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.