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TOOLS TO FIGHT TERRORISM: SUBPOENA AUTHORITY AND PRETRIAL DETENTION OF TERRORISTS

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BEFORE THE

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TOOLS TO FIGHT TERRORISM: SUBPOENA AUTHORITY AND PRETRIAL DETENTION OF TERRORISTS

TUESDAY, JUNE 22, 2004

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

The Subcommittee met, pursuant to notice, at 2:42 p.m., in room SD–226, Dirksen Senate Office Building, Hon. Jon Kyl, Chairman of the Subcommittee, presiding.

Present: Senators Kyl and Feingold.

Chairman KYL. The Subcommittee on Terrorism, Technology and Homeland Security will come to order. I am going to filibuster for just a moment to give Senator Feingold an opportunity to arrive. It will give me a chance to apologize to everyone for our late start.

Something very amazing happened today. The Senate official photograph was to be taken at 2:15, and for some reason that I can't fathom not everybody showed up at exactly 2:15 for that photograph. Senators were actually late to have their picture taken. Now, I must note that most of them were on the other side of the aisle, and maybe Senator Feingold can explain why Senators would actually be late for an opportunity for their photograph to be taken.

But in any event, on behalf of both of us, I apologize for keeping you all waiting and we will be able to begin the hearing now.

If you would like any rebuttal to that, Senator Feingold, you are welcome. Otherwise, I will make my opening remarks.

Senator FEINGOLD. I am non-plused by the partisan attack.

[Laughter.]

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

Chairman KYL. Well, I appreciate our witnesses being here today and we do have a very important subject for discussion. I am going to describe our panel to those of you who are here because it is an exceptionally qualified panel of experts to talk about the problems that we are going to be talking about.

We are going to be focusing today on the general question of what additional tools the Department of Justice might need in order to best prosecute this war on terror in which we are all involved and which we all want to help. In particular, today's hearing will focus on legislation that would extend direct subpoena authority to the FBI for anti-terrorism investigations and a bill that

would add terrorism offenses to the list of crimes that are subject to a statutory presumption of no bail.

Now, let me introduce these witnesses so you will know what kind of expertise we have.

Rachel Brand is the Principal Deputy Assistant Attorney General in the Office of Legal Policy of the United States Department of Justice. Ms. Brand previously served as an associate counsel to the President in the White House, and prior to that as an associate with the law firm of Cooper, Carven and Rosenthal. She has also served as a law clerk to U.S. Supreme Court Justice Anthony Kennedy and to Massachusetts Supreme Court Justice Charles Freed.

Michael Battle is the United States Attorney for the Western District of New York. Prior to his current post, Mr. Battle served as Erie County family court judge in Buffalo, New York. He also previously has served as the assistant attorney general in charge of the Eighth Judicial Circuit with the New York Attorney General's office and as an assistant public defender in the Federal Public Defender's office for the Western District of New York. Finally, Mr. Battle also served 7 years as Assistant U.S. Attorney for the Western District of New York.

James K. Robinson currently is a member of the law firm of Cadwalader, Wickersham and Taft here in Washington, D.C. From 1998 to 2001, Mr. Robinson was the Assistant Attorney General of the United States Department of Justice's Criminal Division. Mr. Robinson has also served as a dean and professor of law at Wayne State University Law School, as the United States Attorney for the Eastern District of Michigan, and as Chairman of the Michigan Supreme Court Committee on Rules of Evidence. He is a coauthor of the recently published Courtroom Handbook on Michigan Evidence.

I want to thank all of you for being here today, and again we really appreciate having your expertise on these issues.

Let me just make a brief comment in opening and then put the remainder of my statement in the record. I will note at this point that, without objection, any member statements will be included in the record if they would like to submit them.

We all are aware of the fact that the Justice Department is in the front of this war on terror here in the United States. It deserves a lot of praise for work that has been done since September 11. Worldwide, more than half of al Qaeda's senior leadership has been captured or killed. More than 3,000 al Qaeda operatives have been incapacitated.

Within the United States, four different terrorist cells have been broken up—cells in Buffalo, Detroit, Seattle and Portland. 284 individuals have been criminally charged to date, and 149 have been convicted or pleaded guilty, including shoe bomber Richard Reid, six members of a Buffalo terrorist cell, two members of a Detroit cell, Ohio truck driver Iymam Faris and U.S.-born Taliban John Walker Lindh.

But we also know that despite these successes, there are additional tools that we can provide to our law enforcement and judicial officers. Just as we send our military men and women into battle with the very best training and equipment, so too must we do the same thing for those who are doing the job here on the home front.

We certainly cannot ignore that the successes that we have had are only the tip of the iceberg, that we still have a huge effort in front of us in order to ensure that we don't have additional attacks here in the United States and that we can roll up those who are responsible for future attacks. That is why we have convened this hearing today to investigate some additional tools that we might be able to provide for our law enforcement community at large, and specifically for Federal law enforcement.

Rather than talk about the legislation that I have introduced at this point or further describe its contents, I am going to defer to Senator Feingold for his opening remarks. And then during the questioning, I am sure we will have a lot more opportunity to get into some of those details. I have authored a couple of bills which I think would help and would provide some additional tools, and we will be very interested in getting the views of those of you who are expert in this matter as to how well you think they would work, whether they are needed and how we could implement them. Again, I thank you all for being here today.

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

Chairman KYL. Senator Feingold.

STATEMENT OF HON. RUSSELL FEINGOLD, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator FEINGOLD. Thank you, Mr. Chairman. First, I want to thank you for allowing me to join you here today. Senator Feinstein, who is the Ranking Member of this Subcommittee, was unable to attend today because of a previous commitment to attend an Intelligence Committee briefing with Director Tenet.

I have always been impressed with the seriousness of the work done in the Subcommittee on Terrorism, Technology and Homeland Security, and today's hearing is no exception. As I have repeatedly said, protecting the country against terrorism should be our Nation's top priority. Deciding what powers we are going to grant to law enforcement in the fight against terrorism is one of the most critical issues confronting Congress, and I am glad that we are taking deliberate steps to consider this very important issue.

I must also express my disappointment, however, at the narrow focus of this hearing. Many members of the Judiciary Committee, both Republicans and Democrats, have been publicly seeking a hearing on how the PATRIOT Act is being used and a real debate on whether some of the most controversial provisions of that Act could be improved to better balance the needs of law enforcement with the civil liberties and privacy of the American people.

In fact, Senator Feinstein, like many of us in Congress, has still not received basic answers to her letters written to the Department of Justice about the PATRIOT Act. She has written to the Department of Justice two times this year and is yet to receive a response. And she is not alone. I have repeatedly asked for information about how some of the most controversial provisions of the PATRIOT Act like Section 215 have been used, and have not received satisfactory responses.

For us to have a meaningful conversation, it needs to be a two-way conversation. Rather than convening to explore how the ad-

ministration is utilizing the powers already granted to it under the original PATRIOT Act, we are here today to learn about administration requests for even more authority.

While I am disappointed that the focus of this hearing is so narrow, I do hope it will help to inform us about whether we need to give the Department of Justice even more power, and if the answer is yes, then what safeguards should be built into that authority.

Today, we will be hearing about proposals to create a new, broad subpoena authority that actually bypasses the grand jury system in terrorism cases, and an expanded presumptive right to pre-trial detention for people charged with any terrorism-related crime. The administration is apparently reluctant to allow these proposals to be linked to the PATRIOT Act, but a version of these proposals did appear in the draft of the so-called PATRIOT II leaked last year, entitled the Domestic Security Enhancement Act.

As our Nation faces terrorist threats, we must respond to those threats without compromising the civil liberties that are the bedrock of our country. We must balance the legitimate needs of law enforcement against the privacy and freedom of all Americans, the vast majority of whom are, of course, innocent of any association with terrorists.

An essential tenet of any plan to keep Americans safe must be a dedication to safeguarding the civil rights and liberties that define this great Nation. The criminal justice system has by and large served us well. Over the years, we have used our criminal justice system to successfully prosecute rapists, pedophiles, drug dealers, street gangs, murderers, organized crime and others, while respecting important civil rights.

I hope the witnesses today will be able to tell us why these new powers are needed in the fight against terrorism. The burden is on the administration to show Congress and the American people why current law is inadequate, why Federal law enforcement needs even more power, and how the power it already has under the PATRIOT Act and the new powers it now seeks are consistent with the Constitution and the Bill of Rights.

I share the Chairman's commitment to protecting Americans from terrorism, but at the same time we cannot ignore the FBI's history of abusing its authority in launching investigations against civil rights and anti-war activists. Taking into account this history of targeting activists that challenge the Government's policies, the language of the pre-trial detention bill is particularly disturbing. In fact, the pre-trial detention bill, Senate 1606, would include traditional forms of political activism in the definition of terrorism.

Mr. Chairman, we should take a considered and measured course when creating new powers, choosing to build upon the well-tested powers already contained in the Criminal Code, if necessary. For that reason, I am very pleased James K. Robinson, former Assistant Attorney General for the Department of Justice's Criminal Division, is with us today to share his wealth of knowledge and experience on these issues. I wish to extend a special welcome to Mr. Robinson and express my great appreciation for his willingness to join us on such short notice.

With respect to the PATRIOT Act, I believe that Americans support common-sense proposals to protect privacy and civil liberties

that would not in any way undermine the fight against terrorism. They have asked the administration and the Congress to listen. Hearing their concerns and acting on them is the right and patriotic thing to do.

So as we begin the hearing today on a set of proposed new tools to fight terrorism, I urge all participants to engage in an open and honest dialogue with Congress and the American people about how to combat the very real threat of terrorism, while respecting the freedoms of all Americans.

I thank you, Mr. Chairman, and I do look forward to hearing from the witnesses.

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

Chairman KYL. Thank you very much, Senator Feingold, and I should have announced earlier that we scheduled this hearing at a time when Senator Feinstein had no alternative but to be at the Intelligence Committee. I know her staff is here and I regret that we had to do that, but I do appreciate Senator Feingold being here.

I certainly agree with much of the sentiment, Senator Feingold, that you expressed. I am trying to find out the exact number of hearings that have been held that have examined the use of the PATRIOT Act, because I think we have had several and I just want the record to reflect whatever that number is. I will see if I can get that, but I am perfectly willing to have more. In any event, we can delve today into some potential new tools that might be used, and I think we have three people here who are very well qualified to discuss that.

I think probably the proper order would be first for Rachel Brand, then Michael Battle, and then James Robinson, the clean-up hitter who I know will have some different point of view. But let's do it in that order and start with you, Rachel Brand. Thank you very much for being here.

STATEMENT OF RACHEL BRAND, PRINCIPAL DEPUTY ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL POLICY, DEPARTMENT OF JUSTICE, WASHINGTON, D.C.

Ms. BRAND. Thank you, Chairman Kyl and Senator Feingold. I appreciate the opportunity to testify today.

The tools that this proposal would provide counter-terrorism investigators could provide the critical difference in certain terrorism investigations. I am going to focus today on the administrative subpoena proposal. Mike Battle will focus on the presumptive pre-trial detention of terrorist suspects proposal.

In terrorism investigations, prevention is the key, and for the law enforcement officers responsible for staying a step ahead of terrorists in these investigations time is of the essence. Even a brief delay in these investigations can be disastrous. Therefore, investigators need tools that allow them to obtain information and to act as quickly as necessary. Administrative subpoenas are one tool that would enable investigators to avoid costly delays.

An administrative subpoena, as you know, is an order from an agency official to a third party requesting the recipient to produce certain documents. These subpoenas are a well-established investigative tool currently available in investigations of a wide variety

of Federal offenses, including health care fraud and sexual abuse of children. In fact, my office has identified approximately 335 existing administrative subpoena authorities for use in civil and criminal investigations.

Administrative subpoenas are not, however, currently available in criminal terrorism investigations. This disparity in the law is illogical, especially considering the particular need for quick action in a terrorism investigation and the potentially catastrophic consequences of a terrorist attack.

The legislation introduced by Chairman Kyl would fix this anomaly in the law by giving the FBI authority to use administrative subpoenas in investigations of Federal crimes of terrorism. Grand jury subpoenas which are issued by Federal prosecutors are a useful tool in all criminal investigations and are available to obtain the same types of records that could be requested with an administrative subpoena.

However, there are circumstances in which the FBI's ability to directly issue an administrative subpoena would save precious time in a terrorism investigation. For example, using an administrative subpoena would eliminate delays caused by the potential unavailability of an Assistant U.S. Attorney, the lack of a grand jury sitting at the moment the documents are needed, or the absence of an empaneled grand jury in the judicial district where the investigation is taking place.

Some of these circumstances occur only rarely, but in terrorism investigations, in particular, investigators need the tools to act as quickly as necessary when these circumstances do occur. And these same considerations have led Congress to create other administrative subpoena authorities that already exist.

The Department has previously provided Congress with examples of when administrative subpoenas would prove useful, but I will recap these briefly now.

In the first example, on a Friday afternoon investigators learn that members of an al Qaeda cell have purchased bomb-making materials. They want to obtain purchase records that may reveal what chemicals the terrorists purchased and delivery records that might reveal the terrorists' location.

Investigators can reach a prosecutor, who issues a grand jury subpoena. But because the grand jury is not scheduled to meet again until Monday, the return date of the subpoena must be Monday, as well, and investigators may not obtain the information for 3 days, by which time the al Qaeda cell may have executed its plan. The return date of an administrative subpoena, by contrast, does not have to be a date the grand jury is sitting, which will potentially allow investigators to obtain information more quickly.

In the second scenario, investigators learn that members of an al Qaeda cell recently stayed at a particular hotel. Investigators want to obtain information about the credit card numbers used to pay for the hotel room, but the hotel manager declines to produce the records without a subpoena for fear of incurring civil liability.

If investigators were able to issue the administrative subpoena immediately, the hotel manager could comply immediately, as well, without fear of incurring liability. Without this authority, however, investigators would have to wait to contact an Assistant U.S. Attor-

ney to assure a grand jury subpoena, which potentially would lose valuable time in a terrorism investigation where speed is of the essence.

In addition to providing an important new law enforcement authority, Chairman Kyl's bill contains important protections. For example, it would not give the Justice Department unilateral authority to compel the production of documents. If a recipient refuses to comply with a subpoena, the Justice Department must go to court to enforce it, and the recipient would have the ability to ask the court to quash the subpoena, as with other subpoena authorities.

Because the bill would only apply to terrorism investigations, in which confidentiality is often critical to success, it would prohibit a subpoena recipient from disclosing the subpoena in cases where the Attorney General certifies that disclosure would endanger national security.

The bill, however, would impose several safeguards on the use of this non-disclosure provision. For instance, the requirement would last only until the Attorney General determines that the requirement is no longer justified by a danger to the national security. At that time, the recipient of the subpoena would be notified that the non-disclosure application had expired.

In addition, the recipient would be explicitly allowed to discuss the subpoena with his or her attorney, and the recipient could challenge a non-disclosure obligation in Federal court and the court could set it aside if it determined that doing so would not endanger the national security.

The bill also would immunize against civil liability individuals who comply with an administrative subpoena. These subpoenas thus protect third parties who are willing to comply with a subpoena, but fear incurring civil liability if they do so. In short, this bill would advance law enforcement's proactive approach to preventing terrorism by giving officers the tools they need to conduct time-sensitive investigations without unnecessary delay, all while providing appropriate safeguards.

Mr. Chairman, thank you again for allowing me to testify and I will look forward to your questions.

[The prepared statement of Ms. Brand appears as a submission for the record.]

Chairman KYL. Thank you for that statement.

Mr. Battle.

STATEMENT OF MICHAEL BATTLE, UNITED STATES ATTORNEY, WESTERN DISTRICT OF NEW YORK, BUFFALO, NEW YORK

Mr. BATTLE. Thank you, Chairman Kyl. Good afternoon, Ranking Member Feingold. I thank each of you for the opportunity to testify before you today.

As United States Attorney for the Western District of New York, I have had firsthand experience with terrorism investigations and prosecutions. As a result of that experience, I can tell you that the safety of our fellow citizens would be significantly enhanced if Federal law enforcement provided for the presumptive pre-trial detention of terrorists.

Mr. Chairman, the Pre-Trail Detention and Lifetime Supervision of Terrorists Act of 2003 is an important and much-needed piece of legislation, and the Department of Justice strongly urges the Congress to pass it as soon as possible.

Let me begin by explaining the nature of the problem that this bill is intended to fix. While it may seem intuitive that those charged with the most serious crimes and who may pose a flight risk or danger to the community should be detained before trail, under current law that is not always the case. Although defendants in Federal cases who are accused of certain crimes are presumptively denied pre-trial release, under Title 18, United States Code, Section 3142(e), the specific enumerated list of such crimes contained in that statute does not include most terrorism offenses.

The consequences of this gap in the law were noted by President Bush, who, on September 10, 2003, in a speech at the FBI Academy, said, quote, "Suspected terrorists could be released, free to leave the country, or, worse, before 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 of accused terrorists."

Mr. Chairman, your bill would answer the President's call to action and close this loophole. The bill would amend Title 18, U.S. Code, Section 3142(e), to presumptively deny release to persons charged with an offense involved in or related to domestic or international terrorism or with the Federal crime of terrorism as defined in U.S. Code 2332b(g)(5). This change in the law would not result in the automatic detention of individuals charged with those offenses, but merely a rebuttable presumption in favor of detention, a presumption that could be overcome with evidence from the accused that would favor release.

Adding all terrorism offenses to the list of crimes for which there is a presumption in favor of detention is warranted because of the unparalleled magnitude of the potential danger posed to our fellow citizens by acts of terrorism. These acts, moreover, are many times committed by individuals who are part of a larger group, many with international connections that are often in a position to help their members flee or go into hiding if released before trial.

It is important to emphasize that this proposed legislation does not represent a solution in search of a problem. This problem is a very real one and, unless fixed, the threat posed by this problem will remain clear and present. I want to share with the Subcommittee one real-life example of how the current statutory scheme can impede terrorism investigations and prosecutions, and why a legislative solution is necessary.

In a recent terrorism case in the Western District of New York involving several defendants collectively known as the Lackawanna Six, the Government sought an order for pre-trial detention of each defendant. The defendants, of course, opposed this motion. Because Section 3142 did not presently include a presumption for pre-trial detention in terrorism cases, a nearly three-week hearing on the issue of detention followed.

In the course of that hearing, we, the Government, were forced to disclose a substantial amount of our evidence against the defendants. In fact, the magistrate presiding over the hearing went

so far as to consider a request by defense counsel to require us to put an FBI agent on the stand so that he could be cross-examined by defense counsel, which is very unusual. Fortunately, the magistrate judge denied this request by the defense, thus avoiding what was already turning into a miniature trial which would have put the government at a significant tactical disadvantage due to what would have been a premature disclosure of even more of our trial evidence.

