judicially Enforceable Terrorism Subpoenas (JETS) Act, S. 2555, would update the law so that the FBI has the authority to issue administrative subpoenas to investigate suspected terrorism, thus allowing the government to better protect the lives of innocent Americans.

Introduction

Congress is undermining federal terrorism investigations by failing to provide terrorism investigators the tools that are commonly available to others who enforce the law. In particular, in the three years after September 11th, Congress has not updated the law to provide terrorism investigators with administrative subpoena authority. Such authority is a perfectly constitutional and efficient means to gather information about terrorist suspects and their activities from third parties without necessarily alerting the suspects to the investigation. Congress has granted this authority to government investigators in hundreds of other contexts, few of which are as compelling or life-threatening as the war on terror. These include investigations relating to everything from tax or Medicare fraud to labor-law violations to Small Business Administration inquiries into financial crimes. Indeed, Congress has even granted administrative subpoena authority *to postal inspectors, but not to terrorism investigators.*

This deficiency in the law must be corrected immediately. Postal inspectors and bank loan auditors should not have stronger tools to investigate the criminal acts in their jurisdictions than do those who investigate terrorist acts. The Senate can remedy this deficiency by passing legislation like the Judicially Enforceable Terrorism Subpoenas (JETS) Act, S. 2555. The JETS Act would update the law so that the FBI has the authority to issue administrative subpoenas to investigate possible terrorist cells before they attack the innocent. The Act would ensure more efficient and speedy investigations, while also guaranteeing that criminal suspects will have the same civil liberties protections that they do under current law.

Terrorism Investigators' Subpoena Authority is Too Limited

Federal investigators routinely need third-party information when attempting to unravel a criminal enterprise. In the context of a terrorism investigation, that information could include: financial transaction records that show the flow of terrorist financing; telephone records that could identify other terrorist conspirators; or retail sales receipts or credit card statements that could help investigators uncover the plot at hand and capture the suspects. When third parties holding that information decline to cooperate, some form of subpoena demanding the information be conveyed must be issued. The Supreme Court unanimously has approved the use of subpoenas to gather information, recognizing that they are necessary and wholly constitutional tools in law enforcement investigations that do not offend any protected civil liberties.[1]

There are different kinds of subpoenas, however, and under current law, the only way that a terrorism investigator (typically, the FBI) can obtain that third-party information is through a "grand jury subpoena." If a grand jury has been convened, investigators can usually obtain a grand jury subpoena and get the information they need, but that process takes time and is dependent on a number of factors. First, investigators themselves cannot issue grand jury subpoenas; instead, they must involve an assistant U.S. Attorney so that he or she can issue the subpoena. This process can be cumbersome, however, because assistant U.S. Attorneys are burdened with their prosecutorial caseloads and are not always immediately available when the investigators need the subpoena. Second, a grand jury subpoena is limited by the schedule of a grand jury itself, because the grand jury must be "sitting" on the day that the subpoena demands

[1] See unanimous decision written by Justice Thurgood Marshall in *SEC v. Jerry T. O'Brien, Inc.*, 467 U.S. 735 (1984).

that the items or documents be returned. Grand juries do not sit at all times; indeed, in smaller jurisdictions, the only impaneled grand jury may meet as little as "one to five consecutive days per month."[2]

The following hypothetical illustrates the deficiency of current law. Take the fact that Timothy McVeigh built the bomb that destroyed the Oklahoma City Federal Building while he was in Kansas; and take the fact that under current practices, grand juries often are *not* sitting for 10-day stretches in that state. If FBI agents had been tracking McVeigh at that time and wanted information from non-cooperative third parties — perhaps the supplier of materials used in the bomb — those agents would have been unable to move quickly if forced to rely on grand jury subpoenas. McVeigh could have continued his bomb-building activities, and the FBI would have been powerless to gather that third-party information until the grand jury returned — as many as 10 days later.[3]

The current dependence on the availability of an assistant U.S. Attorney and the schedule of a grand jury means that if time is of the essence — as is often the case in terrorism investigations — federal investigators, lacking the necessary authority, could see a trail turn cold.

The Better Alternative: Administrative Subpoena Authority

The deficiency of grand jury subpoenas described above can be remedied if Congress provides "administrative subpoena" authority for specific terrorism-related contexts. Congress has authorized administrative subpoenas in no fewer than 335 different areas of federal law, as discussed on pp. 6-7, below.[4] Where administrative subpoena authority already exists, government officials can make an independent determination that the records are needed to aid a pending investigation and then issue and serve the third party with the subpoena. This authority allows the federal investigator to obtain information quickly without being forced to conform to the timing of grand jury sittings and without requiring the help of an assistant U.S. Attorney. And, as simply another type of subpoena, the Supreme Court has made clear that it is wholly constitutional.[5]

The advantages of updating this authority are substantial. The most important advantage is speed: terrorism investigations can be fast-moving, and terrorist suspects are trained to move quickly when the FBI is on their trail. The FBI needs the ability to request third-party information and obtain it *immediately*, not when a grand jury convenes. Moreover, this

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[2] See United States Dep't of Justice, *Federal Grand Jury Practice*, at § 1.6 (2000 ed.). For example, in Madison, Wisc., the federal grand jury only meets a few days every three weeks. See Clerk of the Court for the Western District of Wisconsin, "Grand Jury Service," revised April 15, 2004, available at http://www.wiwd.uscourts.gov/jury/.

[3] Information on Kansas federal grand jury schedules provided to Senate Republican Policy Committee by Department of Justice. In addition, Department of Justice officials have testified to another scenario: even where grand juries meet more often (such as in New York City), an investigator realizing she urgently needs third-party information on Friday afternoon still could not get that information until Monday, because the grand jury would have gone home for the weekend. See Testimony of Principal Deputy Assistant Attorney General Rachel Brand before the Senate Judiciary Subcommittee on Terrorism, Technology and Homeland Security on June 22, 2004.

[4] See U.S. Department of Justice, Office of Legal Policy, *Report to Congress on the Use of Administrative Subpoena Authorities by Executive Branch Agencies and Entities*, May 13, 2002, at p. 5, available at www.usdoj.gov/olp (hereinafter "DOJ Report").

[5] See *SEC v. Jerry T. O'Brien*, 467 U.S. at 747-50.

subpoena power will help with third-party compliance. As Assistant Attorney General Christopher Wray stated in testimony before the Senate Judiciary Committee, "Granting [the] FBI the use of [administrative subpoena authority] would speed those terrorism investigations in which subpoena recipients are not inclined to contest the subpoena in court and are willing to comply. Avoiding delays in these situations would allow agents to track and disrupt terrorist activity more effectively."[6] Thus, Congress will provide protection for a legitimate business owner who is more than willing to comply with law enforcement, but who would prefer to do so pursuant to a subpoena rather than through an informal FBI request.

Constitutional Protections

It is important to note that nothing in the administrative subpoena process offends constitutionally protected civil liberties, as has been repeatedly recognized by the federal courts.

