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

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

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

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

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

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

MANPADS and Other Dangerous Weapons

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

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

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

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

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

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

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

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

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

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

The Material Support Statutes

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

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

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

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

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

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

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

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

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

The Department believes that the burdensome scienter requirements set forth by these courts are neither compelled by 18 U.S.C. § 2339B nor intended by the Congress, and that they would dramatically reduce the utility of that statute. The Department believes that the statute requires only knowledge by the defendant of either the "foreign terrorist organization" designation, or that the organization engages in terrorist activity, as defined by relevant provisions of federal law. The Department has therefore asked in its petition for rehearing *en banc* that the Ninth Circuit clarify its ruling on this point. Nevertheless, to remove any possible ambiguity with respect to 18 U.S.C. § 2339B's scienter requirement, section 114 of the TFTA would clarify that the statute requires only knowledge by the defendant of either the underlying

"foreign terrorist organization" designation, or of the fact that the organization engages in terrorist activity, as defined by relevant provisions of federal law. Persons who provide material support to an FTO with knowledge of this type cannot legitimately claim to have been acting innocuously.

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

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

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

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

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

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

Lone Wolf Terrorists

The TFTA also improves current law by amending the Foreign Intelligence Surveillance Act of 1978 ("FISA") to cover "lone wolf" terrorists. FISA currently does not cover unaffiliated individuals, or individuals whose affiliation with a foreign terrorist group is not known, who engage in or are preparing to engage in international terrorism. Imagine a situation in which a single person comes to the United States to make preparations for or even initiate a terrorist attack. While in the United States, he engages in suspicious activity, such as purchasing large quantities of dangerous chemicals, signing up for commercial airplane flight school with no prior flight experience and no interest in becoming a commercial pilot, or scouting the security perimeter of several nuclear power plants. If FBI authorities become aware of such behavior,

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

they may wish to conduct an international terrorism investigation by obtaining a FISA order permitting electronic surveillance of the suspect. Under current law, FISA would prevent the FBI from obtaining the order unless they could show that the individual was affiliated with an international terrorist organization. But the reality today is that a terrorist who seeks to attack the United States may be a "lone wolf" who is not connected to a foreign terrorist group, or someone whose connection to a foreign terrorist group is not known. The quarter-century-old FISA prevents law enforcement and intelligence authorities from exerting maximum effort to intercept and obstruct such terrorists.

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

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

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

Administrative Subpoenas

One of the TFTA sections that would provide law enforcement and intelligence officials with critical tools for investigating and obstructing terrorist activity is section 105, which

authorizes the use of administrative subpoenas in terrorism investigations. Currently, law enforcement officers responsible for staying a step ahead of the terrorists may be kept a step behind in their investigations due to their inability to issue administrative subpoenas. Because an administrative subpoena is issued directly by an agency official, it can be issued as quickly as investigative needs demand.

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

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

Presumptive Pre-Trial Detention of Terrorism Suspects

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

This omission has presented authorities real obstacles to prosecuting the war on terrorism, as Michael Battle, U.S. Attorney for the Western District of New York, testified before this subcommittee on June 22. In the recent "Lackawanna Six" terrorism case in his district, prosecutors moved for pre-trial detention of the defendants, most of whom were charged

with (and ultimately pled guilty to) providing material support to al Qaeda. It was expected that the defendants would oppose the motion. What followed was not expected, however. Because the law does not allow presumptive pre-trial detention in terrorism cases, prosecutors had to participate and prevail in a nearly three-week hearing on the issue of detention, and were forced to disclose a substantial amount of their evidence against the defendants prematurely, at a time when the investigation was still ongoing. Moreover, the presiding magistrate judge did in fact authorize the release of one defendant, who, it was later learned, had lied to the FBI about the fact that he had met with Usama Bin Laden in Afghanistan.

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

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

Hoaxes

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

Currently, such hoaxes are prosecuted, if at all, under "threat" statutes. In the case of anthrax hoaxes, those statutes would include 18 U.S.C. § 2332a, which criminalizes certain threats to use weapons of mass destruction, and 18 U.S.C. § 876, which criminalizes use of the mail to threaten injury to a person. But these statutes are not sufficient to prosecute all terrorism hoaxes because they do not address conduct that is not a provable threat. For example, calling

law enforcement and falsely reporting the receipt of an envelope filled with anthrax would constitute a hoax, but it would not necessarily be a threat. Nor is current law adequate to allow the prosecution of those who make knowingly false reports about terrorism or the death of or harm to someone serving in the armed forces.

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

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

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