Moreover, without the presumption of detention in this case, the magistrate judge did authorize the release of one defendant. Although that defendant failed to post bail and therefore was not released, it was later revealed that this defendant had been the least candid of the six and had, in fact, lied to the FBI about the fact that he had met with Osama bin Laden in Afghanistan.

If the law had contained a presumption in favor of pre-trial detention applicable to the charges of these defendants, it is unlikely that the Government would have been required to prematurely disclose so much of its evidence, and virtually certain that the hearing would not have lasted almost three weeks. However, let me remind you that even with a presumption of detention in this case, defense counsel would have had the opportunity to argue and present evidence against detention.

In addition to tactical concerns, the absence of a presumption of detention could permit terrorist suspects to go free altogether without facing justice. In another case, for example, a Hezbollah supporter was charged with providing material support to a terrorist organization. He fled the country after being released on bail. After living overseas as a fugitive for 6 years, he surrendered to the FBI and now is in U.S. custody.

These examples illustrate the dangerous loophole that exists in current law. Clearly, we are not talking about a purely theoretical problem that may or may not come up in the future. We are talking about real obstacles the Government has faced in prosecuting the war on terrorism. Mr. Chairman, the passage of this bill will go a long way toward ensuring that such situations cannot occur again.

Once again, thank you for allowing me to testify and present my perspective as a prosecutor in the field on this very important issue, and I look forward to answering any questions that you may have.

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

Chairman KYL. Thank you very much for your testimony, and I note that both of you conformed to our five-minute rule. Your full texts, of course, will be made part of our record and I do appreciate your keeping to our time constraints. We should have plenty of time to have several different rounds of questions.

Our final witness is James Robinson.

Mr. Robinson, the floor is yours.

STATEMENT OF JAMES K. ROBINSON, FORMER ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, DEPARTMENT OF JUSTICE, WASHINGTON, D.C.

Mr. ROBINSON. Thank you, Chairman Kyl and Senator Feingold. I am pleased to appear before the Subcommittee to offer my views on Senator Kyl's proposed Judicially Enforceable Terrorism Subpoena Act.

The issues before the Subcommittee today are of critical importance to the country and I commend the Subcommittee for holding this hearing. I want to personally thank the Chairman and Senator Feingold for your serious attention to the terrorism threat posed today to the United States and to the world.

While working as the Assistant Attorney General for the Criminal Division, it was my honor to appear before this Committee and subcommittees of the Congress dealing with criminal justice issues, and I am pleased to be here today to discuss these important issues dealing with measures designed to help law enforcement in waging the war against terrorism.

As September 11 taught us all too well, terrorism does present a grave danger to our National security and to the safety of American citizens throughout the world. America must bring all of the appropriate resources to bear in the fight for freedom and against terrorism.

I have no doubt that this bill and Representative Feeney's bill in the House—that is, the Anti-Terrorism Tools Enhancement Act of 2003—are offered with America's best interests in mind. However, I think some of their provisions merit very careful consideration both from a law enforcement and from a civil liberties perspective.

As the Subcommittee, I am sure, already appreciates, as currently proposed, these two proposals would fundamentally change in many ways the traditional limits on the power of law enforcement to interfere with the liberty rights of American citizens in dealing with their Government.

More specifically, I encourage the Subcommittee to carefully scrutinize how these new devices contained in these proposals have the potential for curtailing important checks and balances that could well create legal and constitutional challenges, and could in the end cause the war on terrorism more harm than good.

Over the years, Congress has appropriately, I think, been reluctant to expand the powers of criminal law enforcement agents to have direct access to administrative subpoenas to conduct criminal investigations. Such subpoenas interfere with the liberty and privacy rights of American citizens.

While Congress has authorized administrative subpoenas in a variety of civil contexts and in some criminal contexts, the use of the subpoenas for exclusively criminal investigations raises a host of constitutional and due process issues not present in the civil context. To my knowledge, Congress has never authorized the creation of a potentially secret executive branch police proceeding of the type that could be contemplated by these proposals.

I think it is important to weigh the benefit to law enforcement of granting this power to FBI agents or other Federal agents carefully against the potential loss of liberty, and more important from a law enforcement perspective the loss of the ability for the skilled

prosecutors in the Justice Department to work hand in hand with case agents in conducting these very sensitive investigations.

The administrative subpoenas for terrorism cases contemplated by the proposals under review in today's hearing would compel American citizens to appear for compelled questioning, potentially in secret on certification by the Attorney General, before the executive branch of their Government without the participation or protection of the grand jury or of a pending judicial proceeding to answer questions and produce documents. No showing of reasonable suspicion or probable cause, or even imminent need or exigent circumstances, would be required to authorize such subpoenas.

The United States Supreme Court has held that witnesses appearing before Federal grand juries need not be given the Miranda warnings, for example, in these kinds of proceedings because they are very different than the type of proceedings envisioned by the administrative subpoena proposals that are under consideration here today.

The Supreme Court has said that this is entirely different than custodial interrogation, that there are marked contrasts between grand jury investigations and custodial interrogations. And the Supreme Court has indicated that the powerful coercive powers of a grand jury are justified because they are in contrast to police interrogation.

It is certainly my experience that case agents exercise good faith in conducting their investigations. They do so vigorously and in the best interest of the country. I think it works best when they work hand in hand with skilled prosecutors in making these delicate decisions.

The Justice Department has a series of carefully crafted guidelines developed over many years in dealing with the issuance of grand jury subpoenas. And I think it is well to keep in mind that as diligent and fair-minded as case agents are, it is worth keeping in mind a comment that has been attributed to Mark Twain that, "to a man with a hammer, a lot of things look like nails." To an agent with a subpoena, a lot of things will look like subpoenable material.

Under this proposal there is no requirement, as there is under other provisions where administrative subpoenas have been allowed—and I refer the Subcommittee, for example, to the situation in which in situations where the Department of the Treasury feels that there is an imminent threat to a protected Secret Service person, someone protected by the Secret Service, administrative subpoenas are allowed under circumstances where the Director of the Secret Service certifies that there is an imminent threat of injury to a protected party. That would address, it would seems to me, some of the justifications that Ms. Brand, for example, offered about the, I think, very rare situations in which there might be this exigent circumstances need.

I think that the proceedings that might be contemplated by these administrative proceedings are quite unprecedented in the sense that they are secret proceedings. I think the legislation contemplates the creation of guidelines, but it is unclear what those guidelines would be, where the approval level would be.

And I might point out to the Subcommittee that, for example, even Assistant United States Attorneys in this country do not have a right on their own to issue forthwith subpoenas. It requires the personal approval of the United States Attorney, and that is because I think the Department and Congress have been careful to not create a situation that in my written testimony Justice Black once referred to as reminiscent of a star chamber in which you give a blank set of subpoenas to case agents who are under a lot of pressure in these cases to do an effective job, carte blanche, in effect, to give subpoenas to people who have to then, if they want to resist it, hire a lawyer, go to court. If they do any of that, you have lost the advantage of the exigent circumstances.

I think we have developed over many years in the Federal grand jury system a carefully crafted investigative tool that has served the country well over 200 years. I think Congress has been wise to be resistant to the grant of these administrative subpoenas.

I was the United States Attorney in Detroit in the 1970's. This issue of administrative subpoenas for Federal agents has been kicked around for a very long time. I frankly think Congress has been wise to be careful about authorizing and granting this authority, and I think it would be well for the Subcommittee to look at this issue very carefully before making a decision to move in this area. And if it were to do so, once a showing would have to be made—and I suggest more than a hypothetical showing, but some real instances of situations in which there has been real harm in these cases.

And I hate to raise the slippery slope argument, but it seems to me that the notion here is if it is good enough for terrorism cases, why isn't it good enough for kidnapping cases. The agents would love to have it, but I think it is a great advantage to require Federal investigative agents to have to go—it isn't just a speed bump to go to an Assistant United States Attorney trained and familiar with Federal criminal law and worried about what is going to happen down the road. Are we going to create a problem that is going to create a motion to suppress evidence or otherwise interfere with the successful prosecution of the case?

These are all, I think, important issues from a law enforcement perspective, not just a civil liberties perspective, although I think as we think of this—and I agree with Senator Feingold that as we develop these tools and examine them in our important fight against terrorism, we need to make sure that we reserve to American citizens as much freedom and liberty that we have, particularly if at the end of the day we have created a new device, an untested device to give case agents this very awesome power to interfere with people's lives even in situations where there isn't imminent danger.

I have submitted a lengthy piece of written testimony and I would request that the Subcommittee accept that. I share the Subcommittee's view that the fight against terrorism and for freedom must be fought with all appropriate resources. As we fight for freedom, however, we must continue to live freely and in a way that shows the world that we respect and honor and cherish our individual liberties.

With that, I will submit my written submission and be happy to answer any questions that the Subcommittee might have.

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

Chairman KYL. Thank you, Mr. Robinson. All three of you have presented very thoughtful testimony and I very much appreciate it.

What I would like to do is I would just ask Senator Feingold if it would be all right with him, since we don't have other members here—incidentally, as you all know—you are experienced—this does not reflect any disinterest in this subject. We are all supposed to be at about four different places right now, and if more than two bells ring, we will have to leave to go to the floor. It is important to make a record and you all are making a record by your statements, both the written and oral statements, and by questions that we have. Those, of course, are shared with our colleagues and we appreciate it.

Let me begin by getting to one of the last points, Mr. Robinson, that you made. I will ask Ms. Brand a question and if you would like to respond, please do so. The question concerns whether or not this would be something new—these administrative subpoenas would be something new or unprecedented.

You testified, Ms. Brand, that the Office of Legal Policy identified approximately 335 administrative subpoena authorities already existing in current law, and you noted just two examples in health care fraud and sexual abuse. As I understand it, not all of those are required to be sought by the Assistant U.S. Attorney.

First of all, is that latter assumption correct?

Ms. BRAND. The administrative subpoena authority that allows subpoenas to be issued in health care fraud cases and cases involving sexual abuse of minors is given to the Attorney General by the statute. That has been delegated down to Assistant U.S. Attorneys and to any trial attorney in the Criminal Division.

Another very frequently used administrative subpoena authority is 21 U.S.C. 876, which has been delegated from the AG to the FBI. Any special agent can authorize the issuance of a subpoena for Controlled Substances Act criminal investigation, any drug investigation.

Chairman KYL. So it seems to me that it is neither a precedent-creating situation here nor one which hasn't been used a lot, nor one which is only used by U.S. Attorneys.

Mr. Robinson, I would like to get your response to that.

Mr. ROBINSON. Thank you, Senator. There is a report to the Congress on the use of administrative subpoena authorities by the executive branch which I am sure the Senator is familiar with, and it is worth looking at because each of these subpoenas must be reviewed in their context.

My point about this being unprecedented is it is unprecedented in this sense: As I understand, its purpose is to arm line agents, FBI agents, with the ability to serve the equivalent of forthwith subpoenas, which is give a subpoena to somebody that says you come to the FBI office now or tomorrow morning or in 5 minutes from now and bring your documents. So it is a forthwith subpoena that does not have any Assistant U.S. Attorney or Federal prosecutor involvement in its decisionmaking.

It also is secret. It is secret in the sense that the individual involved can't tell anyone but his or her lawyer, presumably, or somebody that they need to go to get documents that they have been subpoenaed. And if they tell the press or anyone else that they have been subject to such a subpoena, as I understand the proposal, they are committing a crime for which they can go to jail for a year. And if they have a certain intent, it can be a 5-year felony.

So in that sense, I am not aware—and perhaps Ms. Brand can enlighten me on this—I am not aware of any administrative procedure subpoena regime that has anything like a secret proceeding in which agents, not lawyers, can give subpoenas to individuals to compel them, on pain of contempt of court or incarceration until they talk, in secret, under these circumstances. So that is what is unprecedented about it.

I think the others are often in the context of a regulatory scheme, for example, in the drug area for controlled substances where we have—it is in the health care area; it is where people who are health care providers, et cetera.

I am not saying there is no room for it at all under any circumstances. I just think that because this is new and because, it seems to me, it is unprecedented in the sense of who is going to use it, when it is going to be used and what the checks and balances are, it requires a little different attention than—and I use these administrative proceedings in my practice in a variety of these settings because I do this kind of work and I am familiar with it.

Chairman KYL. First of all, you cited in your testimony as an example of how we can already obtain certain kinds of documents the national security letters. But as I understand it, they have an automatic non-disclosure requirement. So here again, it is not unprecedented. We already have a precedent of something that isn't optional, but is required, and further has no provision for judicial review.

So if national security letters are fine, then why would something that is less than that create some precedent?

Mr. ROBINSON. I think that is another topic and I think that that is an example of a very targeted, narrow area requiring a high level of approval. We are now talking about, as I understand it, unless there are provisions that I haven't been carefully looking at, basically giving subpoena power to case agents who need not talk to Assistant U.S. Attorneys necessarily and who can make a decision to require a forthwith subpoena to be answered, and not just to deliver documents, as I understand to be the national security letters, but to also, at least in the Feeney proposal but not—and I compliment you, Senator, in yours—these full-scale interrogations. That could be very troubling, and I think that is a particularly troubling approach.

Chairman KYL. Of course, we do not include that in ours. It is only the custodian of the document kind of appearance that is required.

Mr. ROBINSON. I compliment you for that change. I did say in my testimony I was a little uncertain as to the language that appears to come from the Feeney proposal that deals with the broader—

Chairman KYL. I noted your question in that regard and because clearly my intent is the same as yours here, perhaps we can collaborate on language to reflect the point of view you have there.

We need to get into the other subject, too, and I don't mean to ignore you, Mr. Battle. But since we are on the subject of administrative subpoenas, Rachel Brand, can you comment a little bit on some of the points that have been made here with respect to the need for secrecy?

In fact, before I ask you to do that, I presume, Mr. Robinson, that in terrorism cases you would acknowledge that there certainly are some cases where there is a need for quick action and secrecy. The question is how do we deal with that.

Mr. ROBINSON. I certainly agree there is a need for quick action and for secrecy, and I think there are a lot of tools to get at that. I commend the Senator for looking at other ways to do it as long as we do this careful balance that we are all concerned about.

Chairman KYL. Right.

Ms. Brand.

Ms. BRAND. Thank you. A couple of points. I would just like to clarify first of all that nothing in the bill gives line agents the authority to do anything. The authority is given to the Attorney General, which is typical in administrative subpoena authorities.

In other contexts, such as in the drug administrative subpoena context, that authority has been delegated down to the level of supervisory special agent, but it has not been delegated down to the level of line agent. So I just wanted to clarify that. Presumably, the delegation level for this proposal would be taken care of in AG guidelines which would be issued after the bill was passed, if it were.

In terms of the forthwith subpoena point, the bill provides that a reasonable time shall be given to respond. And it is important to remember that the usefulness of administrative subpoenas, which is speed, pertains mostly when the recipient is willing to comply. Obviously, if the recipient is not willing to comply, he can refuse to comply and no sanction whatsoever attaches to the mere refusal to comply with the subpoena. Or he can file a motion to quash, in which case the speed would go out the window. But in most cases where recipients are willing to comply, the ability to issue a subpoena is very useful.

In terms of the need for secrecy, first of all, it is not unprecedented. One type of grand jury subpoena, for example, under the Bank Secrecy Act contains or carries a non-disclosure obligation. There are other administrative subpoena authorities that have other types of non-disclosure obligations that attach to them.

But in terrorism investigations, or really in any investigation, disclosure of the facts of the investigation can cause flight from prosecution, intimidation of witnesses, destruction of evidence, and so forth. That is especially true in terrorism investigations. I know that Mr. Battle has faced issues like that, especially in his Lackawanna Six prosecution. And as you pointed out, the secrecy obligation is not automatic. It only is triggered if the AG certifies that disclosure would endanger the national security.

Chairman KYL. I need to go back and review what we did with respect to guidelines. I certainly agree that guidelines are required

here. The question is how they would be done and if we haven't made it clear enough how guidelines would be produced, again I would appreciate any suggestions on how that would be done.

Mr. ROBINSON. I think it would be helpful to have some guidance with regard to how far down this actually would go in terms of authority. I certainly agree with Rachel that the Department has, I think, over the years done a very good job of making sure that the power that it has been given has been carefully utilized.

Indeed, I testified on proposals to amend the grand jury system and to reform it, and I opposed that because I think the Department has done a good job internally. But I worried a little and I may have misunderstood, but I understood, for example, in Ms. Brand's testimony that there was a contemplation that this would be available to case agents under difficult, exigent circumstances. And if that is not intended, then—

Chairman KYL. But if I understand it, the authority is to given to the Attorney General, who presumably would develop the guidelines under which the authority would be given. Is that correct or is that incorrect?

Ms. BRAND. That is correct, as in the drug context, those who are in the field with the case agents, but who are at a higher level of supervisory authority.

Chairman KYL. Let me ask one last question and then the next round I will go into other legislation. We talk about grand jury, but, Mr. Robinson, I did want to at least ask if you would concede that when we talk about a grand jury subpoena, that is a subpoena issued by a Federal prosecutor. It is not issued by the judge or by the grand jury; it is just issued by the prosecutor pursuant to the proceedings that are then pending.

Mr. ROBINSON. Well, actually, no. The grand jury does issue the subpoena. The prosecutor asks for it, but the grand jury has to give it, and we like to think it isn't just a lip-service process. But I think you are right. There is a very close involvement by prosecutors.

Chairman KYL. Right.

Mr. ROBINSON. But they can't issue them on their own.

Chairman KYL. No, but I guess the point is if the grand jury isn't around, he doesn't get to issue the subpoena and therein one of the concerns we have about the timing issue here.

My time is up, but I will come back to a second round. Let me turn to Senator Feingold.

Senator FEINGOLD. Thank you, Mr. Chairman.

This has already been alluded to, but Ms. Brand, the Kyl and Feeney bills for administrative subpoenas differ in at least one important way. Representative Feeney seeks to allow the use of administrative subpoenas for both the production of documents and for acquiring the testimony of possible witnesses. Now, Senator Kyl's bill seeks to extend the power to cover only the production of documents.

Which of these bills, if either, accurately reflects the administration's position on what administrative subpoena power is necessary in terrorism cases?

Ms. BRAND. We support the bill that Senator Kyl has introduced that does not contain the broad witness testimony provision. The authority that we are after that we really think is necessary is the

authority to subpoena documents. My understanding is that other subpoena authorities that allow for the subpoenaing of testimony of witnesses are used in a civil context. Even though by the statute's terms they appear to be available in the criminal context, they are not used in the criminal context, and we don't feel that authority is necessary.

