Department of Justice

STATEMENT

OF

DANIEL J. BRYANT
ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL POLICY

BEFORE THE

SUBCOMMITTEE ON CRIME, TERRORISM,
AND HOMELAND SECURITY
COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES

CONCERNING

H.R. 3179, THE ANTI-TERRORISM INTELLIGENCE TOOLS
IMPROVEMENT ACT OF 2003

PRESENTED ON

MAY 18, 2004

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Good morning, Mr. Chairman and distinguished members of the Subcommittee. Thank you for the opportunity to appear before you today to discuss H.R. 3179, the Anti-Terrorism Intelligence Tools Improvement Act of 2003.

Since the brutal terrorist attacks of September 11, 2001, the Department of Justice has made significant strides in the war against terrorism. We have prosecuted many cases, among them being 310 individuals charged with criminal offenses as a result of terrorism investigations. 179 of these defendants already have been convicted. We have broken up terrorist cells in Buffalo, Charlotte, Portland, and northern Virginia. Due to interagency and international cooperation, nearly two-thirds of Al Qaeda's leadership worldwide has been captured or killed. And we are steadily dismantling the terrorists' financial network: around the world, $136 million in assets have been frozen in 660 accounts.

These successes would not have been possible without the support of Congress in general and this Subcommittee in particular. On behalf of the Department, I would like to thank you for providing us with the tools and resources that have made it possible for the Department to effectively wage the war against terrorism.

As recent events in Madrid and Saudi Arabia remind us, however, our fight against terrorism is far from over. Our nation's terrorist enemies remain determined to visit death and destruction upon the United States and its allies, and we must maintain our vigilance and resolve in the face of this continuing threat. It is for this reason that the Department of Justice's top priority remains the prevention and disruption of terrorist attacks before they occur. Rather than waiting for terrorists to strike and then prosecuting those terrorists for their crimes, the Department seeks to identify and apprehend terrorists before they are able to carry out their nefarious plans.

The success of this prevention strategy depends, however, upon the Department's capacity to detect terrorist plots before they are executed. And the key to detecting such plots in a timely manner is the acquisition of information. Simply put, our ability to prevent terrorism is directly correlated with the quantity and quality of intelligence we are able to obtain and analyze.

Following the terrorist attacks of September 11, Congress provided the Department in the USA PATRIOT Act with a number of important tools that have enhanced our ability to gather information so that we may detect and disrupt terrorist plots. To give just one example, before the USA PATRIOT Act, law enforcement agents possessed the authority to conduct electronic surveillance – by petitioning a court for a wiretap order – in the investigation of many ordinary, non-terrorism crimes, such as drug

crimes, mail fraud, and passport fraud. Investigators, however, did not possess that same authority when investigating many crimes that terrorists are likely to commit, such as chemical weapons offenses, the use of weapons of mass destruction, and violent acts of terrorism transcending national borders. This anomaly was corrected by section 201 of the PATRIOT Act, which now enables law enforcement to conduct electronic surveillance when investigating the full-range of terrorism crimes.

But while Congress and the Administration working together have made significant strides in improving the Department's capacity to gather the intelligence necessary to prevent terrorist attacks, there is still more that needs to be done. This is why I would like to thank Chairman Sensenbrenner and Chairman Goss for their leadership in introducing H.R. 3179, the Anti-Terrorism Intelligence Tools Improvement Act of 2003, and to thank this Subcommittee for holding a hearing on this important piece of legislation. The Department of Justice strongly supports H.R. 3179. The bill contains a number of significant reforms that would assist the Department's efforts to collect intelligence key to disrupting terrorist plots and better allow the Department to protect that information in criminal trials and immigration proceedings. In my testimony today, I will briefly review the five substantive provisions contained in H.R. 3179 and explain why the Department believes that each one of them would assist our efforts in the war against terrorism.

To begin with, H.R. 3179 would amend the Foreign Intelligence Surveillance Act to allow for surveillance of so-called "lone wolf" international terrorists. Currently, the definition of "agent of a foreign power" found in FISA includes individuals with ties to groups that engage in international terrorism. It does not, however, reach unaffiliated

individuals who engage in international terrorism. As a result, investigations of "lone wolf" terrorists are currently not authorized under FISA. Rather, such investigations must proceed under the stricter standards and shorter time periods for investigating ordinary crimes set forth in Title III of the Omnibus Crime Control and Safe Streets Act of 1968, potentially resulting in unnecessary and dangerous delays and greater administrative burdens.

Section 4 of H.R. 3179 would plug this dangerous gap in FISA's coverage by expanding the definition of "agent of a foreign power" to include a non-United States person who is engaged in international terrorism or preparing to engage in international terrorism, even if he or she is not known to be affiliated with an international terrorist group.