First, the government cannot seek an administrative subpoena unless the authorized federal investigator has found the information relevant to an ongoing investigation.[7] The executive branch – whether Republican or Democrat – carefully monitors its agents to ensure that civil liberties are being protected and that authorities are not being abused.[8]

Second, the administrative subpoena is not self-enforcing. There is no fine or penalty to the recipient if he refuses to comply. Thus, if the recipient of an administrative subpoena believes that the documents or items should not be turned over, he can file a petition in federal court to quash the subpoena, or he can simply refuse to comply with the subpoena and force the government to seek a court order enforcing the subpoena. And, as one federal court has emphasized, the district court's "role is not that of a mere rubber stamp."[9] Just as a grand jury subpoena cannot be unreasonable or oppressive in scope,[10] an administrative subpoena must not overreach by asking for irrelevant or otherwise-protected information.

The Supreme Court has addressed the standards for enforcing administrative subpoenas. In *United States v. Powell*, the Supreme Court held that an administrative subpoena will be enforced where (1) the investigation is "conducted pursuant to a legitimate purpose," (2) the subpoenaed information "may be relevant to that purpose," (3) the information sought is not already in the government's possession, and (4) the requesting agency's internal procedures have been followed.[11] In addition, the Supreme Court has stated that the recipient may challenge the subpoena on "any appropriate ground,"[12] which could include a privilege against self-incrimination, religious freedom, freedom of association, attorney-client privilege, or other

[6] Assistant Attorney General Christopher Wray, in testimony before the Senate Judiciary Committee, October 21, 2003.

[7] See S. 2555, § 2(a) (proposed 18 U.S.C. § 2332g(a)(1)). The Attorney General has the authority to delegate this power to subordinates within the Department of Justice. See 28 U.S.C. § 510.

[8] See, for example, Executive Order Establishing the President's Board on Safeguarding Americans' Civil Liberties (August 27, 2004), detailing extensive interagency oversight of civil liberties protections for Americans.

[9] *Wearly v. Federal Trade Comm'n*, 616 F.2d 662, 665 (3rd Cir. 1980).

[10] *Federal Grand Jury Practice*, at § 5.40.

[11] *United States v. Powell*, 379 U.S. 48, 57-58 (1964); see also *EEOC v. Shell Oil*, 466 U.S. 54, 73 n.26 (1984) (citing *Powell* in EEOC context and adding that the request for information cannot be "too indefinite" or made for an "illegitimate purpose"); *SEC v. Jerry T. O'Brien, Inc.*, 467 U.S. at 747-48 (reaffirming *Powell* in context of SEC administrative subpoena).

[12] *Reisman v. Caplin*, 375 U.S. 440, 449 (1964).

grounds for resisting subpoenas in the grand jury context.[13] This "bifurcation of power, on the one hand of the agency to issue subpoenas and on the other hand of the courts to enforce them, is an inherent protection against abuse of subpoena power."[14]

Third, where the authorized agent has not specifically ordered the administrative subpoena recipient *not* to disclose the existence of the subpoena to a third party, the recipient can notify the relevant individual and that individual may have the right to block enforcement of the subpoena himself.[15] In many cases the "target" (as opposed to the recipient) will have full knowledge of the subpoena.

However, this is not always the case; sometimes the administrative subpoena authority includes a provision prohibiting the recipient from discussing the subpoena with anyone other than his or her attorney. Some critics have argued that federal investigators should not be able to gather information related to an individual without notifying that individual, and that every person has an inherent right to know about those investigations.[16] But, as the Supreme Court has held, there is no constitutional requirement that the subject of an investigation receive notice that the administrative subpoena has been served on a third party. Justice Thurgood Marshall wrote for a unanimous Court that a blanket rule requiring notification to all individuals would set an unwise standard.[17] He explained that investigators use administrative subpoenas to investigate suspicious activities without any prior government knowledge of who the wrongdoers are, so requiring notice often would be impossible.[18] Moreover, granting notice to individuals being investigated would "have the effect of laying bare the state of the [government's] knowledge and intentions midway through investigations" and would "significantly hamper" law enforcement.[19] Providing notice to the potential target would "enable an unscrupulous target to destroy or alter documents, intimidate witnesses," or otherwise obstruct the investigation.[20] The Court further emphasized that where "speed in locating and halting violations of the law is so important," it would be foolhardy to provide notice of the government's administrative subpoenas.[21]

Most Government Agencies Have Administrative Subpoena Authority

Given these extensive constitutional protections, it is unsurprising that Congress has extended administrative subpoena authority so widely. Current provisions of federal law grant this authority to most government departments and agencies.[22] These authorities are not

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[13] See cases collected in Graham Hughes, *Administrative Subpoenas and the Grand Jury: Converging Streams of Civil and Compulsory Process*, 47 VAND. L. REV. 573, 589 (1994), cited in DOJ Report, at p. 9 n.19.

[14] *United States v. Security Bank and Trust*, 473 F.2d 638, 641 (5th Cir. 1973).

[15] In *Jerry T. O'Brien*, the Supreme Court noted that a "target may seek permissive intervention in an enforcement action brought by the [Securities & Exchange] Commission against the subpoena recipient" or may seek to restrain enforcement of the administrative subpoena. 467 U.S. at 748.

[16] See generally *Jerry T. O'Brien*, 467 U.S. at 749-50 (rejecting demand that SEC must notify any potential defendant of existence of pending administrative subpoena).

[17] *Jerry T. O'Brien*, 467 U.S. 735, 749-51. The issue in that case was the nondisclosure provisions of the administrative subpoena authority used by the SEC when investigating securities fraud.

[18] *Jerry T. O'Brien*, 467 U.S. at 749.

[19] *Jerry T. O'Brien*, 467 U.S. at 750 n.23.

[20] *Jerry T. O'Brien*, 467 U.S. at 750.

[21] *Jerry T. O'Brien*, 467 U.S. at 751.

[22] DOJ Report, at p. 5. See appendices A-C to DOJ Report that describe and provide the legal authorization for each of these administrative subpoena powers.

restricted to high-profile agencies conducting life-or-death investigations. To the contrary, Congress has granted administrative subpoena authority in far less important contexts. For example, 18 U.S.C. § 3061 authorizes *postal inspectors* to issue administrative subpoenas when investigating any "criminal matters related to the Postal Service and the mails." One can hardly contend that federal investigators should be able to issue administrative subpoenas to investigate Mohammed Atta if they suspect he broke into a mailbox but should not have the same authority if they suspect he is plotting to fly airplanes into buildings.

It is not just postal inspectors who have more powerful investigative tools than terrorism investigators. Congress has granted administrative subpoena authorities for a wide variety of other criminal investigations. A partial list follows:

- *Small Business Administration* investigations of criminal activities under the Small Business Investment Act, such as embezzlement and fraud.[23]
- *Internal Revenue Service* investigations of such crimes as tax evasion.[24]
- The *Bureau of Immigration and Customs Enforcement* investigations of violations of immigration law.[25]
- *Federal Communications Commission* investigations of criminal activities, including obscene, harassing, and wrongful use of telecommunications facilities.[26]
- *Nuclear Regulatory Commission* investigations of criminal activities under the Atomic Energy Act.[27]
- *Department of Labor* investigations of criminal activities under the Employee Retirement Income Security Act (ERISA).[28]
- Criminal investigations under the *Export Administration Act*, such as the dissemination or discussion of export-controlled information to foreign nationals or representatives of a foreign entity, without first obtaining approval or license.[29]

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[23] Congress granted administrative subpoena authority to the Small Business Administration through section 310 of the Small Business Investment Act of 1958. Delegation to investigators and other officials is authorized by 15 U.S.C. § 634(b). Relevant criminal provisions also include the offer of loan or gratuity to bank examiner (18 U.S.C. § 212), acceptance of a loan or gratuity by bank examiner (18 U.S.C. § 213), and receipt of commissions or gifts for procuring loans (18 U.S.C. § 215).