Senator FEINGOLD. Thank you for that answer. Ms. Brand, time and time again administration officials offer a similar scenario to explain why the power of administrative subpoenas should be extended to anti-terrorism investigations. Late at night, in the middle of nowhere, with no Assistant U.S. Attorney available, the FBI wants to get records from a business about purchase of bomb-making materials. So it appears that the need to obtain records immediately is the main reason for seeking administrative subpoena power.

If immediacy is truly the reason for bypassing the grand jury process, then why is there no language included in either the House or Senate legislation that limits the exercise of the power to exigent situations instead of granting this broad and unchecked power to Federal law enforcement effectively 24 hours a day, 7 days a week?

Ms. BRAND. Most other administrative subpoena authorities—in fact, I only know of one that contains such a limitation, the one that Mr. Robinson alluded to earlier. Most other subpoena authorities, such as the ones available in health care fraud investigations and sexual abuse investigations and drug investigations, do not contain that limitation. Terrorism investigations are much more likely—really, every terrorism investigation involves some exigent circumstance. I don't think that kind of limitation is necessary.

Senator FEINGOLD. In light of the fact that this has to do with a situation where immediacy is required, what would be the harm of having some kind of an intermittent review instead of this kind of open-ended—in the spirit of Senator Kyl's attempt to get this language right?

Ms. BRAND. I am not sure why the provision in 18 U.S.C. 3486 dealing with Secret Service protectees contains the immediacy limitation that Mr. Robinson alluded to. But when you think about exigent circumstances, putting into the law additional approval requirements only slows things down. So an immediacy requirement would have the perverse effect, I think, of slowing things down in a case in which immediacy is the rule.

Senator FEINGOLD. Mr. Robinson, would you like to respond to that?

Mr. ROBINSON. Well, on the subject of slowing things down, I suppose one could say that the Bill of Rights sort of slowed things down, and does occasionally, but it was intended to do that. And it seems to me that if indeed the real motivation for the administrative subpoenas is that there is some kind of exigent circumstance, immediacy—that is what has been offered up as the reason for it—then I am not sure I understand why requiring such a certification as exists with regard to the Director of Secret Service in their administrative subpoenas wouldn't make sense.

The thing that I would worry about, frankly, and I would worry about it as a prosecutor, is that these administrative subpoenas

would be utilized in lieu of a grand jury because it is easier because you don't have to go both an Assistant U.S. Attorney who might be troublesome about things like the guidelines and whether you are following the rules.

There is this tension that exists, as all the prosecutors in the room will know, between agents and prosecutors in this area. It is a healthy tension, it seems to me. It makes Federal criminal investigations much more credible and effective, and in the end it makes sense.

I think we have seen examples of situations in which, when that close working relationship has broken down, we have had problems. I think most recently the wall that was, I think, broken down in the FISA area between prosecutors and investigators in national security cases is a good example.

When I was Assistant Attorney General, this was a battle. Those of us in the Criminal Division wanted access to that information, though we could be helpful in conducting those investigations without violating the FISA statute. And I think ultimately it was determined that that barrier was a good thing to kind of lower.

I think the danger that I would worry about with a widespread administrative subpoena process where the agents don't have to go to the prosecutors and deal with this is that even in non-exigent circumstance cases, you would have this being used in lieu of going through the grand jury process that has a lot of checks and balances associated with it and where the courts have understood that, for example, you have a lot of protections that come from a grand jury system. That is what worries me a little bit.

Senator FEINGOLD. Well, I appreciate that answer because, as I indicated in my question to Ms. Brand, the whole basis for this is the need for an immediate opportunity to get at some information, and I understand that. But then the failure to have some kind of limitation on it after the fact sort of undercuts the credibility of the notion that this is only based on the need for immediate information, and it confuses me.

In fact, it reminds me of the same problem under the sneak-and-peek provisions of the USA PATRIOT Act. Most of us don't want to get rid of the sneak-and-peek provisions completely, but the resistance to having a renewal every 7 days by a judge of the authority to be able to do something so extraordinary in light of the Fourth Amendment puzzles me. Why can't we have that kind of review once the urgency of the situation dissipates so that the case can be made again?

Frankly, Mr. Chairman, this is a big part of the problem in dealing with this issue. I think you, in good faith, are trying to get this right, but it undercuts the credibility of those who want the broader provisions if they won't listen to common-sense ways in which this can be tailored to meet the problem that has been the basis for why they seek the greater powers. I think this is an important thing so that, frankly, we can make joint progress on getting this right, which is exactly what I want to do.

Mr. Robinson, you mention in your statement that the Supreme Court has previously noted that there are important safeguards present in the grand jury system. These safeguards would not be present when using tools like administrative subpoenas. Would you

expand on the safeguards in the current grand jury system and why they are so important?

Mr. ROBINSON. Well, a couple of things. Some of my written testimony was directed to Representative Feeney's proposal, which I think was very troublesome, and I am delighted that Senator Kyl has seen the wisdom of not going that far.

For example, I have pointed out that it has not been found by the Supreme Court necessary to give the Miranda warnings in a grand jury setting, even though the witnesses there are under compulsion with a subpoena. If you don't talk, you can be held in contempt of court unless you assert your Fifth Amendment privilege. But, nevertheless, the Supreme Court says that is a setting in which we have an independent citizen grand jury present; we have a transcript, we have a record; we don't think you need to give the Miranda warnings there.

In the proposal by Congressman Feeney, if you were to allow secret interrogations pursuant to administrative subpoenas, I think you would have a serious constitutional issue there, and the Supreme Court has commented on that.

I would also say that my comments are directed toward the fact that the Department of Justice has a chapter in the U.S. Attorneys Manual dealing with grand jury process and guidelines and who you subpoena, when you subpoena, the appropriateness of subpoenaing people. There is a policy on forthwith subpoenas that requires the approval of the United States Attorney before an Assistant U.S. Attorney can issue a forthwith subpoena.

The Federal courts have expressed serious criticism and concern about the issuance of forthwith subpoenas. And as I understand the principal motivation for this proposal, it is to allow agents to issue forthwith subpoenas. And so this is an area that just needs some care, it seems to me. I think the seasoned judgment of skilled Federal prosecutors, people like United States Attorney Battle and others, is important in this process.

I worry that the proposal is going to create an end-around this system of careful checks and balances and it won't be limited to these exigent circumstances. I mean, case agents want to get the job done and if they don't have to walk across the street and talk an Assistant U.S. Attorney into something, they are going to go and do it themselves. And I don't criticize them for it. That is their job, that is what they are supposed to do.

But I think we have a system that says you talk to the AUSA, you deal with the policies that are involved, you work together on these investigations. I am sure Mr. Battle has duty assistants who are available 24/7, who have beepers on. You know, they are available, they are in the trenches fighting the war on terrorism. They should be there helping to make these critical decisions so that when they get a good case, they do the kind of job they did and I compliment them for in the Lackawanna case and others, and get an effective prosecution, one that is going to stand up and stand the scrutiny of appellate review.

Senator FEINGOLD. Mr. Chairman, I think my time may be up.

Chairman KYL. Let's go to 5 minutes now, so we will just go back and forth, if you want to do that.

Senator FEINGOLD. Sure.

Chairman KYL. We will just do five-minute rounds.

I promised, Mr. Battle, I would get to you next. I just find it incredible that the statutes list a series of alleged criminals for which there is a presumption for detention because of the probability of flight or of some other problem, and yet terrorists are not on that list. I mean, that is such an incredible—well, presumably the statutes were written way back before we were concerned with terrorists, or I am sure that terrorists would have been number one on that list. This disparity makes absolutely no sense to me, and you made the point that it could be very important in certain kinds of cases for terrorists to be added to that list.

Mr. Robinson, I don't recall reading in your testimony specific objections to this, but I honestly am not certain whether you had objections so let me just ask you straight out whether you do.

Mr. ROBINSON. I prepared my testimony starting last Friday and I have looked at this provision as well. I just didn't feel sufficiently comfortable to express a strong opinion on the subject of the proposal. I haven't had a chance to study it with great care.

Chairman KYL. Okay.

Mr. ROBINSON. I mean, I—

Chairman KYL. If you—I am sorry. Go ahead.

Mr. ROBINSON. My only point would be that I was pleased to see that Mr. Battle, notwithstanding the absence of these provisions, did an effective job of making sure that the people who were accused in his district stayed in custody during those proceedings.

But I am just not in a position, I think, to have a careful view of it. I think there are some issues that are worth exploring, and I would be happy to mention a couple of those if you would like,.

Chairman KYL. Well, I think it would be worthwhile if you have a chance. I don't want to make any more work for you, but we can leave the record open and any views that you have that you would like to express to us, I am sure we would both like to receive them.

You might respond to the specific—and I noted the same thing; in the first example Mr. Battle gave, he said, yes, we got it eventually, but it took three weeks of hearing where we had to disclose a lot of information that we would have much preferred not to have disclosed.

If you want to expand on that, Mr. Battle, perhaps that would help lay a greater foundation for this discussion.

Mr. BATTLE. Thank you, Senator. Senator, you mentioned in introducing me that in a prior life I was an Assistant U.S. Attorney. And in that prior life, I prosecuted drug defendants and we had the presumption and it worked very well. It was clear there was a recognition by Congress that at that time those types of defendants presented the kind of problem in our country and in our communities that it was necessary for us to have that type of tool. Obviously, you have alluded to the fact that no less such a tool should be necessary in the context of fighting terrorism.

But the point is in the Second Circuit, we are allowed to proceed by proffer in detention hearings, and in that context the focus of the hearing is really on pre-trial release or detention. In our case, two things happened to us that caught us completely by surprise. One, the attention of the issues shifted to the question of whether or not the statute that we were prosecuting these defendants under

was constitutional, which we should never have had to deal with at that point in the proceedings.

In some sense, while I won't minimize the need for discussions about the strength of the Government's case, we had to go well beyond what I had ever experienced in presenting to the court that which we knew about our case, much of which we wanted to hold close to the vest because the Lackawanna Six case was actually the Lackawanna Eight and we had two defendants who had already fled the country.

So we were put in a real position of jeopardy of having to continue to disclose. And because the court could not start with a presumption that then would shift the burden to defendants to come forward and discuss matters related strictly to the matter of release or detention, but we got into all these other focuses, it put our case in jeopardy and it put our agents in jeopardy.

Chairman KYL. I appreciate that. Let me go back to the question of constitutional issues that have been raised to ask both Ms. Brand and Mr. Robinson, are either of you aware of any case in which the use of administrative subpoenas has been found a violation of the Fourth Amendment? Does the court uphold the existence of that authority?

Ms. BRAND. Thank you. The Supreme Court has held—I am forgetting the year of this decision—that administrative subpoena authorities do not require a probable cause standard, that a relevance standard is sufficient under the Fourth Amendment. So, no, the Supreme Court has never held that an administrative subpoena authority like the one here violates the Fourth Amendment.

The Sixth Circuit in an opinion specifically discussing 18 U.S.C. 3486, which is the health care fraud/sexual abuse of children provision, took Supreme Court precedents to hold that that provision also did not violate the Fourth Amendment with its relevance standard.

Chairman KYL. Thank you.

Mr. Robinson, are you aware of any other different case?

Mr. ROBINSON. No. I think that is right. I am not so sure you could predict the same result under Congressman Feeney's proposal necessarily, but it may not get tested in light of your proposal.

Chairman KYL. We will hope to make ours the one that works and then we won't have that constitutional issue to worry about.

Senator Feingold.

Senator FEINGOLD. Thank you, Mr. Chairman.

Let me just say to Mr. Battle I was going to ask you a question along those same lines about the Lackawanna Six. You know, I am listening carefully about the claims you are making about the problems that this caused for the Government in the disclosing of information, and so on. But I would simply note for the record that this proceeding, in part to your skills and others', was very successful. All the defendants pled guilty and as a part of the plea agreements, all the defendants agreed to fully cooperate with the Government. So I can't help but at least note for the record that the current system seemed to perform pretty darned well in this circumstance. But I do take seriously the specific points you made.

Now, let me ask you something different. In both the Senate and the House legislation on pre-trial detention, the definition of terrorism includes an offense that, quote, "appears by its nature or context to be intended to intimidate or coerce a civilian population, to influence the policy of a government by intimidation or coercion, or to affect the conduct of a government by mass destruction," unquote.

These definitions seem to be broad enough to include the types of protests that regularly occur in cities across this country. For example, many types of loud and angry protests like those that sometimes occur surrounding WTO meetings, property damage protests such as those committed by members of animal rights groups, and right-to-life protests where members make a human barricade between the street and the abortion clinic might conceivably be covered by this definition.

The Attorney General would have the final word on which participants of which political protests could be detained under this proposal. Does the Justice Department really intend to cover political protests in this legislation? Do you see any First Amendment problems with this definition?

Mr. BATTLE. Thank you, Senator. Senator, in our district there is a line of cases that we deal with under a project called EXILE, and that deals with gun prosecutions where we partner with local law enforcement when we bring cases in the Federal context to get sort of more bang for our buck because the statutory scheme allows us to put criminals in jail for longer periods of time for more serious crimes than some of the State statutory schemes allow.

In that context, one of the hammers that we have in the Federal system is that we have a better shot at pre-trial detention of those defendants than they have had success with at the State level. But the policy that we have in our office is never to seek pre-trial detention except in the most appropriate cases, and what that means is we don't ask for it in the cases unless, from a factual standpoint, they fit within what the statute requires in a request for pre-trial detention.

So in response to your question, what I would say is this: We would ask for pre-trial detention in the appropriate cases depending on the defendant. The focus in pre-trial detention is on the defendant and the facts and circumstances that support such.

You may have a defendant that you have described that falls under the definition of international terrorist for which we may move the court for pre-trial detention. We want the ability to do so because in certain circumstances there may be a risk of flight and certainly very much a danger to the community.

Senator FEINGOLD. I appreciate the answer, but it struck me that you seem to be suggesting how you would use the powers that are given. What I was more getting at is the language itself and the potential scope of the language in the hands of those who may not be as responsible. Doesn't that give you some concern?

Mr. BATTLE. Well, if I understand your question, I thought you said that the power would lie in the hands of the Attorney General. But actually the power to detain would lie in the hands of the court and the recommendation of whether or not someone is detained would happen at the earliest stages of a proceeding when a defend-

ant is charged. The issue of pre-trial detention is not visited until some time after the arraignment or the initial appearance.

Senator FEINGOLD. Wouldn't you concede that this is something of a broadening of the flexibility here, that the AG would only certify this?

Mr. BATTLE. I am not sure I understand your question, Senator.

Senator FEINGOLD. The Attorney General certifies that the crime is the type for which the presumption is appropriate, but isn't it somebody else who makes the specific decision about who could be detained?

Mr. BATTLE. The specific decision about detention, from my experience in the field, lies with the magistrate judges and the judicial officers in the Federal system. The statutory scheme that covers pre-trial detention covers a broad range of criminal activity, which we hope will now include statutes that involve terrorism. We use it for drug dealers, we use it in gun cases, we use it in violence cases, we use it in child pornography cases and others of the most serious nature.

Senator FEINGOLD. Mr. Battle, you also cited the case of Mr. Asi, who was originally arraigned in 1998. I understand that Mr. Asi turned himself in to Federal authorities last month. At the more recent 2004 bail hearing when the Government argued that Mr. Asi should be detained, Mr. Asi agreed.

Are you suggesting that Magistrate Morgan made the wrong decision in 1998? Do you know if the Government appealed the detention ruling, and have you personally reviewed the transcript of the proceeding?

Mr. BATTLE. Senator, apologetically, I do not have as much detailed information as it seems you have about that case. I don't really wish to comment about it at this time.

Senator FEINGOLD. Well, do you have any instances where the system has failed us involving a pre-trial detention hearing since Mr. Asi's original pre-trial detention decision in 1998?

Mr. BATTLE. Was your question do I have any—

Senator FEINGOLD. Do you have any instances where the system has failed us?

Mr. BATTLE. None that I am aware of.

Senator FEINGOLD. Thank you, Mr. Chairman.

Chairman KYL. Mr. Robinson might want to add something.

Senator FEINGOLD. Mr. Robinson?

Mr. ROBINSON. I was just going to offer a point of very modest personal privilege that Magistrate Morgan was an Assistant U.S. Attorney of mine when I was U.S. Attorney and I just vouch for her. I think she is an outstanding Federal magistrate judge. I haven't read the transcript of that proceeding, but I know she is diligent and does an effective job.

I was going to just offer one point. I have read the bail decision in Mr. Battle's case and I think it looks to me to be very carefully and thoughtfully done. I think the one incidental benefit that is worth keeping in mind in terms of the integrity of our criminal justice system is for neutral magistrates to be making decisions in this area.

I don't weigh in on this presumption issue yet and I will be happy to get back to it, but I do think the fact that our criminal

justice system gives the power to an independent judiciary to make the bail decision, which is after all a constitutional right in this country, is worthwhile as we look around the world. And we can proud of the fact that when we incarcerate people who are presumed innocent in our system, we do it through a process. Sometimes, it takes longer than we might like, and I know the bail process Mr. Battle referred to was lengthy. But nevertheless I think it is something that we can point to with pride and we should be mindful of that.

I would also just offer again the notion that in some of these terrorism cases, there is a problem—and I am sure Mr. Battle from his former life as a defender will appreciate it—that much of the evidence in these cases is derived and procured by the Government. It is classified, and therefore the Government has most of the information in many of these cases, which would make it difficult sometimes for lawyers representing people accused in some of these cases to do an effective job of dealing with the presumption. It is just a factor.

As I say, I haven't decided myself because I haven't studied it carefully enough, but these are just a couple of thoughts that occurred to me in response to your question, Senator Kyl.

Chairman KYL. I just want to reiterate what we are talking about here in case anybody has missed it. There is a whole list of crimes in which, when a judge or magistrate makes the decision of whether to hold the person without bail because the person is likely to flee, for example, or could pose a danger to people—there is a whole list of provisions in the Code today that say the presumption is that because of the nature of that crime, is the defendant that, in effect, has the burden of proof that he is not going to flee and therefore shouldn't be held. In most cases, it is the Government's burden of proof that he is more likely to flee, and therefore the bail should be set very high or shouldn't be granted.

All we are doing is adding terrorism to that list in which the burden shifts. The arguments are still made by lawyers to a judge, who makes the decision based upon constitutional principles. And all we are doing is saying that of all crimes in the world in which there ought to be a presumption that you might have a problem with this person fleeing or causing a problem, it is in a terrorist case. That is all this legislation seeks to do. So I just wanted to make that clear.

I wanted to ask Rachel Brand about the substantive differences, really, if there are any, between grand jury subpoenas and administrative subpoenas. In other words, assuming that the Attorney General develops good guidelines that apply to the FBI, why should we fear more about an administrative subpoena issued here than a grand jury subpoena, which, of course, are issued all the time—I shouldn't say all the time, but are a frequently issued subpoena.