The Department believes that section 4 of H.R. 3179 would strengthen our ability to protect the American people against terrorism. A single foreign terrorist with a chemical, biological, or radiological weapon could inflict catastrophic damage on this country. Consequently, there is no reason why the Department should be able to conduct FISA surveillance only of foreign terrorists whom we know to be affiliated with international terrorist groups. In some cases, a foreign terrorist may, in fact, be a member of an international terrorist group, but the Department may not be able to establish this fact. In other cases, a foreign terrorist may be a genuine lone wolf. In either of these scenarios, however, it is vital that the Department be able to conduct the appropriate surveillance of such terrorists under FISA so that we are able to effectively and efficiently gather the information necessary to prevent these terrorists from endangering the lives of the American people.

Expanding FISA to reach an individual foreign terrorist is a modest but important expansion of the statute. To be sure, under current law, the Department must show under FISA that a foreign terrorist is a member of an international terrorist group. The House Committee Report on FISA, however, suggested that a "group" of terrorists covered by current law might be as small as two or three persons, and the interests that courts have found to support the constitutionality of FISA are unlikely to differ appreciably between a case involving a terrorist group of two or three persons and a case involving a single terrorist. In addition, it is important to stress that this proposal would not change the standard for conducting surveillance of any United States person but rather would apply only to foreign terrorists.

The Senate has already acted in a strong bipartisan fashion to amend FISA to cover lone wolf terrorists. Section 4 of H.R. 3179 was included in S. 113, which passed the Senate on May 8, 2003, by a vote of 90 to 4. The Department urges the House of Representatives to follow suit and also pass this important proposal in order to plug this dangerous gap in the scope of FISA's coverage to cover "lone wolf" terrorists.

H.R. 3179 also includes two important provisions related to the use of national security letter (NSLs). NSLs are used by the FBI to obtain relevant information from specified third-parties in authorized international terrorism or espionage investigations. NSLs are similar to administrative subpoenas but narrower in scope. While administrative subpoenas can be used to collect a wide array of information, NSLs apply more narrowly to telephone and electronic communication transactional records, financial records from financial institutions, and consumer information from consumer reporting

agencies, as well as certain financial, consumer, and travel records for certain government employees who have access to classified information.

In order to safeguard the integrity of the sensitive terrorism and espionage investigations in which NSLs are used, the NSL statutes generally prohibit persons from disclosing that they received these requests for information. *See, e.g.*, 12 U.S.C. § 3414(a)(3); 12 U.S.C. § 3414(a)(5)(D); 15 U.S.C. § 1681u(d); 15 U.S.C. § 1681v(c); 18 U.S.C. § 2709(c); 50 U.S.C. § 436(b). But these same statutes contain no explicit penalty for persons who unlawfully disclose that they have received an NSL. Section 2 of H.R. 3179 would remedy this defect by creating a new statutory provision imposing criminal liability on those who knowingly violate NSL non-disclosure requirements. This new offense would be a misdemeanor punishable by up to a year of imprisonment, but would carry a stiffer penalty of up to five years of imprisonment if the unlawful disclosure was committed with the intent to obstruct an investigation or judicial proceeding.

Oftentimes, the premature disclosure of an ongoing terrorism investigation can lead to a host of negative repercussions, including the destruction of evidence, the flight of suspected terrorists, and the frustration of efforts to identify additional terrorist conspirators. For these reasons, the FBI has forgone using NSLs in some investigations for fear that the recipients of those NSLs would compromise an investigation by disclosing the fact that they had been sent an NSL. To reduce these fears and thus allow for the gathering of additional important information in terrorism investigations, the Department supports the adoption of the appropriate criminal penalties set forth in H.R. 3179 to deter the recipients of NSLs from violating applicable nondisclosure

requirements as well as the heightened penalties set forth in the legislation for cases in which disclosures are actually intended to obstruct an ongoing investigation.

In addition to setting forth an explicit criminal penalty for those violating NSL nondisclosure requirements, H.R. 3179 would also specify procedures for the Attorney General to seek judicial enforcement of NSLs. The NSL statutes currently make compliance with an FBI request for information mandatory. *See, e.g.*, 12 U.S.C. § 3414(a)(5)(A); 15 U.S.C. § 1681u(a)-(b); 15 U.S.C. § 1681v(c); 18 U.S.C. § 2709(a); 50 U.S.C. § 436(c). These statutes, however, do not specify any procedures for judicial enforcement if the recipient of an NSL refuses to comply with the FBI's request. Section 3 of H.R. 3179 would make explicit what Congress indicated implicitly by making compliance with NSLs mandatory: the Attorney General may seek judicial enforcement in cases where the recipient of an NSL refuses to comply with the FBI's request for information. The judicial enforcement provision contained in H.R. 3179 is similar to the existing judicial enforcement provision for administrative subpoenas under 18 U.S.C. § 3486(c) and would help the Department to quickly and discretely obtain vital information in terrorism investigations.

