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

"A REVIEW OF THE TOOLS TO FIGHT TERRORISM ACT"

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

I.
INTRODUCTION

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

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

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

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

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

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

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

II.
THE TOOLS TO FIGHT TERRORISM ACT OF 2004

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

Title I: Anti-Terrorism Investigative Tools Improvement Act.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Title II: Prevention of Terrorist Access to Special Weapons Act

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

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

Title III: Railroad Carriers and Mass Transportation Protection Act.

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

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

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

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

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

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

Title V: Combating Money Laundering and Terrorist Financing Act.

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

III.
AREAS OF CONSTITUTIONAL OR POLICY CONCERN UNDER THE TFTA

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

1. Section 102 – Lone-Wolf Terrorists Provision

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

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

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

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

I tend to follow the text of the Constitution and reject efforts to add ambiguity where clarity is evident. The fourth amendment affirms "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause." U.S. CONST. amend. IV. Given the clear text of the fourth amendment, I do not believe that FISA is constitutional in allowing searches conducted below the constitutional standard of probable cause and the warrant clause. While the term "probable cause" is used in the statute, it is not true probable cause that a crime is about to be or has been committed. Rather it is probable cause to believe that the target is "a foreign power or agent of a foreign power." 50 U.S.C. § 1805 (a) (3). For this reason, FISA has long been challenged as facially unconstitutional, a claim that has not been fully tested before the United States Supreme Court.

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

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

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

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

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

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

2. Section 103 – No Bail for Terrorists Provision

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

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

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

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

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

3. Section 104 – FBI Subpoenas Provision

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

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

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

b. General Analysis. Much is made of the shift from a grand-jury subpoena to a JETS system. However, the term grand-jury subpoena is misleading in that it is not issued by a grand jury but a federal prosecutor. "[A] grand jury subpoena gets its name from the intended use of the . . . evidence, not from the source of its issuance." *Doe v. DiGenova*, 779 F.2d 74, 80 n.11 (D.C. Cir. 1985). Administrative subpoenas are currently used in dozens of areas and they have been upheld by the United States Supreme Court. It is extremely rare for a federal prosecutor to deny such a request from the FBI and the elimination of an Assistant

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

4. Section 108 – Confidential CIPA Requests Provision

The proposed change in the Classified Information Procedures Act (CIPA) has raised concern among the criminal defense bar. As a criminal defense attorney in national security cases, I must confess to some uncertainty as to the real need for this change given the already generous provisions under CIPA.[5] However, like the

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

JETS provision, the practical effect of this change will likely be marginal in most cases. Currently, the government can ask a judge for the right to submit their request for CIPA protection in an ex parte, in camera setting. This request is rarely denied. This proposal would remove the authority of the Court and require courts to allow such secret submissions.

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

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

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

some ex parte, in camera submissions but it is a power that (in my view) is being abused as a matter of litigation strategy rather than national security. Many cases would benefit from adversarial review by cleared and experienced counsel. As with FISA, it is difficult to review this limited provision without considering the more general controversy over the use of CIPA as a litigation device.

5. Section 109 – FISA Information in Immigration Proceedings

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

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

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

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[6] Issued ten days after 9-11, the memorandum of Chief Immigration Judge Michael Creppy notified immigration judges that they would be expected to close access to cases of "special interest" that would be identified by Attorney General Ashcroft. *See E-Mail Memorandum of Hon. Michael J. Creppy*, Chief Immigration Judge, to all Immigration Judges and Court Administrators (Sept. 21, 2001, *available at* http://archive.aclu.org/court/creppy-memo.pdf.

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

The final provision that warrants special attention is Section 114 dealing with terrorist material support. This proposal would actually improve the current federal law by correcting gaps and ambiguities that have led to recent judicial reversals. In that sense, the proposal can be viewed as a slight benefit to civil liberties by removing a dangerous level of ambiguity in the law.

a. Constitutional Analysis.

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

some significant due process claims. While I personally harbor serious question over the constitutionality of this provision as applied, I believe that most courts would find the current language to be constitutional under all of these grounds.

b. General Analysis.

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

IV.
CONCLUSION

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

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

terrorists have their own bizarre conceptions but they share this view that, if hit hard enough, we will become immobilized. They lack knowledge of our history just as the Boxers lacked knowledge of our anatomy.

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

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

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

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

> I often wonder whether we do not rest our hopes too much upon constitutions, upon laws and upon courts. These are false hopes . . .

> Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, nor court can save it; no constitution, no law, no court can even do much to help it. While it lies there it needs no constitution, no law, no court to save it.[8]

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

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

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

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[8] Learned Hand, The Spirit of Liberty: Papers and Addresses of Learned Hand

89-90 (Irving Diliard ed., 1960).