[24] See 26 U.S.C. § 7602 (granting administrative subpoena authority).

[25] See 8 U.S.C. § 1225(d)(4) (granting administrative subpoena power to "any immigration officer" seeking to enforce the Immigration and Naturalization Act).

[26] See 47 U.S.C. 409(e) (granting subpoena authority to FCC); 47 U.S.C. § 155(c)(1) (granting broad delegation power so that investigators and other officials can issue administrative subpoenas); 47 U.S.C. § 223 (identifying criminal provision for use of telecommunications system to harass).

[27] See 42 U.S.C. § 2201(c) (providing subpoena authority to Nuclear Regulatory Commission); 42 U.S.C. § 2201(n) (empowering the Commission to delegate authority to General Manager or "other officers" of the Commission).

[28] See 29 U.S.C. § 1134(c) (authorizing administrative subpoenas); Labor Secretary's Order 1-87 (April 13, 1987) (allowing for delegation of administrative subpoena authority to regional directors).

[29] See 50 App. U.S.C. § 2411 (granting administrative subpoena authority for criminal investigations).

- *Corporation of Foreign Security Holders* investigations of criminal activities relating to securities laws.[30]
- *Department of Justice* investigations into health care fraud[31] and any offense involving the sexual exploitation or abuse of children.[32]

Moreover, Congress has authorized the use of administrative subpoenas in a great number of *purely civil and regulatory contexts* — where the stakes to the public are even lower than in the criminal contexts above.[33] Those include enforcement in major regulatory areas such as securities and antitrust, but also enforcement for laws such as the Farm Credit Act, the Shore Protection Act, the Land Remote Sensing Policy Act, and the Federal Credit Union Act.[34]

Nor are these authorities dormant. The Department of Justice reports, for example, that federal investigators in 2001 issued more than 2,100 administrative subpoenas in connection with investigations to combat health care fraud, and more than 1,800 administrative subpoenas in child exploitation investigations.[35] These authorities are common and pervasive in government — just not where it arguably counts most, in terrorism investigations.

S. 2555 Would Update the Administrative Subpoena Authority

S. 2555, the Judicially Enforceable Terrorism Subpoenas Act of 2004 (the "JETS Act"), would enable terrorism investigators to subpoena documents and records in any investigation concerning a federal crime of terrorism — whether before or after an incident. As is customary with administrative subpoena authorities, the recipient of a JET subpoena could petition a federal district court to modify or quash the subpoena. Conversely, if the JET subpoena recipient simply refused to comply, the Department of Justice would have to petition a federal district court to enforce the subpoena. In each case, civil liberties would be respected, just as they are in the typical administrative subpoena process discussed above (pp. 4-5).

The JETS Act also would allow the Department of Justice to temporarily bar the recipient of an administrative subpoena from disclosing to anyone other than his lawyer that he has received it, therefore protecting the integrity of the investigation. However, the bill imposes certain safeguards on this non-disclosure provision: disclosure would be prohibited only if the Attorney General certifies that "there may result a danger to the national security of the United States" if any other person were told of the subpoena's existence.[36] Moreover, the JET subpoena recipient would have the right to go to court to challenge the nondisclosure order, and the Act would protect the recipient from any civil liability that might otherwise result from his good-faith compliance with such a subpoena.

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[30] See 15 U.S.C. § 77t(b) (granting administrative subpoena authority in pursuit of criminal investigations).
[31] See 18 U.S.C. § 3486(a)(1)(A)(i)(I) (granting administrative subpoena authority).
[32] See 18 U.S.C. § 3486(a) (granting administrative subpoena authority).
[33] Even where the information is being subpoenaed for civil and regulatory purposes, the government official typically must report any evidence of criminality to federal prosecutors.
[34] DOJ Report, App. A1 & A2.
[35] DOJ Report, at p. 41.
[36] S. 2555, § 2(a) (proposed 18 U.S.C. § 2332g(c)).

Given the protections for civil liberties built into the authority and its widespread availability in other contexts, there is little excuse for failing to extend it to the FBI agents who are tracking down terrorists among us.

Conclusion

Congress is hamstringing law enforcement in the war on terror in failing to provide a proven tool — administrative subpoena authority — for immediate use for the common good. Federal investigators should have the same tools available to fight terrorism as do investigators of mail theft, Small Business Administration loan fraud, income-tax evasion, and employee-pension violations. S. 2555 provides a means to update the law and accomplish that worthy goal.

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U.S. SENATOR PATRICK LEAHY

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Statement of Senator Patrick Leahy
Hearing of the Senate Judiciary Subcommittee on
Terrorism, Technology and Homeland Security
"A Review of the Tools to Fight Terrorism Act"
Monday, September 13, 2004

As we mark the third anniversary of the September 11 attacks, we still have seen no accountability on behalf of the Administration for those events. The Bush Administration resisted this Committee's efforts to examine what led to the tragedy, resisted creation of a Department of Homeland Security, resisted formation of the 9/11 Commission, resisted the efforts of the 9/11 Commission while it was carrying out its task, and continues to resist important recommendations of the 9/11 Commission. This Administration squandered the unity of the American people, the political parties and our international allies in the months and years that have intervened.

Terrorism was not a priority of this Administration as it assumed governing responsibility in January 2001. After the attacks of 9/11, we were told that this Justice Department would "expend every effort and devote all necessary resources to bring the people responsible for these crimes to justice." Three years later, it is appropriate to ask whether even that promise has been kept.

This summer has not been a good one for the Justice Department. In recent days, we have witnessed the unraveling of the Department's first post-September 11 prosecution of a terrorist sleeper cell in Detroit, following on the heels of a growing list of losses and questionable cases. Problems have cropped up in a number of other high-profile cases as well – aptly detailed by the *Baltimore Sun*:

- In May, Lawyer Brandon Mayfield was held for two weeks as a material witness after the FBI mistakenly said his fingerprint matched one found on a plastic bag connected to the deadly terror bombings in Madrid, Spain. The Department has yet to address what went wrong with the process and how it can be fixed. I provided my views to the Department on the outdated and misused material witness statute three months ago, but have received no response.

- In June, a Saudi college student in Boise, Idaho, was acquitted of charges of providing material support to terrorists by creating Web sites that prosecutors claimed helped terrorists raise funds and drum up recruits. "There was no clear-cut evidence that said he was a terrorist, so it was all on inference," a juror reportedly said after the verdict. The material witness statute is just one of the

PATRIOT Act provisions that needs fixing, but the bill under discussion today would simply expand this flawed law.