H.R. 3179 also includes two common-sense reforms that would better allow the Department to protect classified information in criminal trials and to safeguard sensitive intelligence investigations in immigration proceedings. First, section 5 of the bill would amend the Classified Information Procedures Act (CIPA) to improve the Department's ability to protect classified information during the course of a criminal trial. Under section 4 of CIPA, a district court, upon the government's request, may authorize the United States to delete specified items of classified information from documents to be

made available to a criminal defendant during discovery, to substitute a summary of the information for such classified documents, or to submit a statement admitting relevant facts that the classified information would tend to prove, so long as prosecutors are able to make a sufficient showing, such as that the documents are not discoverable or that the defendant would not be disadvantaged by the substitution of a summary of the information for the classified documents themselves. Currently, however, district courts have discretion over whether to permit the government to make such a request ex parte and in camera.

This is problematic because in cases where the government is unable to make a request to withhold classified information ex parte and in camera, prosecutors risk disclosing sensitive national-security information simply by explaining in open court why the classified information in question should be protected. Section 5 of H.R. 3179 would solve this dilemma by mandating that prosecutors be able to make a request ex parte and in camera to delete specified items of classified information from documents or to utilize the other alternatives for protecting classified information set forth in section 4 of CIPA. This provision would ensure that the Department is able to take appropriate steps to safeguard classified information in criminal proceedings without risking the disclosure of the very secrets that we are seeking to protect. It would also allow the Department to make a request to protect classified information orally as well as in writing.

In addition to understanding what this provision would accomplish, it is equally important to understand what this provision would not accomplish. Specifically, it would not affect in any way whatsoever the showing that the United States is required to make under section 4 of CIPA to obtain judicial authorization to withhold classified

information from criminal defendants or to take other steps to safeguard classified information. Simply put, the assertion by some that H.R. 3179 would require a federal judge to permit the United States to turn over to a criminal defendant only a summary of evidence rather than classified documents themselves is demonstrably false. Rather, the bill would only allow the United States to make such a request ex parte and in camera in order to ensure that such information is not disclosed as part of the process of protecting it.

Finally, H.R. 3179 would eliminate that requirement that the United States notify aliens whenever the government intends to use evidence obtained through FISA in immigration proceedings. Current law mandates that the government provide notice to an "aggrieved person" if information obtained through FISA electronic surveillance, physical searches, or pen registers will be used in any federal proceeding. *See* 50 U.S.C. §§ 1806(c), 1825(d), & 1845(c). In 1996, Congress carved out an exception to this requirement for alien terrorist removal proceedings, *see* 8 U.S.C. § 1534(e), but all other immigration proceedings remain subject to this notification requirement.

Unfortunately, however, this mandate that the government notify an alien that it is using information acquired through FISA surveillance in an immigration proceeding may jeopardize in certain situations sensitive ongoing investigations and thus risk undermining national security. As a result, the government is sometimes faced with the Hobson's choice of not using this information in immigration proceedings, and possibly permitting dangerous aliens to remain in the country, or using the information and undermining its surveillance efforts. When faced with this difficult choice, the United

States has decided against using FISA information in a number of instances in an effort to preserve the integrity of ongoing investigations.

Section 6 of H.R. 3179, however, would solve this dilemma by expanding the existing notification exception for alien terrorist removal proceedings to all immigration proceedings. Significantly, the government still would be obliged to disclose to aliens any information it intends to use in immigration proceedings if such disclosure is otherwise required by law. Under H.R. 3179, the government simply would not have to reveal the fact that the information in question was obtained through FISA. The Department supports this provision of H.R. 3179 because it would allow the government to use intelligence in immigration proceedings to safeguard the American people from dangerous aliens without jeopardizing sensitive ongoing investigations.

In conclusion, I would like to thank the Subcommittee again for holding today's hearing on such an important topic. H.R. 3179 contains a series of sensible reforms that would enhance the Department's ability to gather intelligence necessary for preventing terrorism and to protect the integrity of sensitive intelligence investigations. The Department would be happy to work with the Congress in the weeks and months to come on this vital piece of legislation. Thank you once again for allowing me to appear before you today, and I look forward to the opportunity to respond to any questions that you might have