Ms. BRAND. Thank you. The standards are essentially the same. So, substantively, the two are essentially the same. They both are based on a relevance standard, both grand jury subpoenas and almost all administrative subpoenas.

Mr. Robinson suggests that the FBI agents are more suspect, essentially, than Assistant U.S. Attorneys. I would welcome Mr. Battle's comments on the relationship between most U.S. Attorneys' of-

fices and most FBI field offices, but I don't think most prosecutors hold the view that the FBI lacks the professionalism required to utilize this authority responsibly.

Like the U.S. Attorney Manual provisions that Mr. Robinson alludes to, the FBI also has its own internal guidelines for the use of the existing administrative subpoena authorities which point out that they should be used sparingly and give other types of guidance about the legality of their use. So I don't think there is any substantive difference between the two.

Chairman KYL. And the person to whom the subpoena is issued can hire counsel?

Mr. BRAND. The recipient can move to quash or can simply refuse to comply, right.

Chairman KYL. Exactly.

Mr. Battle, would you like to comment on this?

Mr. BATTLE. Senator, if I could just interject, I don't want to leave this hearing today with the thought that U.S. Attorneys or Assistant U.S. Attorneys are in any way opposed to the FBI agents having this subpoena authority that we are discussing in great detail today.

I can tell you that at one point in the Lackawanna Six case, as I said, we started out with eight and it was a weekend when we obtained the complaint from the Federal judge to arrest them on a Friday evening. On Saturday morning, I was en route to Washington to engage in some matters related to the case and I was traveling with the FBI agent in charge of the Buffalo office. The agents were back in Buffalo attempting to round up the six that we knew were in the Buffalo area, and we learned as we boarded the plane that they had five of the six in custody. Two, we think, were abroad, and one was somewhere; we didn't know where that person was.

The agents were in the field. It was a Saturday morning. My office was closed, the courts were closed, and I would like to think that an FBI agent in the field would have had the authority, if necessary, to exercise the appropriate power and, if necessary, have the power to get an administrative subpoena to gather evidence to find the individual that we could not find that we believed was still in the States and in our community. Ultimately, we did find that person because of good police work, but that is something that could have presented a problem for us. So I just don't want that to get lost at this time.

Chairman KYL. I appreciate it.

Senator Feingold.

Senator FEINGOLD. Mr. Chairman, I just have one more question today.

Mr. Robinson, the proposals for a new administrative subpoena and for new pre-trial detention rules would vest more powers in the hands of the administration and take power from the courts and grand juries. This seems to be part of a pattern for this administration.

Do you think that giving the Attorney General and law enforcement more and more authority at the expense of the courts is a positive trend and bodes well for the fight against terrorism and for constitutional protections?

Mr. ROBINSON. I think I would have to say not necessarily, and you have to look specifically at the provisions. But let me take this opportunity to say that I have nothing myself but the highest regard for FBI agents and have worked closely with them. Director Mueller was a colleague of mine at the Justice Department. I have high regard. He held the job that I held there. One of my colleagues in my current law firm is the former Deputy General Counsel of the FBI.

It is important to recognize that the roles of FBI agents and Federal prosecutors are different, and I think the system recognizes that. I am talking about a cooperative relationship that is important. Many FBI agents are lawyers; they are skilled lawyers. Many are not. Many of them are familiar with Federal criminal law and the provisions of the United States Attorneys Manual.

As we go forward with looking at these proposals, I think it is important to have these guidelines in place to make sure that we don't create a parallel system that doesn't end-around this process. I don't think it will help law enforcement in the end. This is an honest disagreement, but I think it is a factor to be taken into consideration as we move forward in creating something that could be a very different method of operation than we have been familiar with.

I know 9/11 has changed everything and it certainly requires us to consider ideas like this, and I think it is appropriate. I congratulate the Chairman for making this kind of a proposal and for the willingness to consider these competing ideas and coming up with the kind of legislation that will be a real aid to law enforcement in the fight on terrorism, which is something that we certainly all share as a goal.

Senator FEINGOLD. Thank you.

Chairman KYL. Thank you, and I want to thank all of you. Would either of the other two witnesses like to make any comments in closing?

I want to express my appreciation to you for supporting my legislation, by the way, and expressing that.

Mr. Battle, did you have anything else that you wanted to add?

Mr. BATTLE. Mr. Chairman, I would just like to say thank you for allowing me to testify.

Chairman KYL. I just want to conclude by making this point. Senator Feingold and I are in complete agreement on two things; they are very general propositions. The first is that we have got to do our best in this war on terror, as well as fighting other criminals. And we also have to adhere to our Constitution and ensure that everyone is treated with the utmost of fairness. Within those two broad agreements, there will necessarily be some disagreements. We aren't good lawyers if we wouldn't find some way of disagreeing with each other about precisely how to go about doing this.

It is my intention in pursuing both of these pieces of legislation to get it right, but to get it; in other words, to ensure that we have given every tool that can be given to our law enforcement authorities, not in any way that it can be abused, but because of the nature of our enemy.

It just seems to me that when you can get records with an administrative subpoena in a health fraud case, you ought to be able to do that in a terrorism case. If you can hold a drug dealer, you ought to be able to hold a terrorist. So these seem to me to be pretty minimal approaches that nevertheless could be helpful.

I think the point was made that it might be relatively rare, but I remember another case that was rare when Agent Rowley complained about the fact that she couldn't get the lawyers back at headquarters to issue a subpoena to go into Zacarias Moussaoui's computers. I actually had to agree with those who defended the decision that they didn't want to seek the FISA warrant because I didn't think they could get it because he didn't technically meet the definition of a person against whom such a warrant could be issued.

Now, some people thought otherwise, but I think the law was clear enough that that would not have been granted, which is why we here in the Senate passed a fix to that that would have covered a case like Moussaoui as well. That bill unfortunately languishes in the House of Representatives right now.

It just seems to me that, therefore, there are consequences to our actions if we don't use every tool that is available. And as long as they are constitutional—the courts have declared these kinds of procedures constitutional—we ought to be as aggressive as we can in dealing with this particular kind of enemy, while always asking the tough questions, the double and triple checking that people like Senator Feingold will always do to ensure that we do it right.

We are going to hold the record open for questions until next Tuesday at 5:00 p.m. I would also invite the witnesses, if they would like to add anything to their testimony, they are certainly welcome to do that.

Senator Feingold, I really express my appreciation to you for being able to be here today.

Senator FEINGOLD. Thank you.

Chairman KYL. Let me just say one other thing. I will make available for the record, and to give to you, Senator Feingold, right now, at least 12 hearings covering the PATRIOT Act. We have tried to hold oversight over that PATRIOT Act, some of which has been very explicit and thorough. Others have touched on it in one way or another.

Senator FEINGOLD. Well, Mr. Chairman, let me just say that I let it go the first time you said it, but I don't believe my comments had to do with the Committee not holding hearings.

Chairman KYL. I misunderstood that.

Senator FEINGOLD. My comments had to do with the fact that the administration has not responded to Senators' letters requesting information, which I find deeply disturbing.

Chairman KYL. I apologize. I misunderstood.

Senator FEINGOLD. I am aware of this list and I have probably been at almost every one of those.

Chairman KYL. Yes. I misunderstood.

Senator FEINGOLD. I appreciate your efforts and my point was not directed at you at all.

Chairman KYL. We will keep holding oversight hearings.

Again, I thank all of the witnesses. This was a very good hearing because we had very good witnesses, and we appreciate the interest of all of you in the audience.

The hearing will be adjourned.

[Whereupon, at 4:03 p.m., the Subcommittee was adjourned.]

[Submissions for the record follow.]

SUBMISSIONS FOR THE RECORD

American Civil Liberties Union
Written Statement at a Hearing on
"Tools To Fight Terrorism: Subpoena Authority and Pretrial Detention of Terrorists"
Before the Subcommittee on Technology, Terrorism and Homeland Security of the Committee on the Judiciary of the United States Senate

Submitted by
Timothy H. Edgar, Legislative Counsel

June 22, 2004

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

I am pleased to submit this statement for the record today on behalf of the American Civil Liberties Union and its more than 400,000 members, dedicated to preserving the principles of the Constitution and Bill of Rights, at this hearing on proposals to remove critical checks and balances from the government's powers to obtain sensitive personal records and to detain accused persons before trial.

Just six weeks after the terrorist attacks in New York and Washington on September 11, 2001, Congress approved the USA PATRIOT Act,[1] which expanded federal law enforcement and intelligence powers at the expense of civil liberties and meaningful judicial oversight.

In January 2003, word leaked from the Department of Justice (DOJ) of a possible successor to the PATRIOT Act, the "Domestic Security Enhancement Act" (DSEA), quickly dubbed "Patriot Act II." The advent of a Patriot II draft seemed to indicate Congress might soon be considering a major new expansion of federal power even before DOJ had explained how it is using the powers already granted and before Congress had undertaken any substantial oversight of PATRIOT Act powers.

Continued grassroots controversy about the impact of the PATRIOT Act on civil liberties, reports of Justice Department abuses of immigration detainees by its own Office of Inspector General, and lingering concern among powerful members of Congress have slowed the seemingly inexorable momentum of new federal government powers. House Judiciary Chairman Jim Sensenbrenner (R-WI) has said that a proposal to eliminate the PATRIOT Act's sunset provision early would only pass "over my dead body,"[2] and is reportedly "cool" to proposals to expand the PATRIOT Act.[3]

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[1] Uniting and Strengthening America by Providing Appropriate Tools to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (Oct. 26, 2001).
[2] Craig Gilbert, *Sensenbrenner Says He'll Enforce Sunset of Police Powers*, Milwaukee Journal-Sentinel, Apr. 17, 2003.
[3] Audrey Hudson, *"Patriot II" Bid Garners Little Favor on Hill*, Washington Times, Sept. 12, 2003.

As a result, the Department of Justice and other supporters of expanded federal powers have not gone forward with a comprehensive sequel to the PATRIOT Act. Nevertheless, they have continued to press forward with a strategy to satisfy a seemingly insatiable appetite for new and unnecessary powers without appropriate checks and balances. This Patriot II agenda includes separate legislation and attempts to attach pieces of Patriot II to other bills.

On June 5, 2003, Attorney General Ashcroft stated that the PATRIOT Act "has several weaknesses which terrorists could exploit, undermining our defenses," and endorsed three provisions of Patriot II. More recently, on September 10, 2003, President Bush announced in a speech at the FBI that the law contained "loopholes" that erected "unreasonable obstacles" to law enforcement. The President urged Congress to "untie the hands of our law enforcement officials" and pass three provisions of Patriot II, each of which was introduced as a separate bill that day or the day before:

- H.R. 3037, "The Antiterrorism Tools Enhancement Act of 2003," allowing the government to seize records and compel testimony in terrorism cases without prior review by a court or grand jury;

- H.R. 3040 and S. 1606, "The Pretrial Detention and Lifetime Supervision of Terrorists Act of 2003," allowing the government to deny bail without proving danger or flight risk for a laundry list of federal crimes said to be terrorism-related[4] (under current law, pretrial detention is available for all federal crimes, but a presumption of detention only applies to terrorism crimes if they are "acts of terrorism transcending national boundaries");

- H.R. 2934 and S. 1604, the "Terrorist Penalties Enhancement Act of 2003," creating a new death penalty (where death results) for "domestic terrorism" as defined by the PATRIOT Act – a definition that applies not only to specific crimes of terrorism but also to <u>any</u> violation of federal or state law if it involves a dangerous act and is intended to influence government policy – a definition so broad it could cover some acts of civil disobedience by protest groups.

The first two of these proposals are the subject of today's hearing.[5]

In arguing for additional legal authorities, Administration officials almost never acknowledge the scope of their existing legal powers. To rectify this gap, this statement explains what the PATRIOT Act and pre-9/11 legal authorities already permit federal agents to do. In fact, DOJ already has broad powers to obtain sensitive records like library and bookstore records, medical records, and other records and detain terrorism suspects without bail.

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[4] This list of crimes, which are called "Federal crimes of terrorism," is contained at 18 U.S.C. § 2332b(g)(5).

[5] The death penalty expansion bill has been the subject of action in the House Judiciary Committee. A copy of my statement for the ACLU in opposition to that proposal is available at: http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=15513&c=206

According to Attorney General Ashcroft, for almost two years, from October 2001 to September 2003, the Justice Department had not even used one PATRIOT Act power – such as the power to get an order from the Foreign Intelligence Surveillance Court for library or other sensitive records without probable cause or individualized suspicion. The Justice Department has now released documents that suggest it requested authorization for such an order in October 2003.[6]

The government has not explained why it had not used the PATRIOT Act records power for almost two years. The most logical explanation is that the power was not needed – that the government could and did obtain the information it sought in its wide-ranging post 9-11 terrorism investigations through its preexisting intelligence and law enforcement powers. Despite this, the Administration argues that Congress should expand this and other PATRIOT Act powers even further.

The powers that are the subject of today's hearing would weaken basic checks and balances and should be rejected.

Administrative Subpoenas

The Administration is requesting power to issue orders in terrorism for library, medical, or other sensitive records, and to obtain testimony, without individual suspicion and without a judge or grand jury. The proposal would weaken checks and balances and is unnecessary, given the array of existing powers to obtain records in terrorism cases.

Current law: Under current law, the government can obtain documents or other "tangible things" in terrorism cases *either* through its normal criminal investigative powers, or its powers under the Foreign Intelligence Surveillance Act (FISA) or other "national security" powers.

The criminal powers include:

- **Criminal search warrants**. These apply to all documents and require a judge or magistrate to find probable cause that the search will produce evidence of crime.

- **Grand jury subpoenas**. These do not require probable cause but do require a grand jury to find that the testimony or documents are relevant to an ongoing grand jury investigation of criminal activity, and they can be challenged before a judge.

The FISA and other "national security" powers, the use of which are classified, include:

- **FISA "physical search" orders.** These do not require probable cause of crime, but instead require a judge of the Foreign Intelligence Surveillance Court (FISC)

[6] Amy Goldstein, *Patriot Act Provision Invoked, Memo Says – FBI Request Came Weeks After Ashcroft Denied Using Controversial Part of Law*, Washington Post, June 18, 2004, at A11.

to find probable cause that the target of the search is acting for a foreign government or organization (i.e., is an "agent of a foreign power").

- **FISA document orders**, added by section 215 of the PATRIOT Act. These do not require probable cause of anything, but instead mandate that a judge of the FISC or a federal magistrate issue an order to produce documents if the government certifies that they are "sought for" an investigation "to protect against international terrorism or clandestine intelligence activities." These orders permit government agents to obtain sensitive information, including library, bookstore, medical, financial, educational, or any other "tangible things" simply by making the certification. The statute provides no mechanism for a recipient of such an order to challenge it. *A recipient is also prohibited by law from informing the person whose records are seized that he or she is under government surveillance, or from objecting to the order to the press or public.*

- **National security letters,** expanded by section 505 of the PATRIOT Act. These allow the FBI, *without a court order*, to compel production of certain financial records and telephone and Internet service provider "subscriber information," if the FBI says the records are relevant to a terrorism or intelligence investigation. The government has said it may use such letters to obtain information about patrons who use a library's public terminals to access the Internet. Like an order under section 215, *a recipient of a national security letter is prohibited by law from informing the person whose records are seized that he or she is under government surveillance, or from objecting to the order to the press or public.*

The powers added by the PATRIOT Act are particularly troubling. Nevertheless, while the court review provided under section 215 is clearly inadequate, it was a significant improvement over the Administration's original proposal, which was to give government agents power under FISA to seize records without any court review at all.

Notably, Attorney General Ashcroft said in a speech in September 2003 that the government had not used one of these powers – FISA document orders. Recently, the government released documents showing that, shortly after this speech, the Justice Department sought authorization from the Foreign Intelligence Surveillance Court for such an order. The government has not provided any useful information about the use of the government's other powers, such as "national security letters," to obtain library records or other sensitive records without individual suspicion. The Washington Post reports that "scores" of such letters have been issued.[7]

Proposed Change: The proposal would create new "administrative subpoena" powers whenever the government seeks documents or testimony in terrorism cases. This would give the government, in effect, a license to seize any documents (including First Amendment protected records like library and bookstore records, medical and genetic information, and membership lists of organizations) and to compel testimony without

[7] *See* Dan Eggen, *Patriot Monitoring Claims Dismissed: Government Has Not Tracked Bookstore or Library Activity, Ashcroft Says,* Washington Post, Sept. 19, 2003, at p. A2.

probable cause of crime, without a connection to a foreign power, and without prior review by a judge or grand jury. In addition, at least as proposed in H.R. 3037, the power would result in an automatic gag order, preventing the recipient of the subpoena from informing anyone of the order, and would permit the government to compel a person to testify, and not just produce documents, also without any prior court review.

While the Administration argues such subpoenas are already available in cases of health care fraud,[8] the proposal actually goes much further. Existing administrative subpoenas only allow for very limited testimony, generally to authenticate the records being sought. By contrast, the Administration proposal permits compelled testimony on any matter at all, setting a frightening precedent. Such subpoenas would allow federal agents to compel Americans to answer questions without a lawyer present, and without even the extremely limited safeguards available to witnesses before a grand jury, such as a verbatim transcript.

The argument for administrative subpoenas also ignores the bargain struck during negotiations over the PATRIOT Act, in which members of Congress agreed to a very broad records power under section 215 while insisting on preserving some (and, in our view, entirely inadequate) court review. Finally, the Administration proposal fails to recognize the sensitive First Amendment interests at stake in national security investigations, which can chill the lawful activities of political and charitable groups, and the history of abuse of government intelligence powers. These First Amendment interests counsel for judicial oversight and other checks which may not be implicated in health care fraud investigations.

Pretrial Detention

The second proposal is to expand pretrial detention and lifetime supervision for laundry list of crimes said to be terrorism-related beyond what is already provided in USA PATRIOT Act. This proposal also weakens important checks and balances and should be rejected.

Current law: Current law provides for pretrial detention for anyone charged with a federal crime if the government can show to a judge that the accused is a flight risk or danger to the community. 18 U.S.C. § 3142(e). For some serious crimes, including "acts of terrorism transcending national boundaries," (defined at 18 U.S.C. § 2332b) there already is a presumption that shifts the burden of proof on flight risk and dangerousness to the accused. If the accused is not charged with acts that meet the definition (for example, because the crime involved only domestic criminal activity), the court may still deny bail, but the government would be required to show with evidence that the defendant is a danger or a flight risk.

Proposed Change: This proposal would require judges to deny bail to many more accused people, even if the government has not shown they are dangerous or likely to flee. A person who is presumed innocent and has not been found guilty of any crime

[8] *See* 18 U.S.C. § 3486.

could be held for months or years without the government having made any showing that he or she is dangerous or a flight risk. The proposal does this by making a laundry list of crimes said to be terrorism-related presumptive "no bail" offenses even if the crimes do not involve "acts of terrorism transcending national boundaries."