- Also in June, the Supreme Court rightfully denounced the Government's policy of indefinitely holding a citizen without due process. As a result, the Government is reportedly negotiating to release Yaser Esam Hamdi, a U.S. citizen held incommunicado for two and a half years while the government proclaimed compelling national security interests required his indefinite detention as an enemy combatant. The Jose Padilla case is in a similar quagmire. The Attorney General first indicated that Padilla was arrested because he was the "dirty bomber" who would have detonated a crude nuclear device in the United States. This year the Justice Department radically revised its description of Padilla, indicating that he was casing apartment buildings. Still more than two years after the terrifying and dramatic announcement of his arrest, he has yet to face charges for his crime and may never have to.

- In August, two leaders of a mosque in Albany, N.Y., were released on bail after a federal judge concluded they were not as dangerous as prosecutors alleged. The evidence included a notebook found at an Iraqi terrorist camp that investigators initially said referred to one man as "commander"; FBI translators later said the reference probably means "brother." I have pressed the Department for months now on the translator issues at the FBI and urged Senator Hatch to explore this issue in a full Committee oversight hearing. None is on the agenda.

The fact is, there have been only a few real criminal victories in the war on terrorism, and these have been overshadowed by seemingly half-hearted prosecutions. Justice Department officials say their record since the 2001 attacks reflects a successful strategy of catching suspected terrorists before they can launch deadly plots, even if that involves charging them with lesser crimes. I certainly cannot contest that lesser crimes are being charged. Of the approximately 184 cases disclosed as International Terrorism matters, 171 received a sentence of one year or less. But is that making us safer? What exactly happens to a suspected terrorist who spends six months in prison and then is deported to his country of origin in the midst of a confrontation that has no end in sight? Does it really squelch deadly plots?

The Administration recently announced the deportation of a Jordanian citizen who worked for the Holy Land Foundation of Richardson, Texas, which was known to provide financial support to the terrorist group Hamas. An immigration judge denied bail and found that the defendant engaged in terrorist activity. Yet there was no indictment of this man. He will return home to Jordan, his birthplace, with the blessing of the U.S. Government. Our terrorist financing laws are appropriately tough and are meant to punish and deter -- the potential sentences start at 10 years' imprisonment. Why aren't they being used?

The Administration has yet to answer pointed questions about the deportation of Nabil al-Marabh to Syria, a state sponsor of terrorism. Al-Marabh was at one time Number 27 on

the FBI's list of Most Wanted Terrorists, and experienced prosecutors wanted to indict him. Why was he released?

Finally, the press reported earlier this summer that the number of federal agents working on the September 11th investigation has reportedly dropped from 70 to 10. And the sole case connected with those attacks, against Zacarias Moussaoui, has yet to be resolved.

I suggest we start asking hard questions about the Department's policies and practices based on existing laws. We should first see where things stand with the single most important legislation on this topic since September 11: The USA PATRIOT Act.

Recognizing that some of the most controversial provisions of the PATRIOT Act will "sunset" at the end of 2005, the 9-11 Commission wrote that the burden of proof for retaining a particular governmental power should be on the Executive branch, to explain how the power actually materially enhances security and whether there is adequate supervision of the Executive's use of the power to ensure protection of civil liberties. The Commission said that a full and informed debate on the PATRIOT Act would be "healthy" because of concerns regarding the shifting balance of power to the Government. Before expanding these provisions we are due an accounting and an explanation why information-gathering provisions the Justice Department has contended to be vital are so seldom used.

I told the Attorney General in his one appearance in the past 18 months, actions speak louder than words. Adding more ways to say killing innocent people in the name of terrorism is a serious crime, or giving federal law enforcement yet easier access into our personal lives, is like adding locks on Fort Knox. Real tools to fight terrorism involve concrete legal strategies, effective use of resources, information sharing, and a government and people united.

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STATEMENT OF
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BEFORE
THE SENATE JUDICIARY COMMITTEE
SUBCOMMITTEE ON TERRORISM, TECHNOLOGY, AND HOMELAND SECURITY

"A REVIEW OF THE TOOLS TO FIGHT TERRORISM ACT"

SEPTEMBER 13, 2004

Thank you, Mr. Chairman, it is an honor to appear before the Subcommittee and to discuss the provisions of the Tools to Fight Terrorism Act of 2004.

I.
INTRODUCTION

Chairman Kyl, given the limited time of the Subcommittee members today, I would like to submit a longer written statement to augment my oral testimony. Today's hearing represents a convergence to the two most essential guarantees of a free nation: civil liberty and national security. I come to this subject with a variety of perspectives. In addition to my academic teaching and writing in this area, I have litigated national security cases in both civil and criminal courts and I have consulted with federal and state legislators on national security matters. Quite frankly, I have also been a vocal critic of some of the measures taken after September 11th on constitutional and policy grounds. For that reason, I am very

grateful for the opportunity to speak to you today and for the your commitment, Mr. Chairman, to seeking the views of experts from all sides of these difficult questions.

In the past three years, there has been a widening gulf between the current Administration and civil liberties advocates over the necessary and proper measures to be applied in the fight against terrorism. Indeed, much of this debate has treated civil liberties and national security as distinct and conflicting concepts. Yet, while there has long been tension between the two interests, they are not mutually exclusive and there is far greater room for compromise than has been suggested in the often heated post-9-11 rhetoric. Today offers an opportunity for both sides to show a willingness to compromise in the interest of both national security and liberty interests. The Tools to Fight Terrorism Act of 2004 (hereinafter TFTA) contains many beneficial changes that will increase the ability of the government to pursue terrorists while preserving necessary guarantees for civil liberties. For my part, the areas of concern in this bill are far less than the areas of consensus.

It is in bad times that history takes the measure of a people and of their system of government. Indeed, we have a system that was designed for the worst and not the best of times. The United States Constitution was written by the world's most

practical men. Where other nations structured their governments along purely philosophical lines, the Framers approached their new Republic with the discipline of a science. James Madison and his contemporaries believed that a new form of government had to be fashioned through a dispassionate and detached understanding of the human character and its needs. The Framers understood that they could not write a Constitution that would answer every question for every generation. Instead, they focused on creating a system that could answer any question or challenge while preserving those first principles that defined the nation. In the end, they wanted a government that would survive, not just inspire. It has survived, often despite our own misguided actions and a litany of deep self-inflicted wounds.

Three years ago this week, the nation awoke to a new reality. While we must be cautious not to legislate out of a reflective impulse, September 11th exposed a number of vulnerabilities and gaps in our legal and intelligence systems that remain only partially addressed. This Act continues to work to close those gaps and to accommodate the interests of the Executive Branch in pursuing, prosecuting, and (hopefully) deterring terrorists. While there are points of concern, the majority of the provisions in this Act are clearly reasonable and not inimical to the civil liberties that we are all seeking to defend in this fight against terrorism.

Some of the most controversial provisions proposed in 2003 have been omitted in favor of a balanced and bipartisan set of reforms. It is a good-faith effort at consensus that both civil liberties and national security advocates should support, even as we work on the few remaining areas of concern.

II.
THE TOOLS TO FIGHT TERRORISM ACT OF 2004

Given the scope and breadth of this legislation, time has not allowed for an exhaustive critique of each and every provision to be presented in the written testimony. However, I have been asked to evaluate the general constitutionality and implications of the roughly fourteen proposals contained in the TFTA. My initial review of these provisions indicates relatively only a few areas of serious constitutional or policy concern, which will be dealt with separately. I would be happy to supply a more comprehensive analysis of the constitutional or policy questions raised by any particular provision if the Subcommittee would like a later written submission. I will begin with those areas where the proposed changes appear both constitutional and reasonable in light of our contemporary threats.

Title I: Anti-Terrorism Investigative Tools Improvement Act.

It is Title I that works the most significant changes in relationship between the government and citizens in the investigation and prosecution of national

security cases. It is inevitable that such changes will raise civil liberties concerns, though I believe most of these concerns may be misplaced. Six of these provisions from Title I will be addressed below in greater detail due to specific constitutional or policy concerns raised by various groups. However, most of Title I is responsive to common sense requests from the Executive Branch to add greater coverage, flexibility, or enforcement under federal laws. Indeed, some of these changes represent important reforms to better deal with current threats facing the country.

Section 104 – This provision would make terrorists eligible for lifetime post-release supervision. Under the current law, certain individuals convicted of terrorist crimes are not eligible for lifetime post-release supervision because the underlying offense did not create a foreseeable risk of death or serious injury. The Justice Department has objected to the current language of 18 U.S.C. §3583 as too restrictive since there are many individuals who knowingly support terrorist activities, but do so through less overtly violent means, such as computer-related crimes. The purpose is only to make such individuals eligible for lifetime supervision. This proposal seems facially reasonable in light of the sophisticated web of supporting co-conspirators working with groups like Al-Qaeda. Congress clearly has the authority and the justification to make such a change.

Section 106 – This provision would impose criminal penalties for anyone who knowingly conveys false or misleading information about either terrorist crimes or the death or injury of a U.S. soldier. Since I have advocated increased penalties for hoaxes,[1] I personally welcome such a law. As a matter of federalism, criminalization of hoaxes should remain primarily a matter for state law. However, there is clearly some federal jurisdiction in these cases. This new provision would create a serious deterrent to a type of misconduct that routinely places the lives of emergency personnel at risk and costs millions of dollars in unrecouped costs for the federal and state governments. Since a terrorist seeks first and foremost to terrorize, there is precious difference between a hoaxster and a terrorist when the former seeks to shutdown a business or a community with a fake threat. Criminal laws serve in part to define and set apart certain forms of harmful conduct. This provision responds to the increase in this form of insidious misconduct and correctly defines it as criminal conduct.

Section 107 – This provision increases the penalties for obstruction of justice in terrorism cases. The Justice Department believes that the increase from 5 to 10 years in terrorism cases is needed to show the added severity of such misconduct in this context. For the purpose of full disclosure, I have represented

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[1] Jonathan Turley, *Just Kidding? Hoaxsters and Terrorists*, The Legal Times, September 12, 2001, at 54.

defendants charged under false statement provisions like 18 U.S.C. §1001 and I have been a critic of the abusive use of false statement charges by the Justice Department in non-terrorist cases. However, seeking higher penalties for obstruction in the area of terrorism is not an unreasonable demand and certainly would not raise any immediate constitutional problems.

Section 110 – This provision would expand the death penalty for terrorist murders. The expansion of the death penalty in this or any other area is obviously part of a broader debate. The proposed change would make co-conspirators liable for the death penalty even if their role were limited to financing an attack. It would effectively make most terrorist offenses death penalty eligible and therefore dramatically increase the potential use of capital punishment in this area. It is likely to pass constitutional muster so long as a close nexus is maintained to the attack, including a clear scienter requirement. What remains is a broad policy question over the death penalty that is beyond the scope of this testimony.

Section 111 – This provision would deny federal benefits to convicted terrorists. The denial of such benefits is currently allowed under the Controlled Substances Act and makes obvious sense given the nature of these crimes.

Section 112 – This provision would adopt more uniform sharing of information across federal agencies – a major weakness recognized after

September 11th. The only concern on this provision concerns congressional oversight. The Attorney General is allowed to adopt uniform guidelines that will affect core privacy and consumer laws. While it is important to adopt uniform standards, this is one change that should be closely monitored for possible legislative correction if privacy protections are compromised.

Section 113 – This provision allows for the sharing of national security and grand-jury information with state and local governments. It was previously enacted by Congress but has been reintroduced due to the Supreme Court's revision of the Federal Rules of Criminal Procedure.

Section 115 -- This provision would create a new crime for persons receiving military-type training from a foreign terrorist organization. This proposal would fill a gap in our laws revealed by recent cases where citizens have trained at terrorist camps, such as Jose Padilla. At the moment, the government must show a separate crime, such as conspiracy or terrorism to prosecute such an individual. The proposed crime has been narrowly tailored to require a clear knowledge element as well as a reasonable definition of military-type training. The United States has an obvious interest in criminalizing such conduct and to deter citizens who are contemplating such training. In my view, it raises no legitimate issue of free association or free speech given the criminal nature of the

organization. Most importantly, given the use of these camps to recruit and indoctrinate such citizens as Padilla and John Walker Lindh, this new criminal offense is responsive to a clear and present danger for the country.

Section 116 – This provision would expand the current statutory law governing weapons of mass destruction to cover attacks on property. It would also expand the definition of restricted persons who are barred from possessing select agents. The proposal would close current loopholes in the interest of national security and do not materially affect civil liberty interests.

Section 117 – This provision would criminalize the participation in programs involving special nuclear material, atomic weapons, or weapons of mass destruction outside of the United States. This new crime with extraterritorial jurisdiction is an obvious response to recent threats identified by this country and other allies like Pakistan. The obvious value of such a law would be hard to overstate. It is unfortunately a crime that defines the perilous times in which we live. While most of the individuals who have committed this type of crime have come from other countries like Russia and Pakistan, it is inevitable that Americans will be drawn by fanaticism or finances to such activities. It is important for the purposes of our extraterritorial enforcement efforts to have a specific crime on the books to address this form of misconduct.

Title II: Prevention of Terrorist Access to Special Weapons Act

Title II is designed to address the growing threat of weapons like Man-Portable Air Defense Systems (MANPADS) and dirty bombs as terrorist weapons. Remarkably, the current law has a conspicuous gap where the mere possession of a dirty bomb and the penalties for possession of such weapons as MANPADS or variola virus (smallpox) are 10 and 5 years respectively. This proposal would increase the potential sentence for possession to 30 years to life. Mandatory life sentences are imposed in cases where use is threatened or intended. A death sentence is imposed where death results from such a use. Given the enormous threats to our country from such weapons, these increased penalties are manifestly reasonable. In my view, the changes in sections 202-205 would not present any constitutional barriers to enforcement.

Sections 206-209 would amend various laws in light of the new crimes or penalties contained in Title II. For example, wiretapping laws are amended to allow these crimes to be used as predicates – an obvious and necessary change. These crimes are also added to the category of terrorist offenses, which is also reasonable. While it is certainly possible that a defendant could be in possession of a MANPADS as part of arms trafficking or some other motive than terrorism, this is clearly one of the most likely forms of terrorist conduct.

Title III: Railroad Carriers and Mass Transportation Protection Act.