Shifting the burden of proof for pretrial detention in many more cases – not involving international terrorism but said to be terrorism related – could result in serious injustices. After September 11, 2001, the government engaged in a widespread campaign of detention that involved immigration charges, criminal charges, and material witness warrants. The Inspector General of the Department of Justice found that many detainees were inappropriately labeled as terrorism suspects and left to languish in jail for months. These findings, while they involved immigration detainees and not criminal detainees, show that DOJ is quick to label people as connected to terrorism and slow to clear them.

Conclusion

The legislative proposals that embody provisions of Patriot Act II – both individually and taken as a whole – represent Administration defiance of the growing opposition to provisions of the PATRIOT Act and other government actions since September 11, 2001 that go beyond what is necessary to fight terrorism and infringe on basic civil liberties. To date, 332 communities in 41 states, representing over 51.9 million people – as well as four state legislatures – have passed resolutions that object to some provisions of the PATRIOT Act and other government actions that infringe on civil liberties. The House of Representatives voted overwhelming, 309 to 118, to prohibit funds for PATRIOT Act "sneak and peek" searches, and an array of bipartisan bills have been introduced in both Houses of Congress to repeal or scale back provisions of the PATRIOT Act.

Broad administrative subpoenas for terrorism and expansions of presumptive pretrial detention are unwise and unwarranted. The federal government already has ample power to obtain documents in terrorism cases and to detain suspected terrorists before trial. Congress should not move a major part of the Administration's agenda to expand the USA PATRIOT Act without far more detailed review of the effect of the Act, and other post-9/11 policies, on civil liberties.

These proposals to remove important checks and balances on government surveillance and detention powers will be seen as another federal infringement on civil liberties that will not make America safer. It will, as a result, increase mistrust, dividing many Americans from their government. It should be rejected.

Department of Justice

STATEMENT

OF

MICHAEL BATTLE
UNITED STATES ATTORNEY
WESTERN DISTRICT OF NEW YORK

BEFORE THE

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

CONCERNING

TOOLS TO FIGHT TERRORISM: SUBPOENA AUTHORITY AND
PRETRIAL DETENTION OF TERRORISTS

PRESENTED ON

JUNE 22, 2004

STATEMENT OF MICHAEL BATTLE
UNITED STATES ATTORNEY
WESTERN DISTRICT OF NEW YORK

BEFORE THE
UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON TERRORISM, TECHNOLOGY
AND HOMELAND SECURITY

June 22, 2004

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

Good afternoon, and thank you for the opportunity to testify before you today. I currently serve as the United States Attorney for the Western District of New York. In that capacity, I have had first-hand experience with terrorism investigations and prosecutions. As a result of that experience, I can tell you that the safety of our fellow citizens would be significantly enhanced if federal law provided for the presumptive pretrial detention of terrorists. Mr. Chairman, you and Senator Chambliss have introduced a bill to do just that. The Pretrial Detention and Lifetime Supervision of Terrorists Act of 2003, S. 1606, is an important and much needed piece of legislation and the Department of Justice strongly urges the Congress to pass it as soon as possible.

Let me begin by explaining the nature of the problem that this bill is intended to fix. While it may seem intuitive that those charged with the most serious crimes, and who pose a flight risk or a danger to the community, should be detained before trial, under current law, that

is not always the case. Although defendants in federal cases who are accused of certain crimes are presumptively denied pretrial release under 18 U.S.C. § 3142(e), the specific enumerated list of such crimes contained in that statute does not include most terrorism offenses. The consequences of this gap in the law were noted by President Bush who, in a September 10, 2003, speech at the FBI Academy, said:

> 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.

Mr. Chairman, your bill would answer the President's call to action to close this loophole. The bill would amend 18 U.S.C. § 3142(e) to presumptively deny 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 change in the law would not result in the automatic detention of individuals charged with those offenses, but merely a rebuttable presumption in favor of detention, a presumption that could be overcome with evidence from the accused that favors release. Adding all terrorism offenses to the list of crimes for which there is a presumption in favor of detention is warranted because of the unparalleled magnitude of the potential danger posed to our fellow citizens by acts of terrorism. These acts, moreover, are many times committed by individuals who are part of larger groups – many with international connections – that are often in a position to help their

members flee or go into hiding if released before trial.

It is important to emphasize that this proposed legislation does not represent a solution in search of a problem. This problem is a very real one and, unless fixed, the threat posed by this problem will remain clear and present. I want to share with the Subcommittee one real-life example of how the current statutory scheme can impede terrorism investigations and prosecutions and endanger the community, and why a legislative solution is necessary. In a recent terrorism case from my district involving several defendants, collectively known as the "Lackawanna Six," the government sought an order for pre-trial detention for each of the defendants. The defendants, of course, opposed our motion. Because Section 3142 does not presently include a presumption for pre-trial detention in terrorism cases, a nearly three-week hearing on the issue of detention followed. In the course of that hearing, we were forced to disclose a substantial amount of our evidence against the defendants. In fact, the Magistrate Judge presiding over the hearing went so far as to consider a request by the defense to require us to put an FBI agent on the stand so that he could be cross-examined by defense counsel. Fortunately, the Magistrate Judge denied this request by the defense, thus avoiding a "mini-trial" which would have put the government at a significant tactical disadvantage due to what would have been the premature disclosure of even more of our trial evidence. Moreover, without the presumption of detention in this case, the Magistrate Judge did authorize the release of one of the defendants. Although that defendant failed to post bail and therefore was not released, it was later revealed that this defendant had been the least candid of the six and had, in fact, lied to the

FBI about the fact that he had met with Usama Bin Laden in Afghanistan. All six of these defendants pled guilty to providing material support to al Qaeda. They were sentenced to prison terms ranging from seven to ten years.

If the law had contained a presumption in favor of pre-trial detention applicable to the charges in the "Lackawanna Six" case, it is unlikely that the government would have been required to prematurely disclose so much evidence, and it is virtually certain that the hearing would not have lasted almost three weeks. However, let me remind you that even with a presumption of detention in this case, defense counsel would have had an opportunity to argue and present evidence against detention.

In addition to tactical concerns, the absence of presumptive detention could permit terrorist suspects to go free altogether without facing justice. In one case, for instance, a Hezbollah supporter was charged with providing material support to a terrorist organization. He fled the country after being released on bail. After living overseas as a fugitive for six years, he surrendered to the FBI, and is now in U.S. custody.

These examples illustrate the dangerous loophole that exists in current law. Clearly, we are not talking about a purely theoretical problem that may or may not come up in the future; we are talking about real obstacles the government has faced in prosecuting the war on terrorism. Mr. Chairman, the passage of your bill would go a long way toward ensuring that such situations

cannot occur again.

Thank you again for allowing me the opportunity to present my perspective as a prosecutor in the field on this important issue. I look forward to answering any questions you may have.

Department of Justice

STATEMENT

OF

RACHEL BRAND
PRINCIPAL DEPUTY ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL POLICY

BEFORE THE

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

CONCERNING

TOOLS TO FIGHT TERRORISM: SUBPOENA AUTHORITY AND
PRETRIAL DETENTION OF TERRORISTS

PRESENTED ON

JUNE 22, 2004

Hearing before the United States Senate Judiciary Committee,

Subcommittee on Terrorism, Technology and Homeland Security:

"Tools to Fight Terrorism: Subpoena Authority and Pretrial Detention of Terrorists"

Testimony of Rachel Brand, Principal Deputy Assistant Attorney General,

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June 22, 2004

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

Thank you for giving me the opportunity to testify at this important hearing. The Department of Justice appreciates your leadership in preserving and promoting the government's ability to prosecute the war on terror. The proposals we will discuss today – administrative subpoenas and the presumptive pretrial detention of terrorist suspects – would provide law enforcement with important new counter-terrorism tools that could make a critical difference in certain cases.

My testimony today will focus on the potential usefulness of administrative subpoenas in terrorism investigations. My fellow witness, Michael Battle, the United States Attorney for the Western District of New York, will testify about the need for presumptive pretrial detention of terrorist suspects.

In combating terrorism, prevention is key. The entire Department of Justice has shifted its focus to a proactive approach to terrorism, reflecting the reality that it is not good enough to wait to prosecute terrorist crimes after they occur. For the law-enforcement officers responsible for staying a step ahead of the terrorists in these investigations, time is critical. Even a brief delay in an investigation could be disastrous. Therefore, these officers need tools that allow them to obtain information and act as quickly as possible. Administrative subpoenas are one tool that will enable investigators to avoid costly delays.

An administrative subpoena is an order from a government official to a third party, instructing the recipient to produce certain information. Because the subpoena is issued directly by an agency official, it can be issued as quickly as the development of an investigation requires.

Administrative subpoenas are a well-established investigative tool, currently available in a wide range of civil and criminal investigations. A 2002 study by the Office of Legal Policy identified approximately 335 administrative subpoena authorities existing in current law. *See Report to Congress on the Use of Administrative Subpoena Authorities by Executive Branch Agencies and Entities* at 5 (May 13, 2002) (available at http://www.usdoj.gov/olp/intro.pdf). These authorities allow the use of administrative subpoenas 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); threats against the President and others under Secret Service protection, *see id.*; and false claims against the United States, *see* 31 U.S.C. § 3733.

Administrative subpoenas are not, however, currently available to the FBI for use in terrorism investigations. This disparity in the law is illogical, especially considering the

particular need for quick action in terrorism investigations and the potentially catastrophic 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."

The legislation introduced by Chairman Kyl would fix this anomaly in the law and level the playing field between terrorism investigations and other criminal investigations by giving the FBI authority to use administrative subpoenas in investigations of federal crimes of terrorism.

Although grand jury subpoenas are a sufficient tool in many investigations, there are circumstances in which an administrative subpoena would save precious minutes or hours in a terrorism investigation. For example, the ability to use an administrative subpoena will eliminate delays caused by factors such as the unavailability of an Assistant United States Attorney to immediately issue a grand-jury subpoena, especially in rural areas; the time it takes to contact an Assistant United States Attorney in the context of a time-sensitive investigation; the lack of a grand jury sitting at the moment the documents are needed (under federal law, the "return date" for a grand-jury subpoena must be on a day the grand jury is sitting); or the absence of an empaneled grand jury in the judicial district where the investigation is taking place, a rare circumstance that would prevent a grand-jury subpoena from being issued at all.

To appreciate the potential importance of an administrative subpoena in a terrorism case, consider the following hypothetical example. On Friday afternoon, counter-terrorism

investigators learn that members of an al Qaeda cell have purchased bomb-making materials from a chemical company. They want to obtain records relating to the purchase that may reveal what chemicals the terrorists bought, as well as delivery records that might reveal the terrorists' location. Investigators reach a prosecutor, who issues a grand jury subpoena for those records. But because the grand jury is not scheduled to meet again until Monday morning and the recipient of a grand jury subpoena is not required to produce the records until the next time the grand jury meets, investigators may not be able to obtain the information for three days – during which time the al Qaeda cell may have executed its plan. If investigators had the authority to issue an administrative subpoena, they could obtain the records immediately and neutralize the cell.

In addition to providing an important new law enforcement authority, Chairman Kyl's bill contains important protections against over-reaching. It would not give the Justice Department unilateral authority to compel production of documents relevant to a terrorism investigation. If a recipient refused to comply with a subpoena, the Justice Department would be required to ask a court to enforce it. And the recipient would retain the ability, as with other types of subpoenas, to ask a court to quash the subpoena.

Because the bill would apply only to terrorism investigations, in which confidentiality is often critical to the success of the investigation, it would prohibit a recipient of a subpoena from disclosing the subpoena in cases in which the Attorney General certified that disclosure would endanger the national security. A knowing violation of such a non-disclosure requirement would be punishable by up to a year of imprisonment, and the offense would carry a penalty of up to

five years of imprisonment if the unlawful disclosure were committed with the intent to obstruct the investigation.

However, the bill would impose several safeguards on the use of the nondisclosure provision. The requirement would last only until the Attorney General determined that the nondisclosure requirement was no longer justified by a danger to the national security, and the recipient of the subpoena would be notified that the obligation had expired. In addition, notwithstanding the nondisclosure requirement, the recipient would be allowed to discuss the subpoena with his or her attorney. The recipient could challenge the nondisclosure obligation in federal court, and the court could set it aside if doing so would not endanger the national security.

The bill also would immunize against civil liability individuals who comply with an administrative subpoena – just as existing administrative-subpoena authorities do. *See, e.g.*, 18 U.S.C. § 3486(d). Administrative subpoenas thus protect third parties who have information relevant to a terrorism investigation and would be willing to provide it to investigators but for a fear of incurring civil liability for disclosure.

In short, this bill would advance law enforcement's proactive approach to preventing terrorism by giving officers the tools they need to conduct time-sensitive investigations without unnecessary delay, all while providing appropriate safeguards.

Again, I thank you, Mr. Chairman, for inviting me to testify. I look forward to answering your questions and those from other members of the Subcommittee.

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Statement of U.S. Senator Russ Feingold
For the Terrorism, Technology and Homeland Security Subcommittee of the Senate Judiciary Committee Hearing on Legal Anti-Terrorism Tools

June 22, 2004

Mr. Chairman, I first want to thank you for allowing me to join you here today. Senator Feinstein, who is the ranking member of this Subcommittee, was unable to attend today because of a previous commitment to attend an Intelligence Committee briefing with Director Tenet.

I have always been impressed with the seriousness of the work done in the Subcommittee on Terrorism, Technology and Homeland Security. Today's hearing is no exception. As I have repeatedly said, protecting the country against terrorism should be our nation's top priority. Deciding what powers we are going to grant to law enforcement in the fight against terrorism is one of the most critical issues confronting Congress and I am glad that we are taking deliberate steps to consider this very important issue.

I must also express my disappointment, however, at the narrow focus of this hearing. Many members of the Judiciary Committee, both Republicans and Democrats, have been publicly seeking a hearing on how the Patriot Act is being used and a real debate on whether some of the most controversial provisions of that Act could be improved to better balance the needs of law enforcement with the civil liberties and privacy of the American people.

In fact, Senator Feinstein, like many of us in Congress, has still not received basic answers to her letters written to the Department of Justice about the Patriot Act. She has written to the Department of Justice two times this year and has yet to receive a response. And she is not alone. I have repeatedly asked for information about how some of the most controversial provisions of the Patriot Act, like section 215, have been used and have not received

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satisfactory responses. For us to have a meaningful conversation, it needs to be a two-way conversation.

Rather than convening to explore how the Administration is utilizing the powers already granted to it under the original Patriot Act, we are here today to learn about Administration requests for even more authority. While I am disappointed that the focus of this hearing is so narrow, I do hope it will help to inform us about whether we need to give the Department of Justice even more power and, if the answer is yes, then what safeguards should be built into that authority.

Today we will be hearing about proposals to create a new, broad subpoena authority that bypasses the grand jury system in terrorism cases and an expanded presumptive right to pre-trial detention for people charged with any terrorism-related crime. The Administration is apparently reluctant to allow these proposals to be linked to the Patriot Act. But a version of these proposals did appear in the draft "Patriot II" leaked last year, entitled the "Domestic Security Enhancement Act."

As our nation faces terrorist threats, we must respond to those threats without compromising the civil liberties that are the bedrock of our country. We must balance the legitimate needs of law enforcement against the privacy and freedom of all Americans, the vast majority of whom are innocent of any association with terrorists. An essential tenet of any plan to keep Americans safe must be a dedication to safeguarding the civil rights and liberties that define this great nation.

The criminal justice system has by and large served us well. Over the years, we have used our criminal justice system to successfully prosecute rapists, pedophiles, drug dealers, street gangs, murderers, organized crime, and others while respecting important civil rights.

I hope the witnesses today will be able to tell us why these new powers are needed in the fight against terrorism. The burden is on the Administration to show Congress and the American people why current law is inadequate, why federal law enforcement needs even more power, and how the powers it already has under the Patriot Act and the new powers it now seeks are consistent with the Constitution and Bill of Rights.

I share the chairman's commitment to protecting Americans from terrorism. But, at the same time, we cannot ignore the FBI's history of abusing its authority in launching investigations against civil rights and anti-war activists. Taking into account this history of targeting activists that challenge the government policies, the language of the pretrial detention bills is particularly disturbing. In fact, the pre-trial detention bill, S. 1606, would include traditional forms of political activism in the definition of terrorism.

Mr. Chairman, we should take a considered and measured course when creating new powers, choosing to build upon the well-tested powers already contained in the criminal code if necessary. For that reason, I am pleased James K. Robinson, former Assistant Attorney General for the Department of Justice Criminal Division, is with us today to share his wealth of knowledge and experience on these issues. I wish to extend a special welcome to Mr. Robinson and express my great appreciation for his willingness to join us on such short notice.

With respect to the Patriot Act, I believe that Americans support common sense proposals to protect privacy and civil liberties that would not in any way undermine the fight against terrorism. They have asked the Administration and Congress to listen. Hearing their concerns and acting on them is the right and patriotic thing to do. So, as we begin this hearing today on a set of proposed new tools to fight terrorism, I urge all participants to engage in an open and honest dialogue with Congress and the American people about how to combat the very real threat of terrorism while respecting the freedoms of all Americans.

Thank you, Mr. Chairman. I look forward to hearing from the witnesses.

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Statement of Chairman Orrin G. Hatch
Before the United States Senate Committee on the Judiciary
Subcommittee on Terrorism, Technology and Homeland Security
Hearing on

"TOOLS TO FIGHT TERRORISM: SUBPOENA AUTHORITY AND PRETRIAL DETENTION OF TERRORISTS"

I want to thank Senators Kyl and Feinstein for holding this hearing today 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. Since last September, the Senate Judiciary Committee, including its subcommittees, has held 19 hearings related to terrorism. I am confident that we will continue to work together in the future as we continue this series of hearings.

Today's hearing highlights the need for our pre-trial detention statute to include a presumption against release for those charged with a terrorist-related crime. In addition, the Subcommittee will exam the need to expand the administrative subpoena authority for terrorism investigations.

Current law provides that a defendant charged with certain major crimes of violence and drug trafficking offenses is presumed to be a danger and will be detained unless that person can demonstrate that they are not dangerous. Unfortunately, there is no similar presumption of detention under current law for a person charged with terrorist crime. To apply presumptions of detentions to drug traffickers and violent criminals but not to terrorists defies common sense.

Additionally, current law provides certain federal officials who are conducting certain federal investigations the authority to request, on an official basis, documents from businesses. There are many areas where the law provides authority to the government to obtain documents by administrative subpoenas, such as in cases involving drug dealers, health care fraud, and environmental crimes. Moreover, for example, the Federal Food, Drug, and Cosmetic Act allows FDA inspectors to make warrantless searches, during the normal course of business hours of literally tens of thousands business establishments and inspect and copy literally millions of pages of business records maintained by producers and distributors of foods, drugs, medical devices and cosmetics.