Title III also closes a series of gaps in current law by creating uniform protections for railroads and mass transportation systems. Railroads have been identified as an area of particular vulnerability for the country and one that demands even greater attention in the future. Obviously, increasing the penalties for terrorist attacks on railroads is not likely to deter the type of fanatical individuals who are perpetrating such crimes. However, it would further guarantee that longer sentences will be meted out to such individuals if caught. More importantly, the law creates a single, comprehensive set of offenses for tampering with or destroying rail or transportation infrastructure. With the enactment of Title III, the country would have a uniform and detailed system of criminal enforcement for acts ranging from undermining trestles to releasing biological weapons in tunnels.

Title IV – Reducing Crime and Terrorism at America's Seaports Act.

Title IV addresses a weakness in the our domestic security system that has been repeatedly criticized as perhaps the country's single greatest threat: seaport security. While much remains to be done in terms of real security improvements at seaports, Title IV represents one of the most significant legal reforms in this area. It is an attempt to impose criminal sanctions on various forms of misconduct that

threaten both the functioning of our seaports and our national security. They include such new crimes as obstructing the boarding of vessels by law enforcement or endangering ships by tampering with their navigation equipment. While many of these acts can be currently prosecuted under other laws, Title IV would create a tailored series of offenses affecting seaports and seagoing vessels. For example, one important addition would be a crime for knowingly transporting dangerous material for a terrorist operation or a terrorist. This new crime in Section 406 will serve to increase the expected deterrent for transporters. Currently, a transporter can be prosecuted as a co-conspirator as well as charged with false statements in many cases. However, Section 406 would define a crime specifically with this type of opportunistic conduct in mind. For a prosecutor, such a tailored law makes a case more compelling for a jury. Rather than presenting fluid conspiracy theories or false documents, the prosecutor can present the jury with an indictment for the specific conduct of transporting terrorists or terrorist weapons.

Obviously, the most important reforms at our seaports is to increase the level of inspection of ships and shipping containers coming into the country. However, criminal law serves an important function in deterring individuals who may be motivated more by money than faith. These laws give the Executive Branch more

flexibility and options in dealing with misconduct at our seaports. It could not be more timely or more justified given recent warnings from security experts.

Title V: Combating Money Laundering and Terrorist Financing Act.

The final section of the TFTA is Title V that expands the list of predicate offenses for money laundering. One of the provisions would make it unlawful to knowingly conceal prior financing related to terrorists. As the government seeks to cut off funding for terrorism, such measures are designed to deter institutions and businesses from facilitating terrorism through standard financing money transmission.

III.
AREAS OF CONSTITUTIONAL OR POLICY CONCERN UNDER THE TFTA

A few of the provisions in the TFTA drew opposition when they were first introduced in earlier legislative vehicles. I would like to touch on each of these six provisions individually to explore the basis for the opposition. All of these provisions come from Title I of the TFTA. While I do not share some of these criticisms, they raise valid and good-faith concerns that the Senate should carefully consider before proceeding in these areas.

1. Section 102 – Lone-Wolf Terrorists Provision

The first major provision of the TFTA has been called the "Moussaoui Fix" or Lone-Wolf Terrorist provision. The provision would amend the Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. 1801 (b)(1), to allow surveillance to be conduced on suspected terrorists who are not linked to a foreign power. Under this new language, FISA could be used against targets who, under the FISA probable cause standard, are alleged to have engaged "in international terrorism or activities in preparation therefore."

a. Constitutional Analysis. For me, this provision raises the most serious concern among the various provisions of TFTA. However, I would like to preface my remarks by a personal caveat. I have long been a vocal critic of FISA, which I have opposed since I first encountered the court as a young intern at the National Security Agency (NSA) in the 1980s.[2] I tend to follow a fairly conservative interpretative approach to the Constitution, placing great emphasis on textualist and intentionalist theories of interpretation.[3] Regardless of the outcome,

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[2] *See, e.g.,* Jonathan Turley, *Through a Looking Glass Darkly: National Security and Statutory Interpretation*, 53 SMU Law Review 205, 242 (2000) (Symposium); Jonathan Turley, *A Shot Across the Bow From the Darkness*, L.A. Times, Aug. 24, 2002, at A11; Jonathan Turley, *Black-Bag Justice*, Legal Times, Nov. 21, 1994.

[3] This includes criticism of more fluid constitutional interpretation found in national security cases. See generally Jonathan Turley, *Art and the Constitution:*

I tend to follow the text of the Constitution and reject efforts to add ambiguity where clarity is evident. The fourth amendment affirms "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." U.S. CONST. amend. IV. Given the clear text of the fourth amendment, I do not believe that FISA is constitutional in allowing searches conducted below the constitutional standard of probable cause and the warrant clause. While the term "probable cause" is used in the statute, it is not true probable cause that a crime is about to be or has been committed. Rather it is probable cause to believe that the target is "a foreign power or agent of a foreign power." 50 U.S.C. § 1805 (a) (3). For this reason, FISA has long been challenged as facially unconstitutional, a claim that has not been fully tested before the United States Supreme Court.

As a critic of FISA, however, I would be the first to admit that the Supreme Court would likely uphold FISA and, perish the thought, reject my textualist view. Thus, I must set aside those threshold objections in evaluating provisions like Section 102. Assuming that FISA is constitutional, the change sought in Section 102 would also be constitutional. If Congress can create a process for searches

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The Supreme Court and the Rise of the Impressionist School of Constitutional Interpretation, 3 Cato Supreme Court Review 69 (2004).

below the fourth amendment standard, then the change from a foreign power criteria to an international terrorism criteria would not change its constitutional status.

b. General Analysis. The fact that this change is likely to pass constitutional muster with the current Supreme Court is, of course, only one of the questions that face this legislative body. There remains the question of whether it is good policy and its implications for the future. FISA was created under the narrow premise that only agents of foreign powers would be subject to its special procedures. Section 102 would potentially broaden FISA dramatically by removing this necessary criteria and allowing the investigation of a category of crime under the lower FISA standard. With the radical expansion of FISA searches in recent years, this change could further expand the use of secret searches. There are already more secret searches conducted under FISA than conventional interceptions under the Fourth Amendment – a fact that would likely have shocked the original authors of the Act. This expansion has increased under the current Administration, which has struggled to shift the focus of the Act from foreign intelligence to more conventional criminal investigations. As you know, the FISA court recently took an unprecedented step in refusing an expansion of use of the Court under Attorney General John Ashcroft – a position reversed by the

FISA Court of Appeals. As it stands, FISA has become a way to circumvent the textual standards of the Constitution as well as the requirement under Title III, the federal surveillance act.

Having raised these concerns, I will commend the Subcommittee on its rejection of prior demands that FISA's standard of proof be lowered further to a type of reasonable suspicion standard. This bill retains the current standard while expanding the potential pool of affected targets. While I believe that courts would likely uphold this provision, it is the provision in TFTA that raises the greatest concerns from a civil liberties perspective.

2. Section 103 – No Bail for Terrorists Provision

A second major provision would create a presumption against bail for accused terrorists. Under this amendment, such a presumption could be rebutted by the accused, but the court would begin with a presumption that the accused represents a risk of flight or danger to society. This has been opposed by various groups, who point to the various terrorist cases where charges were dismissed or rejected, including or the recent Detroit scandal where prosecutorial abuse was strongly condemned by the Court. *See* Chitra Ragavan & Monica K. Ekman, *A Fine Legal Mess in Motown*, U.S. News & World Review, Sept. 13, 2004, at 39. I do not share the opposition to this provision because I believe that, while there

have been abuses in the investigation and prosecution of terrorism cases, the proposed change sought by the Justice Department is neither unconstitutional nor unreasonable.

a. Constitutional Analysis. In *United States v. Salerno*, 481 U.S. 739 (1987), the Supreme Court reviewed the Bail Reform Act and the authority of Congress to restrict bail in some cases. Applying the standard in *Bell v. Wolfish*, 441 U.S. 520 (1979), the Court rejected challenges under the Fifth and Eighth Amendments. The Court noted, as to the Eighth Amendment, that it had previously held that "[w]hile . . . a primary function of bail is to safeguard the court's role in adjudicating the guilt or innocence of defendants, [the Court] rejected the proposition that the Eighth Amendment categorically prohibits the government from pursuing other admittedly compelling interests through regulation of pretrial release." *Salerno,* 481 U.S. 753. This proposal would not impose a categorical denial of bail but a presumption against bail in terrorism cases. Congress has a clearly reasonable basis for distinguishing terrorism from other crimes in such a presumption.[4] In my view, this would be clearly constitutional.

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[4] This can be distinguished from mandatory denials of bail that were the subject of judicial intervention in past cases. *See, e.g., Zadvydas v. Davis*, 533 U.S. 678 (2001); *Patel v. Zemski*, 275 F.3d 299 (3d Cir. 2001).

b. General Analysis. While I have been a critical of the policies of Attorney General John Ashcroft, I do not share the view of some of my colleagues in the civil liberties community in their opposition to this change. There is currently a presumption against pretrial release for a variety of crimes in 18 U.S.C. § 3142(e), including major drug crimes. It seems quite bizarre to have such a presumption in drug cases but not terrorism cases. Like my colleagues on the other side of this issue, I am concerned with the growing and increasingly fluid definition of terrorism in federal cases. However, that is a debate that we can have on the substantive criminal provisions or prosecutions. It is not a compelling argument to keep terrorism from the list of crimes subject to a presumption against pretrial release.

3. Section 104 – FBI Subpoenas Provision

The third provision to trigger opposition has been the effort to create Judicially Enforceable Terrorism Subpoenas (JETS) that would allow the FBI to directly issue subpoenas rather than using a grand-jury subpoena from a U.S. Attorney. Civil liberties advocates have criticized this provision as making these subpoenas too easy for the FBI and removing the potential check and balance of a prosecutor in the process. At a time when there are growing complaints over abuses by the FBI, such a power is viewed as incautious and ill-timed. While I

would not personally favor such a change, however, the opposition to this provision has tended to overplay the significance of the grand-jury subpoena process as a protection of individual rights.

a. Constitutional Analysis. There is little reason to believe that a JETS provision would be unconstitutional. The shifting of a subpoena authority within these offices raises policy and not constitutional concerns. The Supreme Court has always proven highly deferential in such matters. *See Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946). The proposal would allow the individual served with these subpoenas to seek judicial intervention and further requires the FBI to seek judicial assistance in the enforcement of the subpoenas if denied by the recipient.

b. General Analysis. Much is made of the shift from a grand-jury subpoena to a JETS system. However, the term grand-jury subpoena is misleading in that it is not issued by a grand jury but a federal prosecutor. "[A] grand jury subpoena gets its name from the intended use of the . . . evidence, not from the source of its issuance." *Doe v. DiGenova*, 779 F.2d 74, 80 n.11 (D.C. Cir. 1985). It is extremely rare for a federal prosecutor to deny such a request from the FBI and that loss of having an Assistant United States Attorney in the process is not likely to produce a significant change in the level of review. However, it will

remove a person who represents an added point of conferral for the FBI and someone who is a witness to the investigation's development if a case proves to be abusive. Ironically, the stated fear in the civil liberties community is precisely the stated purpose of the government in securing this change: ease of issuance. Given the current controversies, any measure to make investigations easier for the FBI will be viewed with great suspicion. While I do not believe that this is sufficient to oppose the provision, I would strongly encourage the Senate to couple any JETS provision with a close oversight process to monitor the number and nature of subpoenas issued under the new law.

4. Section 108 – Confidential CIPA Requests Provision

The proposed change in the Classified Information Procedures Act (CIPA) has raised concern among the criminal defense bar. As a criminal defense attorney in national security cases, I must confess to some uncertainty as to the real need for this change given the already generous provisions under CIPA.[5] However, like the JETS provision, the practical effect of this change will likely be marginal in most cases. Currently, the government can ask a judge for the right to submit their request for CIPA protection in an ex parte, in camera setting. This request is rarely

[5] CIPA contains highly protective provisions including the right of an interlocutory appeal "from a decision or order of a district court in a criminal case authorizing the disclosure of classified information, imposing sanctions for

denied. This proposal would remove the authority of the Court and require courts to allow such secret submissions.

a. Constitutional Analysis. In my view, removing the Court's authority to deny a request for in camera, ex parte submissions would not violate the Constitution.

b. General Analysis. At the moment, requests for CIPA protections are routinely handled in ex parte, in camera proceedings. Thus, the change in this legislation would likely not change the outcome of the vast majority of such cases. Moreover, little is actually disclosed in cases where such requests are made in public filings – which is why the value of this proposal is somewhat unclear. CIPA needs reform, but, in my view, it suffers not from too little secrecy but too much. The government now routinely demands in camera, ex parte presentations even in cases with defense lawyers who hold full security clearances. These requests are often made for purely tactical reasons to spare the prosecutors from adversarial review by experienced defense attorneys. There is clearly a value to some ex parte, in camera submissions but it is a power that (in my view) is being abused as a matter of litigation tactics rather than national security. Many cases would benefit from adversarial review by cleared and experienced counsel. As

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nondisclosure of classified information, or refusing a protective order sought by the United States to prevent the disclosure of classified information." 18 U.S.C. 7.

with FISA, it is difficult to review this limited provision without considering the more general controversy over the use of CIPA as a litigation device.

5. Section 109 – FISA Information in Immigration Proceedings

This provision would change the current system in which the government must notify parties in an immigration case that it is using information obtained through FISA. Congress previously exempted the government from such a requirement in terrorist removal proceedings. The Justice Department now seeks the same exemption in immigration cases.

a. Constitutional Analysis. Section 109 was criticized recently by the American Immigration Lawyers Association (AILA) group as "constitutionally dubious." Despite my respect for AILA and its work, I must disagree with the suggestion that this provision might be found unconstitutional. The government is allowed to use secret evidence in such proceedings and the only change here is the identification of the source of such secret information. Moreover, the Supreme Court has extended considerable deference to the Executive Branch in such civil proceedings. This provision would, in my view, pass constitutional muster.

b. General Analysis. The real point of concern in Section 109 is not constitutional but practical. The requirement to notify the parties on the use of FISA information offers immigration lawyers an opportunity to raise the issue in

the media as a legitimate advocacy technique. Moreover, it allows the lawyers to highlight the inherent unreliability of information gathered under FISA, which (as previously noted) was designed for foreign intelligence purposes and applies a sub-constitutional standard of proof. Finally, the change moves more of these proceedings away from the public's right to access to judicial proceedings. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 55 (1980). Soon after 9-11 and the so-called Creppy Memorandum,[6] immigration proceedings have move significantly away from public access and review. These are all significant concerns for the Senate to consider. However, the true legal change produced by Section 109 is marginal. There are good-faith reasons for the government's reluctance to acknowledge an on-going FISA investigation. While I oppose FISA generally, this does not appear an unreasonable request from the Justice Department.