As I evaluate the debate in the war on terror and the need to provide additional authorities to law enforcement to fight this battle, I often look to existing legal authorities to determine whether additional authorities are needed in the terrorism arena. When deciding whether a new authority should be extended into the terrorism arena, I believe a good rule of thumb is if the tool is good a one to use against drug dealers; it is probably a helpful tool in the fight against terrorism.

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

HEARING — "TOOLS TO FIGHT TERRORISM: SUBPOENA AUTHORITY AND PRETRIAL DETENTION OF TERRORISTS"

JUNE 22, 2004

STATEMENT OF CHAIRMAN KYL

Good afternoon, and welcome to today's hearing of the Senate Judiciary Committee's Subcommittee on Terrorism, Technology, and Homeland Security. Today's hearing will focus on what additional tools the Justice Department might need in order to successfully prosecute the war on terrorism. In particular, today's hearing will focus on legislation that would extend direct subpoena authority to the FBI for antiterrorism investigations, and a bill that would add terrorism offenses to the list of crimes that are subject to a statutory presumption of no bail.

The Witnesses

I would first like to introduce today's witnesses. Rachel Brand is the Principal Deputy Assistant Attorney General in the Office of Legal Policy of the United States Department of Justice. Ms. Brand previously served as an Associate Counsel to the President in the White House and, prior to that, as an associate with the law firm Cooper, Carvin & Rosenthal. She has also served as a law clerk to U.S. Supreme Court Justice Anthony Kennedy, and to Massachusetts Supreme Judicial Court Justice Charles Fried.

Michael Battle is the United States Attorney for the Western District of New York. Prior to his current post, Mr. Battle served as an Erie County Family Court Judge in Buffalo, New York. He also previously has served as the Assistant Attorney General in Charge of the 8th Judicial Circuit with New York State Attorney General's Office, and as an Assistant Public Defender in the Federal Public Defender's Office for the Western District of New York. Finally, Mr. Battle also served seven years as an Assistant U.S. Attorney for the Western District of New York.

James K. Robinson currently is a member of the law firm of Cadwalader, Wickersham, and Taft here in Washington, D.C. From 1998 to 2001, Mr. Robinson was the Assistant Attorney General of the U.S. Justice Department's Criminal Division. Mr. Robinson also has served as a Dean and Professor of Law at Wayne State University Law School, as the United States Attorney for the Eastern District of Michigan, and as Chairman of the Michigan Supreme Court Committee on Rules of Evidence. He is a co-author of the recently published "Courtroom Handbook on Michigan Evidence."

I would like to thank you all for taking the time to be here with us today – we appreciate your insights into the issues before us.

Justice Department Successes in the War on Terrorism

The recent years have been an extremely busy time for antiterror investigators. The Justice Department deserves praise for what it has accomplished since September 11. Worldwide, more than half of al Qaeda's senior leadership has been captured or killed. More than 3,000 al Qaeda operatives have been incapacitated. Within the United States, 4 different terrorist cells have been broken up -- cells located in Buffalo, Detroit, Seattle, and Portland. 284 individuals have been criminally charged to date, and 149 individuals have been convicted or pleaded guilty, including: shoe bomber Richard Reid, six members of the Buffalo terrorist cell, two members of the Detroit cell, Ohio truck driver Iyman Faris, and U.S.-born Taliban John Walker Lindh.

But: The Failure of 9/11 – And How "Minor" Gaps in the Law Made it Possible

Nevertheless, we cannot ignore that all of these successes were preceded by one massive law-enforcement and intelligence failure. In 2001, at least 19 foreign terrorists were able to enter this country and plan and execute the most devastating terrorist attack this nation has suffered.

The reasons why U.S. antiterror investigators failed to uncover and stop the September 11 conspiracy have now been explored by a Joint Inquiry of the House and Senate Intelligence Committees, other congressional committees and commissions, and are still being explored by the congressional 9/11 Commission. These various commissions and inquiries have reviewed in painstaking detail the

various pre-September 11 investigations that could have – but did not – prevent the September 11 plot. We have seen how close investigators came to discovering or disrupting the conspiracy, only to repeatedly reach dead ends or obstructions to their investigations.

In two of the most important pre-September 11 investigations, we now know exactly what stood in the way of a successful investigation: it was the laws that Congress wrote. Seemingly minor but nevertheless substantive gaps in our antiterror laws prevented the FBI from fully exploiting its best leads on the Al Qaeda conspiracy.

Zacarias Moussaoui

Perhaps the best known example of such a gap in the law involves Minneapolis FBI agents' pre-September 11 investigation of Al Qaeda member Zacarias Moussaoui. Recent hearings before the 9/11 Commission have raised agonizing questions about the FBI's pursuit of Moussaoui. Commissioner Richard Ben-Veniste noted the possibility that the Moussaoui investigation could have allowed the United States to "possibly disrupt the [9/11] plot." Commissioner Bob Kerrey even suggested that with better use of the information gleaned from Moussaoui, the "conspiracy would have been rolled up."

Moussaoui was arrested by Minneapolis FBI agents several weeks before the September 11 attacks. That summer, instructors at a Minnesota flight school became suspicious when Moussaoui, with little apparent knowledge of flying, asked to be taught to pilot a 747. The instructors contacted the Minneapolis office of the FBI, which immediately suspected that Moussaoui might be a terrorist.

FBI agents opened an investigation of Moussaoui and sought a FISA national-security warrant to search his belongings. For three long weeks, these FBI agents were denied that FISA warrant. No search occurred before September 11. After the attacks (and largely because of them), the agents were issued an ordinary criminal warrant to search Moussaoui. Information in Moussaoui's belongings then linked him to two of the actual 9/11 hijackers, and to a high-level organizer of the attacks who later was arrested in Pakistan.

The 9/11 Commissioners are right to ask whether more could have been done to pursue this case. This case was one of our best chances at stopping or disrupting the September 11 attacks. The problem is that, given the state of the law at the time, the answer to the commissioners' question is probably "no." In fact, given the state of the law today, the answer to the question is still "no." FBI agents were blocked from searching Moussaoui because an outdated requirement of the 1978 FISA statute. Unfortunately, one of the statute's requirements is that the target of an investigation be an agent of a "foreign power," such as a foreign government or terrorist group. The law does not allow searches of apparent lone-wolf terrorists such as Zacarias Moussaoui – suspects who have no known connection to any terror group.

According to FBI Director Robert Mueller, this gap in FISA probably would have prevented the FBI from using FISA against *any* of the September 11 hijackers. As the Director noted in his testimony before the Judiciary Committee in 2002, "prior to September 11, [of] the 19 or 20 hijackers, * * * we had very little information as to any one of the individuals being associated with * * * * a particular terrorist group."

At the beginning of this Congress, Senator Schumer and I introduced legislation that would fill this gap in the law, and allow FBI to use FISA to monitor and search actual or apparent lone-wolf terrorists. That bill was unanimously approved by the Senate Judiciary Committee in April of 2003, and was overwhelmingly approved by the full Senate that May. It currently awaits action by the House of Representatives.

Khalid Al Mihdhar

Another pre-September 11 investigation also came tantalizing close to substantially disrupting or even stopping the terrorists' plot – and also was ultimately blocked a flaw in our antiterror laws. This investigation involved Khalid Al Midhar. Midhar was one of the eventual suicide hijackers of American Airlines Flight 77, which was crashed into the Pentagon, killing 58 passengers and crew and 125 people at the Pentagon.

An account of a pre-September 11 investigation of Midhar is provided in the 9/11 Commission's Staff Statement No. 10. That statement notes as follows:

> During the summer of 2001 a CIA agent asked an FBI official * * * to review all of the materials from an Al Qaeda meeting in Kuala Lumpur, Malaysia one more time. * * * * The FBI official began her work on July 24 of 2001. That day she found the cable reporting that Khalid Al Mihdhar had a visa to the United States. A week later she found the cable reporting that Mihdhar's visa application – what was later discovered to be his first application – listed New York as his destination. * * * * The FBI official grasped the significance of this information.
>
> The FBI official and an FBI analyst working the case promptly met with an INS representative at FBI Headquarters. On August 22 INS told them that Mihdhar had entered the United States on January 15, 2000, and again on July 4, 2001. * * * * The FBI agents decided that if Mihdhar was in the United States, he should be found.

At this point, the investigation of Khalid Al Midhar came up against the infamous legal "wall" that separated criminal and intelligence investigations at the time. The Joint Inquiry Report of the House and Senate Intelligence Committees describes what happened next:

> Even in late August 2001, when the CIA told the FBI, State, INS, and Customs that Khalid al-Mihdhar, Nawaf al-Hazmi, and two other "Bin Laden-related individuals" were in the United States, FBI Headquarters refused to accede to the New York field office recommendation that a criminal investigation be opened, which might allow greater resources to be dedicated to the search for the future hijackers. * * * * FBI attorneys took the position that criminal investigators "CAN NOT" (emphasis original) be involved and that criminal information discovered in the intelligence case would be "passed over the wall" according to proper procedures. An agent in the FBI's New York field office responded by e-mail, saying: "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."

The 9/11 Commission has reached the following conclusion about the effect that the legal wall between criminal and intelligence investigations had on the pre-September 11 investigation of Khalid al Mihdhar:

> Many witnesses have suggested that even if Mihdhar had been found, there was nothing the agents could have done except follow him onto the planes. We believe this is incorrect. Both Hazmi and Mihdhar could have been held for immigration violations or as material witnesses in the Cole bombing case. Investigation or interrogation of these individuals, and their travel and financial activities, also may have yielded evidence of connections to other participants in the 9/11 plot. In any case, the opportunity did not arise.

As we all know, the USA Patriot Act dismantled the legal wall between intelligence and criminal investigations. The Patriot Act was enacted too late, however, to have aided pre-September 11 investigations.

Are There Still Gaps in the Law that Might Permit Another September 11?

What the various reports and commissions investigating the 9/11 attacks have shown us so far is that where our antiterror laws are concerned, even seemingly little things can make a big difference. Before September 11, few would have thought that the lack of authority in FISA for FBI to monitor and search lone-wolf terrorists might be decisive as to our ability to stop a major terrorist attack on U.S. soil. And before September 11, though there was some attention to the problems posed by the perceived legal wall between intelligence and criminal investigations, and some efforts were made to lower that wall, there was little sense of urgency to the matter. These all seemed like legal technicalities – not problems that could eventually lead to the deaths of almost 3000 Americans.

Pretrial Detention

The bills that this subcommittee is reviewing today also might seem to be simply legal and technical. In most cases, for example, prosecutors are able to win a denial of bail for terrorist suspects, even though not all terrorist crimes are subject to the same presumption of no bail that applies, for example, to many drug offenses. We do know, however, of at least one case where a terrorist suspect was

able to win pretrial release – and then fled from the United States to the Middle East. That suspect was eventually captured six years later. During that time, he was not a participant in a terrorist attack against the United States – but he could have been.

Judicially Enforceable Terrorism Subpoenas (JETS)

Earlier today, I also introduced legislation that would authorize the FBI to employ judicially enforceable subpoenas in terrorism investigations. My bill would require the FBI to go to federal court to enforce the subpoena in the event that the recipient declines to comply with it. It would also allow the recipient to make the first move and go to court to challenge the subpoena.

This bill also makes what could be regarded as a merely technical change. As today's witnesses know, the FBI already has ways of obtaining a subpoena when it needs one for a terrorism investigation: it simply finds an Assistant U.S. Attorney and asks him to issue a grand-jury subpoena to investigate a potential crime of terrorism.

The advantages of the JETS Act – of giving the FBI direct authority to issue subpoenas – are not so much substantive as procedural: JET subpoenas would not be limited in their return date by when a grand-jury is convened, and FBI investigators would not need to track down an Assistant U.S. Attorney in order to issue the subpoena. As a result, in some cases JET subpoenas could be issued much more quickly than could a grand-jury subpoena. It takes little imagination to see why this could make a difference in a fast-moving terrorism investigation.

JETS Are Little Different From Grand-Jury Subpoenas

As today's witnesses also know, the name "grand-jury subpoena" does not mean that the grand jury itself issues the subpoena. Instead, a grand-jury subpoena is issued by an individual federal prosecutor, without any prior involvement by a judge or grand jury. As the U.S. Court of Appeals for the District of Columbia has noted, "[i]t is important to realize that 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 at 80 n. 11 (1985).

Like the grand-jury subpoenas currently used to investigate potential crimes of terrorism, JET subpoenas also would be issued directly by investigators, without pre-approval from a court. It is thus important to keep in mind that a subpoena is merely a *request* for information – a request that cannot be enforced until its reasonableness has been reviewed by a federal judge. Christopher Wray, the Assistant Attorney General for the Criminal Division, explained the nature of this type of authority in his answers to written question following his October 2003 appearance before the Judiciary Committee:

> The FBI could not unilaterally enforce an administrative subpoena issued in a terrorism investigation. As with any other type of subpoena, the recipient of an administrative subpoena issued in a terrorism investigation would be able to challenge that subpoena by filing a motion to quash in the United States District Court for the district in which that person or entity does business or resides. If the court denied the motion to quash, the subpoena recipient could still refuse to comply. The government would then be required to seek another court order compelling compliance with the subpoena.

Constitutionality of Administrative Subpoenas

Finally, I would note that there can be little doubt as to the constitutionality of allowing the FBI direct subpoena authority for terrorism investigations. The U.S. Supreme Court first upheld the constitutionality of subpoena authority in 1911. *United States v. Wilson* concluded that "there is no unreasonable search and seizure when a writ, suitably specific and properly limited in scope, calls for the production of documents which * * * the party procuring [the writ's] issuance is entitled to have produced."

The Supreme Court also has explicitly approved the use of subpoenas by administrative agencies. For example, in *Oklahoma Press Pub. Co. v. Walling* (1946), the Court found that the investigative role of an executive official in issuing a subpoena "is essentially the same as the grand jury's, or the court's in issuing other pretrial orders for the discovery of evidence." Nearly fifty years ago, the U.S. Supreme Court in *Walling* was able to conclude that Fourth Amendment objections to the use of subpoenas by executive agencies merely "raise[] the ghost of controversy long since settled adversely to [that] claim."

Conclusion

I again thank my colleagues for taking the time to attend this hearing. To many, the issues raised by this hearing may seem like minor, technical matters. But as the painful experience of reviewing the failures that led to the September 11 attacks has shown, even small problems – even relatively minor gaps in the law – can make the difference in whether a terrorist plot against the American people succeeds or not. Few would doubt that international terrorists will try to attack the United States again in the coming years. We are now all very aware of the seriousness of that threat. We would have absolutely no excuse were Congress to ignore the issues raised here today – and allow minor gaps in the law to allow another devastating terrorist attack to occur.

INTRODUCTION OF A BILL TO AUTHORIZE JUDICIALLY ENFORCEABLE TERRORISM SUBPOENAS (JETS)

STATEMENT OF U.S. SENATOR JON KYL

JUNE 22, 2004

Mr. KYL: Mr. President, I rise today to introduce a bill that would authorize the Justice Department to issue judicially enforceable subpoenas in terrorism investigations.

Mechanics of the Bill

Here is how the JETS Act would work: it would allow the FBI to subpoena documents and records "in any investigation of a Federal crime of terrorism." The bill would require the FBI to go to federal court to enforce the subpoena in the event that the recipient declines to comply with it. It would also allow the recipient to make the first move and go to court to challenge the subpoena. The JETS Act also would allow the Justice Department to temporarily bar the recipient of a JET subpoena from disclosing to anyone other than his lawyer that he has received it. The FBI could bar such disclosure, however, only if the Attorney General certifies that "otherwise there may result a danger to the national security of the United States." Also, the recipient of the subpoena would have the right to go to court to challenge the nondisclosure order. And finally, the JETS Act would protect the recipient from any civil liability that might otherwise result from his good-faith compliance with a JET subpoena.

Advantages of JET Subpoenas over Grand-Jury Subpoenas

At the outset, it bears mention that the FBI already has ways of obtaining a subpoena when it needs one for a terrorism investigation: it simply finds an Assistant U.S. Attorney and asks him to issue a grand-jury subpoena to investigate a potential crime of terrorism. The advantages of the JETS Act – of giving the FBI direct authority to issue subpoenas – are not so much substantive as procedural. These advantages principally are two:

1. A grand-jury subpoena's "return date" – the date by which the recipient of the subpoena is asked to comply – can only be a day on which a grand jury is convened. Therefore, a grand-jury subpoena issued on a Friday evening cannot have a return date that is earlier than the next Monday. The JETS Act would allow the FBI to set an earlier return date, so long as that date allows "a reasonable period of time within which the records or items [to be produced] can be assembled and made available."

2. Only an AUSA can issue a grand-jury subpoena. Therefore, whenever the FBI wants to use a grand-jury subpoena in a terrorism case, it must find an AUSA. This can be difficult and time consuming in remote locations. The JETS Act would allow the FBI to forego this exercise.

The Justice Department recently made its case as to why it should be given JETS authority in its answers to Senator Biden's written questions to Christopher Wray, the Assistant Attorney General for the Criminal Division, following Mr. Wray's testimony before the Judiciary Committee on October 21, 2003. Senator Biden asked Mr. Wray to cite "instances where your terrorism investigations have been thwarted due to an inability to secure a subpoena from a grand jury in a timely fashion." While Mr. Wray declined to provide the details of those instances when the lack of direct authority has posed a problem, he did offer the "following hypothetical situations, which could well arise, [and which] illustrate the need for this investigative tool:"

> "In the first scenario, anti-terrorism investigators learn that members of an Al Qaeda cell recently stayed at a particular hotel. They want to know how the cell members paid for their rooms, in order to discover what credit cards they may have used. When investigators ask the hotel manager to produce the payment records voluntarily, the manager declines to do so, explaining that company policy prohibits him from revealing such information about customers without legal process. If investigators had the authority to issue an administrative subpoena, the hotel manager could disclose the records about the Al Qaeda cell immediately without fear of legal liability. In this situation, where the speed and success of the investigation may be matters of life and death, this disclosure would immediately provide investigators with crucial information – such as the location of the terrorists and the nature of their purchases – with which to disrupt and prevent terrorist activity.
>
> "In the second hypothetical situation, anti-terrorism investigators learn on a Saturday morning that members of an Al Qaeda cell have bought bomb-making materials from a chemical company. They want to obtain records relating to the purchase that may reveal what chemicals the terrorists bought, as well as delivery records that might reveal the terrorists' location. The investigators might seek quickly to contact an Assistant United States Attorney, who might immediately obtain a grand-jury subpoena for the records. However, the third party who holds the records could lawfully refuse to furnish them until the subpoena's 'return date,' which must be on a day the grand jury is sitting. Because the grand jury is not scheduled to meet again until Monday morning, investigators may not be able to obtain the information for two days – during which time the Al Qaeda cell may execute its plot. If investigators had the authority to issue an administrative subpoena, which can set a very short or immediate response deadline for information, they may be able to obtain the records immediately and neutralize the cell."

Mr. Wray concluded his answer by noting that "[g]ranting FBI the use of [JETS 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."

Many Executive Agencies Have Subpoena Authority

To place the JETS Act in context, it bears noting that granting the FBI direct authority to issue subpoenas in terrorism cases would hardly be anomalous. As the Justice Department's Office of Legal Policy recently noted in a published report, "Congress has granted some form of administrative subpoena authority to most federal agencies, with many agencies holding several such authorities." (Report to Congress on the Use of Administrative Subpoena Authorities by Executive Branch Agencies and Entities, Pursuant to Public Law 106-544, Section 7.) The Justice Department "identified approximately 335 existing administrative subpoena authorities held by various executive-branch entities under current law." *Ibid.*

Among the more frequently employed of existing executive-subpoena authorities is 18 U.S.C. § 3486's permission for the Attorney General to issue subpoenas "[i]n any investigation of a Federal health care offense." According to the Public Law 106-544 Report, in the year 2001 the federal government used § 3486 to issue a total of 2,102 subpoenas in health-care-fraud investigations. These subpoenas uncovered evidence of "fraudulent claims and false statements such as 'upcoding,' which is billing for a higher level of service than that actually provided; double billing for the same visit; billing for services not rendered; and providing unnecessary services."

Executive agencies already have direct subpoena authority for many types of investigations. Thus it would not be exceptional for Congress grant the same authority to the FBI for terrorism cases. Indeed, as Mr. Wray noted in his above-cited answers to questions, "[b]ecause of the benefits that administrative subpoenas provide in fast-moving investigations, they may be more necessary in terrorism cases than in any other type of investigation." One can hardly contend that although the federal government can use subpoenas to investigate Mohammed Atta if it suspects that he is committing Medicare fraud, it should not be allowed to use the same powers if it suspects that he is plotting to fly airplanes into buildings.

Protections Against Abuse of Civil Liberties

Granting direct subpoena authority to the FBI for terrorism cases first was proposed by the President last year, near the time of the second anniversary of the September 11 attacks. There is one criticism of the President's proposal that was made at that time that I believe needs to be addressed. The New York Times, in a September 14 story, described unnamed "opponents" as denouncing the proposal for "allow[ing] federal agents to issue subpoenas without the approval of a judge or grand jury."

This criticism reflects a misunderstanding of grand-jury subpoenas. The anonymous opponents of the President's proposal appear to be under the impression that the grand jury itself

issues a grand-jury subpoena. This is not the case. Instead, a grand-jury subpoena is issued by an individual federal prosecutor, without any prior involvement by a judge or grand jury. As the U.S. Court of Appeals for the District of Columbia has noted, "[i]t is important to realize that 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 at 80 n. 11 (1985).

Like the grand-jury subpoenas currently used to investigate potential crimes of terrorism, JET subpoenas also would be issued directly by investigators, without pre-approval from a court. It is thus important to keep in mind that a subpoena is merely a *request* for information – a request that cannot be enforced until its reasonableness has been reviewed by a federal judge. As Mr. Wray noted on behalf of the Justice Department in his answers to Senator Biden's questions:

> "The FBI could not unilaterally enforce an administrative subpoena issued in a terrorism investigation. As with any other type of subpoena, the recipient of an administrative subpoena issued in a terrorism investigation would be able to challenge that subpoena by filing a motion to quash in the United States District Court for the district in which that person or entity does business or resides. If the court denied the motion to quash, the subpoena recipient could still refuse to comply. The government would then be required to seek another court order compelling compliance with the subpoena."

This system guarantees protection for civil liberties. The courts take very seriously their role in reviewing subpoena-enforcement requests. As the Third Circuit has emphasized, "the district court's role is not that of a mere rubber stamp, but of an independent reviewing authority called upon to insure the integrity of the proceeding." *Wearly v. FTC*, 616 F.2d at 665 (1980). The prospect of judicial oversight also inevitably restrains even the initial actions of executive agents. As the Public Law 106-544 Report notes, "an agency must consider the strictures of [a motion to quash or a challenge to an enforcement order] before issuing an administrative subpoena." And finally, the system of separated authority to issue and review subpoenas has itself been recognized to guard civil liberties. The federal courts have found that "[b]ifurcation of the 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." *United States v. Security State Bank and Trust*, 473 F.2d at 641 (5th Cir. 1973).

The administrative subpoena is a well-established investigative tool with built-in protections for civil liberties. Its use in antiterrorism investigations should not pose a threat to individual freedom.

The Constitutionality of Executive Subpoena Power

Finally, although the constitutionality of a tool so frequently used for so long might safely be assumed, it nevertheless merits describing exactly why subpoena power is consistent with the Fourth Amendment. A thorough explanation recently was provided by Judge Paul Niemeyer of

the U.S. Court of Appeals for the Fourth Circuit. As Judge Niemeyer noted, the use a subpoena does not require a showing of probable cause because a subpoena is not a warrant – it does not authorize an immediate physical intrusion of someone's premises in order to conduct a search. Rather, subpoenas are subject only to the Fourth Amendment's general reasonableness requirement – and they are reasonable in large part because of the continuous judicial oversight of their enforcement. As Judge Niemeyer stated in his opinion for the court in *In re Subpoena Duces Tecum*, 228 F.3d at 347-49 (2000) (citations omitted):

> "While the Fourth Amendment protects people "against unreasonable searches and seizures," it imposes a probable cause requirement only on the issuance of warrants. U.S. Const. amend. IV ("and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation," etc.). Thus, unless subpoenas are warrants, they are limited by the general reasonableness standard of the Fourth Amendment (protecting the people against "unreasonable searches and seizures"), not by the probable cause requirement.
>
> "A warrant is a judicial authorization to a law enforcement officer to search or seize persons or things. To preserve advantages of speed and surprise, the order is issued without prior notice and is executed, often by force, with an unannounced and unanticipated physical intrusion. Because this intrusion is both an immediate and substantial invasion of privacy, a warrant may be issued only by a judicial officer upon a demonstration of probable cause – the safeguard required by the Fourth Amendment. *See* U.S. Const. amend. IV ("no Warrants shall issue, but upon probable cause"). The demonstration of probable cause to a neutral judicial officer places a checkpoint between the Government and the citizen where there otherwise would be no judicial supervision.
>
> "A subpoena, on the other hand, commences an adversary process during which the person served with the subpoena may challenge it in court before complying with its demands. As judicial process is afforded before any intrusion occurs, the proposed intrusion is regulated by, and its justification derives from, that process.
>
> * * * *
>
> "If [the appellant in this case] were correct in his assertion that investigative subpoenas may be issued only upon probable cause, the result would be the virtual end to any investigatory efforts by governmental agencies, as well as grand juries. This is because the object of many such investigations – to determine whether probable cause exists to prosecute a violation – would become a condition precedent for undertaking the investigation. This unacceptable paradox was noted explicitly in the grand jury context in *United States v. R. Enterprises, Inc.*, where the Supreme Court stated:

> "[T]he Government cannot be required to justify the issuance of a grand jury subpoena by presenting evidence sufficient to establish probable cause because the very purpose of requesting the information is to ascertain whether probable cause exists."

The U.S. Supreme Court first upheld the constitutionality of subpoena authority in 1911. *United States v. Wilson*, 31 S.Ct. at 542, concluded that "there is no unreasonable search and seizure when a writ, suitably specific and properly limited in scope, calls for the production of documents which * * * the party procuring [the writ's] issuance is entitled to have produced."

The *Wilson* Court also noted that the subpoena power has deep roots in the common-law tradition – roots that stretch at least to Elizabethan times:

> "no doubt can be entertained that there must have been some process similar to the subpoena duces tecum to compel the production of documents, not only before [the] time [of Charles the Second], but even before the statute of the 5th of Elizabeth. Prior to that statute, there must have been a power in the Crown (for it would have been utterly impossible to carry on the administration of justice without such power) to require the attendance in courts of justice of persons capable of giving evidence, and the production of documents material to the cause, though in the possession of a stranger."

The Supreme Court also has explicitly approved the use of subpoenas by executive agencies. In *Oklahoma Press Pub. Co. v. Walling*, 66 S.Ct. 494 (1946), the Court found that the investigative role of an executive official in issuing a subpoena "is essentially the same as the grand jury's, or the court's in issuing other pretrial orders for the discovery of evidence." Nearly fifty years ago, the U.S. Supreme Court in *Walling* was able to conclude that Fourth Amendment objections to the use of subpoenas by executive agencies merely "raise[] the ghost of controversy long since settled adversely to [that] claim."

Because granting direct subpoena authority to antiterror investigators would aid them in their important work, and would neither intrude upon civil liberties nor conflict with the Constitution, I propose the following bill, which would authorize judicially enforceable terrorism subpoenas.

Mr. President, I ask unanimous consent that the text of the bill be printed in the RECORD.

108TH CONGRESS
2D SESSION

S. _____

IN THE SENATE OF THE UNITED STATES

Mr. KYL introduced the following bill; which was read twice and referred to the Committee on _____

A BILL

To authorize the use of judicially enforceable subpoenas in terrorism investigations.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Judicially Enforceable Terrorism Subpoenas Act of 2004".

SEC. 2. ADMINISTRATIVE SUBPOENAS IN TERRORISM INVESTIGATIONS.

(a) IN GENERAL.—Chapter 113B of title 18, United States Code, is amended by inserting after section 2332f the following:

1 **"§ 2332g. Judicially enforceable terrorism subpoenas**

2 "(a) AUTHORIZATION OF USE.—

3 "(1) IN GENERAL.—In any investigation con-
4 cerning a Federal crime of terrorism (as defined
5 under section 2332b(g)(5)), the Attorney General
6 may issue in writing and cause to be served a sub-
7 poena requiring the production of any records or
8 other materials that the Attorney General finds rel-
9 evant to the investigation, or requiring testimony by
10 the custodian of the materials to be produced con-
11 cerning the production and authenticity of those ma-
12 terials.

13 "(2) CONTENTS.—A subpoena issued under
14 paragraph (1) shall describe the records or items re-
15 quired to be produced and prescribe a return date
16 within a reasonable period of time within which the
17 records or items can be assembled and made avail-
18 able.

19 "(3) ATTENDANCE OF WITNESSES AND PRO-
20 DUCTION OF RECORDS.—

21 "(A) IN GENERAL.—The attendance of
22 witnesses and the production of records may be
23 required from any place in any State, or in any
24 territory or other place subject to the jurisdic-
25 tion of the United States at any designated
26 place of hearing.

1 "(B) LIMITATION.—A witness shall not be
2 required to appear at any hearing more than
3 500 miles distant from the place where he was
4 served with a subpoena.
5 "(C) REIMBURSEMENT.—Witnesses sum-
6 moned under this section shall be paid the same
7 fees and mileage that are paid to witnesses in
8 the courts of the United States.
9 "(b) SERVICE.—
10 "(1) IN GENERAL.—A subpoena issued under
11 this section may be served by any person designated
12 in the subpoena as the agent of service.
13 "(2) SERVICE OF SUBPOENA.—
14 "(A) NATURAL PERSON.—Service of a sub-
15 poena upon a natural person may be made by
16 personal delivery of the subpoena to that per-
17 son, or by certified mail with return receipt re-
18 quested.
19 "(B) BUSINESS ENTITIES AND ASSOCIA-
20 TIONS.—Service of a subpoena may be made
21 upon a domestic or foreign corporation, or upon
22 a partnership or other unincorporated associa-
23 tion that is subject to suit under a common
24 name, by delivering the subpoena to an officer,
25 to a managing or general agent, or to any other

1 agent authorized by appointment or by law to
2 receive service of process.
3 "(C) PROOF OF SERVICE.—The affidavit of
4 the person serving the subpoena entered by that
5 person on a true copy thereof shall be sufficient
6 proof of service.
7 "(c) ENFORCEMENT.—
8 "(1) IN GENERAL.—In the case of the contu-
9 macy by, or refusal to obey a subpoena issued to,
10 any person, the Attorney General may invoke the aid
11 of any court of the United States within the jurisdic-
12 tion of which the investigation is carried on, or the
13 subpoenaed person resides, carries on business, or
14 may be found, to compel compliance with the sub-
15 poena.
16 "(2) ORDER.—A court of the United States de-
17 scribed under paragraph (1) may issue an order re-
18 quiring the subpoenaed person, in accordance with
19 the subpoena, to appear, to produce records, or to
20 give testimony touching the matter under investiga-
21 tion. Any failure to obey the order of the court may
22 be punished by the court as contempt thereof.
23 "(3) SERVICE OF PROCESS.—Any process under
24 this subsection may be served in any judicial district
25 in which the person may be found.

1 "(d) NONDISCLOSURE REQUIREMENT.—

2 "(1) IN GENERAL.—If the Attorney General
3 certifies that otherwise there may result a danger to
4 the national security of the United States, no person
5 shall disclose to any other person that a subpoena
6 was received or records were provided pursuant to
7 this section, other than to—

8 "(A) those persons to whom such disclo-
9 sure is necessary in order to comply with the
10 subpoena;

11 "(B) an attorney to obtain legal advice
12 with respect to testimony or the production of
13 records in response to the subpoena; or

14 "(C) other persons as permitted by the At-
15 torney General.

16 "(2) NOTICE OF NONDISCLOSURE REQUIRE-
17 MENT.—The subpoena, or an officer, employee, or
18 agency of the United States in writing, shall notify
19 the person to whom the subpoena is directed of the
20 nondisclosure requirements under paragraph (1).

21 "(3) FURTHER APPLICABILITY OF NONDISCLO-
22 SURE REQUIREMENTS.—Any person who receives a
23 disclosure under this subsection shall be subject to
24 the same prohibitions on disclosure under paragraph
25 (1).

1 "(4) ENFORCEMENT OF NONDISCLOSURE REQUIRE-
2 MENT.—Whoever knowingly violates paragraphs (1) or (3)
3 shall be imprisoned for not more than 1 year, and if the
4 violation is committed with the intent to obstruct an inves-
5 tigation or judicial proceeding, shall be imprisoned for not
6 more than 5 years.
7 "(5) TERMINATION OF NONDISCLOSURE REQUIRE-
8 MENT.—If the Attorney General concludes that a non-
9 disclosure requirement no longer is justified by a danger
10 to the national security of the United States, an officer,
11 employee, or agency of the United States shall notify the
12 relevant person that the prohibition of disclosure is no
13 longer applicable.
14 "(e) JUDICIAL REVIEW.—
15 "(1) IN GENERAL.—At any time before the re-
16 turn date specified in a summons issued under this
17 section, the person or entity summoned may, in the
18 United States district court for the district in which
19 that person or entity does business or resides, peti-
20 tion for an order modifying or setting aside the sum-
21 mons.
22 "(2) MODIFICATION OF NONDISCLOSURE RE-
23 QUIREMENT.—Any court described under paragraph
24 (1) may modify or set aside a nondisclosure require-
25 ment imposed under subsection (d) at the request of

1 a person to whom a subpoena has been directed, un-
2 less there is reason to believe that the nondisclosure
3 requirement is justified because otherwise there may
4 result a danger to the national security of the
5 United States.

6 "(3) REVIEW OF GOVERNMENT SUBMISSIONS.—
7 In all proceedings under this subsection, the court
8 shall review the submission of the Federal Govern-
9 ment, which may include classified information, ex
10 parte and in camera.

11 "(f) IMMUNITY FROM CIVIL LIABILITY.—Any per-
12 son, including officers, agents, and employees of a non-
13 natural person, who in good faith produce the records or
14 items requested in a subpoena, shall not be liable in any
15 court of any State or the United States to any customer
16 or other person for such production, or for nondisclosure
17 of that production to the customer or other person.

18 "(g) GUIDELINES.—The Attorney General shall, by
19 rule, establish such guidelines as are necessary to ensure
20 the effective implementation of this section."

21 (b) AMENDMENT TO TABLE OF SECTIONS.—The
22 table of sections of chapter 113B of title 18, United States
23 Code, is amended by inserting after the item relating to
24 section 2332f the following:

"2332g. Judicially enforceable terrorism subpoenas.".

U.S. SENATOR PATRICK LEAHY

CONTACT: David Carle, 202-224-3693 VERMONT

Statement of Senator Patrick Leahy,
Ranking Member, Senate Judiciary Committee
Subcommittee on Terrorism, Technology and Homeland Security
Hearing On "Tools to Fight Terrorism:
Subpoena Authority and Pretrial Detention of Terrorists"
June 22, 2004

This hearing today is yet another example of the skewed priorities of those leading this Committee. Instead of focusing our limited time and resources on pressing issues such as this Administration's justification for invading Iraq or its policies on torture that appear to set the stage for the abuse of prisoners in U.S. custody, the Republican leaders on the Judiciary Committee have unilaterally chosen to hold a hearing on bail reform and administrative subpoenas, and at a time when the Ranking Democratic Member of the Subcommittee cannot be present.

Just last Thursday every Republican Member of the Judiciary Committee refused to join in a bipartisan effort to try to get to the bottom of the prisoner abuse scandal that has led to criticism of the United States around the world and that has magnified the risks for the women and men serving in America's Armed Forces and our citizens in other parts of the world. We were told last week that the Administration did not need a subpoena but would cooperate and produce the materials needed by the Senate Judiciary Committee to conduct effective oversight of the role of lawyers at the Justice Department and the White House in redefining our international obligations under the Torture Convention and the Geneva Conventions. To date, nothing has been produced – not the memoranda, copies of which the press has placed on the Internet, and not even an index of materials being withheld from this Committee, which is the Justice Department's oversight committee.

Further, while we await the Supreme Court's ruling on Executive Branch powers as they pertain to the President's authority to indefinitely detain U.S. citizens as enemy combatants, and as some in the Senate seek a serious consideration of how the USA PATRIOT Act powers have been used, the Administration continues to press for more. This administration's modus operandi is to demand additional executive authority whenever anyone starts to inquire how it has acted improperly and without justifying the misuse of the power it already has.

Based on the title of today's hearing, government witnesses today will presumably talk about the Administration's "need" for subpoena authority in criminal terrorism cases for the sole reason that there are other administrative subpoenas in the U.S. Code and despite

the fact that grand jury subpoenas are available in every terrorism case opened. In fact, the FBI already has far-reaching compulsory powers to obtain documents and witness testimony when it is investigating terrorism, under both its criminal and intelligence authority by way of search warrants, grand jury subpoenas, secret court orders and National Security Letters (or NSLs). More traditional investigative techniques are also available, including mail covers, trash runs, ex parte orders, and writs, just to name a few.