6. Section 114 – Terrorist Material Support and Military Training Provision.

The final provision that warrants special attention is Section 114 dealing with terrorist material support. This proposal would actually improve the current

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[6] Issued ten days after 9-11, the memorandum of Chief Immigration Judge Michael Creppy notified immigration judges that they would be expected to close access to cases of "special interest" that would be identified by Attorney General Ashcroft. *See E-Mail Memorandum of Hon. Michael J. Creppy*, Chief

federal law by correcting gaps and ambiguities that led to recent judicial reversals. In that sense, the proposal can be viewed as a slight benefit to civil liberties by removing a dangerous level of ambiguity in the law.

a. Constitutional Analysis.

The crime of lending material support to designated foreign terrorist organizations has been the source of some of the greatest controversies in the last three years. Indeed, in 2003, the United States Court of Appeals for the Ninth Circuit upheld a lower court that found the provision was unconstitutionally vague by not defining such terms as "personnel" and "training." *Humanitarian Law Project v. U.S. Department of Justice*, 352 F.3d 382 (9th Cir. 2003); *see also Humanitarian Law Project v. Reno,* 205 F.3d 1130 (9th Cir. 2000). This proposal closes those gaps by defining the core terms in the statute. It is also important to note that the law contains a knowledge requirement that the person know that the organization is a terrorist organization or has engaged in terrorist activities." With the new language, the provision would likely be upheld under a void for vagueness attack. There remain serious questions of free speech and association as well as some significant due process claims. While I personally harbor serious question

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Immigration Judge, to all Immigration Judges and Court Administrators (Sept. 21, 2001, *available at* http://archive.aclu.org/court/creppy-memo.pdf.

over the constitutionality of this provision as applied, I believe that most courts would find the current language to be constitutional under all of these grounds.

b. General Analysis.

The material support cases raise some very serious questions of due process, particularly as they relate to the administrative component of the designation process. However, those concerns are not raised in this proposal. To the contrary, this proposal removes glaring gaps in the original language. Yet, it should be clear that the purpose of prosecuting material supporters of terrorist organizations is a vital component of the fight against terrorism. It is inevitable that issues of speech and association will attend such prosecutions. Muslim and Islamic groups have raised some important concerns over the chilling effect of prosecutions. I would personally like to see a comprehensive review and reform of this provision. While I do not share the view of many of my colleagues that such a provision is inherently unconstitutional, I do believe that this is a very delicate area for prosecution and that the provision (and administrative procedures related to the designation of organizations) could be better tailored to protect first amendment and due process concerns.

IV.
CONCLUSION

The general conclusion of my review of the Tools to Fight Terrorism Act of 2004 is that it raises few serious constitutional questions. It does contain some important reforms that would close gaps or clarify language in our current criminal and anti-terrorism laws. The vast majority of these provisions are matters that, in my view, should receive general support as balanced and necessary measures.

As mentioned in my opening statement, our constitutional system allows for a degree of flexibility in addressing threats to national security. Some of our past enemies have underestimated the ability of this country to adjust quickly to such new threats. Indeed, this is the first religious based extremist movement that has sought our destruction.[7] Around 100 years ago, the United States and an international coalition defeated a group called I Ho Ch'uan, or "the Righteous Harmonious Fists" in China. Known as the Boxers, these fanatics were not unlike Islamic terrorists today. The Boxers wanted to kill or repel all foreigners from their sacred land. The Boxers told their followers that Westerners were weak and easy to dominate. Among other things, they were told that the knees of Westerners did not bend and that, if you hit them, they would fall and could not get up. Islamic terrorists have their own bizarre conceptions but they share this view that, if hit

hard enough, we will become immobilized. They lack knowledge of our history just as the Boxers lacked knowledge of our anatomy.

The point is that today's terrorists have more frightening weapons at their disposal but they are not unknown to us. We often forget the challenges that we have overcome and the enemies that we have faced. More importantly, in the face of such danger, we can forget about our unique capability to deal with such threats. We have a constitutional and legal system that can adjust to new threats better than any system on Earth. The idea that we are rigid and unprepared is to ignore the greatest strength of the Madisonian democracy: Its ability to adapt quickly and decisively in the face of national crisis. To paraphrase the Boxers, we have a system with knees; a system that can bend, even when struck hard, and remain standing.

TFTA should be a matter for general consensus rather than division among civil liberties and national security advocates. This does not mean that we cannot disagree on individual provisions and seek their reassessment, such as the FISA change contained in Section 102. However, we need to recognize the improvements in this Act and the good-faith changes that have been made by members seeking a far balance in the legislation. The members, however, must

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[7] *See generally* Jonathan Turley, *The Boxers and Bin Laden*, The National Review, September 26, 2001 (National Review Online).

understand that the current controversies governmental abuses colors the analysis for many civil liberties advocates. Ultimately, giving Attorney General John Ashcroft more authority is an exercise of hope over experience in the use of prosecutorial discretion for civil libertarians. More importantly, it is my hope that the members will seek to prevail upon the Justice Department to recognize the vast changes already made in federal law and procedures. The Attorney General has shown an open antagonism toward the use of federal courts in the trial of accused terrorists and enemy combatants. Often Justice officials have defended their circumvention of the federal courts under vague suggestions that the federal courts are somehow incapable of handing such cases safely or fairly. These proposed changes offer further evidence that Congress is willing to accommodate reasonable demands of the government in federal cases and that the federal courts have ample protection for the prosecution of national security cases. The continued effort to circumvent the federal courts sharply undermines efforts to secure a reasonable consensus on the handling of these cases. Ultimately, no constitution and no federal law can protect a nation from self-inflicted wounds of over-zealous or abusive measures. This point was made by the great Judge Learned Hand:

> I often wonder whether we do not rest our hopes too much upon constitutions, upon laws and upon courts. These are false hopes . . . Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, nor court can save it; no constitution, no law, no

> court can even do much to help it. While it lies there it needs no constitution, no law, no court to save it.[8]

While September 11th showed our great strength, it also revealed a certain crisis of faith in our system's ability to handle these threats. We have a system that has weathered enormous threats and upheavals. While we can always strengthen that system with legislation like TFTA, the strength of our system will depend on a renewed commitment to the use of constitutional and judicial process in facing these threats.

I greatly appreciate the opportunity to submit my own views on this legislation and to contribute to this worthy effort to strengthen our laws and enforcement capabilities.

I would be happy to answer any questions that the Subcommittee may have on this testimony.

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[8] Learned Hand, The Spirit of Liberty: Papers and Addresses of Learned Hand 89-90 (Irving Diliard ed., 1960).

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