I hope the Administration's witnesses will explain why grand jury subpoenas, which are available in terrorism cases, are not adequate government power and individual agents need to wield administrative authority without supervision.

The Attorney General has pointed out several times that there are many administrative subpoena statutes in the U.S. Code. Of course he avoids clarifying that these provisions are in the context of administrative and regulatory programs such as occupational safety, mine safety, and the Securities and Exchange Commission. And each of these powers are subject to various checks and balances. They tend to be civil settings where a grand jury it not utilized. These other administrative subpoenas often issue directly to the subjects of investigations and are generally not subject to secrecy rules.

There are a handful of administrative subpoena powers that are in the criminal code. Because criminal proceedings are unique, and the ability to do harm to the target of a criminal investigation simply for being investigated is great, these existing powers are carefully crafted, limited and statute specific. It is often noted by those who press for these expanded powers that they are already available in health care fraud cases. It is important to remember that this is already a highly regulated area where civil and criminal proceedings are simultaneous and grand jury secrecy can impede an efficient parallel investigation.

There are good reasons why we should not, at this time, go even further down the path of unchecked, essentially unreviewable authority for this Administration to issue demands for documents and testimony.

I do not believe there is a Senate bill yet introduced on this matter. The one bill pending in Congress for expanding subpoena authorities to terrorism investigations was introduced in the House but has not been considered there. Why a Senate Committee must consider it today, in light of House inaction, is not clear to me when there are so many other matters on which we could and should be focused. Moreover, there are key differences between the House bill and these existing authorities. That bill was introduced by a Republican Congressman and is designed to allow the Government to obtain information, in secret, from entities that are not under investigation themselves but have customers whose records the Government is seeking. It would compel any recipient to give testimony, essentially forcing anyone to provide any requested information to the FBI. The persons under investigation would never know that their records have been sought or obtained in secret by the Government. It would be executed in complete secrecy for an unlimited period of time. With no other external check like a court or

grand jury, there would be almost limitless power to collect sensitive personal information. Current administrative subpoenas in Title 18 do not grant such powers.

Recently, FBI Director Mueller testified before the Senate Judiciary Committee, and I do not recall him telling us that he has not been able to do his job effectively. To the contrary, this administration places a great deal of emphasis on press conferences announcing the latest indictments or arrests in grand gestures of their effectiveness on the terrorism front.

My views are also colored by the lack of accountability and openness of this administration. Many on the Judiciary Committee have been seeking information about the implementation of FBI authorities after enactment of the USA PATRIOT Act. But it is like pulling teeth. One of these powers was the Section 215 subpoena – which gave the FBI the ability to seek a secret order from the Foreign Intelligence Surveillance Act (FISA) court to require the production of tangible items and documents. A simple question was asked by many in Congress: How often had the FBI sought to exercise this power? A direct answer could not be obtained. After months and much public outcry, the Attorney General selectively "declassified" some data and announced that these Section 215 subpoenas had never been sought to obtain evidence. Ironically, he made this announcement amidst the Administration's hard-court press for more authorities, despite having never used this particular law enforcement power.

More recently, a one-paragraph memo the Justice Department disclosed under court order last week revealed that the FBI did, in fact, ask the Department to seek permission from the FISA court to use this controversial power a month after the Attorney General said that power had never been used to obtain library records and business records without notifying the persons being investigated. This information was never provided, as far as I know, to the very Committee responsible for the oversight of these law enforcement powers, at the very time specific questions were being asked about their implementation. Instead, the Administration sought to perpetuate the impression that the opposite impression.

In recognizing the complexity in granting administrative subpoena power in any area, the Department of Justice issued, as required by law, an extensive report to Congress in 2002 on the Use of Administrative Subpoenas Authorities by Executive Branch and Entities. In it, the Department noted it would be neither "prudent nor practicable" to make recommendations peculiar to any particular administrative subpoena authority because there are differing purposes and contents for each. The Department concluded its report that it would "look forward to working with Congress and other agencies in the future to evaluate" potential changes. In this most important of contexts, there has been no such cooperation.

I recently made a joint appearance with Senator Hatch before the newspaper editors and publishers. Senator Hatch unreservedly reiterated his opposition to administrative subpoena authority. I share his skepticism of the need for granting more unfettered Government authority. We need accountability. With more oversight and accountability we may have averted the prisoner torture and abuse that America's enemies are using to recruit terrorists. With better oversight we might be getting a better handle on what has gone wrong and what needs fixing in the authorities already provided in the USA PATRIOT Act.

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STATEMENT OF JAMES K. ROBINSON
FORMER ASSISTANT ATTORNEY GENERAL FOR THE CRIMINAL DIVISION
DEPARTMENT OF JUSTICE

BEFORE THE
UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON TERRORISM, TECHNOLOGY
AND HOMELAND SECURITY

June 22, 2004

Mr. Chairman and members of the subcommittee, I am pleased to appear before you today to offer my views on the topic of S.___, the "Judicially Enforceable Terrorism Subpoenas Act." The issues before this subcommittee today are of critical importance to the Country and I commend the subcommittee for holding this hearing. I also want to thank you personally Mr. Chairman and Senator Feingold for your serious attention to the terrorist threat posed today to the United States and the world. While serving as the Assistant Attorney General For The Criminal Division, I was honored to work with the Judiciary Committee on many important criminal justice issues, and I am honored to appear here today to address these measures designed to help law enforcement in waging the war against terrorism.

As September 11, 2001 taught us all too well, terrorism presents a grave threat to our national security and to the safety of American citizens throughout the world. Indeed, recent events, including the heinous and vicious killing of Mr. Paul Johnson last week, demonstrate that Al-Qaeda and other terrorist groups wage their war against freedom and America without respecting human life and the fundamental principles of human rights. Thus, America must bring all of its resources to bear in the fight for freedom and against terrorism. The bill sponsored by Senator Kyl with respect to administrative subpoenas in terrorism cases is an example of America's continuing commitment to winning the battle against terrorism by examining all potential tools to assist law enforcement in this war. I appreciate this personal commitment to making America and Americans everywhere safer.

While I have no doubt that this bill and representative Feeney's bill in the House, HR 3037 (the "Antiterrorism Tolls Enhancement Act of 2003") are offered with America's best interests in mind, some of their provisions merit very careful consideration from both a law enforcement and a civil liberties perspective. These proposals merit the very careful analysis that the subcommittee is undertaking, and I congratulate the subcommittee for holding this hearing to give appropriate attention to the issues they present. I would like to address my remarks to an issue I trust the subcommittee cares deeply about: the importance of maintaining the critical balance between arming law enforcement with effective tools necessary to do its job quickly and effectively, while still continuing to protect the liberty rights of American citizens to be free from undue interference with their rights by their government. As the subcommittee may already appreciate, enacted as currently written, these proposals would fundamentally change the traditional limits on the power of law enforcement to interfere with the liberty rights of American

citizens in dealing with their government. More specifically, I encourage the subcommittee to carefully scrutinize how the new devices contained in these proposals curtail important checks and balances and could well create legal and constitutional challenges that could, in the end, cause the war on terrorism more harm than good.

As I read Senator Kyl's Judicially Enforceable Terrorism Subpoenas Act of 2004, the proposed bill would allow the Attorney General to delegate to law enforcement agents the power to issue administrative subpoenas to compel the attendance and testimony of American citizens at secret Executive-branch-only proceedings, and to require the production of any records found relevant or material to a terrorism investigation. Those who failed to comply with such a subpoena would be subject to civil and/or criminal penalties. Those who violate these bill's secrecy requirements could be prosecuted for doing so. Further, such subpoenas would be subject to judicial review only if a person who receives a subpoena challenges it in court through a motion to quash or some other means, and then only on very limited grounds. Congressman Feeney's bill is similar but broader in that the compelled testimony is not limited to custodians of subpoenaed materials concerning their production and authenticity.

Over the years, Congress has been reluctant to expand the powers of criminal law enforcement agents to interfere with the liberty and privacy rights of American citizens through administrative subpoenas used exclusively to conduct criminal investigations. While Congress has authorized administrative subpoenas in a variety of civil – and some criminal – contexts, the use of such subpoenas for criminal investigations raises a host of constitutional and policy issues not present in civil administrative matters. To my knowledge, Congress has never authorized the creation of a potentially secret Executive branch police proceeding of the type contemplated by these proposals. The benefit to law enforcement of granting this power must be carefully balanced against the potential loss of liberty involved. With limited exceptions, absent judicial process such as a search warrant, a grand jury subpoena or a trial subpoena, American citizens have always had the right to decline to answer questions put to them by the police or to deliver their documents without a search warrant. Just yesterday the Supreme Court, in *Hiibel v. Sixth Judicial District Court Of Nevada, Humboldt County, __U.S.__(2004),* while holding that a person stopped by the police in a proper *Terry* stop with reasonable suspicion must give his name to the police under a state statute requiring him or her to do so, the Court recognized that American citizens under our constitutional system generally have the right to refuse to answer questions put to them by the police or to agree to a request that he or she appear at the police station for questioning or face contempt of court charges and potential imprisonment until submitting to the questions of the police.

The administrative subpoenas for terrorism cases contemplated by the proposals under review in today's hearing would compel American citizens to appear for compelled questioning in secret before the Executive branch of their government without the participation or protection of the grand jury, or of a pending judicial proceeding, to answer questions and produce documents. No showing of reasonable suspicion, or probable cause or imminent need or exigent circumstances would be required to authorize such subpoenas. Years ago Justice Hugo Black, dissenting in *Anonymous v. Baker,* 360 U.S. 301, 299 (1959), condemned procedures authorizing "compelled testimony to be given in communicado," saying: "in fact it was Star Chamber judges who helped make closed door proceedings so obnoxious in this country that the bill of rights guarantees public trials and the assistance of counsel. And secretly compelled

testimony does not lose its highly dangerous potentialities merely because it represents only a 'preliminary inquisition . . . ."

The United States Supreme Court has held that witnesses appearing before federal grand juries need not be given the Miranda warnings in such proceedings because these proceedings are very different than the type of proceedings envisioned by the administrative subpoena proposals under review today. The Court in *United States v. Mandujano,* 425 U.S. 564, 579-80 (1976), made the point "that many official investigations, such as grand jury questioning, take place in a setting wholly different from custodial interrogation." the Court noted that: "the marked contrasts between a grand jury investigation and custodial interrogation have been commented on by the Court from time to time. Mr. Justice Marshall observed that the broad coercive powers of a grand jury are justified, because 'in contrast to the police--it is not likely that [the grand jury] will abuse those powers." (citations omitted). While my experience has been that federal agents act in good faith in conducting their investigations, nevertheless, as Mark Twain is quoted as having once said: "to a man with a hammer, a lot of things look like nails!" To an agent with an administrative subpoena, a lot of things may look like they need a subpoena. The Supreme Court noted that there are important safeguards present in the grand jury system that would simply not be present in the context of the secret *ex parte* proceedings contemplated by the proposed administrative subpoenas system. In *United States v. Williams,* Justice Scalia explained that the grand jury is "[r]ooted in long centuries of Anglo-American history" and "acts "as a kind of buffer or referee between the government and the people." *United States v. Williams,* 504 U.S. 36, 47 (1992)

While noting that the investigative power of federal grand juries are very substantial, the Supreme Court in *United States v. R. Enterprises,* 498 U.S. 292, 299 (1991), said: "the investigatory powers of the grand jury are nevertheless not unlimited . . . . Grand juries are not licensed to engage in arbitrary fishing expeditions, nor may they select targets of investigation out of malice or intent to harass." Critical to the integrity and effectiveness of the grand jury system for the investigation of federal crimes is the active participation of the skilled prosecutors of the Department of Justice and their supervisors acting pursuant to the detailed guidelines set forth in the United States Attorney's Manual. Their involvement not only makes for more effective investigations, it minimizes the likelihood of legal problems that can cause difficulties in the prosecution of the case at the post-investigative stage.

Today, with very few exceptions, subpoenas requiring Americans to provide secret sworn testimony and/or produce documents to the government in a criminal investigation, may only be issued by a grand jury with the active involvement of federal prosecutors. The secret proceeding contemplated by the proposals under review today appear virtually unprecedented, as is the potential that administrative subpoenas could be issued by federal agents without the approval of federal prosecutors. Indeed, the proposal creates a secret system not even available in the current grand jury system where under Rule 6(e) of the Federal Rules Of Criminal Procedure, witnesses are free to discuss the subject of their grand jury testimony on the courthouse steps after their appearance if they choose to do so. Under the proposals being considered today, such conduct with respect to an administrative subpoena would become a new federal crime. As a core constitutional institution adopted in this nation's earliest days, the grand jury has been the primary instrument used to investigate and charge federal crimes for well over two hundred years. The United States grand jury is a body of ordinary citizens that serves to protect the

innocent and indict those as to whom the grand jury has probable cause to believe to be guilty of a crime. Similarly, Justice Department prosecutors and federal judges protect the innocent and ensure that the justice system operates fairly and with due process. The United States Attorney's Manual has an elaborate system of checks and balances on the powerful investigative powers of the grand jury. Thus, the current subpoena issuance process serves as a check on the mistaken, or perhaps improper, use of power each time a subpoena is issued in a criminal case. As Assistant Attorney General, I testified before Congress against "reform" proposals to weaken the grand jury system by requiring lawyers in the grand jury and other measures. I did so because I believe this system has served America well over hundreds of years and that changes, including the creation of an alternative system not subject to those protections, should be undertaken with great caution.

Under Senator Kyl's proposed Judicially Enforceable Terrorism Subpoena Act of 2004 and Representative Feeney's proposed Antiterrorism Tools Enhancement Act of 2003, however, the grand jury or judge could be largely removed from the criminal investigative process in terrorism cases. The potential for checks on the abuse of governmental power would only exist where the person subpoenaed hires a lawyer to challenge the subpoena in federal court. Such a challenge would require a person to expend potentially substantial resources, and in many cases, the subpoenaed party holding information concerning third parties would have little incentive to expend the resources to do so. In many instances the person's whose privacy rights might be adversely impacted by the issuance of such a subpoena would never be notified that their documents have been sought by the government and they would have no standing to challenge the propriety of the subpoena in any case. At this point, it seems to me that the present system for investigating terrorism is far more consistent with our traditional notions of freedom and individual liberty than the system contemplated in these proposed bills.

I believe that any effort to change the current system in the dramatic way contemplated by these proposals should be supported by compelling evidence that there is a real need for federal agents to be granted this new investigative power. Furthermore, any power granted by Congress to meet such a need (if one is found) should be narrowly tailored to address the demonstrated need. If, for example, it is concluded that there is a real danger that the absence of the administrative subpoena power might prevent law enforcement from addressing a "imminent threat" to national security or from protecting the lives of American citizens from imminent danger, it might be appropriate to use the approach Congress took with respect to authorizing administrative subpoenas by the Secretary of the Treasury in cases where there is an imminent threat against a person protected by the Secret Service such as the President. I was pleased to see that the administrative subpoenas authorized by Senator Kyl's proposed bill uses a more tailored approach by proposing far less sweeping administrative subpoena powers than the bill proposed by Representative Feeney. As I understand it, Senator Kyl's bill would limit administrative subpoenas, at least in the first instance, to the production of "records or other materials" and testimony "by the custodian of the materials to be produced concerning the production and authenticity of those materials." I was, however, uncertain about the reasons, or the need, for authorizing a broader, court-ordered administrative subpoena in the event of "contumacy" or in cases where the documents are not produced in response to the subpoena. As I understand the proposal, in such cases, the court could compel "testimony touching the matter under investigation" that would not be limited to the production or authenticity of the documents

covered by the subpoena. Once the matter has reached this stage, the reason for not simply seeking a grand jury subpoena rather than pressing for an administrative subpoena is unclear.

As drafted, nothing in the bills proposed by Senator Kyl and Representative Feeney would prevent the administrative subpoena power from being delegated to federal prosecutors, agents of the Federal Bureau of Investigation or other law enforcement agents to use in their discretion without supervisory approval. While the bills direct the creation of Justice Department guidelines to "ensure the effective implementation" of this authorization for the use of administrative subpoenas, Congress would be delegating very substantial power to the Executive branch without knowing by whom that power would be employed or what limits, if any, would be placed upon its use. While our Nation's federal prosecutors and agents are extraordinary individuals and represent some of our Nation's best and brightest, I question whether - even if the case for administrative subpoenas in terrorism cases is made - it is wise for Congress to delegate such significant governmental power without insisting that its use be approved at the highest level of the government and be limited to the least intrusive implementation required to accomplish the objective of the legislation. For example, when Congress empowered the Secretary of the Treasury in 18 U.S.C. § 3486(a)(1)(ii) to approve the issuance of administrative subpoenas with respect to "an investigation of an imminent threat . . . against a person protected by the secret service," Congress required that the Director of the Secret Service determine that a threat against the Secret Service protectee be "imminent." When a finding of "imminence" is not appropriate, the Secret Service investigation proceeds in the normal course through the grand jury process. Perhaps a similar approach should be considered for terrorism cases when there is an imminent threat of harm to the national security or to human life.

Of course, individual rights are not absolute; those rights must be balanced against the need effectively to fight terrorism – perhaps the greatest danger to America that exists today. I am not yet convinced, however, that the administrative subpoena power is a necessary change in the law or that the subpoena power proposed in these bills are narrowly tailored enough to avoid unnecessary intrusion on the liberty rights of American citizens. I am also concerned that the easy availability of this new tool would result in federal agents bypassing the checks and balances built into our current grand jury system that requires the active involvement of federal prosecutors and compliance with the guidelines set forth in the United States Attorney's Manual for issuing grand jury subpoenas. The government already has numerous legal tools to obtain records and compel witnesses to testify. In exigent circumstances, a search without a warrant is even possible—assuming, of course, probable cause. Federal prosecutors routinely and easily receive grand jury subpoenas today. In addition, there are likely other ways of altering the subpoena issuance process in terrorism investigations that retain the checks on executive power discussed earlier. Additionally, the FBI presently uses national security letters that require businesses to turn over many kinds of records in counter-terror and counter-intelligence investigations. Another tool that the government presently uses to obtain records and evidence in terror probes is the FISA warrant, including an emergency FISA warrant approved personally by the Attorney General that provides a 72-hour window for wiretapping or eavesdropping before review by an intelligence court.

I believe that we must fight against terrorism and for freedom with all of our resources. However, as we fight for freedom, we must live freely, and in a way that shows the world that we respect, honor, and cherish our individual freedoms. Mr. Chairman and members of the subcommittee, that completes my prepared testimony. I appreciate the opportunity to appear before you and will be pleased to attempt to respond to your questions at this time.

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